REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 30 & 31 of 2009
SAMUEL KOYA MACHAKA ……..……1ST APPELLANT
SAID MULEWA MKARE ……2ND APPELLANT

VERSUS
REPUBLIC ……..……RESPONDENT

JUDGMENT

This appeal is filed by Samuel Koya Mwachaka referred to as 1st appellant) and Said Mkare Mlewa (referred to as 2nd appellant). They had been jointly charged with robbery with violence contrary to section 296(2) of the Penal Code but upon trial the charge was reduced to robbery contrary to section 296(1) of the Penal Code and 2nd appellant was convicted of the charge and sentenced to 10 years imprisonment whilst 1st appellant was acquitted. 2nd appellant was also convicted on a charge of cultivating cannabis sativa and sentenced to serve 2 (two) years imprisonment.

The 1st appellant was convicted on a charge of burglary and stealing contrary to section 304 Penal Code as read with section 279 Penal Code and sentenced to serve ten (10) years imprisonment. They had entered a plea of not guilty on all the charges. They had been jointly charged with another who died and charge was withdrawn on the charge of robbery with violence.

The prosecution case was that on the night of 16th and 17th September 2006 at Mere village in Ganda location, within Malindi District, they jointly with others not before the court, while armed with dangerous/offensive weapons, namely pangas, robbed Kavetha Bungo Mkare twelve lessos, one crate of soda, two cartons of vestline oilment, one weighing machine, seven cartons of Eveready dry cells, one carton of 250gm Omo, one spring weighing machine, four glasses of water, two packets of Angel dry yeast and cash kshs, 9780/- all to the total value of Kshs. 22,644/- and at or immediately before or immediately after the time of such robbery, used actual violence to the said Kavetha Bungo Mkare.

The charge against 2nd appellant relating to cultivating cannabis sativa plants contrary to section 6(a) of the Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994 as read with section 2(b) of the same Act was that on the 17th day of September 2006 at Mere Village in Ganda location, within Malindi District, was found having cultivated 5 (five) plants of cannabis sativa (bhang) value at Kshs. 50/- in contravention of the said Act.

The 1st respondent on the charge of burglary was to the effect that on the night of 17th and 18th day of September 2006 at Kwa Upanga village in Ganda Location within Malindi District, jointly with others not before court, broke and entered the dwelling house of Charles Kahindi Mangi with intent to steal from therein and did steal from therein 3 pairs of trousers, one stapler, two spanners and one shirt all valued at kshs. 2260/- the property of the said Charles Kahindi Mangi.
Kavetha Bugo Mkare (PW2) was a businesslady in Mere operating a shop which sold food stuffs and

other household items and general shop items. She lived in the shop. On 17-09-06, she closed the shop at 9.00pm – at the time her family would go to sleep in the bush because of the security situation but she opted to sleep in the shop. The reason for sleeping in the bush was so that if robbers struck they would not find them there. Her husband left the shop at around midnight, and PW3 slept for a short while, then through the windows, she saw torch lights outside. She hid under the bed, - the thieves knocked the wooden door, then broke it. They were armed with pangas and asked for her husband Bugo Mkare (PW2). She told them he had gone to Mombasa to buy provisions and they ordered her to come out from under the bed. There were three men inside the house and she saw others peeping through the windows. She recognized two men who were inside as Saidi (2nd appellant) and Shariff (now deceased) as her lantern lamp was on. She told the trial magistrate.

"I could see with the light from the lantern. I recognized 1st accused (now 2nd appellant) because he is a son to my husband's brother. He was wearing a green hat. The face was visible. He was holding a panga."

They then asked her to give money which was proceeds from sales, and she gave them Kshs. 1000/-. The thugs ransacked the shop, taking away sodas, sugar and clothes. They also took lessos, shoes – they remained in the shop for one hour. Some things dropped as the robbers left. Her husband and neighbours begun searching for the attackers at about 3.00am and 2nd appellant was arrested and some money was recovered from his pockets. Upon arrest the suspects were taken to PW1's house. She was not injured during the incident.

On cross-examination she stated that the incident took place at 3.00am and she was able to see the thugs with the aid of a lantern which was burning – although this was not included in her statement to the police. She said on cross-examination by 2nd appellant that:-

"I saw the men clearly. Al were wearing jeans trousers….you were wearing a green hat …I stood and was able to see their faces clearly…. I recognized you and Shariff because I knew you before …I recognized your voices and faces….and I used to see you in that greet hat. All of you had hats…my money was found on you."

Bugo Mkare (PW2) is PW3's husband and confirmed to the trial court that he had gone to hide in the bush because of being terrorized by robbers but his wife declined to accompany him saying God was her security. At 3.00am he got information about the incident at his home and was advised by the reportee one Kazungu Jona (a neighbour) on whose farm he had gone to hide, to go and check. He saw many torches, so an alarm was raised and about 100 villagers responded and they surrounded the homestead. When the thugs started to leave, PW2 recognised them as he was inside a toilet and peeped through the door five metres away. He saw four men leaving, and among them was the 2nd appellant, Shariff and Baraka. It was his evidence that the moon was bright enough to enable him see that 2nd appellant and Shariff were holding a sack.

PW2 stated as follows:-

"The 1st accused is my nephew, he is my brother's son. When we called our relatives, they spotted 1st accused and arrested him….when we reached accused 1, house, the District Officer and others searched his house and found a water pipe, mine and bhang. The water pipe had been stolen previously….the District Officer removed a car battery which I recognised as mine. I know its mine. I recognize it by looking at it. I had it for a year….it had been stolen sometime before this incident. It was recovered from accused 1 person's house"

The evidence of Charles Kahindi Mangu (PW1) was that on 17-09-06 he was at home at about 7.30pm – he had a kiosk near Kwaupanga Primary School which he had closed at 9.00pm. The next day when he went to the kiosk, he found the wall broken and also realized that someone had broken the *makuti* roof and gained entry into the shop. He found that three pairs of trousers, some shirts, bicycle spanners and stapler had been stolen. He went to make a report to the Assistant Chief and found that Chikole (whom he identified as 1st appellant) had been arrested and a Kangaroo Stapler, a yellow shirt, pair of black trousers belonging to PW1 (which 1st appellant was wearing at the time) were recovered from 1st appellant's house and he named 1st appellant as William Chakoya. On cross-examination PW1 stated:

"I know you. You are William Koya Mwadiambi alias Biriki. I heard your name when you were recording statement."

He identified the trouser which was recovered as his because of its 32 inch waist, a tear on the side of the trouser leg, and its black colour – he explained that the tear was caused by a bicycle and the yellow shirt had no identifying mark but he knew it was his because he had bought it as part of school uniform for sale. – he stated:-
"I have no receipt for the shirt. The shirt is mine. I have nothing to prove it is mine"

Cpl Donald Kalama (PW4) accompanied 2nd appellant and his father to their home in Mchungeleni village, as they had reported that their houses had been burnt. At the home he found 5 (five) seedlings of bhang in a nursery within 2nd appellant's compound. A crowd which had gathered there said 2nd appellant's house was burnt because he was involved in a robbery the previous night. PW4 searched the 2nd appellant's compound and found a pipe, a car battery, 2 pangas and five soda bottles hidden behind the house. He searched 2nd appellant and recovered Kshs. 583/- in two Kshs. 200 denominations, one Kshs 100/- note and coins. PW4 then visited the complainant's home and he identified 2nd appellant as having been among the people who robbed him. He explained that the items referred to were found outside the house NOT inside the house.

PW4's evidence was that he did not recover anything from 2nd appellant's house because by the time he got there, the house was smoldering, having been burnt down on allegations that 2nd appellant had been involved in a robbery.

Juma Omar Kassim (PW5) the Assistant Chief of Mere Sublocation told the trial court that 2nd appellant had reported to him that his house had been burnt down, and he visited the scene and confirmed that. While trying to find out the cause of arson, he was informed that 2nd appellant was a suspect in a robbery which had taken place the previous night and that 2nd appellant had fled. Then he said:-
"Inside the house we found a pipe, soda bottles, glasses and a battery. We searched accused 1 and found him with cash Kshs. 563/- At his garden we found 5 seedlings of bhang plants."

The recovered seedlings were presented to the government analyst for examination and John Njenga (PW6, a government analyst at Government Chemist Department, Mombasa), found them to be cannabis sativa. His report was presented to the court as Ex.7.

In his unsworn defence 1st appellant told the trial court that on 18-9-06 while having a drink of palm wine at Magweni, he was arrested and accused of being involved in a robbery. He was beaten by a group of people, among them being PW2 who urged that he should be killed. He was rescued by police officers and the District Officer (DO).
He was taken to hospital, and after treatment he accompanied the police to his home. There he found the complainant and many other people and PW2 set his house on fire with the help of the complainant. Upon inquiry the crowd said pW2 had given instructions to burn down the house because 1st appellant was having an affair with his wife and that appellant would be charged in court for adultery. While the D.O was asking many questions, PW2, fled – so 1st appellant went with the D.O to Malindi Police Station but when they got to Ganda Location, they found PW2 sitting with PW1 holding a paper bag containing 1st appellant's property. PW1 claimed he had also been robbed and that some of those items recovered were his. It was his testimony that PW1 and PW2 are bossom friends and they work together.

He contested PW1's claim that the trouser was his by virtue of the tear on the trouser leg saying he too rides bicycles and the ear was not sufficient proof. He insisted that the school shirt belonged to his son who was born in 1994. He insisted that the whole matter arose due to PW2's belief that he was having a love affair with PW2's wife and that he was framed on the charge of robbery after PW1 and PW2 realized they would be arrested and charged with the offence of arson.

2nd appellant's unsworn defence was that on 17-09-06 while at his home, his uncle (PW2) came with

some people and attempted to arrest him, but he resisted and fled. When he returned, he found that his house had been burnt down to ashes. So he reported to the area Assistant Chief who accompanied him back to the scene. The chief went to a nursery which had seedlings, and claimed they were bhang seedlings, he carried them way to the police station. PW2 then called the chief aside and they spoke, shortly the Assistant Chief took panga, glass and battery from 2nd appellant's house.
The AP also removed Kshs. 586/50 cents from his pockets. He was then charged for robbery yet he knew nothing about it.

The trial magistrate in her judgment held that from the evidence of prosecution, she was satisfied that a robbery had taken place in the home of the Mkares and that PW1's shop had also been burgled. She found that PW3 was able to see and recognize 2nd appellant with the aid of a lantern which provided sufficient light to aid in identification. Further that PW2 was able to identify the 2nd appellant from the toilet where he hid.

She stated that:-
"Recognition is of more probative value than identification of a stranger. PW2 saw the robbers using moonlight. The moon was very bright. PW2 identified the items that were recovered at the home of 1st accused during arrest."

The trial magistrate took note of the items recovered from the 1st appellant and stated:-
"The stapler had no mark but PW1 said he had it a week prior to this incident. The yellow shirt was for sale. It was a boy's shirt part of uniform. The pair of trousers recovered was what the 2nd accused was wearing at the time of his arrest…..PW2 showed the court the tears and he proved that the items belonged to him."

The trial magistrate considered 2nd appellant's defence and dismissed it as a denial saying PW3 had no grudge with him. The trial magistrate further stated regarding 2nd appellant:-
"Besides even if nothing stolen was recovered from 1st accused, the testimonies of PW2 and PW3 confirmed that 1st accused participated in robbery. The account of PW2 and PW3 as to how they recognized PW1 was not shaken during cross-examination. The lighting was sufficient for recognition. The evidence of PW2 and PW3 coupled with the recoveries made further confirm that 1st accused participated in the robbery."

The learned trial magistrate accepted the evidence of PW2 regarding recoveries made as truthful and that 1st appellant's claim that he had an affair with PW3's wife hence this charge, was false as PW3 stated on cross-examination that she had never seen the 1st appellant before. As to claims that the shirt PW1 had identified belonged to his son, the trial magistrate took note that 1st appellant never raised the issue on cross-examination and dismissed his defence as a sham.

In reducing the charge against 2nd appellant the trial magistrate stated.
"Though the robbers were armed, no personal violence was used on anyone."
The learned trial magistrate was also persuaded that 1st appellant was part of a party that burgled PW1's shop and stole from therein.

