REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 209 of 2002

BETWEEN

JOHN NAKUCHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(From original conviction and sentence of principal Magistrate's

Court at Isiolo in Criminal case No. 59 of 2002 dated 5.9.200)

JUDGMENT OF THE COURT

The appellant herein, John Nakuchi was tried and convicted on three counts of robbery contrary to section 296(2) of the Penal Code. He was sentenced to suffer death on each of the three counts as by law established.

The particulars of the charge on count 1 are that on the 5th day of January 2002 at Kulamawe Village in Isiolo District within Eastern Province jointly with others before the court, while armed with knives, hacksaw and axe robbed Mwangi Gichere of his black leather jacket and cash Kshs. 9,500/= all valued at Kshs. 12,500/= and immediately before and immediately after such robbery threatened to use actual violence to the said Mwangi Gicheru.

The particulars of the charge on count two are that on the 7th day of January 2002 at Kulamawe Village in Isiolo District within Eastern Province jointly with others before the court while armed with knives, hacksaw and an axe robbed Julius Mjumbe of his cash Kshs. 2,035/= and immediately before or immediately after such robbery threatened to use actual violence to the said Julius Mjumbe. The particulars of the charge on count three are that on the 7th day of January 2002 at Kulamawe Village in Isiolo District within the Eastern Province jointly with others before the court while armed with knives, hacksaw and an axe robbed Martin Mwiti of his black kiwi of 12gms, a red magnetic lighter (big) and cash 17/= all valued at Kshs. 187/= and immediately before and immediately after such robbery threatened to use actual violence to the said Martin Mwiti.

The appellant was also charged in the alternative with handling stolen goods contrary to section 322(2) of the Penal Code, the particulars thereof being that on 9th day of January 2002 at Kulamawe Village in Isiolo District in Isiolo District of Eastern Province otherwise than in the course of stealing dishonestly received or retained black kiwi of 12 gms, and red magnetic lighter (big) knowing or having reason to believe it to be stolen goods.

The appellant appealed against both conviction and sentence and set out seven grounds of appeal.

The appellant's complaints against the judgment of the learned trial magistrate Mr. P.M Ndungu were that (a) the identification evidence was not without error or mistake; (b) the prosecution's evidence was contradictory, (c) the learned trial magistrate did not consider the appellant's defence, (d) the prosecution's case was not proved beyond any reasonable doubt and (e) the learned trial magistrate misdirected himself on the burden of proof.

The brief facts of the case can be stated. On 5.1.2002 at about 7.30pm complainant in count one of Mwangi Gichere (PWI) hereinafter referred to as Mwangi) was going home when he met with some two thugs who confronted him and robbed him of money and a jacket. The two thugs were armed with a knife. Before robbing him, the thugs warned Mwangi not to scream. After the robbery, Mwangi reported the incident to police. Some few days later, Mwangi was informed that his stolen jacket had been recovered but that the same was recovered from one Ekiru. Mwangi also identified Ekiru at an identification parade. Ekuru was however not charged.

On 7.1.2002 at about 9.00pm, the complainant in the 3rd count, one Martin Mwiti (PW3 hereinafter referred to as Mwiti) was walking home from work. As he crossed the road near Development Office, Mwiti was confronted by some two people who ordered him to sit down after they had flashed the torch at him. Soon after, Mwiti was ordered to stand up and while one of the two people held a knife on Mwiti's head, the second man frisked Mwiti's pockets and removed therefrom some kiwi shoe polish, some coins and a cigarette lighter. After the two men had left, Mwiti rushed and reported the incident to the nearby Administration Police Camp.

As Mwiti and some APs returned to look for the robbers, they found the complainant in count two, one Julius Mjumbe (PW4, hereinafter referred to as Mjumbe) being robbed at the same spot. The Administration Police Officers, namely Rueben Samoeo (PW2) Emmanuel Munde (PW6) and PC Kobia Mugambi (PW7) were among the officers who accompanied PW3 to the scene of the robbery. The three officers gave chase and managed to arrest one thug known as Michael Ekiru. The other thug disappeared into the darkness. Michael Ekiru was apparently charged in a different case.

