JUSTUS KIRIINYA.....1ST APPELLANT

JOHN MWENDA M'IBAE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from a judgment of M.S.G. Khadambi (Mrs.) SRM

delivered on 13.10.2005)

JUDGMENT

This appeal arises from a ghastly robbery in which the husband of the complainant, PW, Florence Karimi Gitari, was killed. The two appellants before us together with six (6) others were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code, tried, convicted and sentenced to death by Mrs. M.S.G. Khadambi, SRM. Their six (6) co-accused persons were acquitted of this charge under section 210 of Criminal Procedure Code. All of them (the appellants) and their co-accused persons were also acquitted, under section 210 of the Criminal Procedure Code, of the offence of robbery with violence charged in the second count. The appellants also faced separate alternative charges of handling stolen property contrary to section 322(3) of the Penal Code.

The learned trial magistrate correctly, in our view, made no finding on the alternative counts. The appellants were not satisfied with both the conviction and sentence, for the offence of robbery with violence, hence this appeal.

The appellants filed two separate appeals which were consolidated before the commencement of the hearing of the appeal. They each relied on four (4) identical grounds, which we condense into three and summarize as follows:-

(i) that the learned trial magistrate relied on contradictory prosecution evidence

(ii) that the learned trial magistrate failed to warn herself of the dangers of convicting on the evidence of a single witness

(iii) that the learned trial magistrate failed to consider the defence of the appellants.

The learned counsel for the respondent conceded the appeal on the ground that there was failure on the part of Mrs. Khadambi, SRM, learned trial magistrate to comply with the provisions of section 200 of the Criminal Procedure Code. Counsel, however, applied for a retrial, arguing that there was overwhelming evidence. He went ahead to enumerate that evidence as:-

(i) the evidence of a single witness, the complainant who recognized the appellants

(ii) that evidence was corroborated by the recovery of recently stolen goods from the appellants, and

(iii) that the appellants were identified at an identification parade

The appellants opposed a retrial arguing that they have spent substantial period in prison while the trial itself took some three (3) years. They also argued that the evidence adduced was not sufficient.

We have most carefully considered these submissions. The only issue we are called upon to consider is whether we ought to order for a retrial, there being no dispute the matter having been substantially heard by Mr. W.M. Muiruri, SPM, was taken over, on his transfer by Mrs. Khadambi, SRM, who, from the record, did not comply with section 200 of the Criminal Procedure Code. Section 200 aforesaid enjoins the succeeding magistrate, in mandatory terms, to explain to the accused person his/her right to re-summon any witness. The failure to comply with that provision was, therefore, in our view, fatal.

As we have stated, before us is the question of a retrial. It has been held by a long line of authorities, led by the case of **Muiruri V. R.** (2003) KLR 552 that the question whether or not to order a retrial must depend on the particular facts and circumstances of each case. The court in that case expressed itself thus:-

"***It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial (see Zedekiah Ojuondo Manyala V.R. (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the courts."***

We may also add, on the authority of **Dickson Mwaniki M'Obici & Another V.R.** Civil Appeal No. 78 of 2006, that a retrial will also be ordered where, in the opinion of the court, and on proper consideration of the admissible evidence a conviction might result. See also **Mwangi V. R.** (1983) KLR 522.

We start by considering the likelihood of a conviction if a retrial is ordered. The court will not order a retrial if by so doing the prosecution will have, as it were, a second bite of the cherry, thereby taking advantage to fill-in the gaps in its case.

The prosecution is relying on the evidence of identification at the scene of robbery; at the identification parade; and on the doctrine of recent possession. At the scene, apart from the deceased (husband of the complainant), there were several other people, including the complainant herself. Her worker PW3, Joseph M'Ruguru, her son (then fourteen (14) years old), PW4, Chris Mwenda Gitari, her house help PW5, Florence Koome, another worker, PW6, Moses Gikundi, her neighbour, PW7, Jonah Nkubitu and another neighbourhood, PW9, Samwel Kathunkumi, were either in the complainant's house where the offence was committed or in the neibourhood. For instance the complainant's son, Chris Mwenda and the house help, Florence Koome were in the same house as the complainant and came face to face with the robbers. It was however, their testimony that they were not able to identify any of them. The complainant's two workers, Moses Gikundi and Joseph M'Ruguru were in their house within the complainant's compound. Both maintain that they did not identify any of the robbers. It is only the complainant who testified that although the robbers were many (more than four (4)), and even though it was about 1.00am, she was nonetheless able to identify two of the robbers, the 1st and 2nd appellants.

It was her testimony that she woke up when she heard a bang at the gate leading to her house, and moved to the window facing the gate. On looking out she saw the 1st appellant carrying a panga and an iron bar while the 2nd appellant was armed with a metal bar and a big stone. She estimated that the two were some 3-4 meters from where she was standing. It was also her testimony that there was electricity light and finally that the appellants were well-known to her, being her neighbours and having employed the 2nd appellant on various occasions as a casual labourer in her home and having on several occasions given a lift to the 1st appellant.

On being recalled on 11th December 2004, the complainant confirmed that there was one bulb electricity lighting on the side of the house facing the gate. That it was with the aid of that light that she was able to

identify the robbers.

In re-examination the complainant clarified that the bulb was fluorescent. Our understanding of the two, that is a bulb and fluorescent, is that they are distinct. We talk of fluorescent tube as opposed to a bulb. That being as it may, she continued to state that there was enough light. She therefore relied on the evidence of recognition. Both the appellants, on the other hand confirmed that they were neighbours of the complainant; that the 1st appellant was given lifts by the complainant; that the 2nd appellant did some casual work for the complainant. But both have denied involvement in the crime, raising a defence of *alibi.*

In the case of **Dickson Mwaniki M'Obici** (supra) the court citing with approval the case of **Sekitoleko V. Uganda** (1967) EA 531 stated that as a general rule of law the burden on the prosecution to prove the guilt of an accused beyond reasonable doubt never shifts even where the accused raises a defence of *alibi* and the burden of proving an *alibi* does not lie with the accused.

On recognition or identification, it is now trite law that when the evidence before the court is only that of a single witness on identification, the court has to be extra careful before entering a conviction. That need for extra care is not reduced even when the evidence is that of recognition for there may be cases where even people who know each other very well may still make mistakes. In such circumstances, the court must look for other evidence to lend assurance as to the participation of the suspect in the commission of the offence. See **Abdalla bin Wendo and Another V. R.** (1953) 20 EACA 166. In the case of **R. V. Turnbull** (1976) 3 ALL ER 519 at 522 Lord Widgery C.J. said:-

"***Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

The learned trial magistrate after properly warning herself on the issue of a single eye witness fell into grave error by holding that the complainant positively identified the appellants. Although the appellants were well known to the complainant and even though there was light as claimed by the complainant we are of the very considered view that the complainant was unable to identify the assailants for the following reasons.

The normal and natural thing to do when one has been attacked by people known to one, particularly neighbours, and where death of a loved one has occurred, is to name the attackers to the first people one meets. In David Masinde V. R. Cr. Appeal Nos. 33 and 34 of 20004 and another, the court stated,

"***In every case in which there is a question as to the identification of the accused, the fact of there having been a description given and the terms of that description are matters of highest importance of which evidence ought always to be given first of all by the person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given. See R. V. Kabogo s/o Wangunyu, 23(1) KLR 50. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity."***

The complainant maintained that she gave the names of the appellants to the police, one Inspector Odhiambo Mboya immediately after the robbery. She confirmed, however, that that fact was not recorded in her statement to the police. She stated that despite her giving the names of the assailants, the appellants were not arrested. It took the intervention of the Police Headquarters, after she complained that serious investigations were commenced by Chuka Police Station instead of Meru Police Station under whose jurisdiction the robbery had occurred and where it was reported.

