REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 6A OF 2017

CONSOLIDATED WITH

CRIMINAL APPEALS NO. 6B & 6C OF 2017

BETWEEN

STEPHEN BARASA ALIAS WAINGO.....1ST APPELLANT

DANIEL AMADIVA.....2ND APPELLANT

PETER LEMASHON LEKUPELE.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. R. M. Oanda, PM

dated 24th January 2017 at the Magistrate's Court at Kilgoris

in Criminal Case No.576 of 2015)

JUDGMENT

1. The appellants, **STEPHEN BARASA ALIAS WAINGO**, **DANIEL AMADIVA** and **PETER LEMASHON LEKUPELE** were charged, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296 (2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the charge were that on 22nd May 2015 at Ololtingual Village in Transmara West District of Narok County jointly while armed with rungus robbed **JOSEPH SASWEK** Kshs. 160,000/- and a torch and immediately before or immediately after the time of such robbery beat the said **JOSEPH SASWEK**.

2. The 2nd and 3rd appellants faced alternative charges of handing stolen property contrary to **section 322(2)** of the ***Penal Code***. As against **DANIEL AMADIVA**, it was alleged that on 23rd May 2014, otherwise than in the course of stealing whereas they received or retained Kshs. 146,000/- knowing or having reason to believe it to be stolen. As against, **PETER LEMASHON LEKUPELE**, it was alleged that on 23rd May 2015 at Lolgorian area in Transmara West District of Narok County otherwise in the course of stealing, he dishonestly received or retained a torch knowing or having reasons to believe it to be stolen.

3. Following the conviction and sentence, the appellants have now lodged their respective appeals to challenge their convictions and the sentence of death imposed on each of them. Before I deal with the grounds of appeal, I recognise that it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**). In order to proceed with this task, I will set out a summary of the evidence as it emerged before the trial court.

4. Joseph Saswek (PW 1) testified that on the night of 22nd May 2015, he had just arrived home at about 10.00pm. He heard some commotion in the maize plantation and went out with his dogs to find out what was happening. As he was in the maize plantation, he was

attacked by three assailants who pushed him to the ground. He testified that it is the 2nd appellant who hit him and cut his tooth. The assailant took Kshs. 100,000/- from his pocket, his torch and rungu before they left. His screams attracted the neighbours who arrived and they started looking for the assailants.

5. PW 1 went to Lolgorian Hospital for examination and treatment on 23rd May 2015. He was examined by Julius Munyendo (PW 6), a clinical officer, who noted that PW 1 had mild bruises on the neck and tenderness. His had a loose incisor tooth on the lower jaw and tenderness on the left lower limb extending to the hip joint. He opined that the injuries were caused by kicks and fists and classified them as harm. He produced the P3 medical form.

6. PW 1's wife, Narkungera Ole Moitie Saswek (PW 2), recalled that on the material night, PW 1 went outside to attend to the commotion in the maize farm. She heard him scream and when she went, she met the 3rd appellant coming out of the maize farm. She asked him what the problem was but he took off.

7. Kennedy Kede Puya (PW 3), who had been with PW 1 earlier that evening, testified that after PW 1 left for his home, he heard some screams. He immediately ran to PW 1's homestead where he met PW 1, PW 2 and other neighbours. PW 1 told him that he had been attacked by thugs who had taken his money. PW 2 told him she had met the 3rd appellant in her compound, so they started looking for him. PW 1, PW 2 and PW 3 went to the 3rd appellant's house where they found his wife and the 1st appellant's wife. They were told that the 3rd appellant had left with the 1st and 2nd appellants. As they left, they met the 3rd appellant who implicated the 1st and 2nd appellant. The 1st appellant arrived but before he could be arrested, he escaped. In the meantime, the group went to report the incident at Lolgorien Police Station. Later on he went to the bus stage to look for the 1st appellant who was arrested as he was about to enter into a vehicle.

8. John Saswek (PW 4) also responded to the alarm raised by PW 1 and rushed to his homestead where he met PW 1. PW 1 informed him that he had been robbed of Kshs. 160,000/-. He joined the party in looking for the assailants. They first arrested the 3rd appellant who implicated the other appellants. He recalled that the 1st appellant was arrested at the stage as he was trying to run away and he had money in his possession while they recovered PW 1's torch from the 2nd appellant.

