**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 27 OF 2015**

***HIGH COURT CRIMINAL APPEAL NUMBERS 27, 28 AND 29 OF 2015 (ALL CONSOLIDATED UNDER HIGH COURT CRIMINAL APPEAL NO.27 OF 2015)***

**SAILOL KAKANYI ...........................................1ST APPELLANT**

**TOPOTI OLOMUNYAK...................................2ND APPELLANT**

**NGENOI SEKETO SHILALO...........................3RD APPELLANT**

***VERSUS***

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

*(Being an appeal from the judgment of Principal Magistrate's Court at Mavoko law Courts delivered by **Honourable P. OOKO, (Principal Magistrate)** on 5th day of February, 2015 in **MAVOKO PM.CR.CASE NO.1168 OF 2013**)*

**JUDGMENT OF THE COURT**

1. This appeal arises from the conviction of Hon. P. Ooko Principal Magistrate at Mavoko Law Courts vide PM's Criminal Case No.1168 of 2013 delivered on the 5th day of February, 2015. The three (3) Appellants herein had been charged with a main charge of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal code. It was alleged that on the night of 25th October, 2013 at Portland Farm in Athi River District within Machakos County jointly while armed with offensive weapons namely rungus and swords, robbed Tonga Mututua and Simama Ole Maleton of 17 flock of sheep and 6 flock of goats valued at Kshs.230,000/= the property of **Philip Nkaminya Supeyo** and at the time of such robbery with violence threatened to use personal violence to the said Tonga Mututwa and Shimama Ole Maleton. The Appellants also faced an alternative charge of handling stolen goods contrary to Section 322(2) of the Penal Code as it was alleged that on the 23rd October, 2013 along the Nairobi – Mombasa Highway at Mlolongo in Athi River District within Machakos County otherwise than in the course of stealing, dishonestly retained seventeen (17) flock of sheep and six (6) flock of goats all valued at Kshs.230,000/=, the property of **Philip Nkamiya Supeyo** knowing or having reasons to believe them to be stolen properties or unlawfully obtained. The trial court found all the three (3) Appellants guilty of the main charge and sentenced them to suffer death.

2. The Appellants were aggrieved by the conviction and sentence and have filed several grounds of appeal. The three (3) Appeals herein were consolidated into one with Criminal Appeal No.27 of 2015 being the lead file herein. The Appellants initially filed grounds of appeal and subsequently filed amended grounds of appeal which can be summarized as follows:-

***(1) THAT the learned trial magistrate erred in law and fact by shifting the burden of proof to the Appellants in breach of the provisions of Section 107 of the Evidence Act.***

***(2) THAT the learned trial magistrate erred in law and fact by convicting the Appellants on uncorroborated evidence as there were lack of crucial witnesses and lack of identification by the witnesses.***

***(3) THAT the learned trial Magistrate erred in law and fact in convicting the Appellants on a duplex charge.***

***(4) THAT the learned trial magistrate erred in law and fact in convicting the Appellants on a flawed doctrine of recent possession yet the recovered exhibits were not produced as exhibits.***

3. The Appellants therefore pray that the conviction be quashed and sentence set aside and that they be set at liberty.

4. With the leave of the court, parties filed submissions which I have carefully considered.

5. As this is the first appellate court, its duty is to re-evaluate the evidence and come to its own independent conclusion bearing in mind that it had no opportunity to hear or see the witnesses testify or observe their demeanour but to make an allowance for that (see **OKENO =VS= REPUBLIC[1972] EA 32** and **PANDYA VS REPUBLIC [1957]** and **KARIUKI KARANJA =VS= REPUBLIC [1986] KLR 190).**

6. The Complainant **Philip Supeyo (PW.1)** testified and stated that on the 23/10/2013 around 5. 30 a.m. he received a telephone call from his herdsboy one Tonga Mututwa that his sheep and goats had been stolen. He immediately alerted police at Athi River Police Station. Apparently police on night patrol had stopped a certain Motor vehicle Registration Number KBU 904 L which was ferrying goats and Sheep and which was later detained at Athi River Police Station. The Complainant rushed there and positively identified his stolen animals which were photographed and released to him.

7. Tonga Mututwa (PW.2) stated that he was a herdsboy and had securely locked the animals and retired to bed only to be woken up early in the morning by barking dogs. He found the animal shed broken into and sheep and goats stolen and that the robbers pelted him with stones. He alerted his employer and was later able to positively identify recovered animals at Athi River Police Station. He was not able to identify the identity of the robbers as it was at night.

8. The investigating officer Sergeant Sylvester Wambua (PW.3) stated that he was on night patrol within Mlolongo town when he and fellow officers intercepted a lorry registration number KBU 904 L make Toyota Dyna which was ferrying animals and ordered the occupants to alight. Two occupants managed to escape while two (2) were arrested. The remaining two occupants were unable to produce an animal movement permit and were thus placed in custody. The case was investigated by another officer which led to the arrest of the other suspects and all four (4) were later charged with the offences herein. However, the investigating officer was not called to testify and Prosecution closed its case.

After hearing the Prosecution's evidence, the Appellants were put on their defence. They all tendered unsworn statements. The first Appellant stated that he was going about his business of selling milk within Kitengela when he met the second Appellant and as they exchanged greetings certain strangers ordered them to sit down. They were later pushed onto a vehicle and driven to Athi River Police Station where they found the 3rd Appellant and another in custody. He denied ever being found in possession of the alleged stolen animals. The second Appellant reiterated the averments of the 1st Appellant that they were exchanging greetings when they were bundled into a vehicle and driven to Athi River Police Station from where they were charged. The third Appellant stated that he was proceeding to his place of work at Mlolongo town when police stopped him and ordered him to identify himself and on failing to offer a bribe of Kshs.5,000/= he was bundled into a vehicle and driven to Athi River Police Station where he was charged. He denied committing the alleged offence. The driver of the Motor vehicle KBU 904 L

was also charged alongside the Appellants as the fourth accused and who had implicated the three (3) Appellants in the commission of the offence and who was subsequently acquitted by the trial court.

10. The appeal is opposed by the Respondent. Counsel for the Respondent submitted that the trial Prosecutor had proved its case beyond any reasonable doubt and therefore the Appeal herein should be dismissed and the conviction and sentence of the trial court be upheld.

11. I have considered the evidence which was adduced before the trial court and find certain issues not in dispute. Firstly, that none of the alleged robbers were identified by the complainant Tonga Mututwa (PW.2). The said witness stated both on examination in chief and on cross-examination that he never saw any of the Appellants herein. Secondly, the recovered goats and sheep were never produced as exhibits and neither was the lorry registration number KBU 904 L produced as an exhibit. Thirdly, the investigation officer was not called to testify and to explain the sequence of investigations arrest of suspects and production of exhibits.

12. Having established the above, I now proceed to consider the grounds of appeal raised by the Appellants.

13. As regards the first ground of appeal, the Appellants have raised the issue that the learned trial magistrate erred in law and fact when he shifted the burden of proof upon the Appellants contrary to Section 107 of the Evidence Act. A critical look at the judgement of the learned trial magistrate reveals that he had heavily relied on the doctrine of recent possession and was of view that the Appellants were under obligations to offer an explanation as to how they came into possession of the stolen sheep and goats. This was a clear misdirection on the part of the learned trial magistrate. Since it is trite law that in Criminal cases, the burden of proof always rests on the shoulders of the Prosecution to discharge and which is always beyond reasonable doubt and at no time does it shift to the defence (see **WOOL MIGITON =VS= DPP [1935] AC 462).** Again it is noted that the trial court record proceedings shows that the recovered sheep and goats were never produced as exhibits. It transpired that the said animals were said to have been photographed and released to their owner, and at no time did the trial court see the said animals and neither were the photographs even marked for identification or produced before court. Therefore the first and second ground of appeal raised by the Appellants has merit and succeeds.

