REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 23 OF 2015

JAMES MUTHIKE FLORA alias **"JIM"…….....1ST APPELLANT**

ANTONY KAMAU NJERI alias **"KAMA"……..2ND APPELLANT**

-VERSUS-

REPUBLIC…….....…….…….....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (P. M. Kiama) at Wanguru, Criminal Case No. 339 of 2014 delivered on 12th June, 2015)

JUDGMENT

1. The appellants **James Muthike Flora** alias **Jim** and **Anthony Kamau Njeri** alias **Kama** were charged before Wanguru Principal Magistrate's Court vide Criminal Case No. 339 of 2014 with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in that on 18th June, 2014 at Nyangati Location in Kirinyaga County, jointly being armed with offensive weapons namely a panga robbed Daniel Mwangi Chomba of a T-shirt and cash ksh.1300/- all valued at Ksh.1450/- and at the time of such robbery wounded the said Daniel Mwangi Chomba. They pleaded not guilty to the charge and after a full trial they were found guilty and convicted. The appellants were sentenced to suffer death.

2. The appellants were dissatisfied with the conviction and filed this appeal. The 1st appellant James Muthike Flora alias Jim filed this appeal while the second appellant Anthony Kamau Njeri filed Criminal Appeal No. 24 of 2015. On 22nd June, 2016 the two appeals were consolidated. The appellants were granted leave to rely on amended grounds of appeal. The 1st appellant James Muthike Flora alias Jim relied on amended grounds of appeal which are as follows:

> ***(i) That the learned trial magistrate erred in both law and fact when he convicted me in the present case by relying on evidence of identification by recognition yet failed to find that the same wasn't free from error or mistakes a conditions were fleeting glances.***
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> ***(ii) That the learned trial magistrate erred in both law and fact when he convicted me in the present case by believing that the t-shirt produced in evidence as an exhibit was proof that I committed the offence yet failed to find that the evidence surrounding the t-shirt really exonerates me from the crimes commission.***
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> ***(iii) That the pundit trial magistrate erred in both law and fact when he convicted me in the present case yet failed to find that my arrest was basically on suspicion.***
>
> ***(iv) That the learned trial magistrate erred in both law and fact when he dismissed my plausible***

defense.

3. The 2nd appellant Anthony Kamau Njeri alias Kama relied on amended grounds of appeal which are as follows:-

(i) That the learned trial magistrate erred in both law and facts when he heavily relied on the evidence of purported visual identification/recognition yet failed to find the same wasn't free from error on mistake.

(ii) That the learned trial magistrate erred in both law and facts when he convicted the appellant in the instant case yet failed to find that investigations carried out were shoddy and faulty done.

(iii) That the learned trial magistrate erred in both law and fact when he dismissed my defense that was capable of dislodging the prosecution's case.

The appellants pray that the conviction be quashed and the sentence be set aside.

4. The prosecution called four witnesses to support their case. The facts of the case are that the complainant Daniel Mwangi Chomba (P.W. 1) was working in a rice field on 18th June, 2014 with the 1st appellant James Muthike Flora alias Jim. They finished the work and went home together. They stopped at Kimbimbi market where the complainant bought a T-shirt for Ksh.150/- while 1st appellant bought a trouser. The complainant parted with 1st appellant and went to Mumbi bar where he took a beer as he watched World Cup. He then boarded a matatu at around 10.00 p.m to take him to his home at Kirimara village on the way to Embu. As he alighted he saw the 1st and 2nd appellant and recognized them as they were flashed by the headlights of the matatu. As the complainant walked home the two appellants attacked him. The 1st appellant struck him on the left shoulder with a panga injuring him. The 2nd appellant held the complainant on the legs and tried to knock him down. The 1st appellant held his T-shirt upon which the complainant removed it and let go so that he could escape. The T-shirt was left in the hands of 1st appellant. The appellant frisked his pockets and stole Ksh.1300/-. The complainant escaped from the scene and ran to the house of the in-charge Ndiara village, David Muriuki (P.W. 2) and reported to him. The complainant was advised to go and report the incident at Kimbimbi Administration Police Camp. The same night there was a theft of cows in the same village. P.W. 2 and other neighbours went out and screamed. The suspects ran away. P.W. 2 informed the neighbours that the complainant was attacked. The villagers decided to go to the house of the complainant so that he could tell them who attacked him. They went to the house of the 1st appellant where they found the appellants playing cards. The complainant identified the two appellants as the ones who robbed him. The complainant identified the T-shirt which he was robbed from the house of the 1st appellant. The T-shirt was found on the table in the house of 1st appellant. The appellants were arrested. The matter was reported to the Police. The complainant was issued with a P-3 form which was filled. The doctor found that the complainant had sustained injuries which were bodily harm. The P-3 form was produced as exhibit 2 by **Doctor Kevin Wambala**. The appellants were then charged.

