REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINA APPEAL NO. 115 OF 2007

MATAYO JUMA KUNDU ……………..…..…..…….. 1ST APPELLANT

STEPHEN EWOI ERENG ………………...……….. 2ND APPELLANT

EMMANUEL BARAZA WALUCHO ....…………… 3RD APPELLANT

PETER JUMA EMWENI …………….…..……….. 4TH APPELLANT

GODFREY MATUNDA HAJI …………...…….. 5TH APPELLANT

VERSUS

REPUBLIC ……………………………...……..……. RESPONDENT

(Being an Appeal from the conviction and sentence of Hon. S. ATONGA (Principal Magistrate) in Kapsabet Principal Magistrate's Court Criminal Case No. 745 of 2006 delivered on the 20th November 2007)

JUDGMENT

The five appellants were allegedly in a group of about twenty (20) people who on the 4th April 2006 between 1.00 a.m. and 3.00 a.m. at Kabutie Village and Chepterit Sub-location in Nandi North District while armed with crude weapons robbed John Kimaiyo Kitur of Ksh. 3,000/- and Sammy Kiptoo Kiplagat of Ksh. 600/-, mobile headset make Alcatel 331, two jackets all valued at 6,399/- and at or immediately before or immediately after the time of such robbery used actual violence to the said John Kimaiyo Kitur and Sammy Kiptoo Kiplagat.

Additionally, it was alleged that on the material date, the appellants also unlawfully assaulted Rita Jepkemboi Kitur and Hellen Jeptum and maliciously damages two doors valued at Ksh. 5,000/- the property of John Kimaiyo Kitur.

After their arrest while inside a public service vehicle (matatu) on the 5th April 2006, the appellants appeared before the Principal Magistrate at Kapsabet on the 12th April 2006 charged with two counts of robbery with violence contrary to S. 296 (2) of the Penal Code (i.e. counts 1 and 5), two counts of assault causing actual bodily harm contrary to S. 251 of the Penal Code (i.e. counts 2 and 3) and one count of malicious damage to property contrary to S. 339 (1) of the Penal Code (i.e. count 4). The appellants

pleaded not guilty to all counts. They were tried and convicted on all the counts and sentenced to death on counts 1 and 5, six months imprisonment on counts 2 and 3 and three months imprisonment on count 4. The sentences on counts 2, 3 and 4 were suspended or held in abeyance in view of the death sentences on counts 1 and 5. The death sentence on count 5 should also have been held in abeyance in view of a similar sentence on count 1 (**See, BORU & ANOTHER VS. REPUBLIC (2005) KLR 649**).

Being dissatisfied with the conviction and sentences, the appellants filed separate appeals which were consolidated and heard together.

The grounds for the appeals are contained in the respective petitions of appeal and are more or less similar.

The main ground is that the learned trial Magistrate erred in law and fact in convicting the appellants on the basis of inadequate, unreliable and incorrect evidence of identification.

The appellants also raise issue with regard to their conviction on the basis of the recovery of the alleged stolen items inside a public service vehicle.

At the hearing of the appeal, the appellants represented themselves and relied on the written submissions to argue their case.

The learned Senior Deputy Prosecution Counsel (SDPC) **MR. OLUOCH**, opposed the appeals on behalf of the respondent. In his response to the appellants' submissions, he submitted that on the material date PW 1, PW 2 and PW 3 were attacked by a group of people whom they saw and identified as the five appellants. The three witnesses further identified the first appellant (Matayo) and the third appellant (Emmanuel) in an identification parade.

The learned prosecution Counsel submitted that the identification of the third appellant was however dock identification. Learned Counsel went on to submit that PW 4 and PW 5 were together when they were attacked and robbed by a group of people. Their stolen property were later recovered from the appellants in a public motor vehicle Reg. No. KAU 249 K.

The learned prosecution Counsel submitted that PW 8 was the driver of the said motor vehicle and that he mentioned the first, second, third and fourth appellants as the four people who stopped him while they were carrying a sack and asked him to stop at a particular place where they were joined by the fifth accused.

Learned counsel further submitted that after being tipped off by some passengers, the driver of the vehicle drove the same to Langas Police Station where the five appellants were arrested and found in possession of property stolen from PW 1, PW 2, PW 3 and PW 4. Learned Counsel submitted that although the appellants denied being in possession of the stolen items, they did not say why the complainants implicated them.

On sentence, the learned prosecution Counsel submitted that since the first count of robbery was an attempt, S. 389 of the Penal Code ought to be applied so that the sentence is reduced to one of seven (7) years imprisonment. However, with regard to the fifth count, the sentence of death was merited. Therefore, all the other sentences should have been held in abeyance.

Responding to the foregoing submissions by the learned prosecution Counsel, the first appellant contended that PW 4 did not say how he identified him as a suspect and that the driver of the matatu referred to a person who tipped him but was not called to testify. Further, it was not proved that he (first appellant) was in possession of the stolen items.

The second appellant contended that he was arrested in a vehicle in which he was a passenger but its driver did not record a statement immediately but long after his arrest. Further, PW 10 alleged that he was identified in an identification parade yet PW 1, 2, 3, 4 and 5 did not say as much in their testimonies.

The second appellant submitted that although PW 1 reported that he was robbed by twenty people, he later changed and said that he was robbed by five people. He (second appellant) wondered how he could be identified in an identification parade when he could not be identified at the scene of the offence.

Appellant four contended that he was arrested in a vehicle in which he was a passenger and that nothing was found in his possession. Further, PW 4 did not say how he identified him.

Appellant five contended that PW 1 and PW 2 did not say how they arrested him and that they told PW 9 that they were attacked by twenty people without saying how they identified any one of the robbers.

The fifth appellant further contended that the mention of five robbers was an afterthought and that he was not arrested with any stolen property which was found in a vehicle carrying many people. Further, the owner of the property could not be identified and the identification parade conducted was not proper.

Having read and heard the submissions by both sides, our duty is to reconsider the evidence and draw our own conclusions. We however, bear in mind that the trial Court had the advantage of seeing and hearing the witnesses.

Briefly, the prosecution case was that on the night of 4th April 2006 at about 1.00 a.m., **JOHN KIMAIYO KITUR (PW 1)** and his family were asleep at their home when they were awakened by dog barks. Kitur using a rear door proceeded to a main house and on flashing his torch saw five people through the glass door. He identified the five people as the appellants armed with a panga (machete), iron bar, hammer and small metal. The appellants introduced themselves as police officers and demanded that the door be opened. Kitur suspected that something was wrong. He proceeded to another room where he woke his two sons and armed himself with pangas. His wife raised alarm thereby prompting the intruders to break the door with the iron-bar in their possession. The appellants entered the house and a struggle ensued between them and the occupants of the house. The appellants fled from the scene when neighbours arrived. Kitur (PW 1) was injured in the process. Later, after an ambush, the appellants were arrested and some stolen items recovered. Kitur (PW 1) attended an identification parade in which he pointed out the first, third, fourth and fifth appellants.

RITA KITUR (PW 2) confirmed the attack and robbery. She said that she was able to see and identify the second accused (fifth appellant) with the aid of a bright light passing through the glass.

CHEPTUM (PW 3) confirmed that they were attacked by a group of people but she was only able to identify the third accused (fourth appellant) with the aid of bright moon light.

SAMUEL KIPTOO LAGAT (PW 4), was at his home on the material night at about 3.00 a.m. when he was awakened by a group of five people alleging to be police officers. He opened the door and switched on the lights. The five people demanded and were given a mobile phone. They took away two jackets and a cap before they tied him (PW 4) with a piece of mosquito net and warned him against screaming. He said that the first and third accused (first and fourth appellants) were near him. He identified them. After the intruders left, Lagat (PW 4) untied himself, alerted a neighbour and reported to the police. Later, he identified the first and fourth appellants in an identification parade. His two stolen jackets and a cap were recovered.

LINUS KIPKOECH KORIR (PW 5) was at the time a neighbour of Lagat (PW 4). He confirmed that Lagat came to his house and reported that he had been robbed. He accompanied Lagat to the Police Station to make a report.

DR. KIPKIRUI (PW 6) of the Moi Hospital Eldoret examined Kitur (PW 1), Rita (PW 2) and Cheptum (PW 3) and confirmed that they suffered bodily injuries. He later compiled and signed the necessary P3 forms.

P.C YUSUF KIBET (PW 7) of Langas Police Station Eldoret was on duty at 8.30 a.m. on the

material date when a public service vehicle arrived at the police station with police officers and the appellants. He (PW 7) arrested and interrogated the appellants. They told him that they lived in Kitale and Eldoret. He recovered three torches, a metal rod, clothes and pliers which were in a sack inside the motor vehicle. The sack was in a position different from where the appellants were seated. It was pointed to him by a passenger in the vehicle.

WESLEY SAINA (PW 8), was the driver of the public service vehicle Reg. No. KAV 249 K. He was at the Kapsabet Stage at 6.00 a.m. on the material date. On his way to Eldoret, he stopped at a place called Mbelekenya where four members of the public stopped and boarded the vehicle. Two of them had a sack and said that one of them was ahead. The person was picked up and the vehicle headed towards Mosoriot where two other members of the public carrying a walking stick stopped and also boarded the vehicle. After a while, these two people with a walking stick stopped the vehicle and called the driver (PW 8) aside. They told him that the suspects they were looking for were in the vehicle. He (PW 8) then drove to Eldoret Airport and alerted the police officers who were there. The police officers boarded the vehicle and ordered that no passenger was to alight. The vehicle was driven to Langas Police Station where all passengers were told to alight. The passenger with a walking stick going by the name Kibet then identified the five appellants as the suspects. Two sacks removed from the vehicle were found to contain pair of shoes, a panga, pliers, three torches, a cap and a jacket. After the appellants were arrested, the driver (PW 8) proceeded with his journey with the rest of the passengers.

P.C JOSEPH ANAMBI (PW 9) of Kapsabet Police Station received a report of the robbery and proceeded to the scene where he found the first complainant (PW 1) together with PW2 and PW 3. He examined the scene and collected some exhibits. Later, a report was received that a son of the complainant had spotted five suspects who were arrested at Langas Police Station. The five suspects were forwarded to Kapsabet Police Station. They were the five appellants herein.

After being identified in an identification parade, P.C Anambi (PW 9) preferred the present charges against the appellants.

C. IP LUCY KARANI (PW 10) of Kapsabet Police Station conducted the identification parade in which the first, second, third and fifth appellants were identified by PW 1 and PW 2.

The appellants were placed on their defence on the basis of the foregoing evidential facts by the prosecution. They all denied the offences. The first appellant (**Matayo**) said that on the material date he boarded a vehicle to go to Eldoret. The vehicle picked several passengers on the way and then proceeded to Langas Police Station. All the passengers including himself were searched. Nothing was recovered from him. He was beaten up so that he could admit the offences but he declined. He was thereafter taken to Kapsabet Police Station where he was placed in an identification parade and allegedly identified. He was later taken to Court and charged together with persons he did not know.

The second appellant (**Stephen**) said that he boarded the same vehicle and on the way to Eldoret it diverted and entered the Eldoret Airport where police officers ordered all the passengers to alight. Thereafter, the vehicle was driven to Langas Police Station where he was arrested. He was searched and beaten in order to admit offences he knew nothing about. Later, he was taken to Kapsabet Police Station where he was placed in an identification parade but was never identified.

The third appellant (**Emmanuel**) said that he was on his way to Eldoret in the same vehicle when it was diverted into the Eldoret Airport and later driven to Langas Police Station where the passengers were ordered to alight. He was arrested and later taken to Kapsabet Police Station. His house was searched and nothing was recovered. He was then placed in an identification parade where he was allegedly identified.

The fourth appellant (**Peter Juma**) was also in the same vehicle which was driven to the Eldoret Airport and then to Langas Police Station where he was arrested and later taken to Kapsabet Police Station where he was allegedly identified in an identification parade and charged with persons he did not know.

The fifth appellant (**Godfrey**) said that he boarded the same vehicle at Chepterit Stage on his way to Mosoriot. However, the vehicle was driven to the Airport and then to Langas Police Station where he was arrested and beaten up. He was later taken to Kapsabet Police Station where he was placed in an identification parade whose purpose was unknown. On 12th April 2006 he was charged at the Kapsabet Court jointly with people he did not know.

After considering the evidence in its totality, the learned trial Magistrate concluded that the material offences were committed against the complainants. We uphold the finding.

With regard to the identification of the appellants as having been part of the group of people who attacked, robbed and assaulted the complainants, the learned trial Magistrate relied on the evidence of identification by PW 1, PW 2, PW 3 and PW 4 and the evidence of the recovery of property stolen from the complainants by PW 7 to arrive at the conclusion that the five appellants were positively identified as having participated in the offences.

The learned trial magistrate appreciated that the offences occurred in the night but was of the view that the bright torches in the possession of the robbers may have aided in the identification of the appellants at the scene of the offences.

On recovery of the alleged stolen items, the learned trial Magistrate found that the appellants failed to explain how they came into possession of the stolen items thereby putting into effect the presumption that they were the robbers.

On our part, we find it difficult to agree that the bright torches in possession of the offenders enabled PW 1, 2, 3 and 4 to clearly see and make a positive identification of the appellants. This is because if it is the robbers who had the torches they must have beamed them at the victims or at places where they were looking for property. In the circumstances, it was not possible for the offenders to be identified with the aid of light from their own torches. None of the witnesses said that the torches were flashed directly at the offenders. PW 1 talked of flashing his torch at the offenders. He said nothing about the intensity of the torch light and the distance between himself and the offenders when he flashed the torch. He did not even say whether or not the torch was flashed directly at the offenders and even if that were so, it was not possible for him to see and identify five robbers at one go.

PW 2 talked of the offenders’ bright torches. She also talked of bright light passing through the glass. She did not mention the source of the bright light passing through the glass and how it enabled her to see the robbers or any one of them.

PW 3 talked of bright moonlight as having enabled her to see and identify one of the robbers outside the house while he was two (2) metres away. Nobody else talked about the moonlight. The learned trial Magistrate did not consider it as having been a reliable source of light otherwise he would have indicated as much. We also think that it was not a proper source of light considering the circumstances and anxiety prevailing at the time.

PW 4 was attacked and robbed separately. He talked of having switched on his house lights without saying whether or not they assisted in the identification of the offenders. His evidence in chief implied that the torches in the possession of the offenders enabled him to identify two of them. In cross-examination, his suggestion was that the lights in his house assisted in the identification of the offenders. He said nothing about the intensity of the lights and how they enabled him identify two of the offenders.

Given that the offences were committed in circumstances which were not favourable for identification and given that the available sources of light could not offer any assistance in the identification of the robbers, we are of the view that the evidence of identification given by PW 1, 2, 3 and 4 against the appellants was not reliable and watertight so as to leave no doubt that the appellants were positively identified as having been part of the gang of robbers who terrorized and robbed the complainants on the material night. It was possible that the identification of the appellants was erroneous

and probably mistaken.

With regard to the recovery of the alleged stolen property, we do not think that there was sufficient and credible evidence to establish possession by the appellants of the items found in sacks in a public service vehicle (matatu). The appellants boarded the vehicle like any other passenger. They were taken to Langas Police Station together with other passengers. The sacks were not found where each of the appellants was seated in the matatu. It was not determined who was the actual or constructive owner of the two sacks in which property allegedly stolen from the complainants was recovered.

The police officer who found the items in the vehicle (PW7) clearly indicated that he found two sacks in front away from where each of the appellants were seated. He could not state with certainty that the sack and the items found therein belonged to the appellants or any one of them. The driver of the vehicle (PW 8) also indicated that two sacks were inside the vehicle. He said that the sacks were kept therein by the first and fourth appellants. This was stated during cross-examination but not during examination in chief when he (PW8) said that two people boarded the vehicle with a sack at a place called Mbelekenya. He only talked of one sack and did not identify the passengers who entered with it in the vehicle. His evidence that the first and fourth appellants may have been the owners of the two sacks was unreliable and could have been an afterthought.

It is instructive to note that the person responsible for loading goods into a matatu vehicle (i.e. the loader or conductor) was not called to testify and establish the identity of the owner or owners of the two sacks found in the material vehicle.

In essence therefore, there was insufficient evidence or none at all, to prove that the appellants or any one of them was in actual or constructive possession of the items found inside the material vehicle. According to the driver of the vehicle (PW 8) the appellants were implicated by a person called Kibet who was in the company of another person with a walking stick or sticks. These people were also not called to testify.

Without proof of possession, the doctrine of recent possession and the presumption which goes with it could not be applied against the appellants who could not in any event be asked to explain what was not in their possession.

All in all, the totality of the evidence adduced against all the appellants was inadequate and unreliable for a sound and proper conviction.

With regard to the sentences, they were proper and lawful. However, in view of the death sentence on count one, the sentences on the rest of the counts ought to have been held in abeyance including the death sentence on count five.

S. 389 of the Penal Code was not applicable in the present circumstances for the simple reason that the first count was not an attempted robbery with violence but an actual robbery with violence contrary to S. 296 (2) of the Penal Code.

In sum, all the five appeals are allowed. The conviction of each of the appellants is quashed with the result that all the sentences imposed against them are hereby set aside. They will each be set at liberty unless otherwise lawfully held.

J. R. KARANJA
JUDGE

A. MSHILA
JUDGE

[Delivered and signed this 15th day of November 2011]