9. The investigating officer, PC Willis Ochieng (PW 5), recalled the morning of 23rd May 2015 at about 1.30am, PW 1 reported the incident at Lolgorian Police Station. He visited the scene of the incident and recalled that neighbours had formed groups to locate the assailants who were known. He testified that he visited the 2nd appellant's house at about 3.00pm and recovered a torch belonging to PW 1. The 1st appellant was arrested at about 6.00am as he was boarding a matatu. Upon arrested he was found with Kshs. 146,000/-. He stated that the 1st appellant recorded a confession.

10. In his sworn testimony, the 1st appellant denied the offence but admitted that he had in his possession, Kshs. 146,000/- when he was arrested and taken to the police station as he was going to sell his business wares in Kilgoris. The 2nd appellant, in his unsworn statement, the appellant told the court that he had been working in Marusala on the way to Kehancha where he had gone on 18th May 2015. He arrived at Lolgorian on 22nd May 2015 at about 7.00pm, went to a disco and got drunk and was only arrested and taken to the police station. The 3rd appellant also denied the charge in his unsworn statement told the court that prior to the incident he had a disagreement with someone who had sold him land.

11. Based on the evidence, the trial magistrate was convinced that the prosecution had established that a robbery had been committed. He was satisfied that the 1st and 2nd appellant were identified by PW 1 while the 3rd appellant was seen at the scene. Additionally, money stolen from PW 1 was recovered from the 1st appellant and his torch recovered from the 2nd appellant. The appellants dispute these findings and in their respective petitions of appeal and written submissions and attack the conviction and sentence on several grounds. They contend that they were not identified as the assailants as the circumstances prevailing were not favourable for positive identification. They also complained the recovery of the money and torch did not satisfy the test of the doctrine of recent possession. They complained the evidence was inconsistent and lacked the credibility to support the conviction.

12. On its part, the respondent supported the conviction and sentence and urged that the prosecution proved all the elements of the offence.

13. The offence of robbery with violence under **section 296(2)** of the ***Penal Code*** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at, immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic*** **NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR,** ***Oluoch v Republic*** **[1985] KLR 549** and ***Ganzi & 2 Others v Republic*** **[2005] 1 KLR 52)**.

14. Although PW 1 did not allude to the assailants being armed, the testimony of PW 1 is that he was attacked by three people who assaulted him and caused him to suffer injuries including a broken tooth. The injuries were confirmed by PW 6. His money and torch were stolen by the assailants. Having evaluated the evidence, I am satisfied that the prosecution proved the elements of the offence of robbery with violence.

15. The substantial issue in this case is whether the appellants were identified as the assailants who attacked PW 1. The incident took place at about 3.00am in the morning in circumstances that were difficult for positive identification. In ***Wamunga v Republic*** **[1989] KLR 424** the Court of Appeal warned that:

> ***[W]here the only evidence against a defendant is 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 be the basis of a conviction.***

16. 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 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 (see ***Maitanyi v Republic*** **[1986] KLR 198** and ***R v Turnbull*** **[1967] 3 ALL ER 549)**. The Court of Appeal was categorical in ***Kiarie v Republic*** **[1984] KLR 739**, that reliance on such evidence of identification must be *"absolutely watertight"* to justify conviction.

17. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see ***Anjononi & Others v Republic*** **[1980] KLR 59**). But in ***Wanjohi & 2 Others v Republic*** **[1989] KLR 415**, the Court of Appeal held that, *"recognition is stronger than identification but an honest recognition may yet be mistaken."*

18. This case was not one of identification of a strangers but of recognition. The fact the appellants were neighbours and lived within the same neighbourhood is confirmed by the fact that on the material night when they were identified as the assailants, PW 1, PW 2, PW 3 and PW 4 confirmed they visited their houses to look for them.