5. The 1st appellant gave a statutory statement in his defence and stated that on 18th June, 2014 he went to work at rice fields and after completing work he was paid his dues and went home. Later he returned to Kimbimbi market where he bought some clothes then returned home at 6.00p.m. The 2nd appellant who is his cousin met him. They had supper then proceeded to the home of 1st appellant and slept. Later P.W. 2 went to the house and arrested them. Administration Police officers took them to Wanguru Police Station.

6. The 2nd appellant gave a statutory statement in his defence in his defence and stated that on the material day he went to assist his aunt. Later he decided to go to the market where 1st appellant was. They returned home together and the aunt gave them supper. They went to bed around 9.00 p.m. Later at 3.00 a.m. P.W. 2 accompanied by the complainant went to the house and alleged that they had assaulted the complainant. They were arrested and taken to Wanguru Police Station.

7. The prosecution called four witnesses in support of their case. This being a first appeal, the Court has a duty to analyse the evidence again and come up with its own independent finding but keeping in mind that the trial court had the advantage of seeing the witnesses and observing their demeanor and give allowance for the same. This as was held in the case of **Okeno -V- Republic (1972) E.A. 32**.

8. P.W. 1 Daniel Mwangi Chomba was the complainant. He told the Court that on 18th June, 2014 he went to Nyangati to cut paddy rice around 7 a.m. Upon finishing he was paid Ksh.550/- and together with the cash in his pocket of Kshs.1050/-, he had a total of Kshs.1600/-. As he washed his clothes which were muddy, the shirt got torn therefore he wore sweater without the shirt. At 6 p.m., he went with the 1st accused to Kimbimbi market and purchased a T-shirt while the 1st accused bought a trouser then they parted ways. He thereafter wore his T-shirt, entered Mumbi bar and took one beer. At 10 p.m. he proceeded home, alighting at Kwa Kareithi stage whereupon he saw the both accused persons using the vehicle's headlights. After the vehicle he had alighted from moved, he crossed the road towards his home. However, after crossing he was attacked by the accused persons whereby the 1st accused struck him with a panga and the 2nd accused held his legs trying to knock him down. In the process, the 1st accused stole his money Kshs.1300/- and in an attempt to escape he decided to take off his t-shirt then went to the house of village in charge called David. He was advised to go report to Kimbimbi AP camp but when he went home to get other clothes he was advised to report the following morning since it was late. While asleep, he was called by villagers who wanted to shown the robbers who attacked him in view of the fact that cattle had also been stolen. He took then to the accused person's house and found them together with an unknown person and recovered his t-shirt.

9. The evidence was not shaken. P.W. 1 knew the appellants. It was easy to recognize them with the help of headlights from the motor vehicle. P.W. 2 David Muriuki is the village in charge. He testified that on 18th June, 2014, while at home he was called and upon opening the door P.W. 1 who had no clothes introduced himself. P.W. 1 stated he had been attacked at Kwa Kareithi stage and robbed of Kshs.1300/- by Jim and Kamau. He advised him to go home put on some clothes then proceed to hospital. P.W.1's father called later and he informed him of what transpired. Around 2 a.m. he was phoned by a neighbour Peter Kinyua who told him two cows had been stolen. They went out and screamed whereupon the suspects ran away. He reported to the chief and also told him about the incident with P.W.1. They went with P.W. 1 to 1st accused's house and found him together with 2nd accuse and another person playing cards. P.W. 1 identified his t-shirt which they carried away. After interrogation, it was determined that the accused persons were not involved in cattle theft but had robbed P.W. 1.

10. The evidence by P.W. 2 shows that when P.W. 1 reported to him, he gave him the names of the assailants. The names were of the two appellants. This shows that the complainant had recognized the assailants. Most importantly is the fact that the T-shirt which the complainant was robbed was recovered from the house of 1st appellant who was with the 2nd appellant and another person. The appellants in their defence did not deny that the T-shirt was recovered. The fact that the T-shirt was recovered from this house brings in the doctrine of recent possession which leads to the inference that the appellants had committed the offence.

11. The P.W. 3 Dr. Kevin Wambua is the doctor who filled the P. 3 form. He produced the P.3 which was filled by his work mate Doctor Manyeki. P.W. 3 testified that P.W. 1 had cut wounds and bruise on the humerous region and left shoulder. The age of injury was one day. The degree of the injury was assessed as harm.

12. P.W. 4 **Corporal John Kanjala** is the investigating officer attached at Wanguru Police Station. His evidence was that on 19th June, 2014 the appellants were taken to the Police Station on suspicion of having robbed P.W. 1. He interrogated P.W. 1 who told him how he had been attacked by the two appellants as he was heading home. The two were arrested and a T-shirt was recovered.

13. The evidence adduced was cogent and reliable. The appellants' grounds of appeal can be summarized as identification by recognition which they allege was not free from error, relying on the T-shirt to convict instead of exonerating the appellants and failure by the trial magistrate to consider the defences of

the appellants. The appellants submit that the evidence relied on was adduced by a single identifying witness. The appellants claimed that the source of light, time taken to identify the appellants, the angle of identification and the state of P.W. 1 after taking beer should have been considered before the trial court accepted their recognition. P.W. 1 testified that the appellants were flashed by headlights of the vehicle. There is no doubt that those were bright lights which enabled the complainant to recognize people he knew. This was identification by recognition. In the case of **Mwendwa Kilonzo & Another -V- R (2013) eKLR,** the Court of Appeal upheld the trial court and the decision of the High Court on the issue of identification by recognition where they stated as follows:

"This is what the trial magistrate found on this point: "Though it was at night there was adequate light from the bright torches that the accused persons had. This coupled with the fact that the robbery occurred in a single room enabled witnesses to identify the accused."

The learned judges on the whole evidence of identification concluded:

"In our own assessment of the evidence adduced before the trial court, we hold that the appellants were positively identified at the scene of crime."

The complainant knew the two appellants well before the incident. With bright light from the vehicle he could not have failed to recognize the assailants. The vehicle stopped to drop the complainant. This gave the complainant time to recognize the two. In the case of **Peter Musau Mwanzia -V- R (2008) eKLR** the Court of Appeal dealing with the issue of recognition stated:

> ***"In the well known case of R -V- Turnbull (1967) 3 ALL. E.R 549 at page 552 it was stated " Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recogise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made." We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would proof that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger……..such knowledge need not be for a long time but must be for such time that a witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."***

These circumstances are present in this case. The undisputed evidence is that the complainant (P.W. 1) had worked with 1st appellant during the day before he was attacked that night and they even went shopping together and therefore they knew each other well. P.W. 1 stated that he recognized the 1st accused from the headlights of a vehicle which are usually very bright and therefore the possibility of mistake is ruled out. The complainant stated that the people who were flashed by the headlights are the same ones who robbed him. I am of the view that the evidence of P.W. 1 is credible. The testimony is corroborated by the fact that at the time of arrest the T-shirt which the complainant was robbed of was recovered from the house where the two were. In their defence, the appellants told the Court they were arrested on allegation that they attacked the complainant. Though the appellants submit that evidence surrounding the T-shirt exonerated them, this is not the case. The appellants submit that it was not proven that the T-shirt recovered belonged to P.W. 1 as it had no cut on the area where P.W.1 was cut and it was not bloodstained. There was also the color of the T-shirt with a claim that it was maroon and also red. In my view, the issue of the color of the T-shirt is not a cause of alarm. P.W. 1 testified it was red. P.W. 2 said it was red and also said it was maroon. The difference between red and maroon is not a cause of alarm since maroon is just a darker shade of red and therefore they can easily be confused. The 1st appellant in his defence stated that those who went to his house took a T-shirt. He did not lay any claim on the T-shirt. There is no dispute that the T-shirt belonged to the complainant who had bought it that same day. I am of the view that based on this evidence what comes out of the discovery of the T-shirt with accused persons is the doctrine of recent possession. It also corroborates the evidence of the complainant and puts weight to the evidence of the complainant. The doctrine of recent possession was dealt with by the Court of Appeal in the case of **David Mutune Nzongo -V- Republic (2014)eKLR** where the Court stated:-

"It is important to note that even though the High Court made a finding that the evidence on identification with regard to the appellant and co-accused was not sufficient, the evidence of recent possession alone is sufficient for the conviction of the appellant. In the case of Douglas Sila Mutuku & 2 others v Republic [2014] eKLR the Court of Appeal held that:

"Although none of the witnesses identified the 3rd appellant, the fact that shortly after the robbery, he was found in possession of some of the items stolen from the victims there is a rebuttable presumption of fact under Section 119 of the Evidence Act, that he was either the robber or a guilty receiver, unless he offers a reasonable explanation as to his possession of those items."

The Court has further set the standards upon which the Court will rely on the doctrine of recent possession to convict. In **Erick Otieno Arum -V- R. (2006) eKLR** the Court of Appeal stated:

"In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant".

It was the evidence of P.W. 1 that he bought the T-shirt that same day and put it on as the shirt he had was torn and muddy. When he bought the T-shirt he was in company of the 1st appellant. Later the 1st appellant robbed him. P.W. 2 confirmed that when P.W. 1 went to his house to report the robbery he was naked. This confirms that the T-shirt had been robbed. I am of the view the evidence surrounding the T-shirt does not exonerate the appellants, it corroborates the testimony of P.W. 1. What the appellants are saying is that yes the T-shirt was recovered but because it was not cut and had no bloodstains should go to their benefit. The issue of T-shirt being cut or bloodstained was not raised during trial. It cannot be raised at this stage.

14. The appellants also raised the issue that no inventory was recorded. It has been held in a decision which binds this court that the issue of an inventory is a procedure one which does not vitiate the trial. In **Leonard Odhiambo Ouma & Another -V- Republic (2011) eKLR** the Court held:

"Failure to compile an inventory as contended in ground 5, is in our view a procedural step which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial."

Further in the case of **Stephene Kimani Robe & 2 Others -V- R (2013) eKLR** the Court stated;

"The purpose of an inventory is to keep records of exhibits recovered during investigations. Failure to prepare an inventory cannot vitiate the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence".

So the purpose of an inventory is documentation during investigations of the recovered items and to keep a record, failure to prepare such inventory cannot diminish evidence of the physical existence of exhibits produced and identified in the trial. In any case the appellants confirmed the recovery of the exhibit, that is the T-shirt. The court cannot disregard the exhibit simply because the procedure was not followed when there is no dispute on recovery of the exhibit.

15. The appellants faulted the conviction on the ground that shoddy investigations were carried out. The appellants contend that they were arrested on suspicion. I am of the view that the appellants were identified at the scene of the robbery and upon arrest were found in possession of the T-shirt stolen during the robbery. Though appellants say they were in the house asleep during the time the complainant was robbed, this is disapproved as they were in possession of the stolen T-shirt only a few hours after the robbery. The robbery, arrest and recovery happened one after the other within a short time during the same night. Suspicion was ruled out charge proved. The investigations were not shoddy. The

complainant was referred to hospital and P.3 form was filled. All what needed to be done was done.

16. The prosecution discharged the burden of proof. The ingredients of the charge of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** were properly laid down by the trial magistrate. It states:

> ***"If the offender is armed with a dangerous or offensive weapon or in instrument, or is in company with one or more other person or persons, or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

In the Court of Appeal decision **Daniel Njoroge Mbugua -V- R (2014) eKLR** it was stated:

> ***"The ingredients of the offence of robbery with violence were further elaborated by the Court of Appeal in the case of Oluoch -V- Republic (1985) KLR where it was held that robbery with violence is committed in any of the following circumstances:***
>
> ***(a) The offender is armed with dangerous or offensive weapon or instrument, or***
>
> ***(b) The offender is in the company of one or more person or persons.***
>
> ***(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person……"***

The use of the word "or" implies that if any of the three conditions is fulfilled then the offence would be said to have been committed.

17. In this case the two appellants attacked the complainant together. The 1st accused was armed with a panga and the two beat the complainant and struck him with a panga causing injuries as stated in the P.3 form. They robbed cash money Kshs.1300 and a T-shirt. The offence of robbery with violence was complete. The prosecution discharged the burden proof. The trial magistrate considered all the evidence and arrived at the right conclusion. The conviction of the appellants was proper. There is no reason to interfere with the judgment of the trial magistrate. There was sufficient evidence adduced to proof the charge against the appellants beyond any reasonable doubts. The appeal lacks merits. I dismiss it.

Dated and delivered at Kerugoya this 21st day of July, 2017.

L. W. GITARI

JUDGE

L. W. Gitari J.,

Mr. Mwangi for applicant

Respondent absent

Court assistant Naomi Murage

Read out in open court this 21st day of July, 2017.

L. W. GITARI

JUDGE

21.7.2017