REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO.4 OF 2021

CONSOLIDATED WITH CRIMINAL APPEAL NO.38 OF 2020

JAMES MAINA NJUGUNA.....1ST APPELLANT

EDWIN OTIENO AURA.....2ND APPELLANT

VERSUS

STATE.....RESPONDENT

(Being an appeal from the conviction dated 7th June 2020 and sentence

dated 11th September 2020 in Kisii CMCR No.1114 of 2014 of the

Hon. S.K. Onjoro (S.R.M.))

JUDGMENT

1. The appellants and other accused persons were arrested and charged jointly for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the main count were that on 12th March 2014 at Kisii town, Bartholomew *alias* Bwire Kuboe ("the 1st accused"), Edwin Kinyanza ("the 2nd accused"), James Maina Njuguna ("the 1st appellant") and Edwin Otieno ("the 2nd appellant") with others not before the court while armed with dangerous weapons namely firearms, robbed Benard Nyagaka Ogari cash Kshs. 9,000/=, 4 mobile phones make Nokia 1210, Nokia Lumia LG E410 and Nokia 1280, one motor vehicle registration number KBV 321S make Toyota Premio and other house hold goods all valued at Kshs. 1.7 million and immediately before such robbery used personal violence to the said Benard Nyagaka Ogori.

2. The 1st accused and the 1st appellant also faced an alternative count of handling stolen property contrary to **section 322 (1)** of the **Penal Code**. The particulars of the offence were that on 3rd June 2014 at Eldoret Town within Eldoret county otherwise than in the course of stealing, dishonestly retained one motor vehicle registration number KBV 321S Toyota Premio valued at Kshs.1.3 million knowing or having reason to believe it to have been stolen or unlawfully obtained.

3. The trial court found that the prosecution had proved the main count of robbery with violence against the 2nd appellant. It convicted him of the offence and sentenced him to serve 25 years' imprisonment. The 1st appellant and the 1st and 2nd accused persons were acquitted of the main count as there was no evidence linking them to the offence. On the alternative charge, the court found that a case had been made against the 1st appellant for handling stolen property. The 1st appellant was thus convicted of the offence and sentenced to serve 8 years' imprisonment.

4. Being aggrieved by the trial court's decision, the appellants filed distinct appeals which were subsequently consolidated.

THE EVIDENCE

5. Since this is a first appeal, it is the duty of this court to re-evaluate the evidence adduced before the trial court afresh, bearing in mind that it did not see or hear the witnesses testify.

6. According to the prosecution, PW1's house help Jackeline Kwamboka (PW2) was the first person to encounter the intruders that fateful night. She was asleep in her bedroom when she heard someone open the door at about 2:00 a.m. and hold her by the neck. The intruder

motioned for her to be silent. She testified that there were two intruders that night. The lights were on and she was able to see that one was dark, of medium height and had a gap between his teeth. He was also wearing a uniform resembling that of the Administration Police. They threatened to kill her and she was forced to take them to where her boss PW1 slept. PW 1 could only identify the 2nd appellant amongst the accused arraigned before the trial court insisted that she could identify his features including a mark above his left eye. She stated that he was armed with a gun that night.

7. Bernard Nyagaka Ogari (PW1) testified that he was in his house watching a football game when at about 2:30 a.m., he heard a knock on their bedroom door. His daughter was at the door together with their house help (PW2) and a stranger. The stranger asked them to lie on the bed with their faces downward. Jared who was living with PW1 was also brought into the room. PW1 recalled that their house had been ransacked for about 3 hours. PW1 recalled that one of the men was friendly. He offered them some water and had a conversation with them. The men asked him questions about his vehicle and asked him for his car keys and the keys to the main gate. When the men left at about 6:00 a.m. they raised an alarm. They discovered that goods worth about Kshs. 1.7 million including phones, the TV, gas, electronics and the vehicle had been stolen.

8. Sometime in June 2014, PW1 received a call from the K.R.A. asking him whether he had lost his vehicle. He was directed to travel to Langas Police Station where he found his vehicle without its original number plate. The other items listed in the charge sheet were however not recovered.

9. PW1 testified that although he had never seen the 2nd appellant before, there was light in the house and he was able to see him for almost two hours. He described the 2nd appellant at the police station and was also able to identify him at an identification parade conducted at Kisii Central police station. PW1 testified that the 1st appellant was not present at his home that night. He was informed that his vehicle had been recovered when the police had gone to rescue another vehicle stolen from Nakuru and the 1st appellant had been linked to the theft of that other vehicle.

