



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

Criminal Appeal 422 of 2006 & 424 of 2006 (Consolidated)

**WELLINGTON EKHOYA NYONGA1ST
APPELLANT**

**JOSEPH KONYA LOKORI2ND
APPELLANT**

- AND -

REPUBLICRESPONDENT

**(An appeal from the Judgment of Principal Magistrate Mrs. Wasilwa dated 1st August, 2006 in
Criminal Case No. 2076 of 2006 at Kibera Law Courts)**

JUDGEMENT OF THE COURT

Both appellants faced charges in two counts, of robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws of Kenya), and 1st appellant herein also faced an alternative charge of handling stolen goods contrary to s. 332 (2) of the Penal Code.

The particulars of the main counts were, firstly, that the appellants, on 11th March, 2004 at Kirigu Village, Karen in Nairobi, while armed with dangerous weapons namely machetes and clubs, jointly robbed *James Guchu Ndung'u* of one television set, Panasonic by make; a cellphone, being Siemens C35; two wrist-watches; assorted clothing; and household utensils – all valued at Kshs.100,00/= – and at, or immediately before or immediately after the time of such robbery, threatened to use personal violence upon the said *James Guchu Ndung'u*.

The particulars of the second count were that the appellants, on the material date and at the said place in Karen, Nairobi, while armed with dangerous weapons namely machetes and clubs, jointly robbed *Ann Wanjiku Guchu* of cash in the sum of Kshs.200/= and a jacket – bearing in total a value of Kshs.1050/= – and at, or immediately before or immediately after the time of such robbery, injured the said *Ann Wanjiku Guchu*.

James Guchu Ndung'u (PW1) testified that he and his wife and their child were asleep at midnight on the material night, a night of heavy rain, when they were awakened by three men who were already right

inside their bedroom. These intruders, who had machetes and were flashing torches, demanded money with menaces; and they stopped PW1 and his family who began to scream in alarm. Upon PW1's wife saying there was no money in the house, one of the intruders took PW1's wrist-watch, and then both intruders moved on, into his daughter's (PW3) room; and they cut PW3 on the hands, with a sharp object. They forced PW1 and his family into the beds, and the intruders started ransacking the house. One of the intruders collected the family's cups and plates, tucked these into a basket, and the two of them left the house; and this enabled PW1 and his family to rise up and raise alarm, the help by neighbours. PW1 reported the incident at Mutuini Police Post, and Police officers later came to the *locus in quo*.

It was found that the intruders had stolen a coloured Panasonic television, a radio-cassette, a camera, a Siemens cellphone, bed-sheets, plates, cooking-pans, a jacket and other items.

PW1 testified that he had recognised one of the robbers, 2nd appellant herein – because this intruder had been left inside his room by the other robbers, and had remained there for some time; and it was this intruder who was packing household items into the basket in the course of theft. PW1 had not known 2nd appellant before, but he saw as a distinguishing feature of the 2nd appellant the *gap between his front incisors* – and the trial Court recorded the existence of such a gap in 2nd appellant's teeth. PW1 had later identified his family- items which had been stolen, and which were said to have been found with the appellants, by Police officers. PW1 was able to indicate the specific features of the stolen items, and in some cases, to produce his purchase-documents for such items.

On cross-examination, PW1 said that although the material night was dark and there was no electric lighting, the robbers were flashing torches which sometimes lit their own faces. PW1 had not recognised 1st appellant, and he saw 1st appellant for the first time at the Police station. PW1 said of 2nd appellant herein, that this appellant had remained in PW1's bedroom for about *one hour continuously*, and this particular appellant had behaved as the ring-leader of the intruders. PW1 said 2nd appellant had a torch at the material time; he thus responded to 2nd appellant's questioning: "You had a torch; the light would reflect back on your face as you searched all over the room. You were arrested later, after the incident".

PW2, *Lucy Wambui Guchu* and her husband had gone to bed on the material night at about 10.00 a.m., a dark night because of a power black-out. The witness was awakened by the presence of strangers, armed with "a gun and a *panga*", in her bedroom. The intruders had not covered their faces; they wore coats and hats; they flashed torch-lights about. The intruders demanded money; but PW2 told them she had no money and they could take anything else. They took her wrist-watch and her husband's cellphone which was on the fridge, a Siemens. As the robbers frog-marched PW2 into various sections of the house, she heard her daughter (PW3) scream: "Mum, they have cut me!" The robbers herded the whole family into the main bedroom and confined them there. One robber, who stashed family property into a basket, *remained in the main bedroom for about one hour*. After the lot of the robbers sounded by their footsteps to be gone, the complainants stood up; and PW2 saw the clock show that it was 1.30 a.m. The complainants now raised alarm, and a neighbour took them to hospital, before reports were made to the Police. It turned out that the complainant's daughter (PW3) had been cut not only on the hands, but also in the thigh.

PW2 subsequently learned that a man had been arrested by the Police while carrying stolen property; and she and PW3 went and identified items of theirs which had been stolen – a television and a bed-sheet.

It was PW2's testimony that she had not identified 1st appellant at the *locus in quo*; but she had identified 2nd appellant who had *one incisor missing from his jaws*.

On cross-examination, PW2 maintained that she had clearly observed 2nd appellant's face during the robbery, and that this appellant had lit up the *locus in quo* with a torch which reflected back on his face, and showed him to have a *missing front tooth*.

Since the foregoing point was significant in relation to identification, the learned Magistrate took care to

observe the demeanour of the witness; and she recorded:

“[The witness] refuses to be cowed by [the cross-examination]; she is consistent in her [testimony] and sounds [as if] she knows what she [is] talking about”

Ann Wanjiku Guchu (PW3) was awakened by two men as she slept, at 12.30 a.m. on the material night. These men ordered PW3 to wake up, and they demanded money and cellphones. The two had their faces unconcealed, and they were dressed in jackets. When PW3 stood up to give her Kshs.200/= which was in her jacket-pocket away, she noticed that one of the intruders was already wearing the very jacket she had kept in her wardrobe. At this stage one robber left PW3's room; and the remaining one was forcing her to remove her skirt. This twenty-two year old lady refused to remove her skirt; and a struggle ensued, in the course of which she was cut in the thigh and on the hands. After the robbers left, a neighbour took PW3 to Kikuyu Mission Hospital, where she was treated and discharged.

It was PW3's evidence that the robber who had cut her with a machete had been left alone with her for some 10 - 20 minutes; and that this robber was the 1st appellant herein. The witness said she was able to see 1st appellant's face on account of the general flashing of torches which lit up her bedroom and enabled her to see him.

John Mwangi (PW4), a minor aged 14 years, testified that on the day following the material day he was playing football in an area neighbouring the *locus in quo* when a young lady, one *Karigu*, invited him and his colleagues to see a television set which was hidden in the bush. PW4 went and saw the said television set and, at the time, there were two men standing nearby. These two men asked PW4 and his friends to go away and not tell anyone else about the television set; for this favour the boys would be rewarded with Kshs.400/= for buying *mandazi*. It was PW4's testimony that the two men who were standing close to the hiding-place of the television set, were the 1st and 2nd appellants herein. At that time, two men came along and arrested 1st appellant herein, even as 2nd appellant took to his heels. Those who arrested 1st appellant took the hidden television set to Mutuini Police Post, and PW4 now identified the said television set in Court. Both appellants had pretended to be participants in the football game with PW4 and his friends, before the television set was sighted in the bush; and when it was sighted, one of the appellants had told the boys (including PW4) that the television set was his and he was transferring it from his current house at Kawangware which had been demolished. On cross-examination, PW4 testified that after 2nd appellant had run away, 1st appellant too tried to do so but was arrested before he could vanish. Of this witness, the trial Court made a note on his demeanour: “*He is truthful and consistent in his [testimony].*”

Another young boy, *John Ngure Muraya* (PW5) testified that he was in the company of *John Mwangi* (PW4) when he saw a television set hidden in the bush; and a man who stood close-by, offered to buy PW5 and his friends “uniforms for playing football if we [did not] tell on him”; and at this stage another man also came to the spot where the television set was found hidden. The first of these men then started *playing football* with PW5 and PW5's colleagues; but word was passed on regarding the hidden television set, whereupon the second man ran away but the first one who “wanted to escape ... was tripped and fell down”, and he was arrested; the one who escaped is the 2nd appellant; and 1st appellant is the one who was arrested and taken to the Police Post with the television set. PW5 identified the said television set in Court.

Police Constable Edwin Kipsang (PW6) of Mutuini Police Post re-arrested the man who was brought in by Members of the public who also brought along a television set, on 13th March 2004 at 7.00 p.m. Already at this time a report had been made about a robbery incident during which a television and other effects had been stolen. PW6 identified the said television in Court, and produced it as an exhibit.

To PW7, *Police Constable Joseph Biwott* of Mutuini Police Post, the complainants herein had come with a report on 18th March, 2004 that they had found one of those who had been involved in robbery on the material date; and on 19th March, 2004 PW4 and other officers went up to the house said to belong to one of the robbers. PW7 and his colleagues arrested the occupier of the said house, 2nd appellant; 1st

appellant was already held in custody.

Dr. Zephania Kamau (PW8) the Police Surgeon had examined complainant PW3 on 29th April, 2004, and found her to have an injury on the right hand. PW8 also found PW3 to have a scar with stitch marks on the upper part of her thigh. He concluded that the injuries were caused by a sharp object, and classified the degree of injury as harm.

In his defence, 1st appellant said he knew nothing about the material offence, and that he had been arrested for no reason; and he denied ever having met 2nd appellant before the time of his arrest. The 2nd appellant too, said he knew nothing about the night-incident in respect of which he had been charged.

From the foregoing evidence, the learned Magistrate drew her conclusions as follows:

“The question for determination by this Court is whether the accused persons were properly identified by the complainants. This question can be answered by considering the circumstances surrounding the robbery: was the light from the torches reflected on the walls ample light to identify the suspects [by?]. The witnesses all say the accused persons [flashed] [strong] [torch-light] on the walls, and the lights reflected back on [the accused persons] ... Accused 2 spent a long period of time, about one hour, in the bedroom of PW1 and PW2. He went with PW2 to open the door. He held PW3’s hand for PW2 to tie it up. [This] is a considerable length of time [for identifying someone]. [The 1st appellant] ... was identified by PW3 and he spent about 20 minutes in PW3’s bedroom. The reflection from the torches also made her see him, and they also struggled for one minute when [1st appellant] wanted to remove her skirt. This length of time and the reflection from strong [torch-light], I believe, was ample [for making an identification]. ... One day later the accused persons are seen with the stolen television [and bed-sheet]. Using the doctrine of recent possession, I find [that] the accused persons were robbers ...”

The learned Magistrate observed that the defences put up by the appellants herein, amounted to mere denial, and they did not “shake the prosecution case in any way”. She concluded that the prosecution had established their case against the accused persons beyond any reasonable doubt; the learned Magistrate found each of the appellants guilty as charged, convicted them and sentenced each to suffer death, as prescribed by law.

In his petition of appeal, 1st appellant contended that the lighting conditions prevailing could not have permitted proper identification of the robbers; that the members of the public who first effected the arrest, had not been called as witnesses; that an identification parade had not been conducted; that the defence evidence had unreasonably been rejected. These same contentions were made too by 2nd appellant herein.

On the occasion of hearing the appeals each appellant came to Court with written submissions, to which was attached a document with the rubric “amended grounds of appeal”. And in these new grounds, 1st appellant contended that he had not been arrested while in possession of the stolen items; and that some of the prosecution evidence was contradictory. These same additional points were made in 2nd appellant’s documents.

The 1st appellant in his oral presentation which he made in person, urged that since the material night was a rainy and dark night, the conditions for identification were not favourable. Precisely the same contention was made by 2nd appellant, who wondered how torch-light flashed upon a victim by an intruder, could at the same time illuminate the intruder.

We have carefully considered all the evidence, and come to the conclusion that in the specific circumstances attending the robbery incident, it cannot be doubted that the complainant did, indeed, identify the appellants herein as the robbers. Within the confines of the house’s interiors, the attackers abundantly flashed their powerful torches; these attackers remained at the *locus in quo* for considerably long periods of time – an hour and possibly longer; these attackers were engaged with the complainants in

close physical proximity involving body contact, even as they flashed their torches around; the attackers' faces were open and unmasked; witnesses of honest demeanour saw details of the attackers' faces, notably 2nd appellant's missing front tooth. The trial Court was clearly impressed with the demeanour of the complainants as witnesses, and this Court has no basis for doubting that such an assessment was but fair in every respect.

No doubts have been raised, besides, as to the circumstances in which items stolen during the robbery were found; and it is clear to us that the appellants herein, who had in their possession or control the complainant's television and bed-sheet only so recently stolen, are, by the *doctrine of recent possession*, to be regarded as the thieves. Since the theft itself was executed during violent robbery, it follows that the appellants were rightly convicted of robbery with violence.

We dismiss both appeals; we uphold conviction in both cases; we affirm sentence in both cases.

Orders accordingly.

DATED and DELIVERED at Nairobi this 28th day of January, 2009.

J. B. OJWANG **M. WARSAME**

JUDGE **JUDGE**

Coram: Ojwang & Warsame, JJ.

Court clerk: Huka & Erick

For the Appellant: Mr. Mulati

Appellants in person