The appellants challenged these findings on grounds that:-
1) The charge was incurably defective.
2) The trial magistrate failed to take into account the circumstances for identification and that conditions at the alleged scene were not clearly explained to have been favourable for positive visual identification by PW3.
3) The case was full of discrepancies
4) The evidence was uncorroborated
5) The trial magistrate failed to consider that there existed bad blood between 2nd appellant and PW2 and PW3

6) Prosecution case was not proved beyond reasonable doubt.

7) Important witnesses were not summoned
8) The charge of burglary and stealing was not proved
9) The ten year sentence on the charge of burglary was harsh.

Both appellants filed written submissions.
1st appellant submitted that the charge was defective as the particulars of the charge did not give a detail of the items listed and sought to rely on the case of Alexander Nyacherio Maruri v R Cr. App. 1590/04 which held that there should be no material discrepancies between the evidence given to the police and the evidence given by the complainant during trial."
He also contested the finding on identification saying if pW1 was awoken from her sleep, then at what point did she light the lantern, and that there may have been no such light as is borne by the fact that she never mentioned the same in her statement to the police. He also points out that there was no evidence led as to whether the lantern produced sufficient light for positive identification or the distance between the witness and the appellant, and duration of her observation of the person she claimed to be the appellant. Also that PW2 never mentioned the presence of a lantern burning inside the house. He cited the case of Kamau V R (1975) EA 159 and ERIA Sebuato v R (1960) EA 174 where the courts recognized that in testing the credibility of the evidence of identification at night, in difficult circumstances, it is essential to make an inquiry of the relevant circumstances, such as the nature of the light, its size, its position relative to the suspect. He also cited from the case of Turnbul v R (1976 3 All ER pg 549 at pg 552 which held that:
"Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone whom he knew, the giving should be reminded that mistake of recognition of close relatives and fakeness are sometimes made"

He also argues that there is contradiction in the evidence of PW2 who said that he saw 2nd appellant leaving his home holding a bottle in his hands, then later he claimed that he saw 2nd appellant and one Shariff leaving his home while holding a sack.
Further he points to contradictions regarding the recovered battery MFI – 15 which both PW1 and PW2 claim as theirs. PW1 says it bears the initials Charles MC whereas PW2 says it bears the mark KV. He urged the court to consider the past conflict he had with PW2, who admitted to have made several reports alleging crimes purportedly committed by 2nd appellant and find that this present case is s continuation of the grudge PW2 had against her.

He wonders why the other people who were said to have hidden inside the toilet with PW2 were never called as witnesses to confirm seeing him at the scene citing the case of Bukenya v Uganda Cr. App. No. 68 of 1970 EACA where it was held that:
"(1) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(2) The court has a right and duty to call witnesses whose evidence appears essential to the just decision of the court

(3) The court may infer that the evidence of uncalled witnesses if called, would tend to be adverse to the prosecution 2nd appellant submitted that in the present case these principles were not followed and the conviction was not safe."

The 1st appellant's submission were that his rights under section 72(3) (b) of the Constitution were violated although he did not give details as regards date of arrest and date of being taken to court. Let me from the onset point out that this did not form one of his grounds of appeal and therefore offends the provisions of section 350(2) of the Criminal Procedure Code.

It was his contention that there was no evidence to prove that he participated in the burglary at PW1's shop, nor was there sufficient evidence to show that the goods recovered belonged to the complainant and

no one else.
He wonders what nexus there is between the names referred to by PW1 as being his names i.e Chikoya, William Koya, William Chakoya and William Koya Mwachambi alias Biriko because his official names are Samuel Koya Mwachaka, and submits that he is being victimized in place of someone else and he was never identified at the scene of the burglary and that the trial magistrate based her judgment purely on the complainant's assertion with no investigations being carried out.

At the hearing of the appeal, Mr. Ogoti for the State filed a notice of enhancement of sentence under section 354(3) (11) in respect of the capital charge or robbery contrary to section 296(2) Penal Code with regard to the 2nd appellant. Upon the court explaining to the 2nd appellant the nature and possible consequences of that notice should his appeal fail, the 2nd appellant thought over the matter for ½ hour and informed the court thus:
"I have decided to abandon the appeal and continue my ten year sentence."

Consequently the appeal by the 2nd appellant was marked as withdrawn on the charge of robbery. With regard to the 1st appellant, Mr. Ogoti (the ADPP) in opposing the appeal submitted that items stolen from PW1's shop on the night of the burglary, were recovered from 1st appellant's house and positively identified by the complainant whose evidence was corroborated by that of the assistant Chief. Further that the evidence against 1st appellant proved beyond reasonable doubt the charge against him, as he was found in possession of the stolen items shortly after the burglary and it was not likely that the same had changed hands.

He urged the court not to interfere with the sentence saying it is not excessive as it is within the law.

As regards 2nd appellant's conviction on charge of cultivating bhang, Mr. Ogoti that the recovery was made right within the appellant's compound in his presence and evidence of PW4 was corroborated by that of PW5. Further, that, the plants were subjected to analysis by PW4 and found to be cannabis sativa and this evidence was water tight, so the conviction and sentence should be upheld.

No one saw the 1st appellant break into and steal from PW1's shop on the night of the burglary. His conviction was premised on the evidence that he was found with goods recently stolen from PW1's shop. He was said to have stolen three pairs of trousers, one stapler, two spanners and one shirt.

In his evidence in chief, he confirmed to the trial court that there was no identity mark on the kangaroo stapler, nothing to prove he was the owner, except that he had it for a week prior to the theft. The same applied to the yellow shirt, which he said was his because of the fact that he sold similar shirts in his shop – needless to say, there was no lead to demonstrate that the shirt was new or unused nor did PW1 have a receipt or any evidence to confirm his claim to own the same. Then there was the black pair of trousers which he identified because it had a tear on the leg, which he said was caused by a bicycle. His evidence was that 1st appellant was wearing the trouser when he was arrested, while the stapler and shirt were recovered from his house. PW1 stated on cross-examination that he found the items inside the 1st appellant's house before the house was torched.
With regard to the trouser, PW1 said:
"Even if you have waist 32 then it is a coincidence but the trouser is mine"

When PW4 (the police officer) went to the scene, the house of 1st appellant had already been torched, 1st appellant badly injured as a result of beatings, and he searched but recovered nothing, since everything had been burnt.
On cross-examination by 1st appellant, PW4 said:-
"When I got to Kakuyuni, I found that you had been beaten by the mob….I took you to your house. I found your house smoldering. I never found anything at your house. I do not know what happened before you were beaten."

Then there is the evidence of the Chief Juma Omar (Pw5) said he did not know how 1st appellant was

arrested and that he never went to 1st appellant's house – 1st appellant having been arrested by civilians who handed him over to PW5. The chief on cross-examination by 1st appellant said:-
"I never saw the things being recovered from you. I saw some items brought, when you were arrested. When I saw the items allegedly recovered from you, they were in the complainant's hands."

Yet according to PW1, he followed the chief to the place where he had gone to pursue a thief at Bajue and the thief whom he named as William Koya also referred to as Chikola had been arrested – then *"Together with the Assistant Chief and crowd, we went to Chikola (Accused 2) (now 1st appellant) home"*

Now there is contradiction in the evidence by prosecution witnesses and it would seem that PW1 either exaggerated the content of his evidence or he referred to events that never took place. The chief denied witnessing any recovery of items or even going to 1st appellant's home.
So what remains is the claim about the black trouser, since the other two items have nothing peculiar to establish them as being items that can only be found with PW1 and no one else. Given his exaggeration or making up of matters that never were, then his credibility is doubtful especially taking into account that no one else seems to have witnessed this dramatic recovery!! So the doctrine of recent possession does not even apply and the conviction was not safe – the evidence on record did not prove the charge beyond reasonable doubt. As a consequence thereof, my finding is that the appeal by 1st appellant has merit and is allowed.
The conviction is quashed and sentence is set aside.
With regard to the 2nd appellant on the charge of cultivating bhang – he confirmed that PW4 and PW5 visited his home and questioned him about the plants that were growing in his garden. He even confirmed that PW5 took away the plants to the police station. It is not contested that those very plants are the ones that were taken to the government analyst for examination and a report submitted to the trial court confirmed them to be bhang.

There was no error in the finding made by the trial magistrate on this charge, the conviction was safe and I uphold it. The sentence is confirmed. The appeal by 2nd appellant on count 3 is dismissed.

Delivered and dated this 10th day of February 2010 at Malindi.

H. A. Omondi
JUDGE