14. As regards the second ground of appeal, namely that the Appellants had been convicted on uncorroborated evidence, I find the Prosecution called only three (3) witnesses. The herds boy who lived in the same compound with the sheep and goats stated that the robbery took place at night and he could not manage to identify the robbers whom he claimed threw stones at him. The said witness further confirmed that he had not known the Appellants before and did not see them at the alleged scene of crime. The arresting officer (PW.3) stated that he was on night patrol duties when he intercepted a lorry registration number KBU 904 L which was ferrying sheep and goats and managed to arrest the 3rd Appellant and the lorry driver who was later acquitted. The investigating officer was not called to testify and explain how the other appellants were arrested and also to produce the recovered exhibits. It was necessary for the Prosecution to present enough evidence which could corroborate that of PW.1, PW.2 and PW.3 so as to justify a sound conviction. Even though one of the suspects who was the lorry driver had tried to implicate the 1st Appellant herein ad was subsequently acquitted, his evidence was that of an accomplice which required to be corroborated. There was no such corroboration and hence the conviction of the Appellants was unsafe. The second ground of appeal therefore succeeds.

15. As regards the third ground of appeal, the Appellants have maintained that they were convicted on a duplex charge. Indeed the main count was that of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal code. Each of the two provisions of the law appears to attract different kinds of sentences as follows:-

> **Section 295:**
>
> "***Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or to property in order to obtain***

***or retain the thing stolen, or to prevent or overcome resistance to its being stolen or retained is guilty of the felony termed robbery.”***

**Section 296 (1)**

“***Any person who commits the felony of robbery is liable to imprisonment for 14 years.”***

Section 296 (2) of the Penal Code entails robbery with violence in which more than one person takes part or where a victim is wounded or threatened with actual bodily harm and which provides for a penalty of death sentence if one is found guilty. Hence there is clearly a distinction between the two provisions. Section 296 (2) of the Penal code provides for the ingredients for the offence as well as the punishment section. It has been held in several cases that it would be wrong to charge an accused person facing such an offence with robbery under Section 295 as read with Section 296(2) of the Penal Code because that would not contain the ingredients that are in Section 296(2) of the Penal Code and could create confusion and hence a charge which contains both sections 295 and 296 (2) of the Penal Code amounts to a duplex charge. In the case of **MATHENGE =VS= REPUBLIC HC CR A no.222 of 2014** it was held thus:-

“***The offence of robbery with violence is totally different from the offence under Section 295 of the Penal Code. ..............................as it would not be correct to frame a charge of the offence of robbery with violence under section 295 as read with Section 296(2) as this would be a duplex charge.”***

It is therefore clear that an accused person is likely to be prejudiced as it would not be clear as to which offence he or she has been charged with. Article 50 of the Constitution provides that an accused is entitled to a fair trial. The charge was not amended by the Prosecution at any stage of the proceedings. I find this greatly prejudiced the Appellant’s rights to a fair trial. Such an irregularity cannot be cured under Section 382 of the Criminal Procedure Code. The Appellants herein were sentenced to death pursuant to Section 296(2) of the Penal Code yet Section 295 which is a simple robbery attracting a sentence of 14 years imprisonment pursuant to Section 296(1) of the Penal Code has been left out yet the same formed part of the charge sheet. The Appellants in such circumstances could not be said to have known which charge they faced in the trial. Consequently the Appellants appeal on this ground succeeds.

16. In the result it is the finding of this court that the Prosecution had not proved its case beyond reasonable doubt. The conviction arrived at by the trial court is therefore unsafe. The Appellants appeal therefore succeeds. The conviction by the lower court is hereby quashed and sentence set aside. All the three (3) Appellants are ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**Dated, signed and delivered at Machakos this 4th day of MAY 2017.**

**D. K. KEMEI**

**JUDGE**

**In the presence:-**

Appellants:- All three in person ....................

.Saoli for Respondent ...................................

C/A: Kituva .......................................................