REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.133 OF 2017

(FORMERLY NKR HCRA.201/12)

(Appeal Originating from Nyahururu CM's

Court by: Hon. D. K. Mikoyan– P.M.)

STEPHEN KIPKEMOI CHEPKWONY

SAIDIMU SAITOTI NAIKUNAI.....APPELLANTS

SIMON MADEN TITIA

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

Stephen Kipkemoi Chepkwony, Saidimu Saitoti and **Naikunai Simon Maden Titia**, the 1st to 3rd appellants respectively, were convicted of the offence of ***Robbery with Violence contrary to section 296(2) of the Penal Code*** and were sentenced to suffer death by **SPM Mikoyan** on 22/10/2012.

The particulars of the charge are that on 16/11/2011 at Morro Farm in Subukia District of Rift Valley Province, jointly robbed Peninah Waithera Karuri of two mobile phones make Nokia 1200, Motorolla C117, one cock and a half sack of dry maize all valued at Kshs.7,000/= and immediately before the time of such robbery, threatened to use actual violence on the said Peninah Waithera Karuri.

In the alternative, Simon Maden Titia faced a charge of *Handling stolen goods contrary to section 322(2) of the Penal Code*.

The particulars of the charge are that on 18/11/2011 at Subukia Trading Centre, Nakuru County, otherwise than in the course of stealing, dishonestly retained two cocks, a half sack of dry maize, one Knapsack sprayer and two Skyplasts all valued at Kshs.9,000/= having reason to believe them to be stolen property. No finding was made on the alternative charge. The applicants were faced with other offences for which they were acquitted.

Appellants are all aggrieved by that conviction and sentence on Count 1 and filed their respective appeals which were consolidated to proceed as Criminal Appeal No.133 of 2017.

Each appellant filed their respective grounds of appeals. The 1st appellant filed Criminal Appeal NO.201 OF 2012 on 23/10/2012 and his grounds of appeal. He filed amended grounds of appeal on 6/3/2017 and adduced more grounds orally. The grounds can be summarized as follows:

(1) That the evidence of recognition/identification was not watertight;

(2) That the police did not carry out any investigations;

(3) That the trial court shifted the burden of proof on him;

(4) That the appellants' defence was not considered;

(5) That the charge sheet was defective;

(6) That Section 214(1) CPC and 136 CPC were violated.

(7) That his fundamental rights under Article 49(1)(i), (ii) and (iii) and 50(2)(g), (h) were violated as he was not told the reason for arrest nor did the magistrate inform him of his rights.

The 2nd appellant had filed grounds in *Criminal Appeal No.202 of 2012* and further grounds were filed in court on 23/3/2017. The grounds can be summarized as follows:

(1) That the court erred by basing the conviction on contradictory and uncorroborated evidence;

(2) That the trial court erred by amending the charge sheet in the middle of the trial;

(3) That the evidence on recognition/identification was not watertight;

(4) That the trial court in its judgment failed to consider his defence;

(5) That the court erred by failing to allow the appellant to submit.

The 3rd appellant in Criminal Appeal No.203 of 2012 filed his grounds of appeal dated 22/10/2017 and further grounds and submissions on 9/3/2017; the grounds are summarized as follows:

1) That the appellant was convicted on a defective charge sheet;

2) That the appellant's rights were violated in that witness statements were not given to him;

3) That the identification of the appellant was not watertight;

4) That his defence was not considered.

All the appellants therefore pray that the court do quash the convictions, set aside the sentences and acquit them.

Mr. Mong'are learned counsel for the State opposed the appeals by stating that the charge was not defective and that the witnesses adduced evidence supporting the charge; that the fact that one particular was missing is not fatal to the prosecution's case: On the issue of failure to be issued with witness statements, counsel argued that the trial court ordered that the appellants be issued with witness statements and the appellants never complained that they were not issued with the statements; that in this case, there was no need for an identification parade because identification was visual and that witnesses gave graphic accounts of the events and corroborated each other; that there was medical evidence that corroborated the evidence and recovery of some of the goods connected the appellants to the offence. Counsel further argued that failure to allow the appellant to mitigate cannot result in acquittal of the appellants.

As regards identification by one witness, it is the respondent's submission that the court can rely on the evidence of one identifying witness provided the court believes the witness to be truthful; that in this case, there was light and the court did caution itself of the dangers of reliance on such evidence. On whether the court considered the defence, counsel argued that the judgment clearly shows that the defences were considered; and lastly that the burden of proof sometimes shifts where a fact is within the special knowledge of an accused.

This is the first appellate court and it is required of me to review the evidence afresh, re-evaluate it and arrive at my own determination and conclusions. (*Okeno v Republic 1972 EA 32*). The prosecution's case was as follows:

Paulina Waithira Karuri (PW1) a resident of Subukia Moro recalled that she retired to bed on 17/11/2011 with her children but was woken up by her son Sammy who informed her that people were in the house. She gave Sammy her spot light. Sammy went to check but came back calling her name and it is then she noticed 3 people next to her bed, one was armed with a panga, and he asked her to wake up and give them money; she did not recognize all of them but saw the 3rd appellant's dressing; that the robbers took 2 half sacks of maize and her cock. Next day, she reported at the police station and later, she found the cock and ½ sack of maize at the police station after she heard that some people had been arrested and were at Subukia Police Station; that she found accused persons at police station and was only able to identify accused 3 who was wearing a striped shirt that she had seen him with at night. PW1 said the house had electricity but lights were not lit.

PW2 Hannah Muthoni (2nd complainant) testified that she locked her cock in the kitchen on 17/11/2011 at 7.00 p.m. and went to sleep but did not find it next morning. Later, a police officer went to her home and asked her to go to police station to see if the cock at police station was hers and she found her red/brown spotted cock and it was photographed. She was shown the accused 3 as the person who was found with the cock.

PW3 Rachael Wanjiru Njuguna (3rd complainant) of Subukia recalled that on 23/10/2011, about 1.00 a.m. her daughter Alice informed her that there was movement outside her window; that the security lights were on and upon looking outside, found that the

maize they had left outside was gone and the canvas was folded. She called her neighbours and husband who in turn called police. On going out, she found 3½ bags of maize missing from the store and the door to the store was open. They started a manhunt for the thieves and recovered 2 bags of maize hidden in the Napier grass and they returned it home. She did not suspect anybody.

PW4 Peter Njuguna Waruhiu husband to Wanjiku Njuguna (3rd complainant) recalled that on 24/10/2011, about 3 – 4.00 a.m. there was a commotion in their home and with help of security lights, saw three armed people outside their house; one wore a striped shirt and a dirty torn jeans trouser, armed with a panga, club and something in his rear pockets; that after the thugs left, together with neighbours they tracked the thugs up to Subukia Nyahururu road. He kept out of sight but trailed them to a house and later reported to Subukia police station. He returned to the house with police about 6.00 a.m. and two of the people who were outside the house ran away. Police chased the 2 as he guarded the house. The two were not arrested. They entered the house and found one person hiding in rugs. Inside the house, they found 2 cocks in gunny bags, maize in gunny bags, about 5 pangas and hammers. He identified 3 hammers in court, spray pump – 6 pairs of gumboots, several chicken that had been slaughtered and some half cooked; that it is accused 3 who was found in the said house and on the way to the police station, threw the cocks in the river but the police retrieved them. He also identified the 2 cocks in a photograph and the 2nd appellant as one of the two people who ran off.

PW5 PC Mwaura of Subukia Police Station on 24/10/2011, received a report of house breaking from Peter (PW4) who led PW5 and his colleague to the hide out of the thugs in a mud house; that they found 1st & 2nd appellants seated outside the house but they took to their heels on seeing the police. They chased them but did not manage to arrest them; on coming back to the house, found accused 3 asleep in the said house. In the house, they found a gunny bag with 2 cocks red & white, 3 hammers, 2 pangas, 7 pliers, 2½ gunny bags of maize, a knapsack, 42 Skyplast 6 pairs of gum boots, red striped shirt which accused 3 wore; they managed to arrest accused 3 and on 18/1/2012, both accused 1 & 2 were arrested at Subukia Trading Centre by his colleague.

In his defence, the 1st appellant (DW1) told the court that police went to his rented house on 18/1/2012 about 7.00 p.m. searched it, found nothing and arrested him without informing him why; that the complainant went to station but failed to identify him. He denied having been in Subukia on 18/11/2011 and 19/11/2011 and 24/10/2011.

The 2nd appellant (DW2) in his unsworn statement, said that on 18/1/2012, he went with a cousin to Subukia Centre to see the wife in hospital. On the way home at 9.30 p.m. he entered a bar found some friends and they went home together but they met police, were taken to police station and next morning the OCS asked them for Kshs.500/= each, the others paid but he did not have and remained in custody.

The 3rd appellant (DW3) in his unsworn defence stated that on 16/11/2011, he got a tender to split timber at Subukia which he did. Later, he went to a chang'aa den and after he drunk it, he lost consciousness till he came to when in police custody. He denied committing the offence.

The offences herein were committed on the night of 23/10/2011, 24/10/2011 and later on the night of 17th/18th/11/2011. Therefore, the crux of the three consolidated appeals is identification. In the judgment of the trial court, reliance was made on the evidence of PW1 and PW4. I will consider the evidence of each witness on the issue of identification.

In the case of *R.V. Turnbull (1976) WLR 445* which has been applied in many cases in Kenya, the court set down some 9 principles that can guide the court in cases of identification. The court posed several questions that the court needs to consider, which are as follows:

> ***"a. How long did the witnesses have the accused under their observation?***
>
> ***b. What was the distance between the witnesses and the accused person?***
>
> ***c. What was the lighting situation?***
>
> ***d. Was the observation impeded in any way, as for example, by passing traffic or press of the people?***
>
> ***e. Had the witnesses ever seen the accused person?***
>
> ***f. If the witnesses knew the accused prior to the current transaction, how often?***
>
> ***g. If the witnesses had seen the accused only occasionally prior to the current transaction, did the witness have any specific reason for remembering the accused?***
>
> ***h. How long elapsed between the original observation and the subsequent identification to the police?***
>
> ***i. Was there any material discrepancy between the description of the accused given to the Police by the witnesses when first seen by them and his actual appearance?"***

As respects the 1st appellant, I find that none of the witnesses saw him on the nights that the offences were committed; PW1 mentioned having seen only one person. PW2 & 3 did not see the people who stole their cock and maize respectively. PW4 the husband of PW3 said that he trailed the people who stole from his home to a house. When he went to call police and upon return, two of the people ran away. He did not mention having seen the 1st appellant. He said that it was at day break about 6.00 a.m. He

only mentioned having recognized one of the two people who were outside the house, not 1st appellant.

PW5 on being called by PW4, found two men who outside the house and upon the two seeing the police they ran off. Both PW4 & 5 did not state how far the two men who ran off were from them before they ran, nor did they say how they were able to identify the two people. Did he approach them from the front or back; how much light was available. Although PW5 said he knew the 1st appellant before, he did not state how he was able to identify or recognize the 1st appellant on that day. The 1st appellant was arrested by an officer who did not testify. PW5 said that he knew the 1st appellant as a habitual offender but did not link the 1st appellant to the offences he was charged with. In its judgment, the trial court stated that PW5 recognized the 1st appellant at the scene but nowhere in his evidence did PW5 state that he recognized the 1st appellant. PW5 merely stated:

> **"*Saidimu and Chepkwony were seated outside…….both started running."***

In cross examination of PW5 by 1st appellant, he admitted that he never indicated in his statement that he knew the 1st appellant or those who had escaped nor did he give any names of the suspects. In my considered view, there is no evidence on record to demonstrate that PW4 or 5 identified or recognized the 1st appellant. Further, there is not a scintilla of evidence that the 1st appellant was in recent possession of any of the stolen items.

As regards the 2nd appellant, none of the complainants identified him save for PW4 who said that 2 men ran off when he came back to the house where the people he had trailed had entered. He said *"I can pick accused 2 in the dock as one of those who ran away but the other was taller only that I could not recall him well"*.

The way that PW4 put his statement, it is obvious that he was not sure that the 2nd appellant was one of the two people who ran off. Besides, PW4 never told the court how much light there was at 6.00 a.m., how far the two men were from him, how he was able to identify him, from the face or only clothing. He said the 2nd appellant was dressed in dirty torn jeans but PW5 who was with PW4 never mentioned how the 2nd appellant was dressed and yet PW5 chased the two suspects for a while and should have been better placed to describe them. PW5, apart from stating that he saw the 2nd appellant outside the house before he ran off and that he knew him before, did not disclose how he was able to recognize or identify the 2nd appellant. Although PW5 stated in cross examination by 2nd the appellant that he noted his name in the O.B., PW5 had earlier denied that he recorded any of the suspects' names in the O.B. The trial court erred in finding that the name of the 2nd appellant was noted in the O.B. because the O.B. was never produced in evidence. I find that the prosecution failed to adduce sufficient evidence on how the 2nd appellant was identified/recognized and the trial court erred in finding that he was properly identified. The identification of the 2nd appellant was not watertight.

In my view, it seems the police arrested the 1st and 2nd appellants based on allegations that they were previously involved in crime. The arresting officer was not called to tell the court on what basis he arrested the 1st and 2nd appellants. Having found that the identification of 1st and 2nd appellants was not watertight, I find their conviction to be without basis and the convictions are hereby quashed. Having so found, I find it unnecessary to consider the other grounds of appeal because without identification, the 1st and 2nd appellants cannot be linked to the offence.

As regards the 3rd appellant he challenged the investigating officer's evidence on recovery; that he did not make any inventory as required by the law and that the evidence of PW5 is at variance with the O.B. entry No.7 of 18/1/2011 which was requested for by the 3rd appellant and was produced in court on 3/8/2016. The O.B. reads:

> **"*Return prisoner in/Recovery made"***

The prisoner was named as Simon Maden alias Masai (3rd appellant) who was to be charged with the offence of robbery with violence, House breaking and resisting lawful arrest. The items that were allegedly recovered are two hammers, two bicycles, a pair of pliers and that more recovery was to be made. The 3rd appellant did not request for a follow up on what was recovered later, besides there must have been an entry in the O.B. when the 3rd appellant was arrested. The O.B. entry 7 of 18/1/2011 cannot be read in isolation of the other O.B. entries. The 3rd appellant never challenged either PW4 or PW5 on the exhibits produced in court and which were allegedly recovered in the house where the 3rd appellant was arrested.

Now turning to the identification of the 3rd appellant; PW1 testified that she was able to see one of the three men who entered her house on the night of 17/11/2011 and 18/11/2011 because he wore a stripped T-shirt and she saw him at police station next day. However, PW1 never told the court how she managed to see the 3rd appellant and the stripped T-shirt in a dark room. After the 3rd appellant's arrest, the police should have conducted an identification parade to establish whether or not PW1 could pick out the robbers. In the case of *John Mwangi Kamau v Republic (2014)* KLR the court considered the worthlessness of dock identification and the need for identification parades when it said: "*identification parades are meant to test the correctness of a witness's identification of a suspect*……In *Gabriel Kamau Njoroge v Republic (1982-1988)iKAR 1134*, the court observed:

> **"*a dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."***

In the instant case, there is no evidence that PW1 gave a description of the suspect to the police nor is there evidence that she even gave the colour of the T-Shirt that he wore. There are very many stripped T-Shirts in the market. In my view, PW1's evidence on identification of

the 3rd appellant is worthless.

The 3rd appellant was also linked to this offence through the evidence of PW4 and 5. According to PW4 and 5, the 3rd appellant was arrested in the house where PW4 had trailed the suspects. Both PW4 had told the court that they recovered 2 live cocks, 3 hammers, 2 pangas, a pair of pliers, 2 gunny bags of maize, knapsack and 2 pairs of gum boots. When PW1 went to the police station next day, she identified ½ sack of maize (Ex.1(a) and a cock which was photographed P.Ex1(b). According to PW4, he found 3rd appellant wearing a striped shirt which was produced in evidence. PW4 had seen the same T-shirt outside his house when the thieves struck. The evidence of PW4 & 5 as regards the recovery of the exhibits was not challenged. The third appellant did not claim that they were his. I believe he was found in the house where the said items were found and was therefore in recent possession of the same. The doctrine of recent possession has been applied in a host of decisions of this court. In the case ***Isaac Ng'ang'a Kahiga alias Peter Nganga v Republic Cr.Ap.272 of 2005***, the court outlined the elements necessary to establish recent possession.

