



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 103 OF 2008

NAFTARI KING'ORI NJOROGE APPELLANT

versus

REPUBLICRESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 105 OF 2008

CHARLES WACHIRA MWANGI..... APPELLANT

versus

REPUBLICRESPONDENT

and

CRIMINAL APPEAL NO. 104 OF 2008

FRANCIS WANJOHI NYUTHE..... APPELLANT

versus

REPUBLICRESPONDENT

JUDGMENT

1. The appellants were charged with the offence of robbery with violence contrary to section 296(2) the particulars of which were that on the night of 27th/28th day of April 2006 at Ngangarithi village in Nyeri District of Central Province jointly with another not before the court while armed with dangerous weapons namely pangas and iron bars robbed **Jackson Ngumba Kiritu** of a mobile phone make Motorola C 200 Sumsung No.710, Total gas cylinder of 2 Kgs and a camera make Yeshika and at or immediately before or immediately after the time of such robbery used actual violence to the said **Jackson Ngumba Kiritu**.
2. In count II they were charged with robbery with violence contrary to section 292(2) of the Penal Code the particulars of which were that on the night of 27th/28th day of April 2006 at Ngangarithi village in Nyeri District of Central Province jointly with another not before the court while armed with dangerous weapons namely pangas and iron bar robbed **Lewis M. Waititu** of two mobile phones make motorolla c116 and Motorola C 115 a meko gas cylinder and cash money Ksh. 1500 and at or immediately before or immediately after the time of such robbery used actual violence

- to the said **Lewis Macharia Waititu**.
3. Count III charges of robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on the night of 27th/28th day of April 2006 at Ngangarithi village in Nyeri District of Central Province jointly with another not before the court while armed with dangerous weapons namely pangas and iron bar robbed **Michael Wamwea Kimeria** of cash **200 Mobile phone make Sagem 320**, a pair of shoes a wrist watch, motor vehicle radio make L.F.G. and loud speaker make Sony and at or immediately before such robbery used actual violence to the said Michael Wamwea **Kimeria**.
 4. Count IV robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on the night of 27th/28th April 2006 at Ngangarithi village in Nyeri within Central Province while armed with dangerous weapons namely pangas and iron bar robbed **Eunice Wanjiru Ndumia** of cash Ksh. 2000 and a Mobile phone make Siemen A.35, and at or immediately before or immediately after that time used actual violence to the said **Eunice Wanjiru Ndumia**.
 5. Count V robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on the 27th/28th day of April 2006 at Ngangarithi village in Nyeri District of Central Province jointly with another not before the court while armed with dangerous weapons namely pangas and iron bars robbed **Joseph Gitonga Ndwiga** of cash Ksh. 3400 and mobile phone Siemen A.35 and a motor vehicle radio make Artech and stove and at or immediately before or immediately after the time of such robbery used actual violence to the said **Joseph Gitonga Ndwiga**.
 6. They pleaded not guilty, were tried convicted and sentenced to suffer death, Being aggrieved by the said conviction and sentence they each filed separate appeals which appeals we consolidated for the purposes of this hearing.
 7. At the trial before us Mr. Njue appeared for the State while the Appellants who were not represented each filed an amended memorandum of appeal and written submissions which they relied upon.

SUBMISSIONS.

8. The first appellant **Mr. Naftali Kingori Njoroge** and the 2nd appellant **Charles Wachira Mwangi** each filed identical amended memorandum of appeal and written submission in which the grounds of appeal can be summarized as follows:
 - a) The charge sheet was defective
 - b) There was no proper identification.
 - c) The appellants defence was not taken into account.
9. It was submitted that the charge sheet shows that the three appellant were jointly with others not before the court whereas the evidence tendered showed that there were only three assailants and that their identification was faulty and the court ought to approach the same with cautious and that the state and the mind of P.W.1 could not have allowed the same to identify the attackers. Further the intensity of the light at the place of the attack was not indicated.
10. It was further submitted that the appellants should have been charged with handling stolen property since it is alleged that they were found in their possession and that theory of the doctrine of recent possession could not be applicable. It was submitted that no reason was given by the court for rejecting their defence.
11. The 3rd appellant Francis Wanjohi Nyuthe in his memorandum of appeal raised the following grounds:
 - a) That the appellant was convicted on the basis of recognition which was not supported by the OB
 - b) The court could in relying on the identification by P.W.1 P.W.5 while they did not give the descriptions of the attackers to the police.

c) The prosecution case was not proved to the requisite standard.

12. He submitted that P.W.4 stated that he had known him before and that he recognized him on the night of the robbery but did not give his names to the police and that the prosecution case was full of contradiction and was not proved beyond reasonable doubts.
13. Mr. Njue for the state submitted that the convictions of the appellants was safe. At the time of robbery though at night there was sufficient light to enable P.W.1 identify the appellants and that this was corroborated by the evidence of P.W.4 and P.5, it was submitted that the appellants were identified by more than one witness.
14. It was submitted that the defences of the appellants were considered and found to have been displaced by the prosecution evidence. The doctrine of receipt possession under section 119 of the Evidence Act was properly applied since the items stolen were positively identified and the recovery thereof done the next day after the robbery. He further submitted that the 1st appellants defence of alibi was properly rejected since it was contradictory to the evidence of DW1 his wife.
15. This being a first appeal we are expected to reassess the evidence tendered before the trial court and to come to our own conclusion thereof which we hereby do.
16. P.W.1 testified that on the night of 27th, 28th April 2006 at about 2-3 a.m he was in bed when three people armed with pangas metal and rungu entered his house each armed with a torch. He was with them for about 10 minutes and that he was hit with a panga on the right side of his neck. He was able to identify his stolen items on 1st May 2006 at Nyeri Police station. He further stated that during the attack there was electricity light on and that he was able to identify two of the attackers.
17. P.W.2 Michael **Wamwea Kimeria** testified that on the same day he was in bed in his house at around 2 am he heard a bang on his door three people came into the house and one of them smashed the light bulb and thereafter his items stated in the charge sheet were stolen. The next day he was able to identify his stolen items at Nyeri police station.
18. P.W.3 **Ephraim Gathigu Karanja** testified that on 28th April 2006 he visited Florida Bar Nyeri where he found the appellants taking beer and saw the 1st appellant showing a cellphone to the 3rd appellant which he recognized as belonging to P.W.4. P.W.4 stated that he was called by P.W.3 and was able to identify the appellants whom he recognized as his attackers and that the third appellant came from his area.
19. P.W.5 also confirmed the attack and was able to identify the appellants at the dock. P.W.6 **Geoffrey Maina Gatere** a taxi driver stated that on 27th April 2006 the appellants asked him to take them to Kamakwa and that he was called by Kingori the 1st appellant whom he had carried twice and that when he returned to the taxi bay he realized that two radio had been left in his motor vehicle. He tried to call the 1st appellant who did not respond.
20. P.W.7 **CPL Peter Njoroge** the investigating officer stated that on 28th April 2006 the appellants were brought in with four cellphones and that he called the victims who were able to identify the said cellphones. The 3rd appellant disclosed to him that they had kept the gas cylinders with someone they called Shylock where they were found and the 3rd appellant told him that they had left radios in a taxi which were recovered from P.W.6. P.W.8 **Apc ALBERT KIMATHI MBAKA** confirmed the arrest of the three appellants at Florida bar.
21. When put on their defences the 1st Appellant gave sworn defence and stated that on 25th April 2006 he was called by one of his brothers to attend a funeral in Nakuru. He left for Nakuru and on 28th April 2006 was arrested in Nyeri at a bar. He stated that he was not in Nyeri on the day of the alleged robbery and produced a fare receipt.
22. The 2nd appellant gave unsworn statement that he was a lorry turnboy and on 28th April 2006 he took the lorry to the garage and thereafter entered Florida bar when a police man who had arrested him on 17th April 2006 took them to Nyeri police station and booked them on the offence of burglary and stealing which he denied. He further stated in his defence that the officer who arrested him and who did not come to court to testify was having an affair with his wife and had earlier arrested him in order to have free access to his wife.
23. The 3rd appellant gave sworn evidence stated that he was a trolley load carrier at Nyeri town and that he does the job of removing empty crates of bar from Florida bar. That on 28th April 2006 as he waited for his wage he sat by a table with three people he did not know. That one left the table and returned with two others who announced they were police officers who arrested him and took

him to Nyeri police station and that on the night of the robbery he slept at his house. Under cross examination he admitted that he was on the same table with the 1st and 2nd appellants.

24.D.W.4 **Lucy Njeri Njuguna** testified that the 1st appellant was her husband On 25th April 2006 they traveled together to Nakuru to attend the funeral of his brother upto 28th April 2006 when they returned to Nyeri she left the 1st appellant in town and at 4.00 pm. learnt that he had been arrested.

25.D.W.5 **Agnes Njoki Wanjohi** testified on oath that the 3rd appellant was her husband. On 27th & 28th April the 3rd appellant arrived home at 7 pm had supper and returned to bar upto 7 am when she served him tea.

26.From the proceedings and submissions herein we have identified the following issues for determination.

- 1) Whether the appellants were positively identified during the night of the robbery.
- 2) Whether the offence of robbery with violence was proved.
- 3) Whether the appellants defence were taken into account.

27.From the evidence tendered before the trial court which we have analysed herein above the alleged robbery took place at night on 27th/28th April 2006 and therefore the question which we ought to answer is whether the circumstances were favourable for identification. As stated herein P.W.1 told the court that each of the appellants had a torch and that he was with them for about 10 minutes. He further stated that during the attack the electric light was on and that the 3rd appellant who he identified in the dock had a police baret. 1st appellant had Islamic cap and the 2nd appellant who took his wallet had no cap

28.Under cross examination P.W.1 confirmed that he saw the 1st and 2nd appellants in his house and his evidence was corroborated by the evidence of P.W.2 and P.W.3 who found the appellants at Florida Bar where he recognized the phone of P.W.4 Lewis Macharia Waititu who was his worker which led to the arrest of the appellant and that during the attack on P.W.4 the electric light was on and he was able to identify the 3rd appellant who comes from his home area.

29.From the evidence tendered we are of the considered opinion that the conditions for identification of the appellant was ideal and that the appellants were properly identified during the night of the robbery.

30.We have also taken into account the evidence of P.W.6 **Geoffrey Maina Gatere** who stated that he had offered taxi services to the 1st appellant before and that the same together with the two appellants hire him to take them to Kamakwa which he did and that they left two radios in the car which he took to the police after the 3rd appellant told P.W 7 that they had left them in his car. P.W.8 **Albert Kimathi Mbaka** who arrested the appellants also confirmed that the appellants were found in possession of four (4) cellphones.

31.On the issue of the appellants defences the trial court at page 97 of the proceeds analysed and considered the defence tendered and dismissed the 1st appellant's alibi defence since it was contradicted by his witness D.W.5 and as regards 3rd appellant the court ruled that it would not stand in the evidence of P.W.1 ad P.W.5 who clearly identified them

32.We therefore find that the appellants defences were properly considered and dismissed by the trial court. We further find that the trial court properly applied the doctrine of recent possession of stolen items in convicting the appellant since they did not give any reasonable explanation to the contrary.

33.We therefore find that the prosecution case against the appeal was proved to the required standard and that their conviction and sentence were safe.

34.In the upshot of this is that we find no merit on the appeals herein and therefore dismiss the same.

Dated and delivered at Nyeri this 5th day of February 2014.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE

Mr. Cheboi for the state

Appellant in person

Court: Judgment read in open court in the presence of the above named.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE