REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 475 & 479 of 2003

BENSON TITO BULIMU ……1st APPELLANT

JAMES AYANGA OKULO ……..……..2nd APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

[From Original Conviction and Sentence in Criminal Case Number 535 of 2003 of the Senior Resident Magistrate's Court at Maseno]

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk – Raymond/Laban

Appellant in person

JUDGMENT

Benson Tito Bulima (first appellant) and James Ayanga Okulo (second appellant) were charged before the Senior Resident Magistrate at Maseno with the offence of robbery with violence contrary to Section 296(2) of the Penal Code, in that on the 24th May 2003, at Ebulako Village Wekhomo location Vihiga District Western Province, jointly with others not before court robbed Ann Aranga Onane of Kshs. 15,030/=, a mobile phone, a jacket and a handbag containing several documents all valued at Kshs. 30,000/= and at or immediately after or immediately before the time of such robbery used personal violence to the said Ann Aranga Onane.

The first appellant was in the alternative charged with handling stolen goods contrary to Section 322 (2) of the Penal Code, in that on the 25th May 2003, at Ebusakami Village, South Bunyore location, Vihiga District Western Province, otherwise than in the course of stealing, dishonestly retained or received a jacket and a handbag knowing or having reasons to believe they were stolen goods.

We must point out at this juncture that the alternative count was defective in as much as the particulars consisted of two elements of handling (i.e. retained or received). This amounted to duplicity. In the case of **Selimia Mbeu Owuor & Another =vs= Republic NRB CR/APP NO. 68 OF 1999** (unreported), the court of Appeal said:-

"**Under Section 322(1) of the Penal Code, a person handles stolen goods if he, otherwise than in the course of stealing, dishonestly**

(a) receives

(b) retains

(c) Undertakes or assists in their retention, removal etc.

The prosecution must accordingly choose under which of these sub-heads they wish to proceed and it is not open to them to combine dishonest receipt with dishonest retention in one charge, if they do that the charge would be bad for duplicity. The point is that an accused person is entitled to know whether it is being alleged that he dishonestly received the goods or that he dishonestly retained them and so-on".

Be that as it may, after the trial before the Senior Resident Magistrate, the appellants were convicted for the offence of robbery with violence and sentenced to death. They are dissatisfied with the conviction and sentence and have now appealed to this court on the basis of the grounds contained in their respective petitions of appeal. The first appellant (Benson) appeared in person before us and relied on his written submissions, which also doubled up as supplementary grounds of appeal. He argued that there was no evidence to show that the recovered items were found with him by a village elder.

The second appellant (James) was represented by Mr. Aring'o, who argued that the identification evidence was by a single witness (i.e. PW1) who had a flirting glance at the second appellant in poor light, did not have adequate opportunity and her identification of the second appellant may have been mistaken.

Mr. Aringo also argued that there was no nexus between the second appellant and the recovered items. He said that robbery was not proved against the second appellant and that no identification parade was carried out, although necessary, due to the circumstances of identification. He said that joint intention was not established against the second appellant and that the trial magistrate failed to consider the alibi raised by the second appellant. He contended that the trial magistrate erred in finding that the charge against the second appellant was proved.

Being the first appellate court, our primary duty is to re-examine and re-evaluate the evidence with a view to arriving at our own findings and conclusion bearing in mind that the trial court had the opportunity to see and hear the witnesses (**See OKENO =vs= REPUBLIC [1972] EA 32).**

The case for the prosecution was that on the material date between 6:00 p.m and 7:00 p.m the complainant Anne Aranga Onane (PW1) was walking home along a road leading to Maseno Hospital when she heard people talking from behind. She looked behind but could not immediately recognize the people talking. She kept walking when suddenly a group of five people reached her. One of the people in the group appeared intoxicated and went like he was going for a short call. A second person passed her. She sensed danger but was suddenly stopped and held by the mouth, throat and hair as her property was taken away. She found an opportunity to scream thereby causing the attackers to run away. She arrived home and reported to her husband who took her to hospital. She thereafter reported to an assistant

chief. The matter was eventually reported to the police and in the course of investigations, the appellants were arrested and charged accordingly.

The case for the appellants was that they did not commit the offence against the complainant. The first appellant is a bricks vendor and re-called being at his home at about 9:00a.m when he saw a group of people. He thought they were police officers. He placed a child on the ground and ran off. He was pursued and apprehended by the group. He was thereafter beaten up and handed to the police. He was charged and joined with the second appellant whom he did not know.

The second appellant is a socks vendor. He was at home on 8th June 2003, at 2:00 p.m when a person called Jairo arrived with others and apprehended him. He was taken to Kawangware chief 's office where he found the complainant's husband. He was thereafter taken to Kabete Police Station where he stayed for six (6) days before being transferred to Luanda Police Station where he was charged. He was in Nairobi when the offence was committed.

The basic issue that arose for determination was whether the offence of robbery with violence was committed and if so, whether the appellants were positively identified as having been involved. The complainant (PW1) said in her evidence that she was walking home when she was confronted or accosted by a group of five people who assaulted and stole her property including a mobile phone , a jacket and handbag containing personal documents. The evidence without substantial dispute established a common intention to rob the complainant and also established that the intention was in fact executed. The ingredients of Section 296(2) of the Penal Code were duly established in terms of the decision in **Johana Ndugu =vs= Republic C/APP NO. 116 of 1995 (NBI)** ***(unreported).***

With regard to the identification of the attackers, the evidence implicating the appellants was that of the complainant (PW1), her husband Daniel Amukola Otuoma (PW2), a village elder Mariko Nyaunda Ondiek (PW3) and a villager Julius Mbeta (PW4). The complainant's evidence was direct evidence of identification against the second appellant while that of her husband (PW2), village elder (PW3) and villager (PW4) was indirect evidence against the first appellant. Both appellants denied the offence and implied that they were arrested and charged without good cause.

The second appellant contended that he was in Nairobi when the offence was committed.

The complainant (PW1) however stated that she saw and recognized the second appellant as having been one of the offenders. She said that it was not completely dark and was not yet 7:00 p.m when the offence occurred. She said that the second appellant was the second offender who passed her and at that moment she looked at and identified him. She said that he is well known to her and is known as Ayanga alias Esilema.

The complainant's husband (PW2) confirmed that immediately after being attacked and robbed, the complainant told him that the second appellant was among the offenders.

P. C. Etyang Odeke (PW5) of Luanda Police Station also confirmed that the complainant reported that she was offended by the second appellant and others.

We are without doubt in our minds convinced that the second appellant was seen and recognized by the complainant (PW1) at the scene of the offence. She indicated that the offence occurred in twilight when it was not completely dark and that she had a close look at the second appellant. She clearly showed that favourable conditions and adequate opportunity did exist for her to positively identify by recognition the second appellant.

We are alive to the fact that the complainant's evidence of identification of the second appellant was that of a single witnesses which would require corroboration in given circumstances.

We did not find any direct or indirect corroboration. However, the evidence could still be relied upon even in the absence of corroboration on the basis that the complainant's identification of the second

appellant was not in difficult circumstances and that this was more of a case of recognition rather than identification.

The dangers inherent in the identification of a suspect by a single witness in unfavourable circumstances would not apply herein.

In **ANJONONI & OTHERS =vs= REPUBLIC [1980] KLR 59**, The court of Appeal said:-

" The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Sino Ole Giteya =vs= Republic (*unreported)".*

This case does aptly apply to this present case. The complainant's evidence of identification of the second appellant was properly considered and relied upon by the trial magistrate. It had the ultimate effect of discrediting the alibi raised by the second appellant which alibi was well considered by the trial court and dismissed.

As for the first appellant, the evidence against him was based on the fact of recent possession of the complainant's stolen items. The complainant's husband (PW2) stated that after the necessary report was made to the assistant chief, instructions were given to the village elder and his vigilantes to go in search of the suspects. The complainant's husband joined the group and they proceeded to the house of the first appellant where some of the complainant's stolen good (PEX.2 – 4) were recovered. The recovery was on the following day after the offence. The items (PEX 2-4) were duly identified by the complainant without any particular dispute or claim of ownership by the first appellant.

The complainant's husband (PW2) further stated that upon arrival at the first appellant's home, the first appellant dropped down a baby he was carrying and took off. He was however pursued and apprehended. This fact was confirmed by the first appellant in his defence. He only added that he thought the group coming to his home were police officers and decided to run away. Why would he run away if he was indeed innocent?

The village elder (PW3) and the villager (PW4) strongly supported the complainant's husband's evidence that the first appellant was found in possession of items stolen from the complainant. There was cogent and credible evidence showing that the first appellant was found in recent possession of stolen goods. This provided strong circumstantial evidence to link him to the offence and raised a rebuttable presumption of fact that the person in possession was either the thief or a guilty receiver (**See Section 119 Evidence Act).**

The first appellant did not offer any explanation to rebut that presumption. He could not be heard to say that the items were "**planted**" on him. The circumstances gave rise to the presumption that he was among the people who robbed the complainant. The circumstantial evidence against him was watertight and justified an inference that he participated in the offence.

All in all, the conviction of the appellants by the trial court was proper and lawful. In the end result, the appeals have no merit and are hereby dismissed.

Dated, signed and delivered at Kisumu this 29th day of July 2008.

J. W. MWERA **J. R. KARANJA**

JUDGE

JUDGE

JRK/aao