REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEALS NOS. 156, 157 & 158 OF 2009

HILLARY CHEDI MMBOI.....1ST APPELLANT
ROBIN ANALO KIYAI.....2ND APPELLANT
TITO WEKESA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence of Hon. Atieno Alego (Senior Resident Magistrate)

in Eldoret CM.CR. No. 3185 of 2009 delivered on the 16th September 2009)

JUDGMENT

These are three appeals, consolidated and heard together. They all arise from the decision and Judgment of the Senior Resident Magistrate in CMCC No. 3185 of 2009 at Eldoret in which the three appellants were convicted and sentenced to death for the offence of robbery with violence contrary to S. 296 (2) of the Penal code. In addition, the appellants were convicted and sentenced to ten (10) years imprisonment each for the alternative counts of handling stolen goods contrary to S. 322 (2) of the Penal Code.

The particulars respecting the main count were that on the 17th May 2009 at Majengo Village Lugari District Western Province, the appellants while armed with dangerous weapons namely pangas, slasher and timber robbed Pius Chibaso Kibao of six cushions, one sewing machine head, three mattresses, one Panasonic radio, one mobile phone make Motorolla C 113, two thermos flask, two bags of dry maize, sixteen kilograms of dry beans and one chicken all valued at Ksh. 24,850/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Chibaso Kibao.

As for the alternative counts, it was alleged that on the 18th May 2009 at Matunda Township Lugari District, each of the appellant otherwise than in the course of stealing dishonestly received or retained stolen property viz ten bags of dry maize, one mattress, one Panasonic radio cassette, one panga, a sewing machine head and six cushions.

The alternative counts were however defective for want of duplicity.

In the case of **SELIMIA MBEU OWUOR AND ANOTHER, CRIMINAL APPEAL NO. 68 OF 1999**, the Court of Appeal sitting in Nairobi stated that:-

"Under Section 322 (1) of the Penal Code, a person handles stolen goods if he, otherwise than in the course of stealing, dishonestly

(a) receives,

(b) retains,

(c) undertakes or assists in their retention, removal etc.

the prosecution must accordingly choose under which of these sub-heads they wish to proceed and it is not open to them to combine dishonest receipt with dishonest retention in one charge, if they do that the charge would be bad for duplicity. The point is that an accused person is entitled to know whether it is being alleged that he dishonestly received the goods or that he dishonestly retained them and so on."

Thus, the conviction and sentence of each of the appellant on the charge of handing stolen property was wrong and unlawful.

Besides, the sentence imposed on the alternative counts ought to have been held in abeyance on the authority of the Court of Appeal decision in **BORU & ANOTHER VS. REPUBLIC (2005) KLR 649**.

Be that as it may, the appellants were dissatisfied with the conviction and sentence and filed separate appeals which as observed hereinabove were consolidated and heard together.

The grounds of appeal contained in the respective petitions of appeal are more or less similar. These are essentially an attack on the prosecution evidence of identification and on the insufficiency or lack of evidence to establish the complainant's ownership of the alleged stolen property and/or lack or insufficiency of evidence establishing the recovery of the said property.

The appellants also complain that the prosecution failed to call vital witnesses and generally that the case against them was not proved beyond reasonable doubt.

At the hearing of the appeals, the appellants represented themselves and relied on their respective written submissions to support and fortify their grounds of appeal.

The learned Senior Deputy Prosecution Counsel (SDPS), **MR OLUOCH**, appeared for the respondent. He opposed the appeals by submitting that PW 1 and PW 2 were asleep in their house when they were attacked by a group of about three armed thugs who on entering the house had covered their faces with masks which they removed during the robbery. The thugs asked for food and one of them (the second appellant) asked for a match stick to ignite a lantern lamp. After the lamp was ignited, the thugs with the masks off their faces ate the food inside the house. It was then that they were seen and

recognized by both PW 1 and PW 2.

