REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 12 & 7 of 2006

JOHN MAARI WAMBUGU……1ST APPELLANT

GEORGE MWANGI MUNYARIA *alias* THEURI……2ND APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

JUDGMENT

The appellants herein John Maari Wambugu and George Mwangi Munyaria alias Theuri were charged with the offence of **robbery with violence** contrary to **section 296(2) of the Penal Code.** The particulars of offence state that on the 5th December, 2004 at Bankers Estate in Nyandarua District within Central Province, jointly with another not before court being armed with offensive weapons namely pangas and knives, robbed Stephen Anthony Mwangi cash Shs. 40/=, one mobile phone make Nokia 2100, and the jacket all valued at Kshs 9,490/= and at, or immediately before or immediately after, the time of such robbery threatened to use actual violence to the said Stephen Anthony Mwangi.

The Principal Magistrate's Court at Nyahururu tried the appellants. They were found guilty and on conviction, they were sentenced to the mandatory death sentence. The appeals in respect of the 1st and 2nd appellant were consolidated during the hearing and they were heard together. The 1st appellant was represented by Mrs Ndeda while the 2nd appellant was unrepresented.

The judgment of the trial court was challenged on several grounds, which were argued together. It was contended that the conviction was based on the evidence of identification when the circumstances for a correct identification can be said to have been difficult due to the prevailing circumstances when the offence took place. Moreover the description of the assailants such as their physical appearance was not given to the Police when the complainant and PW2 reported the matter to the Police. The decision by the trial court was also challenged for failure to take into account contradictions in the evidence of PW1 and PW3, which contradictions were material and watered down their evidence. Lastly the trial court's judgment was also faulted for failure to take into account the defence especially the defence of alibi by the 1st appellant, which challenged the prosecution's evidence, and if it were taken into account, it would have entitled the 1st appellant to an acquittal. These were the grounds of appeal that cut across the appeals of the 1st and 2nd appellant.

On the part of the State the appeal was opposed. The learned State Counsel **Mr. Mugambi** submitted that the appellants were recognised by PW1 who the police to the arrest of the 1st appellant. The 1st appellant upon arrest led the police to the house of the 2nd appellant where a jacket and a torch, which were positively identified as belonging to PW1, were recovered. The 2nd appellant did not give a

satisfactory explanation of how he came to be in possession of items that were stolen from PW1 a short while ago. Counsel submitted that the conviction was based on the evidence of recognition and recovery of stolen items thus the doctrine of recent possession was applied. As regards the inconsistencies in the dates, counsel submitted that there was a typographical error regarding the dates when the offence took place, which is not material. The trial court disregarded the defence especially the defence of alibi because it was a mere sham.

As required of this court by law, we briefly set out the summary of the evidence before the trial court, which led to the conviction and sentence of the appellants. **Stephen Anthony Mwangi [PW1]** testified that on 5th December 2004 at about 8.00 p.m. he left his business premises and walked home with his wife **Margaret Wanja Mumbi [PW3].** At the gate of their house, three men who ordered them to sit down accosted them. According to PW1, the assailants were armed with kitchen knives, which he was able to see from the light illuminating from his house. They were ordered to surrender the money and after ransacking the pockets of PW1 the robber took 400/= from his pockets. PW1 was slapped and ordered to knock the gate.

The maid opened the gate and the robbers accompanied PW1 and PW3 to the house. In the sitting room there was electricity light. PW1 was ordered to sit on a chair that was in the kitchen. One of the assailants locked up PW1's sister and maid in one bedroom while the other robber led PW3 to the bedroom. They ransacked the bedroom and took away a jacket, a Nokia mobile phone and Kshs 40/= from PW1. After they failed to get the money they left and warned PW1 not to make noise. PW1 testified that he was able to identify the assailants because the episode of robbery took about 40 minutes. He also recognised the 1st appellant who used to pass by his shop. The 1st appellant was armed with a panga. He is the one who slapped PW1 and guarded him. The 2nd accused person was armed with a kitchen knife.

According to PW1, he recognised the 1st appellant because he was employed as a taut at Ol Kalou town centre. The matter was reported to the Old kale Police Station the following morning. On 9th December 2004 PW1 testified that he saw the two of the suspects entering a video shop. He laid an ambush and with the help of the members of the public he arrested the 1st appellant. When the 1st appellant was taken to the police station, he led the police to the house of the 2nd appellant when they found a jacket and a torch, which were positively identified by PW1.

Anthony Maina Mwangi [PW2] operates the video shop where the 1st appellant was arrested. He testified that on 10th December 2004, he heard people screaming thief. He identified the 2nd appellant as one of the people who were in his video shop. The 2nd appellant dropped a mobile telephone from his pocket, which PW2 collected and took Ol Kalou police station. The mobile telephone was identified by PW1 as the one, which had been robbed from him.

That of his wife, PW3 who was also a victim of the robbery, corroborated the evidence of PW1. She was robbed of ksh 23 and a mobile telephone. PW3 said she was able to identify the robbers whom she recognised although she did not know their names and she used to see them within Ol Kalou town. She however did not know where the 1st appellant was working. The robbers threatened her when she was taken to the bedroom. After the robbery she met one of the suspects namely the 2nd appellant. She informed PW1 who reported the matter to the Police. Later on the appellants were arrested and the items that were stolen from her husband were recovered.

PC Edward Rotich [PW4] was at the Ol Kalou police station when PW1 and PW3 reported a robbery incidence that had occurred the previous day. PW1 told the Police that he could identify the robbers as he used to see them within Ol Kalou town. On 10th December 2004 while at the station the 1st appellant was apprehended by PW1 with the help of members of the public. He interrogated him and learnt that he was staying with the 2nd appellant at Huruma Estate. The 1st appellant led the police to Huruma estate where they recovered a jacket, a torch inscribed the initials of PW1, which PW1 was able to positively identify as he used to mark his torches and brought another one with a similar inscription.

The following day on 11th December 2004 PW2 brought in a mobile phone, which he said the 2nd appellant dropped in the video shop. PW1 was also able to identify positively the mobile phone. PW4 arrested both the appellants and charged them with the present offence.

Put on their defence, the 1st appellant gave a sworn statement of defence and denied having been at the scene of the robbery on the material day. He claimed that he was in Githurai. He also relied on the evidence of Rahab Nyambura Muchiri a vegetable vendor who testified that she had indeed sold vegetable to the 1st appellant on the evening on 10th December 2004 at Githurai 44 estate. The 2nd appellant gave a sworn statement of defence and denied having committed the offence. He denied that any items were recovered from his house at Jua Kali. He claimed that the Police had a paper bag which contained items that were produced in court.

After considering the above evidence the learned trial magistrate was satisfied that the prosecution had proved the case beyond reasonable doubt. He also considered the defence, which he dismissed as lacking in merit. Finally, after considering the submissions by counsel for the 1st appellant the trial court was convinced that the case against the appellants was proved to the required standard.

This appeal raises the issue of identification. We note the robbery took place at night when PW1 and PW3 who are the victims of robbery were attacked. PW1 in his evidence in Chief testified that the robbers were armed with knives and they were ordered to sit down. While PW3 said they were ordered to lie down and the assailants were armed with pangas. Although this contradiction ought to have been resolved by the trial court we find that it was not resolved. We have further evaluated these inconsistencies, we are however of the view that these inconsistencies are not material and on their own do not affect the overall weight of the evidence before the court.

There was also the issue of identification of the assailants. After the robbery, PW1 reported the matter to the Police the following day. Although in his evidence he testified that he had recognised the assailants, the description of the assailants was not given to the Police when the report was made. PW1 merely told PW4 that he could identify the robbers whom he used to see within Ol Kalou Centre. He did not give their actual description. PW1 is the one who spotted the appellants and with the help of the members of the public he managed to apprehend the 1st appellant who led the Police to the arrest of the 2nd appellant.

In his defence the 1st appellant claimed that he had only rented a room at Ol Kalou after he had gone there for his normal business. The 2nd appellant also claimed in his sworn statement that he was working in a bar and there were rental rooms, which he rented to the 1st appellant. Moreover when the appellants were arrested no identification parade was conducted to establish whether PW3 could actually identify the assailants. This was necessary in view of the fact that robbery had taken place at night when circumstances for positive identification can be said to have been difficult and while bearing in mind that in the first report PW1 had not given any report to the Police regarding the description of the assailants. The evidence, which was given by DW3, raised the issue of alibi and the trial court merely dismissed it as an open lie. Although the prosecution did not lead any evidence to displace this testimony by DW3 and the trial magistrate did not give reasons why he disregarded the defence of alibi. It is for the above reasons that we are not satisfied that the offence of robbery with violence was proved against the appellants.

On the alternative charge, the 2nd appellant was found in possession of a jacket and a torch, which were positively identified by PW1. PW2 also testified that the 2nd appellant dropped the mobile phone when the 1st appellant was being arrested. It was taken to the Police Station and PW1 positively identified it as the one, which had been stolen from him during the robbery. In his defence the 2nd appellant said those items were not recovered from his house but the Police framed him up and said he was in possession of items that were found in a paper bag. We find no justifiable reason why the Police would go out of their way to plant and frame up the 2nd appellant with the offence of being in possession of stolen items. We disregard that line of defence. From the evidence it is clear the items were recovered from the 2nd

appellant by PW4 and PW1 during the arrest. The 2nd appellant did not offer any satisfactory reason on how he came to be in possession of the items that were stolen two days before. The law as relates to circumstances under which an accused person can be convicted based on the doctrine of recent possession are well settled in the case of **Isaac Nganga Kahiga Vs Republic CA Criminal Appeal No. 272 of 2005 (Nyeri)** (*unreported*). It was held at page 7 that: -

"***It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant, thirdly; that the property was stolen from the complainant; and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses*.**"**

Taking the totality of the evidence before the trial court we are satisfied that there was sufficient evidence to convict the 2nd appellant of the alternative charge of being in possession of stolen items. However the evidence in support of the main count of robbery with violence is not safe to sustain the conviction. We quash the conviction and sentence imposed on the 1st and 2nd appellant for the first count of robbery with violence. The 2nd appellant is convicted of the alternative count of handling stolen property. Considering that the appellant has been in lawful custody since December 2004. We are satisfied that that would be reasonable punishment for the offence of handling stolen property. We therefore commute the sentence to the period already served. Unless the appellants are otherwise lawfully held they are to be set at liberty forthwith.

Judgment read and signed on 14th day of May 2009

M. KOOME

JUDGE

M. MUGO

JUDGE