REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 140, 141 & 142 of 2008

KENNEDY ORENGE WAMUMBA.....1ST APPELLANT

TEKETI OLE KIU.....2ND APPELLANT

STEPHEN MAINA WANJA.....3RD APPELLANT

ISAAC SITONIK MASSEY.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants herein together with two other accused were charged with the offence of **robbery with violence** contrary to **section 296(2)** of the **Penal Code.** The prosecution called nine (9) witnesses after which the trial court found that the Appellants had a case to answer. Each of the Appellants and two of their co-accused elected to give unsworn testimony and offered no other evidence in their defence. The 5th Accused was acquitted for lack of evidence. The Appellants were however convicted, and sentenced to death as by law prescribed. Each of the Accused appealed to this court on respectively eight and seven grounds against their conviction.

The 4th Appellant, Isaac Sitonia Massey died whilst in prison. His appeal therefore abated in terms of **Section 360** of the **Criminal Procedure Code,** thus leaving three Appellants.

The three appeals, namely, Nakuru H.C. Criminal Appeal Nos. 140 of 2008 *(Kennedy Orenge Wamumba vs. Republic),* Nakuru H.C. Criminal Appeal No. 141 of 2008 *(Teketi Ole Kiu vs. Republic)* and Nakuru HC Criminal Appeal No. 142 of 2008 *(Stephen Maina Wanja)* were by order of court made on 27th January 2010, consolidated and were heard as one appeal with the control file being Nakuru HC. Criminal Appeal No. 140 of 2008.

The three appeals raised similar grounds and in essence argued in the written submissions that there was no evidence of their

positive identification. So when the appeal was heard before us, **Mr. Mugambi** learned State Counsel submitted to us that he was conceding to the appeals by the 1st and 2nd Appellants respectively, that is to say, Kennedy Orenge Wamumba and Teketi Ole Kiu. The ground given by Mr. Mugambi was lack of identification by the complainants of these two Appellants, and the fact that the Appellant did not know them before. Mr. Mugambi however supported the conviction of the 3rd Appellant on the same ground that he was positively identified.

The entire prosecution case lay on whether or not there was conclusive and positive identification of the Appellants by the complainant. This is because, none of the items stolen in the course of the robbery from either PW1 or PW2, were recovered from, and so that the Appellants could not, be pinned down on the doctrine of possession of recently stolen items for which the Appellants could not give reasonable explanation. The issue is therefore whether the Appellants or any one of them was positively identified.

Mr. Mugambi, learned State Counsel did not support the conviction of the 1st Appellant *(Kennedy Orenge Wasumba),* and the 2nd Appellant *(Teketi Ole Kiu)* on the ground that there was no evidence of identification. Although the State did not support the conviction of the said 1st and 2nd Appellants, it is still our statutory duty and command of judicial precedent from the Court of Appeal to examine the evidence before the lower court and come to our own findings and conclusions.

It is clear from the evidence of both PW1, PW2, PW3, PW5 and PW6, that there was a robbery with violence staged against the home of PW2, and the shop or hotel of PW3, and all the evidence suggests that it was perpetrated by the same persons or group of persons of whom the Appellants formed part.

Raids into the house of PW2 and PW3 were staged in the dark of night. According to the evidence of PW1, his shop was struck at about 1.00 a.m. by a gang of five 5 men who sought money from him as he could not afford to have a well-stocked shop without lots of money. The robbers did not find much joy in PW2's shop, even with threats from one of the gangsters, and Maasai swords put on him. The robbers had to make do with a Nokia 1600, a Sony radio cassette, a pair of safari shoes, one black jacket, 6 packets of milk, 4 pairs of torch batteries and 15 bottles of soda, and left. Although PW2 testified that he knew the Appellants, he only came to see them after their arrest and not at the scene.

The position is different with regard to the robbery staged at the home of PW1 Robert Maleya Letoluo. The time was about 1.00 a.m. in the night. PW1 was asleep with members of his family, his two boys aged 13 and 17 years of age, and a girl of 6 years. PW1 was in bed but not asleep in a separate room with his wife, and the 6 year old girl. His boys slept in their own room. No sooner had he seen light fall on his curtains over the window panes and voices outside, than his door was broken open by a huge boulder, which the Police later collected and he identified in court.

Before he could jump out of bed, he was surrounded by a gang of five men who ordered him back to bed, and spoke in Kiswahili demanding Kshs 100,000/= from the wheat he had allegedly sold and when that money was not forthcoming, they demanded for whatever other money he had in his person, coat or wherever. When they only got his 600/= from his jacket pocket, they told him he was a joker. They collected, his cell-phones Motorolla C117, Nokia 3310 and Motorolla C115, and a Sagem. But this was not enough, they threatened to hit PW1 with simis unless he produced real money. PW1's son, David Lotoluo, PW5, came to the rescue, he opened a door to the shop, and the gang helped itself to a DVD, Home Theatre with 5 speakers and carried those items in a yellow paper bag and normal travelling bag from the PW1's shop.

All this while, his wife PW1 was unable to identify any member of the gang. His son, in the process of getting access to the shop, however met one Baba Naserian his friend at Olurukwa Primary School. PW1 and his wife (PW4) did not believe that their well known watchman could be part of the gang. That watchman became Accused 3 and now the 2nd Appellant in these proceedings.

The evidence of PW4, *(J.N.L)* and her little girl PW6 *(a minor)*, and her son, PW5 unraveled what PW1 was unable to see with the glare of beams of torch light on his face. While the gang was busy harassing PW1, it accidentally woke up little N from her peaceful slumber, she screamed, but one of the robbers immediately got hold of her and flung her into bed. What the gangster did not reckon with was that whilst all this was happening, PW4, the child's mother was watching the robber. This was her testimony -

> ***"… when he bent directing the torch on the child ordering her to shut up, I got a chance to see his face properly and to identify him. I was lying next to him and his torch light enabled me to see him clearly. It is not a person I knew before. He was tall, well built, and brown in complexion and had one dark tooth. I could identify three persons. Those are the ones I have described, another was mono-eyed, and one had the gun. The one with the gun pointed it at my husband at close range and he had a torch. I saw him clearly. I as well saw him when the child was brought back, the one with a dark tooth ordered me to sit on the bed. He took and removed the pillows in search of money. He told her that they could not come using their fuel, and go without money. The 3rd one had no one tooth. The 3rd lowered her cover sheet up to her chest and told her that even if she looked at him clearly there was nowhere to take him …."***

The question of the identity of those robbers would not be known to them *(PW1, PW2, PW3 and PW4)* until the next day when they managed to tell their ordeal and report the matter to Narok Police Station.

In a community where the welfare of a neighbor is still everyone's concern, community policing is very real. From the description

of the attackers, the elders in the community had mobilized and had had one suspect arrested. That person was the 2nd Accused Kennedy Orenge Wamuremba *(and the 1st Appellant herein),* and he is said to have given the names of other suspects.

On 30th August 2006, at 11.00 a.m. little N spied one of the suspects near a salon where she had been taken for a hair cut. With help from the Police, this suspect was apprehended by the Narok River. He was the 4th accused, and 4th Appellant. He is now deceased and his appeal abated as stated above. The 5th suspect Lesemoi Kiok but was acquitted for luck of evidence. So that left the 1st Accused *(now 3rd Appellant, Stephen Maina Nanya),* Kennedy Orenge Wamuremba 1st Appellant and the 3rd Accused Teketi Ole Kiu, the 2nd Appellant.

Mr. Mugambi learned State Counsel says, the 1st Appellant *(Kennedy Orenge Wamuremba)* and Teketi Ole Kiu *(the 2nd Appellant)* were not positively identified, and their appeals should therefore be allowed. With respect, we disagree with learned counsel.

It is the law that anyone under the age of 18 years, is a child. PW5 was 14 years of age. He was not subjected to a *voir dire* by the trial magistrate. His little sister Naanyu Lotuluo aged 8, was subjected to a *voir dire*. Both told their story in a matter of fact way, no speculation, no guile. Should the court accept the evidence of one *(aged 8)* because it was subjected to a *voir dire*, and the other aged 14 was not subjected to a voir dire should be rejected? Again with respect, the evidence of the 14 year child is admissible, after all both were subjected to cross-examination. Cross-examination is not however the reason for admitting their evidence. The reason is that the purpose of a *voir dire* examination is to test the intelligence of the child as to its ability to distinguish the importance of telling the truth as against telling lies, and consequences thereof. A child of 14 years is possessed of sufficient intelligence to be able to distinguish the importance of telling the truth as opposed to lying.

The trial court was correct in accepting the evidence of PW5, the boy of 14 years without necessarily subjecting him to a *voir dire*. He was sworn to tell the truth. This was his testimony -

> ***"… I ran to call neighbors. I met a watchman along the way. He is father Naserian the school watchman. I knew him well, since I was in class 4. He was a watchman at O Primary School. We met at the store. He was standing there, and we almost collided. There was full moon. I knew him well. He is in court. He is the 3rd accused at the dock. When he saw me he ran and hid. Another came and hit me with the flat side of the simi and ordered me to return to the house.***
>
> ***…I only identified one person, the 3rd accused. I told my father I saw the watchman, Baba Naserian. My***

father said he was not a possible suspect. I insisted …"

On cross-examination by the 3rd accused *(2nd Appellant),* PW5, reiterated his evidence in-chief that he saw the 2nd Appellant, and that when he followed the footsteps, to the watchman's resting place, the watchman *(2nd Appellant)* was not at his place of work. On the other hand PW5 stated clearly that he did not see 5th Accused who was consequently acquitted.

PW5 testified that the 2nd Appellant was picked/identified among 50 elders by PW4. He was restrained from trying to escape.

We can therefore say that the Appellants were not caught at the scene of the robbery. We can also say that none of the items allegedly stolen by the appellants were recovered from any of the Appellants. Only the Appellants know where those goods were taken.

How can the Appellants explain their being charged and convicted and sentenced as they were? The 5th Accused was acquitted as he was not identified. The 4th Accused *(now deceased)* stated he had played football on 12th August, 2006 and parted company with PW1 at 8.00 p.m. As the offence took place at between 1.00 - 2.00 a.m. then he had ample time to be at the scene. There is of course a danger in acting on un-corroborating evidence of a minor, but the trial court warned itself of this, and we note that both PW5 and PW6 were minors, were credible, as both children spoke with sincerity of heart and without guile. The 1st and 2nd accused persons *(now 1st and 3rd Appellants)* offered defences which the lower court correctly observed as mere denials. Both PW3 and PW4 gave graphic physical features of these Appellants and by which they were identified by the elders and the appellants handed over to the Police for investigation and prosecution.

For those reasons, we can see no valid reason for allowing the appeal on any of the Appellants.

Before we conclude this judgment we wish to dispose of several issues raised by the 2nd Appellant relating to the alleged violation of his fundamental rights contrary to section 77(2)(f) of the Constitution. Section 77(2) (f) requires that the charges be explained to the accused in a language which the accused understands. We have examined the record herein and are satisfied that the Appellants took active part in the proceedings and cross-examined the witnesses. They could not have done so if they did not understand the language or the evidence was not translated to them in a language they understood. We see no merit in this contention.

For all those reasons, we affirm the judgment and orders of the lower court. We dismiss the appeal herein.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 12th day of March 2010

D. K. MARAGA

JUDGE

M. J. ANYARA EMUKULE

JUDGE