The learned prosecution Counsel went on to submit that among the stolen items was a bag of maize. Drops of maize seeds led to the house of the first appellant where a half sack of maize was recovered. The sack was positively identified as belonging to PW 1. Later, a panga, thermos and radio belonging to PW 1 were also recovered in the house of the second appellant while a sewing machine and seat cushions belonging to PW 1 were recovered in the house of the third appellant. Feathers of chicken belonging to PW 1 were also identified.

The learned prosecution Counsel contended that the evidence by PW 1 was corroborated by that of PW 2 and that the second appellant's conduct of trying to flee from the police was relevant against him. In that regard, the case of **HERMAN NJOROGE NJAU VS. REPUBLIC CR. APP. NO. 139 OF 1986** was relied on.

The learned prosecution Counsel also contended that since the appellants did not claim ownership of the recovered items which were identified by PW 1 and PW 2, a presumption arose that the appellants were the thieves. In that regard, reliance was placed on Ss 109 and 119 of the Evidence Act and the case of **SAMUEL KIPROTICH CHESEREK & OTHERS VS. REPUBLIC CRIMINAL APPEAL NO. 265 OF 2003 AT ELDORET C/A**. For the foregoing reasons, it was the respondent's contention that the appeals ought to be dismissed for want of merit.

On sentence, the learned prosecution Counsel correctly submitted that the sentence on count two (i.e. the alternative counts) ought to have been held in abeyance in view of the death sentence respecting the main count.

Having heard both sides, our obligation is to reconsider the evidence adduced at the trial and arrive at our own conclusions bearing in mind that the trial Court heard the advantage of seeing and hearing the witnesses (See, **OKENO VS. REPUBLIC [1972] EA 32** and **ACHIRA VS. REPUBLIC [2003] KLR 707**). In that regard, the prosecution case was briefly that on the material date at about 11.00 p.m., the complainant **PIUS CHEVASI KIBAO (PW 1)** and his wife **AGNETA MUHALIA (PW 2)** were asleep at their Majengo home in Lugari District when they were attacked by a group of about three people armed with offensive weapons such as pangas (machetes) and a slasher. The group threatened the two and commenced taking household items including mattresses, sewing machine, clothes, a panga, a radio, a bag of maize, thermos flasks, hens and a mobile phone. The group later took away the items. In the course of the robbery, the group of three removed the masks that they wore and ate the beans availed to them. They also ignited a lantern lamp thereby enabling the complainant (PW 1) and his wife (PW 2) to see and identify them as the appellants herein. The first appellant was said to be a neighbour of the complainant. He was traced to his house and found in possession of a bag of maize allegedly part of the stolen property. Maize seed drops led to his house. The second and third appellants were also found in possession of additional stolen items said to belong to the complainant. The robbery is said to have taken a considerable period of time i.e. between 11.00 p.m. to 4.00 a.m.

EZEKIEL MUSUNGO KUTTA (PW 3) visited the scene after being alerted accordingly. He confirmed that maize seed drops led to the house of the first appellant who was later apprehended and found in possession of the stolen maize. He (first appellant) mentioned the second and third appellants as his accomplices. The second appellant made an attempt to run away after he was sighted. Ezekiel (PW 3) also confirmed that some other stolen items were found in the house of the second appellant and that of the third appellant.

The Assistant Chief of Matunda Sub-Location, **JOSEPHAT SHIWANI NDOMBE (PW 4)** received information of the incident and contacted the police. He also confirmed that maize seed drops led to the house of the first appellant and that after his arrest, the first appellant mentioned the second and third appellants. The Chief also confirmed the stolen maize and other items were respectively found in possession of the appellants.

