**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL APPEAL NO. 46 OF 2018**

**CONSOLIDATED WITH HCCRA NO. 47 OF 2018**

**1. ZACHARY NYANGARE.....1ST APPELLANT**

**2. EDWIN MACHOGU MACHOGU.....2ND APPELLANT**

**=VRS=**

**THE REPUBLIC.....RESPONDENT**

**{Being an Appeal against the Judgement of Hon. M. O. Wambani – CM dated and delivered on the 14th day of November 2018 in the Original Nyamira CM Criminal Case No. 1091 of 2014}**

**JUDGEMENT**

The appellants were jointly charged with Robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the charge were that on 1st November 2014 at Nyakenimo Sub-location, Kebabora village in Nyamira North District within Nyamira County, jointly with others not before court while armed with dangerous weapons namely pangas, rungus and metal bars robbed Solomon Kebaso cash Kshs. 10,200/=, one Samsung TV valued at Kshs. 8,500/= one Etel phone valued at Kshs. 7,000/=, G-tide phone valued at Kshs. 3,300/= all valued at Kshs. 26,300/= the property of the said Solomon Kebaso and immediately before the time of such robbery used actual violence to the said Solomon Kebaso.

The 1st appellant was also separately charged with an alternative charge of Handling stolen goods contrary to Section 322 (1) (2) of the Penal Code where it was alleged that on 5th November 2014 at Kebabora village Nyakenimo Location in Nyamira North District within Nyamira County otherwise than in the course of stealing dishonestly retained TV Samsung knowing or having reasons to believe it to be a stolen property.

Both the appellants pleaded not guilty to the charges. The prosecution then called five witnesses to prove its case and the appellants gave sworn testimony in which they maintained their innocence. However, after evaluating the evidence the Learned trial Magistrate came to the conclusion that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellants on the main charge. Thereafter and upon conducting a sentence hearing the Learned trial Magistrate sentenced the appellants to life imprisonment.

Being aggrieved by conviction and sentence the appellants preferred this appeal. The appeals were filed separately but on 12th February 2019 this court consolidated the appeals for expediency.

The appeal was canvassed partly through oral submissions and partly through written submissions the appellants acting in person and Principal Prosecution Counsel Mr. Jami acting for the respondent.

As the first appellate court my duty goes beyond considering the submissions. It behoves me to evaluate the evidence adduced in the court below so as to arrive at my own independent determination. In doing this, I must make provision for the fact that I did not see or hear the witnesses give evidence – **(See Okeno Vs. Republic [1972] EA 22.**

It is my finding that whereas it was proved beyond reasonable doubt that a robbery occurred in the complainant's house on the material night the evidence adduced fell short of proving the case against the appellants. The burden of proof is one beyond reasonable doubt. In her judgement the Learned trial Magistrate acknowledged there was doubt in the prosecution's case when she stated: -

> ***"….However, if there be any doubt as to whether the accused persons committed the alleged offence herein, this court shall warn itself that the doubt if there be any, of which there is none, is quite slight not to miscarry out (sic) justice against each***

***accused persons herein."***

To me this suggests that there was some reasonable doubt in the mind of the court and the court should have proceeded to acquit the appellants.

On my part I find that the charges were not proved beyond reasonable doubt. In regard to the principal charge the complainant testified that he and his wife were staying in a single room and that when the door was hit he only saw two people. He named those two people and stated that one of them was the second appellant (Edwin Machogu Machogu). He claimed to have seen the two men when one of them shone a torch on the TV which was on a table. He did not allege that the 1st appellant was one of the men he saw. Contrary to the testimony of the investigating officer neither the complainant (Pw1) nor his wife (Pw2) gave evidence of a third man/assailant who stayed outside the house. The complainant claimed that it was the 2nd appellant who took the TV, the sewing machine and two phones outside. From his testimony the 1st appellant was not one of the two people who robbed him that night. On her part Pw2 did not state the number of the attackers but her evidence suggests they were more than one. She did not implicate the 2nd appellant but she was categorical that the person she saw with a torch was the 1st appellant. This is in sharp contradiction of Pw1's testimony that the attacher who had a torch was Machogu. The question begs – if all this was happening in a single room with the two witnesses being in one place why was their evidence at such variance? If Pw2 in fact saw the 1st appellant, then it means there were three and not two attackers yet Pw1 was certain that they were only two. If Pw2 in fact identified the 1st appellant, then it means that he was also one of the two people referred to by her husband (Pw1) since only two people entered the house. She herself does not claim that the 2nd appellant was one of the attackers so could Pw1 have been mistaken. Which of them was mistaken as to the identity of the people they saw?

In my mind the contradictions in the evidence of these two key witnesses creates doubt in their evidence and renders it unreliable. It is probable that the only reason Pw2 alleged to have identified the 1st appellant is because she was told that their TV was found in his house. During cross examination by the 1st appellant the complainant (Pw1) made the following very curious statement: -

***"We had not fully established that the TV was mine."***

At what point then was the TV set established to be his? It is instructive that the TV that was allegedly recovered from the 1st appellant's house was not put to the complainant and his wife during the trial. There is therefore no evidence that that TV was theirs. The TV was only brought to court at the time the investigating officer gave evidence and he produced it in evidence. It was not even put to Pw3 to confirm that it was the one he found in the 1st appellant's alleged house. In the end there was no nexus between the TV produced in court, the TV recovered by Pw3 and the TV stolen from the complainant's house at the time of the robbery. If there was, that was not established by the testimonies of the complainant (Pw1), Pw2 and Pw3. The practice where the investigating officers hold onto the exhibits until they come to court and omit to bring them to be identified by the other witnesses is to be deprecated. The recovered item must be put to the witness and he/she must be asked to say why he/she identified the item/article as the one stolen from him. failure to do so leaves a gap in the prosecution's case. In this case it is my further finding that even had the TV been positively identified as the one stolen from the complainant's house on the night of the robbery the evidence that it was found in the 1st appellant's house also fell short of the standard required.

It is Pw3 who testified that this TV was found in the 1st appellant's house. This was barely four days after the robbery and this would be recent possession which in itself would prove the 1st appellant was one of the robbers. However, Pw3's evidence was very inconsistent. Initially he was clear that the TV was found in a house belonging to the 1st appellant's uncle who is deceased but that the appellant lived in that house. Then he changed and said that the appellant lived in his own house not far from that house. So which is which? Was the 1st appellant staying in that house or in his own house? This issue ought to have been resolved by calling a witness who could with cogency tell the court if the 1st appellant indeed stayed in the house where the TV was recovered. When asked if the 1st appellant's said uncle had a family Pw3's reply was that he did. However, he did not tell this court whether that family lived there or not. A doubt therefore arises as to whether there was anybody else staying in that house and whether the TV could have been taken there by somebody other than the 1st appellant. This doubt is compounded by Pw3's testimony that the house was not locked when he got there. It could be, therefore that somebody else found the house open and put the TV there. This somebody could have been anybody. Nobody claimed to have seen the 1st appellant at the house at around the time it is suspected the TV was taken there.

The upshot is that there were a lot of gaps and doubt in the case for the prosecution and these should have been resolved in favour of the appellants. Accordingly, I find merit in their appeal and the same is allowed. Their conviction is quashed, the sentence is set aside and they should be set at liberty forthwith unless otherwise lawfully held.

**Signed, dated and delivered in Nyamira this 6th day of June 2019.**

**E. N. MAINA**

**JUDGE**