



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1176, 1183 & 1187 of 2002

*(From original conviction and sentence in Criminal Case No. 6558 of 2001 of the Chief Magistrate’s Court at Kibera- C. Mwani-P. M.)*

FRANCIS KOIKAI KATIKENYA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1183 OF 2002

GEORGE ODERA MBAGO..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1187 OF 2002

JULIUS MUKURE LENGARE ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

The Appellants **FRANCIS KOIKAI KATIKENYA** and **GEORGE ODERA MBAGO**, and **JULIUS MUKURE LENGARE** were tried and convicted on one counts of robbery with violence contrary to Section 296 (2) of the Penal Code by the Principal Magistrate at Kibera.

Their co-accused in the Court below, Simon Mutetei Okumbe was however acquitted of the charge for lack of evidence under Section 215 of the Criminal Procedure Code. Upon that conviction the three

Appellants were sentenced to suffer death in the manner authorized by the Law.

The Appellants were dissatisfied with the conviction and sentence and hence individually and separately lodged these Appeals. The Appeals were subsequently consolidated for ease of hearing and as they arose from the same Criminal case in the subordinate Court.

The prosecution case was that on 18. 11. 2001 at about 2 a. m., PW1 and his wife, PW2 were in their house in Bulbul, Ngong when a gang of about 8 people forcefully entered their house. They were armed with spears, simis and rungun. They ordered PW1 to remove all the money and then tied both his hands and legs. They took his 2 T. V's, Kshs.15,000, C. D. bag and radio cassette. They continued harassing PW1 and PW2 for one hour demanding that PW1 shows them how a mobile works. They then left.

After they left, PW1 called the Police who came with a sniffer dog and perused the robbers into the forest. Later PW1 and PW2 learned that some people had been arrested with stolen items. They proceeded to Ngong Police Station and identified his red bag, 2 radio cassettes, one C. D., one radio cassette, one red Cap, computer bag and siragger sword given to him on retirement.

PW1 and PW2 were not able to tell from whom the items had been recovered. During the incident, PW1 was able to identify two of the robbers being the 1<sup>st</sup> and 3<sup>rd</sup> Appellant herein. He did so as a result of the light emitted from the support light when he colleagues were shining it so as to enable PW1 show the 1<sup>st</sup> Appellant how the mobile worked. By the same means he identified the 3<sup>rd</sup> Appellant as he demanded money from his wife PW2 whilst holding a knife. As for PW2 she only identified the 3<sup>rd</sup> Appellant who came to her brandishing a knife and demanding money. She had the kitchen lights on and was thus able to see the 3<sup>rd</sup> Appellant clearly.

PW3 was a police officer testified as to the recovery of the items belonging to the Complainant. He stated that on 28. 9. 2001 whilst at the Police station, a suspect by the Ibrahim Maloba agreed to lead them to Dagoretti where some of his accomplices were said to be. He first led them to the house of the 3<sup>rd</sup> Appellant where they recovered some electronic goods and radios, whereas in the house of the 4<sup>th</sup> accused person, who was acquitted, they recovered assorted clothing's and a safari bag. Finally in the house of the 1<sup>st</sup> Appellant they recovered a video deck, a bicycle and clothes. They circulated the information regarding the recovered items and some Complainant and went and identified some of them. The Appellants were then arrested and charged with instant offence.

Put on the Defence, both Appellants elected to make unsworn statements of defence and denied their involvement in the crime. 1<sup>st</sup> Appellant testified that on 17<sup>th</sup> he was on his way from Nkoroi riding a bicycle. At Bisina he bumped into 2 police officers who stopped him. They asked him for his full names where he was coming from as well as what he does for a living. He provided the information.

As they were talking a Police Land Rover came and he was forced into it plus the bicycle. He was taken to Ongata Rongai Police Station and after sometime he was later charged with the instant offence.

