REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 512 of 2005

ELIJAH NGUGI KIMEMIA .....1ST APPELLANT
ANTHONY KAMAU LUCY .....2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT
(From the original conviction and sentence in Criminal Case No. 829 of 2005 of the Chief Magistrate's Court at Thika by U.P.Kidula – Chief Magistrate)

JUDGMENT

The appellants **ELIJAH NGUGI KIMEMIA and ANTHONY KAMAU LUCY** were charged and tried alongside five other co-accused. Whilst their said co-accused were acquitted, the appellants were convicted as follows;

(i) The 1st appellant, ELIJAH NGUGI KIMEMIA, who was the 1st accused at the trial was convicted on 4 counts of robbery with violence; being counts Nos. 1, 2,3 and 5.

(ii) The 2nd appellant, ANTHONY KAMAU LUCY, was convicted on 3 counts of robbery with violence; being counts 1, 2 and 3. He was also convicted on one count of Burglary and Stealing contrary to section 304(1) and section 279 (1) of the Penal Code.

The 2nd appellant herein was the 2nd accused during the trial.

And following their convictions, the two appellants were sentenced to death on each of the counts of robbery with violence. However, in relation to the conviction for Burglary and Stealing, the learned trial magistrate ordered that the sentence be held in abeyance, because the 2nd appellant had already been sentenced to death.

In the appeals before this court, the appellants raised four substantive issues, which can be summarized as follows;

(a) There was no positive identification by the prosecution witnesses;
(b) The doctrine of recent possession was not applicable to the facts of the case;
(c) The complainants did not prove ownership of the items;
(d) The trial court failed to give due consideration to the defences.

The appellants pointed out that the incidents are said to have taken place late at night, and largely in darkness.

The assailants were said to have been strangers to the complainants; so that even where there was some light, the circumstances prevailing were described as not having been conducive for positive identification.

The reasons for that submission was that the attacks were unexpected and sudden, causing the complainants to experience shock and fear. In those circumstances, the appellants contend that there was a possibility of mistaken identification.

In any event, the appellants both denied that any of the items which the complainants later claimed ownership of, were recovered from their respective houses. Both appellants had, in their respective defences, denied the assertions that they were found in possession of the property which the complainants had been robbed of. The appellants said that they had no knowledge of the said property.

Had the said items been recovered from their houses, the appellants contend that the prosecution should have called the chief of Kinale location to corroborate the said evidence. In their view, the said chief, who was said to have been present during the recovery of the complainants properties, would have been as essential and independent witness.

By failing to call the chief and also the father to the 1st appellant, as witnesses, the prosecution is said to have failed to call essential witnesses; and by so doing, the prosecution is said to have conducted itself in a manner that was prejudicial to the appellants.

Meanwhile, even if the said items had been recovered from the appellants' respective houses, (which they denied), the complainants are said to have failed to prove that they owned the said items.

That submission is founded upon the failure by the complainants to produce receipts to prove that it is they that had purchased the said items.

On other hand, the learned state counsel, Mr. Mureithi, submitted that the evidence on record was simply overwhelming. He believes that the two appellants were positively identified, and also that the trial court was right to have invoked the doctrine of recent possession. Therefore, the respondent urged us to uphold both the convictions and the sentences against the appellants.

Being the first appellate court, we are obliged to re-evaluate all the evidence on record, and to draw therefrom our own conclusions. We will now proceed to undertake that task, whilst bearing in mind the competing submissions presented before us.

The prosecution called a total of eleven witnesses.

PW 1, JOSEPH MUTIMU NDICHU, was the complainant on count No. 1. He was woken up at about 3.00a.m.on the morning of 23rd December 2004. What woke him up was the breaking of glass and noises outside his house.

When **PW 1** switched on the light, there was no light that came on. Within no time, **PW 1** heard noises within his sitting room. And soon thereafter, the bedroom door was knocked down, and two short men entered the bedroom.

As there was no light inside the house, **PW 1** shone his torch-light on the intruders. He did so "once or twice"

The intruders then carted away some of his house-hold goods, namely, a JVC Television; a VCD player; two remotes; a Samsung mobile phone; and KShs.1,500/-.

