REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 494 of 2002

(From the Original Conviction and Sentence in Criminal Case No. 7031 of 2002 of the Senior Principal Magistrate's Ms. Mwangi, SPM Court at Kibera)

NICHOLAS MUTISYA MBUVI …………………..........................………….... APPELLANT

VERSUS

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

JUDGMENT

NICHOLAS MUTISYA MBUVI, the Appellant, was charged with robbery with violence contrary to Section 296 (2) of the Penal code. The particulars of the offence being that on the 1st day of November, 2001 at Karen, within Nairobi Area, jointly with others not before court robbed, ***FRANCIS KAHURA KURIA*** two televisions, video machines and two amplifiers total valued at Kshs.55,000/= and at or immediately before or immediately after the time of such robbery wounded the said Francis Kahura Kuria.

At the conclusion of the trial Ms. Mwangi, Senior Principal Magistrate, Kibera, made a finding that the offence of robbery with violence contrary to Section 296 (2) had been proved. She then convicted the Appellant accordingly and sentenced him to death as required under the law.

The facts relied upon by the Prosecution are brief and may be summarised as follows:- PW1 and PW2 who are husband and wife respectively were asleep in their house at Karen when at about 10.30 p. m. their door was forced open and some people got in and took 2 T.V. sets a Sony and a Greatwall, 2 Amplifiers and a video. As they were taking these items one of the intruders demanded money from PW1 but when he could not give he was suddenly hit on the forehead and injured. The intruders then left locking them in the house from outside. Once gone PW1 and PW2 alerted security guards who responded and opened the door. PW1 was then taken to hospital and admitted for one day. The same intruders had also robbed PW1's neighbour and seriously injured him. The neighbour eventually succumbed to the injuries and passed on. After being discharged ffrom hospital PW1 reported the incident to the Police where he learned that some of the intruders had been cornered in the neighbouring compound and one of them clobbered to death. However others managed to escape. They left behind some of the items which had been stolen from PW1's house. These were the two T. V.s, amplifier and video. In the process of the robbery, PW1 alleged that he had managed to identify one of the robbers with the assistance of the security lights. That person was the Appellant. Subsequent thereto and as PW1 was proceeding to Mutuini he saw the Appellant. He alerted the Police and together they proceeded to the Appellant's house. He was arrested and the house searched where upon a speaker, a spanner and a screw driver recovered. According to PW1 there had been a robbery on him again the previous night and two bikes stolen. PW1 was able to positively identify the speaker recovered from the Appellant's house as

his. He had done some modifications on it. The Appellant was then charged.

Put on his defence, the Appellant elected to make an unsworn statement of defence. He stated that on 7. 11. 2001, he woke up and went to work as a tout. However he found the motor vehicle damaged and came back home. At about 8.30 a. m. Police came and took him to the Police station. He remained at the Police station for 5 days and was subsequently charged for an offence he knew nothing about.

In his petition of Appeal, the Appellant faults his conviction on alleged identification, possession of alleged stolen items, defectiveness of the charge and failure to consider his defence adequately. In support of the Appeal, the Appellant submitted written submissions that we have carefully read and considered.

The Appeal was opposed. Mr. Makura, Learned State Counsel submitted that there was sufficient evidence to sustain the conviction. That PW1 was positively able to identify the Appellant at the scene of crime as there was electric light. Similarly PW1 was able to identify the Appellant the following day and let the Police to arrest him. On his arrest, the house was searched and items which had been stolen from the Appellant during the robbery to wit a speaker, spanner and screw driver recovered. To counsel therefore the doctrine of recent possession applied. That evidence alone according to learned state counsel was sufficient to convict the Appellant. As regards the Appellant's defence, Counsel submitted that the Appellant's brief statement of defence was duly considered by the trial Magistrate before it was rejected. Counsel therefore urged us to dismiss the Appeal and confirm the sentence.

Re-evaluation of evidence is indeed a matter of law since there is a duty imposed on us as the first Appellate Court to reconsider the evidence, evaluate it and draw our own conclusion in deciding whether the Judgment of the trial Court should be upheld. That duty has been spelt out in many cases including ***OKENO VS REPUBLIC (1972) EA 32.*** We shall endeavour to fulfill this mandate.

On identification, we note that the incident took place at about 10.30 p. m. Both PW1 and PW2 testified to that effect. They were asleep and it was at night. Identification at night whether by a single witness or not is at best treated with great caution and must be watertight to found a conviction. See ***MAITANYI VS REPUBLIC (1986) KLR 98.*** Regarding how PW1 identified the Appellant, this is how he delivered himself:

"……***The security lights were on when they got into the house so I saw them…"***

However PW2, the wife of PW1 who was in the same house stated:

"…***..I saw person come in and walked where the video and T. V. was and ordered us to cover ourselves…. I never saw them because I covered my self….."***

It would appear that both PW1 and PW2 were caught unaware whilst still asleep in bed. Before they could get out of bed they were ordered to cover their faces. There is no evidence on record that there was electricity in the house. PW1 talks of security light. To our mind security light are never mounted inside the house. Ordinarily they are always located outside the house. That being the case, how then would PW1 have managed to see any of the robbers. If PW1 saw the robbers as they entered his house if at all, the light emanating from the security lights outside would be shinning on them from behind and in such case the face of any robber would not have been exposed in such a manner as to enable PW1 see it. In our view because both PW1 and PW2 were caught by the robbers unawares whilst still in bed, ordered to cover their faces and as the location of the alleged security light if at all and its intensity being unknown on the recorded evidence, PW1 could not have been in a position to identify any of the robbers. Our conclusion aforesaid is buttressed further by the fact that both PW1 and PW2 did not specifically mention the role played by the Appellant in the robbery, nor did they give a description of the Appellant to the Police.

PW3 also in his evidence claimed to have identified the Appellant. He testified that:-

"…***..The person who was calling me to go to him is the 4th (sic) accused before Court. He was***

following me carrying a heavy thing. There are security lights in the compound and events (sic) PW1's house are security lights…."

Before this alleged identification, PW3 had earlier on testified thus:-

"……***I heard the car being touched and I went to look. I met with somebody with a torch torching (sic) me to go where he was. I ran and pressed the alarm. I disappeared and heard the bang…."***

On the basis of the foregoing evidence certain pertinent questions arise. – If there was security lights why would the robbers be using a torch? Further if the torchlight was directed at PW3, how could he then have been able to see the robber he claimed to be the Appellant. Finally having seen this person with a torch, and decided to run and press the alarm and having disappeared, at what point then was he able to observe the Appellant and subsequently identify him. For the robbers to have been using torches would suggest that either there was no light in the compound or even if there was, it was not illuminating sufficiently as would have enabled PW3 to identify the Appellant.

These are the only witnesses who claim to have identified the Appellant. It as been said by the Court of Appeal in ***CLEOPAS OTIENO WAMUNGA VS REPUBLIC(KISUMU) (unreported)*** that:-

"…***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 on the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, C. J. in the well known case of REPUBLIC VS TURNBULL (1476) 3 ALL E R 549…."***

Unfortunately the Learned trial Magistrate in the instant case did not deem it necessary to caution herself nor did she even attempt to make the necessary inquiries regarding the light in terms set out in ***REPUBLIC VS TURNBUL (Supra).*** These omissions were fatal to the prosecution case. As we have already stated on our own evaluation of the evidence on record on this aspect of the matter leaves us very skeptical of the alleged identification of the Appellant by PW1 and PW3.

The conviction of the Appellant was also found on the alleged recovery from his house of a speaker which had been stolen from both PW1 and PW2 during the robbery. PW1 testified on the issue as follows:-

"…***..The previous night they had stolen our two bikes and we had reported. A s we went to Mutuini we saw the accused. I was able to identify him and reported to police. We went to his house and there I found my robbed off speaker, spanner and screw driver the 1st night…."***

As for PW2 she testified on the same issue as follows:-

"…***..The previous night they had stolen two bicycles, and car speak ad tools. I learned the speaker was found but not the bicycles….."***

It does appear that the complainant was a victim of two robberies. In the first robbery two bicycles, speaker, spanner and screw driver were stolen. All the witnesses who testified confirmed that they never identified whoever committed the first robbery. This 1st robbery was not the subject of the instant charges. Indeed a perusal of the charge sheet indicates that it relates to the second robbery. The items stolen and particularized in the charge sheet are two television, video machine and two amplifiers. These items were stolen during the second robbery. However they were not recovered in the house of the Appellant but in the neighbouring compound where they were abandoned by the robbers when they were confronted by the neighbours and one of them lynched. There is no mention on the charge sheet of the speaker, spanner and screw driver. Indeed the Appellant was not charged with the first robbery. He faced the robbery committed on PW1 and PW2 the second time. Consequently the items which were recovered

in the Appellant's house and which were allegedly stolen during the 1st robbery and which were introduced in evidence and marked as exhibits 5 and 7 had no relevance with the instant charge.

These exhibits ought to have been excluded as they were not connected to the charge facing the Appellant. Alternatively the Appellant ought to have been charged in connection to the theft that took place during the first robbery. That being our view of the matter, the doctrine of recent possession would not be applicable in the circumstances of this case. In the premises, we would agree with the submissions of the Appellant that the recovered items had been stolen earlier and not in the robbery incident that culminated in him being charged with instant offence. That being the case we would further agree with his submissions that there was therefore no concrete evidence to connect the Appellant with exhibits 1-4 nor exhibits 5-7. The doctrine of recent possession was therefore wrongly invoked by the learned trial Magistrate to sustain the conviction against the Appellant.

Having considered what the Appellant has put before us in his petition of Appeal and written address and in the light of the scope of the duty of this Court, we are not satisfied that the conviction of the Appellant is safe.

In the result, this Appeal is allowed, the conviction is quashed and the sentence is set aside. The Appellant shall be set free forthwith unless otherwise lawfully held.

Dated at Nairobi this 6th day of June, 2006

………………………………………

LESIIT

JUDGE

……………………………………….

MAKHANDIA

JUDGE