> ***"it is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof:***
>
> ***(i) That the property was found with the suspect;***
>
> ***(ii) That the property is positively the property of the complainant;***
>
> ***(iii) That the property was stolen from the complainant;***
>
> ***(iv) 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 this case, the maize and cock had been stolen on 17th to 18th November, 2011 night a few hours earlier and were recovered the next morning about 6.00 a.m.; PW1 told the court that the sack had a mark but did not show the court. But the maize having been found with a cock which, PW1 identified had just been taken the previous night, I am satisfied that PW1 was able to identify her property. The stolen items were found in the house where the 3rd appellant was found hiding or sleeping and he did not give any reasonable explanation as to how he came by them or whose the property was. I am satisfied that the 3rd appellant was found in recent possession of PW1's cock and maize. The 3rd appellant's defence that he was arrested in changaa den is not convincing and I dismiss it as a sham.

The appellants faced a charge of robbery with violence. In the case of ***Oluoch v Republic (1985) KLR*** the court held:

> ***"Robbery with violence is committed in any of the following circumstances:***
>
> ***(a) The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***(b) The offender is in company with one or more persons; or***
>
> ***(c) At or immediately before or immediately after the time of the robbery, the offender wound; beats, sticks or uses the personal violence to any person….."***

In the instant case, PW1 was attacked by 3 men, who were armed and though medical evidence was not availed, PW1 said she was hit with the panga. The offence of robbery with violence was proved.

The other complaint by the 3rd appellant is that the charge was defective because it is brought under Section 296(2) of the Penal Code. The offence of robbery is defined under Section 295 of the Penal Code, generally. However Section 296(2) goes on to define the offence of robbery with violence and the sentence thereunder. The charge that the appellants faced is clearly described as 'Robbery with Violence. The particulars of the charge are also clear that the suspects were three, 'were armed and used violence. The charge was not misleading at all and it accorded with the evidence. Further, section 382 of the CPC is a cure to any error or irregularity and I find that ground to be baseless.

The 3rd appellant also alleged that his Constitutional rights were violated in that he was not supplied with witness statements in order to prepare his case. I have perused the record. Under Article 50(2)(j) of the Constitution the accused person is entitled to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to the evidence which is ordinarily witness statements and of exhibits if there are any. On 24/1/2012, the court trial ordered that the appellants be supplied with witness statements at their own cost. After that, none of the appellants ever complained that the witness statements had not been supplied to them. I believe that if the statements had not been supplied to the appellants they would have complained to the court. The 3rd appellant cannot raise the issue now.

Having reviewed the judgment of the trial court, I note that at no time did the court consider the defences of the appellants. That was a major omission but that notwithstanding, this court has had an opportunity to consider the defences. I have considered the 3rd appellant's defence and found it to be a mere denial and not believable. Failure to consider the defence cannot invalidate the rest of the evidence.

In conclusion, I find that the 1st and 2nd appellants were not identified as having robbed PW1 on the night of 17th and 18th November, 2011. Their appeals are merited and are successful. I hereby quash the conviction against the 1st and 2nd appellants, set aside the sentences and set

them at liberty forthwith, unless otherwise lawfully held.

As for the 3rd appellant, I am satisfied that he was found in recent possession of the complainant's property and must have been one of the robbers. I find the conviction of the 3rd appellant to be well founded and I confirm it. This court has no discretion to interfere with the sentence. Both appeals on conviction and sentence are dismissed.

Dated, Signed and **Delivered** at **NYAHURURU** this 6th day of June 2017.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei for Prosecution Counsel

N/A for appellants

Soi - Court Assistant

Appellants 1 – 3 - present