REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CRIMINAL APPEAL NO. 117 OF 2013

R.V.P. WENDOH AND J.A. MAKAU JJ

LPARI LOLOPIRO …… APPELLANT

• V E R S U S –

REPUBLIC …… RESPONDENTS

(From the original conviction and sentence in criminal case no. 407 of 2013 of the Principal Magistrate's Court at Marsabit Law Courts – B.M. Ombewa – Principal Magistrate)

JUDGEMENT

1. The Appellant Lpari Lolopiro was charged with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence are as follows:-

Count I

On the 23rd day of July 2013 along Merille-Lontolio road in Laisamis within Marsabit County jointly with others not before court, being armed with dangerous and offensive weapons namely M-16 rifle, G3rifle, swords and clubs robbed ALI DADACHA BAMIN of Ksh. 44,000/- mobile phone make Nokia X2-05,one jacket, one travelling bag and assorted motor vehicle spare parts all valued at Kshs. 55,500/-

Count II

On the 23rd day of July 2013 along Merille-Lontolio road in Laisamis within Marsabit County jointly with others not before court, being armed with dangerous and offensive weapons namely M-16 rifle, G3 rifle, swords and rungu robbed BAICHA DUKHLE of Ksh. 12,000/-

2. That after trial the appellant was convicted on the two counts but sentenced to death on Count I only and court stated it could not sentence him to death on both Counts. Being aggrieved by the conviction and sentence he filed th is appeal. The appellant relied on four (4) grounds of appeal being as follows;-

> **1. That the learned trial magistrate erred in law and facts in failing to consider that the parade identification was not properly conducted.**

2. That the leaned trial magistrate erred in law and facts in relying only on the evidence given in the possession of the alleged exhibit on me which has no stand a conviction.

3. That the learned trial magistrate erred in law and facts in failing to consider my sworn defense.

4. That the learned trial magistrate erred in law and facts in failing to consider network track.

3. The appeal was opposed. Mr.Mulochi, learned state counsel represented the state in this appeal.

4. We as a first appellant court and as expected of us have subjected the evidence adduced in the lower court to a fresh analysis and evaluation and have drawn our conclusions giving due allowance for the reasons we neither saw nor heard any of the witnesses. We are in that regard guided by the court of appeal decision of **Okeno v Republic [1973]EA 32** in which it was stated as follows:-

> ***"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Santilal M. Ruwala v. Republic [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"***

4. The facts of the prosecution case were that on the material day the complainants Ali Barmin Dadacha. (PW1) and Baicha Dohle (PW2) were with other passengers travelling from Merile to Koro on 23rd July 2013 at around 3.30 p.m. in Motor vehicle registration No. KPL 347 Land Rover belonging to Barmin Dadache (PW1) driven by his driver namely Mahmoud Galboia; that between Merile and Lontolio in a laga they came across two logs placed at the middle of the road blocking the road; that suddenly a man emerged from the side of the road armed with a gun shooting in the air and ordered them to stop . The said man was dressed in the full combat military uniform, in a black scarf on the head; that two other people emerged from the sides of the road armed with rungus and swords. The man with a gun ordered them to alight from the motor vehicle. They alighted but other passengers ran to the bush leaving the two complainants and the driver behind. The first complainant gave the robbers Ksh. 44000/- and his bag which had motor vehicle spare parts, wallet, and Nokia X2-05 phone. One of the robbers took the second complainant's wallet which had Kshs. 12000/- . The robbers thereafter disappeared into the laga. That one of the passengers contacted a person who in return contacted the police officers who came to the scene after about 30 minutes. PW1 was later called to Laisamis police station and was told that there was a suspect arrested with his phone. That he identified his phone at the police station. The appellant had meanwhile been arrested at Logologo Trading Centre on 26th July 2013 by the Administration Police Officers after members of public had reported to him of the appellant having a phone which had names of prominent people including District Commissioner of Laisamis, OCS Laisamis Police Station and former Councillor of Kor ward. That the administration officers proceeded to the scene and found the appellant seated outside a kiosk. They asked him to produce the mobile phone and he complied. The phone was X2-05 by make with a blue cover. The Administration Police took the appellant's bag which had his identity card, headgear, jungle hat, military camel bag, white tanker shoes, a club and a sword; Kshs. 8000/- was also recovered from him. The appellant was escorted to Logologo Administration Police Post and handed to police officers for Laisamis. An identification parade was later conducted at Laisamis

Police Station in which the appellant was identified by PW1. The accused also allegedly made a confession which was taken down by C.I. Kibiton John Boino (PW5). The appellant was subsequently charged with two counts of robbery with violence.

5. The Appellant's defence was unsworn. He put forward a defence of being framed denying he had the exhibits produced before the court. He further avered that he was arrested while travelling from Merile to Logologo and taken to police station. He conceded that all the exhibits produced in court were his except one.

6. The appellant in his appeal filed written submissions. In his written submissions he raised several issues for consideration by this court; such as the appellant's identification, the conduct of the identification parade and failure to produce documentation on recovery and an inventory note of what was recovered at the time of the appellant's arrest.

7. Mr. Mulochi, learned state counsel opposed the appeal. He submitted on issue of failure to call a witness by the prosecution to be a matter within the discretion of the prosecution and that an appellate court should not interfere with the exercise of that discretion unless for example, it is shown that the prosecution was influenced by some oblique motive. In support of that proposition he refered to the case of **Julius Kalewa Mutunga vs Republic C.A. Criminal Appeal No. 31 of 2005 (Nyeri) at page 5 last paragraph**. He urged the appellant has not demonstrated that failure was influenced by bad motive and urged that the appellant's submission on that line be disregarded. He urged that PW4 was the arresting officer and he testified. That the appellant's defence he submitted was a mere denial. He submitted that the court correctly relied on the doctrine of recent possession relying on the case of **David Mutune Nzongo v Republic C.A. CR. A No. 536 of 2010 (Nairobi) on page 6 last paragraph** where the court re-echoed its decision in the case of **Hassan v Republic [2005] 2 KLR 11** where as regards recently stolen goods it delivered its self thus:-

> ***"where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver."***

8. Mr. Mulochi learned state counsel submitted further that PW4 recovered a phone belonging to PW1 on 26th July 2013 having been stolen on 23rd July 2013. He urged that the phone had been identified by its blue cover and the complaint's name which had been saved in the Bluetooth in complaint's name so that if the sim card is removed complaint's name "Barmin" would appear when it is opened. He submitted the phone belonged to PW1 and was found in possession of the appellant who did not offer any explanation how it came to be in his possession. He urged PW5 and PW6 were taken to the scene by the appellant. He continued by submitting that the conviction and sentence were proper and urged us to dismiss the appeal.

9. The appellant in response submitted that the identification parade was not properly conducted and the complainants were shown to him before the identification parade.

10. The appellant amongst his grounds of appeal raised the issue of identification and the issue of identification parade urging that he was not properly identified. The appellant in his written submissions urged us to consider the complainants evidence that they did not give any description on physical appearance of their assailants. He also submitted that was confirmed by PW3 who conducted the parade.

11. The way to test whether the identification was free from any error or mistake has been dealt with in many cases and of special mention are the following:-

> **Paul Etole and another vs Republic CA No. 24 of 2000 Pg 2 & 3.**
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> ***"The prosecution case against the second appellant was presented as one of recognition or***

visual identification. The appeal of the second Appellant raised problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the courts should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

Cleaphas Otieno Wamunga vs. Republic 1989 KLR 424, the Court Of Appeal stated as follows:-

"The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery CJ. In the well-known case of R. Vs Turnbull 1976 (3) All E.A. 549 at Pg.552 where he said "Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

12. The trial magistrate in this matter as regarding identification observed as follows:-

"Barmin (PW1) testified that the person who had a gun shot three times in the air. He was in military uniform and had a black head scuff and head gear."

13. From the evidence adduced by PW1 and PW2 it is clear the offence took place at 3.30 p.m. That the attacker who appeared first was armed with a gun which looked like G3 rifle. He shot in the air. He was in full combat for KDF and had on his head a black scuff. The attack was sudden and PW1 and PW2 did not state that they were able to see the attacker's face. What we can note from the complainants evidence is that they were unable to give a description or physical appearance of the attack. The police were first informed that one attacker had a military combat attire and no other description was given of the attacker.

14. We have considered the trial magistrate's judgment and note that he did not consider lack of important details regarding identification. There was no other evidence of the attacker other than the attacker being dressed in military uniform/combat attire and being armed with G3 rifle of his description. There was no evidence on the physical appearance of the assailant; nor was there evidence as to whether any of the complainant saw the assailant's face and whether on seeing him again they could identify him or whether when gun shots were shot in the air the assailant was still under the complainants observation and for how long.

15. PW2 in his evidence stated that somebody emerged from the right side of the laga. He had a gun. He fired and he did not know how many shots were fired. He said the person who had a gun had combat gear. However he did not give a description of the person to the police. Similarly PW1 did not give description of the attacker to the police. PW3 in his evidence testified that the appellant was arrested even before the complainants had given the description of the assailant. PW3 organized an identification parade after the appellant had been arrested by PW4 on suspicion of having been involved in robbing the complainants.

16. We note that the appellant was arrested before the complainants had given the description of their attackers and was immediately subjected to identification parade on27th July, 2013 at 11.30 a.m.

17. We wish to observe that the complainants though the police came to the scene of robbery within 30 minutes when their memory was fresh; they did not give descriptions of the suspect they claim to have identified to the police. They did not give explanation for that failure; such as that they were in shock or otherwise. In this regard we find guidance in the case of **Simiyu & another v Republic [2005] 1 KLR 192** where the court expressed itself on this point as follows:-

> ***"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the 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 accused, and then by the person or persons to whom the description was given."***

18. We are persuaded to find and hold that the witnesses in this case did not give the description of the attackers to the police when they came to the scene or immediately thereafter because they were not certain of their identify, but gave general description of how the suspects were dressed which description could not exclusively fit the appellant alone. They did not even tell the police if they saw the attackers they could identify them.

19. We have observed further that though the police had not been given a description of the robbers, one CPL Abdi Adam Omar, attached to Logologo AP Post arrested the appellant on 26th July 2013 when members of the public reported that the suspect had been spotted in Logologo centre with a phone with numbers and names of DC Laisamis, OCS Laisamis and a former Councillor for Kor Ward in absence of the witness or complainants. This is clear in our mind that at the time of arrest of the appellant the witness had not identified the appellant as a suspect of the robbery before the arrest. We wonder on what basis the appellant was arrested and charged with robbery with violence. The appellant was arrested because the members of public had reported to PW4 that he had been seen with a mobile phone which had names of prominent people such as DC,OCS and Councillor. This was not a good basis for arresting the appellant as the names which were in the phone are names of public figures or public servants which any member of the public can have for various reasons including security. It is not only the complainant who could have access to the said names and mobile numbers. The prosecution did not call any evidence to show that the appellant could not access mobile numbers of the said public servants but the first complainant only.

19. We would like to turn to the identification parade conducted in identification of the appellant. The appellant in his appeal urged that the parade was not properly conducted. PW3 CPC Benson Sindoni conducted the identification parade. He testified that he had morans brought from Laisamis. He picked morans of similar physic and attire of the appellant, provided them with military attire including the appellant. He also gave them rifles. He stated the appellant chose to stand between No. 4 and No. 5. That PW1 identified appellant by touching him. We have observed that members of the identification parade are listed at page 4 of prosecution exhibit 5 however, our observation is that of the eight (8) members of the identification parade the name of the appellant "LPARI LOLOPIRO" was not included and as such we do believe that the witness was unable to identify the appellant who was not a member of the parade as PW3 wanted the court to believe in his evidence before the trial court. The position allegedly chosen by the appellant in the parade between no 4 and 5 in our view is not correct as in the said exhibit no. 5 such position did not exist.

21. We are in view of the evidence adduced before the trial court that the police did not have a description of the robber at the time of carrying out the identification parade and as such we are of the view that there was no basis upon which identification parade could have been organized and concluded fairly in which the appellant was purportedly identified. We have observed the

appellant was not a member of the purported identification parade and we hold the purported identification parade was worthless, irrelevant and inconsequential. We find that the appellant was not identified at the purported parade.

22. On the phone X2-05 we have observed that PW1 identified the said phone by its make and blue colour. He did not produce any receipt to support his claim of ownership over the said phone. The type of phone X2-05 and blue cover are readily available in open markets in Kenya and outside Kenya. Anyone can walk to a shop and buy a similar phone and similar cover. The prosecution did not adduce evidence to show that it is only PW1 who has that type of phone in the country. Further PW1 purportedly identified the phone by the name "Barmin" which he purported appears when sim card is removed and on opening the phone. We take note the prosecution did not adduce evidence to show that the complainant is the only person known by the name "Barmin" and with right of the use of the name "Barmin". Barmin is a common name and as the complainant did not have exclusive use of the said name, we find the name "Barmin" insufficient to prove that the phone X2-05 purportedly found with the appellant solely belonged to the complainant. We do therefore find that the appellant was not found in possession of complainants phone and further with a recently stolen property of the complainant.

23. In view of what we have stated herein above we are satisfied that the alleged identification of the appellant as one of the culprits in this case was not free from error. We are of the view that had the trial magistrate analysed the evidence on identification and taken into account all factors we have enumerated hereinabove, he would have come to a different conclusion. It is therefore our finding that the appellant was not properly and positively identified as the person who perpetrated the robbery in this case against the complainant.

24. We now have to turn to the doctrine of recent possession. The State Counsel refered us to the case of ***David Mutune Nzongo vs Republic CA. CR.A. no. 536 of 2010 (Supra)*** on page 6 **last paragraph** . The law on doctrine of recent possession has been stated in several cases. (See **Nyanja Kahiga alias Peter Ngang'a Kahiga vs Republic Court of Appeal at Nyeri Cr.A.No. 272** of **2005(2006|) eKLR, Martin Oduor Lango & Others vs. Republic Court of Appeal Criminal Appeal No.282 of 2002 [2014]eKLR).** The law is that the doctrine to apply, the prosecution must establish the following conditions; first, that the property was found in possession of the suspect, secondly, that the property was positively identified by the complainant and thirdly; that the property was recently stolen from the complainant.

25. In this case, the only property that was stolen during the robbery and allegedly recovered after three (3) days was PW1's mobile phone. According to the charge sheet and PW1's evidence, the make of the stolen phone was Nokia X2-05. The complainant was able to positively identify the phone in court in his evidence and he did not produce a receipt of purchase of the said phone. He relied on the make of the phone; blue cover and the name "Barmin" which would appear when the sim card is removed and phone opened. We note the evidence of PW1 was not corroborated by any of the prosecution witnesses who knew the recovered phone to belong to PW1 nor was there a special mark with which the complainant could identify the phone with as his own.

26. PW4 who gave evidence that he recovered the phone X2-05 from the appellant in company of APC Korossi, APC Nicholas Magara was the only police to give evidence. His co-police officers as well as members of the public who accompanied him were not called to give evidence. The appellant denied the phone was recovered from him claiming it was planted on him. In this appeal the appellant challenged the recovery of the phone from him submitting that no documents of recovery or inventory notes were produced to connect the recovery of the phone from him.

27. We have carefully considered the prosecution evidence and we are satisfied that the prosecution did not adduce sufficient evidence to prove to the required standard that the said mobile phone had actually been recovered from the appellant after it had been stolen. We find therefore not all the conditions for the doctrine of recent possession to apply has been satisfied in this case.

28. We therefore do not agree with the submissions of Mr.Mulochi learned state counsel that the doctrine of recent possession is applicable in this case. We find the learned trial magistrate finding that the complainant's mobile phone had been recovered from the appellant three (3) days after robbery was not capable of support from the evidence on record.

29. Having come to the conclusion we have; we have come to the conclusion that the charge of robbery with violence in respect of the two counts with which the appellant was charged with and convicted on were not proved against the appellant beyond any reasonable doubt. We are therefore satisfied that his conviction on the two counts for the offence of robbery was not safe. We allow the appeal with regard to both the conviction and sentence in both Count I and II. The conviction in both Counts is hereby quashed and the sentence set aside. The appellant should be set at liberty unless he is otherwise lawfully held.

READ AND DELIVERED IN OPEN COURT ON THE 8TH DAY OF JULY 2015 AT MERU.

R.V.P. WENDOH **J.A.MAKAU**

JUDGE **JUDGE**

8.7.2015 **8.7.2015**