10. SGT Humphery Osero (PW3) testified that his colleague the late PC Irumbi received information that a stolen vehicle registration number KBV 321S had been recovered at Eldoret. They went to Langas police station with PW1 who identified the vehicle as his. They were informed by the OCPD that they had received information about a Toyota Town Ace vehicle stolen from Nakuru and on getting to the scene, they found the complainant's vehicle. PW3 testified that the 1st appellant, the 1st accused in the matter before the trial court and one Samuel Muchiri were found at the scene when the stolen Toyota Town ace and the complainant's vehicle were impounded by police officers from Langas. The 1st appellant was arrested about 2 months after the vehicles were impounded.

11. As for the 2nd appellant, he was arrested in other cases with police uniform and fake guns. An identification parade was conducted by Chief Inspector Nzomo on 1st October 2014 and the 2nd appellant and the 1st and 2nd accused persons were identified by the complainant. PW3 clarified that he was not present when the appellant was arrested or when the identification parade was conducted.

12. PC Dickson Gitonga (PW4) testified that on receiving the information about the stolen vehicles, he went to the National petrol station at Langas where they found about 7 people around and inside a Toyota Town Ace registration number KBQ 385B. Some ran away but they managed to get 3 people in the vehicle. They arrested the 1st accused and the 1st appellant. 10 meters away, they found an unoccupied Toyota Premio. The pump attendants told them that they did not know how the vehicle had gotten to the petrol station. PW4 testified that the 1st appellant had told him that he was a mechanic.

13. Chief Inspector Stephen Oloo (PW5) confirmed that they received information which led to the retrieval of the Toyota Town Ace and the complainant's Toyota Premio vehicle KBV 321 S by PW4 and other the officers. He stated that the 1st accused and the 3rd appellant had been brought to the station pending their transfer to Nakuru.

14. At the conclusion of the prosecution's case, the trial court found that a case had been made against each of the accused persons. The 1st appellant elected to give a sworn testimony in his defence but when the matter came up for defence hearing he was absent and was convicted and sentenced in absentia.

15. The 2nd appellant gave a sworn statement in his defence. He testified that a CPL Mire had asked him to meet him and when he did, the officer arrested him. He was taken to the CID offices in Kisii and asked whether he had done any business or given CPL Mire a phone. He was then charged with stealing the phone but the case was dismissed. He was later charged with stealing PW1's vehicle. The 2nd appellant asserted that he had been framed in the case relating to the theft of the vehicle. He denied being identified in an identification parade by PW1 and insisted that although he had a scar on his face he was not dark as described by the complainant.

SUBMISSIONS

16. The appellants canvassed their respective appeals by way of written submissions. The 1st appellant submitted that there was nothing connecting him to the stolen car. There were no photographs showing that he was found inside the vehicle nor was there forensic evidence of finger prints to show that he was in the vehicle. He referred to the evidence of PW4, who had stated that he was found with the Townace vehicle and not PW1's vehicle which was 10 meters away. The 1st appellant argued that the trial court had ignored the evidence of the arresting officer who testified that he could not connect him to the stolen vehicle. He also faulted the trial court for relying on the evidence of PW3 who was not at the scene. He complained that he had been convicted in absentia yet he was involved in a road accident and was hospitalized at the time.

17. For his part, the 2nd appellant began his submissions by arguing that the conditions were not favorable for a positive identification. He observed that although PW1 had claimed that he had identified him at an identification parade, the trial court did not interrogate whether the parade had been conducted in accordance with Chapter 46, Force Standing Orders. He observed that no identification parade had been

conducted in the case of PW2. She had also testified that the appellant was a dark guy with a gap on his teeth but admitted that she had not indicated the same in her statement. According to the appellant, the witnesses' evidence was dock identification which was worthless.

18. The 2nd appellant also argued that the witnesses had contradicted themselves in terms of identification. PW1 had testified the appellant was dark but denied that he had indicated in his statement that the appellant was wearing uniform resembling that of Administration police. Conversely, PW2 had testified that the assailant was dark and medium sized and had a gap between his teeth and had a uniform resembling that of Administration police. She also stated that the assailant had a mark in his left eye. In his view these contradictions proved that the witnesses were not credible or trust worthy. He also argued that the witnesses had not given a description of their assailant when they made their initial report.

19. The appellant also noted that the prosecution had failed to call some essential witnesses such as the person staying with the complainant known as Jared, the people who had gone to the scene when the alarm was raised and Inspector Nzomo who had allegedly conducted the identification parade.

20. Counsel for the state opposed the appeals through oral submissions. On the first appeal, counsel submitted that the appellant was absent on the day he was to present his defence. Warrants for his arrest were issued and extended severally after which the defence hearing proceeded and judgment was delivered. The 1st appellant was arrested a week later and given an opportunity to present his mitigation before he was sentenced to 8 years' imprisonment. Counsel submitted that the trial court did not err in convicting the appellant in absentia as he had violated the terms of his bond. He relied on the case of ***R vs Galmo Abagare Shamo 2017 eKLR*** in support of this position.

21. He submitted that the 1st appellant had been found in possession of the complainant's vehicle and argued that the other issues raised by the appellant were matters of evidence which the appellant could only have raised in his defence. Counsel insisted that the appellant's conviction was safe and the sentence very lenient, as the maximum sentence for the offence is 14 years.

22. On the 2nd appellant's appeal, counsel contended that an identification parade form had been produced as exhibit No.1 to prove that the complainant had been able to him identify in the parade. He submitted that the 2nd appellant had not raised any issue during the trial, with respect to the fairness of the parade. Regarding the appellant's contention that some witnesses had not been called to testify, counsel submitted that the prosecution had the preserve to call any number of witnesses to establish a fact as provided under **section 134** of the **Evidence Act**. Counsel submitted that the conviction was well founded and sentence lenient, as the lawful sentence for the offence is death.

23. In brief rejoinder to the submissions by counsel for the state, the 1st appellant reiterated that he was unable to attend court as he was involved in an accident and at the time, there was no movement due to the Covid-19 pandemic. He maintained that the arresting officer had not arrested him in possession of PW1's vehicle and had caught him with KBQ which he was repairing.

24. The 2nd appellant reiterated that the officer who had conducted the identification parade was not called to testify.

ANALYSIS AND DETERMINATION

25. The 1st appellant was charged and convicted for the offence of handling stolen property which is defined under **section 322 (1)** of the **Penal Code** thus;

> 322 (1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.
>
> (2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

26. The case against the 1st appellant was based on the evidence of PW3, PW4 and PW5. PW4 testified that they received information about the location of a stolen vehicle, make Toyota Town Ace. He went to the scene with other officers and arrested 3 people including the 1st appellant. PW1's vehicle was about 10 meters away from the place they had impounded the Toyota Town Ace. PW5 confirmed that the 1st appellant was booked at Langas police station in connection with the stolen vehicles. PW3 was not present when the vehicles were recovered but testified that they had arrested the 1st appellant 2 months after the vehicles were recovered in Langas on the theft of another vehicle. His co-accused, Bartholomew, also gave evidence connecting the 1st appellant to PW1's vehicle. He testified that PW1 was the one who had gone to his garage with the vehicles from Nakuru.

27. Although the 1st appellant was apprehended close to the location where PW1's vehicle was recovered, he was not caught in possession of the vehicle. The prosecution's case was that he was caught in another vehicle recovered at the vicinity. The prosecution did not explain how PW1's vehicle got to the scene or what reasons they had to connect the 1st appellant to the vehicle. The case against the 1st appellant for possession of stolen property was based on circumstantial evidence which must point unerringly at the accused. The chain of circumstances in this case were not sufficient to sustain an inference of guilt. In the absence of corroboration, the evidence by his co- accused was also insufficient to sustain a conviction.

28. When the matter came up for defence hearing, the appellant was not present and was convicted and sentenced in absentia. The procedure to be followed by the court in the event that an accused person does not appear in court after the adjournment of a matter is provided for under **Section 206** of the **Criminal Procedure Code** thus;

206 (1) If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, **unless the accused person is charged with felony,** proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.

(2) If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.

(3) A sentence passed under subsection (1) shall be deemed to commence from the date of apprehension, and the person effecting apprehension shall endorse the date thereof on the back of the warrant of commitment.

(4**) If the accused person who has not appeared is charged with a felony**, or if the court refrains from convicting the accused in his absence, **the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.** [Emphasis]

29. The court in the case of ***Republic v Wilfred Lerason Tapukai Criminal Revision No. E003 of 2021 [2021] eKLR*** interpreted the above provision as follows;

9. I find that the first magistrate did not have jurisdiction to deliver the judgment and to impose a sentence in the absence of the accused, since the offence of assault is not a misdemeanour. It is only in cases where an accused is charged with a misdemeanour that the court is allowed to deliver judgment and sentence an accused in his absence. This clear from the provisions of section 206 (1) of the Criminal Procedure Code which read as follows: …

10. It is clear from the foregoing provisions that a trial held in absentia is only allowed in respect of persons who are charged with misdemeanours. The offence of assault carries a maximum sentence of imprisonment of five years and for that reason it is not a misdemeanour.

30. According to section 36 of the Penal Code, a misdemeanor is an offence that is punishable with imprisonment for a term not exceeding two years or with a fine, or with both. The offence of handling stolen property is not a misdemeanor as it is punishable by imprisonment for a term not exceeding 14 years.

31. Pursuant to Section 206 (4) above, the trial court was required to issue a warrant for the arrest of the 1st appellant as opposed to convicting him in absentia when he failed to appear for hearing. It is noteworthy that during cross examination, PW4 stated that when he apprehended him, the 1st appellant had told him that he was a mechanic. There had also been an indication in the course of the trial that the 1st appellant had been involved in road traffic accident and was undergoing treatment. A distinction can be drawn between this case and the case of ***R v Galma (supra)*** as in this case, the 1st appellant had a surety. His surety was not summoned to testify on the whereabouts of the 1st appellant nor was the investigating officer summoned to explain the efforts that had been made to trace the appellant.

32. The trial court failed to follow the procedure set out under section 206 (4) above and thus deprived the 1st appellant an opportunity to present his defence. Consequently, I find that the conviction and sentence imposed upon the 1st appellant are unlawful and I hereby quash them.

33. Next I turn to the appeal by the 2nd appellant. The 2nd appellant was charged and convicted for the offence of robbery with violence which is defined under **Section 296 (2)** of the **Penal Code** thus:

"(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."

34. The ingredients of the offence of robbery with violence were set out in the case of **Oluoch vs Republic [1985] KLR** thus;

"Robbery with violence is committed in any of the following circumstances:

a. The offender is armed with any dangerous and offensive weapon or instrument; or

b. The offender is in company with one or more person or persons; or

c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person …"

35. The 2nd appellant challenged his conviction for the offence of robbery with violence on the basis that the conditions at that time were not favorable for a positive identification. He complained that PW1 and PW2 had given varying descriptions of the assailant hence their evidence was inadequate to link him to the robbery. He also argued that the officer who had conducted the identification parade was not called to give his evidence.

36. The 2nd appellant was convicted on the direct evidence of PW1 and PW2. According to the witnesses, the robbery took place in the wee

hours of the morning on 12th March 2014. Since the conditions for identification were difficult, the trial court was required to make an inquiry into the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused to enable his identification him (See ***R vs Turnbull [1976]3 All ER 549***).

37. PW1 was fully awake and was watching a game when the assailants burst into his room with PW2 and his daughter in tow. He testified that they ransacked his house for about 2 to 3 hours and took clothes and household items from the house. He also told the court that he had had a conversation with one of the burglars and that the burglars later demanded for his car keys. PW1 asserted that the 2nd appellant was the one he saw in his house that day and added that he had identified him in an identification parade.

38. PW2 testified that she was awoken from sleep by the assailants who coerced her into leading them to where PW1 was. She recalled that the burglars had demanded Kshs. 9,000/= from PW1 and the car keys. PW2 testified that the lights in the house were on at the time the incident took place. She did not attend an identification parade but she insisted that she recalled the features of the 2nd appellant very well.

39. The 2nd appellant was a stranger to both PW1 and PW2. The court in the case of ***Maitanyi -vs- R (1986) KLR 198*** held that in such cases, it was ideal that a complainant give a description of his or her assailants to the police or to those who come to his or her aid at the first instance. PW1 testified that he had given a description of the 2nd appellant at the police station. According to the investigating officer PW3, the 2nd appellant was apprehended in relation to other cases and on being subjected to an identification parade by one Chief Inspector Nzomo, he was positively identified by PW1.

40. PW3 presented the identification parade form on behalf his colleague. He did not give an explanation for why the officer was not available to adduce evidence on the manner in which he had conducted the identification parade. From the identification parade form produced by PW3 it can be observed that contrary to the requirement in the **Police Force Standing Order 6 (iv) (d)** that a suspect be placed among 8 people, the parade in which PW1 identified the 2nd appellant was short of one person. The appellant rightly argued that the officer who had conducted the identification parade was an essential witness to the case and should have been called to give evidence on the identification parade.

41. In the case of ***Ibrahim Agevi Kigame and Another v Republic ELD CA Criminal Appeal No.289 of 2009 [2011] eKLR*** the Court of Appeal held that where the officer who had conducted the identification parade was not called to testify, the identification of the accused amounted to dock identification. The court held;

> "Looking at the record, many aspects of the evidence on these parades could only be answered by the officer who conducted the parades and the parade forms. Thus that officer was a necessary witness for the prosecution in the entire case, for without him and the forms it could not be established as to whether the identification parades were fairly conducted. He was a witness that the prosecution needed to establish their case on identification beyond reasonable doubt. He was not called; with the consequence, that in our view, the evidence establishing identification of the appellants was not before the court…
>
> We, with respect do not share the view of the superior court that the identification of the appellants was otherwise than mere dock identification. In the absence of the officer who conducted the identification parade and the parade forms, nothing remained before court other than dock identification which is worthless. Conviction could not therefore proceed on that evidence alone.

42. Similarly, the court in ***Achieng' v Republic [1981] KLR 175*** held as follows:

> "where an identification parade was held, the officer who conducted it must be questioned about it. Where such an officer is not questioned the evidence of identification can still be accepted as reliable if there is other evidence such as the finding of goods in possession of the appellant.

43. Counsel for the state argued that the failure by the prosecution to call a witness was not fatal to its case as the prosecution was not required to call a certain number of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt. (See ***Keter vs. Republic [2007] 1 EA 135***). It can also be argued that dock identification can be relied upon depending on the facts and the circumstances of the case. On this the Court of Appeal in the case of ***Nathan Kamau Mugwe versus Republic [2009] eKLR*** stated thus;

> "We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification."

44. As observed above, the officer who conducted the identification parade was not called to testify. The 2nd appellant was a stranger to both PW1 and PW2, thus their evidence was dock identification. PW4 and PW5, told the trial court that the 2nd appellant was arrested by the police on 6th April 2014, a few weeks after the robbery. He was not arrested in possession of any of the stolen items. Other than the dock identification by PW1 and PW2, the 2nd appellant was not linked to the crime by any other evidence.

45. In the case of ***Toroke vs. Republic [1987] KLR 204*** the court held that it was possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. The court observed that the error or mistake was still there whether it was a case of recognition or identification. I also find guidance in the case of ***John Nduati Ngure v Republic CRIMINAL APPEAL NO. 121 OF 2014 [2016] eKLR*** where the Court of Appeal held thus;

> 21. In our view, the Muiruri case did not overrule the rationale for exercising caution when dealing with dock identification evidence. The bottom line in the authorities is that the court will only base a conviction on such evidence:

> "**…**if satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification."

22. We find and hold that in the circumstances of this case, it was necessary to hold a properly organized identification parade for Githaiga to affirm his identification of the appellant as one of the attackers at the scene. The dock identification which came three or seven months later was of little, if any, probative value.

46. The Court of Appeal in ***David Karanja & Others v Republic CA No.117 of 2005*** also cautioned on the danger of an improperly conducted identification parade thus;

> "It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

47. PW1 testified that he had given an initial report to the police when he went to report the matter but the officers who took his initial report were not called to corroborate his testimony. PW2 admitted that she did not write down the description of the 1st appellant in her statement. There were a lot of unanswered questions on the circumstances that led to the arrest of the 2nd appellant. The person who gave information leading up to his arrest was not disclosed by the prosecution. It was claimed that the 2nd appellant was arrested in connection to other crimes but the basis upon which the police officers decided to have him subjected to an identification parade in relation to the crime in question was not revealed. The court in the immediate foregoing authority warned that a botched identification parade may cause a witness to point out the person in the dock as the assailant. The trial court did not address its mind to the failure by the prosecution to give sufficient evidence on the identification parade. PW2 admitted that she had not given a description of the appellant in her statement and did not also participate in an identification parade. I therefore find that the 2nd appellant was not properly identified as the person who stole from PW1.

48. In light of the reasons I have given, I find that there is merit in the appeal by the 1st appellant and the 2nd appellant. The conviction and sentences against **JAMES MAINA NJUGUNA** and **EDWIN OTIENO AURA** are hereby quashed. The appellants are set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 3RD DAY OF NOVEMBER, 2021

R.E. OUGO

JUDGE

In the presence of:

1st Appellant Present in person

2nd Appellant Present in person

Mr. Kaino State Counsel ODDP

Ms. Rael Court Assistant