REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 112 & 113 of 2002 & 181 of 2006

[From Original Conviction and Sentence in Criminal Case No. 949 of 2000 of the

Chief Magistrate's Court at Nakuru – S. MUKETI - S.R.M]

PATRICK KAMAU NJUGUNA *Alias* PATTY ..…… 1ST APPELLANT

PHILIP GITAU KARANJA *Alias* MZEE YA KIJIJI.....2ND APPELLANT

SAMUEL KAMAU MURAGURI *Alias* KILOMBI ..... 3RD APPELLANT

VERSUS

REPUBLIC ……..…….....……..….RESPONDENT

JUDGMENT OF THE COURT

The appellants, Patrick Kamau Njunguna, 1st appellant, Philip Gitau Karanja 2nd appellant and Samuel Kamau Muraguri, 3rd appellant respectively were charged with two counts of the offences of robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the first count stated that on the night of 10th and 11th day of April, 2000 along Maji Mazuri Eldama Ravine in Koibatek District within the Rift Valley Province, jointly while armed with dangerous or offensive weapons namely; Somali swords and rungus robbed David Cherogony Chepsom of his bicycle make Phoenix Frame Number YN 272913 and unknown amount of money and at or immediately before or immediately after the time of such robbery killed the said David Cherogony Chepsom.

The particulars of the second count stated that on the 8th day of April, 2000 at Maji Mazuri Eldama Ravine Railway Line in Koibatek District within the Rift Valley Province, jointly while armed with dangerous or offensive weapons namely; Somali swords and rungus, robbed Oliver Kipchirchir of his wallet containing Kshs.70/- and personal documents, one jacket and a pair or shoes all to the total value of Kshs.2,120/- and at or immediately before or immediately after the time of such robbery, injured the said Oliver Kipchirchir.

The 1st and 3rd appellants also faced an alternative charge of handling stolen property contrary to Section 322 (1) of the Penal Code.

The particulars of the alternative charge in respect of the 1st appellant stated that on the 20th day of April, 2000 at Mau Summit Area in Nakuru District within the Rift Valley Province, otherwise than in course of stealing, dishonestly handled a jacket knowingly or having reasons to believe it to be stolen goods.

And the particulars of the alternative charge in respect of Samuel Kamau Muraguri *alias* Kilombi stated that on the 11th day of April, 2000 at Maji Mazuri Trading Centre in Koibatek District of the Rift Valley Province, otherwise than in the course of stealing, dishonestly, handled a pair of shoes knowing or having reasons to believe them to be stolen goods.

The appellants pleaded not guilty to the charges and after a full trial by the Senior Resident Magistrate, Nakuru. They were convicted of the two counts of robbery with violence and sentenced to the mandatory death sentence for both counts. The appellants being dissatisfied with the conviction and sentence have appealed before this court and raised several grounds of appeal in what they call a memorandum of appeal.

During the hearing the appeals in respect of the three appellants, the three appeals were consolidated for purpose of hearing and determination as they arise out of the same conviction. The appellants challenged the conviction and sentence on the grounds that there was no evidence of identification of stolen items and thus the doctrine of recent possession was not applicable in the circumstances of this case.

The trial court was faulted for relying on conflicting and contradictory evidence by the prosecution witnesses and for failing to weigh the evidence against the laid down principles of law as regards the offence of robbery with violence.

The appellants were of the view that the charges against them were not proved to the required standard and moreover the trial magistrate ignored their defence evidence, which if it was taken into account would have entitled the appellants to an acquittal. These same grounds of appeal cut across on all the three appeals by the appellants.

The appeal was opposed by the respondent, Mr. Koech, the learned Senior State Counsel supported the conviction and sentence. He submitted that the appellants' were convicted on the basis of the evidence of recovery of stolen items that were found in possession of the appellants immediately after the robbery. The 1st and 2nd appellants are the ones who led the police to where the bicycle that was stolen from the first robbery victim was sold. They also led the police to the 3rd appellant who was arrested with a pair of shoes which was identified by the second victim of the robbery. According to Mr. Koech, the appellants did not offer any explanation as to how they came to be in possession of stolen items so soon after the robbery. Thus, the trial court made the inference from the circumstances that the appellants were the robbers.

We shall refer to the issues raised in the above submissions after setting out the summary of the evidence that led to the conviction and sentenced of the appellants.

On the nights of 10th and 11th April 2000 along Maji Mazuri, in Eldama Ravine, there was an incident of robbery with violence. The victim of the robbery David Cherogony Chepsom was killed in the cause of the robbery and his bicycle which he was riding, stolen. Members of his family and other villagers found his body with injuries by the roadside on the morning of 11th April 2000. The body was taken to the mortuary, a postmortem was carried out and Dr. Dan Kiptom, (PW3) who produce the postmortem report and P3 form, certified that the cause of David Cherogony Chepson death was cardial arrest due to twisting force applied on the neck due to assault.

Oliver Kipchirchir, PW 2 was also a victim of robbery, he told the court that on 8th April 2000 at about 7.30, he was attacked along the same place and the robbers robbed him of his coat and his wallet. He managed to run to his home where he was assisted to go to hospital and he was hospitalized for four days. He said in his evidence that some of the items that were stolen were recovered.

PC Suleiman Opondi, PW 11 was the investigating officer, he gave evidence of how the 1st appellant was arrested and brought to Koibatek Police Station by the Mau Summit Police, he came wearing the jacket which had been stolen from PW 2. The 1st appellant led the Police to Londian where he had sold the bicycle to Francis Macharia, PW 8. He also mentioned the 2nd appellant and more so, PW 8 identified the 1st and 2nd appellants as the two boys who sold to him a bicycle.

The 3rd appellant was arrested with a pair of shoes that was found with his brother. The other piece of evidence against the appellants was a statement under inquiry that was recorded from the 1st appellant by Inspector of Police, Daniel Wanyama that was admitted in evidence.

Put on their defence, the 1st appellant gave unsworn statement and denied having had anything to do with the offences for which he was charged with. Similarly, the 2nd appellant gave an unsworn statement and denied having been involved in the robbery incidences.

The third appellant gave a sworn statement in defence, he said that the pair of shoes that was recovered from him, he had bought them from the 1st and 2nd appellants.

The trial court evaluated the evidence and made the following findings.

"The issues that need to be determined are whether the accused had the opportunity, whether there is evidence against each of the deceased persons, if all the ingredients were proved and if any doubt was cast on the prosecution evidence.

There is evidence that places all the three accused persons at the scene, they each therefore had the opportunity.

***A**gainst the 1st appellant and the 2nd appellant, they were both seen trying to sell and eventually sold the deceased bicycle. They are the ones who led the police to the recovery of the same. There is a statement by Philip Gitau which is not defended. On its own, it would have been of no use but read in the light of the rest of the evidence, it shows that the 2nd accused was involved.*

The 3rd appellant was found with shoes belonging to the 2nd complainant, which had been robbed at the same venue where the first victim was found murdered ….."

This being a first appeal, this court is mandated to reconsider the evidence, re-evaluate it itself and subject the entire evidence to its own independent scrutiny and arrive at a decision on whether or not to allow the appeal. (*See* the case of Okeno Vs Republic [1972] E.A 32). We have considered the submissions that were made before us by the appellants and by Mr. Koech on behalf of the State. We have carefully re-evaluated the evidence that was adduced before the trial magistrate's court. The issue for determination by this court is whether the prosecution proved the charge of robbery with violence against the appellants to the required standard of proof beyond reasonable doubt.

The prosecution relied on the evidence of the recovery of the stolen items and the evidence of a confession to secure the conviction of the appellants before the trial magistrate's court. The appellants complain that the said evidence of the recovery of the bicycle, shoes and jacket did not connect them to the robberies in question. They also criticized the trial magistrate for admitting the evidence of the confession which in their view was illegally obtained from the 2nd appellant. David Cherogony Chepsiom was riding his bicycle along the Maji Mazuri – Eldama Ravine road on the night of the 10th and 11th April 2000 when he was accosted by robbers and robbed of his bicycle. He was attacked and fatally injured in the course of the robbery. Patrick Kariuki Njuguna (*the 1st appellant*) and Phillip Gitau Karanja (*the 2nd appellant*) left a bicycle, which was later identified to belong to the deceased, at the premises of PW7 John Muthee Mwangi on the 12th April 2000 at 9.00 a.m. The 2nd appellant was wearing a jacket which was identified by PW2 Oliver Kipchirchir as the one which was robbed from him

on the night of the 8th April 2000 at 7.30 p.m. when he was accosted by a robber, hit on the head and seriously injured. The said jacket was positively identified by PW2 to belong to him. On the 19th April 2000 PW10 APC John Kerich went to a garage at Londiani Township where bicycles were being repaired. He was shown a bicycle which was being sold. PW10 became suspicious and made inquiries as to the ownership of the said bicycle. He established that the said bicycle was owned by the 1st appellant. The bicycle was produced in evidence by the prosecution and was later identified to belong to the deceased.

After the appellants had been arrested, PW13 Inspector Daniel Wanyama wrote a statement under inquiry from the 2nd appellant Phillip Gitau Karanja who confessed to have robbed the deceased of the bicycle while in the company of the 1st appellant. Although the statement was retracted by the 2nd appellant during trial, the same was admitted in evidence by the trial magistrate. We have looked afresh at the evidence adduced before the trial magistrate and we are of the view that the evidence of the recovery of the bicycle and the jacket in the possession of the 1st and 2nd appellants sufficiently connects them to the robbery of the deceased and PW2. As it was held in the Court of Appeal case in Nyeri, Isaac Nganga Kahiga Vs Republic C.A Cr. Appeal No. 272 of 2005 (Nyeri) (Unreported) at page 7

" *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."*

In the present case, the items found in possession of the 1st appellant and 2nd appellant were positively identified to belong to the deceased and PW2. The said bicycle and jacket were found in possession of the 1st and 2nd appellants in a period of less than seven (7) and twelve (12) days respectively after the said robberies. The 1st and 2nd appellants could not offer a satisfactory explanation of how they came to be in possession of the said items which were robbed from the deceased and PW2. We find that in the circumstances of this case the doctrine of recent possession applies to prove the charge of robbery with violence against the 1st and 2nd appellant.

We are fortified in our decision that it is the 1st and 2nd appellants who robbed the deceased and PW2 by the evidence of PW10 who produced the statement made under inquiry and which was written by the 2nd appellant whereby he confessed that he, in the company of the 1st appellant, robbed the deceased of the said bicycle and in the course of robbing him fatally injured him. Although the statement was retracted by the 2nd appellant during trial, the said was admitted in evidence after a trial within a trial. The Court of Appeal held in Tuwamoi –Vs- Uganda [1967] E.A 84 at page 91 para. FG:

"A trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court……"

In the circumstances of this case we hold that although the 2nd appellant retracted his confession during trial, the evidence contained in the said confession was corroborated by the evidence of the recovery of the stolen item. In any event taking into account the totality of the evidence adduced by the prosecution it is clear that what the 2nd appellant stated in the said confession was in fact true. We are conscious of the legal requirement that accomplice evidence, being evidence of the weakest kind should not be relied on by a court to convict an accused person in the absence of other evidence. As was held by the Court of

Appeal in the recent case of Benson Limantees Lesimir & Anor. –vs- Republic CA Criminal Appeal No. 102 and 103 of 2000 (Nakuru) (unreported), that although such evidence is generally considered to be of the weakest evidential value, nevertheless, it can be accepted in evidence to lend assurance to an otherwise strong case against such an accused person. Taking into account the totality of the evidence adduced by the prosecution in this case the said evidence of retracted confession lends assurance to the evidence of the recovery of the items which were robbed from the victims of the robbery.

We have considered the defences which were put forward by the 1st and 2nd appellants and hold that the same did not displace the otherwise strong culpatory evidence adduced by the prosecution. We therefore hold that the prosecution proved its case to the required standard of proof on the charge of robbery with violence on the two counts against the 1st and 2nd appellant. There was no sufficient evidence to connect the 3rd appellant Samuel Kamau Muraguri with the said robbery. His appeal is therefore allowed.

The upshot of the above reasons is that the appeal filed by the 1st appellant Patrick Kamau Njuguna and the 2nd appellant Philip Gitau Karanja lack merit and is hereby dismissed. Their conviction and sentence are hereby confirmed. The 3rd appellant Samuel Kamau Muraguri is acquitted of the two charges of robbery with violence. He is ordered released from prison forthwith and set at liberty unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Nakuru this 20th day of December 2006.

MARTHA KOOME

JUDGE

L. KIMARU

JUDGE