19. The conviction of the 1st and 2nd appellant was based on positive recognition. PW 1 stated that, *"the 1st accused took money from me."* In cross examination he reiterated that, *"You dropped me onto the ground. You took away the money and you ran away."* PW 1 identified the 2nd appellant as the person who hit him, cut his tooth, took his torch and rungus and ran away. When cross-examined by the 1st accused he stated, *"I struggled with accused 2 and I left him. He went with my torch and rungus."* In answer to the 2nd appellant's questions he stated, *"You dropped me and the torch was on, I was able to see you well. I saw you but I didn't say. You pinned me onto the ground. You later ran away ….."*

20. On the basis of this testimony and the fact that PW 1 knew both appellants, the close interaction and the fact that he struggled with the 2nd appellant when the light was on, I am satisfied that the circumstances were favourable for positive recognition and that PW 1 positively recognised the 1st and 2nd appellants. Although PW 1 did not recognise the 3rd appellant, PW 2 met him at the scene immediately she went out after hearing PW 1 raise alarm. The recognition of the 1st and 2nd appellant is assured by the fact that immediately the neighbours gathered, PW 1 informed them of the attack and they immediately went to look for all the appellants as they had been implicated and they were in fact arrested in the locality on the same early morning.

21. The case against the 1st and 2nd appellants was also founded on the doctrine of recent possession which posits that upon proof of the unexplained possession of recently stolen property, the trier of fact may draw an inference of guilt of theft or of offences incidental thereto. In ***Arum v Republic*** **[2006] 1 KLR 233**, the Court of Appeal set out conditions that must exist before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case. These include proof that:

(a) The property was found with the suspect;

(b) The property was positively the property of the complainant;

(c) The property was stolen from the complainant;

(d) The property was recently stolen from the complainant.

The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

22. In this case, PW 1 testified that his torch was taken by the 2nd appellant. The torch was recovered. PW 4 and PW 5 confirmed that when they went to his house, they recovered the torch which was positively identified by PW 1 as his. It was also identified by his wife, PW 2 as belonging to PW 1. The 2nd appellant denied that nothing was recovered from his house. The affirmative evidence is that PW 1 testified that it is the 2nd appellant who in fact ran away with his torch. The torch was recovered and positively identified by PW 1 and the 2nd appellant did not lay any claim to it or explain its possession. I find that the torch put him squarely at the locus in quo as the person who assaulted PW 1.

23. As regards the 1st appellant, the prosecution case was that Kshs. 160,000/- recovered was stolen from PW 1. PW 1 positively identified the 1st appellant as the person who stole the money from him. He was trying to leave Lolgrian at 6.00am on the material morning and after his arrest, witnessed by PW 3 and PW5 and confirmed by PW 5, he was carrying Kshs. 146,000/-. Although the prosecution could not positively state that each note was the one that PW 1 had, the inference that the 1st appellant is the one who stole the money is irresistible as he was positively identified at the scene as having stolen from PW 1 and he was found with a large sum of money not long thereafter in circumstances where he was trying to run away from Lolgorian. In light of this evidence, I reject his defence that he was merely going to Kilgoris to do business.

24. Finally, the 3rd appellant's conviction rested on the fact that he was at the locus in quo when the incident took place. PW 2 testified that she saw him in their compound when she responded to PW 1's screams. Apart from that evidence, the only other evidence tying him to the offence amounts to inadmissible evidence of statements he made when he was arrested and was being beaten. I find his conviction unsafe. I therefore allow the 3rd appellant's appeal. The conviction and sentence is hereby quashed. He is set free unless otherwise lawfully held.

25. I affirm the conviction for the 1st and 2nd appellant. As regards the sentence, the mandatory death sentence was found unconstitutional by the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic*** **SCK Pet. No. 15 OF 2015 [2017] eKLR.** The Court of Appeal in ***William Okungu Kittiny v Republic*** **KSM CA Criminal Appeal No. 56 of 2013 [2018]eKLR** applied the same principle to the offence of robbery with violence contrary to **section 296(2)** of the ***Penal Code***. I therefore set aside the sentence of death and now call upon the appellants to make their mitigation.

DATED and DELIVERED at KISII this 17th day of DECEMBER 2018.

D.S. MAJANJA

JUDGE

Appellants in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.