As for the 2<sup>nd</sup> Appellant, he testified that on 18<sup>th</sup> he had attended a burial function at Karen and was on his way to Kibera. At a bus stage he stopped a motor vehicle thinking that it was a matatu. The vehicle turned out to be a Police vehicle. The Police asked him where he was coming from at that hour (9.30 p. m.) and he told them. However the Police accused him of being a thief at the bus stage. They arrested him and took him to Lang'ata Police Station where he was held for one week and thereafter was charged alongside other people he did not know.

As for the 3<sup>rd</sup> Appellant he stated that he was on his way from Dagoretti slaughter house where he works when he met with 2 Police officers who demanded to know where he works and his ID Card. He did not have the ID card and was then handcuffed and taken to hardy Police Station. After 2 weeks he was transferred to Ongata Rongai and hence to Ngong. He was then brought to Court and charged with an offence he knew nothing about. As already stated, the Appellants were dissatisfied with their conviction and sentence, hence this Appeal.

The Appellants have raised the same grounds of appeal which revolve around; evidence of identification, recovery of the exhibits, defective charge sheet and failure to give adequate consideration to the Defences advanced by the Appellants.

At the commencement of the hearing of the appeal, the Appellants were with the permission of the court allowed to hand in written submissions. We have carefully considered the said written submissions.

On behalf of the State, Mrs. Obuo Learned State Counsel conceded the Appeal in respect of the 1<sup>st</sup> and 3<sup>rd</sup> Appellant. In conceding to the Appeal, the Learned State Counsel submitted that the offence was committed at night. The Complainants did not know the robbers before hand. No identification parade was conducted in respect of the Appellants. No identification parade was conducted in respect of the Appellants. In those circumstances, Counsel submitted that the evidence on record was that of dock identification of the Appellant which is worthless. That being the case, Counsel submitted, there was no sufficient evidence against the 1<sup>st</sup> and 3<sup>rd</sup> Appellant to convict them. In any event the circumstances of identification were also not favourable. With regard to the 2<sup>nd</sup> Appellant, the state opposed the Appeal and supported both the conviction and sentence. The Learned State Counsel submitted that a radio was recovered from his place 10 days after the offence was committed. The said radio was identified by the Complainant. Counsel submitted that the doctrine of recent possession applied, as the Appellant did not give any explanation where he got the radio.

Regarding the defective charge sheet, Counsel submitted that through there were variances between the charge sheet and the evidence tendered in Court regarding the date when the offence was committed, the mistake is nonetheless curable. Counsel concluded her submissions by stating that there was sufficient evidence against the 2<sup>nd</sup> Appellant and therefore urged us to dismiss his Appeal.

Being the first appellate Court, we shall subject the entire evidence tendered in the lower Court to a fresh evaluation and assessment so as to reach our own conclusion as to the guilt or otherwise of the appellants (SEE OKENO –VS- R (1972) E.A. 32.)

On the question of Identification we note from the record that both PW1 and PW2 claimed to have managed to identify the 1<sup>st</sup> and 3<sup>rd</sup> Appellants at the scene of crime. PW1 testified thus:

***“... I remember the Epsom who was asking me how the mobile works. It is the 1<sup>st</sup> accused. I have never seen him before. His colleague was sporting for him is I teach him how the mobile worked. I saw the 3<sup>rd</sup> accused too. I was able to identify him because he is the one who asked my wife for money as the other were sporting for him. He was holding a knife.”***

As for PW2 eh evidence on identification was as follows:-

***“... I can clearly identify the 3<sup>rd</sup> accused who came to me for money and was asking for how the mobile works....”***

Under cross-examination I had left the kitchen light and the lights was near where I was. You came to me asking for money holding a knife. You also had a torch.... I was able to pick your physical appearance.

Incidentally in the subordinate Court during the trial, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused are in that order the Appellants herein. According to these witnesses they were aided in identifying the Appellants through torchlight and some light from the kitchen.

In the case of CLEOPHAS OTIENO WAMUNGA –vs- REPUBLIC, CR. APP. NO. 20 OF 1982, at KISUMU the Court of appeal stated:-

***“Evidence of Visual Identification in criminal cases can bring about miscarriage of justice and it is of***

***vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the Defendant depends wholly or to a great extent on the correctness of one or more Identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the Defendant on reliance on the correctness of the identification. The way to approach the evidence was succinctly stated by Lord Widgery, C.J. in the well known case of REPUBLIC –VS- TURNBULL (1970) 3 ALL E.R. 549.....”.***

The need for caution was all the more important in the instant case considering the manner in which the offence was committed. However the trial Court never cautioned itself of the danger of convicting the Appellants on that evidence. This was a serious non-direction.

It is on record that the offence was committed at night and the robbers took a while with the complainants before they left. They were armed with torches from whose light PW1 and PW2 managed to identify the 1<sup>st</sup> and 2<sup>nd</sup> Appellant. There was also light from the kitchen which PW2 claimed assisted in identifying 3<sup>rd</sup> Appellant. Was the identification of the Appellants in the circumstances aforesaid watertight and free from possible error? We do not think so. As stated in the celebrated case of ***REPUBLIC –VS- TURNBULL (SUPRA)***, the Court is expected to make certain inquiries regarding light. In the instant since the Prosecutor had failed to lead evidence regarding the light case the trial Magistrate ought to have inquired as to the intensity of the torchlight as well as the light from the kitchen. The Court was not told the number of torches that were involved and their sizes. This would have assisted to determine the beam and intensity of the light. Further, the distance between where the robbers were in relation to PW1 and PW2 was not explored nor disclosed in the evidence tendered. Worse still there was no inquiry made as to how long the torchlight was focused on the 1<sup>st</sup> and 3<sup>rd</sup> Appellants as to enable PW1 and PW2 positively identify them. Finally nowhere in the evidence is it shown that PW2 kept the robbers under any close observation. We are told that there were more than 8 robbers involved. This is by far a big ground in a house and or room. It is not said anywhere in evidence, that once these people entered the house, they all stood at one place. If anything the evidence seem to suggest that there was a lot of movement in the house as the robbers removed the items from the house. In those circumstances we are not satisfied that the conditions prevailing were ideal for a positive identification of the 2 Appellants. We are fortified in this view by the fact that none of the two witnesses were able to give a description of the two Appellants to the Police officers who visited the scene soon after the incident and attempted to trace the robbers with a sniffer dog.

In the case of ***REPUBLIC –VS- MOHAMED BIN ALOI (1942) EACA 72***, it was held that:

***“.....The first report should be put in evidence so as to check whether or not the witness identified the accused person and by what means.....”***

Unfortunately this was not done with the consequence that, the probative value of the evidence of identification if any, was whittled down.

The matter was further compounded by the failure by the Police to conduct an identification parade in respect of these Appellants. There was absolutely no reason why an identification parade was conducted in respect of the 1<sup>st</sup> ad 2<sup>nd</sup> Appellant so as to enable the two witness identify the Appellants. Had it been done and the two witnesses successfully picked out the Appellants this would have provided the necessary corroboration of their evidence regarding the identification of the Appellants at the scene of crime.

On the basis of the foregoing we agree with the Leaned State Counsel that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were not positively identified at the scene o crime. Their purported identification by PW1 and PW2 in Court can only be classified as in Court can only be classified as dick identification. It has been held severally that dock identification without an earlier identification parade is almost worthless (See ***KIARIE VS REPUBLIC (1984) KLR 735 and NJOROGE VS REPUBLIC (1987) KLR 9***. The Learned State Counsel was therefore right in conceding the Appeal in respect of the 1<sup>st</sup> and 3<sup>rd</sup> Appellants on that score.