We are unable to be persuaded by the complainant's version because in her first statement recorded by Inspector Odhiambo Mboya, according to the evidence of the police officer who took over the investigations, PW16, Benjamin Gitonga, the complainant gave the name of Mukira Mbaya, as the suspect. We find it incredible that Inspector Odhiambo would have recorded the name of Mukira Mbaya,

an advocate of this court and not the appellants.

We also note that although the incident took place on the night of 8th and 9th March 2002, the complainant only complained to the Police Headquarters of the inaction of Meru Police Station after three months, yet the appellants are categorical that they were all along available in their homes and that nobody questioned them regarding the incident. They further stated that they attended prayer meeting at the complainant's residence throughout the mourning period and even attended the burial of the complainant's husband without being suspected. Indeed the complainant confirmed when she testified on 30th July 2003 that she did not give the names of the robbers when taking her injured husband to the hospital, moments after the robbery. She gave the names, she stated, after one week. Her workers, Joseph M'Ruguru and Moses Gikundi stated categorically that the complainant did not name those who had attacked her and her family, yet they were the first people she called to come and assist take her husband to the hospital.

The complainant also sought the assistance of another neighbour, PW9, Samwel Kathunkumi to take her injured husband to the hospital. Once again she neither mentioned the names of the robbers, leave alone the appellants to him nor did she say whether any of the robbers were known to her. The robbery was reported to Meru Police Station on the night it happened. Cpl. Javan Wambugu (PW10) entered the incident in the Occurrence Book (O.B.). According to him the complainant was unable to count the number of the robbers. He also confirmed that she (the complainant) did not give him the names of the suspects or their physical descriptions. PW7 Jonah Nkibitu who went with church members to condone the complainant's family the following day after the attack also confirmed that no names of suspects were mentioned.

From this it is absolutely clear to us that the complainant was not able to identify the robbers. She only went to the Police Headquarters to complain when the police took so long to take action against the only suspect whose name she had given, namely, Mukira Mbaya, who is also her brother- in-law. We are also persuaded that the arrest of the appellants some five months after the robbery was an afterthought. That probably explains also why the complainant took seven months after the attack to have the P3 form completed by PW15, Wilson Namu, a clinical officer.

Because the complainant was not certain of the people who robbed her and her family it was necessary to conduct an identification parade. That parade, we find, served no useful purpose in view of what we have said. We reiterate that if indeed the complainant had identified, infact recognized the appellants, who were her neighbours, of what purpose was the parade, nearly six months later?

Then there is the issue of the coat and the video cassette allegedly separately recovered from the appellants. Once again it is incredible that the appellants could have stolen the two items and six months later they would still keep the same in their houses when they are neighbours of the complainant. The doctrine of recent possession was not applicable in the circumstances of this case.

For these reasons it is our considered opinion that a retrial will only present to the prosecution an opportunity to fill-in these gaps. The appellants were arrested in August 2002, their trial commenced in September 2002, and they were sentenced on 13th October 2005. So their trial alone lasted some three (3) years. Three more years have passed since they were sentenced, making a total of six years, a substantial part of their lives for no fault of their own. It would therefore not be in the best interests of the appellants to order a retrial. A retrial would certainly be prejudicial and occasion injustice to the appellants.

For all these reasons, we are satisfied that the learned trial magistrate erred both in law and facts in finding the appellants guilty. The upshot is that the appeal is allowed, the conviction quashed and the sentence of death set aside. We order that the appellants shall be set at liberty forthwith unless held for any lawful reasons.

Dated and delivered at Meru this 28th day of July 2008.

M.A. EMUKULE

JUDGE

W. OUKO

JUDGE

29.7.08

Coram: M.A. Emukule, J

W. Ouko, J

Mr. Kimathi for state

Gacheri C/Clerk

Both appellants present

Judgment delivered.