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

Criminal Appeal 403 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 25750 of 2003 of the Chief Magistrate's Court at Makadara (Mr. Nyakundi– CM)

JAMES KIENJI MAINA……..……..……..APPELLANT

VERSUS

REPUBLIC…… ……..……....RESPONDENT

CONSOLIDATED WITH

404 OF 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 25750 of 2003 of the Chief Magistrate's Court at Makadara (Mr. Nyakundi– CM)

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J U D G M E N T

JAMES KIENJI MAINA, hereinafter referred to as the 1st Appellant and **JOSEPH KINGORI MATHENGE,** the 2nd Appellant were jointly charged with one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code.** It was alleged that on 30th November 2003 at Kamuru Made in the Street Rehabilitation Centre, jointly with others not in court and while armed with a pistol, they robbed the Complainant, **JOEL NJUE** of various properties all valued at Kshs.429,000/-. Both Appellants were found guilty of the offence, convicted and sentenced to death as by law prescribed.

They were aggrieved with their convictions and therefore lodged these appeals which we have consolidated having arisen out of the same proceedings.

The Appellants have raised similar grounds of appeal in which they challenge the conviction on the basis of visual identification which they maintain was made under difficult circumstances; that the doctrine of recent possession did not apply since the goods were not properly identified; that the evidence or the value of the goods was concocted and that the learned trial magistrate erred in rejecting their defences without giving them due consideration.

The facts of the prosecution case were that at 6.30 p.m. on the material day a gang of robbers attacked Kamuru Made in the Street Rehabilitation Centre and drove away with thirty six cartons of shoes, six mountain bicycles, one projector, one cash sale register machine and one speaker belonging to the centre and one T.V. set, one lap top and a VCD deck belonging to the Complainant. At 9.00 p.m. the Complainant and others using the centre's vehicle reported the robbery at Ruai Police Station and carried one Police Officer, PW1, to help chase the vehicle ferrying the goods. They caught up with it at a roadblock between Ruai and Njiru. The Appellants were the driver and turn boy respectively and both were arrested with all the stolen goods inside their canter van.

In their defences the Appellants, said that they had been hired by people who were in a motor vehicle whose registration number they gave in court. They said that the goods were loaded onto their vehicle by other people at a roadside. That they were told to follow the hirer's vehicle to Umoja but were intercepted on the way. The hirers also disappeared.

The Appellants acted in person in this appeal while **Miss Gateru,** State Counsel represented the State and opposed the appeal. Going directly to the analysis of the evidence vis-à-vis issues raised by the Appellants in their petitions of appeal, the Appellants challenged the strength of the evidence of identification adduced against them. **Miss Gateru** submitted that the evidence of the prosecution sufficiently proved the charge and that the possession of the stolen goods soon after the robbery was sufficient prove that the Appellants were involved in the robbery.

The learned trial magistrate, at page J3 of the judgment concluded thus: -

"***PW4 stated that there was light. The thugs were armed with a gun. They took him to the room and tied him. I find there was sufficient time and light in the classroom, which led to the identification of the accused persons. The accused persons were arrested jointly with the goods at Police roadblock in possession of the goods soon after the robbery gives only one final inference. That accused persons were the ones who planed the commission of the robbery. The mere possession of the goods immediately after the robbery was sufficient reason to arrive at the conclusion that accused persons participated in the robbery."***

There are two issues which are also points of law and facts. One, the evidence of visual identification and two, possession of recently stolen goods. We shall first deal with the issue of visual identification. From the evidence adduced before the court, only one of the witnesses who testified actually witnessed the robbery. That was PW4 who was the special owner of the goods stolen from a container at the centre where he worked, and the owner of electrical goods stolen from his house i.e. TV set, VCD and Lap top. From the evidence of PW4 it is clear that he only identified the 2nd Appellant in the case as the man who was left guarding guests in PW4's house. PW4 did not identify the 1st Appellant at any stage. In **MURUBE & ANOTHER vs. REPUBLIC 1986 KLR 356, NYARANGI, PLATT & APALOO JJA** held: -

"***In the evaluation of the evidence of the identifying witness, the court was to ensure beyond all reasonable doubt that the witness was honest and unmistaken about her identity of the Appellants."***

In **JOSEPH NGUMBAO NZARO vs. REPUBLIC [1991] 2 KAR 212, HANCOX CJ, GACHUHI and COCKAR JJA** held: -

"***1. Before accepting visual identification as a basis for conviction the court had a duty to warn itself of the inherent dangers of such evidence.***

2. A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential."

PW4's evidence was unfortunately heard by one **KANYANGI,** Senior Principal Magistrate before he ceased to exercise jurisdiction and **NYAKUNDI** Senior Principal Magistrate then, took over the matter

and continued from where the preceding magistrate had left. In compliance to the option taken by the Appellants, under **Section 200(3)** of the **Criminal Procedure Code** the succeeding magistrate could not comment on the demeanour of PW4, and is in very much the same position as ourselves. It is therefore understandable that the learned magistrate, **MR. NYAKUNDI,** could not comment on the demeanour and credibility of PW4. That not withstanding, we believe that a proper evaluation of the evidence of this witness can help to assess the quality of his identification of the 2nd Appellant.

We noted that PW4 said that he was marched to his house by two robbers where he found one man standing guard at his house. PW4 stated that he was taken to his house for exactly two to three minutes and further and most important, that was the only place where the lights were on. There were no lights outside his house, PW4 said. The circumstances at which PW4 saw the thug who was guarding guests at his house was poor in our assessment both in light of PW4's confession that he had a problem with his eyes and could not see clearly and also for the fact that he had a fleeting glance at the said thug. We think that the evidence of identification of a man who confesses to having poor eyesight and who claims to have seen and identified a person under difficult circumstances such as nighttime, seen in a fleeting glance cannot be accepted as correct identification free from the possibility of error or mistake. We think that such evidence ought not be relied upon to base a conviction without other evidence to corroborate it. PW4's evidence of identification of the 2nd Appellant was not safe.

We noted that the learned trial magistrate did not warn himself as required before relying on the visual identification by PW4. Even if he had warned himself before relying on PW4's evidence, we do not think that the quality of identification was good to base a conviction.

The only evidence left against both Appellants was that of possession of the stolen goods. Both Appellants do not deny having the goods in question in their possession and neither did they claim ownership.

The issue of goods not being properly identified we think was an afterthought and under **Section 382** of the **Criminal Procedure Code**, ought to have been raised during the trial in the lower court. The issue is whether "mere possession" was sufficient reason to find the Appellants to have been part of those who robbed the Complainant as learned trial magistrate concluded in his judgment.

We have considered the Appellants' explanation of how they came by the goods. Both Appellants were consistent in their defences and their evidence was in tandem. They each narrated how they had spent the day tending to hired transport services to persons who approached them. They then said that a person in a vehicle, whose registration number they gave hired them to carry the goods in question. They each described how they were led to a place in Kamuru where other people loaded goods onto their vehicle. They followed the vehicle of their hirer until Njiru/Ruai junction where the hirer went past the Police Road Block but they were stopped and eventually arrested.

Is the Appellants' defence reasonable? We think that the Police Officers who stopped the Appellants at the road block ought to have been called to testify as they may have had vital evidence to give which would have shed some light to the case. Going by what is on record from the prosecution witnesses, especially PW4, the thugs struck at 6.30 p.m. They took one hour at the Complainant's premises during which time PW4 first heard a saloon car and then a canter vehicle come and later leave. So if robbery took approximately one hour, the robbers must have left the scene at about 7.30 p.m. There is a period of one to one and half hours gap between the time the robbers left the scene and the time the Appellants were found with the goods. None of the witnesses described the distance between the centre at Kamuru where the incidence occurred to junction where the Appellants were arrested. It is however clear that the Complainant and PW3 and others left the centre after the robbers had driven off and first reported to the police before proceeding to the junction. The distance and direction from the centre to the Police Station where report was made and the junction in question were all not disclosed. However, considering that the robbers took a direct route while PW4 and others first went to report to the police, the fact that PW4 and the Police Officers took, PW1 still caught up with the Appellants at the junction just soon after they were stopped is suggestive that the Appellants story may as well be plausible. That those who left the centre with the goods may have offloaded them to a roadside from where the Appellants collected them just

before their arrest.

We do find that in view of the many unresolved gaps in the prosecution case, and the lapse of time between the robbery and the Appellants arrests, and in view of the Appellants' unshaken defence, the 'mere possession' of the stolen goods were not conclusive of the Appellants involvement in the court. We find that the lapses in the prosecution case raises doubts to the Appellants' involvement in the case. We find that in the circumstances, the Appellants' defence ought to have been accepted.

Having considered the Appellants' appeals we find that the conviction entered against them was not safe and ought not to be allowed to stand. We allow their appeals, quash the conviction and set aside the sentences. The Appellants should be set free unless they are otherwise lawfully held.

Dated at Nairobi this 1st day of February 2007.

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Miss Gateru for the Respondent

CC: Tabitha/Eric

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE