REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 78 & 79 OF 2013

GEOFFREY MWANGI MUGURE..……..…1ST APPELLANT

JOHN KARANJA MBURU……..…..2ND APPELLANT

VERSUS

REPUBLIC …….……..…….....…….RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kikuyu Cr. Case No. 17 of 2009 delivered by Hon. D. Mulekyo, Ag. CM on 3rd April, 2013).

JUDGMENT

Background

From the outset, this court would wish to state that the record of proceedings as forwarded to this court is not complete. It lacks a copy of the charge sheet whose original could also not be found in the original trial record. Before the hearing of the appeal, both Appellants confirmed that they were jointly charged alongside another with one count of robbery with violence contrary to **Section 296(2) of the Penal Code**. It is then expected that both statement of the charge and its particulars would be adequately copied from the judgment of the trial court. Unfortunately, the learned trial magistrate only made a statement of the charge but referred the particulars to the charge sheet itself. For avoidance of doubt, she recorded the opening remarks in the judgment as follows:

> **"the accused herein jointly face one count of robbery with violence contrary to Section 296(2) of the penal Code. The particulars are contained in the charge sheet. They denied the charges and the prosecution called eight witnesses."**

In an attempt to get a copy of the charge sheet, the court through the State Counsel requested for a copy of the charge sheet from Kikuyu Police Station where the Appellants were charged. Learned State Counsel Miss Nyauncho did sermon the OCS of the said Police Station who sent to court the officer in charge of crime section who confirmed that the charge sheet could not be traced. The appeal therefore proceeded without a complete record of appeal.

Having set out the background to this appeal, my view is that the best approach in determining the guilt or otherwise of the Appellants in the absence of the charge sheet would be to order for a retrial. Nevertheless, that would only be informed on account of whether upon reevaluating the entire evidence there is a likelihood of a conviction. This court has had in the premises to sum up the entire prosecution

evidence. The prosecution called a total of eight witnesses.

According to the complainant who testified as PW1, on the material date 8th December, 2009 at around 7.30 pm, he had just alighted from a Matatu and taken a feeder road heading to his home. He was then accosted by two young men who he recognized as his neighbours. His evidence was that the 1st Appellant worked for a neightbour called Baba (father to) Gitahi whilst 2nd Appellant worked at a neighbour's firm. One of them was carrying what appeared to him to be a slasher while the other had a piece of wood. He was ordered to surrender whatever was in his possession. But before he could do so, he was hit with a club on the head. He was also cut on the head with an object that looked like a panga. He lost his mobile phone and cash kshs. 1,500/=. As he struggled with the assailants, he was stabbed on the rib and the upper side of the upper lip. He was then left alone lying on the ground. At that time, he noticed that the two assailants had been joined by a third person whom he did not identify. He in addition lost some grocery shopping, a driving licence, an identity card, a business card, a zain line and his safari boot shoes. He managed to drag himself to a neighbour's home (PW2) who upon giving him first aid took him to Thogoto PCEA Hospital in Kikuyu for treatment after which he was referred to Kenyatta National Hospital. On the following morning on their way back to hospital, they made a report at Kikuyu Police Station.

According to PW1, he described his assailants to PW2, Peter Kagure Njoroge. He insisted that he knew the 1st Appellant worked at Baba Gitahi's home whilst the 2nd Appellant worked at a neighbour's home. Word then spread in the village about the robbery. Villagers arrested the suspects and PW1 was asked to go and identify them. At the time both Appellants and the 3rd accused had been arrested. He was able to identify the two Appellants but did not identify the 3rd accused. On the third day, the police summoned him to identify the three suspects who had then been taken into custody. The police also showed him his driving licence, Identify Card, an Orange sim card line, a receipt of purchase for mobile phone, a grocery list prepared by his wife which he confirmed were robbed from him by the suspects. He also informed the police how he was able to identify the suspects. He stated that at the scene, there was electric light on top of a nearby workshop which enabled him to clearly see the assailants.

PW2 corroborated the evidence of PW2 to the extent that PW1 described to him his attackers. He also confirmed that he took PW1 to hospital. **PW3, Peter Kiguru Muturi** was the chairman of Community policing. His testimony was that he was informed about the robbery and that he witnessed that the Appellants and the 3rd accused were arrested by members of the public.

PW4, Peter Mbugu Njenga was a brother to PW1 confirmed that PW1 that PW1 had indeed been injured during the robbery. He was also present during the arrest of the Appellants. It is the Appellants who led them to the arrest of the 3rd accused. He also informed PW3 of the arrest and PW3 in turn called the police who re-arrested the suspects.

PW5, PC Samuel Kirage testified that on 10th December, 2009, while in the company of **PW8, Corporal Ahmed Rashid**, went to the house of the 1st Appellant where they recovered PW1's identity card and a receipt of purchase of his mobile phone. From the house of the 2nd Appellant, they recovered PW1's driving licence and some passport photographs. From the house of the 3rd accused, they recovered PW1's Orange sim card, a grocery shopping list and two business cards. They then escorted the Appellants back to the police station. His further testimony was that the items recovered from the house of the 2nd Appellant were under the bed and those from the 3rd accused were on the table.

PW6, James Kibui a Clinical Officer from Tigoni Hospital examined PW1 on 16th December, 2009 and filled his P3 Form which he adduced as evidence. He confirmed that he sustained multiple cut wounds on the face, skull and chest. He noted that the weapon used to cause the injuries was a sharp object. He referred to treatment notes from Kikuyu Hospital.

PW7, Steven Matindi Joel Waibi was an Assistant Government Chemist did analysis of the blood stains found on two business cards and a receipt for purchase of a mobile phone and blood group sample of

PW1. His analysis concluded that PW1's blood group was O and that the blood stains found on the exhibit were also of blood group O. He thus concluded that the blood stains on the item belonged to PW1. He adduced an examination report dated 20th July, 2010. In cross-examination, he stated that the Appellants were also of blood group O and could not therefore rule out that the blood stains on the exhibits were from them.

PW8 was the investigating officer who summed up the evidence of the prosecution. He corroborated the evidence of PW 5 with regard to the recoveries of the exhibits. He also recorded the necessary statements and preferred the charges against the Appellants.

After the close of the prosecution's case, the court ruled that both Appellants had a case to answer and were accordingly put on their defence. The 3rd accused was however acquitted on grounds of insufficient evidence.

DW1, 1st Appellant recalled that on 9th December, 2009 at around 1930 hrs a group of people arrived at his house and informed him that they wanted to interrogate him and also search his house as he was new to the area. They asked him to escort them to his house where they found the 2nd Appellant. Their respective houses were then searched before they were led to a field where the mob started assaulting them. He testified that he blacked out and when he awoke the next day he found himself at the police station. He recalled that on 12th December, 2009 he was taken to Tigoni Hospital and he was detained until 17th December, 2009 when he was arraigned in court. He denied committing the offences in question.

In cross examination he testified that he was a shop keeper in a shop owned by one Baba Kariuki and that he did not previously know the complainant. He stated that he did not know the persons who showed up to his house and that he did not see any police officers amongst them. He stated that he did not know the 2nd Appellant and that the mob resolved to go to his home which was also searched. He testified that no recoveries were found in either house and that he had never seen the driving licence identified by the complainant.

DW2, 2nd Appellant testified that he was a shamba boy. He recalled that on 9th December, 2009 at around 2000hrs he heard a knock on his door and upon opening it found a mob who he initially thought were police officers. They searched his house and found nothing. They asked him to accompany them and when they arrived at a field they accused him of being a thief. When he denied the allegation they attacked him. He testified that he blacked out and that when he came to he found himself at the police station. He testified that on 12th December, 2009 he was taken to the hospital before being arraigned in court on 17th December, 2009 on charges that he denies.

In cross examination he testified that the crowd never gave reasons for coming to his house and that they were hostile. He testified that he saw the 1st Appellant who was previously unknown to him. He testified that he knew the complainant who lived next door and was thus a neighbour. He denied that a driving licence and other documents were recovered from his house. He testified that on 8th December, 2009 he was at his employer's home still working.

