REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 106 of 2006

1. BONIFACE NZOMO MASILA.....1ST APPLICANT

2. RAPHAEL KYALO MAINGI.....2ND APPLICANT

VERSUS

REPUBLIC.....DEFENDANT

JUDGMENT

1. Boniface Nzomo Masila and Raphael Kyalo Maingi were the accused persons in Kangundo' SRM's Court Criminal Case Number 533/2005. In that case they were charged with two counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code and the alternative charges of the offence of handling stolen property contrary to section 322(2) of the Penal Code.

2. The evidence leading to the charges was that in respect of count 1 and the alternative charge to it, PW1, Nicholas Mutiso stated that on 21.8.2005, he was riding his bicycle at 7.30 pm and a few metres from Komarok shopping centre, he met two people and suddenly one of them lunged at him and cut him with a panga. He fell down and he was robbed of Kshs. 500/=, a hat and a bicycle. The robbers then ran away with the stolen items and PW1 also ran off screaming for help. He found police offices who went to the scene and then recorded PW1's statement and PW1 went home. The next day, he made a formal report at Tala Police Post and then he went to Kangundo Hospital for treatment. He returned home and he received information that his bicycle had been recovered. He confirmed that fact when he went to Kangundo Police Station and he identified the bicycle because he had the receipt for its purchase (exhibit 2) and he had also christened it *"God knows all"* which writings were still on it and he also knew its frame number as 433266 size 24 (exhibit 1).

3. It was PW1's evidence that he was unable to recognize any of the robbers and PW6, Bernard Muling Kitonga confirmed that the receipt (P.Exhibit 2) was in his name because he is the one who purchased the bicycle and later sold it to PW1.

4. In respect of Count II and the alternative to it, PW2, Peter Maweu Muteti and PW4, Agnes Mwende were sleeping in their house within Kivale village on the night of 21/22.8.2005 when at 3.00 a.m robbers struck. According to PW2, he suddenly saw a lot of light in the house and three men entered his bedroom armed with a pistol, axe and iron bar. It was their common evidence that they could identify the Appellants using light from the torches that they were flashing around and that one robber hit PW4 with an axe. PW1 in any event reacting to their threats gave them Kshs. 1500/= while PW2 gave them Kshs. 4500/= and a mobile phone motorolla 2228. They also took 4 shaving machines, a video recorder and a

generator and then locked their victims in and left. The whole ordeal took about 20 minutes and as soon as the robbers left PW2 jumped out through a window and ran to the home of one Moses Maina and woke him up. Shortly thereafter they saw two men coming towards their direction while riding a bicycle. When asked where they were going, they said that they were going to buy milk. PW2 said that he got "*suspicious"* because the two "*did not have jerricans."* When the two were then asked to produce their identify cards they had none and so they "*arrested"* the two and the bicycle was taken to PW2's house and the suspects were taken to Tala Police Post. An axe- exhibit 3 was recovered from PW2's house while the generator and video recorder were recovered from a bush nearby.

5. When PW2 was cross-examined, he said that he recognized both Appellants because they had the same clothes they were wearing during the robbery and that light from the robbers' torches was sufficient for him to identify them.

6. PW3, Joseph Kioko Wambua was the clinical officer who treated PW1 after the attack and produced the P3 form- exhibit 4 which he signed on 20.9.2005. PW1 had injuries to the left hand, chest and abdomen.

7. PW5, Lillian Kalekye Kioko, a clinical officer treated PW4 and produced the P3 form (exhibit 5) showing that she had injuries to the buttock.

8. PW7, PC Albert Munyao was at a road block along the Koma-Mitaboni road at 7.30 p.m on 21.8.2005 when he heard shouts and together with PC Nzuki drove in the direction of those shouts and on the way they met PW1 who was bleeding from injuries allegedly sustained when he was attacked by two people who also robbed him of a bicycle and cap. They searched the area but did not find the attackers and the next day, PW1 made his report at Tala Police Post which PW7 recorded.

9. PW8, PC Samuel Khisa conducted an identification parade on 31.8.2005. PW2 was able to identify both Appellants but another person Raphael Kimula could only identify Raphael Kyalo Maingi, the second Appellant.

10. PW9, PC Paul Kirui is the one who re-arrested the Appellants at Tala Patrol Base and investigated the case.

11. When they were put on their defences, the 1st Appellant gave a sworn statement and stated that on 21.8.2005 he woke up at 4.30 a.m to go and harvest sand together with the 2nd Appellant. On the way they were accosted by some people who then arrested them for reasons he did not know and he denied having the bicycle belonging to PW1. The 2nd Appellant gave similar evidence and we see no need to repeat it.

12. In his judgment, the learned trial magistrate and we disagree found that the charge in respect of count 1 was not proved beyond reasonable doubt and he acquitted the Appellants. We cannot delve too deeply into the issue for reasons that there is no appeal against that acquittal and we stand by the provisions of section 348 A as read with section 354 (3) (C) of the Criminal Procedure Code.

13. Regarding count II, the learned trial magistrate found that the charge had been proved beyond reasonable doubt and proceeded to convict the Appellants accordingly. On our part, we are entitled to analyze and evaluate the evidence afresh and reach our own conclusion and in doing so we find as follows:-

14. Firstly, there is no doubt that PW2 and PW4 were attacked on the night of 21.8.2005 and the items elsewhere listed above stolen and PW4 injured when she was hit with an axe. Their evidence in that regard is unchallenged and since the robbers were more than one and had dangerous weapons and wounded PW4 then section 296(2) of the Penal Code properly applies. It provides as follows:-

"*If the offender is armed with any dangerous or offensive weapon or is instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the*

robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death" as the offence of robbery with violence will have been committed thereby.

15. The only question that arises is whether the Appellants were two of the three robbers. The evidence of identification is the only evidence that is relevant in the matter and in that regard PW3 was unhelpful. She said that she could identify the Appellants but did not attend the identification parade and we are not convinced that she was able to identify them at the scene. Her sources of light was what she called "*a lot of light from moonlight*". It is a fact that the robbery took place inside her house and in fact inside her bedroom and it is unclear how moonlight could permeate the locked house which the robbers had to break into using a big stone. In any event while PW2 testified as to "*a lot of light"* in the house, it was also his evidence that the light came from torches that the robbers had and he did not mention moonlight as the source of the light. PW4 did not mention the torch light and that inconsistency is very material.

16. As regards PW2, we have stated that the issue of the lighting available is crucial and the evidence in that regard and in the circumstances of this case is not conclusive. However he was able to pick out the Appellants in a purported identification parade. We shall dispose of the matter of the parade by stating that PW2 was the person who initially arrested the Appellants and handed them over to PW9. How then could the same person purport to identify them at an identification parade some days later? The whole parade became a farce for that reason it cannot be relied upon. In Njihia vs Republic [1986] KLR 422 it was stated as follows:-

"*It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."*

17. We wholly agree and will dismiss the purported identification parade and the identification thereof as completely worthless and the same could not have been the basis for a proper conviction.

18. Secondly, there are certain gaps in the evidence which are unexplained. One of them is failure to call Benson Maina and Raphael Kimula to testify. Benson Maina was present when the Appellants were purportedly apprehended and would have confirmed PW2's evidence while Kimula attended the identification parade but it is unclear why he did so and yet no witness stated what his role in the entire case was. If he was able to identify the 2nd Appellant where is the connection between that fact and the charge?

19. The other issue relates to failure by PW4 to attend the identification parade. Unlike PW2 whose identification is suspect, PW4 would have been the ideal witness to attend the parade for reasons that subsequent to the attack, she had no other contact with them that night. That she did not do so weakened the prosecution's case considerably.

20. Lastly, our considered view is that the fact that the Appellants were properly found with the stolen bicycle belonging to PW1 would have attracted the invocation of the doctrine of recent possession. That was not the case in respect of count II as none of the items stolen were found in the Appellant's possession.

21. For all these reasons and very reluctantly, we shall allow the Appeals, quash the convictions, set aside the sentences and order that the Appellants shall be ordered to be released unless they are otherwise lawfully held.

22. Orders accordingly.

Dated and delivered at Machakos this 20th day of July 2009.

ISAAC LENAOLA

JUDGE

M. WARSAME

JUDGE