



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

**Criminal Appeal 589 & 590 of 2004**

**JACKSON KINYA MUCHIRI.....1<sup>ST</sup> APPELLANT**

**CHARLES MURIUKI IRERI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From Original Conviction and Sentence in Criminal Case No. 10 of 2004 of the Principal Magistrate's Court at Kikuyu – M.W. Murage P.M)***

**JUDGMENT**

**JACKSON KINYUA MUCHIRI** (*the 1<sup>st</sup> appellant*) and **CHARLES MURIUKI IRERI** (*the 2<sup>nd</sup> appellant*) were jointly charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. They were also jointly charged with a third count of burglary and stealing contrary to section 304(2) and 279(b) of the Penal Code. They were also charged jointly with an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code.

After a full trial, they were acquitted of count 3 and the alternative charge. They were however convicted of counts 1 and 2, both of which were for robbery with violence. They were sentenced to suffer death as provided for by law. Being aggrieved by the decision of the learned trial magistrate they filed their appeals to this court which appeals were consolidated and heard together. Their grounds of appeal are similar and can be summarized as follows –

1. The learned trial magistrate erred in convicting them without appreciating that their identification was not positive in light of the fact that there was only moonlight and the complainants were totally drunk.
2. The learned trial magistrate erred in convicting them in light of contradictions in the prosecution case.
3. That the learned trial magistrate erred in convicting them while the US dollar note produced

exonerated them from commission of the offence.

4. That their defences were not given due consideration.

The appellants also filed written submissions.

Learned State Counsel, Mr. Makura, opposed the appeals, and supported both convictions and sentence. It was counsel's contention that the convictions were based on identification, recovery of stolen items, as well as the arrest of the two appellants.

Counsel contended that the appellants were positively identified by the complainant in count 1 that is PW1, and the complainant in the second count who was PW2. Counsel contended that though the incident occurred at about 11.30 p.m. there was sufficient moonlight which enabled PW1 to identify the appellants. Counsel further contended that there was electric light which enabled witnesses to clearly see and identify the appellants. Counsel contended that the identification of the appellants was positive and without possibility of error.

The learned State Counsel also contended that the appellants were arrested by PW4 immediately after the commission of the offences. PW4, who arrested the appellants, was led by PW1 who saw where the appellants had fled to after the commission of the offence. Counsel also contended that on arrest PW4 and PW1 recovered a SEIKO watch which was positively identified by PW1. Also 50 Congolese francs were recovered, which was positively identified by PW2. Therefore the appellants must have been the robbers.

Counsel also contended that it was not true that the learned trial magistrate did not give weight to the defences of the appellants. It was counsel's position that the defences were considered and dismissed by the learned trial magistrate.

In response the 1<sup>st</sup> appellant stated that he was arrested in the house in which he worked. That was the house where PW1 ran to during the robbery.

The 2<sup>nd</sup> appellant on the other hand submitted that PW1 ran to that house to ask for assistance. He contended that the 1<sup>st</sup> appellant was a friend of PW1, that was why she ran to that house for assistance and left her things behind in that house. He contended that it was not true that there was electricity light. He also contended that the money was found with PW3 and was the subject of a different case.

This being a first appeal, we are bound to evaluate the evidence a fresh and come to our own conclusions and inferences taking into account that we never saw nor heard the witnesses testify to determine their demeanour, and give allowance for that – see **OKENO – vs – REPUBLIC [1972] EA 32**.

The conviction of the appellants by the magistrate was partly based on visual identification. The magistrate stated thus in her judgment page J2 –

**“From the evidence of PW1 and PW2 both of them identified the accused as being among those who attacked them. After attacking PW2, accused immediately attacked PW1 and robbed her”.**

In our view the circumstances for identification were difficult. In **ODHIAMBO – vs – REPUBLIC [2002] 1 KLR 241** Chunga CJ, Lakha and ole Kewiua JJA held –

“1. Courts should receive evidence on identification with great circumspection particularly where circumstances are difficult and do not favour accurate identification”.

The robbery occurred at night. PW1 stated that there was moonlight and therefore he was able to identify both appellants. The robbers were four in number. This witness stated that she ran to a house of one Njoki for help. She did not recognize any of the robbers at the scene where the robbers initially confronted them. However at the house of Njoki, the robbers came and demanded for her SEIKO watch,

and money Kshs.1,300/= and she gave them. They also physically assaulted her. When they left her, she looked behind and saw the house they entered. She went home and later the same night brought the police to that house, a house for workers of Njoki, in which they found and arrested the two appellants. Clearly this witness does not state at what particular point she identified the two appellants. PW4, PC ALISON MWENDO who arrested by the appellants, was merely told by PW1 that she knew the house the robbers ran into. There is no evidence that PW1 told PW4 that she could identify the appellants. In our view there was no evidence that PW1 identified any of the appellants during the robbery.

PW2 SAMMY SUNGURA NDUNGU, husband of PW1 was hit and he fell unconscious. According to him the robbers were five in number, not four as stated by PW1. According to him also there was electricity light, contrary to what PW1 said. He claimed to have been robbed of Kshs.2,400/=, 2000 Tanzania notes and 50 Francs of Congo. He testified that he was faced by the 2<sup>nd</sup> appellant before he was hit. Therefore he recognized the 2<sup>nd</sup> appellant. We note that he was not present when arrest was made, and there was also no identification parade conducted for him to identify the robbers.

In our view, the evidence of identification on record is not without possibility of error. First of all the appellants were arrested because they were in a house pointed by PW1 that the robbers allegedly entered after the robbery, not because of any description given by PW1 of the robbers or any of them. It is not clear from the evidence whether PW1 could indeed identify the other two robbers. Secondly, no identification parade was conducted, for PW2 to confirm whether the two appellants were among the people who robbed them. That identification parade was so important. The failure to conduct an identification parade casts serious doubts on the identification of the appellants by PW2. It was imperative on the learned magistrate to have examined closely, the circumstances of identification of the appellants by each of the identifying witnesses – see **PAUL ETOLE & ANOTHER –vs- REPUBLIC CA No. 24 of 2000 (unreported)**. In our view, had the learned magistrate warned herself and closely examined the circumstances of identification by each witness, she would not have come to the conclusion that the identification was positive and without possibly of error.

The other complaint of the appellants is that the prosecution evidence had serious contradictions. The contradictions that we find in the evidence of the prosecution is on the lighting at the scene as well as the number of robbers. These contradictions, per se, on their own could not vitiate the conviction of the appellants if they were, indeed positively identified, or there was other evidence connecting them to the offence such as recent possession of stolen property. We find no evidence of contradiction that would vitiate the conviction. That ground fails and we dismiss the same.

We now turn to the recovery of stolen items. According to PW4, they found a cap belonging to PW1 in the house where the appellants used to live under the mattress. The 2<sup>nd</sup> appellant also took them back to the house in which the two appellants were arrested and the SEIKO watch of PW1 was recovered. According to PW1, when they went to the house with the police, they saw her cap which she identified as “coach”. After four days, she went to the police station and told the 1<sup>st</sup> appellant to give back her watch and she would withdraw the case. Then, after a further three days, she was called and found that the 1<sup>st</sup> appellant had produced the SEIKO watch.

In their defences both appellants stated that the cap and watch were in their house. They stated that PW1 went there that night of the alleged robbery when she was drunk. According to 1<sup>st</sup> appellant she asked for help from the 1<sup>st</sup> appellant who did not help her and pushed her out. When PW1 was pushed out, she left behind her cap and watch. The 2<sup>nd</sup> appellant on the other hand stated that when PW1 came to that house she made love to 1<sup>st</sup> appellant. PW1 then also wanted to make love to 2<sup>nd</sup> appellant who refused, as she was like her mother. She went away leaving her cap and watch. As she was annoyed, she brought the police.

The doctrine of recent possession of allegedly stolen goods clearly applies here. In **REX – vs – BAKARI s/o ABDULLAH (1949) 16 EACA 84**, the Court of Appeal for Eastern African held –

“..... cases often rise in which possession by an accused person of property proved to have been very

recently stolen has been held not only to support a presumption of burglary or breaking and entering but of murder as well, and if all the circumstances of the case point to no other reasonable conclusion the presumption can extend to any charge however penal”.

Clearly, the evidence on record shows that the 1<sup>st</sup> appellant had possession of the items allegedly stolen or robbed. He had control of the house in which those items were found, and does not plead ignorance of the presence of those items therein. However, he has given an explanation as to how those items were left behind there. 2<sup>nd</sup> appellant has also given an explanation. Both of them stated that they were left there by PW1 when she went to seek for help, and that in fact PW1 knew the 1<sup>st</sup> appellant before. The 1<sup>st</sup> appellant stated that he declined to assist PW1. The 2<sup>nd</sup> appellant infact stated that PW1 even made love to the 1<sup>st</sup> appellant and demanded to make love to him but he refused, as PW1 was an old woman.

The appellants have given an explanation as to how the items recovered in their house got there. That explanation has could possibly be true, taking into account that PW1 appeared to have been drunk. In our view, the explanation given by the two appellants as to how the items got into that house rebutted the presumption that they were the robbers.

That is not all.

The evidence and conduct of PW1 gives us some uneasiness regarding her credibility. In NDUNGU KIMANYI –vs- REPUBLIC (1979) KLR 282, the Court of Appeal held –

**“The witness upon whose evidence it is proposed to rely should not create the impression in the mind of the court that he is not a straight forward person, or raise suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence .....**”

The conduct of PW1 who is the witness relied upon by the magistrate, gives the impression that she is not credible or trustworthy. There is no evidence that she reported the incident to any neighbour or to the police. She did not give any explanation for the failure to report. That leaves us in doubt on her credibility and trustworthiness. The report to the police appears to have been made by third parties who never testified. In view of the circumstances of this case, we have to give the benefit of that doubt to the appellants, who have explained how the items which were found in the house where they were arrested came to be there.

For the above reasons, we allow the appeals quash the convictions and the sentence imposed by the learned trial magistrate. We order that both appellants be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 19<sup>th</sup> day of June 2007.

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**OJWANG**

JUDGE

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DULU

**JUDGE**

In the presence of –

1<sup>st</sup> appellant

2<sup>nd</sup> appellant

Mr. Makura for State

Huka/Eric – Court Clerks

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**OJWANG**

**JUDGE**

.....

**DULU**

**JUDGE**