REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEALS 203 & 204 OF 2003

SILVANUS JOMO MADEGWA……..……..1ST APPELLANT

BENSON OUMA…….2ND APPELLANT

VERSUS

REPUBLIC……..……..…RESPONDENT

(From original conviction and sentence in Criminal Case No.2551 of 2002 of the Chief Magistrate's Court at Nakuru – J. S. KABURU, SPM)

JUDGMENT OF THE COURT

The appellants were charged with two counts of robbery with violence contrary to **Section 296(2)** of the **Criminal Procedure Code**. They had been jointly charged with two others who were acquitted. In the first count the particulars were that on 5th September 2001, at Section 58 Nakuru Municipality, the appellant jointly with others, while armed with dangerous weapons namely pistols, homemade guns, bolts cutters and clubs robbed one Dhanji Liladhar Parmer of a Sonny TV with its remote, multi choice satellite decoder and its remote, satellite receiver and its remote, amplifier and other assorted electronic equipment and cash Kshs.32,000/- all valued at Kshs.215,000/- and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said person. In the second count the particulars were that on the aforesaid date and place as hereinabove and in similar circumstances as in count one the appellants robbed Pradip Dhanji of Kshs.7,300/- and a motor vehicle registration number KWW 900, make Peugeot 504 pick up together with the vehicle keys.

After a full trial, the appellants were found guilty and convicted in both counts and sentenced to suffer death as mandatorily provided. The appellants were dissatisfied with the said conviction and sentence and preferred appeals to this court against both the conviction and sentence. The first appellant is Silvanus Jomo Madegwa, the appellant in Criminal Appeal No. 204 of 2003 and the second appellant is Benson Ouma Amuokoa alias Ambrose, the appellant in Criminal Appeal No. 203 of 2003. The two appeals were consolidated, with consent of the appellants, and heard together. The appellants raised more or less the same grounds of appeal which can be summarized as hereunder:-

1. That the learned trial magistrate erred in law and in fact in convicting the appellants in the absence of sufficient identification evidence.

2. That the learned trial magistrate erred in law and in fact in holding that the appellants were found in possession of stolen items soon after the robbery and thereby convicting them.

3. That the learned trial magistrate erred in law and in fact in admitting the appellants' statements under inquiry.

4. That the learned trial magistrate erred in law and in fact in rejecting the appellants' defences without giving good reasons for so doing.

The brief facts of the prosecution case were as follows:-

On 5th September 2001, at about 8.45 p.m., **Dhanji Liladhar Parmer, PW1** was in his house at Section 58, Nakuru. He was resting on his bed watching television. Suddenly two men entered the room and demanded money from him. He told them that there was some money in a briefcase in the room and before he could take the briefcase and remove the money, the robbers grabbed the same from him. They also robbed him of Kshs.4,000/- which was in his wallet. He was made to lie down on the floor. The two men tied his hand. He was taken to the living room where he found his family members lying on the floor with two other men guarding them. One of them had a firearm. One of the robbers ordered PW1's son, **Pradip D. Dhanji, PW2** to accompany him to his room. The other robbers started removing electronic equipment from PW1's house. The equipment included television sets and their remote controls, world space receiver, amplifiers and other equipment as stated in the charge sheet. The robbers loaded all the goods in a Peugeot 504 Pick Up registration number KWW 900 and drove off. PW1 recognised one of the people who was loading the items as his watchman, the first appellant. This is a person was known to him as he had worked for him for nearly nine months prior to the robbery indent. After the robbery, the first appellant absconded from work and did not report for duty thereafter. In the course of the robbery, PW1 and PW2 were injured by the robbers.

The following day, PW1 learnt that some electronic items had been recovered at Lanet area. He identified most of the items as being the ones which he had been robbed of the previous day. The stolen vehicle was also recovered at the Pipeline area.

PW2 corroborated the evidence of PW1 in all material aspects. He confirmed that their watchman, the first appellant herein, was one of the people who robbed them. Shortly before the attack the firs appellant had asked for a match box and drinking water. He had also requested PW2 to go out of the house and park his vehicle registration number KWW 900 at a different location. The robbers got an opportunity to move into their house when he was going out at the request of the first appellant. PW1 and PW2 testified that electricity lights were illuminating inside and outside the house. In an identification parade that was organized by the police, PW2 identified the second appellant and other two people who were acquitted by the trial court.

PW1's wife, Muktabi A. Parmer also corroborated the evidence of PW1 and PW2. she stated that it was their watchman, the first appellant, who facilitated the entry of the other robbers into their house on the material night of the robbery.

John Kamau Gitu, PW3, was a member of a vigilante group that was operating in an area known as Teachers Estate. He testified that on 5th September 2001, members of the vigilante group were patrolling their area of residence when two people were spotted carrying a bag. When they were ordered to stop, they ran away leaving behind the bag that was in their possession. The vigilante group checked the contents of the bag. They found a radio cassette, world space receiver, video cassettes and many other items in the bag. Most of these items were identified by PW1 and PW2 as their property that was robbed from them on the material night. The vigilante members took the recovered items to the area chief on the following day. PW10 corroborated the evidence of PW3 as he was also a member of the vigilante group.

