REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeals 149, 150 & 151 of 2007

1. PAUL SAWALE LOBULO ……1ST APPELLANT

2. DOMINIC IRERI NDWIGA……..…….2ND APPELLANT

3. BERNARD KARUME MWANGI ……...……..3RD APPELLANT

VERSUS

REPUBLIC …….....…….RESPONDENT

(From the original conviction and sentence in Criminal Case No. 3699 of 2005 of the Chief Magistrate's Court at Thika by L. W. Gicheha – Senior Principal Magistrate)

JUDGEMENT

The three appellants **Paul Sawale Lobulo**, **Dominic Ireri Ndwiga** and **Bernard Karume Mwangi** were tried for a charge under section 296(2) but after full trial the charge was reduced to a simple robbery under section 296(1) of the Penal Code. They were also charged with alternative charge of handling stolen property contrary to section 322(2) of the Penal Code. The prosecution called 7 witnesses in support of their case.

On the material night PW2 and 5 were asleep in their home at Nembu when at around 1.00 a.m. they heard the door being hit and broken into. PW2 together with his wife PW5 who were sleeping upstairs when they heard unusual movements in downstairs of their home, they raised alarm and switched on security lights. PW2 after waiting for few minutes went downstairs and open the dining door where he found pieces of broken glasses and a lot of blood on the floor. He also found the main door to the house was broken. And that his TV, video deck and his coat were missing from the sitting room. PW2 called his neighbours to send someone to the chief and the chief came later with officers from Gatundu Police Station. The evidence of PW2 is that on the following morning he learnt that some people were arrested and the items earlier stolen from him were recovered from them. He went to the police station and he identified all the items that were stolen from him.

PW3 is the officer who arrested the appellants herein from inside motor vehicle KAJ 454Y. According to PW3 he was alerted that there were three suspicious people inside the *matatu*. He stopped the motor vehicle and carried out a search. He then arrested the appellants with the same clothes and items earlier stolen from PW2.

PW4 who was the conductor of motor vehicle KAJ 454Y stated that he picked the three appellants from some stage and that one of them was injured on his leg. He stated the first appellant was the one who was carrying the sack and he refused to release to him so that it could be stored at the back of the *matatu*. He identified the three appellants as the persons who were arrested with items stolen from PW2.

PW6 also testified how he stopped the vehicle to carry the three appellants who were carrying some items in two sacks. He also confirmed that the appellants were the ones who were arrested by PW3 on the material night and with the subject goods that were earlier stolen from PW2.

The accused were put on their defence and they all denied the offence that was alleged against them.

In convicting the appellants the trial court held and I quote;

"**I have no reason to doubt that a robbery did take place on the night of 27th and 28th July 2005 in which PW2 and PW5 were robbed of the items stated in the charge sheet. This is proven by their evidence which is corroborated by PW3 who recovered the stolen items while in transit and PW7 who visited the scene and found out how the robbers had gained entry to the house. However certain things are not indispute. Firstly that the complainant did not see these robbers. They only heard them and either because of their screams and/or alleged injury to their colleague they did not finish breaking into the area where the complainant and his wife were but instead took what was in the sitting room and ran away".**

It is important for us to restate that robbery with violence under section 296(2) is a serious offence which needs serious consideration. And secondly it is the duty of the court to establish whether the evidence on record supports the ingredients of the charge. The evidence of PW2 and PW5 is that they heard unusual movements in downstairs of their home on the material night and that they did not see the appellants at the time of entry and at the time of departure. It is for that reason that we must say that there is no basis for the trial court to have reduced the charge from robbery with violence under section 296(2) to a simple robbery under the Penal Code. We find that there was no robbery that was perpetrated against the complainant. And since there was no contact between the appellants and the complainant at the time of the alleged robbery there cannot be a basis to charge the appellants with an offence which was not disclosed in the evidence that was tendered before the trial court. We therefore think that the charge preferred by the prosecution against the appellants and as reduced by the trial court cannot be sustained. We set aside the conviction of the appellants to robbery under section 296(1) of the Penal Code, quash the conviction of each of the appellants and set aside the sentence imposed by the trial court. However, we find that there is strong evidence to show that the appellants had committed an offence under Section 304(2) of the Penal Code. The evidence shows the appellants committed the offence of breaking, entering and stealing from a dwelling house during the night. PW2 said he heard a noise from the downstairs of his house. He went down, found his TV and other items had been stolen. PW5 the wife to PW2 corroborated that upon hearing unusual movements at the downstairs of their home, they made screams in order to scare away the intruders. PW2 and PW5 confirmed that they did not find the attackers and/or appellants herein at the time they reached the downstairs of their home. It is therefore our position that there is overwhelming evidence against all the appellants that they have committed an offence under section 304 as read with 279 (g) of the Penal Code. We accordingly convict them. In sentencing we take into consideration that the appellants were in custody from 5th August 2005. We therefore think appropriate sentence is seven (7) years imprisonment from the date of conviction. Upon completion of seven years they shall be liable to be released.

Dated, signed and delivered at Nairobi this 26th day of January 2009.

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

JUDGE **JUDGE**