Determination

The first issue to delve into is whether the Appellants were properly identified. From the evidence of PW1, he knew both Appellants as they worked for his neighbours. He described them by their physical appearances although he did not know their names. This would lead the court to conclude that their identification was by way of recognition. That said though, two issues cast a doubt on whether PW1 properly identified the Appellants. The first is on the nature of lighting at the scene of robbery. PW1's testimony was that the scene was well lit with electric lights illuminating from a distance of about 50 metres. PW8 who visited the scene stated that the nearest lighting came from a distance of about 100 metres. Unfortunately, neither PW1 nor PW8 gave a description or specified the intensity of the light that

would assure the court that PW1 was able to recognize his assailants. If PW1clearly saw his assailants it was expected that he would have reported to the police that he was able to recognize his attackers. This did not happen as attested by OB No 9/9/12/2009 which was the initial report he made at Kikuyu Police Station. The same read as follows:

> **"… that yesterday on 8/12/09 at about 1930 hrs at Muguga site, he was attacked by two men who were armed by panga and cut him on the face…"**

The report he made to the police was a clear indication that he did not recognize his assailants both by names or physical appearance. Courts have often held that identification by way of recognition is the best mode of identification as the same is based on long acquaintance of both the victim and the assailant. That is why it is more convincing and more assuring that a complainant properly identified his assailant if the latter was previously known to the complainant. As such, there cannot be any excuse if the complainant knew the assailant and does not make a report in that respect in the first instance. See **Simiyu & another vs Republic [2005] 1 KLR 192**. The Court of Appeal sitting at Eldoret (Tunoi, Waki and Onyango Otieno JJA, delivered itself as follows:

> **"if PW1 and 3 recognized the appellants as their immediate neighbours, then why did they not give their names to the police soon after the attack upon them? In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description are matters of highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the person, and then by the person or persons to whom the description was given. See R vs Kabogo S/o Wagunyu 23(1) KLR 50."**

The court went on to state as follows:

> **"the omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity. The failure by the superior court to consider this aspect of evidence shows that the superior court dealt with the evidence in a perfunctory and generalized manner. There was no exhaustive appraisal of the evidence tending to connect each appellant with the commission of the offences to see whether their respective conditions were safe."**

A similar scenario is presented in the instant case. The case for the prosecution was that the identification was by recognition. However, the quality of that identification as presented by the witnesses was not only weak but raised the doubt that there may have been a mistaken identify.

That said, it behooves the court to re-evaluate whether the doctrine of recent possession could apply as an alternative avenue to found a conviction against the Appellants. The prosecution adduced evidence that both Appellants were found with some of the stolen properties. According to PW2, 3 and 4, the search in the Appellants' house was conducted on 9th December, 2009 which was a day after the robbery. This was s civilian search as the police were not involved. During this search, no recoveries were made. Thereafter, the Appellants together with 3rd accused were handed over to the police. A second search was conducted on 10th December, 2009. According to PW5 one of the arresting officers, from the house of the 2nd Appellant, PW1s identity card together with a receipt for purchase of his mobile phone were recovered. From the house of the 3rd accused two passport size photo- graphs were recovered. The items recovered from 2nd appellant were found under his bed and from the house of the 3rd accused on a table. My take on this is that these items were placed in conspicuous locations such that the members of public who searched the houses on 9th December, 2009 could not have missed them. It begs questions how these items found their way into the Appellants' respective houses on 10th December, 2009. Furthermore, the police are well versed with their mandatory obligation to prepare and sign an inventory of any recovered goods. This was not done at all again raising eye brows whether indeed any recoveries at all. In the circumstances, I hold that the learned trial magistrate misdirected herself in applying the doctrine of recent possession to convict the appellants.

One other issue is the fact of medical examination done on the recovered items together with blood group of PW1 and the Appellants. Blood stains were found on two business cards and a receipt for purchase of PW1's mobile phone. The analysis showed that those blood stains were of blood group O which was also the blood group of PW1. In cross-examination, PW7 stated that the Appellants were also of blood group O and he could also not rule out that the blood stains on the exhibits were also from the Appellants. The court is of a similar view that this analysis did not aid the prosecution's case in any way. Conversely, it created more confusion. Furthermore, it is trite to note that both Appellants gave defence that they were assaulted before their arrest and probably that is how their blood group could have landed on the exhibits held by the police who took them to hospital. Therefore, I am unable to conclude that the medical examination linked both Appellants to the robbery.

No doubt the complainant was robbed by armed assailants who injured him and stole his personal belongings. However, the evidence adduced does not sufficiently link the Appellants to the robbery. I do find in the circumstances that the case was not proved beyond a reasonable doubt. Ordering a retrial would be an exercise in futility. I thus quash the conviction, set aside the death sentences and order that both Appellants be set free forthwith unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED AT THIS 17TH DAY OF JULY, 2017.

G. W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. 1st Appellant in person.

2. 2nd Appellant in person.

3. Miss Sigei for the Respondent.