On the arrest of Ekiru a search was carried out at his house during which a sword – P exhibit 4, an axe – P exhibit 3 a hacksaw P exhibit 5, shoe polish – P exhibit 6 and a lighter P exhibit 7 were recovered. Thereafter, Ekiru took the officers to the house of the appellant from which nothing was recovered. A jacket was also recovered from Ekiru.

When called upon to defend himself, the appellant gave a brief unsworn statement. He told the court that on 9.1.2002 at about 11.00am he saw a police officer come to his place of work where he used to sell vegetables at Soko Mjinga. After the police had asked him for his name they arrested him and took him to the police station.

He was later interrogated and subsequently identified at an identification parade by two of the complainants who had come to the crime office while the appellant was also present. The appellant denied any involvement in the commission of the alleged offences. When the appeal came before us for hearing, the appellant submitted that the allegedly stolen items and particularly the jacket were found with Michael Ekiru who was never charged alongside the appellant.

The appellant also raised the issue of the identification parade and submitted that the only reason why he was identified at the parade was because the witnesses had seen him at the crime office prior to the identification parade. He also submitted that without Michael Ekiru having been charged then the conviction against him (appellant) was misplaced and urged the court to quash the same. The appeal was not opposed on the following grounds

(a) That the evidence upon which the learned trial magistrate based the conviction was wanting and more so because the appellant and indeed the second robber was not identified by the complainants during the robbery;

(b) That the allegedly stolen items were recovered from one Michael Ekiru who was arrested while

robbing PW4

(c) That the prosecution evidence of the arresting officer – PW2 - clearly showed that it was Michael Ekiru who led the police officers to the home of the appellant and further that nothing connected with the alleged robberies was recovered from the appellant's house during a search conducted thereat;

(d) That the identification of the appellant at the identification parade was strange and finally

(e) That the evidence by PW5 and PW6 was inconsistent with the evidence given by PW2.

We have ourselves carefully reconsidered the evidence on record vis-avis the submissions made by learned state counsel. From that re-evaluation and reconsideration, the following facts emerge:- That during all the three robberies none of the victims identified the appellant as one of the attackers. PW4, Mjumbe, testified that the person who was arrested after the robbery and whom he, Mjumbe, also identified at the parade, was not charged alongside the appellant. It further emerges from the evidence that none of the stolen items were recovered from the appellant; and finally that the only connection between the appellant and the commission of the various offences was one Emmanuel Ekiru from whom all the stolen items were recovered but who, unfortunately for the prosecution's case was not arraigned in court together with the appellant.

Yet it comes out from the evidence of Mjumbe that he was able to identify the appellant with the help of a torch which the appellant was flashing at him. We have agonized over the judgment of the learned trial magistrate and find ourselves in agreement with the learned state counsel that it would be unsafe, in the circumstances of this case to let the conviction stand. It is our finding that the conditions for the identification of the appellant as the robber by each of the three complainants were such that they were not error free. We shall first of all examine again very briefly the evidence of Mwangi.

His evidence was that the thugs flashed a torch at him but nowhere in his evidence does Mwangi say that he identified either or both of the robbers. The only other evidence was that Mwangi's jacket was recovered two days after the robbery. The person from whom the jacket was recovered was not the appellant but was one Emanuel Ekiru who was never charged together with the appellant. If indeed the evidence of Mwangi would have been that his stolen jacket was recovered from the appellant then we would have had no difficulty whatsoever in reaching the inevitable conclusion that the appellant was either the thief of the stolen jacket or the handler thereof. In the circumstances of this case, the evidence points to Ekiru and not to the appellant as either the thief or the handler of Mwangi's stolen jacket. No evidence was adduced to confirm that the appellant was infact the other thug with Ekiru though most likely, he was.

For the reasons given, we find that the conviction of the appellant on count one of the charge cannot be sustained. His appeal on count one must therefore succeed and we so find.

We now turn to the evidence of Mjumbe, PW4. That is the evidence that was given in support of count two of the charge. According to Mjumbe, he was walking home at about 8.00pm after he had been to the shop to buy paraffin, bread and sugar. He was then confronted by two thugs who were armed with a sword which was placed on his (Mjumbe's) neck as the thugs robbed him of some Kshs. 2,055/=. The police officers came to the scene and that is when Mjumbe shouted that he was being robbed. The robbers fled on realizing that police were at the scene but the police gave chase and managed to arrest one of the thugs who later turned out to be Michael Ekiru. The other thug escaped but later on and with the help of Ekiru the appellant was arrested.

Two days after the robbery, Mjumbe identified the appellant at an identification parade. According to PW2, Rueben Samoe, on 7.1.2002, Mwiti reported to the police that he had been robbed and together with other officers he accompanied Mwiti to the scene of the robbery. On reaching near the scene the thugs flashed their torches but on realizing that police were at the scene the thugs fled though one of the robbers named Ekiru was arrested. According to PW2, a search at Ekiru's house yielded all the exhibits that were produced in evidence among them the Kiwi shoe polish and the lighter stolen from Mwiti, PW3.

According to Mwiti, he told police that he could identify the assailants if he saw them. PW2 who received the report from Mwiti did not say that Mwiti had told him he (Mwiti) could identify the thugs. PW5, PC Patrick Matheka testified to the effect that the Kiwi shoe polish and the lighter were recovered from the appellant. PW6, Cpl Emmanuel Muinde's testimony was that after receiving a report from Mwangi of a robbery he PW6, sent officers along with Mwangi to the scene. On the following day Mjumbe and Mwiti made similar reports of an attack at the same place. That is when he arranged to go and lay an ambush in the area. He went out with some officers together with Mwiti and Mjumbe. On reaching the spot the attackers stopped the complainants and that is when the officers pounced on the attackers. Michael Ekiru was arrested while the other thug escaped. According to PW6, Ekiru was armed with a Somali sword, hacksaw and an axe.That it was Ekiru who told the officers that he had been with John Nakuchi, the appellant herein.

What comes out from the totality of the evidence is that it is not quite clear to us under what circumstances both Mwiti and Mjumbe were able to identify the appellant as one of the robbers. Mjumbe alleged that he was able to identify the appellant by help of torch light from the torch which the robbers had, and that the identification was possible at the time when the appellant was frisking his pockets for money. Mwiti gave a similar story, but we find it difficult to agree that there was enough light from the robbers' torches which could have enabled either Mwiti or Mjumbe to positively identify the appellant.

There is also the contradiction in the evidence of PW2, PW3 and PW5 as regards the recovery of the Kiwi shoe polish and the lighter – whether these were recovered from the appellant or from Ekiru. In our considered view, these contradictions viewed against the conditions under which the identification of the appellant is said to have occurred leave considerable doubt in our minds as to the safety of the convictions on both counts two and three. We therefore find that those convictions cannot be allowed to stand.

As a final point in our judgment we note that the framing of the charge in count three does not comply with the provisions of section 296(2) of the Penal Code and in our view, the charge was bad for duplicity. Section 296(2) of the Penal Code provides as follows:-

> **"(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

Count three of the charge alleges that "immediately before and immediately after such robbery threatened to use actual violence……." On this score therefore, even if there had been sufficient evidence to connect the appellant to the offence, we would still have allowed the appeal on this count for the simple reason that the charge was bad for duplicity.

In the result therefore, we concur with learned state counsel that the appellant's appeal must succeed in its entirety. We accordingly allow the sam e, quash the conviction on each of the three counts. We also set aside the sentence of death imposed upon the appellant on each of the three counts. Unless otherwise lawfully held, the appellant is to be released from prison forthwith.

It is so ordered.

Dated and delivered at Meru this 30th day of June 2005.

D.A. ONYANCHA

JUDGE

30.6.2005

RUTH N. SITATI

JUDGE

30.6.2005