



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.39 OF 2009**

**(CONSOLIDATED WITH CRIMINAL APPEAL NOS.40 AND 42 OF 2009)**

**PETER MBARIA.....1<sup>ST</sup> APPELLANT**  
**JULIUS MURAGURI MIATU.....2<sup>ND</sup> APPELLANT**  
**CYRUS MAINA MIATU.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**[An Appeal from original conviction and sentence in Narok P.M.CR.C.NO.1336/2006 by Hon S. M. Githinji, Principal Magistrate, dated 6<sup>th</sup> February, 2009]**

**JUDGMENT**

The appellants were initially charged jointly with another, Parken Korunyo, with six counts of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. The charges against Parken Korunyo were withdrawn after he escaped.

According to the charge sheet, the appellants are alleged to have participated in a spate of robberies on diverse dates between 20<sup>th</sup> September and 10<sup>th</sup> November, 2006. It is alleged that they committed the robberies as follows:

Count 1: - they are said to have robbed Dominic Nkawatei (P.W.8) on the night of 20<sup>th</sup> and 21<sup>st</sup> September, 2006 of cash Kshs.4,500/= and other personal items at Jora reserve, Narok.

In the alternative count, it is alleged that the 1<sup>st</sup> appellant, otherwise in the course of stealing, dishonestly received or retained one radio, make Sonitec, the property of P.W.8, knowing it to have been stolen or unlawfully obtained.

Count 2: - the appellants were accused of robbing Jackson Oloshoro Nkawatei (P.W.9) of cash Kshas.1,500/= and personal items on the night of 12<sup>th</sup> and 21<sup>st</sup> September, 2006 at

Jora reserve.

The 1<sup>st</sup> appellant is charged alternatively with handling stolen property namely a pair of shoes, the property of P.W.9

The other complainants in counts 3, 4, 5 and 6 are Ntereni Nkini Nkongoya (P.W.1), Malit Soyiantet (P.W.3), Danson Liarash (P.W.4) Masud Osman (P.W.5).

It was further alleged that in each instance, the appellants were armed with pistols, rungun, simis, bows and arrows. It is also on record that the robberies took place at night.

With regard to the 1<sup>st</sup> count, it was the evidence of P.W.8 that although he was robbed of the items listed in the charge sheet, he was unable to identify the robbers as it was dark. P.W.8, however, testified that he was able to identify his stolen radio when it was recovered by the police. Similarly P.W.3, P.W.5 and P.W.9 did identify their assailants. It was, however, the evidence of P.W.3 that he was able to identify the bows and arrows stolen from him.

All the appellants denied involvement in the commission of the offence with the 1<sup>st</sup> appellant maintaining that P.W.13, P.C. Nelson Wanyonyi, the investigating officer went to where he lived with Parken Korunyo (at large) and searched his (1<sup>st</sup> appellant's) house and that of Parken Korunyo and a 3<sup>rd</sup> house in the neighbourhood. From the 1<sup>st</sup> appellant's house, P.C. Wanyonyi collected some household items which he took along. The 1<sup>st</sup> appellant was arrested and upon reaching the police station, he found Parkan Korunyo (at large), the 2<sup>nd</sup> and 3<sup>rd</sup> appellants having already been arrested in connection with a different case. The 2<sup>nd</sup> appellant confirmed that he was arrested together with the 3<sup>rd</sup> appellant, who is his brother on allegations by their father that they were thieves; that they had family differences with their father. The 2<sup>nd</sup> appellant confirmed that he was arrested together with his brother, the 3<sup>rd</sup> appellant but for no apparent reason.

The learned trial magistrate considered the evidence presented by the appellants and by the prosecution witnesses and found, from the evidence of recent possession, that the 1<sup>st</sup> appellant was guilty of the offences charged in counts 1, 2 and 3; that P.W.1 was able to identify the appellants on the night of the offence and later at an identification parade, confirming the charges in counts 5 and 6 as against 2<sup>nd</sup> and 3<sup>rd</sup> appellants. That meant that the 1<sup>st</sup> appellant was acquitted of counts 4, 5 and 6 while the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were acquitted of counts 1, 2, 3 and 4. Upon conviction, the appellants were sentenced to death.

Being aggrieved, they brought separate appeals which were consolidated at the commencement of the hearing. The appeal has raised the following condensed grounds:

- i) there was no sufficient evidence of identification;
- ii) the offence charged was not proved;
- iii) the defence was improperly rejected.

Learned counsel for the respondent opposed the appeal arguing that P.W.1 and P.W.4 were able to identify the appellants with the aid of torch lights. They also picked them out at an identification parade and finally that the appellants were found in possession of recently stolen items.

We have considered the evidence on record as well as submissions by both sides. We have noted earlier that P.W.8, the complainant in count 1, did not identify the robbers and the only incriminating evidence presented by him was with regard to the recovery of a radio which he maintained was stolen from him and indeed we have no doubt that he positively identified it as his by his name inscribed on it. However, the evidence of the investigating officers as to where the radio was recovered is not clear.

In his evidence in chief, he stated that:

**“In the 1<sup>st</sup> accused’s house there was a Sonitec radio recovered from 2<sup>nd</sup> accused person. We arrested 1<sup>st</sup> and 2<sup>nd</sup> accused.”**

The investigating officer further gave evidence that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons occupied two separate houses. In cross-examination by the 1<sup>st</sup> appellant, he went on to say:

**“We got you from your house near Harmony Primary School (Academy). We got the bicycle from your house.”**

Relying on the doctrine of recent possession, the learned trial magistrate found that the recovery of the radio from the 1<sup>st</sup> appellant’s house without acceptable explanation from him was evidence that he was part of the gang that had robbed P.W.8. That finding cannot stand in the light of what we have stated above. There was no evidence that the radio was found in the 1<sup>st</sup> appellant’s possession.

P.W.9, the complainant in count 2 also did not identify the robbers on the night of the raid but was able to identify a bicycle and a pair of shoes stolen from him. The bicycle, according to the investigating officer was recovered from the 1<sup>st</sup> appellant’s house. That the recovery was in the presence of the 1<sup>st</sup> appellant’s landlord. Possession, being an essential ingredient of the doctrine of recent possession and the 1<sup>st</sup> appellant having denied possession, it was necessary to prove beyond any doubt that the house in which the bicycle was found was the 1<sup>st</sup> appellant’s. By calling the 1<sup>st</sup> appellant’s landlord, the prosecution would have proved that he witnessed the recovery of the bicycle from the house and that the house was exclusively occupied by the 1<sup>st</sup> appellant. Without this nexus, we cannot agree with the learned trial magistrate that there was evidence of recent possession of the bicycle.

Turning to the question of recovery of the shoes, it was P.W.9’s testimony that he lost 3 pairs of shoes in the robbery. After sometime, the investigating officer took him to the prisons where he was shown a pair of brown shoes. He identified it as his from the colour and the number (size). But he admitted that there was nothing unusually unique about the shoes. We agree. The shoes, in our view, were not positively identified by P.W.9. The investigating officer on his part stated that the shoes were recovered from the 1<sup>st</sup> appellant’s house, yet P.W.9 said the shoes were shown to him at the Prison.

In count 3, the appellants are charged with robbing P.W.1, who was guarding a hotel where various items were stolen. It is further stated that the appellants were armed with guns and simis. The attack was on 21<sup>st</sup> October, 2006 at 2a.m. and it involved 3 persons, who were unknown to the complainant (P.W.1) prior to the night in question.

These factors notwithstanding, P.W.1 maintained he was able to identify the robbers with the aid of lights from 3 torches which the robbers had; that one of the robbers was close by him; that there was light in the counter area of the shop; that he spend about 11 minutes with the robbers and 5 minutes with the 1<sup>st</sup> appellant; that he was able to pick out the 1<sup>st</sup> appellant in the police identification parade. P.W.2 James Karino Ole Ngumei was the owner of the hotel which P.W.1 was guarding. He (P.W.2) confirmed to the trial court that when P.W.1 called him about the attack, he (P.W.1) did not tell him that he could identify any of them.

However, one month later, when P.W.2 and others in the area, whose items had been stolen in previous robberies, were called to the police station to identify the stolen and recovered items, P.W.1 upon being prompted told the police that he could identify one of the robbers. The 1<sup>st</sup> appellant who was at the station was then paraded with others and identified by P.W.1.

The identification parade was conducted by P.W.12, I.P. Leonard Lutta on 24<sup>th</sup> November, 2006, exactly

one month after the complainants were robbed. I.P. Lutta was emphatic that he conducted a parade in respect of the 2<sup>nd</sup> appellant, Julius Muraguri, who was identified in the parade by two witnesses, Danson Liarash and Masud Osman, P.W.4 and P.W.5 respectively.

We will revert to the evidence of P.W.4 and P.W.5 but suffice to state that if there was a parade in which P.W.1 identified the appellants, no such evidence was led.

Malit Soyiantet, P.W.3 was the complainant in count 3. He was like the rest attacked at night at about 10p.m. Due to darkness, he too was not able to identify those who attacked him. But one month later, he was called to the police station to identify his stolen personal effects from many recovered items. He was only able to identify some arrows and a bag. He, however, failed to point any peculiar mark on the 26 arrows or the bag to establish ownership. The doctrine of recent possession was, once again, not proved by the evidence presented by P.W.3.

We now revisit the evidence of P.W.4 and P.W.5. Both were employed at Basabra Petrol Station as pump attendants while P.W.6 also worked at the petrol station but as a watchman. They were robbed at 1.20a.m. by armed gang of 5 members, who were strangers to them. Out of the three, only P.W. 4 maintained that he identified 3 of the 5 robbers, although they were all together. P.W.4 stated he identified the suspect who escaped, the 2<sup>nd</sup> and 3<sup>rd</sup> appellants; that he identified them with the aid of light in the area; that he told the police that he could identify 3 of the assailants. He was called to an identification parade one month later where he picked out the three (3).

This evidence cannot pass credibility test. P.W.4 never told his two colleagues that he could identify 3 of the attackers. It is equally incredible that although they were taken hostage by the robbers, only P.W.4 was able to identify them. The police officer to whom he reported that he could identify the robbers was not called as a witness to confirm that assertion. The parade officer, I.P. Lutta, we reiterate confirmed that, the parade he conducted, only P.W 4 and P.W.5 participated in. P.W.5 could not identify any of the robbers in the parade. Only the 3<sup>rd</sup> appellant was in the parade and only one parade was conducted, according to Ip. Lutta. For these reasons, we find the evidence of P.W.4 untruthful.

For all the reasons given, we come to the conclusion that the learned trial magistrate failed to analyse the evidence before her and thereby fell into grave error. The finding of guilt, conviction and sentence of death cannot stand. We allow the appeal, quash the conviction and set aside the sentence. The appellants are set at liberty forthwith unless otherwise for any other lawful reason detained.

**Dated, Delivered and Signed at Nakuru this 8<sup>th</sup> day of June, 2011.**

**R.P. V. WENDOH  
JUDGE**

**W. OUKO  
JUDGE**