**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**Criminal Appeal 331 & 332 of 2003**

(From original conviction and sentence of the Senior Resident Magistrate's Court at Molo in Criminal Case No. 1657 of 2001 -R.K.KIRUI [S.R.M] )

**JOSEPH KURIA NDUNGU……1ST APPELLANT**

**JONES OCHOLA JUMA……2ND APPELLANT**

**VERSUS**

**REPUBLIC……..RESPONDENT**

**JUDGMENT OF THE COURT**

The appellants, Joseph Kuria Ndungu (*hereinafter referred to as the 1st appellant*) and Jones Ochola Juma (*hereinafter referred to as the 2nd 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 night of the 15th and 16th of June, 2001 at Greenhill Farm, Njoro, in Nakuru district the appellants jointly, while armed with dangerous weapons namely Somali swords and iron bars robbed Rachel Chepngeno Komen of electronic goods listed in the charge sheet and cash Ksh.4000/= all valued at Ksh.150,000/= and at or immediately before or immediately after the time of such robbery, the appellants wounded the said Rachel Chepngeno Komen. Each of the appellant was alternatively charged with one count of **handling stolen property contrary to Section 322(2) of the Penal Code.** The 1st appellant was said to have been found in possession of one radio cassette make National model RX 150 and a small bag on the 14th of August 2001 in circumstances that suggested that the 1st appellant dishonestly retained the said properties knowing or having reasons to believe that they were stolen. The 2nd appellant was also said to have been found in possession of one CD Panasonic speaker No.HN 5DA 054244 and one brief case on the 14th of August 2001 in circumstances that suggested that the 2nd appellant either stole or dishonestly retained the said items having reasons to believe them to be stolen property. The appellants pleaded not guilty to the charge and after a full trial both appellants were convicted as charged and were sentenced to death on the main charge as is mandatorily provided by the law. They were aggrieved by their conviction and sentence and duly filed an appeal to this court.

The appellants, in their petitions of appeal, raised more or less similar grounds of appeal. They were aggrieved that they had been convicted based on the evidence of a single identifying witness which was made in circumstances that were difficult. They were further aggrieved that they had been convicted based on the evidence of an identification parade which was held contrary to the law. They faulted the trial magistrate for ignoring their defences before arriving at the decision convicting them. The two

separate appeals filed by the appellants were consolidated and heard as one during the hearing of the appeals. The appellants, with the leave of the court, presented to this court written submissions in support of their appeals. Mr. Koech, learned State counsel made oral submissions urging this court to find that the prosecution had adduced sufficient evidence of identification and the recovery of the stolen items which proved to the required standard that the appellants were involved in robbery. He urged the court to dismiss the appeals.

We shall give reasons for our judgment after briefly setting out the facts of this case. PW4 Recho Chepngeno Komen (*Recho*) was asleep in her house at Njoro on the night of the 15th and 16th of June 2001. At about 2.00 a.m., she was woken up when the door to her house was being broken. She switched on the alarm and screamed for help. She was ordered to keep quiet. The robbers succeeded in gaining forceful entry into her house. They disabled the alarm. Recho testified that the robbers were two in number. She testified that she identified the appellants as the persons who robbed her because the electricity lights had been switched on. The robbers then broke into her wardrobes and picked several items and put them on bed sheets which they had converted to as luggage carrier. She testified that she was robbed of two radio cassettes, one wrist watch, a suit case, a CD player, two speakers, a video machine and shoes. In the course of the robbery, she testified that she was beaten using the panga which one of the robbers had in his possession. She was injured on her face, back, legs and head. She testified that the 1st appellant strangled her. The robbers then left her house. She reported the incident to the police.

On the 13th of August, 2001 she was informed that some of the items which were stolen from her house had been recovered. She was emphatic that she had recognized the appellants when they robbed her in her house and confirmed this identification when she pointed out the appellants in a police identification parade which was held after the appellants were arrested. The complainant did not tell the court how she was able to identify the appellant because it is apparent that no description of the robbers was made to the police by the complainant after her robbery ordeal. Further, although she claimed that she was able to point out the appellants in an identification parade which was held by the police, no evidence of the police identification parade which was allegedly held was adduced in court. Recho testified that the items which were recovered and which she identified to be hers were one Rado wrist watch, a radio cassette, a speaker, a brief case and a bag.

Two months after the robbery, Recho was seen by PW1 Bernard Nyandemo, a Clinical Officer based at Njoro Health Centre who filled a P.3 form of the injuries that Recho alleges to have sustained during the robbery. The P.3 form was produced as an exhibit in court. According to PW1, Recho had sustained an injury on the right side of the face, the left ear was tender and painful, the ear drum was inflamed and was discharging a fluid, there was a scar measuring about 10cm by 1cm on the right region of the abdomen. He formed the opinion that the injuries were caused by both blunt and sharp objects.

On the 27th of July 2001, PW2 David Kaboya Njoroge was at his shop at Elburgon when he was approached by the 1st appellant who offered to sell him a Rado watch. The 1st appellant was selling the Rado watch at Ksh.600/=. PW2 offered to buy the watch at Ksh.200/=. The 1st appellant accepted the offer. Two weeks later, the 1st appellant was brought to PW2's shop by the police. PW2 surrendered the watch which was sold to him by the 1st appellant. PW3 PC Gilbert Cheruiyot testified that the complainant made the report of the robbery at her house, immediately after it had occured.

On the 13th of August 2001 he received a report from the OCS Elburgon Police station to the effect that some items which had been stolen from Njoro had been recovered. PW3 accompanied the complainant to Elburgon Police Station where she was able to identify three items which had been robbed from her. The items were; a radio cassette, a brief case and CD player. PW3 interrogated the 1st appellant who led him to the shop of PW2 where the Rado wrist watch which had been sold to PW2 was retrieved. PW3 testified that when an accomplice of the 1st appellant was arrested, he was found in possession of the CD player and the brief case. The recovered items were photographed by PW5 Sgt Kiplagat Sigilai, and officer from the scene of crime office, Nakuru. The photographs were produced in evidence as exhibits.

PW6 PC Jeremiah Munya testified that on the 13th of August, 2001, the 1st appellant was handed over to him by a police officer who had arrested him at Kasarani Estate, Elburgon. He interrogated him after which the 1st appellant offered to escort the police to the house of the 2nd appellant where several items which were identified to have been stolen from the house of the complainant were recovered. He investigated the case and decided to charge the appellants with the offence of robbery with violence.

When the appellants were put on their defence, they each denied to have been involved in the robbery. They gave alibi defences. They testified that they were elsewhere when the robbery took place. They further denied that the stolen items were recovered in their possession. The 2nd appellant testified that the radio cassette which was found in his possession belonged to him. He testified that he had produced a receipt and given it to the police as proof of ownership of the said radio cassette when the case was being investigated.

This is a first appeal. As was held by the Court of Appeal in **Isack Nganga Kahiga vs Republic C.A. Cri. Appeal No.272 of 2005 (Nyeri)** (*Unreported*) at page 5;

"***It is trite that a trial court has a duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyse a fresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demenour and so the first appellate court would give allowance of the same."***

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to support the charge of robbery with violence against the appellants. We have carefully considered the submissions that were made before us, both oral and written, by the appellants and by Mr. Koech on behalf of the State. We have also re-evaluated the evidence adduced by the witnesses before the trial magistrate.

In his judgment, the trial magistrate at page 2 held as follows;

"*On the other hand, the complainant seemed sure she saw the two accused and another clearly as there were lights from several bulbs in her house. Though (an) identification parade officer did not testify and the parade report was not produced, her evidence is sufficiently corroborated by the recovery of some of her stolen items from the three persons. The 1st accused (1st appellant) led PW6 to the house of the 3rd accused (2nd appellant) and the others from where the items were recovered. He also led PW3 to PW2 to whom he had sold the complainant's wrist watch. The said accused did not explain how they got the items and I believe they robbed the complainant of the same as per her evidence."*

It is clear from the above judgment of the trial court that the appellants were convicted on the evidence of identification and on the evidence of the recovery of the items which were stolen from the house of the complainant during the material night of the robbery. The thrust of the submissions made before us by both the appellants and by the State were on these two points.

As regard the evidence of identification, it is clear that the complainant made the identification of the appellants in circumstances that can be said to have been not conducive for positive identification. The complainant did not know the appellants prior to the night of the robbery. It is not clear from her evidence how long the robbery took place. It is further not clear if the complainant saw any distinctive marks or characteristics of the robbers that enabled her to be certain that she had positively identified the appellants as being among the robbers who robbed her. It is conceded that the testimony of the complainant was evidence of a single identifying witness who made an identification in circumstances which can be described to be difficult. As was held by the Court of Appeal in **Maitanyi vs Republic [1986] KLR 198 at page 200**

"***Although the lower court did not refer to the well known authorities <u>Abdulla bin Wendo &</u> <u>Anor. Vs Reg (1953) 20 EACA 166</u> followed in <u>Roria vs Rep. [1967] EA 583</u>, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition***:-

'*Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this 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 a single witness, can safely be accepted as free from possibility of error'*."

In the present case, as stated earlier in this judgment, the complainant made the identification of the appellants in the circumstances which were difficult. She did not tell the court how she was able to be positive that she had identified the appellants as the robbers. There is no evidence on record that she had given the police the description of the robbers when she made the first report of the robbery to the police. From the circumstances of the robbery, it cannot be ruled out that the complainant was in a state of shock that she could not be in a position to have positively identified the appellants. Her identification of the appellants could have been confirmed if the evidence of the police identification parade was adduced before the trial court.

For some reason, the prosecution did not deem it necessary to call the police officer who conducted the police identification parade. We further hold that, even if the said evidence of police identification were produced, in the absence of a description of the robbers made when the initial report of the robbery was made to the police, there would be no basis upon the said police identification parade could have been held. We therefore hold that the said evidence of identification of the appellants by the complainant is tenuous, to say the least. Such evidence of identification cannot sustain a conviction in a tribunal correctly applying its mind to the facts of the case. We therefore agree with the appellants that the said evidence of identification ought not to have been considered by the trial magistrate in convicting them.

As regard the evidence of the recovery of the stolen items, the robbery took place on the night of the 14th and 15th of June, 2001. Some of the items which were robbed from the complainant were recovered in possession of the appellants on the 14th of August 2001. These items were positively identified by the complainant to belong to her. PW3 and PW6 testified that on the circumstances under which the said stolen items were recovered in possession, first of the 1st appellant and later, after the 1st appellant had led the police to the house of the 2nd appellant where a radio cassette was recovered. Do the circumstances under which the said items were recovered in possession of the appellants' lead to the conclusion that it is the appellants who robbed the same from the house of the complainant? Does the doctrine of recent possession apply in the case of the appellants in this case? As was held by the Court of Appeal in **<u>Isaac Nganga Kahiga vs Republic CA. Cri. Appeal No.272 of 2005 (Nyeri)</u>** (*<u>unreported</u>*) at page 7 of its judgment;

"***It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses***."

From the evidence adduced in this case, it is clear that the 1st appellant did not explain how he came into possession of the items which were found in his position and which the complainant positively identified

to belong to her. The 2nd appellant on the other hand gave an explanation that the radio cassette which was recovered in his possession belonged to him. He even produced a receipt. However, the complainant testified that the said radio cassette was among the items which were stolen from her house on the night of the robbery. The trial magistrate believed her.

On re-evaluation of the evidence adduced, we do not see any grounds upon which we can disagree with the finding reached by the trial magistrate as regard to the ownership of the said radio. We therefore dismiss the submission by the 2nd appellant that he was the owner of the radio cassette. In our considered view, the 2nd appellant raised the issue of the ownership of the radio cassette as an afterthought. He did not question PW6 when he testified in court as to the circumstances under which the said radio cassette was recovered. There is no doubt therefore that the said properties which were stolen from the house of the complainant were recovered in the possession of the appellants.

However, on re-evaluating the evidence adduced we are not satisfied that the doctrine of recent possession applies in this case to connect the appellants to the robbery which took place in the house of the complainant two months before the said stolen items were recovered in their possession. In our view in the circumstances of this case, the two months is such a period that it cannot be said to be recent. However we are of the view that the prosecution proved the alternative charge that the appellants were found in possession of items which were positively proved to belong to the complainant. The appellants knew or ought to have known that the said items were stolen property or dishonestly retained.

In the circumstances therefore, we find that the appellants appeal against their conviction on the charge of robbery with violence contrary to **Section 296(2) of the Penal Code** is allowed. The prosecution did not prove the said charge against the appellants. Their conviction is therefore quashed and the death sentence imposed set aside. The appellants are however convicted of the alternative charge of being found in possession of stolen property contrary to **Section 322 (2) of the Penal Code**. We have considered that fact that the appellants have been in lawful custody since the 14th of August 2001 when they were arrested. They have thus been in lawful custody for a period of slightly more than five years. In our opinion, the said period that the appellants have been in custody is sufficient punishment for them. The sentence of the appellants is commuted to the said period already served. The appellants are thus set at liberty and ordered released from prison unless otherwise lawfully held.

It is so ordered.

**DATED at NAKURU this 12th day of October, 2006**

**M. KOOME**

**JUDGE**

**L. KIMARU**

**JUDGE**