REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAkuru

CRIMINAL APPEALS 31, 32 & 33 OF 2002

PETER JUMA ODIENGA……...……1ST APPELLANT

RONALD BUNDI ONCHWARI…….2ND APPELLANT

DAVID MBIRUA MUYA…….....…….3RD APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

(From original conviction and sentence in Criminal Case No.3611 of 1997 of the Principal Magistrate's Court at NYAHURURU – C. O. MOITUI, SPM)

JUDGMENT OF THE COURT

The appellants together with others were jointly charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code.** The particulars of the offence were that on the night of 21st and 22nd November 1997 at Milimani Estate Nakuru jointly with others and while armed with dangerous weapons which included iron bars, simis, rungus and swords, robbed Mary Wanjiru Mwangi assorted items including motor vehicle registration number KAE 271E and cash Kshs.14,000/- and many other items, all valued at Kshs.1.5m, the property of the said Mary Wanjiru Mwangi and immediately before or after the said robbery used actual violence on the said Mary Wanjiru Mwangi.

After a full trial each of the appellants was found guilty and convicted and sentenced to death as mandatorily provided. They were aggrieved by the said conviction and sentence and each preferred an appeal before this court. The three appeals were consolidated and heard together. The grounds of appeal raised by the appellants were more or less the same and can be summarised as hereunder:-

1. That they were prejudiced in their trial in that although the alleged offence was committed at Nakuru, they were charged before the Principal Magistrate's Court at Nyahururu.

2. That the prosecution case was partially conducted by unqualified police officers.

3. That they were convicted on a defective charge in that the motor vehicle that was alleged to have

been stolen was registration number KAE 271E yet according to the evidence that was tendered before the court the motor vehicle was actually registration number KAB 271E.

4. That the learned trial magistrate erred in law and in fact in convicting the appellants on identification evidence which was insufficient.

5. That the learned trial magistrate erred in law and in fact in convicting the appellants on evidence of recovery of recently stolen tools.

6. That the entire prosecution evidence was insufficient to warrant a conviction.

It is important that we set out the prosecution case as was presented before the trial court, albeit briefly. **PW1, Mary Wanjiru Mwangi,** testified that she was a business lady in Nakuru and was staying at Milimani Estate with her two daughters; Irene Mumbi and Alice Wairimu Mwangi, PW4. On 21st November 1997 at about 11.00 p.m. while she was in her bedroom, she heard one of the girls telling the other that some people were opening the main door. She woke up and was suddenly confronted by about seven people. She had put off the lights but the robbers put them on. She was assaulted and ordered to produce all the money that she had. She gave them Kshs.8,000/- but the robbers were not satisfied and beat her up and ordered her to produced some more money. PW1 gave them a further Kshs.6,000/- which she had kept in another place. The robbers ransacked the house and took very many household goods and jewellery. They also took the daughters of PW1 to the room where PW1 was sleeping and they started beating all of them. They put the goods in a motor vehicle registration number KAB 271E, a Peugeot 504 pick up which was parked outside the house. One of the items that was stolen was a bicycle. PW1 said that she was able to identify the robbers because all the lights in the house were on. She further stated that the robbers remained in the house from about 11.00 p.m. upto about 2.00 a.m.

After the robbers left, a neighbour telephoned the police and informed them about the robbery. The police returned after a short while and said that they had arrested one suspect, the first appellant, who was working as a watchman in the house of PW1. The first appellant was said to have been found riding a bicycle that was stolen on the material night.

On 6th December 1997, the police called PW1 and her daughters to go and identify some people who had been arrested. PW1 had earlier told the police that she did not know her assailants but was able to identify them if she saw them. PW1 identified six people who included the appellants herein. The stolen motor vehicle was found abandoned outside a night club within Nakuru Town. Some of the stolen items were in the vehicle.

PW2, Norah Kirubi, was a girlfriend to the second appellant. She testified that on 26th November 1997, the second appellant went to her house with two bags and left them there and also gave her Kshs.9,000/- to keep for him. PW2 spent Kshs.1,000/- but kept the rest of the money. A few days later police officers went to her house and enquired whether the second appellant had left some goods there and she gave to them the two bags which contained various items among them a video machine, binoculars and a camera, all of them being among the items that had been stolen from the house of PW1. She also gave them the Kshs.8,000/- which she remained with. Later she recorded a statement.

PW3, Corporal John Njugu, was the first police officer to visit the house of PW1 immediately after the robbery. He testified that on 22nd November 1997 at about 5.00 a.m. he arrested the first appellant as he was cycling towards Kericho direction. The first appellant told PW3 that he had been robbed of his money and so he had decided to cycle to his home in Kisii. Shortly thereafter the first appellant started running away but PW3 caught up with him and arrested him. The bicycle was identified by PW1 as being one of her stolen items.

The police arrested the second appellant on 29th November 1997 and recovered a walkman from him. The walkman was identified by PW1 as one of the stolen items. On the same day, the third appellant was arrested and a wrist watch was recovered from him. The wrist watch was identified by PW1 as having

been stolen on the night of the robbery. The police also recovered from the house of the third appellant an identity card belonging to Irene Mumbi Mwangi, a daughter of PW1. They also recovered a pocket mirror which was identified by PW1 as hers.

PW4, Alice Wairimu Mwangi, corroborated the evidence of PW1 in all material respects.

Before the evidence of PW4 was finalised, the trial magistrate, W. N. Nyarima, SRM, decided that he was not going to hear the case any further but did not state the reasons for so doing. He ordered that the matter be heard by the Principal Magistrate at Nyahururu Law Courts. He remarked as follows:-

"***Some of the accused have not attended the hearing. Because of some reasons that I am not inclined to put on record, I have come to the conclusion that this matter be heard by the Principal Magistrate in court No.1. This case file is accordingly remitted there for action and/or orders."***

The trial magistrate made the above order on 6th December 1999. It would appear that on the same day the file was placed before C.O. Moitui, Principal Magistrate, who recorded further evidence on cross examination of PW4. The trial court did not comply with the provisions of **Section 200** of the **Criminal Procedure Code** and particularly the requirement that where one magistrate commences hearing of proceedings which had previously been conducted by another magistrate, the succeeding magistrate should inform the accused of his right to demand that any witness who had testified earlier be resummoned and reheard. We will revert to this issue at a later stage of this judgment.

PW6, Inspector Patrick Mutenyi, testified as to how the identification parade in respect of the second appellant was carried out. He said that the second appellant was properly identified by PW1 and PW4.

PW7, Inspector Absolom Monari, conducted the identification parade in respect of the first and the third appellants and they were duly identified by PW1 and PW4.

PW9, Inspector Gramons Awour, recorded a statement under inquiry from the second appellant, who allegedly confessed that he had taken part in the robbery. The second appellant denied having made a confessionary statement and a trial within a trial was ordered. The trial court ruled that the confessionary statement was admissible and went ahead to admit the same and it formed a basis for convicting the second appellant.

In his unsworn defence, the first appellant said that on 21st November 1997 at about 10.00 p.m. while he was guarding the house of PW1, he saw some people flashing torches at him and he was ordered to keep quiet. They threatened to shoot him if he raised an alarm. He said that they beat him up as they demanded for keys to the house but he said that the keys were with PW1. They broke into the house of PW1 and he saw them loading some goods into a motor vehicle that was parked outside the house. He further stated that he was bundled in the vehicle and dropped off at Section 58 within Nakuru Town. He decided to walk to the police station to report the matter and on his way he met police officers who stopped him and arrested him. He denied having taken part in the robbery.

The second appellant gave a sworn testimony of defence and said that he was a second hand clothes dealer and that on 21st November 1997 he went to work at about 8.30 a.m. He closed his business at about 1.00 p.m. due to heavy rains and went to his house. He was then visited by PW2 who was his girlfriend and they stayed there upto about 2.30 p.m. Later they decided to visit a sister of PW2 at Bangladesh Estate but they were unable to reach their destination because of heavy rains. They returned to his house and went to bed at about 9.00 p.m. On the following day at about 7.30 p.m. he found PW2 with PW3, Corporal Njogu, kissing each other and he quarreled with PW2. Later on, PW2 went to his house and decided to collect all her clothes and other items but the second appellant stopped her from removing the items. He further stated that on 29th November 1997, PW3 and other police officers arrested him and took him to the house of PW2. He denied having given any items to PW2 to keep for him.

The third appellant raised the defence of an alibi. He alleged that on the material night he was away in Narok area and that he was not connected with the robbery in any way.

In his judgment, the trial magistrate held that all the appellants had been properly identified by PW1 and PW4 as there was sufficient light in the house of PW1 on the material night. He further observed that the robbers were in the house of PW1 for a period of nearly three hours and that was sufficient time to enable the two witnesses observe their assailants in details. In respect of the first appellant, the trial magistrate held that being a watchman in the house of PW1, the two witnesses knew him prior to the date of the robbery and it was not therefore difficult for them to recognize him on the material night. Further more, the first appellant had been arrested riding a bicycle belonging to PW1 a few hours after the robbery.

Regarding the third appellant, the trial court held that his possession of the wrist watch that belonged to PW1 was conclusive evidence that he was involved in the robbery. The court further observed that the third appellant was found in possession of an identity card of Irene Mwangi, the daughter of PW1.

With permission of the court, the appellants tendered written submissions in support their grounds of appeal. We do not wish to reproduce those submissions as they are on record but we will refer to them later in this judgment.

Mr. Koech, state counsel, supported the conviction of the three appellants and the sentences that were pronounced by the trial court. He told this court that the first appellant was employed as a watchman by the complainant and that the complainant did not see the first appellant on the night of the robbery. He further pointed out that the first appellant was arrested shortly after the robbery and was riding a bicycle that had been stolen from the house of PW1 and he also had a bag that contained some of the stolen items. He submitted that the doctrine of recent possession was rightly applied in convicting the first appellant. Mr. Koech further submitted that the other appellants were also found with stolen items that belonged to PW1 and they could not give an account as to how they came into possession of the same. He added that the second and the third appellants were properly identified by PW1 and PW4.

Regarding the argument by the appellants that some of the prosecutors who handled the prosecution case were unqualified in terms of **Section 85** of the **Criminal Procedure Code**, Mr. Koech submitted that such prosecutors appeared only during mentions of the case when no substantive hearing took place. He urged the court to disregard that argument by the appellants and in the event that the court held otherwise, a retrial be ordered.

We now turn to the various grounds of appeal that were advanced by the appellants. Regarding the first ground of appeal, it is true that the offence for which the appellants were convicted was committed in Nakuru and therefore they were supposed to be charged before the Chief Magistrate's Court at Nakuru. **Section 71** of the **Criminal Procedure Code** provides that every offence shall ordinarily be tried by a court within the local limits on whose jurisdiction it was committed, or within the local limits on whose jurisdiction the accused was apprehended, or is in custody on a charge for the offence. It is therefore not clear why the appellants were charged before a court in Nyahururu. The prosecution did not advance any reasons for so going. The appellants did not raise any objection to that effect before the trial court although the court file shows that they were aggrieved by such a move and even wrote protest letters to the Hon. The Attorney General.

While we admit that the appellants should have been tried before the Chief Magistrate's Court in Nakuru or before any other court of competent jurisdiction within Nakuru, we do not think that the appellants were in any way prejudiced by the fact that their case was taken before the Nyahururu Principal Magistrate's court. We therefore reject the first ground of appeal.

Turning to the second ground of appeal, **Section 85(2)** of the **Criminal Procedure Code** provides as follows:-

"***(2) The Attorney-General, by writing under his hand, may appoint any advocate of the High Court or***

person employed in the public service, not being a police officer below the rank of Assistant Inspector of police, to be a public prosecutor for the purposes of any case."

We have carefully gone through the proceedings and noted that on several occasions the prosecution case was conducted by police officers who were unqualified to do so. One such officer was Sergeant Migwi who conducted the prosecution case on 12th November 2001 when a substantial part of the defence case was heard. There were also several incidents when the matter was mentioned and during which unqualified prosecutors appeared during the mentions. The Court of Appeal has categorically stated the legal position where such unqualified prosecutors conduct prosecutions. Some of those decisions include ***BERNARD LORIMO EKIMAT V R*** Criminal Appeal No. 151 of 2004 and ***ELIREMA & ANOTHER V R*** [2003] KLR 537. The proceedings which were conducted by such unqualified prosecutors were a nullity in law. We therefore uphold the second ground of appeal.

We now turn to the third ground of appeal. One of the items that the appellants were alleged to have robbed the complainant of was a motor vehicle which was described in the list of the robbed items that accompanied the charge sheet as registration number KAE 271E. However, the evidence that was produced before the trial court showed that the correct registration number of the vehicle was KAB 271E. The prosecution should have applied to amend the charge sheet in terms of the provisions of **Section 214** of the **Criminal Procedure Code** but did not do so; However, it was not in dispute that the motor vehicle which PW1 was robbed of and which was produced in court was KAB 271E. That error in description of the motor vehicle did not occasion a miscarriage of justice on the part of the appellants. In any event, **Section 382** of the **Criminal Procedure Code** provides that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered in appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial unless such an error, omission or irregularity occasioned a failure of justice. We therefore reject the third ground of appeal.

Turning to the evidence on identification, PW1 told the police immediately after the robbery that she did not know who her assailants were but she could identify them if she saw them. She did not make any effort to describe to the police how they looked like or how they were dressed or whether they had any peculiar mark on their bodies which were distinctive and unmistakable. If indeed the robbers remained in the house of PW1 from about 11.00 p.m. to 2.00 a.m. and there was sufficient electricity light in the house, PW1 and PW4 were in a position to carefully observe their assailants and should therefore have described them to the police at the earliest opportunity. In ***FREDRICK AJONDE VS R, Criminal Appeal No. 87 of 2004*** (unreported), the court of Appeal held that before an identification parade is conducted, a witness should be asked to give the description of the person sought to be identified failing which the identification would be of no value. In the same decision, it was also held that an identification parade is valueless where a witness already knows who the suspect is, as was the case with the first appellant who had been employed by PW1 as a watchman. It is trite law that before a court can base a conviction on the evidence of identification at night, such evidence should be water tight. In our view, therefore, the conviction of the appellants based on identification evidence was improper. However, in so far as the doctrine of recent possession was applicable there was no doubt that each of the appellants were found with some of the items which had been stolen from the house of PW1 shortly after the robbery.

In ***PERER KIMARU MAINA V R, Criminal Appeal No. 111 of 2003,*** it was held that where there is evidence that an accused person is found in actual possession or has shortly after a robbery sold one of the items stolen during the robbery, is deemed to be in recent possession of the stolen item and evidence of recent possession of a stolen item is sufficient to found a conviction for the offence of robbery with violence. In the circumstances we reject ground five of the appeal.

Turning to the last ground of appeal, **Section 200(3)** of the **Criminal Procedure Code** states as follows:-

"***Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

Subsection (4) thereof proceeds to state that where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial. As we stated earlier in this judgment, the first trial magistrate, Mr. W. N. Nyarima refused to continue with the hearing after he had taken down the evidence of PW1, PW2, PW3 and having partially heard the evidence of PW4. Cross examination of PW4 was done before another magistrate, Mr. C. O. Moitui. Mr. Moitui did not comply with the aforesaid provisions of **Section 200(3)** of the **Criminal Procedure Code**. PW1 and PW4 were key prosecution witnesses because they were the ones who allegedly identified the appellants. Their evidence was of crucial importance and this includes their demeanour. In ***NJENGA V R*** [1984] KLR 605 the Court of Appeal stated as follows:-

"***In a case depending on visual recognition, where the principle witness is heard by one magistrate and the second identifying witness by another, we think it essential that the requirement of subsection(3) should be observed, as it is for the protection of an accused person."***

Similarly, in ***NDEGWA VS R*** [1985] KLR 534 the Court of Appeal, considering an appeal where the evidence before the trial court was recorded by two different magistrates and where the provisions of **Section 200** of the **Criminal Procedure Code** were not observed, delivered itself as follows:-

"***No rule of natural justice, statutory protection, evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of a subject since he is the most sacrosanct individual in the system of our legal administration."***

The court went on to state that the statutory and time honoured formula that the magistrate making the judgment should himself see, hear, assess and gauge the demeanour and credibility of witnesses should always be maintained.

In our view, failure to comply with the mandatory provisions of **Section 200(3)** of the **Criminal Procedure Code** was fatal to the proceedings as we believe that the appellants were materially prejudiced by such failure. In view of this finding and considering that part of the proceedings before the trial court were conducted by an unqualified prosecutor, the conviction that was arrived at cannot stand. Considering all the circumstances of the case, we do not think that a retrial would be appropriate. Consequently, we allow the appeal, quash the conviction and set aside the sentence that was pronounced by the trial court. The appellants should be set at liberty unless otherwise lawfully held. It is so ordered.

DATED at Nakuru this 23rd day of October 2006.

M. KOOME

JUDGE

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Mr. Mugambi, State Counsel for prosecution and the appellants.

M. KOOME

JUDGE

D. MUSINGA

JUDGE