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

Criminal Appeal 129, 133 & 134 of 2006

JOSEPH NJUGUNA MWAURA ...……..…… 1ST APPELLANT

PETER NJOROGE KAMAU ……..….. 2ND APPELLANT

PATRICK MURIGI KIBIA …… 3RD APPELLANT

-AND-

REPUBLIC ……...…… RESPONDENT

(An appeal from the Judgment of Chief Magistrate Mrs. U.P. Kidula dated 15th March, 2006 in Criminal Case No. 9249 of 2004 at Thika Law Courts)

JUDGMENT OF THE COURT

The charges in the case before the trial Court were framed in four counts, with an alternative charge to the fourth count which concerned only the 1st appellant herein. The other counts were against the three appellants herein, as well as a fourth accused who, however, does not appear in this appeal.

The 1st count was robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the accused, jointly with others not before the Court, on 14th October, 2004 at Charagu Village, Maragua District in Central Province, and while armed with dangerous weapons namely machetes, axes, iron bars and hammers, robbed *George Mwaura Muiruri* of one cellphone, being Sagem 3020, two machetes, one jacket, one pair of safari boots, and three coats all valued at Kshs.12,400/= and, before the time of such robbery, threatened to use actual violence upon the said *George Mwaura Muiruri*.

The 2nd count was, again, robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63). The particulars were that the accused persons jointly with others not before the Court, and while armed with dangerous weapons namely machetes, axes, iron bars and hammers, on 14th October, 2004 at Charagu Village in Maragua District, robbed ***Alexander Thuo Mwaura*** of cash in the sum of Kshs.80,000/=, one radio cassette of make Sony 717, one cellphone of make Alcatel 331, two kilograms of sugar – all valued at Kshs.99,000/= - and before the time of such robbery threatened to use actual violence upon the said ***Alexander Thuo Mwaura***.

The third count was, once again, robbery with violence contrary to s. 296(2) of the Penal Code. The particulars were that the accused persons acting jointly with others not before the Court and while armed with dangerous weapons namely machetes, axes, iron bars and hammers, on 14th October, 2004, at

Muhutia Village in Maragua District, robbed ***Peter Gichuru Karanja*** of cash in the sum of Kshs. 9,900/=, one cellphone of make Siemens C45, and three wrist-watches all valued at Kshs.20,000/= and, before the time of such robbery, threatened to use actual violence upon the said ***Peter Gichuru Karanja.***

The forth count was still robbery with violence, contrary to s. 296(2) of the Penal Code; and the particulars were that the appellants, jointly with others not before the Court and while armed with dangerous weapons namely machetes, axes, iron bars and hammers, on 14th October, 2004 at Muhutia Village in Maragua District, robbed ***Joyce Wanjiku Gichuru*** of cash in the sum of Kshs.500/= and before the time of such robbery, threatened to use actual violence against the said ***Joyce Wanjiku Gichuru***. To this charge, and for the 1st appellant herein only, there was the alternative charge of handling stolen goods contrary to s. 322(2) of the Penal Code. The particulars were that the 1st appellant, on 17th October, 2004 at Kandara Township in Maragua District, otherwise than in the course of stealing, dishonestly retained one cellphone, make Sagem 3020, knowing or having reason to believe it to be stolen goods.

PW1, ***George Mwaura Muiruri***, a farmer and businessman living at Kandara, was asleep at his house when he heard dogs barking outside. When he went outside to check, he saw more than ten people who flashed torches at him and ordered him to return inside. He returned and locked the door from inside. He was ordered now by the invaders to open up, or risk his house being burnt. They started filing in, after the door was opened. As they flashed their torches generously, PW1 saw ***2nd appellant*** herein, who then seized PW1's jacket which was on the table, and used it to cover-up his head. When the intruders demanded money, PW1 told them he used his money to purchase sand for building, but if they would permit him, he would go to the house of his son, ***Alexander Thuo*** (PW2), to check if he had remained with any money. He was allowed to go to PW2's house, though surrounded by as many as six or seven of the attackers as he walked along. They warned him they would shoot him with a gun if he attempted to escape. As they repeatedly flashed their torches, PW1 was able to see ***1st appellant*** (***Joseph Njuguna Mwaura)*** as he stood against the wall of PW2's house. PW1 was at that time able to see 3rd appellant (***Patrick Murigi Kibia***) as well; 3rd appellant was standing next to 1st appellant.

PW1 asked his son to open the door; PW2 who had already heard voices in the compound, had put on the lights in his house. As soon as PW2 opened the door, PW1 was pushed in by the attackers, and he and his son were ordered to sit on a sofa set in the house. To the demand from one of the intruders for Kshs.100,000/=, PW2 said he only had Kshs.7,000/=, which PW1 asked him to surrender to the attackers. When PW2 stood up to go into his bedroom, all the robbers followed him, save for one who was left guarding PW1. This intruder left behind began helping himself to goods in the house: radio cassette, television; as he was so preoccupied, PW1 left the room and ran away. He shouted for help, and a neighbour, ***Nduati***, woke up; PW1 ran to ***Nduati's*** house, and borrowed a pair of trousers, as he was only in his underwear and vest. From here, PW1 went up to Kandara Police Station, about 5-6 km. away, and made a report. It took him an hour to get there. Police officers then returned with him, in a motor vehicle, to his home, only to find the robbers gone.

On checking his house, PW1 found his Sagem 3020 cellphone missing. He had also lost three jackets, and a pair of safari boots. On the Sagem cellphone, PW1 had inscribed his initials GMM on the inside cover; and he now identified this cellphone when it was shown to him in Court. Two machetes had also been stolen, and he identified one of them, which bore his mark, in Court.

When PW1 recorded his statement with the Police, on the day following the attack, he identified 1st appellant as one of the robbers. The 1st appellant had grown up in the local neighbourhood, and he was well known to PW1. PW1 had also known 2nd appellant, who used to be a bar-tender at a bar known as Kibenge. The 3rd appellant was a neighbour, and PW1 had known him for a long time.

On cross-examination, PW1 testified that 1st appellant was arrested as he tried to sell off PW1's cellphone, a Sagem 3020, which had been stolen.

PW2, ***Alexander Thuo Mwaura***, testified that he is a businessman and was at his house at Kandara on

the material night, when his father had asked him to open; and when he opened, robbers entered, at least one (4th accused – not an appellant herein) of whom he knew, as this intruder was a neighbour. PW2 had surrendered Kshs.7,000/= to the intruders, and when he went to his bedroom to check if there was any money, one of them accompanied him. As he searched in his suitcase, he saw 1st appellant herein, ***Njuguna***, standing at the bedroom door. The intruders suddenly found out that PW1 was missing from the sofa set where he had been ordered to sit. Soon after they left, PW2 heard screams from neighbours. PW1 later returned with Policemen from Kandara Police Station.

On cross-examination, PW2 said 1st appellant was one of the robbers, and he had seen this appellant as he was opening his door when asked to do so by PW1. PW2 said he also saw 1st appellant standing at his bedroom door. PW2 said that nothing stolen from him on the material night was recovered from 1st appellant. He said he had not seen 2nd appellant among the robbers.

PW3, Police Force No. 63835 P.C. ***Moses Thuranira*** was at the material time serving at Kandara Police Station. He was in the company of P.C. ***Kibiro*** at 3.00 a.m. when PW1 came along to make his report. PW3 left accompanied by P.C. ***Kibiro***, a Police driver, and PW1 up to the ***locus in quo***. PW3 and his colleagues found that PW1's house had been broken into and several items had been stolen. The Police took statements, and began investigations. On 17th October, 2004 PW3 received information which led him to a suspect who was selling a cellphone. As he struggled with this suspect endeavouring to arrest him, the suspect threw the cellphone onto the road. PW3 called for help, and was able to arrest the suspect and to retrieve the said cellphone, which was now produced in Court as an exhibit. PW2's wife brought to the Police station a machete and an arrow which had been recovered at their home following the attack of the material night. PW3 testified that 2nd appellant is the one he had arrested while he had a cellphone in his possession; but nothing was recovered from 2nd appellant.

On cross-examination, PW3 said one of the cellphones which had been stolen from his house was marked with his initials, GMM, and he identified this very cellphone which was an exhibit in the trial Court.

PW7, Police Force No. 46410, ***Cpl. Lawrence Weru*** of Makuyu Police Station testified that he was in office at 6.00 pm on 23rd November, 2004 when a complainant, ***George Mwaura Muiruri*** (PW1) came along, and reported having seen two people who had robbed him on 17th October, 2004. PW7 went with his fellow-officers, and arrested 3rd appellant herein and another (who died while on remand).

On cross-examination by 3rd appellant, PW7 said he had recovered nothing from this appellant when he arrested the appellant.

After the Court put each of the appellants to his defence, they all elected to give unsworn statements, without calling any witness.

The 1st appellant said he had been arrested by Police officers on 17th October, 2004 without cause. He said he did not know PW1, and when he was arrested he had no cellphone belong to PW1.

The 2nd appellant said he did not know why Police officers arrested him as he slept in his house on 19th October, 2004 at 3.00 a.m. He said PW1 had failed to identify him at an identification parade conducted by the Police.

The 3rd appellant said he had been arrested by Police officers on 17th November, 2004 as he slept in his house, for reasons unknown to him. He denied the charges.

In her judgment, the learned Chief Magistrate found the three appellants herein guilty in counts 1 and 2, but acquitted them in counts 3 and 4. Each of the appellants was, consequently, sentenced to death in accordance with s. 296(2) of the Penal Code (Cap. 63).

The learned Magistrate stated, quite correctly in our view, the principle which should guide the Court's ultimate findings:

"***To be able to prove the case, the prosecution must show that the accused persons were identified at the scene of the robbery and that they were identified in conditions conducive to proper identification."***

The learned Magistrate observed that the key witness in the trial was PW1, and a determination whether he properly identified the intruders who attacked his home on the material night, would resolve the question of identification. In the Magistrate's words:

"***The issue is, how was PW1 able to identify the robbers[?]. His evidence is that these robbers, all had torches. They [flashed] these torches all over the house and not directly at him. In the torch-light he saw [2nd appellant herein]. He recognized a neighbour. Accused 2 realised that he had been seen and tied a jacket on his head.***

"***PW2, while being led to his son's house, then saw [1st appellant herein]. Accused No. 1 was standing near the son's house. Also with him was [3rd appellant herein]. He saw the two also in the torchlight as they headed to the son's house.***

"***In the son's house there was a light. The son, PW2, having heard the commotion, had woken up and lit a lantern …. So when the group entered together with the torchlight, with the lantern on, visibility was increased.***

"***PW2 saw the people and identified them. The 1st accused was the one who first stood at his bedroom door when he was led there to go and get more money."***

Such conditions, the learned Magistrate concluded, were favourable to proper identification of the accused [persons] – the reason being:

"***If we consider that PW1 and PW2 were not that terrified by the attack, and also that the robbery appeared leisurely and unhurried, then with the torchlight and later the lantern light, it was quite possible to clearly see the people involved in the robbery. Coupled with these conditions was the fact that the robbers were people well known to both PW1 and PW2. They were neighbours, and the identification was immediately followed by recognition."***

The learned Magistrate considered and dismissed old "*grudge"* reason for PW1's reports to the Police made against some of the appellants.

The Court made observations on PW1's demeanour:

"***He was a steadfast witness. He was questioned over a long time by the accused persons. He maintained his steadfast demeanour and, [despite] ….. being provoked by the accused over and over again, he remained very consistent in his evidence. There was no confusion on his part about the occurrence of the events and what he did and what he recorded. He was a more steadfast witness than his much younger son who was PW2. I was very impressed with PW1's demeanour and I believe his evidence ….. I believe that he identified his Sagem 3020 …. when it was recovered and shown to him …… I have no doubt it was his phone which had been robbed on the night of the robbery."***

Sagem 3020 cellphone bearing PW1's special markings was, according to PW3, recovered from 1st appellant. In the light of this evidence, the trial Court found that the prosecution evidence against 1st appellant was "*unassailable*", for this appellant had been at the scene; he had been seen by both PW1 and PW2; and he was found in possession of PW1's Sagem cellphone.

The learned Magistrate further found 1st appellant guilty of the offence in count 2. She, however, acquitted 1st appellant of the charge in count 3. This related to robbery in the house of PW6; this witness

made it clear that he had been unable to identify the robbers. And for lack of evidence, the trial Court made no convictions in respect of count 4.

The learned Magistrate made no finding in relation to 1st appellant, on the alternative count, of handling suspected stolen property, since she had already found him guilty on the main charge.

The trial Court also found 2nd and 3rd appellants guilty as charged, in respect of counts 1 and 2.

Learned counsel, ***Ms. Njuguna***, in her submissions for the first two appellants, asked this Court to re-assess the testimonies of PW1 and PW2, and to hold that the same showed no identification that could be a basis for a conviction. Counsel doubted PW1's testimony that he had been ordered by the robbers to open his door, then he opened and the robbers entered one by one, and that he had been able to observe these robbers. She contended that there was a gap in such testimony; it had not been clarified if each and every one of these robbers had a flashing torch in his hands. On the testimony of PW1, that as soon as he set his eyes on 2nd appellant, this appellant pulled out a jacket for masking his face, counsel contended that this evidence needed to be corroborated by other evidence. Moreover, counsel urged, PW2 had testified that he had not seen 2nd appellant among the robbers who entered his house.

What learned counsel does not bring out in the foregoing contention is that the same robbers had attacked two different houses – that of PW1 and that of PW2; and PW1 says he saw 2nd appellant ***outside*** PW2's house, while PW2 says he did not see 2nd appellant ***inside*** his own house; and therefore, PW2's testimony on this point, we believe, by no means contradicts that of PW1.

Learned counsel also contended that the fact that PW1 was being pushed around by robbers when he had only an underwear and a vest on, would show he was subjected to terror, and he did not have conducive circumstances for making a proper identification of the 1st and 2nd appellant as some of the robbers. In this regard, counsel brought fourth in aid the Court of Appeal decision, ***Paul Etole & Another v. Republic***, Criminal Appeal No. 24 of 2000, in which the following two passages appear:

(i) *"**The prosecution case against the 2nd appellant was presented as one of recognition or visual identification. The appeal of the 2nd appellant raises problems relating to evidence [of] visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused."***

(ii) *"**All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened: but the poorer the quality, the greater the danger. In the present case, neither of the two counts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise, or whether it was a full moon or not or its intensity. It was essential that there should have been an inquiry as to the nature of the light available which assisted the witness in making recognition. What sort of light, its size, and its position vis-à-vis the accused, would be relevant. In the absence of any inquiry, evidence of recognition may not be held to be free from error."***

Learned counsel was of the view that the mode of identification and recognition, in the instant case, fell foul of the foregoing principles, though she made no specific reference to the learned Magistrate's focus on the impact of a combination of torches and a lantern, on the scope for visibility. Counsel contended that the trial Court had issued no warning to itself on the dangers attendant on the available evidence of visibility.

Learned counsel contended that a conviction for robbery with violence, in the circumstances of this case, was misplaced, because no evidence was given that the attackers upon the complainants had been

armed.

Learned counsel ***Mr. Muriuki*** for 3rd appellant, contended that common cause between 3rd appellant and those who attacked the complainants had not been demonstrated. He urged that the conviction of the 3rd appellant was not safe, and his appeal should be allowed.

Ms. Gateru, learned State Counsel, contested the appeal, and supported both conviction and sentence in the three cases. She distinguished a case relied on by counsel for the appellants, ***Gilbert Kipkorir Kemboi v. Rep***, Criminal Appeal No. 173 of 2000 – as not being authority for the proposition that in all cases of robbery with violence, the ingredient of ***being armed*** was required; the terms of s. 296(2) of the Penal Code describes different situations in which a suspect is to be charged with this offence; and in the instant case, the culprits were in the company of several others, as they lodged their attack on the complainants – a typical scenario of robbery with violence.

Ms. Gateru urged that the appellants had been properly identified, at the ***locus in quo***. As these appellants were previously known to both PW1 and PW2 the mode of identification of them was recognition; and in the ***Paul Etole*** case which had been relied on by the appellants, it had been recognized that recognition was more reliable than the ordinary identification of a stranger.

Counsel urged that PW1 had seen the appellants thanks to torch-illumination, which fell on all the faces of those present. The light which PW2 had lit, had further strengthened the conditions of visibility (in his house), counsel submitted, making it possible for both PW1 and PW2 to see their attackers. PW1 had known 1st appellant for many years; he had also known 2nd appellant who used to work in a neighbouring bar; and 3rd appellant too, was a neighbour – and so, counsel urged, there was a good basis for identification.

Ms. Gateru urged that if any contradictions were to be found in the prosecution evidence, they would be minor, and should not be held to affect the merits of the proceedings and the verdict of the trial Court. Counsel noted that the trial Court had made an express statement on the demeanour of witnesses, and had found the prosecution evidence to be truthful.

Counsel urged that the unsworn defence statements had been adequately considered by the trial Magistrate, who rejected them as untruthful.

We have carefully considered all the evidence taken in the trial proceedings, and we are unable to agree with appellants' counsel that PW1 and PW2 had not truly identified the appellants as part of the gang of robbers which attacked them on the material night. We would accept the trial Court's assessment of the demeanour of witnesses as entirely proper; and we find no element of untruth in the identification testimony given by PW1 and PW2. From that position alone, it follows that the appellants herein were properly convicted and sentenced.

In the case of PW1, again, we entertain no doubt that he was found with PW1's Sagem 3020 cellphone which had only so recently been stolen. By the doctrine of recent possession (***R v. Bakari s/o Abdulla*** 16 EAC 84), which we hold to apply in the circumstances of this case, 1st appellant is to be presumed to have been the thief. And in what circumstances did he steal the said cellphone? Obviously, 1st appellant stole it through robbery, on the material night, from PW1; and this, clearly, shows PW1 to have been a robber on the material night, when he had been accompanied by several other robbers.

We dismiss the appeals by 1st, 2nd and 3rd appellants. We uphold the conviction of each of these appellants in counts 1 and 2. We affirm sentence as imposed by the trial Court, in respect of counts 1 and 2. The sentence imposed against each of the appellants in count 2 shall remain suspended, pending execution of the sentence imposed against each of them in count 1.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 21st day of February, 2008.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ.

Court clerks: Huka and Erick

For the 1st and 2nd Appellants: Ms. Njuguna

For the 3rd Appellant: Mr. Muriuki

For the Respondent: Ms. Gateru