REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 180 & 181 OF 2000

(From Original Conviction and Sentence in Criminal Case No. 1637 of 1999 of the Chief Magistrate's Court at Nakuru – S. MUKETI - S.R.M)

JOHNSON LUHOMBO BUKHALA ..……....……. 1st APPELLANT

DAVID ANYANDA MWORE …...……..……. 2ND APPELLANT

CHRISTOPHER NDUSI……..…..……..…..... 3RD APPELLANT

VERSUS

REPUBLIC …….…....…...…..…….…..….... RESPONDENT

JUDGMENT OF THE COURT

The three appellants; **Johnson Luhombo Bukhala, David Anyanda Mwore** and **Christopher Ndusi**, the 1st, 2nd and 3rd appellants respectively were charged with the offence of **robbery with violence** contrary to **Section 296(2) of the Penal Code** before the Chief Magistrate's Court in Nakuru.

The 1st and 3rd appellants also faced an alternative charge of **handling stolen property** contrary to **Section 322(2) of the Penal Code.**

The particulars of the offence as stated in the charge were that during the night of 10th-11th September, 1999 at Kaptembwa Estate in Nakuru District within the Rift Valley Province jointly with others not before court while armed with dangerous weapons namely; a home made pistol, toy pistol and Somali swords robbed **Annah Erumbe** of cash Shs.5,800/-, one radio, cassette, one video cassette, one video deck and one wrist watch all valued at Kshs.60,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Annah Erumbe.**

The particulars of the alternative charge of handling stolen property stated;

On the 18th day of September, 1999 at Ronda Estate in Nakuru District within the Rift Valley Province, jointly otherwise than in the course of stealing, dishonestly received or retained one radio cassette and a wrist watch the property of **Mannoh Kilach** knowingly and having reasons to believe them to be stolen or unlawfully obtained.

The appellants pleaded not guilty to the charge and after a full trial, were found guilty of the main count of robbery with violence and were sentenced to the mandatory death sentence as by the law provided.

The three appellants being dissatisfied with the conviction and sentence have appealed to this court and raised the following grounds of appeal:

¨ **The learned trial magistrate erred in law and in fact by convicting the appellants of the offence charged when the offence was not proved to the required standard in criminal law.**

¨ **In considering the evidence before the court, the learned trial magistrate misdirected herself and based the decision on the wrong principles.**

¨ **There was heavy reliance on the prosecution's evidence and the defence by the appellants was ignored.**

¨ **There were contradictions in the prosecution's case and the conflicting evidence raised certain doubts which ought to have been resolved in favour of the appellant.**

During the hearing of the appeal, the appellants also raised further grounds of appeal to wit:

q **The charge sheet is defective and**

q **The prosecution was irregularly conducted as the quorum of the court is not indicated on page 27 of the proceedings.**

The grounds of appeal raised by the three appellants are similar and during the hearing of this appeal and with the consents of the appellants the three appeals were consolidated for the purposes of the hearing and determination of this appeal.

The evidence that led to the conviction and sentence of the appellants was given by a total of eight (**8**) prosecution witnesses.

Briefly stated, it was the prosecution's case that during the night of 10th and 11th September, 1999 at Kaptembwa Estate in Nakuru, at Salga bar the 3rd appellant who was at the material time working as a watchman in the same establishment requested the complainant **Anna Irungu** (**PW 1**) to serve three people who were sitting on their own. That is when **PW 1** was attacked by the three people, they poured spirit in her eyes, switched off the lights, beat her up while demanding to be given the money. They stole from her Kshs.5,800/-, a cassette deck, radio and watch. The third appellant who was the watchman was nowhere to be seen when **PW 1** was struggling with the attackers.

PW 1 was admitted in hospital for four days as a result of the injuries she sustained. She was able to identify the 1st appellant during an identification parade. **Manoah Kilachi**, (**PW 2**) was the proprietor of Salga Bar and on the 11th September 1999, he received the report about the robbery at his premises, he reported the matter to the police and the scene of crime officers lifted the fingerprints from the beer bottles. He decided to look for the 3rd appellant who had disappeared from work and they travelled with police to Kakamega where they arrested the 3rd appellant in a house. They recovered a radio that was stolen on the material day and which belonged to his establishment. The 3rd appellant led the police to the 2nd appellant where they recovered a red knife that belonged to the same establishment. He also led them to another place where they arrested the 1st appellant who was found with a watch that belonged to **PW 1**. In the cycle mat where the 1st appellant was arrested, a cassette and a pistol were recovered.

P.C Jonesmas Langat, **PW 3** was the arresting officer. After the report of the robbery was made at Kaptembwa Police Post, he visited the scene and recovered a cap in the bar. After investigations, he was led to the house of the 2nd appellant where they recovered a photograph of the second appellant in which the 2nd appellant was taken while wearing the same cap that was recovered from the scene. They also arrested the 1st appellant who was found wearing a watch belonging to **PW 1** and a cassette.

Further, prosecution evidence was led by **P.C Livingstone Lihanda**, **PW 7** who dusted the fingerprints from the scene of crime and forwarded them to Nairobi for examination.

Joseph Chogo (**PW 8**) is a fingerprint expert attached to the C.I.D Headquarters. He examined the fingerprints marks and identified the same to belong the 1st and 2nd appellant.

Put on their defence, the appellants gave a sworn statement of defence. The 1st appellant denied having been involved in anyway with the offence that he was charged with. He gave a story of how he had hit a pedestrian with his bicycle, the police apprehended him and was later charged with the offence of robbery with violence.

Similarly, 2nd appellant gave a long story of how he had disagreed with the Investigating Officers after he repaired their vehicle and they refused to pay for his charges. He told the court he could not understand why he had been arrested apart from the fact that he had disagreed with **PW 4** and **PW 6**.

The 3rd appellant in his defence contended that he had taken leave from his employer to travel to his home in Kakamega. Regarding the radio that was found in his possession, he claimed that the same was given to him by his employer so that he could repay for the same in instalments.

It is on the basis of the above evidence that the appellants were convicted of the charge of robbery with violence. In the judgment of the trial court, the learned trial magistrate emphasized that the 1st appellant's fingerprints were lifted at the scene of crime and they were identified as his, besides the investigating officers recovered a cassette that was at the 1st appellant's premises and he was arrested with a watch belonging to the complainant.

More fundamentally, the 1st appellant was positively identified by **PW 1** during an identification parade.

As regards the 2nd appellant, the trial court similarly found the fingerprints that were dusted at the scene of crime were identified as his. A knife was recovered from his house that was identified as belonging to the establishment and a picture/photograph was recovered from his house in which he was wearing a similar cap. Thus the trial court found that the 2nd appellant was involved with the robbery.

With reference to the 3rd appellant, the trial court found that although there was no evidence that the 3rd appellant was involved with the robbery, his conduct of disappearing from his place of work immediately after the robbery was inconsistent with innocence. The court found that he the 3rd appellant was one of the principal offenders who should not only be found guilty of handling stolen property but with the main count.

This appeal was opposed by **Mr. Gumo**, the learned Assistant Director of Public Prosecutions on behalf of the State. He submitted that the conviction was based on the evidence of identification of the 1st appellant by the complainant. The robbery took place in a place where there was electricity light that illuminated the scene. *Secondly*, the 1st and 2nd appellants had handled beer bottles which were dusted for fingerprints which were identified as belonging to the 1st and 2nd appellants.

Thirdly, Counsel for the State argued that there is no defect in the charge sheet and the appellants were not prejudiced, and finally, this case was properly conducted by a qualified prosecutor throughout the hearing.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced before the trial court and arrive at its own independent determination on whether to uphold the conviction of the appellants. In so doing this court should bear in mind that it neither saw nor heard the witnesses as they testified and give due regard to that. (*See* case of **Njoroge –Vs- Republic [1987] K.L.R 19**)

We have re-evaluated the evidence that was adduced before the trial court and the submissions made

before us by the appellants and by the State. The issue for determination is whether the prosecution proved its case to the required standard of proof beyond reasonable doubt. The prosecution mainly relied on the evidence of identification of the 1st appellant by **PW 1** and on the evidence of recovery of stolen property and the fingerprints that were dusted from the scene of crime. The evidence by **PW 1** stated that when she was called by the watchman to attend to the three people who were sitting alone, the lights were switched off. It was about 10.30 p.m. The complainant did not record any distinctive features that enabled her to identify the 1st appellant. Moreover during cross-examination, **PW 1** said she was shown the suspect by the police. The second piece of evidence was the recovery of the watch that belonged to the complainant in possession of the 1st appellant.

This court is not satisfied with the evidence of identification more so because **PW 1** who was the eye witness did not give a description of the physical features of the persons who robbed her and her evidence during cross-examination to the effect. That she was shown the 1st appellant by the police, raises doubts in our minds on whether the 1st appellant was properly identified.

The principles governing the evidence of identification by a single identifying witness and the dangers of relying on such evidence were articulated by the Court of Appeal in the case of **Maitanyi –Vs- Republic [1986] K.L.R 198** where it was held

"***Although it is trite law that a fact may be proved by the testimony of a single witness. This does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult."***

On the issue of the recovery of a watch that belonged to the complainant and the fingerprints that were lifted from the scene, we find this circumstantial evidence not satisfactory for reasons that the 1st appellant could have gone to the bar and handled the beer bottles, among other customers. He could also have been involved in the robbery or he could have handled the stolen item namely the watch. In view of these doubts, we are of the view that they should be resolved for the benefit of the 1st appellant.

As regards the second appellant, the fact that a photograph was found in his house where he was taken with a cap similar to the one that was recovered on the scene, is not satisfactory evidence. Similar caps are likely to be found, as there was no evidence from the manufacturer that was the only cap.

On the evidence of fingerprints, we are of the opinion that the circumstantial evidence based on the fingerprints is not satisfactory granted that the 2nd appellant was not identified.

As regards the 3rd appellant, the trial court properly made a finding that he did not participate in the robbery but due to reasons that he escaped from employment, he was found with the radio that was stolen and that he knew the whereabouts of the 1st and 2nd appellants, he was found guilty and convicted.

We have re-considered the evidence against the 3rd appellant and we are of the view that the same was consistent and proved the alternative charge of handling stolen property. Accordingly, we quash the conviction on the first count and substitute it with that of a conviction of the alternative charge of handling stolen property. Considering the 3rd appellant has been in lawful custody for almost six (**6**) years, we hereby commute the sentence to the period already served.

The appeal against the 1st and 2nd appellants is also allowed, the convictions are quashed and unless otherwise lawfully held, the appellants are set at liberty forthwith.

It is so ordered.

Judgment read and signed at Nakuru on this 14th day of November 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE