REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.37, 32 & 35 0F 2018

(An Appeal arising out of the conviction and sentence of Hon. S. Jalang'o- SRM

delivered on 13th February 2018 in Makadara CMC. CR. Case No.1505 of 2016)

JACKSON NYAUSI NYAMWEA.....1ST APPELLANT

OKEMO OMARI LATEMO.....2ND APPELLANT

WYCLIFF MARTIN ABUNA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Jackson Nyausi Nyamwea (1st Appellant), Okemo Momari Latemo (2nd Appellant) and Wycliff Martin Obuna (3rd Appellant) were charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 18th May 2006 at Kamukunji in Nairobi County, the Appellants jointly with others not before court, while armed with crude weapons, namely knives robbed Bernard Grutenburg Kagunza (the complainant) of a Toshiba Laptop valued at Kshs.168,000/-, Kshs.70,000/- cash, a suitcase, assorted clothes, 2 pairs of shoes, an iron box, a power bank all valued at Kshs.302,650/- and at the time of such robbery threatened to use actual violence to the complainant. The 1st Appellant was further charged with the offence of **handling stolen goods** contrary to **Section 322(1)** as read with **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on the same day at Shauri Moyo, Kamukunji within Nairobi County, otherwise than in the course of stealing, he dishonestly retained a Toshiba Laptop, an external hard disc, a suitcase, vests, backpack knowing or having reason to believe them to be stolen property. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were convicted of the main count of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code.** They were each sentenced to serve twenty-five (25) years imprisonment. The Appellants were aggrieved by their conviction and sentence. Each Appellant filed a separate appeal challenging his conviction and sentence.

The Appellants raised more or less similar grounds of appeal in their petitions of appeal. They were aggrieved that they had been convicted on the basis of the evidence of identification yet the same was made in difficult circumstances that was not favourable to positive identification. The Appellants were aggrieved that they had been convicted on the basis of dock identification which did not establish that they had been positively identified. The Appellants faulted their conviction on the basis of a charge sheet which they were of the view was fatally defective. They took issue with the fact that they were convicted on the basis of prosecution evidence that could not sustain or form a basis for conviction. They faulted the trial magistrate for reaching the impugned decision before taking into account their plausible defence. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their respective convictions and set aside the custodial sentence that was imposed on them.

During the hearing of the appeal, the three separate appeals were consolidated and were heard together as one. All Appellants presented to court written submission in support of their respective appeals. It was the Appellants' case that they had been convicted on the evidence of identification which could not stand up to legal scrutiny. They accused the trial court of relying on the evidence of police identification parade in the absence of a first report made by the complainant to the police. The Appellants complained that the trial court failed to consider the ingredients that constituted the charge of robbery with violence and thereby convicted them when the said ingredients had not been established to the required standard of proof. They faulted the reliance by the trial court on the evidence of identification. They were of the view that the circumstances favouring positive identification was absent when the complainant was purported to have identified them. They took issue with the manner in which the police identification parade was conducted. They were of the view that the same was not conducted in accordance with the rules thereby prejudicing them. As regard the 1st Appellant, it was his submission that the testimony adduced by the complainant was contradictory, that it was not worth reliance being placed upon it. The 1st Appellant was of the view that he was framed

with the recovery of the alleged robbed items and therefore the trial court erred in failing to find that he had been maliciously charged. The Appellants' appeal submitted that their respective defences were not considered before the trial court reached the impugned decision. The Appellants relied on several cited authorities in support of their submission urging the court to allow their respective appeals.

Ms. Nyauncho for the State opposed the appeal. She submitted that the prosecution adduced sufficient culpatory evidence which connected the Appellants to the crime. She explained that the complainant had just arrived in Nairobi from Kisumu. He alighted from the bus and was walking to where he was to spend the night. He was accosted by a gang who robbed him of his suitcase and a bag that contained a laptop. He told the court that he was able to identify the persons who had robbed him. The gang robbed him after threatening to stab him with a knife. As the complainant was making his way to the police station, he was called through his mobile phone by a police officer. They inquired from him if had lost a laptop. He answered in the affirmative. The police officer from Shauri Moyo Police Station had obtained the complainant's mobile phone number from the laptop that had been recovered from the Appellants. An identification parade was conducted whereby the complainant positively identified the Appellants. She urged the court also to take into consideration that the stolen items were recovered in the Appellants' possession so soon after the robbery. It was her submission that the prosecution had adduced overwhelming evidence which established the Appellants' guilt to the required standard of proof beyond any reasonable doubt. She urged the court to dismiss the respective appeals lodged by the Appellant.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellants. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32)**. In the present appeal, the issue for determination is whether the prosecution established the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also had the benefit of considering the rival submission made by the parties to this appeal in light of the petitions of appeal that were lodged by the Appellants. It was clear to this court that the prosecution relied on the evidence of identification and that of the recovery of the stolen items so soon after the robbery to secure the conviction of the Appellants. The complainant testified that on 18th May 2016 at about 7.30 p.m., as he was walking from the bus station near Kamukunji, he was accosted by a gang of four men who blocked the path that he was walking. They threatened him with knives. He testified that the gang then robbed him of his suitcase which had a laptop, a phone charge, a power bank and his travel documents. He told the court that he was able to identify the Appellants in the course of the robbery as there was sufficient light. He explained that he was also robbed of Kshs.70,000/-. After the robbery, he decided to report the incident to the police. As he was walking towards the police station, he received a call from a person who identified himself as a police officer from Shauri Moyo Police Station. He asked him to go to Shauri Moyo Police Station where he discovered that his laptop, bag and socks had been recovered. The other items that had been recovered were an external hard disc and his pair of shoes. Also recovered was a vest. The complainant positively identified these items as his property. The items were produced into evidence by the investigating officer PC Stephen Njihia (PW1).

Two days later, *i.e*. on 30th May 2016, the complainant was requested to attend three police identification parades conducted by PW5 IP Yahya Abdalla. In the three identification parades, the complainant identified the three Appellants in the identification parades. The issue for determination by this court is whether in the circumstances that the robbery took place, the complainant positively identified the Appellants. There are plethora of decisions that give guidance to the court on how to evaluate the evidence of identification. In **Hassan Abdalla Mohammed v Republic [2017] eKLR**, Kemei J held thus:

> ***"Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in Wamunga v Republic [1989] KLR 424 at 426 had this to say:***
>
> ***"Where the only evidence against the defendant is the evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***
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> ***In Nzaro v Republic (1991) KAR 212, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify a conviction***.""

In **Wilson Kamotho Giuthi v Republic [2008] eKLR** Ngaah J held thus:

> ***"The need for the trial court to warn itself of the dangers of relying on the evidence of visual identification by a single witness is an issue that was taken up in the Court of Appeal in Kisumu Criminal Appeal No.20 of 1989, Cleopas Otieno Wamunga versus Republic where it noted that the evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. The court proceeded to state that whenever a case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant based on the evidence of identification.""***

In the present appeal, it was clear to this court that the circumstances in which the complainant says that he identified the Appellants was not conducive for positive identification. The robbery incident took place at about 7.30 p.m. It was at night. It was not clear from the complainant's evidence how in the short time that it took to rob him, he was able to be positive that he had identified the four men who had accosted and robbed him. Although the complainant stated that there was strong street lights at the vicinity where he was robbed, it was not clear from his evidence where the position of the street light was *visa vis* the position of the persons who were robbing him. In the hectic circumstances of the robbery, where the complainant had been surrounded and was being threatened to be stabbed, it could not be possible that he was in such a state of mind to positively identify the Appellants as his assailants. It was instructive that in his testimony, the complainant did not state how he was able to identify the Appellants. He did not give their descriptions or the clothes that the Appellants

wore at the time of the robbery. It was clear from the complainant's testimony that by the time he reached the police station, the Appellants had already been arrested by the police and some of his robbed items recovered.

This court would have had confidence in the evidence of identification if the police identification parade had not been bungled. The police identification parades were conducted by PW5 IP Yahya Abdalla. In the identification parade forms which were produced in court as ***Prosecution's Exhibits No.10, 11*** and ***12***, the members of the identification parade in the three identification parades were the same save for the Appellants who were inserted into the identification parades. It would not have taken a rocket scientist to point out the odd men out in the identification parades. The identification parades were therefore conducted contrary to the **Police Standing Orders** that specify the manner in which identification parades ought to be conducted. In the present appeal, instead of conducting parades with different members who had more or less similar features with each Appellant, the parade officer used the same members in the identification parade thus rendering the entire identification parade worthless for the purposes of confirming the identification of the robbers. In the premises therefore, this court agrees with the Appellants that the evidence of identification that was adduced by the prosecution witnesses did not meet the threshold that would have enabled this court make a finding that the Appellants were positively identified by the complainant, and further that the identification was free of the possibility of error or mistaken identity.

In the case of **Abdalla Bin Wendo v Republic (1953) 20 EACA 166**, the Court held that where the evidence of identification does not give confidence to the court that it is watertight and free from the possibility of error or mistaken identity, the court is required to rely on other evidence to corroborate that evidence of identification. In the present appeal, the prosecution adduced further evidence in form of the recovery of some of the stolen items a few hours after the same had been stolen from the complainant. The complainant told the court that he was robbed at about 7.30 p.m. Some of the stolen items were recovered by the police. He was called to the police station a few minutes to 9.00 p.m. where he positively identified the recovered items which were produced as exhibits by the prosecution.

PW3 PC Cardine Musau and PW4 PC Jacob Kavoo then, based at Shauri Moyo Police Station testified that at about 7.40 p.m. on 18th May 2016, while they were on patrol at Shauri Moyo Slums, they received a call from an informer who told them that three young men were selling a laptop suspected to have been stolen. They were directed where to find the suspects. They arrested the three Appellants. The 1st Appellant was carrying a bag. When they opened the bag, they found a laptop which had a phone number embossed on it. They called the complainant through the number. The complainant positively identified the items that were recovered. PW3 and PW4 arrested the Appellants and took them to the police station. They were charged with the offence for which they were convicted.

In order to secure a conviction of the Appellants on the application of the doctrine of recent possession, the prosecution was required to establish certain facts. These facts were set out in the case of **Edward Otsudi –vs- Republic [2013] eKLR** at page 4 where the court held thus:

> ***"In the case of Erick Oherio Arum –Vs- Republic Criminal Appeal No.85 of 2005, the Court in respect of the doctrine of recent possession had this to say:-***
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> > ***"…In our view, before a Court of law can rely on the doctrine of recent possession as basis of conviction in a criminal case the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly, that: that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses……""***

In the present appeal, the prosecution established to the required standard of proof beyond any reasonable doubt that the complainant was robbed of his property at about 7.30 p.m. on 18th May 2016. The items were recovered a couple of hours later in the Appellants' possession. The items recovered from the Appellants were positively identified by the complainant. Indeed, during the entire trial, the Appellants did not claim ownership of the said items that were found in their possession. The said items were found in the Appellants' possession a couple of hours after they had been robbed from the complainant. From the nature of the recovered items, this court holds that the recovery was recent. The Appellants failed to give an acceptable explanation why the items robbed from the complainant were found in their possession. The Appellants failed to discharge the rebuttable presumption placed on them that they were in possession of the said items because they had robbed the same from the complainant. That being the case, this court holds that the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellants robbed the complainant. In the circumstances therefore, the Appellants' respective appeals against conviction lacks merit and is hereby dismissed.

As regard sentence, following the recent decision by the Supreme Court of **Francis Karioko Muruatetu & Others –vs- Republic [2017] eKLR**, the Court has a discretion of sentencing the Appellants now that the mandatory death sentence has been declared unconstitutional. The Appellants were each sentenced to serve a term of twenty-five (25) years imprisonment. This court has considered the Appellants' respective mitigation. It has also taken into account that a substantial part of the stolen items were recovered. The court also notes that the complainant was not injured in the course of the robbery. Taking into consideration the totality of the circumstances in which the robbery took place and the mitigation of the Appellants, this court formed the view that the custodial sentence of twenty-five (25) years imprisonment was harsh and excessive. The same is set aside and substituted by a sentence of this court. Each Appellant is sentenced to serve ten (10) years imprisonment from the date they were convicted by the trial court on 13th February 2018. For avoidance of doubt, this court has taken into consideration the period that the Appellants were in remand custody prior to their conviction by the trial court. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF MARCH 2019

L. KIMARU

JUDGE