REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 189 of 2005

[*From Original Conviction and Sentence in Criminal Case No.2378 of 2004 of the Chief Magistrate's Court at Nakuru – M.W. Onditi - S.R.M*]

NICHOLAS AMBUGA LIMANYE …..……. APPELLANT

VERSUS

REPUBLIC ……..…....……..…... RESPONDENT

JUDGMENT OF THE COURT

Nicholas Ambuga Limanye, the appellant herein was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code before the Chief Magistrate's Court at Nakuru. The particulars of the charge were that on the 29th day September 2004 at about 6.30 p.m. along Section 58 within municipality Nakuru District of the Rift Valley Province jointly with others not before court while armed with pistol robbed ***Joseph Njoroge Njunge*** one motor vehicle registration number KAC 139F Seiko watch, rado watch, and cash Kshs.4300/- all valued Kshs.200,000/- and at or immediately before or immediately after time of such robbery used actual violence to the said ***Joseph Njoroge Njunge***.

The appellant also faced an alternative charge of **handling suspected stolen property** contrary to **Section 323** of the **Penal Code**. The particulars of the charge provided that on the 4th day of October 2004 at Nakuru Township in Nakuru District of the Rift Valley Province, handled a wrist watch make Rado valued at Kshs.800/- otherwise than in the course of stealing knowing or having reason to believe to be stolen or unlawfully obtained.

The appellant was also charged with the count of being in possession of **Narcotic Drugs** contrary **to Section 3 (2)** of the **Narcotic Drugs** and **Psychotropic Substances Act No. 4 of 1994.** The particulars of the count stated that on the 1st dayof October 2004 at Kanyori Estate in Nakuru District within Rift Valley Province, was found being in possession of 100 gms of bhang which was not inform of medical preparation.

The appellant was tried before the Senior Resident Magistrate's Court at Nakuru, was convicted of the main charge and sentenced to the mandatory death sentence. The appellant being dissatisfied with the conviction and sentence has appealed.

The appellant has challenged the conviction based on the evidence of recognition which he contends lacks credibility for lack of support by an initial report on description. The appellant also questioned the

prosecution's evidence which he contended was contradictory regarding the identification.

The appellant also faulted the trial court for relying on evidence of identification parade that lacked credibility and was *null* and *void*. The appellant was also aggrieved that the trial magistrate failed to take into consideration the sworn statement of defence.

During the hearing of this appeal, the appellant who was unrepresented sought to introduce further grounds of appeal which were duly admitted. The matter raised in the supplementary grounds are cross-cutting on the above grounds save for the ground that the trial court erroneously convicted the appellant based on the fact that a wrist watch Rado make was found in possession of the appellant's wife. This being a first appeal, this court is mandated to re-consider and re-evaluate the entire evidence and arrive its own independent determination as to whether to uphold the conviction of the appellant or not. This court has to bear in mind that it neither saw nor heard the witnesses as they testified and give due allowance for that as it was held in the case of **Njoroge –Vs- Republic [1987] KLR 19**).

This appeal turns on three issues, whether the appellant was convicted on sound evidence based on identification. Whether the doctrine of recent possession is applicable in this case, and finally, whether it was necessary to rely on the evidence on identification parade.

This appeal was opposed by the State. The learned Senior Counsel, ***Mr. Koech*** supported the conviction and sentence. ***Mr. Koech*** submitted that the appellant's conviction was based on the evidence of identification by **PW 1** and **PW 2** who recognized the appellant as one of the three robbers who had robbed and commandeered **PW 1**'s motor vehicle. Furthermore, there was recovery of the watch that was stolen from **PW 2** which was recovered from the appellant's wife and no explanation was offered by the appellants as to how his wife came into possession of the watch.

We now set out the summary of the evidence before the trial court. It was the prosecution's case that ***Joseph Njoroge Njunge***, (**PW 1**) was driving his motor vehicle registration number KAC 139F Toyota Corrola. On 29th September 2004 at about 6.00 p.m., along Section 58 Estate when his vehicle ran out of petrol. He decided to get petrol on foot and on his way back he met ***JWM***, **PW 2** who is his tenant. ***J*** was accompanied by her child aged about four (**4**) years and he offered to give them a lift in his evidence. After refunding the vehicle **PW 1** was accosted by three strangers, they banged the vehicle with a pistol, and hit **PW 1** and bundled him on the back seat. The attackers commandeered the vehicle, one of them sat in front and the one holding the gun sat on the back seat with **PW 1** and **PW 2**. They sprinkled tobacco on the eyes of **PW 1** and **PW 2**. They robbed the complainants of money, car radio, wrist watch and a car radio all valued at Kshs.200,000/-.

The attackers used the vehicle to block another vehicle which they took control of and went with the car keys of **PW 1.** While the vehicle was being driven by the attackers, **PW 2** told the court that she recognized the appellant as the one who sat at the back seat armed with a pistol. She said that the appellant threatened to rape her and indecently assaulted her by torching her buttocks. The incidence was reported to the police on the same day and on 1st October 2004, ***P.C Joshua Otieno***, (**PW 3**) who was based at the CID Flying Squad Unit Nakuru police station following the particulars he said he received from one of the complainants, arrested the appellant outside his house. The police conducted a search in the appellant's house but did not recover anything. While the appellant was in police custody, his wife came to the police station to check on him and she was wearing a wrist watch which **PW 2** identified as the one that was stolen from her. An identification parade was conducted by Inspector ***Davies Keya Simiyu*** on 10th August 2004 and the appellant was identified by **PW 1**.

Place on his defence, the appellant gave a sworn statement of defence and denied having had any involvement with the robbery that he was charged with. He contended that the complainant was framed up by **PW 2** with whom they had a grudge. The appellant told the court that he was a neighbour of **PW 2**, where she runs a saloon business and the appellant brews and sells changaa and one day the appellant's customers fell outside **PW 2**'s hair saloon and vomited on her business premises. That is why **PW 2** threatened the appellant with dire consequences. The appellant argued that the charges were amended after he was brought to court to make good the threats by **PW 2**.

The learned trial magistrate in her judgment seem to have relied on the evidence of identification of the appellant by **PW 1** and recognition by **PW 2** and the recovery of the wrist watch which was positively identified by **PW 2** as one of the items that were stolen from her during the robbery.

To determine whether the evidence of identification of the appellant by **PW 1** was safe from error, **PW 1** told the court that he was able to identify the appellant with ease since he was the one who was holding a pistol during the robbery and he sat on the back seat with him. Besides it was not dark. The appellant was also the one who was threatening to rape **PW 2** during the robbery and **PW 1** told the court he had known the appellant prior to the day of the robbery where he used to see him looking drunk.

In this case, if **PW 1** recognized the appellant perhaps it was not necessary to conduct an identification parade as this was identification by recognition. It was held in the case of **Ajode –Vs- Republic [2004] 2 KLR 81**

"***Once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition."***

The Court of Appeal went further to quote with approval the case of **Githinji Vs Republic [1970] E.A 231** a High Court decision by ***Mwendwa CJ*** (*as he then was*) and ***Simpson CJ*** (*as he then was*)

"***Once a witness knows who the suspect is, an identification parade is valueless***."

Even though the identification parade was not necessary, the court could have relied on the evidence of **PW 1** based on recognition and thus the factors to consider was whether the circumstances for identification by recognition were conclusive. It is clear the robbery took place at about 6.30 p.m., there was natural light. **PW 1** further said that it was the appellant who was holding the pistol and who sat with him on the back seat. He emphasized that the appellant is the one who ordered him to start the vehicle.

Although this is not the only piece of evidence that the trial court relied on we are satisfied that the evidence of **PW 1** regarding identification of the appellant was cogent. We also find that that identification parade was not necessary however we do not think the evidence of identification parade at all prejudiced the appellant and in any event it is not the only evidence the trial court relied on.

The trial court also relied on the evidence of **PW 2** which was based on recognition. **PW 3** testified that the particulars of the appellant were given by the complainant that is what led to the arrest of the appellant. Even the appellant admitted that **PW 2** was well known to him but he contended that there was a grudge between him and **PW 2** and thus **PW 2** was trying to fix him following a disagreement.

Besides the evidence of **PW 1** and **PW 2**, there was the circumstantial evidence regarding the recovery of the complainant's wrist watch which was recovered from the appellant's wife who had come to the police cells to check on the appellant. Although there was no evidence adduced to confirm that the person from whom the wrist watch was recovered was the appellant's wife, this was a strange coincidence.

As it was held in the case of **Republic Vs Kipkering Arap Koskei & Another 16 E.A.C.A 135**

"***In order to justif, the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt"***

In the present case, we find no other hypothesis on how a woman would turn at the police cells to check on the appellant while wearing the wrist watch which was stolen from **PW 2** other than to link the appellant with the robbery.

We have considered the facts and the evidence at length the upshot of which we uphold the conviction and sentence of the appellant in respect of count one and quash the conviction sentence in regard to count

two.

The appeal is hereby dismissed.

It is so ordered.

Judgment read and delivered this 14th February 2007.

M. KOOME

JUDGE

L. KIMARU

JUDGE