As for the 2<sup>nd</sup> Appellant, the State supports his conviction and sentence on the doctrine of recent possession. According to the Learned State Counsel the 2<sup>nd</sup> Appellant was found in possession of some of the items stolen from the Complainant during robbery a few days, indeed ten days after the robbery. This possession and recovery therefore connects him with the crime although he was not seen or identification at the scene of crime. Dealing with the doctrine of recent possession, the Lord Chief Justice of England in the case of REPUBLIC VS LOUGHIN 35 CR. APP. NO. 69

**“.....If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop breaker.....”**

And in the case of STEPHEN NJENGA MUKIRIA & ANOR –VS- R, NAKURU CR. APP. NO. 175 OF 2003 (UNREPORTED), our own Court of Appeal held that:-

**“.....The doctrine of recent possession may be relied upon not only to prove a charge of theft but other charges like robbery with violence, manslaughter, murder e.t.c.....”**

When the doctrine is applied:

**“.....the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he had in his possession had been stolen, had been stolen a short period prior to the possession, that the lapse of time from the time of the loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.....” (SEE MAINGI –VS- R (1989) KLR 225.**

What are the items that recovered from the 2<sup>nd</sup> Appellant, soon after the robbery. According to the sate Counsel it was a radio. This radio it is alleged belonged to PW1 and it as positively identified by him as well as PW2. according to PW3 who recovered the items for the Appellant, he testified that: “... **He tool us tot eh 2<sup>nd</sup> accused house where we got 3 radios...**”

From the foregoing certain pertinent questions arise. Is the radio the same as the radio, whereas what was recovered from the Appellants are three radios. Further it is not clear what was about the radio or the radio cassette that made it possible for both PW1 and PW2 to identify them as theirs. They never produced any evidence documentary or otherwise to show that indeed the radio and or radios belonged to them. It is not sufficient just to claim without any back up evidence that a certain item belongs to you. Radios and or radio cassettes are items of common use and can be found everywhere. It is therefore necessary for whoever claims ownership to strictly proof such ownership. There was no such prove in this case. We note that in his defence the 2<sup>nd</sup> Appellant basically denies that anything was recovered from him. He actually raised an alibi defence. However in his testimony, PW3 stated that during the recovery, he called the Landlord to the 2d Appellants to witness the recovery. Surprisingly and for no good reason this alleged landlord was not called t testify. Further one would have expected that an inventory of the items recovered would have been prepared and signed by both the Appellant and PW3 and witnesses as necessary. This too was not done. In the light of the defence raised by the 2<sup>nd</sup> Appellant, a doubt is raised as to whether the said items were recovered if at all in the presence of the Appellant. In her judgment, the Learned Magistrate stated:-

**“.....The 2<sup>nd</sup> accused was found in possession of the two radios identified by PW1 and PW2 as theirs. He would not say where he got the same....”**

It is not correct that the 2<sup>nd</sup> accused was found in possession of radios. Rather and according to the evidence, 3 radios are alleged to have been recovered from him. In the alternative count of handling stolen goods contrary to Section 322 (2) of the Penal Code, faced this Appellant alone, the Appellant is alleged to have dishonestly had held a part from other items, one sonny radio cassette.

In our view there are far too many doubts raised regarding the recovery , identity and ownership of the radio and or radios and or radio cassettes a to make the Application of the doctrine of recent possession impossible.

In our view the Learned trial Magistrate was wrong to invoke the said doctrine as well.

That being our view of the matter and the Appellant having not been identified at the scene of crime by any of witnesses we find that his Appeal ahs merit as well and we allow it.

In the upshot, all the Appellants have succeeded in their Appeals. Their Appeals are therefore allowed, conviction quashed and sentences imposed on then set aside. They shall forthwith be set at liberty unless they are otherwise lawfully held.

Dated at Nairobi this 6<sup>th</sup> day of June, 2006.

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**LESIIT**

**JUDGE**

.....

**MAKHANDIA**

**JUDGE**