**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAKURU**
**Criminal Appeal 236, 237, 238 & 239 of 2008**

**PAUL MWANGI GITHINJI.....................................1ST APPELLANT**

**MOSES NJOROGE NDUNGU.............................2ND APPELLANT**

**ANDREW MWANGI NDERITU...........................3RD APPELLANT**

**ROBERT MUNGAI MWANGI..............................4TH APPELLANT**

**VERSUS**

**REPUBLIC....................................................................RESPONDENT**

***(An Appeal from original conviction and sentence in Nyahururu P.M. CR.C.NO.572/2007. by Hon T.M. Matheka, Ag. Principal Magistrate, dated 3rd October, 2008)***

## JUDGMENT

The four appellants in this consolidated appeal were charged with three counts of **robbery with violence** contrary to **section 296(2)** of the **Penal Code** and two alternative charges of **handling stolen goods** contrary to **section 322(2)** of the **Penal Code.**

After a full trial, the learned trial magistrate found that the prosecution had proved the three main counts beyond reasonable doubt and upon conviction, sentenced the appellants to suffer death in accordance with the law. We wish to point out at this stage that the learned magistrate having convicted the appellants on all the three counts ought to have indicated that the sentence related only to one count while holding in abeyance convictions in the other counts.

Having made that observation, we are also alive to the duty imposed upon this court as the first appellate court to evaluate the evidence on record afresh so as to arrive at its own conclusion bearing in mind that we did not see the witnesses.

The appellants were jointly accused that on the night of 20th February, 2007 at Mutarakwa area in Nyandarua, they jointly robbed the three complainants in the charge sheet various personal items; that the appellants were armed with a rifle, pangas and clubs; that at or immediately before or immediately after the time of the robbery they used personal violence to the complainants.

The prosecution called seven (7) witnesses the effect of whose evidence was that on the night in question, the complainants who were traveling in a canter motor vehicle Reg. No.KAP 979W belonging to **P.W. 4 Justus Mugi Kabugi (Justus)** and driven by **P.W.1 Stephen Wahome Gichahi (Wahome)** from Embu going to sell mangoes in Nyahururu. The two were accompanied by a conductor (turn boy) – **P.W.2 John Kabuge Kamau (Kamau).** Upon reaching Mutarakwa area, in Nyandarua District at about 12.30a.m. four men emerged from both sides of the road. One of them stood right infront of the vehicle with a gun pointed at the vehicle. In view of this threat, Wahome slowed down

and as he did so, the windscreen and the side widows were hit with stones. The three of them were pulled out of the vehicle, beaten while being ransacked. In the process they lost cash, wrist watch, wheel spanner, thermos flasks, medicine, *rungu* (club), national identification cards, bank plate, wallet, driving licence, a jacket, mobile phones and all the items listed in the charge sheet.

The robbers after taking these items, allowed the complainants to proceed with their journey. The first stop they made was at Mairo-inya police station where they made a report. With police officers, they returned to the scene but, of course, did not find any of the robbers. Because Justus sustained a fracture on the leg during the robbery, he was rushed to the hospital. The next morning when the three complainants returned to the police station, Wahome straight away saw his stolen jacket hanged at the police station. They were informed that some suspects had been arrested with items answering to the description of those the complainants had lost to the robbers the night before. They saw the suspects and recognized them.

**P.W.7, P.C. Kimathi Kinoti** gave an account of how acting on information from an informer, he in the company of two other officers, Sgt. Irungu and P.C. Wacheke, raided two houses at a place called Kwa Njeri where they recovered some of the exhibits and arrested the four appellants. They were subsequently charged.

In his unsworn defence, the first appellant stated that as a milk trader, he set off early in the morning on the day in question. He met police officers who asked for his identification card and a permit for trading in milk. He did not have the latter and was arrested, joining ten other suspects who had been arrested earlier. He denied involvement in the robbery, the subject of this appeal.

The 2nd appellant, on the other hand in unsworn defence attributed his arrest by Sgt. Irungu that morning to the latter's suspicion that he was having a love affair with a certain lady by the name Esther Wambui, who Sgt. Irungu claimed was his girlfriend. The 2nd appellant maintained that he had only sold shoes to her. When Sgt. Irungu saw him come from her house he had gone for the payment of the balance of the price of shoes she had purchased.

The 3rd appellant gave a sworn statement in which he blamed his woes to his failure to raise Kshs.5000/= for the D.O.'s *harambee* and protection fees for his illegal trade in busaa and changaa brews. He particularly blamed two police officers P.C. Waithaka and a madam Wanjiru.

Finally, the 4th appellant defended himself saying he had visited his mother-in-law, Florence Wanjiku/Mama Mwihaki. The latter arranged for him to spend the night at a neighbour's house. While sleeping, police came and arrested him. After failing to bribe a police
officer (P.C. Kimathi) he was charged with the offence in question which he denied participating in.

The trial court considered the evidence presented before it and found the appellants guilty. The conviction aggrieved the appellants hence this appeal. In more or less similar grounds, the appellants have challenged the conviction on the grounds that the trial court failed to consider that:

i) the prosecution evidence was full of contradictions
ii) the evidence of the investigating officer and the informer was not tendered
iii) that no identification parade was conducted
iv) dock identification was not sufficient
v) the defence case

The appellants cited the following cases, copies of which or their reported citation as is usually the case in appeals of unrepresented appellants, were not supplied, apart from the last two;

- **Geoffrey Ngure** Vs. **Republic**, Cr. Appeal No.106 of 1986
- **Peter Mwangi** Vs. **Republic** Cr. Appeal No. 176 (years not indicated)
- **Needer** Vs. **Republic**, Cr. Appeal No.228 of 1980

- **Patrick Kabui Maina** Vs. **Republic**, Cr. Appeal No.849/86
- **Gabriel Kamau Njoroge** Vs. **Republic** (1982-88) IKAR, and
- **Githinji & Another** Vs. **Republic**, (1970) EA 231.

Learned counsel for the respondent supported the conviction but stated that although the identification of the appellants was improper the evidence of the appellants being in possession of recently stolen items was sufficient to convict them. That a blue jacket belonging to Wahome and a *rungu* (club) were found in two rooms occupied by the appellants; that the items were positively identified by the complainants; that the appellants were unable to give satisfactory explanations as to how they came by them.

We have considered these submissions as well as those authorities we could lay our hand on. It is common ground that the robbery took place at night (after midnight) and also that the robbers were strangers to the complainants. This matter was decided on the issue of identification which is also the crux of this appeal.

While Wahome and Kamau were categorical that they could identify their attackers, Justus, on the other hand stated that he was unable to identify any of them. Wahome and Kamau testified that they saw the 3rd appellant armed with a gun with the aid of the motor vehicle headlights and parking lights. Again Wahome alone alleged that he was able to identify all the four appellants as their assailants. Kamau was however unable to identify the 1st, 2nd and 4th appellants, with the result that the only evidence implicating the three appellants is that of Wahome and is therefore evidence of a single eye witness.

It is now trite law that when the evidence before a court on identification is mainly that of a single witness, the court has to be extra careful before entering a conviction. In such circumstances, the court needs to see if there is other evidence to lend assurance as to guilt of the suspect before a conviction can be entered. See **Abdalla bin Wendo & Another** Vs. **Republic** (1953) 20 EACA 166.

We reiterate that the attack was after midnight, the only source of light was the motor vehicle headlights, the robbers were not known to the complainants, the robbers were four in number, they emerged from both sides of the road, the robbers hit the windscreen and windows of both sides of the vehicle, the complainants were directed to lie down while being beaten. In view of these circumstances, is it possible that no error was made by Wahome in his identification of the appellants as the robbers? In our view it is doubtful.

The prosecution is also relying on the identification at the police station as well as the recovery of the lost items allegedly from the appellants to corroborate the evidence of Wahome and Kamau.

The Force Standing Orders, issued by the Commissioner of Police pursuant to **section 5(1)** of the **Police Act** provides for the conduct of an identification parade in certain circumstances. **Paragraph 6(1)** thereof stipulates that;

> **"6(1). The necessity and value of holding identification parades in appropriate cases cannot be overstressed. The police should not take a witness direct to an accused/suspected person for the purpose of identification except when they are sure that the accused/suspect is well know to him/her. When the whereabouts of the accused/suspected person is known to the police, but there is some doubt as to whether he/she is the correct person, the only way to ensure a fair and correct identification is by means of an identification parade."** (Emphasis supplied)

The police officers at the Mairo-Inya Police Station completely went against their own standing order and in the excitement asked the complainants to go to the cells and see if fours suspects being held there were the same ones who had robbed them the previous night. That was highly irregular.

We turn to consider the question of the recovered items. The evidence of recovery came from **P.W.7, P.C. Kimathi Kinoti**. It was his testimony that at 1a.m., he received a report that a robbery had taken place at Mutarakwa.

At 3a.m., he got information from an informer that some suspicious persons had been seen enter a house at place called Kwa Njeri. In the company of two other officers, they raided two houses. In the first house they found the 1st and 2nd appellants and recovered a wheel spanner and a blue jacket while from the second house, occupied by the 3rd and 4th appellants a *rungu* (club) was retrieved. When the officers saw the registration number of the complainant's motor vehicle inscribed on the spanner, they suspected the appellants as the robbers who had attacked the complainants. They arrested them and after placing them in the police cells, the officers returned to the scene and the suspects' houses. From the scene they found broken glasses, plastic containers, thermos flask, Uchumi paper-bag, while from the suspects' houses they recovered from the first house a jacket and a watch and some medication from the second house.

Several issues arise from this evidence. One of the most critical links to the appellants' is the alleged discovery from them of the jacket and the wheel spanner. The information leading to the discovery is said to have been supplied to **P.W.7 P.C. Kimathi Kinoti** by an informer, whose identity P.C. Kimathi was not ready giving to disclose. I know not of any law that allows the police to conceal such important evidence. As a matter of fact, such evidence is clearly hearsay hence inadmissible if the informant is not called to testify. As was correctly observed by the Court of Appeal in **Patrick Kabue Maina and three others** Vs. **Republic,** Criminal Appeal No.8 of 1986:

> **"The would-be robbers were going to carry a pistol and simis, according to the police informant. It was for this reason that they laid ambush for them. The appellants who fitted the description of the would-be thieves were intercepted and apprehended. The informant was not put in the witness box. Accordingly, the evidence narrated to the court about what the informant told the police was inadmissible as hearsay evidence and ought to have been rejected by the trial court."**

P.C. Kimathi's evidence of recovery of the stolen items is as confusing as it is incredible and in our view does not meet the conditions precedent for the application of the doctrine of recent possession. In his evidence in-chief, P.C. Kimathi stated that when they arrested the appellant, they recovered a wheel spanner and a blue jacket which they took away for further investigations. Retrieved from the second room was only a *rungu* (club).

It will be recalled that before this arrest and discovery, police from Mairo-Inya Police Station had been with the complainants to the scene of robbery and nothing was recovered. It is then strange, indeed unbelievable that a few hours later P.C. Kimathi and some officers who had been to the scene earlier on returned there and found several items belonging to the complainants. Why was it necessary to return to the scene? They also returned to the houses where the appellants had been arrested, this time without them. Again by some magic spell more items belonging to the complainants were found in the two houses.

Another aspect of this evidence is the ownership of the home where the exhibits were recovered and the appellants arrested. There is evidence that it belonged to one John Ndirangu. Attempts to call John Ndirangu were abandoned by the prosecutor. Without his evidence, the issue of possession has not been proved.

In the result, we find that the circumstances at the scene were such that positive identification was not likely. We also find that the identification of the appellants at the police station without a formal parade was irregular and finally that the doctrine of recent possession failed.

For these reasons, we allow the appeal, quash the conviction and set aside the sentences imposed on the appellants. They will be
set at liberty unless otherwise for any lawful cause they are detained.

Orders accordingly.

**Dated, Signed and Delivered at Nakuru this 12th day of March, 2010.**

**M. J. ANYARA EMUKULE**
**JUDGE**

**W. OUKO**

**JUDGE**