REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 9, 10 & 11 of 2002

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 1232 of 2002 – G. A. Ndeda [C.M.]

VINCENT MWANUNDU…….....……1ST APPELLANT

WILSON MONDAY BUDEBU….....……..……2ND APPELLANT

LOGIS KADEL…….....……3RD APPELLANT

VERSUS

REPUBLIC…….....……..…….RESPONDENT

JUDGMENT

The appellants, Vincent Mwanundu (*hereinafter referred to as the 1st appellant*), Wilson Monday Budebu (*hereinafter referred to as the 2nd appellant*) and Logis Kadel (*hereinafter referred to as the 3rd appellant*) were charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on the 16th of March 2000 at Milimani Estate, Nakuru, the appellants jointly with others not before court and while armed with dangerous weapons namely pangas, rungus and swords robbed Daniel Kirui of Kshs 50,000/=, two television sets make Sharp and Phillips, mobile phone and a CD sony radio and at or immediately before or after the time of such robbery threatened to use actual violence to the said Daniel Kirui. The appellants' co-accused in the subordinate court called Nashon Opiyo Ogutu was alternatively charged with handling stolen goods contrary to **Section 322(2) of the Penal Code**. The particulars of the charge were that the said Nashon Opiyo Ogutu otherwise than in the course of stealing dishonestly received one television make Phillips S/No. 22C3040/05T valued at Kshs 30,000/= knowing or having reasons to believe it to be stolen. The appellants co-accused pleaded guilty to the alternative charge and was sentenced to serve a probationary sentence. On their part, the appellants pleaded not guilty to the charge and after a full trial were found guilty of the main charge. They were convicted as charged and sentenced to the mandatory death sentence. They were aggrieved by their conviction and sentence and each filed a separate appeal to this court.

At the hearing of appeal, this court was informed that Vincent Mwanundu, the 1st appellant died in prison while awaiting the hearing of his appeal. His appeal was therefore marked as abated. The 2nd and the 3rd appellant's appeals were consolidated and heard as one. The grounds in support of the appeals filed by the appellants are more or less similar. The appellants were aggrieved that they had been

convicted based on the evidence of dock identification and of an identification parade which had been improperly conducted. They were further aggrieved that they had been convicted based on insufficient evidence adduced by the prosecution witnesses. They faulted the trial magistrate for convicting them even though none of the items that were robbed from the complainant were recovered in their possession. They were aggrieved that the trial magistrate had considered accomplice evidence which was not corroborated to convict them. They were finally aggrieved that the trial magistrate had not considered their respective defences before arriving at the said decision convicting them. The appellants, with the leave of the court, presented to this court written submissions in support of their appeals. They urged this court to allow their appeals. They further made oral submissions in support of their appeals. Mr. Koech learned state counsel made submissions urging this court to dismiss the appeals filed by the appellants because the prosecution had established the case against the appellants on the charge of robbery with violence to the required standard. We shall revert back to the submissions made after briefly setting out the facts of this case.

On the 16th of March 2000 at about 3.00 a.m., PW1 Daniel Kiplagat Kirui, a manager with Lima Limited was asleep in his house at Milimani estate, Nakuru. His daughter PW2 Betty Chebet Kirui was asleep in another bedroom in the same house. Three of his relatives PW3 Phillip Cheruiyot Kimaiyo, Peter Kiprop and Alan Kiprono were sleeping in a house adjoining the main house. PW1 testified that he heard dogs barking and when he woke up he realised that there were three people who were in his bedroom. They ordered him to cover his face and give them the money which was in his possession. They ransacked his house and took Kshs 50,000/= from him. They also took a mobile phone and its charger and a radio cassette make Dynamic. They also robbed him of his sony CD and a TV booster. They robbed him of his Phillips television which was in his sitting room. He testified that the robbery took place for sometime and he was able to identify the three robbers. It was his testimony that the robbers were Kamba, Luhya and Turkana respectively from the way they spoke the Kiswahili language. He was also able to identify that the 1st appellant (*who is now deceased*) had a cut on his ear. Although the robbers threatened him using a knife, they did not harm him. After the robbery, the robbers locked him inside his bedroom. PW2 and PW3 corroborated the evidence of PW1 in so far as it related to the circumstances that the robbery took place. PW2 however testified that she only recognised the 1st appellant who is deceased. She did not identify the 2nd and the 3rd appellants. PW3 testified that he identified the 2nd and the 3rd appellants during the night of the robbery.

After the robbery, PW1 made a report to the police. PW4 PC Samson Otieno visited the scene of the robbery immediately the report was made. He was accompanied by a dog handler. They were however unable to make any headway because the sniffer dogs could not trace the scent of the robbers. PW1 testified that, on his own, he made inquiries to establish who could have robbed him on the material night. Acting on information received, on the 13th of May 2000, he led the police to the arrest of the 1st appellant, the 2nd appellant and the 3rd appellant. Nothing was recovered in the houses of the 1st and 3rd appellants. However a diary which was allegedly robbed from PW3 was recovered in the house of the 2nd appellant. PW1 testified that when he saw the appellants, he was able to identify them as the persons who robbed him.

PW5 PC Joel Wambua accompanied PW1 to the house of the 2nd appellant on the 28th of July 2000 where he was able to arrest the 2nd appellant. PW6 David Njokho Simiyu, a police officer attached to the CID office, Nakuru (*his rank was not stated*) conducted an identification parade at Nakuru police station whereby PW3 identified the 3rd appellant as being among the robbers who robbed them on the material night. The identification parade was conducted on the 7th of August 2000. PW7 PC Ibrahim Koech accompanied the complainant to Ol Kalou where they managed to arrest the 3rd appellant. The house of the 3rd appellant was searched but nothing in connection with the robbery was recovered.

PW9 Cpl. Hamisi Alfany was the investigating officer in this case. He testified that he conducted the investigations and established that it was the appellants who had robbed PW1. He testified that the television set which was robbed from the house of PW1 was recovered from the appellants co-accused in the lower court who was convicted on the alternative charge of handling stolen property. He testified that

the appellants co-accused in the lower court had informed him he had been sold the said television set by a girl who had been given the said television set by the 1st appellant who is now deceased. He testified that he recovered the diary from the house of the 2nd appellant when he arrested him. The diary was identified by PW3 and was confirmed to have been robbed from him on the material night of the robbery. PW10 Inspector Daniel Langat took a statement under inquiry from the 2nd appellant. The 2nd appellant in the said statement which was retracted during trial confessed to having participated in the robbery of the house of PW1.

After the close of the prosecution's case, the appellants gave unsworn statements in their defence. The 2nd and the 3rd appellants denied that they were involved in the robbery. The 2nd appellant testified that he was arrested on the 27th of July 2000 while he was at his house at KITI. He testified that the police searched his house and found nothing connected with the robbery. He denied that anything connected with the robbery was found in his house. The 3rd appellant similarly testified that on the material night of the robbery he was asleep at the house of his relative at Engashura. He testified that sometimes in the month of April 2000 he was requested by PW1 to assist him to investigate the people who had robbed him on the 26th of March 2000. He testified that he offered to assist PW1 and was paid Kshs 500/= to enable him make inquiries as to who could have robbed PW1. He testified that he knew PW1 because they attended the same church. He was therefore shocked when on the 5th of August 2000 the police went to his home at Ol Kalou and arrested him allegedly because he had robbed PW1. He testified that the police recovered nothing when his house was searched. He denied that he had anything to do with the robbery.

This being a first appeal this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses (*See* **Njoroge –vs- Republic [1987] KLR 19**). We have re-evaluated the evidence that was adduced before the trial magistrate's court. We have also considered the submissions made before us by the appellants and by the State. The issue for determination by this court is whether the prosecution proved to the required standard the charge of robbery with violence against the appellants.

The prosecution relied mainly on three pieces of evidence to secure the conviction of the appellants. The first piece of evidence was the evidence of identification of the appellants by PW1 and PW3. PW1 testified that when he was robbed on the 26th of March 2000, he was able to identify the three men who robbed him. PW3 testified that he identified the 3rd appellant during the night of the robbery. However from the evidence which was adduced by the prosecution, it is clear that PW1 and PW3 did not give a description of the robbers when they made the initial report to the police. There is no evidence that the said witnesses described the physical features of the persons who robbed them. It is clear from the evidence that PW1 did not know the identity of the persons who robbed him. The subsequent identification of the appellants by PW1 and PW3 two months and five months respectively after the event raises doubt that they identified the appellants. It is evident from the testimony of PW1 and PW3 that they were frightened when they were attacked by the robbers. The robbers did not give them an opportunity to identify them because they put off the electric lights.

Although PW1 testified that the robbery took sometime, it is not clear from the evidence how long the said robbery took. PW1 had been instructed by the robbers to cover his face and therefore he could not have been certain of the identity of the robbers. When PW3 attended the identification parade and purported to identify the 3rd appellant in an identification parade which was conducted by David Simiyu (*PW6*) there was no initial report which the police could have relied on to confirm the identity of the person identified in the police identification parade. The rank of David Simiyu was not stated when he testified in court. It is not therefore clear whether he was an inspector of police who was authorised to conduct such identification parades. Taking into consideration the totality of the evidence on identification, we are not satisfied that the complainant properly identified the appellants. We hold that

the trial magistrate erred in deciding that the prosecution had proved its case based on the evidence of identification.

The second piece of evidence that the prosecution relied in its bid to secure the conviction of the appellants is the evidence of the recovery of the television set which was robbed from the house of the complainant (*PW1*). As stated earlier in this judgment, the said television set was recovered in the possession of the appellant's co-accused in the lower court who pleaded guilty to the charge of being found in possession of stolen property contrary to **Section 322(2) of the Penal Code**. The said co-accused of the appellant did not testify in the trial of the appellants. No evidence was adduced that he had received the said television set from the appellants. The only evidence connecting the 1st appellant with the recovery of the said television set was that of PW9, the investigating officer in this case. The said evidence was to say the least tenuous. Similarly the evidence of the recovery of the diary which was allegedly robbed from PW3 from the house of the 2nd appellant was of such a nature that it could not attract the application of the doctrine of recent possession. If anything it could only have proved that the 2nd appellant was guilty of handling stolen property.

The third piece of evidence that the prosecution relied on in its bid to secure the conviction of the appellants was the evidence of the confession by the 2nd appellant. In the said confession the 2nd appellant implicated his co-appellants in the said robbery. During the hearing of the case, the 2nd appellant retracted the said confession. After a trial within a trial, the said confession was admitted in evidence. The law as regard retracted confessions is well settled. The Court of Appeal held in **Tuwamoi –vs- Uganda [1967]EA 84** at page 89 that;

"***The present rule then as applied in East Africa in regard to retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but the court might do so if it is fully satisfied in the circumstances of the case that the confession must be true."***

In the present case, it is clear that the said confession cannot be said to be the whole truth. The statement is short and does not explain the circumstances under which the said alleged robbery took place. The said confession was not corroborated in material respects by the evidence which was adduced by the prosecution witnesses. It is clear that this court cannot rely on the said confession to secure the conviction of the appellants.

Taking into totality the evidence adduced by the prosecution witnesses and the evidence which was adduced by the appellants in their defence, and further taking into consideration the submissions made in this appeal, it is clear that the participation of PW1 in the entire investigation by the police lent credence to the evidence of the 3rd appellant that PW1 knew him long before he was arrested due to the fact that they used to attend the same church. It is apparent from the evidence adduced that it was PW1 who was directing the police in their investigations. The police did not independently investigate the case to establish the guilt or innocence of the appellants. The period in which the case was investigated *i.e.* over five months, meant that crucial evidence which could have been gathered from the scene of the robbery including the recollection of the witnesses could have been lost. In the circumstances of this case therefore we hold that the appellants raised reasonable doubt in their defence that they indeed participated in the said robbery.

The upshot of the above is that we hold that the appeals filed by the appellants must succeed. Their conviction by the trial magistrate is quashed. They are acquitted of the charge of robbery with violence contrary to **Section 296(2) of the Penal Code**. They are ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

DATED at NAKURU this 6th day of July 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE