REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 358 & 359 of 2002

(From original conviction and sentence in Criminal Case No. 2462 of 2001 of the Senior Resident Magistrate's Court at Molo – R. KIRUI - SRM)

GEOFFREY NJIU NDUNGU…….....…..1ST APPELLANT

MICHAEL MUIRURI NGANGA…….....…2ND APPELLANT

VERSUS

REPUBLIC…….....…….…….…….RESPONDENT

JUDGEMENT OF THE COURT

Geoffrey Njiu Ndugu and **Michael Muiruri Nganga,** the 1st and 2nd appellants respectively were charged with the offence of robbery with violence contrary to section 296(2) of the penal code before the Senior Resident Magistrate's Court at Molo.

The appellants were among the nine (9) accused persons who were charged before the lower court and in the course of trial, the 4th and 7th accused persons escaped from lawful custody while the 5th accused died while trying to escape from lawful custody. The 2nd, 3rd, 8th and 9th accused persons were acquitted and the 1st and 6th accused who are the appellants were convicted and sentenced to the mandatory death sentence.

The appellants also faced an alternative charge of handling stolen property contrary to section 322 (1) (2) of the penal code.

The particulars of the charge were that on the 5th day of December, 2001 at Mwithirithia Estate within Molo township in Nakuru District of the Rift Valley Province, while armed with home made gun, pistols, simis and pangas the appellants jointly robbed **John Wamagana Kungu** Cash kshs.28,000/=, two leather jackets, seven compacts, one small calculator, one Eveready torch, two radio cassettes – panasonic and sanyo with one speaker each, one electronic plug, one electric transformer, three wall clocks, one intercom set, one complete set of remote alarm, one camera, one graphic equalizer, one cordless telephone handset, two travelling bags, one kaunda shirt, three shorts, one long trouser, two coats, one

cloth sack containing two rolls of white elastic bands all valued at kshs.63,230/= and at or immediately before or immediately after the time of such robbery threatened to use actual robbery to the said **John Wamagana Kungu**.

The 1st appellant faced the alternative charge of handling stolen property and the charge stated.

The particulars of the charge were that, on the 20th day of December, 2001 at Karatina Trading Centre within Nakuru District of the Rift Valley province, other than in the course of stealing, he dishonestly retained one leather jacket, one small calculator and seven compacts all valued at Kshs.3,100/=, knowing or having reasons to believe them to be stolen property or unlawfully obtained.

The second appellant also faced the alternative charge of handling stolen property contrary to section 322(1) (2) of the penal code and the charge reads as follows:

"***On the 18th/20th day of December, 2001 at Miti Mingi/Kerisoi farm in Molo in Nakuru District of the Rift Valley Province otherwise in the course of stealing dishonestly retained one cloth sack containing two rolls of elastic bands (****white in colour****) one complete set of microphone, one radio cassette make sanyo, two bedside speakers and one transformer all valued at Kshs.12,450/= knowing or having reasons to believe them to be stolen or unlawfully obtained."***

The appellants were tried by the Senior Resident Magistrate at Molo. They were convicted of the main charge and sentenced to the mandatory death sentence as provided by the law.

The appellants being dissatisfied with the conviction and sentence passed against them, have filed this appeal and raised several grounds of appeal. During the hearing of this appeal both appeals Nos. 358 of 2002 and 359 of 2002 were consolidated under the holding file No. 358 of 2002 for purposes of hearing and determination of the appeal. The appellants are dissatisfied with judgement of the trial court for reasons that there was no evidence of identification of the appellants and the circumstances of the identification of the 1st appellant was made under difficult circumstances.

The trial court was faulted for relying on a statement under inquiry by the 5th accused person implicating the appellants which statement was retracted during the hearing.

The appellants also contended that vital witnesses were not called and the prosecution failed to establish its case beyond reasonable doubt. The appellants also attacked the prosecution for failure to ensure that an identification parade was conducted, and the trial court for rejecting their defences and failing to give reason for such rejection.

During the hearing of the appeals, the appellants who were unrepresented sought to introduce further grounds of appeal and written submissions which were duly accepted. The appellants in the supplementary record have raised an additional ground of appeal that the charge as drawn on the main count was defective for failure to define what is a dangerous weapon. All the other grounds in the supplementary records are cross-cutting on the above issues and thus need not be set out. The evidence that led to the conviction and sentenced of the appellants was led by a total of seven (7) prosecution witnesses.

Briefly stated, it was the prosecution's case that on 5th December, 2001 at Mwithirithia Estate, Molo, **John Wamagana Kungu (PW1)** was in his house with his son aged 15 years by the name **Victor Nderi Kungu (PW 2)** when a group of people entered his house and demanded to be given money. They were armed with pistols and riffles. The complainant gave them Kshs.25,000/= and after they asked how much it was 9th accused who was at the door switched off the light. PW 1 said that he identified the first appellant when he stepped on him and removed the clothes and compact disc from the bed. He said he requested him not to take the compacts as they contained the complainant's christmas songs and the 1st appellant said they too listen to christmas songs.

PW 1 said the 1st appellant threatened to injure him if he failed to produce more money. It was at that moment that neighbours raised an alarm and the attackers disappeared in the dark. The complainant reported the matter to the police and all the items that were stolen were reported as recorded in the charge sheet. PW1 was later called by police on 9th December, 2002 and in the company of **P.C. James Rono (PW 4)**, they recovered a leather jacket, a torch, some cassette tapes, from the house of the 1st appellant. The first appellant also led them to a house of his grandmother from where they recovered a calculator. On the 18th December, 2002 PW 1 once again accompanied the police to the house of the 2nd appellant where they recovered elastic bands and the bag that was stolen from him.

In summary, the evidence that connected the appellants to the offence was that of the complainant, who saw the 1st appellant during the robbery. Items that were stolen during the robbery were recovered from the 1st appellant a short while after the robbery and thus the doctrine of recent possession was applied by the trial court to connect the 1st appellant with the robbery. The other piece of evidence relied on by the trial court was that the 1st appellant was named by the 5th accused in the lower court in his confession which was accepted in court as evidence, the cautionary statement under inquiry was produced as exhibit No. 29.

As regards the 2nd appellant, who was the 6th accused in the trial court, the evidence that led to his conviction and sentence was the recovery of elastic bands, a bag and speakers and radio cassette. The 2nd appellant was also mentioned by the 8th accused person as the one who sold to her the stolen items a few days after the robbery. He was further implicated in the statement under inquiry by the 5th accused. It is on the basis of the above evidence that the appellants were put on their defence. The 1st appellant gave a sworn statement of defence and denied that any items were recovered from his house. He testified that he had been arrested while on the road. He denied any involvement with the robbery. The second appellant gave unsworn statement of defence and alleged that he purchased a radio, 2 speakers and a set of elastic bands from one Peter Njenga, he denied having been involved with the robbery.

On the part of the state, the learned Senior State Counsel Mr. Koech left this matter for consideration and determination by Court. We have given due consideration to the entire evidence and we have taken into consideration that this being the first appellate court we are mandated to re-evaluate and subject the entire evidence to independent scrutiny so as to reach our own independent determination on the guilt or otherwise of the appellant. ***(See the case of Okeno -Vs – Republic [1972] E.A. page 32).***

This appeal turns on three principal issues:

Ø **Identification of the appellants.**

Ø **Recovery of stolen items in possession of the appellant and reliance on evidence of an accomplice.**

Ø **Whether the charge sheet is defective.**

On the issue of identification, it is only the 1st appellant who was identified by PW1 during the robbery. The robbery took place at night according to the PW 1, he was ordered to give money and after he produced the money, the 9th accused person switched off the light. He said he was able to see the 1st appellant who stepped on him and took away the compacts from the bedroom and even talked to him. It would appear this happened when the lights had been switched off as according to PW2 , the lights were on for a period of about 5 minutes. Certainly the identification took place in what would be called difficult circumstances. It was held in the case of ***MAITANYI –VS- REPUBLIC 1986 1 KAR 75***.

"**Subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but the rule 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.**

In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of single witness can safely be excepted from the possibility of error."

Similarly, in the present case it is evident the trial court did not rely on the sole evidence of identification. The evidence by PW 1 and **PW4** confirm that on 9th December, 2002, PW 1 accompanied Police officers who were acting on a tip off, they met the 1st appellant who led them to his house where they recovered, a leather jacket, cassettes and a torch. These items were identified by PW 1 as part of his stolen items. The 1st appellant led the police to his grandmother's house where they recovered another stolen item, a calculator. These items were recovered a few days after the robbery and thus the doctrine of recent possession was applied by the trial court. This doctrine stems from the provisions of the **Evidence Act Section 119** which provides:-

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being made to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case."

The appreciation of this doctrine is well articulated in the case of ***Republic –Vs- Hussein S/O Mohamed [1948] 25 EACA 121*.** In this case, the 1st appellant was found in possession of stolen items only a few days after they were stolen, the 1st appellant had a duty to offer a reasonable explanation to rebut the presumption of fact raised by that possession that he was either the thief or a guilty receiver.

The 1st appellant denied possession and in view of the evidence by PW 1 and PW 4 we are satisfied that the trial court properly rejected the defence.

As regards the 2nd appellant, he said that he bought the items that were found in his possession from **Peter Njenga** at a place called **KEEP LEFT**. This defence by the 2nd appellant has to be weighed against the evidence of the 8th accused person who said that the items that were found in her possession were purchased from the 2nd appellant and the 7th accused person who were all introduced to her by the 5th accused person. This evidence of an accomplice must be treated with caution and we find it weak to sustain a conviction.

The 2nd appellant was not identified by the complainant and his only connection to the robbery was the possession of the items that were found in his possession which he said he purchased. We have carefully re-evaluated the evidence and we are satisfied that since there was no evidence of identification by the complainant of the second appellant the doctrine of recent possession cannot be safely applied in the circumstances of the present case to connect the appellant to the robbery.

Taking into consideration the totality of the facts and all circumstances under which the items were recovered from the 2nd appellant especially the defence by the 2nd appellant, we are satisfied that evidence on record in our view is weak to sustain a conviction of the 2nd appellant on the charge of robbery with violence. We find that there is ample evidence to sustain the alternative count of handling stolen property.

On the issue of whether this court should consider substituting the conviction with that of handling stolen property, we are satisfied that there is sufficient evidence to support the conviction of the alternative court. The circumstances under which the items were found in possession of the 2nd appellant suggest that he was aware that he was handling stolen property. We therefore convict the 2nd appellant to the alternative charge of handling stolen property contrary to section 322 (2) of the penal code.

On sentence we have considered the 1st appellant has been in lawful custody from December, 2001 when he was arrested and

arraigned before the trial court which is adequate punishment for him. His sentence is therefore commuted to the period already served. There is yet another issue of the charge sheet being defective for failure to disclose whether the appellants were armed with dangerous weapons. What constitutes an offence of robbery with violence under section 296(2) has been summarized as either;

Ø **if the offender is armed with any dangerous or offensive weapon or instrument.**

Ø **if he is in the company with one or more other person or persons.**

Ø **if immediately before or immediately after the time of the robbery he wounds beats, strikes or uses any other violence to any person.**

See the Case of Johana Ndungu –VS- Republic Criminal Appeal No. 116 of 1995 (unreported).

In this case we find the charge was properly drawn and therefore the ground of appeal in respect of the charge sheet has no merit. The upshot of the above analysis is that the appeal as against the 1st appellant fails and the conviction and sentence is hereby upheld.

In respect of the 2nd appellant the appeal is allowed in respect of the main count and substituted with a conviction in regard to the alternative count of handling stolen property. The sentence is commuted to the period already served and unless the 2nd appellant is otherwise lawfully held he is hereby set at liberty.

It is so ordered

Judgement read and signed at Nakuru this 13th day of July, 2006.

MARTHA KOOME

JUDGE

L. KIMARU

JUDGE