P.C ELPHAS BETT (PW 5) of Matunda Police Station investigated the case and charged the appellants with the present offences. He received the necessary report on the material date at 6.00 a.m. and proceeded to the scene together with his colleagues. They found the first appellant having been apprehended with maize suspected to be part of the items stolen from the complainant. Members of the public were at the scene "*baying*" for the first appellant's blood. He (first appellant) mentioned the second and third appellants. On being spotted, the second appellant made an attempt to take off but was apprehended. A radio, panga and a red jacket were found in his house. The third appellant was also arrested and his house searched. A sewing machine and seat cushions were found inside the house.

The evidence by P.C Bett (PW 5) culminated the prosecution evidence against the appellants.

In their respective defence, the appellants made statements in which they denied their involvement in the offences.

The case for the first appellant was that he was at work on the 18th May 2009 when he was approached by two strangers who took him towards a river and questioned him about what he does during the day and night. The two strangers considered him a suspect in some case and took him to a village elder who handed him over to the police where he was charged along with his co-accuseds whom he had not previously known.

For the second appellant, his case was that at 1.00 p.m. on the 18th May 2008 he was at work when three police officers approached and told him to accompany them to Matunda Police Station where his finger prints were taken. He was later taken to Court and charged with the present offences which he knew nothing about.

As for the third appellant, his case was that he was at work on the 18th May 2008 at 1.00 p.m. when three people approached and told him to accompany them to the Police Station where his finger prints were taken. He was later taken to Court and charged with the present offences which he was unaware of.

With the close of both the prosecution and defence case, the learned trial Magistrate considered the entire evidence availed before her and concluded thus, that the offence of robbery with violence was properly laid down and duly established and that the three appellants were positively identified at the scene of the offence by PW 1 and PW 2 and further that the appellants were separately found in possession of property which had been stolen from the house of PW 1 and PW 2.

The learned trial Magistrate accepted the prosecution evidence that the lantern lamp in the house of PW 1 and PW 2 aided in the identification of the appellants which identification was subsequently confirmed in the course of identification parades carried out after the arrest of the appellants.

The learned trial Magistrate also accepted that the appellants were each found in possession of property stolen from PW 1 and PW 2 which property was not claimed by the appellants and which was positively identified as belonging to the said witnesses.

As required of a first appellate Court, we have reconsidered the evidence availed at the trial. In that regard, we are satisfied that the charge of robbery with violence under S. 296 (2) of the Penal Code was properly laid down and duly established within the principles laid down by the Court of Appeal in **JOHANA NDUNGU VS. REPUBLIC CRIMINAL APPEAL NO. 116 OF 1995**.

As noted hereinabove, the alternative counts were not properly laid down and were all bad for duplicity. With regard to the alleged identification of the appellants at the scene of the offence, we note that if indeed the robbery took such a considerable period of time between 11.00 p.m. to 4.00 a.m., then indeed there was adequate opportunity for proper and reliable identification of the robbers. This was however, subject to existence of favourable conditions for identification.

There was evidence that the three robbers were wearing facial masks when they entered the house but removed them while in the course of the robbery inside the house. If that is accepted to have been so, then it would be quite in order to opine that the robbers exposed themselves to the possibility of being identified while in the process of the robbery. But even in these circumstances, there had to be favourable conditions for identification given that the offence occurred in the hours of darkness. The only sources of light mentioned by PW 1 and PW 2 were a lantern lamp and flashes from torches in the possession of the robbers. However, the flashes from the torches could not have aided in the identification of the robbers as they were shone or directed at the victims who were thus "blinded" such that they could not really have seen and properly identified the robbers.

It was indicated that the lantern lamp was lit by the robbers and it was then that PW 1 and PW 2 clearly saw and identified the three appellants. However, PW 1 and PW 2 did not state anything to do with the intensity of the light generated by the lantern lamp or lamps or how far the light was firstly, from themselves and secondly, from the appellants. It was not sufficient for PW 1 and PW 2 to merely state or imply that the light from the lantern lamp aided them in identifying the three appellants.

In **KENNEDY MAINA VS. REPUBLIC CRIMINAL APPEAL NO. 14 OF 2005 AT NAKURU**, the Court of Appeal citing the English case **REPUBLIC VS. TURNBULL (1976) 3 ALL ER 549**, noted that in cases of identification among the important factors to consider is the intensity of the light at the scene.

In our view, the circumstances at the scene at the material time were not conducive for proper and reliable identification of the appellant. It is doubtful whether this was a case of recognition as was alluded by the learned trial Magistrate as well as herein by the learned Prosecuting Counsel.

Whereas the first appellant may have been previously known to PW 1 and PW 2 the same was not the position with regard to the second and third appellants. And, if PW 1 and PW 2 were previously known to the first appellant why hold an identification parade in his respect?

Even in cases of recognition as opposed to mere visual identification, the existing circumstances must be favourable for a reliable and favourable identification of an offender.

In essence, the direct evidence of identification adduced against the three appellants was not safe and reliable for a holding that they were positively identified at the scene of the offence as those who committed the offence against the complainant (PW 1) and his family. Their identification by both PW 1

and PW 2 was nothing short of dock identification considering that the officer who conducted the identification parade did not testify and produce the necessary identification parade forms.

In **NJOROGE VS. REPUBLIC (1987) KLR 19**, the Court of Appeal stated that:-

"Dock identification is worthless, the Court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade."

Although it was alleged herein that the appellants were also identified in identification parades conducted after their arrest, there was no evidence of how the parades were conducted.

The trial Court and indeed this Court could not in the circumstances determine whether the parades were fairly conducted in accordance with the set down rules so as to arrive at the conclusion that the appellants were indeed positively identified at the scene.

The other dimension taken by the prosecution to prove that the appellants were involved in the offence was founded on indirect or circumstantial evidence arising from their alleged recent possession of part of the property stolen from the complainant.

In the case of **ISAAC NANGA KAHIGA alias PETER NGANGA KAHIGA VS. REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005,** the Court of Appeal stated that:-

"It is trite law that before a Court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect and secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again will depend on the easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses."

Herein, there was evidence from the prosecution that part of the items stolen from the complainant were recovered a day or less than a day after the offence. Such evidence was availed by PW 1, PW 2, PW 3, PW 4 and PW 5. The recovered items included some maize found in the house of the first appellant, a radio and panga found in the house of the second appellant and a sewing machine head and seat cushions found in the house of the third appellant. The appellants were thus in actual possession or constructive possession of the said items. They never attempted to give any explanation of their possession of the said items. Indeed, there was no dispute that the items were stolen from the complainant and were positively identified as the property of the complainant.

There being sufficient and credible evidence showing that the property were recovered while in their possession, it was incumbent upon the appellants to give an explanation of their possession thereof. They did not and as a result failed to rebut the presumption that they were the thieves who stole the complainants' property.

Evidence of recent possession, is sufficient circumstantial evidence, which depending on the facts of each

case may support any charge, however penal (See, **ODHIAMBO VS. REPUBLIC [2002] 1 KLR 214**).

We would therefore hold that the evidence of recent possession adduced against the appellants was not only sufficient but also credible enough to prove the charge of robbery against them.

In addition, as regards the second appellant, there was further circumstantial evidence to prove his guilty i.e. his attempt to run away on being spotted by police officers and all those in search of him. Such conduct was an indication of the second appellant's guilt. Otherwise, why would he attempt to run away and escape from law enforcers if he was truly innocent? (See, **HERMAN NJOROGE NJAU VS. REPUBLIC (Supra)**).

Ultimately, it is our opinion that the three appeals lack merit. We uphold the conviction and sentence on the main count one and dismiss the appeals in respect thereof.

The conviction on the alternative counts was unlawful and is hereby quashed. The sentence arising therefrom is set aside.

Ordered accordingly.

J. R. KARANJA

JUDGE

A. MSHILA

JUDGE

[Delivered and signed this 19th day of October 2011]