Administration Police Constable Harrison Ohaga, PW4, who was attached to Lanet Chief's office, testified as to how two members of a vigilante group took a bag containing the recovered items to Lanet Chief's office. The bag and its contents were thereafter handed over to the police.

Inspector Shadrack, PW6, conducted the identification parade where the second appellant was identified by both PW1 and PW2.

Inspector Daniel Langat, PW11, recorded a statement under inquiry from the first appellant. In the said statement the first appellant stated in details how the robberies were planned and executed. Although the first appellant objected to the production of the said statement, after a trial within a trial was conducted, the same was admitted in evidence.

Chief Inspector Leonard, PW12, recorded a statement under inquiry from the second appellant who also stated in details how the robberies were planned and executed. He had objected to the production of the statement, but after a trial within a trial was conducted, the court ordered that the statement be produced.

Inspector John Riambira, who was erroneously referred to as PW11, testified that on 28th November 2001, a suspect by the name John Macharia was arrested within Mwariki area of Nakuru. The suspect, upon interrogation, led the police in the arrest of another suspect known as Peter Wanguchu who in turn led the police into arresting another suspect by the name Wamalwa. Wamalwa led the police to the house of the second appellant. When the police searched the house of the second appellant, they recovered several electronic equipments and other crude objects used in house breaking. A television set and a wall clock were some of the things that were recovered in the house of the second appellant. The two items were positively identified by PW1 as being part of the things that he was robbed of. The witness also produced the crude objects which were recovered from the house of the second appellant. They included a big pair of scissors, a small axe, a simi, a panga and a sharp metal. A torch was also recovered together with the aforesaid items. After recovery of the said items the second appellant was arrested.

Sergeant Geoffrey Mangeni, PW13, testified that on 12th November 2001, he was at Nakuru CID offices when he learnt through the police communications system that a person had been arrested at Kiamunyi area by members of the public. It was reported that the person was suspected to have been involved in a robbery at Section 58, Nakuru. When he went to the said place he found the first appellant having been tied by members of the public. PW13, effected the arrest of the first appellant and took him to the CID offices.

In his unsworn defence, the first appellant admitted that he had been employed by PW1 as a watchman. He said that on the material night at about 8.30 p.m., he saw PW1's dogs going to the gate. He followed them there and realized that there were some strangers except one person whom he had recognized as PW1's day worker by the name Hudson Ndiogotio. The first appellant asked them what they wanted and they told him that they wanted to see PW2 as they had brought him a television. He said he was given a key to open the rear gate for the strangers. The strangers went in to the house and after a short while, the first appellant saw things being loaded into PW2's pick up. He said that he opened the gate for them and was told to get into the pick up which he did. He further testified that he did not know that PW2 was not in the vehicle. He further stated that the vehicle was driven towards Nairobi direction and near Nakuru Blankets it was driven off the road. They offloaded the goods at some place. He further testified that he was ordered to get into the vehicle and he was taken to a forest where he spent the night. The following day he went to his house and found that his wife had been arrested. As he was going to look for his wife he was arrested by members of the public at Kiamunyi area. Thereafter he was taken to Nakuru Central police station and charged for robbery with violence.

The second appellant gave a sworn defence. He testified that on 30th November 2001, he went to see a friend of his known as William but he did not find him in his house. He left his friend's house at about 8.00 p.m. Since it was dark, he said that he requested his friend's wife to give him something which he could defend himself with and was given a club. On the way home, he met with four people who enquired why he was carrying the club. One of the people assaulted him and as he was about to fight

back they introduced themselves as police officers. The second appellant further testified that he recognized one of the four people as Police Constable Liambila with whom they had differed over a woman known as Jane. He said he was arrested and taken to CID offices where he was beaten by the said PC Liambila and Corporal Muriuki. Later he was charged together with the first appellant and other people with the said robberies. He denied to have been found in possession of any stolen items.

The second appellant called **Rose Nafula, DW3** as a witness. She was alleged to be the wife of the second appellant's friend, William. She testified that on 30th November 2001, the second appellant went to her house to see her husband and waited for him up to 8.00 p.m. when he left. She heard that the second appellant had been arrested the following day.

We have considered all the evidence that was adduced before the trial court by both the prosecution and the appellants. This being a first appeal, this court is mandated to re-evaluate and re-consider that evidence and arrive at an independent decision as to whether or not to uphold the conviction of the appellants. The court must, however, bear in mind that it neither saw nor heard the witnesses as they testified and must therefore make an allowance for that. It was so held in ***NJOROGE V REPUBLIC [1987] KLR 19.***

Turning to the first ground of appeal regarding identification of the appellants, PW1 PW2 and PW8 clearly recognized the first appellant as their watchman. The first appellant had worked in the house of PW1 for nearly nine months prior to the robbery incident. There were bright electricity lights which had been put on when they saw and recognized the first appellant together with other people. The three witnesses saw the first appellant loading the items that they had been robbed from the house into the pick up of PW2. The first appellant admitted that indeed he opened the gate to the house of PW1 and allowed some strangers to get into the house. He further admitted that the strangers carried some items from the house of PW1 which were loaded into the vehicle of PW2. He did not therefore deny that he was seen and recognised by PW1, PW2 and PW8 on the material night. In our view, therefore, there was sufficient evidence of recognition to warrant conviction of the first appellant. In ***ANJONONI AND OTHERS VS REPUBLIC [1980] KLR 59***, the Court of Appeal emphasized the value evidence of recognition of an accused by a complainant as opposed to identification of a stranger. In that case, the court stated that:-

"***Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

The first appellant did not allege that there was any possibility of mistaken recognition by PW1, PW2 and PW8. In ***R VS TAMBU [1976] 3 ALL ER 549*** where a clear distinction was drawn between identification and recognition, the court stated as follows:-

"***Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

As we have already stated hereinabove, the first appellant was sufficiently recognized by the three witnesses and there was no possibility of any mistaken identity.

Although PW1 and PW2 participated in an identification parade, the same was not necessary for purposes of identifying the first appellant as he was known to them. As for the second appellant, he was identified by PW1 and PW2 in an identification parade. If the conviction of the second appellant was entirely dependant on the said identification, we would have held that there was in sufficient evidence to sustain a conviction because the two witnesses did not state how long they had observed the second appellant and for the further reason that they were not asked to describe the second appellant prior to their being asked to identify him. It is trite law that before an identification parade is conducted, an identifying witness should be asked to give the description of the person sought to be identified so that the description can be matched against the identification of the suspect.

See the Court of Appeal decision in ***FREDRICK AJODE VS REPUBLIC***, Criminal Appeal No. 87 of

2004 at Kisumu (unreported).

However, the second appellant was found in possession of some of the goods that the complainants were robbed of, nearly three months after the date of the robbery. The second appellant did not give sufficient explanation as to how the said items were found in his house. He merely denied having been found in their possession. In ***JAMES TIOKOI KOITOI VS REPUBLIC*** ***Criminal Appeal No. 138 of 2003 at Nyeri (unreporte***d), it was held as follows:-

"***Where an accused person is found in possession of goods recently stolen during a robbery, the trial court is at liberty to draw a presumption that the accused was one of the robbers unless the accused properly accounts for their possession."***

In ***MALINGI VS REPUBLIC [1989] KLR 225***, Bosire J. (as he then was), commenting on the doctrine of recent possession, stated as follows:-

"***By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to the possession; that the lapse of time from the time of his loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a presumption of facts is a rebbutable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

Applying the above principles, we hold that the second appellant was properly convicted on application of the doctrine of recent possession.

Turning to the third ground of appeal, the appellants recorded detailed statements under inquiry where they stated how the robberies were planned and executed and the roles which each one them played in executing the robbery. The statements are on record and we perused them. They were admitted in evidence after a trial within a trial was conducted in respect of each one of them. In ***JOHN NDEGWA NJUGUNA AND ANOTHER VS REPUBLIC*** Criminal Appeal No. 88 of 2003 at Mombasa (unreported), the Court of Appeal held that a statement under inquiry may be properly admitted where it contains a detailed account of what took place that only the accused could be in a position to provide those minute details. Having carefully considered the two statements alongside the rest of the prosecution evidence, we are satisfied that the trial court was justified in admitting the statements under inquiry that had been recorded by the appellants. We therefore dismiss the third ground of appeal.

The trial court considered the defences that were advanced by the appellants, though not in exhaustive details and found no merit in them. We are aware of the holding by the Court of Appeal in ***OUMA VS REPUBLIC [1986] KLR 619***, that at the time of evaluating the prosecution's evidence, the trial court must have in mind the accused person's defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of that defence being true. The court went on to say that if there was doubt, the benefit of that doubt always goes to the accused person.

Although the trial court did not evaluate in details the defence evidence, in our view, it did not entertain any doubt that there was any possibility of the defence evidence being true. The defence by the first appellant was clearly untenable, considering that he was clearly recognized by the appellants and the excuse he gave for opening the gate to the complainant's house and allowing strangers to get into the house was completely unacceptable. Equally the defence by the second appellant did not dislodge the evidence that was adduced against him by the prosecution witnesses. We find no merit in the fourth ground of appeal.

All in all, we dismiss the appellants' appeals in their entirety and hold that their conviction was safe.

DATED, SIGNED and DELIVERED at NAKURU this 20th day of December, 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE

Judgment delivered in open court in the presence of the appellants and Miss Opati for the state.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE