REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 49 & 50 of 2005
(From Original Conviction and Sentence in Criminal Case No. 3 of 2004 of the Principal Magistrate's Court at Kikuyu – Mrs. M.W Murage (PM)

GEORGE NJOROGE WAIRIMU……APPELLANT
VERSUS
REPUBLIC ……..……RESPONDENT
CONSOLIDATED WITH
Criminal Appeal 50 of 2005

DAVID KABUTHIA KANGETHE …….……...…APPELLANT
VERSUS

REPUBLIC ……..…….RESPONDENT

JUDGMENT

GEORGE NJOROGE WAIRIMU (*1st appellant*) and **DAVID KABUTHIA KANGETHE** (*2nd appellant*) were jointly charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. They were also jointly charged with one count of theft from a locked motor vehicle contrary to Section 279(g) of the Penal Code. They were in the alternative jointly charged with two counts of handling stolen goods contrary to section 322(2) of the Penal Code.

After a full trial, they were convicted of the two main counts. They were ordered to be detained at the President's pleasure, in accordance with the provision of section 190(2) of the Children Act, No. 8 of 2001, as they were found to be under 18 years of age.

Being dissatisfied with the decision of the learned trial magistrate, they filed their respective appeals to this court, through their counsel Njenga Mbugua & Company Advocates.

The grounds of appeal were common to both appeals and were that –

1. The learned trial magistrate erred in law and in fact by convicting the appellants on the evidence of a single identifying witness.

2. The learned trial magistrate erred in law and in fact by relying on evidence of identification parades that were not properly conducted.

3. The learned trial magistrate erred in law and in fact by relying solely on the evidence of the prosecution witness without considering the defences put up by the appellants.

4. The learned trial magistrate erred in law and in fact by convicting in respect of count 2 but failed to pronounce sentence and thus rendering the entire proceedings null and void.

5. The learned trial magistrate erred in convicting the appellants who were charged with 4 counts without specifying or explaining the count for which she sentenced the appellant.

6. The whole judgment is against the weight of the evidence adduced and has resulted in a miscarriage of justice.

The appeals were consolidated and heard together as they arose from the same incidents. At the hearing of the appeals, Mr. Njenga, appeared for both appellants, while Mrs. Obuo appeared for the State.

Mr. Njenga, learned counsel for the appellants, submitted that the incidents occurred at night, and the identification of the appellants was not positive. PW2 who was the complainant in the charge of robbery with violence, merely said that there was light from a nearby church. He did not give any description of any of the appellants. There was therefore a possibility of mistaken identity. The OB reports that were produced (No. 85 of 18.1.2004) showed that the reportees of the incident were **MBUGUA** and **MUHORO**, not the complainant in the first count, **PETER GITAU KARIUKI.** Counsel submitted that, though identification parades were held 5 days later, PW2 did not state how he was able to identify the appellants. Counsel emphasized that the complainant in the second count **EVANSON KIARAHA NYORO** (PW3) was not mentioned at all in the OB report. He was also not able to identify anybody. He contended that the evidence of identification was not conclusive and could not sustain a conviction. In any event, the single identifying witness (PW2) stated in evidence that he saw the appellants being fingerprinted, which reduced the validity of the identification parades.

Counsel submitted further that the arrest of the appellants did not arise from the report of any of the complainants. The arresting officers merely arrested youngsters whom they met that night. Counsel contended that there was no evidence to convict the appellants on the second count. The complainant in the second count (PW3) merely stated that he could identify the radio at the police station. It was counsel's contention that the benefit of the doubt should have been given to the appellants.

Learned State Counsel, Mrs. Obuo, opposed the appeal and supported both conviction and sentence.

With respect to the 1st count counsel submitted that the identification was positive. The complainant (PW2) testified that there was light at the scene, and that he struggled with the appellants for 30 minutes. PW2 used to see the appellants before at the stage. He knew the appellants physically before, though not by name. It was counsel's contention that the identification at the scene was positive and there was no possibility of mistaken identify. Counsel also asserted that though an identification parade was conducted, it was not strictly necessary.

Counsel contended further that the evidence of the arresting officers (PW4 and PW6) supported the prosecution case. They went out on patrol after a report was made. When the appellants were arrested, the 1st appellant had the mobile telephone, and the 2nd appellant had the radio, both of which were later identified by the complainants. They were in possession of the items just a few hours after the incident. The appellants did not explain how they came to be in possession of the items. Counsel submitted that the doctrine of recent possession applied.

Counsel further submitted that there was overwhelming evidence for proof of the 2nd charge of theft from a motor vehicle. The evidence of the complainant (PW3) was supported by the evidence of the recovery of the radio by the arresting officers.

In a short reply, learned counsel for the appellants, Mr. Njenga, submitted that the report of theft from the motor vehicle was made at 10.00 a.m. the next morning, while the radio was recovered the previous night. The recovery of the radio therefore had no relation to the report, nor could it be said to be recent possession of stolen goods.

The facts of the case are that on 18th January 2004, Peter Gitau Kariuki (PW2), was walking at 8.00 p.m. from Gikuni to Nyathuna in Kiambu District, when he was attacked by three people. One of the attackers held him and demanded some money. PW2 hit the man and he fell down. The other men ran

after PW2 and hit him on the left eye and head and he fell. There was a struggle between PW2 and the attackers lasting 30 minutes. The attackers managed to take his shoes, alcatel mobile phone, and money. PW2 went and reported the incident to the chief. He later went and reported to Kikuyu police station. This was the subject of the first count.

On the same 18.1.2004 at 11.00 p.m., Evans Kiaraho Nyoro (PW3) was driving his vehicle KAA 031. He was going home and was alone. The vehicle went into a ditch. As he tried to remove the vehicle from the ditch, somebody entered the vehicle and removed the radio. He reported the incident to the police the next day. This was the subject of the charge of theft from a motor vehicle.

The appellants were arrested by APC Philemon (PW4) and APC Francis Ngugi on the night of the two incidents. That was after PW2 made a report to the chief's office about theft of his mobile phone, Kshs.8,000/= and safari boots. The arresting officers were on patrol and saw five to six young people. They arrested two at gunpoint, but others escaped. Those arrested were the appellants. According to the arresting officers, the 1st appellant had a motor vehicle radio, and the 2nd appellant had a mobile phone. The two were later charged with the offences.

Both appellants gave sworn testimony in their defences. In addition, they called one defence witness.

In his sworn defence, the 1st appellant stated that on the material day he had gone to a funeral fundraising. As he walked back home, he heard people approaching from behind. They were with David. Later they met police who arrested them, after shooting in the air. He denied committing the offences.

The 2nd appellant in his sworn defence, stated that he was from a funeral with the 1st appellant when they met 3 police officers who stopped them. Some people from behind ran away and the police chased them. After the chase, the police came back with pangas, rungus and a hammer. They arrested them. He denied committing the offences.

The defence witness **LUCY WANJIRU** confirmed that the appellants had attended a fundraising for a funeral that day.

We have re-evaluated and analysed the evidence on record as required of a first appellate court (see **OKENO – vs – REPUBLIC [1972] EA 32.**

The conviction of the appellants primarily hinges on identification. There was also alleged recent possession of stolen property. The identification is by a single identifying witness. In **ODHIAMBO – vs – REPUBLIC [2002] 1 KLR 241,** the Court of Appeal held –

"1 The court should receive evidence of identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification.

2. Where evidence rests on a single witness and the circumstances of identification are known to be difficult, then what is needed is other evidence either direct or circumstantial pointing to the guilt of the accused persons from which, the court may reasonably conclude that identification is accurate and free from possibility of error".

The offences occurred at night. The circumstances of identification for both offences were difficult. With regard to the 1st count the complainant PW2 claimed that he identified or recognized the two appellants. That there was in fact some security light from a nearby church. He also stated that he knew the two before by appearance. We note however, that there is no evidence as to how far the church was, how far the source of the light was, and the intensity of the light. In addition there is no evidence that the complainant described any of the appellants or stated that he could recognize any of them if he saw them, when he made the first report.

An identification parade was conducted five days afterwards. PW2 was said to have identified both the appellants. The two identification parades were conducted on the same day, that is 23.1.2004. The people who participated in both the parades, except for the appellants, were the same people. That was an error, as it was easy for the single witness (PW2) to notice the new person in the parade. We are not sure which of the two parades was conducted first. The identification parades cannot be relied upon, as they were irregularly conducted.

Considering all the evidence on record, we are of the humble view that the identification of the appellants is far from positive. It will not be safe to sustain a conviction on the same.

The other evidence against the appellants is that of possession of the mobile phone and the radio. The two items were recovered at night by the arresting officers. The arresting officers did not state in evidence that there was light at the scene of arrest which could make them see, who among the five or six young men that they chased, had the radio and the mobile phone. PW4 stated that they searched the appellants and found the 2nd appellant with a mobile phone in his pocket, and the 1st appellant with a vehicle radio. The appellants in their defences stated that the police came with items after chasing the other people. In our minds there is a doubt as to whether the radio and the mobile phone were actually found on the appellants. There is a real possibility that the same were recovered elsewhere or dropped by the people who ran away.

That is not all. The two items are common items and did not have any specific identifying marks. Even assuming for argument's sake, that the items were recovered from the appellants, we are still in doubt as to whether the said items were the actual items that were stolen from the two complainants. The learned trial Magistrate should have given the benefit of the doubt to the appellants.

Consequently, we allow the appeals, quash the convictions and set aside the sentence of the learned trial magistrate. We order that both appellants be set at liberty unless otherwise lawfully held.

Dated at Nairobi this 17th May 2007.

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LESIIT

JUDGE

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DULU

JUDGE

Read and delivered in the presence of –

1st appellant

2nd appellant

Mr. Njenga for the appellants

Mrs. Obuo for State

Tabitha/Eric – Court Clerks

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LESIIT

JUDGE

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DULU

JUDGE