



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
Criminal Appeal 46 3 5 & 2 of 2004**

DAVID MURUNGI.....1ST APPELLANT

AND

Criminal Appeal 6 of 2004

PHILLIP MWENDA.....2ND APPELLANT

AND

Criminal Appeal 3 of 2004

PAUL EMATHE.....3RD APPELLANT

AND

Criminal Appeal 5 of 2004

JOSEPH KINYUA.....4TH APPELLANT

AND

Criminal Appeal 2 of 2004

JAMES MUTHEE.....5TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence of P.M. Ndungu, PM

in Isiolo PM's Cr. Case No. 810 of 2003)

J U D G M E N T

The appellants were with others who were not convicted charged with robbery

with violence contrary to Section 296(2) of the Penal Code. Alternative to the robbery charge they were charged with Handling stolen property contrary to Section 322(2) of the Penal Code. They were also charged with a second count of Burglary contrary to Section 304(2) of the Penal Code and Stealing contrary to Section 279(b) of the Penal Code with an alternative count of Handling stolen property contrary to Section 322(2) of the Penal Code. The appellants alone were convicted of the two main

charges of robbery with violence and Burglary and Stealing. They were sentenced to death in relation to the first count of robbery with violence and to 4 years in relation to the count of burglary and stealing each, respectively, the two sentences to run concurrently. They appealed against the three convictions and the three sentences.

During the prosecution of these appeals the State conceded the appeals to count II of burglary and stealing but supported the appeals to robbery with violence in count I.

The prosecution called eleven witnesses who testified. Pw1 was Ruth Kirori who testified that on 4th July, 2003, she was sleeping in her house alone when at 1.00 a.m. five people broke into the house. They were carrying a panga and a torch. They confronted the witness who is the complainant in this case and demanded money as they beat her using slaps as well as rungu. The people finally stole from her Kshs.100/=, beans, a mosquito net, a pullover and lamp. They also took Pw1's clothes after the witness implored the people not to kill her. They tied her on the bed, locked house and escaped. Thereafter the witness untied herself and raised an alarm, and one Kagwiria and one Mjumbe came. Pw1 further testified that she was not able to recognize any of the attackers but said that she had recognized the voice of one of them whom she knew as "David." In the next morning Pw1 accompanied by one Grace, reported the incident to the Munanda Administrative Police Officers. They then went to Isiolo Town Market where they found one Beatrice Kendi, the 5th accused in the lower court, selling some beans which they immediately suspected to be the stolen beans. Pw1 testified further that she did not know any of the accused persons, although she said, she earlier used to see the 2nd appellant. She claimed that the 2nd appellant had told her to "kaa chini", which is the voice she recognized as that of the 2nd appellant. The witness admitted that there was no light in the house at the time of the attack. Afterwards the witness in company of others made a report to the police station.

Salome Karoga gave evidence as Pw2. She stated that on 25th June, 2003 at about 4.00 a.m. she was sleeping in her house at Maili Tatu in Isiolo Town. Her mother, Grace, also slept in the house. Some people broke into her compound after cutting through the fence and started to flash torches all over. They sometimes directed the flashes to the house where Pw2 slept. The people then entered what was serving as the kitchen. Pw2 was not able to see what they carried from her bedroom. But she claimed to have identified two people – Mwenda, the 2nd appellant and Kinyua, the 4th appellant.

However, one of the people was flashing a torch as others proceeded to carry beans which were in bags in the kitchen. When the thieves left, the witness stayed until 6.00 a.m. in the morning when on checking, she confirmed that 3 ½ bags of her beans had been stolen. She also confirmed that thieves had stolen 10 kg of peas, 1 cassette, two pangas and 5 compacts. She then reported the theft to the Administrative Police Officers at Mugae, and soon there after, to the police station at Isiolo. The latter started investigations. Nine days thereafter Pw2's radio and a panga were recovered in one of the appellant's house but the witness was not present. She was able to identify the radio which had a panga-mark on it. She also identified a panga, whose handle she had recently replaced. She testified that she had only recognized the 2nd and 4th appellants during the burglary. She also testified that she had given the names of those who she recognized to the police when she reported the incident.

