REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 207 of 2007

AKIM LUKAS NAMBE…….…….APPELLANT

VERSUS

REPUBLIC……..……..…RESPONDENT

JUDGMENT

The appellant **Akim Lukas Nambe** was charged with the offence of **robbery with violence** contrary to **section 296(2)** of the **Penal Code** and **an** alternative charge of **handling stolen property** contrary to **section 322(1) of the Penal Code**. The particulars of the robbery with violence charge as appearing in the charge sheet are that, on the 19th day of February 2006 at Mimwaita Farm in Nakuru District within Rift Valley Province, the appellant, jointly with others not before court while armed with rungus robbed Richard Seroney Chepkwony of his sony radio, cassette, Video deck, DVD make Sony three cellphones, pair of shoes, five assorted clothes and cash Shs 20,700/= all valued at Kshs 61,050/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said RICHARD CHEPKWONY.

The particulars of the handling charge state that on the 19th day of February 2006 at Sobea Area in Nakuru District within the Rift Valley Province, otherwise than in the course of robbery, the appellant dishonestly received or retained one shirt, one school bag and 2 kgs of rice knowingly or having reasons to believe them to be stolen properties.

Aggrieved by both the conviction and sentence the appellant preferred this appeal citing 5 main grounds as set out in his petition of appeal filed on 16th October 2007.

Firstly, the appellant contends that he was not properly identified as being one of the persons who robbed the complainant since the attack was at night, thus rendering the circumstances of positive identification unfavourable. Secondly, he faulted the identification parade stating that he was shown to **PW1, PW2** and **PW3** prior to their being called to identify their attacker. As a further ground, the appellant stated that **Section 150** of the **Criminal Procedure Code** was contravened in that he was denied the opportunity to recall certain witnesses when he requested the same from the trial court and that his defence, which he considered weighty enough to earn him an acquittal, was completely ignored. Finally the appellant stated that, as regards the exhibits said to have been recovered from him, no distinctive feature or description of the same was given by the complainant to rebut the appellant's claim of ownership.

The State, represented by the learned state counsel **Mr. Mugambi**, has conceded the appeal on the ground, only, that the appellant was not properly identified. He submitted that although the complainant was among the people who arrested the appellant he did not give

any description of his attacker, only stating that he saw him wearing his shirt as he boarded a matatu. Also that **PW5** testified that the only reason he arrested the appellant was that he did not give a satisfactory account of where he was going when confronted. For these reasons Mr. Mugambi submitted that the conviction was unsafe and asked us to quash it.

The appellant filed written submissions and relied solely on them to argue his appeal and did not say anything in response to the State Counsel's submissions. We have considered the appellant's submissions which we have noted, however, contain several arguments on matters not raised in the petition of appeal. We have avoided delving into those extra grounds as no amendment was effected in regard to the original petition. As is required of us, being the first appellate court, we have carefully examined the proceedings and judgment of the trial court and re-evaluated the evidence tendered by both sides.

We shall be quick to state that the submissions by the State that the complainant *(PW1)* was among the people who arrested the appellant is not borne out by the evidence. PW1's testimony was that he ***"received a report that someone had been arrested"*** on 20th February 2006, a day after the robbery. He testified that a neighbour had called the police while the robbery was on course. The Police arrived at the scene immediately the attackers had left and set out in pursuit of the robbers. PW1's car was used in the exercise but the robbers were not found.

In convicting the appellant the learned trial magistrate relied mainly on the evidence of **PW1, PW2** and **PW3** which she considered to represent an accurate and corroborated account of what had taken place. That theirs was direct evidence of persons who witnessed the incident, and were able to see the appellant among the robbers well enough by means of electric lighting and thus able to identify him at an identification parade arranged for the purpose. The learned trial magistrate found also that the evidence of PW1, PW2 and PW3 was corroborated by the evidence of PW4 who arrested the appellant within 30 minutes of the robbery and found him carrying items stolen from the complainant's house a short while earlier. She rejected his defence of alibi on the ground that the appellant had failed to take **PW4 t**o his sister's house where he alleged to have been coming from.

The evidence of the various witnesses was correctly captured in the judgment and we see no need to restate the same herein. After re-evaluating the evidence we are not inclined to accept the State's submission that the appellant was not positively identified. As clearly stated by **PW1, PW2** and **PW3** the robbery took place between 9.00 and 10.00 p.m. and the scene was well lit. There was electric lighting both inside the house and in the compound. **PW1** and **PW3** found the robbers already in the compound. The appellant was inside the house harassing **PW2,** the couple's children and two employees. Their faces were not covered and they wore jungle jackets. **PW1** was certain that the appellant was among the robbers since he talked with him and even told him where to get money. **PW2** identified the appellant as the robber who took her to the bedroom to look for money and also as the one who was picking things in the living room and passing them to another who carried them outside. She was with the appellant for between 10 and 20 minutes and saw him take her son's school bag and empty its contents. Her testimony was corroborated by that of **PW3** who was present as the appellant and his colleagues ransacked **PW1** and **PW2's** house.

PW4 arrested the appellant only about half an hour after the robbery, having been told of the same as it was being executed. He set off to look for the robbers. The appellant was found carrying a school bag in which there was a jungle jacket, which, according to **PW4** caused more suspicion, since the information circulated from the police control room was that the robbers were dressed in jungle jackets. The appellant was wearing a shirt which he asked to be allowed to remove during the parade conducted the following day and which shirt was claimed by the complainant and confirmed by **PW2** to have been among the items stolen. He also had with him a packet of rice. **PW2** and **PW3** had seen the robbers take a packet of rice

from the complainant's house. That he would have owned all these things which were similar in all material respects to items stolen just before from the complainant's house is highly improbable.

We are of the view that the circumstances surrounding the appellant's arrest by **PW4** are corroborative of the evidence of **PW1, PW2** and **PW3**. The appellant did not challenge the evidence of PW4 to the effect that he asked to be allowed to remove the shirt he had been found with when arrested, wearing instead another shirt borrowed from a prisoner. After the parade he put back PW1's shirt. As luck would have it, he was seen wearing it by the very people he had wished to hide it from.

Contrary to the appellant's contention that his defence was not considered, we find that the same was considered and correctly rejected. Taking the entire evidence in totality we have come to a conclusion that the appellant was properly identified and his conviction was based on sound evidence. We have examined the proceedings of 21st March 2006 and are unable to see how **section 150** of the **Criminal Procedure Code** was contravened to the prejudice of the appellant.

Considering the above, and having found that the conviction and sentence were well arrived at the same are upheld.
Accordingly the appeal is hereby dismissed.
Dated signed and delivered at Nakuru this 11th day of December 2009

M. G. MUGO
JUDGE

W. OUKO
JUDGE