REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 38 AND 39 OF 2016

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 15 of 2015 of the Chief Magistrate's Court at Naivasha – E. Kimilu, SRM)

PETER LOIYAN EMOJONG……1ST APPELLANT

PHILIP ESINYEN EKAI……2ND APPELLANT

-VERSUS-

REPUBLIC…….RESPONDENT

J U D G M E N T

1. The Appellants herein, **Peter Loyian Emojong** (1st Appellant) **and Philip Esinyen Ekai** (2nd Appellant) were jointly charged with Robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. In that, on the night of 2nd January, 2015 at Kasarani area in Naivasha sub-county within Nakuru County, they jointly, being armed with dangerous weapons namely a panga and stick robbed **Samuel Njoroge Gathungu** of a mobile phone **Techno T340** valued at Kshs 2,000/= and a Rhino torch valued at Kshs 200/= and at the time of such robbery used actual violence to the said **Samuel Njoroge Gathungu**.

2. They denied the charges but following a full trial, they were found guilty and convicted. They were sentenced to death. Aggrieved with this outcome, they appealed to this court. Through similar amended grounds of appeal and submissions, the two Appellants have sought to have the convictions quashed.

3. The amended grounds of appeal are as follows:-

> **"1. THAT, the trial magistrate erred in law and facts by basing his conviction on the strength of the light without considering duration PW1 took with the assaulting.**
>
> **2. THAT, the trial magistrate erred in the law and fact with the admission of exhibits without proper identification of the stolen property.**
>
> **3. THAT, the trial magistrate erred in law and fact by convicting Appellant with the uncorroborated evidence.**
>
> **4. THAT, the magistrate erred in law and facts when he failed to observe that key eye witness were not summoned or listed as witness.**
>
> **5. THAT, the trial magistrate erred in law and facts when the prosecution failed to do the DNA to prove the ownership of the blood on the stick."**

4. In written submissions, the Appellants point out concerning identification at the scene of offence, that it was not watertight as the offence occurred at night; that **PW1's** evidence to have used torch light is doubtful. The Appellants challenge **PW1's** evidence that the Appellants were known to him, citing his failure to state so to **PW2** who came on to the scene soon after the robbery, or at the time of recording his statement to police. The Appellants also take issue with the evidence tendered in identification of the phone claimed by the complainant to be his.

5. Concerning grounds 3 and 4, the Appellants continue to assail the complainant's identification of the stolen phone and torch. Further, the Appellants argue that key witnesses who gave the Appellant's names to the complainant did not testify, nor DNA tests carried out to confirm that a recovered blood stained rungu bore the complainant's blood. They submit that this was a case of suspicion and that they were not connected through credible evidence to the commission of the offence.

6. The appeal was opposed by the DPP through Mr. Mutinda. He reiterated evidence by **PW1** and **PW2** which he said was unshaken and positively placed the Appellants at the scene of offence.

7. The duty of the first appellate court remain as succinctly stated in **Pandya -Vs- Republic [1957] EA 336** to wit:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

8. The prosecution case through six witnesses was as follows. On the night of 2nd January, 2015 **Samuel Njoroge** (**PW1**) the complainant herein, was on duty as a guard at the gate of Maranju Farm at Kasarani. At about 10.45pm he was approached by two persons, identified as the two Appellants. They demanded that he opens the gate. He asked them for identification documents but they refused to present any. They were armed with a *simi* and a club.

9. They then set upon **PW1** and assaulted him. **PW1** raised an alarm while struggling with the men. The men took the gate keys from the complainant, his **Techno phone** and torch before opening the gate and escaping. **Jasten Masambaga Kharigala** (**PW2**) who is a colleague of **PW1** found the latter lying by the gate with head injuries. He notified police and escorted **PW1** for treatment.

10. At about 1.00am the two men (**PW1** and **PW2**) returned to the police station. Acting on information gathered, they proceeded in the company of police to a place described as Babu's plot and identified as the Appellant's residence. They forced a door open to the room identified as the 2nd Appellant's. **PW1** immediately confirmed he was one of the assailants. The group was then led by the 2nd Appellant to the room occupied by the 1st Appellant.