The third witness was Japheth Muriuki, Pw3. He operated a hotel in Isiolo Town. He was at home on 4.7.2003 when he got a report of robbery at the home of Pw1 who had as well been assaulted. Pw3 immediately went to Maili Tatu where he met Pw1 in the presence of the Police. He gathered information there that the robbers included one David and one Mwenda, both of whom the witness, knew. Pw3 decided to visit the home of David and Mwenda but got information that they were not at home. He then with other people went to Isiolo Town Market place where they found Mwenda. The witness then further said that he knew David Muriungi and Mwenda only by appearance and not by their names and that the person he saw at the market was the 1st appellant, David Muriungi. When David Muriungi mentioned the name of Kinyua, the 4th Appellant, the police visited the house of the 4th appellant where they found the appellant absent. His wife was however, present and opened the house for a search. It was Pw3's testimony that the police recovered a radio and a panga exh. 6 and 9. The witness in company of others then were led to where the 4th appellant was and he was arrested together with one Muthee, the 5th appellant. The arrest is said to have taken place at Kulamawe before the two were handed over to the

police who questioned them. As a result of the information the two gave to the police, the 4th appellant led them to the market stall of the 5th accused in the lower court, Beatrice Kendi. The said Beatrice Kendi is said to have informed the police that the 1st, the 2nd and 4th appellants had sold beans to her. The police are also said to have taken possession of some beans found in the possession of a third person to whom Beatrice Kendi had sold them.

Thereafter the said Beatrice Kendi was arrested as well and the police were then led to the house of James Muthee the 5th appellant, herein. In Muthee's house a mosquito net (exh.2) and a pullover (exh.1) were purportedly recovered.

Pw3 also testified that the 4th appellant had then led the police in the presence of the witness to the house of one Emathe, the 3rd appellant herein. In Emathe's house they recovered a lamp. Later more beans (96 kgs) were recovered from the house of one Thurania and also from the house of the 3rd appellant, Emathe.

The 4th person who gave evidence as Pw4, was Martin Kimathi, who lived at Maili Tatu in Isiolo town. He recalled that on 4th July, 2003 he was at his home when Pw1 Ruth in company of Kimathi's grandmother Salome Karuga, Pw2 went there at 2.00 p.m. and reported that she had been robbed the night before. Ruth had informed him that one of the robbers who had robbed her was the son of Julius Mberia. Martin Kimathi further testified that he had also been robbed on 25th June, 2003 when they had lost several goods. As a result of the information, members of the public had arrested the sons of Julius Mberia with the help of Administrative Police Officers. It was the sons of Mberia, i.e. 1st and 2nd appellants who led them to where Kinyua, the 4th appellant could be found. 1st and 2nd appellant had alleged that the mosquito net and pullover were in Kinyua's custody. Kinyua was soon arrested in the company of one Muthee, the 5th appellant, {but in the lower court Pw4 pointed to the 3rd accused (3rd appellant) as the 5th accused}. Pw4 further testified that after his arrest the 4th appellant led the police to Beatrice Kendi, the 5th accused in the lower court and there found some beans (exhibit 1), which were carried to the police station. From the police station police officers went to the house of 4th appellant and there recovered a radio, exh.9, and a panga, exhibit 6, both of which pw4 identified as those earlier stolen from their house.

Administrative Police Officer No.207238 James Ireri gave evidence as Pw5. He was at the material time attached to Mugae A.P Post in Meru Central. He recalled that on 4.6.2003 he was at the camp when two women, Pw1 Ruth Kirori and another, reported that Pw1 had been robbed early that morning. He noticed that Pw1 was bleeding. She told the witness that she had recognized the voice of one of the robbers whom she identified as a son of Julius Mberia called Mwenda who was a neighbour in the same locality. Pw5 then visited Pw1's house and noticed that many house items were scattered all over. Pw1 complained to them that three bags of beans, eggs and a mosquito net had been stolen by the gang. Pw1 picked a torch and a rope at the scene, purportedly used by the robbers. Pw5 also testified that when he later confronted the 1st appellant about the torch, the latter said that the same belonged to Kinyua, 4th appellant. At the house of the 1st appellant where also the 2nd appellant lived, Pw5 recovered a radio exh.1 and a panga.

From there they were led, in company of many members of the public, to the house of the 4th appellant where they allegedly found a pullover and a mosquito net as well as a rungu. They then arrested the 4th appellant, and proceeded to the market where they were led to the said Beatrice Kendi the 5th accused (in the lower court) who had sold some beans to some other person. Beatrice Kendi is said to have then refunded the money she had received from the 3rd person and the beans were taken possession of by the police.

Beatrice Kendi testified that the 2nd and 4th appellants are the ones who had sold the beans to her. That is when the 5th appellant got arrested and the recovered exhibits were taken to Isiolo Police Station for investigations. The next witness was PC Geoffrey Kailutha who testified as Pw6. He was at the material time at Isiolo Police Station when Administrative Police Officers with members of the public took to the Station, the 1st and 2nd appellants in company of Beatrice Kendi, the 5th accused in the lower court. They also had in their possession beans which were reported to have been stolen by the two suspects

during a robbery the night before. As a result of the information given by the said two suspects on interrogation, the police in their company went to the 4th accused who in turn led them to the house of 5th appellant at Kambi ya Juu where they found a pullover and a mosquito net which were later identified by Pw1 as hers. Also in the house of 4th appellant they recovered a knife and a radio which was, according to Pw6, identified by Pw2 as his. Thereafter the 2nd and 5th appellants mentioned one Emathe who was as a result, later arrested at Cheseles and a lamp was recovered from his house. Further, the said Emathe who later was charged as 3rd accused and is 3rd appellant herein, informed the police that he had sold some beans to one Gakii at the market and 45 kgs were recovered from the said Gakii. This witness concluded his evidence by stating that he collected the exhibits recovered and he produced a panga, a rope and a radio and all other exhibits numbering 1 – 9.

Pw7, PC 73747, Peter Mutuma recalled that he was at Isiolo Police Station on 4.7.2003 when appellants 1, 2, 4 and 5 were taken to the Station. They mentioned another suspect called Emathe to whose house the police went and arrested him. A lamp was recovered from Emathe's house as well as 45 Kgs of beans he is said to have sold to a third party. Pw7 firmly testified that he was the one who arrested Emathe, the 3rd appellant.

Pw8, Grace Mbutho is the mother of Pw2 and was staying with the latter in the latter's house on 25.6.2003. At night towards the morning people she did not identify broke into her daughter's house and stole beans therefrom. Her daughter Pw2, claimed in the morning that among the robbers were two sons of Julius Mberia. She confirmed that she did not know the two people who had attacked them.

Janerose Kanario gave evidence as Pw9. She said that she traded in cereals at Isiolo Market generally. On 4.7.2003 at 12.00 p.m. she was at the market when Beatrice Kendi, the 5th accused in the lower court, came there accompanied by a young man who carried for her a load of beans measuring 93 Kgs. Beatrice Kendi sold to Pw9 the beans at Kshs.21 per Kg and paid in all 1953/= for the whole load. Soon thereafter she saw the said Beatrice Kendi under arrest of the Police who informed the witness that the beans she had bought had been stolen. Beatrice Kendi, offered to refund the Kshs.1953/= and the police took away the beans. She did not know nor suspect that the beans were stolen when she purchased them.

Some other evidence came from Pw10, David Thurania of Isiolo, Kulamawe. He also was a cereal trader at the Isiolo Town Market. On 4th July, 2003 at 8.00 a.m. he was at his market stall when two young men sold beans to him. The two were the 1st and 2nd appellants. The 1st appellant had arrived at the market on a bicycle and sold 47 kgs of beans at 21/= per kilo. The 2nd appellant sold 48 kgs to him at the same price. Later Pw10 saw the two young men brought under the arrest of the police who informed Pw10 that the beans that the two young men had sold to him were stolen. He knew the two young men, (the 1st and 2nd appellants), before the relevant day by face but not by names.

They had sold cereals to him several times before.

The last witness who gave evidence for the prosecution was Pw11, Elias muhiddin. He is a clinical officer who on 25th August, 2003 medically examined Pw1, Ruth Kirori, who had been assaulted allegedly during a robbery. He treated her and prepared and signed a P3, which he produced in evidence.

All the six persons were found to have a case requiring them to defend themselves.

The 1st appellant David Muriungi stated that he had left his house on 4th July, 2003 going to the market. He was there when Administrative Police Officers arrested him and forced him to take them to his house which they searched. The police took five cassettes of his and demanded to be shown beans stolen by the 1st appellant. He denied knowledge of such beans and was beaten by the police. The police then went to the store of one Thurania where they took some beans from. The appellant alleged that he had a grudge with the officer who arrested him over a piece of land. He was later charged with these offences.

The 2nd appellant Phillip Mwenda, stated that on 4th July, 2003 at 1.00 p.m. he came from

the hospital and went to sleep at his house. That is when Administrative Police Officers arrested him after he explained that he was sleeping at that time because he was ill. He was taken to the police Station and later charged with these offences which he knew nothing about.

The 3rd appellant, Paul Emathe, stated that he was, on 5th July, 2003, at his place of work where he mended shoes when the police went there, arrested him and took him to the police station where they later charged him with these offences. He knew nothing about the charges nor did he know those who were charged jointly with him.

The 4th appellant, Joseph Kinyua stated that on 4th July, 2003 in the morning, he took children to school. When he returned he found his house had been broken into by the police. He went to the police station where after introducing himself, he was arrested, detained and later charged with these offences. The police had taken a radio, cassettes, a mosquito net and a bag of clothes from his house which items were not produced in court nor returned to him. The police had demanded Kshs.200/= from him so that they could release him but because he did not have it, he was not released. The beans that were recovered on the material day by the police were his own.

The 5th appellant, James Muthee who was 6th accused in the lower court, stated that on 5th July, 2003, the 1st appellant had gone to 5th appellant's house and taken some beer. Thereafter the said 1st appellant sold to him a sweater (pullover) and a mosquito net at Kshs.300/=. Later he saw the police with the 1st appellant who was under arrest come to him. That is when he learnt that the items which he had bought from the 1st appellant, were stolen items. He surrendered the items to the police and was then arrested and later charged with these offences.

All the five appellants had given unsworn statements in their defences.

The honourable trial magistrate considered all the evidence on the record. He rejected the defence statements as untruthful. He appears to have not given much weight to the evidence of identification by Pw1 and pw2, of their attackers during the night of the robbery. He however clearly accepted that robbery had taken place. He relied on the evidence proving possession of items recently stolen which were found in the possession of the 1st, 2nd, 3rd, 4th and 6th accused, respectively. He observed that the 5th accused who was the person among others found with beans which were identified by the complainant as hers did identify the people who sold the beans to her the same morning. The honourable trial magistrate as well accepted the evidence that linked the 1st, 2nd, 3rd, 4th and 5th appellants to the robbery. He acquitted the 5th accused in the lower court because he believed that she had bought the beans in her everyday business without believing them to have been stolen.

We have carefully perused and analysed the evidence on the record. We have no doubt that robbery took place in the homes of pw1 and pw2 in the evenings of 4th July, 2003 and 25th June, 2003. We also find that Pw1, Ruth Kirori lost about 3 bags of beans, a mosquito net, a pullover and a lamp during the robbery. We note that in her evidence in court she mistakenly identified the 2nd appellant, Phillip Mwenda, as David Muriungi.

This in our view and finding confirms that her identification of the 1st and 2nd appellants during the robbery, could not alone be relied upon. Although the evidence on record from Pw1 tends to indicate that pw1 identified the 2nd appellant by hearing and identifying 2nd appellant's voice, we are doubtful that such identification would be reliable. Much so because she admitted in her evidence in chief that she had not talked to "David", the 1st appellant before the night of the robbery. Even more important is the fact that she in court wrongly identified the 2nd appellant Phillip Mwenda, as David Muriungi the 1st appellant. If the person whose voice Pw2 purported to have identified was that of the 2nd appellant and not the 1st appellant, her identification of either would be regarded as even less reliable.

Moving to the evidence of Pw2, Salome Karoga who was robbed about a week earlier than Pw1, we note that she claimed to have physically identified the 2nd and 4th appellants. She said that she could not see what they were carrying as she was inside her bedroom. And yet she at the same time asserted that one of them was carrying a torch, as the others were removing and carrying away beans

which were stored in bags. It is in Pw2's evidence as well that she mentioned the names of the 2nd and 4th appellants to the police when she first reported the robbery incident and we note that she insisted throughout her evidence that she knew and saw them well during the robbery. Up to this point however, we find the evidence of identification of Pw2 also quite weak and unreliable. That she could under the circumstances subsisting at the scene of crime see and identify the 2nd and 4th appellant using a torchlight being carried by one of the attackers, is an amazing possibility that is unlikely to be reliable enough on its own. Without more evidence therefore, our view and finding is that if conviction depended only on identification evidence then it cannot be allowed to stand. However, there is the evidence of possession of recently stolen properties which we now turn to consider.

Pw2, Salome Karoga, who was robbed on the night of 25th June, 2003 at 5.00 a.m. waited until daylight when she checked to establish what had been stolen by the robbers. She established that her 3 bags of beans had indeed been stolen. Also stolen were two pangas, a cassette, and a compact. She had reported that she had identified the 2nd appellant Phillip Mwenda and 4th appellant Joseph Kinyua as some of those who had attacked her. Administration Police Officers who received the first report made efforts to get the robbers but it does not seem to have borne fruit until a week later on 4th July, 2003.

On 4th July, 2003, Ruth Kirori Pw1, was robbed in the night as evidence showed. In the morning she went to Munanda A.P's camp where she reported the robbery to No.207238, APC James Ileri Pw5. The latter noticed that Pw1 was bleeding from the injuries she claimed she had sustained during the robbery. She mentioned that she had recognized the voice of the 2nd appellant, Phillip Mwenda, among the robbers. APC James Ileri, visited the robbery scene and observed that the house of Pw1 was totally scattered. He picked a torch at the scene which was said to have been dropped by the robbers. The officer, accompanied by several members of the public including close relatives of the complainant, proceeded to Isiolo Town to look for the 2nd appellant. The first person they found however, was the 1st appellant who is the brother of the 2nd appellant. When APC James Ileri showed the 1st appellant the torch he had picked at the robbery scene, the home of Pw1, the latter identified the torch as belonging to the 4th appellant, Joseph Kinyua. Attention then turned to the 4th appellant.

APC James Ileri was then led by the 1st appellant to his home to get the 2nd appellant. The 2nd appellant was indeed found at his home in possession of two radios and a panga. In the process the name of the 4th appellant was again mentioned by the 1st appellant as having in his possession some of the stolen items. It is then it appears, that the police visited the 4th appellant's house where only his wife was found. When the police made a search they found a panga and a radio which was immediately identified by one Martin Kimathi, Pw4, who is the son of Pw2, Salome Karoga. Later on the two items were also identified by Salome Karoga herself as hers. She pointed to a panga mark on the radio which was thereon before it was stolen. She also pointed at the panga's handle which she claimed she had herself fixed. The panga and the radio were produced in evidence as exhibit 6 and 9.

According to the evidence of Pw5, APC James Ileri, he and the members of the public accompanying him looked for the 4th appellant Kinyua and when they found him they arrested him. On being confronted about the robbery he offered to lead them to the Town Market, to a certain woman who he said, had the stolen beans. The woman turned out to be the 5th accused in the lower court Beatrice Kendi aformentioned. The record further shows that at the woman's stall the police found beans which had been sold to a third party but had not been delivered. The woman, on being questioned, admitted having bought the beans from the 2nd and 4th appellants. The police took possession of the beans and escorted the 1st, 2nd, 4th appellants as well as the 5th accused in the lower court, Beatrice Kendi, to Isiolo Police Station. We further note from the evidence that at the police station, the 1st, 2nd and 4th appellants mentioned the 5th and 3rd appellants as being in possession of some other stolen properties. At the house of the 5th appellant James Muthee, a search yielded a pullover exh.1 and a mosquito net, exh.2. We note that these two items were later identified by Pw1 as hers that had been stolen during the robbery on 4th July, 2003. When the police visited the house of the 3rd appellant Paul Emathe they recovered a lamp later identified by Pw1 as hers. The 3rd appellant also admitted that he had sold some beans to one Gakii which beans were immediately recovered from Gakii.

Pw10 David Thurania testified also that the 1st and 2nd appellants had on 4th July, 2003

sold to him 95 Kgs of beans. He said so in the presence of the 1st and 2nd appellants and Thurania surrendered the beans to the police. We also note that Pw9 Janerose Kanario bought 93 Kgs of beans from the 5th accused in the lower court, Beatrice Kendi. When the police caught up with her, Beatrice Kendi refunded the purchase price amounting to Kshs.1953/= to pw9 and surrendered the beans to the police who took possession of it.

All these beans which amounted to over 170 kgs were produced in court as exhibit. We have carefully considered the above evidence. We note some minor contradictions as to who was found with what property. We are however satisfied that the substantive evidence remains intact. We have come to the conclusion that the 1st, 2nd, 3rd and 4th appellants were in the morning of 4th July, 2003, in possession of a substantial amount of beans of over 170 kgs altogether, which they sold to the 5th accused in the lower court, Beatrice Kendi, and to Pw10, David Thurania, the same morning.

When the 1st and 2nd appellants were confronted about the beans they appear to have led the police and the complainants to the 4th, 5th and 3rd appellants as those who participated in the theft of the beans the night before. They did not at any time during the early confrontation deny possession of the beans. The complainant, Pw1, had claimed that the recovered amount of beans were hers, stolen the night before from her house.

Beatrice Kendi, the 5th accused in the court below, in her defence statement however, claimed that the beans she was found with were her own and that she did not participate in the robbery. We have however considered her defence independently but it is our view that although the 5th accused aforesaid took the stand she took, she did so against the weight of evidence on record and we do not believe her. There is in our view, adequate evidence on the record to prove that she was found with a large quantity of beans and that she at the time convincingly explained to the police officers who confronted her, that the beans had been sold to her the same morning by the 2nd and 4th appellants, as per the evidence of Pw5. We observe as well that the 5th accused in the court below did not dispute that piece of evidence when she cross-examined Pw5. Her change of mind to claim that the beans she was found with, were hers, was in our view, second thought and unbelievable. It should also be noted that Pw10, David Thurania, testified that on the same morning when the 2nd and 4th appellants sold beans to the 5th accused aforesaid the 1st and 2nd appellants also sold beans to him, the quantity of which was 95 kgs. He paid Kshs.21/= per Kg which totaled to Kshs.1995/=. When the police arrested the two appellants, the latter were the ones, according to the evidence on the record, who led the former to Pw10 from whom the beans were recovered and later taken to the police station. When 2nd appellant suggested to the witness in cross-examination that he, the 2nd appellant, did not sell the beans to him, the witness persisted that 2nd appellant did so. On the other hand when the 1st appellant suggested to Pw10 that the beans he sold to Pw10 were 1st appellants, the witness said he could not tell.

The conclusion we come to on careful consideration of the above evidence, is that the 1st, 2nd and the 4th appellants are directly linked to the beans sold to the 5th accused in the court below and to pw10, David Thurania. There is sufficient believable evidence therefore, that the 1st, 2nd and 4th appellants sold the beans to the two persons who both gave a reasonable innocent explanation as to how they came into possession of the beans.

The police in our view, should not therefore have charged the 5th accused person in the court below as they rightly and wisely did not charge Pw10. They instead should have used her as a prosecution witness. Be that as it may, we have come to the conclusion that the 1st, 2nd and 4th appellant were under legal obligation to reasonably explain where they obtained the reasonably large quantity of beans that they sold to Pw10 and to the 5th accused in the court below. In our view and finding, although the actual possession of the beans was not with the 1st, 2nd and 4th appellants, when it was found, technical possession or implied possession was with them.

The beans had been recently stolen from Pw1 and having come to the conclusion as we have just done, that they were found in the hands of the 1st 2nd and 4th appellants, we shall in a moment turn to the issue of "recent possession". Meanwhile we turn to first examine the evidence concerning other items allegedly stolen during the alleged robberies against Pw1 on 4th July, 2003 and against Pw2 on

25th June, 2003.

Pw1 testified that she lost several items during the robbery upon her on 4th July, 2003. They included Kshs.100, three or so bags of beans, a mosquito net, a pullover, a hurricane lamp and her personal clothes. When several items were recovered the next morning, she identified as hers, the beans which we have already dealt with hereinabove, the pullover and the mosquito net allegedly found in the house of the 5th appellant (6th accused) and the hurricane lamp found in the house of the 3rd appellant.

Pw2 testified that she lost several items during the robbery that took place in her house in the night of 25th June, 2003. When the robbery of 4th July, 2003 took place against Pw1, it was suspected that the robbers who committed the earlier robbery were the same ones who committed the later one. The two complainants were also said to be related. When the appellants were being arrested, Pw4, Martin Kimathi, a son to Pw2, was accompanying the police officers who visited the houses of the appellants. Pw2 had lost a panga and a radio. The panga's handle had been recently replaced by Pw2 and this fact enabled her to identify the panga when it was recovered at the house of the 4th appellant in the presence of her son Pw4. The stolen radio had a panga-mark on it before it was stolen during the robbery and Pw2 identified the radio by the panga-mark.

There is evidence on record too that the hurricane lamp stolen from Pw1 was satisfactorily identified by Pw2 when it was recovered near the house of the 3rd appellant who led the police to where it was hidden in a fence. Recovery of the lamp was confirmed in the evidence of Pw6 and Pw7, but Pw4 who was present on the 3rd appellant's arrest stated that he was not arrested with anything. The 3rd appellant however claimed that the 1st and 2nd appellants falsely named him.

Our view and finding after considering all the evidence is that the lamp was found in technical possession of the 3rd appellant. We have carefully considered the evidence of recovery and identification of the mosquito net, the pullover and the lamp allegedly belonging to Pw1. We have also considered the evidence of recovery and identification of the radio and panga allegedly belonging to Pw2. We are satisfied that the mosquito net and the pullover were recovered in the house and possession of the 5th appellant (6th accused). He himself in his unsworn statement in his defence had admitted that much, although he claimed that the items had been sold to him by the 1st appellant. We are also satisfied that Pw1 satisfactorily identified all her recovered items including the hurricane lamp.

Turning to the radio and panga stated to belong to Pw2, we are satisfied that Pw2 and her son Pw4, sufficiently identified the items to be theirs. Pw4 averred that the radio and panga were recovered in the house of the 4th appellant. However Pw5 who was an Administrative Police Officer who was in charge of the earlier part of the search of the stolen items testified that the radio and the panga aforementioned were found in the house of the 1st and 2nd appellants. And yet Pw6, PC. Geoffrey Kailutha who was in the two's company testified that it was the radio and a knife which was found in the 4th appellant's house thus leaving out the panga. In his defence the 4th appellant did not expressly aver that the panga and the radio were not found in his house, although there is evidence that the search was conducted in his absence, in the presence of his wife. He could have called his wife to testify as to what was found in his house especially to rebut the evidence of his possession of the radio and panga recorded against him. But he chose not to do so although in his defence statement he mentioned that the police had taken his radio among other items. We have anxiously considered this piece of evidence. We are however, fully satisfied that the radio exhibit 9 and panga exhibit 6, were found in possession of 4th appellant.

There was finally the evidence of possession of the hurricane lamp belonging to Pw1. The evidence suggested that it was recovered near the 3rd appellant's house after he led the witnesses to the fence where it was picked from. He did not question this evidence nor deny it in his defence statement. Indeed he never as much as referred to it in the said defence statement. We are satisfied that he was found in possession of it.

The final position then, in relation to the said possession of the various stolen items, in summary, is as follows: -

The beans belonging to Pw1 Ruth Kirori, were found in the technical possession of the 1st appellant, David Muriungi, the 2nd appellant, Phillip Mwenda, and the 4th appellant, Joseph Kinyua jointly and severally.

The mosquito net and the pullover belonging to Pw1 were found in the possession of the 5th appellant (6th accused), James Muthee. The hurricane lamp belonging to Pw1, was found in the possession of the 3rd appellant, Paul Emathe.

The panga and the radio belonging to pw2 and her son Pw4, were found in the possession of the 4th appellant.

With the above conclusions, it will now be necessary to decide the legal implication of such possession by the appellants.

The evidence recorded before the trial court which evidence the court relied on to convict the appellants is that the complainant, Ruth karori, was attacked by robbers in the night of 4.7.2003 and robbed of over 170 kgs of beans, one pullover, 1 pair of rubber shoes, 1 hurricane lamp, 30 eggs, cash of 100/=, and one mosquito net all valued at Kshs.7230/=.

This court, having carefully considered the evidence in the record has accepted the conclusions reached by the trial court that the 1st, 2nd and 4th appellant were found in technical possession of beans amounting to over 170 Kgs later the same day. The 5th appellant was found with the mosquito net and the pullover. The 3rd appellant was found with the hurricane lamp. There is no doubt that the possessions aforementioned were by any standard, recent and should therefore be governed by the legal criminal principle of “recent possession”. In the English Case of **R v Loughin** 35 Cr. App. R.69, the Lord Chief Justice of England said in relation to the said principle of law germane to a consideration of this matter before us:

“If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker.”

In this case before us the various appellants i.e. 1st, 2nd, 3rd,4th and 5th were found in possession of properties recently stolen from Pw1 during a robbery. The inevitable conclusion we come to is that each appellant, (in respect to each item found in each one’s possession) was the robber or robbers unless each gave a reasonably acceptable explanation that the possession was innocently acquired. Only the 5th appellant tried to explain his possession of the mosquito net and the sweater or pullover found in his possession. He said that the items were sold to him for Kshs.300/= by the 1st appellant, after the latter had taken some alcohol at the 5th appellant’s house. We have carefully considered this explanation in the face of the evidence before us. The robbery took place in the late hours of the morning of 4th July, 2003. Tracing of the stolen items was in progress soon after break of daylight the same morning. Arrest of the 1st appellant came in those early hours of the morning. Indeed it was the 1st appellant who was arrested earliest and he is the one who started leading the police and members of the public to the houses of the other appellants. We see no opportunity for the 1st appellant to have gone to the 5th appellant to indulge in drinking to the point where he could offer to sell the stolen items. Further, the 5th appellant’s explanation was not raised during the prosecution case. It was sprung upon the 1st appellant when he could and had no chance to respond to it. We find that the 5th appellant’s explanation was not credible and amounted to an afterthought. We are aware that the burden on him to give an innocent explanation is very light, ie. on the balance of probability. However, even upon such low standard, we are of the view that the explanation he gave is false. All the other appellants i.e. 1st, 2nd and 4th did not attempt to explain away their possession of the item or items found with them.

We accordingly come to the only reasonable conclusion available to us in law; that the 1st, 2nd, 4th and 5th appellants were the thieves who broke into the house of Pw1, Ruth Karori and

robbed her of those items in the morning of 4th July, 2003. They were more than one in number and they used violence before, during and after the robbery as is shown by the evidence of Pw1 and of Pw11, Elias Muhiddin who was a clinical officer in Isiolo District Hospital and who treated Pw1 of injuries inflicted during the robbery and who thereafter filled and produced a P3 form in evidence.

We wish to observe that the evidence of “recent Possession” which we have analysed above although independently sufficient to warrant a conviction in this case, also lends, corroboration to the complainant’s claim that she had recognized the 1st appellant’s voice during the robbery. We note however that the honourable trial magistrate did not base his conviction upon the evidence of voice identification. We as well do find that the said piece of evidence was so weak and unreliable that we reject it.

As far as the 3rd appellant is concerned, we have come to the conclusion that he was found in possession of the hurricane lamp which was recently stolen from the complainant, Pw1. We already have found that he failed to give an innocent account of the lamp. We have therefore, as well, no alternative conclusion to reach but that he was one of the robbers who robbed Pw1 in the morning of 4th July, 2003, in company of the 1st, 2nd, 4th and 5th appellants.

Before we conclude this judgment we wish to make some relevant comments. The 4th Appellant argued that he was not found in possession of the pullover and the mosquito net, despite the evidence to that effect by Pw5. We have considered this evidence. We note that there is evidence on the record to the effect that the two items were recovered in the possession of the 5th appellant. Indeed the 5th appellant in his defence statement admitted as much. Under these circumstances we have no alternative but to accept the 4th appellants admission to this piece of evidence and to conclude, unlike the trial magistrate, that Pw5 must have been wrong thereto. In any case the conclusion we have reached is in favour of and does not prejudice the 4th appellant, despite the fact that the trial magistrate may have relied on it.

Further, some of the appellants, particularly the 4th appellant complained that the prosecution was conducted by an unqualified person being P.C. Ngugi who so jointly acted with Inspector of Police, Chabari. He therefore argued that the trial was a nullity as per the provisions of Section 85 of the Penal Code which authorizes only police officer above the rank of Assistant Inspector to prosecute. We have carefully perused the record. We note that there are several dates and instances where both Inspector of Police Chabari and PC Ngugi are shown to have been in attendance. But careful observation shows that it was Inspector Chabari who throughout the prosecution, led the witnesses and not P.C. Ngugi. We are however perplexed as to why the trial magistrate found it necessary to record the presence of P.C. Ngugi whose duties are never indicated throughout the record. We think that the practice is not only irregular but completely unwise. It should be brought to an end at once since it serves no useful purpose apart from causing confusion.

The appellants also raised objection to their convictions on the basis that their unsworn defences were not taken into account by the learned trial magistrate until he had made conclusions of their guilt. We considered this complaint. We note however that the honourable trial magistrate tabulated the appellants defences variously in details. He noted earliest in his judgment that the defences were mere denials. He then analysed how the several accused led the police to various people and places where the stolen goods were recovered, thus effectively contradicting the appellant’s mere denials. While it is true that the trial magistrate specifically rejected the appellants defence statements in the last but one paragraph of his judgment, which we hold is an unwise approach, we hold that in this particular case, defence statements had been analysed and compared and contrasted with the prosecution evidence much earlier in the body of judgment. We would therefore reject the appellants’ argument to the effect that their defences were not considered or taken into account. No prejudice therefore, arose or occurred against the appellants in this case therefore. We, however take this opportunity to advise trial courts to always take the earliest opportunity to consider defences given by accused persons jointly with the rest of the prosecution evidence. It is an irregularity which seriously undermines the basic rights of the accused if the accused’s defence is ignored or not considered at all or considered too late when the court has already made up its mind as to the guilt of the accused. This kind of irregularity would often lead to the quashing

of the conviction however well supported it may be by evidence.

For the above reasons we have come to the conclusion that the charge of robbery is properly supported by sufficient evidence and that the same was proved beyond a reasonable doubt against the 1st, 2nd, 3rd, 4th and 5th appellants. Their separate appeals which were consolidated before the appeals were prosecuted are therefore hereby rejected. The conviction of robbery with violence contrary to section 296(2) of the Penal Code, against each one of them is upheld as their appeals, each, are dismissed. The sentence of death against each of them is as well confirmed.

The appellants' appeal against the conviction in count II in respect to the burglary and stealing charge were conceded by Mr. Muteti on the ground of an incurable duplicity.

We have ourselves considered the convictions thereon and are satisfied that Mr. Muteti's concession was not only wise but also proper in law.

The appeals related to count II are hereby, therefore, allowed and the conviction is quashed as against each appellant. The double sentences of 4 years against each appellant on each limb of the charge are hereby set aside forthwith. As each appellant was and is to suffer the death sentence, in respect to count 1 these prison sentences were superfluous. As this and the Court of Appeal has stated from time to time, where an accused person has been sentenced to suffer death, all other sentences which may arise as a result of other additional conviction have to stand suspended pending the execution of the first death sentence. What is surprising is that the mistake to impose such other additional sentences is being committed by the same trial magistrates again and again as if they do not read appeal judgments.

Dated and delivered at Meru this 27th day of July, 2005

D. A. ONYANCHA

JUDGE

RUTH N. SITATI

JUDGE