REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINA DIVISION
CRIMINA APPEAL NO. 644 OF 2003

(From Original Conviction and Sentence in Criminal Case No. 3775 of 2001 of the Senior Principal
Magistrate's Court at Kiambu)

KYALO MULI ZAMALO……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

The appellant **KYALO MULI NZAMALU** was convicted for the offence of robbery contrary to section 296(1) of the Penal Code, and was then sentenced to 6 years imprisonment, together with 5 strokes of the cane, and to Police supervision for 5 years after completion of the sentence.

Being dissatisfied with the conviction and sentence, the appellant lodged an appeal against the whole judgment. The grounds of appeal can be summarized as follows:

1. The learned trial Magistrate erred in holding that the appellant had been positively identified by the witnesses, who gave inconsistent and contradictory evidence.

2. The learned trial Magistrate erred in convicting the appellant on insufficient evidence.

3. The trial court misdirected itself by shifting the burden of proof to the appellant.

4. The trial court erred in rejecting the appellant's defence without assigning reasons for the said rejection.

At the hearing of the appeal, the appellant said that he did not have the ability to articulate his submissions orally. He therefore sought to rely on his written submissions. He therefore sought to rely on his written submissions. After due consideration, I allowed the appellant to rely on his written submissions.

It was the contention of the appellant that the prosecution witnesses did not positively identify him at the scene of the robbery. Indeed, as far as the appellant was concerned, there had been only one identifying witness, PW1 and his said evidence should be deemed unreliable as it was at night, and in doubtful circumstances. The appellant asserted that the alleged identification was in difficult circumstances because the complainant and his wife were under attack, by three thugs, at night. He further submitted that the evidence of the complainant (PW1) was inconsistent with that of PW3 (his wife), who was the only other person who was in the house at the time of the robbery. As far as the

appellant is concerned, Pw1 had testified that when the thugs entered the house, the complainant was in the bedroom. For that reason, the applicant submits that the witness could not have identified the thugs as the said thugs did not enter the bedroom.

Furthermore, it was the appellant's submissions that the evidence of PW1 was inconsistent with that of PW3. To his mind, the appellant believed that whilst PW1 said that he was in his bedroom with his wife, the latter (PW3) had testified that they (PW1 and PW3) were seated in the sitting room.

For the foregoing reasons the appellant submitted that he had not been positively identified.

A perusal of the record reveals that PW1 was asleep, in his bedroom; at the time he heard the main door being broken. He then woke up and switched on the sitting room lights. He did so from his bedroom, as the switch was located there. He says that he identified the appellant, and the other two robbers, as there was ample light in the sitting room. He also said, during cross-examination by the 1st accused, that the said accused was only some 5 metres away from him. Furthermore, the robbery lasted some 15 minutes. PW1 also said the following, when he was cross-examined by the appellant;

> **"I identified you in my house. You would be cheating the court if you said that you were not in my house. I was in the sitting room when I identified you. I saw you through security lights and the lights in the house."**

In effect, the foundation of the appellants criticism seems to have fallen through. I say so because whereas the appellant insists that PW1 was in his bedroom at the time of the robbery, that is not borne out by the evidence on record. PW1 was only in his bedroom when the thugs started breaking down the main door to his house. He then switched on the lights in the sitting room, and was thereafter in the sitting room, from where the robbers took his television set. Indeed as PW1 said, one of the thugs was only 5 metres from him.

On her part PW3 is recorded as having testified that as at the time when the breaking down of the main door was in progress, her husband, PW1, was at the bedroom door. Later, during cross – examination by the 2nd accused, PW3 said:

> **"I saw all the robbers. I identified all of them. I identified the tall person who first entered the house. I never saw a scar on you. It is not true that I am confusing you for somebody else. I was near the sitting room door when you entered. My husband was also in the sitting room."**

I have set out the foregoing at length, as it shows that the submissions by the appellant were not founded on the testimony of the witness. Nowhere did PW3 says that both she and her husband were sitting in the sitting room at the time of the robbery. Therefore, the alleged inconsistency or a contradiction in the evidence between PW1 and Pw3 are without basis.

I am satisfied that the circumstances prevailing at the material time were not difficult for purposes of positive identification. The electric lights were on in the sitting room, wherefrom the robbers stole the television. Both PW1 and PW3 emphasized that they did identify the robbers.

Secondly, I hold the considered view that the doctrine of recent possession serves to place the appellant squarely at the scene of crime. The said crime was said to have been committed at about 1.30 a.m., on the night of 21st November 2001. Less than four hours after the robbery, the appellant and his two colleagues were arrested by members of the public. At the time of arrest the robbers had the television which had been stolen from the complainants house. The said television was positively identified by PW1 as belonging to him. The appellant and his two colleagues did not lay claim of ownership over the said television. Secondly, the television was wrapped in the jacket and sack, which the robbers put it in, while still in PW1's house. To my mind, these factors go to prove that the appellant was one of the robbers.

The appellant submitted that the evidence adduced in court was insufficient because none of the

members of the public who arrested him were called to testify in court. On her part, the learned State Counsel, Ms Okumu submitted that the prosecution evidence was sufficient to sustain conviction.

The responsibility of determining the persons to call as prosecution witnesses, rest solely with the prosecutor. If the prosecutor should fail to call any person as a witness, such failure could lead to an acquittal, in the event that the evidence already tendered before the trial court turned out to be insufficient to sustain a conviction. But if the prosecutor formed the considered opinion that the evidence already tendered was sufficient to found a conviction, he would not be obliged to call any more witnesses. Thus, the complaint by the appellant to the effect that none of the persons who arrested him were called to testify, could only avail the appellant in the event that the evidence before the court was not sufficient. I have already held that the identification of the appellant herein was positive, and free from doubt. I have also held that the doctrine of recent possession served to place the appellant at the scene of crime. In the circumstances, I find that the prosecution cannot be faulted for failing to call any more witnesses, including the persons who arrested the appellant.

Upon perusing the record, I noted that on 13th December 2002, the prosecutor sought an adjournment as he was not ready to proceed with the case. He is recorded as having said;

> **"I am not ready to proceed. I had witnesses in court but the charge sheet is defective. I intended to draft another one. All the items stolen and recovered are not reflected in the charge sheet."**

I have carefully perused the record, but failed to find any new charge sheet, which was drafted by the prosecutor, after 13th December 2002. In the circumstances, I was compelled to give serious consideration to the failure by the prosecution to amend the charge sheet, which he had said was defective. A scrutiny of the evidence tendered in court shows that the items which were adduced as exhibits, at the trial, were a Television, broken door, a rock, a sack and a jacket. Of all those items the only one which was stolen and which belonged to PW1 was the television. The door was not stolen; it was only broken by the thugs so that they could gain entry into the complainant's house. The jacket and sack were not claimed by PW1; indeed he said that he did not know the owner of the said two items. Having given due consideration to the evidence adduced in court vis - a – vis the charge sheet, I failed to discern the reason why the prosecutor had expressed the view that the charge sheet was defective.

The appellant also submitted that an identification parade ought to have been conducted. I have noted that PW1, PW4 and PW5 were present when the three thugs who were arrested, were being taken to the Chief's Camp. In those circumstances, I hold the view that an identification parade would not have added value to the witnesses' identification of the robbers.

Having re-evaluated the evidence which was adduced before the trial in court, I hold the considered view that the conviction was safe. And as regards the sentence, I find that imprisonment for five years is neither harsh nor excessive, as the maximum sentence prescribed is fourteen years imprisonment. However, the sentences of corporal punishment and police supervision have since been repealed. Accordingly, I order that the said sentences be vacated. Save for that, I do uphold both conviction and the appeal is therefore dismissed.

Dated at Nairobi this 20th day of September, 2004

FRED A. OCHIENG

JUDGE