About one month later, at the police station, **PW 1** identified his Television, VCD player and two remotes. He was told that the said items were recovered from Kinale, in Mai Mahiu.

Although **PW 1** insisted that he did identify the 1st appellant, the learned trial magistrate held that the alleged identification was not free from the possibility of mistake. She therefore discounted the said identification.

In our own assessment, the learned trial magistrate was right to have held that the prevailing conditions were not conducive for positive identification.

PW 2, JAMES WANJOHI MAHUTHU, was attacked at about 4.15a.m. He was fully awake, and did engage the intruders even before they entered his house. He threw items, such as sufurias, at the intruders.

During that time, the lights were still on. But then suddenly, the lights went off. It is after the lights went off that the robbers entered the house.

During his evidence-in-chief, **PW 2** said that he identified the 1st appellant. He did so

when lying down on his stomach, on his bed.

But during cross-examination, **PW 2** conceded having not identified anyone. He had said as much in his statement to the police.

Later, **PW 2** identified his "Sony" T.V "Samsung" DVD and a remote control. He did so at the Ruiru Police Station, about one week after he had been robbed.

In her judgment, the learned trial magistrate held that the conditions that existed at the time **PW 2** was robbed were not conducive to identification of the 1st appellant beyond reasonable doubt. Again, we do share that view.

Indeed, we would go further to point out that **PW 2** himself conceded having not identified the robbers. But even if he had allegedly identified the 1st appellant, there was a real possibility that he could have been mistaken.

In relation to counts 1 and 2, the appellants were convicted on the basis of the doctrine of recent possession. When invoking that doctrine the trial court held that the properties belonged to the complainants, yet same were recovered from the appellants within a short period after the robbery.

But the appellants now argue that the complainants did not prove ownership. That argument is based on the grounds that both **PW 1** and **PW 2** did not produce receipts to prove that they owned the respective items which they claimed ownership of.

Whereas receipts are an easy and direct way of proving that a person owns a particular item, it cannot be right to say that unless the person produced a receipt, he had failed to prove ownership. Each claim of ownership must be determined on the basis of the facts of the case within which such claim is made. We say so because it is possible for receipts or other documentary proof, having been misplaced, stolen or destroyed. It is also possible that the item was a gift from a son, a daughter, a parent, a relative, a friend etc. In such circumstances, the owner may or may not have a receipt.

A person may have marked the items by a particular identifying feature, such as his initials. That would be good enough.

It is also possible that although an item did not have any particular mark which was placed on it by the owner, he had used it for such a long period of time that it had developed certain features that could enable him identify it easily even if it was placed amongst other similar items.

In this case, the learned trial magistrate noted that both **PW 1** and **PW 2** did not produce

receipts. Secondly, those two complainants did not have any identifying marks on the items whose ownership they claimed.

In those circumstances, the trial court nonetheless held that those two complainants had proved ownership because, in her view;

> **"They are items that are in use in most families on a daily basis. Due to this constant usage, they become so familiar that one can easily pick up their items from many similar items. Indeed, this is what happened....."**

In principle, we do agree with the learned trial magistrate that items which are used regularly, over a reasonable length of time may become so familiar that the owner or the person who uses it, may be able to pick it up easily, even if the items were placed together with many other similar items.

However, it is a matter of evidence as to whether or not the owner had used any particular item daily or regularly; and also for how long.

In this case, neither **PW 1** nor **PW 2** told the court about the length of time they had had their various items, nor how regularly they had used them. And as the items did not have any particular identifying marks, the complainants should have told the court about any features on the said items, which enabled them to identify the items as theirs. We say so because otherwise, a person may genuinely believe that an item was his simply because it looked like the one belonging to him; and not because he had reason to lay claim to the particular item. Such a possibility is very real especially on items such as the ones herein, which the learned trial magistrate correctly described as being

> **"in use in most families on a daily basis."**

In effect, we are unable to make a finding that **PW 1** and **PW 2** proved that the items they lay claim to actually belonged to them. Therefore, one ingredient of the doctrine of recent possession was not proved. Consequently, on counts 1 and 2, it would be unsafe to uphold the convictions.

Meanwhile, **PW 3, ROBERT NDUNGU MBURU**, was robbed on the night of 22nd August 2004, at about 2.00a.m. As he was hiding in the ceiling when the robbers ransacked his house, he did not identify any of them.

But he later identified a carpet, at the Ruiru Police Station, where the police had laid out many items that they had recovered from the house of the 1st appellant. The recovery had

been made by **PW 9** and **PW 10**, on 28th January 2005.

The learned trial magistrate held that a carpet was the kind of item which does not change hands fast. Accordingly, when it is found in the possession of someone, it would be safe to apply the doctrine of recent possession, provided that the period within which it was recovered was not so long after the date of the robbery, as to give rise to the possibility that the person had received it innocently.

But then again, **PW 3** had no receipt or other document to prove ownership. And he did not otherwise tell the trial court how exactly he knew for certain that the carpet was his. Perhaps the carpet was worn out on certain specific portions, reflecting the position in which it was placed within **PW 3's** house; we do not know, because **PW 3** did not tell the court if that was the position.

In the event, although the reasoning of the learned trial magistrate was sound on the law, the same was not founded upon factual evidence.

PW 4, JOSEPHAT NJENGA MWANGI, was the complainant on count 3. He was robbed on 21st December 2004, at about 2.30 a.m.

When he heard noises, as if his gate was being broken, he woke up and put on the security lights. There were two security lights, each of which was 500 watts.

According to **PW 4**, he did see two of the robbers very clearly when they were struggling to cut the grills at the window, as the security lights were above them.

Although the robbery lasted 20 minutes, **PW 4** testified that he saw and identified the two appellants herein, over a span of 2 minutes.

The learned trial magistrate described **PW 4** as a truthful witness, who seemed to have kept his wits about him, even when he was under attack. The court also found that the circumstances prevailing were conducive for positive identification.

On our part, we did not have the benefit of seeing **PW 4** as he testified. We therefore have no basis for doubting the assessment of that witness, by the trial court.

Secondly, as the two appellants stood below a security light which was very bright, for about 2 minutes, as they cut the grills on **PW 4's** window, we find that that was sufficient time for him to identify them positively.

In any event, when **PW 4's** mattress was recovered, he identified it because of two features. The mattress had a flower pattern and its binding was not aligned to the mattress.

PW 4 had had the mattress for very long.

Given the evidence tendered by **PW 4**, we are satisfied that the mattress which was recovered from the house of the 1st appellant was his.

On that basis, the doctrine of recent possession was, in our humble opinion, correctly applied by the trial court. But that doctrine was only applicable to the 1st appellant; not the 2nd appellant.

That notwithstanding, we are also satisfied, as was the trial court that the two appellants were positively identified. There was no room for mistaken identification.

Therefore, the conviction against the appellants, on count 3 is upheld.

PW 5, JEDIDAH NYAGUTHI MUREITHI, was robbed on 17th September 2004, at about 8.00p.m. The robbers accosted her when she was alighting from her car, just after she arrived home. They then escorted her into the house, where they robbed her. They also drove away in her vehicle, which was later recovered although it did not have the spare-wheel, jack, battery and some other small accessories.

When she was called to the Ruiru Police Station, **PW 5** identified;

"the centre part of the radio without the speakers."

She identified it because her five year old son had scratched an "X" mark inside the groove of the CD compartment. **PW 5** also said that she had purchased the radio quite a while back.

And when **PW 5** recorded her statement, she said that she could identify the robbers if she saw them.

But **PW 5** did not describe any of the robbers to the police, nor did she attend any Identification Parade, to identify any of her attackers.

Yet, **PW 5** testified that she saw the 1st appellant clearly, especially when he was coming down the stairs, whilst she was being led up the stairs. She said that although the 1st appellant was clean shaven at the time of the trial, the said appellant had a beard and hair on his head at the time of the robbery.

Although an Identification Parade would have provided the best test for the court to assess **PW 5's** contention about having positively identified the 1st appellant, we nonetheless find that the role played by said appellant, and his description was so detailed that they can only point at his positive identification, by **PW 5.**

Secondly, and in any event, the radio which was recovered from the 1st appellant was positively identified by **PW 5**, as belonging to her. Therefore the doctrine of recent possession was applicable.

PW 6, LAWRENCE KARANJA NJUGUNA, was away from home, on the night of 4th December 2004. When he returned home on the next morning, he found his house broken into, and his property stolen.

On 28th January 2005 **PW 6** identified two speakers for his "Sharp" radio. He was able to identify them because they had his initials "LKN", which he had scratched onto the speakers.

The speakers were recovered by **PW 9,** from the house of the 2nd appellant.

The 2nd appellant appeared to confirm that fact when, in cross-examination, he asserted that **PW 9** had just removed the items from his house.

But if the items were recovered from the 2nd appellant's house, in the presence of the chief of Kinale Location, should the prosecution have been obliged to call that chief as a witness? That is the contention of the appellant.

And the reason for that contention is that the police officers who allegedly recovered the property, had done so outside their area of jurisdiction.

We understand the appellants to be contending that the police officers had no jurisdiction in the Kinale area.

However, it has not been shown to us that police officers have jurisdiction over limited areas at any one time; nor have we been able to ascertain that assertion.

In any event, the decision by the police officers, to go along with the chief of the Kinale area, is one which portrays the said officers as demonstrating respect and transparency in the conduct of their duties.

Contrary to the assertion of the appellant, the police officers conduct was reflective of independence, as opposed to that of officers who might have had a hidden agenda, when conducting a search.

The police were neither complainants nor were they in any way associated with any complainants, so as to be construed as not being independent. They therefore did not require the backing of the evidence of "another independent witness", such as the chief.

In effect, we find no reason, in law, for holding that the chief was an essential witness in this case. The reason for so finding is that, in law, a fact can be proved by any one or more

witnesses. And in this case, there were already two police officers who had corroborated each other's evidence on the recovery of the properties from the houses of the two appellants. It is not the higher the number of witnesses who testify on any one issue who would make the issue be held to be factually correct.

PW 7, APC ABDI ALI, and PW 8, CPL JAMES GITAU were involved in the arrest of the other five accused persons, who are not party to this appeal. Those five were acquitted by the trial court.

PW 9, APC ISAIAH KALWANYI and **PW 10, APC JEREMIAH NDERITU** were in the group of officers who conducted "an operation" at Kinale. The operation was activated after the officers received some information concerning the whereabouts of property that was believed to have been stolen.

PW 9 and **PW 10** recovered a large quantity of items from the houses belonging to the 1st and the 2nd appellants, respectively. The said items were then ferried from Kinale, to Ruiru, where complainants identified some of them as belonging to them. As a result of the said identification by some complainants, the police preferred charges against the appellants herein.

PW 11, PC ROBERT NGWILI, was attached to the Ruiru Police Station as at 28th January 2005. It is he who re-arrested the appellants when they were taken to the police station by **PW 9** and **PW 10.**

PW 11 also received the property that had been recovered.

When **PW 11** interrogated the appellants, they denied being involved in the robberies.

When the appellants were put to their respective defences, each of them simply told the court about having been arrested late on the night of 27th January 2005. Indeed, the 1st appellant said it was 3.00a.m.; which would tally with the hour that both **PW 9** and **PW 10** said they arrested the appellants. Neither of the appellants said anything about where they were or what they were doing at the time when the various robberies are said to have taken place.

Therefore, there was not much that the court could give due consideration to, by way of defences, save for the denials. Of course, we are not suggesting that the appellants had any obligation to prove their innocence. We are fully aware that at all times, it was the onus of the prosecution to prove that the appellants were guilty.

In the final analysis, we allow the appeal to the extent of quashing the convictions on counts 1 and 2; and setting aside the sentences in that regard.

However, we do uphold the convictions on counts 3, 5 and 6. However as a person cannot be hanged more than once we do hereby only uphold the sentence on count 3. For that offence, the appellants death sentence remains in place. However, we set aside the death sentence in relation to count No. 5; and instead we direct that the sentence shall be held in abeyance.

Also, in relation to count 6, the sentence against the 2nd appellant shall continue to be held in abeyance.

It is so ordered.

Dated, Signed and Delivered at Nairobi, this 8th day of March, 2010.

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FRED A. OCHIENG	**M.A. WARSAME**
JUDGE	**JUDGE**