11. The room door was also forced open. The 1st Appellant was found lying in bed with a panga tucked in his waist. On a table were the **Techno** phone and **Rhino** torch identified by the complainant as his stolen goods. Also recovered was a blood stained rungu. The two men were arrested.

12. The Appellants upon being placed on their defence elected to make unsworn statements. The 1st Appellant stated that he was from work headed for his house at Kasarani at about midnight when he met with security officers. They arrested him allegedly in connection with possession of or dealing with charcoal, and took to the police station. He denied that he was arrested while in his house. The 2nd Appellant testified that he worked at Shalimar Flower Farm and resided at Kasarani. He spent most of the day on 2nd January, 2015 at a birthday party and later went to a club. He got very drunk and was arrested by officers known to him, including **CPL Nickson Sulunya (PW4)** and one **AP John Muriithi** with whom he had previous run-ins in 2014. He denied knowing the 1st Appellant or involvement in the offence.

13. There is no dispute as to the time and date of the arrest of the Appellants at Kasarani. From the evidence by **PW1**, **PW2** and the police officers, there can be no dispute that a report of robbery was made at police at Kasarani Police Post to **CPL Sulunya (PW4)** at about 11.00pm. The **P3** form (Exhibit 5) tendered by **Mesa Silvester** (**PW3**) a clinical officer, indicates that **PW1** had sustained several injuries to the head which required stitching, to the left shoulder and right hand.

14. The key issue in dispute is the involvement of the Appellants in the incident complained of, or their possession of the items allegedly stolen from the complainant. Two pieces of evidence tended to connect the Appellants with the offence, namely, identification evidence by **PW1** and the possession of the goods claimed by **PW1** to have been taken from him in the course of the robbery.

15. On the former, **PW1** maintained that by use of his 3-battery **Rhino** torch he was able to see the two men who approached him at the gate demanding that he opens it. **PW1** stated of the encounter in his evidence-in-chief that:-

> **"I flashed my torch and they came to the gate. I asked them to present their identification documents. I saw their faces very well since they came close to me and I had a bright torch. They refused to present their identity documents. I told them I would not open the gate unless they identify themselves. One was armed with a panga and the other one with a rungu. The one holding a panga attempted to cut me and I grabbed him and got panga. I fell down while struggling with him and the one with the rungu began to hit me……At the time of attack the 2nd Accused had the panga and 1st Accused had a rungu. I saw them clearly with my torch. It's a 3-battery torch and was bright. I had seen (the) Accused persons since they used to sell fish to us for about two months."**

16. The witness reiterated this evidence during cross-examination first during his first appearance, and again at the close of the trial when he was recalled for further cross-examination. Because the robbery, as usually is the case, happened unexpectedly, and at night, I think the trial magistrate should have considered the evidence of identification in a little more detail, rather than in the broad strokes fashion he did.

17. The Court of Appeal has in several cases pronounced itself concerning visual identification by night or in difficult circumstances, such as those pertaining in to the present case. In the case of **Joseph Muchangi Nyaga & Another -Vs- Republic (2013) eKLR** the court stated in this regard :-

"Evidence of visual identification should always be approached with great care and caution (See Waithaka Chege versus Republic (1979) (KLR 217). Greater care should be exercised where the conditions for favourable identification are poor. (Gikonyo Karume and Another Versus Republic (1980) KLR 23) ……before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of and the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him……"

18. The trial magistrate in analysing the evidence on identification, sought guidance from the legal authority in **Stephen Thama Wanjohi – Vs- Republic [2014] 1976 – 1980 KLR 1566** before concluding:-

"The court has evaluated evidence on record. This court is satisfied complainant recognized his attackers using torch light. He knew them as fishermen because he could see them pass through the gate from farm slums. The circumstances of identification were favourable and free from error. The complainant had not thought attackers had other motive when he flashed his torch. He properly described his attackers who were arrested immediately."

19. The Appellants now complain that the duration of the complainant's encounter was unknown. From the evidence of **PW1**, he engaged the two intruders for some time and came close while demanding to see their identification. He described them by height, as one tall, and the other short, stating that they had sold him fish previously. That he recognized them in the glare of his torch light although he did not know their names. He did repeat this description to **PW2** who responded to his cry for help and later on the same night identified the two men when their respective homes were visited by the police in the company of **PW1** and **PW2**.

20. Reviewing for myself the identification evidence adduced at the trial, I have concluded that the trial magistrate's finding that this was a case of positive recognition and is not assailable. The circumstances described by **PW1** clearly favoured such positive recognition. It would appear that on reporting to police, **PW1** and **PW2** with the assistance of members of public traced the homes of the two men. The fact that the said members of public did not testify does not weaken the consistent evidence of **PW1**, **PW2**, **PW4** and **PW5** in that regard.

21. Allegations of a previous disagreement between **PW4** and **PW5** with the 2nd Appellant was not put to them in cross-examination. Nor suggestions that the circumstances of their arrest were other than the witnesses stated, namely that the 1st Appellant was arrested in connection with charcoal trade while the 2nd Appellant for drunk and disorderly behaviour.

22. The evidence of the prosecution witnesses is consistent as to the recovery of the weapons used in the offence and stolen items identified by **PW1** in the room occupied by the 1st Appellant. It matters not that no evidence of his tenancy was tendered. He was alone in the room, with a *simi* tucked in his waist and the stolen items on the table.

23. These items were identified by **PW1** at the trial, and at no time did the 1st Appellant claiming them as his. This evidence was not shaken. The identification of the items cannot be faulted. The possession evidence raised a rebuttable presumption under the doctrine of recent possession. The trial magistrate sought guidance on this aspect for the decision in **Arum –Vs- Republic [2006] 1KLR 233**. Having received the possession evidence under the guidelines in that decision, the trial court was satisfied that recent possession had been proved.

24. In **David Nzongo -Vs- Republic [2010] eKLR** the Court of Appeal stated regarding the application of the doctrine of recent possession:-

"There is a rebuttable presumption of fact under Section 119 of the Evidence Act, Cap 80, Laws Kenya that the appellant was either the robber or a guilty receiver, unless he offers a reasonable explanation as to his possession of suspected stolen items."

In the case of *Francis Kariuki Thuku & 2 others –Vs- Republic [2010] eKLR* this Court held that:-

"*Concerning the application of the doctrine of recent possession to the facts in* the case, we are of the view that the appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of R. V. Loughin 35 Cr. Appl. 269 by the Lord Chief Justice of England and this Court's own decision of Samuel Munene Matu V. R. Criminal Appeal No. 108 of 2003 at Nyeri demonstrates that the doctrine was properly applied. The recovery of the items in the case before us was within 7 days whereas in the MATU case (supra) a period of 20 days was held to be recent. We accordingly uphold the superior court's view of the law on the point. In this regard we would re- echo the decision of this Court in the case of Hassan -vs- Republic [2005] 2 KLR 11 where as regards recently stolen goods it delivered itself thus:-

Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption *of fact arises that he is either the thief or a receiver." (*Emphasis supplied)

25. Section 111 of the Evidence Act provides:-

"(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity."

26. The 1st Appellant's defence steered clear of the recovered items hence no explanation for the possession was given. The failure by the prosecution to test the blood stained *rungu* for DNA does not in any way diminish the evidence of recovery of not only the *rungu*, but also the stolen goods from the 1st Appellant's house. Nothing turns on that question. For my part, having reviewed the entire record, I am satisfied that the Appellants were convicted on strong and credible evidence. Their appeal has no merit and is hereby dismissed.

Delivered and signed at Naivasha, this 3rd day of May, 2018.

In the presence of:-

Mr. Koima for or the DPP

1st Appellant – present

2nd Appellant – present

C/C – Japheth and Kamau

C. MEOLI

JUDGE