REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal No. 194 Of 2012

NELSON KIMANI THINJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Molo S.P.M.CR.C.NO.817 of 2007 by Hon. H.M. Nyaga, S.R.M. Dated 5th October, 2012)

JUDGMENT

1. The appellant, Nelson Kimani Thinji, was charged on two counts of the offence of **Robbery with violence** contrary to **Section 296(2)** of the **Penal Code.**

2. Particulars of the charge on count l are that on the 3rd April, 2011 at Sachangwan within Nakuru County jointly with others whilst armed with dangerous weapons namely iron bars and knives robbed James Kitolo of 2 bales of wheat flour and or immediately before or immediately after the time of the robbery threatened to use actual violence to the said James Kitolo. On count ll the particulars are that on the 3rd April, 2011 at Sachangwan within Nakuru County jointly with others whilst armed with dangerous weapons namely iron bars and knives robbed John Mutua of 2 bales of wheat flour and at or immediately before or immediately after the time of the robbery threatened to use actual violence to the said John Mutua.

3. Judgment was delivered on 5th October, 2012 by Hon. H.M. Nyaga, Senior Principal Magistrate. He found the appellant guilty of a lesser offence of **Robbery** contrary to **Section 296(1)** of the **Penal Code.** The appellant was convicted and sentence to seven (7) years imprisonment.

4. The appellant being aggrieved by the decision of the magistrate preferred this appeal.

5. In his Petition of Appeal, the appellant listed seven (7) grounds of appeal which can be summarised as hereunder:

i) that the learned trial magistrate erred in law and fact in convicting the appellant for the offence of simple robbery whereas there was no evidence at all to support the charge;

ii) that the learned trial magistrate erred in law and in fact in not taking cognizance of the fact that the appellant was below the age of majority at the time of trial and should have arranged a separate trial for him as a minor;

iii) that the learned trial magistrate erred in law and fact in holding the appellant guilty of simple robbery whereas the prosecution did not prove their case beyond reasonable doubt;

iv) that the learned trial magistrate erred in law and fact by shifting the burden of proof upon the appellant;

v) that the learned trial magistrate erred in law and fact in taking into consideration the contradictory identification made by both P.W.1 and P.W.4.

6. Briefly, the facts of the case before the lower court are that **James Kitolo Thumo (P.W.3)** was transporting goods from Mombasa to Kampala by Motor Vehicle registration No.KAU 235A. He was traveling aboard the said vehicle in the company of **John Mutua Mutisya (P.W.1),** the turn boy. While on the Nakuru-Eldoret Highway, near Sachagwan, they were accosted by robbers who hurled stones at their cabin forcing **P.W.3** to stop the vehicle. A group of the robbers ran behind the motor vehicle, forced it open and stole 2 bags of wheat. **P.W.1** and **P.W.3** alighted from the cabin and pursued the robbers. During the encounter, **P.W.1** was hit with a stone, beaten and threatened to be stabbed. He ran towards **P.W.5's** house where he sought refuge. **P.W.3** retreated and was not injured.

7. **Sandra Mwihaki Githambo, P.W.5**, who lives near the road saw two of the robbers beating **P.W.1.** She pleaded with them not to kill **P.W.1.** According to her, the aqppellant was one of the robbers and she knew him prior to the incident as they grew up together in the area.

8. **P. C. Juma Kisera, P.W.2,** arrested the appellant after a tip off from members of the public and with the assistance of **P.W.5** who had recorded a statement with the police.

9. The appeal was canvased before us on 15th October, 2013. Mr. Karanja, counsel for the Appellant and Mr. Gitonye Muriithi, Learned Prosecuting Counsel for the State both made oral submissions.

ISSUE FOR DETERMINATION

10. After hearing the submissions of both counsel, we find the following issues for determination:

i) Identification of the appellant

ii) Recent possession

iii) Whether the appellant was a minor at the time of the trial and the legality of the sentence imposed

iv) The unlawful detention of the appellant for four (4) days.

ANALYSIS

11. This court being the first appellate court, we are duty bound to re-assess and re-evaluate the evidence on record and arrive at our own independent conclusion. Refer to **Okeno** V. **Republic** [1972] E.A.32.

12. On the issue of identification, it was the submission of learned counsel for the Appellant that the police ought to have conducted an identification parade.

13. The reasons adduced by the said counsel were firstly, that it was the evidence of **P.W.1** and **P.W.3** that they were attacked by a group of nine (9) young men.

14. Secondly, **P.W.1** and **P.W.3** stated that they saw the appellant for the first time during the attack.

15. Both witnesses testified to the fact that the appellant was not arrested at the scene of crime.

16. Counsel further submitted that the record does not show that these prosecution witnesses gave the

police any description of the appellant to facilitate the arrest of the appellant.

17. The appellant was arrested on the information given to the police by **P.W.5**, and notwithstanding the fact that **P.W.5** had identified the appellant by way of recognition; counsel submitted that the identification parade ought to have still been conducted.

18. On the issue of identification, Prosecuting Counsel for the State did not oppose the Appeal as it was clear from the record that the Appellant was not arrested at the scene of crime, neither was he arrested with any of the stolen property.

19. Counsel for the State further submitted that there was no evidence that the complainants gave any description of the attackers to the police.

20. As it was apparent from the record that no identification parade was conducted, therefore, the identification relied upon to support the conviction was dock identification.

21. For the reasons stated above, the State conceded the appeal.

22. We have had occasion to peruse the record and to re-assess and re-evaluate the evidence on record on the issue of identification.

23. We note that the offence relates to robbery and in such serious crimes, the issue of positive identification of the perpetrator is of crucial importance.

24. P.W.1 and P.W.3 were the complainants in the case against the appellant and that it was incumbent upon them to identify the person(s) who they saw committing the crime.

25. It was the evidence of both witnesses, **P.W.1** and **P.W.3** that they were attacked by a group of nine (9) young men. It was also their testimony that they did not know nor had they ever seen the appellant or the attackers prior to the incident.

26. Their evidence and that of **P.W.2** was that the appellant and the others were not arrested at the scene of crime.

27. We reiterate the fact that **P.W.1** and **P.W.3** must have been able to positively identify the person(s) who committed the offence and we also opine that the police should have accorded **P.W.1** and **P.W.3** the opportunity to identify such persons and that this could only have been done by way of an identification parade.

28. We reiterate the contents of our paragraphs 25 and 26 aforesaid and also make reference to the trial magistrate's judgment in which he states that an Identification Parade would have ***"fortified"*** the evidence on identification.

29. We concur with the Learned Prosecuting Counsel for the State's submissions that in the absence of an Identification Parade, what then remains is Dock Identification.

30. Dock identification entails a witness identifying a suspect in court and courts have held that this is the most unreliable form of identification.

31. The evidence on record shows that no out of court identification in the form of an identification parade was conducted and we are therefore satisfied that the appellant was not positively identified and we hereby allow this ground of appeal as it is found to have merit.

32. On the issue of recent possession, the evidence of **P.W.2** was that at the time of arrest, none of the stolen property was found in the appellant's possession.

33. Counsel for the State also concurred with this submission that the appellant was not found with any of the stolen property and Counsel conceded this ground of appeal.

34. We find no evidence on record in support of the appellant being found with recently stolen property and find that this ground of appeal has merit and it is hereby allowed.

35. The next issue to be canvassed relates to the appellant being a minor and the legality of the conviction and sentence passed by the trial magistrate.

36. Counsel for the appellant submitted that, after the plea was taken, the trial magistrate made the following remarks:

> **".....that the subject be remanded at the Nakuru Juvenile**
>
> **Home....."**

37. Therefore, counsel submitted that the entire trial was defective as it was not done in accordance with **Article 53(8)** of the **Constitution 2010** nor the provisions of S**ection 184-200** of the **Childrens Act** and that the appellant was a minor and was tried with adult offenders, was convicted and then sentenced by the trial magistrate contrary to the laid down provisions of **Section 190** of the **Childrens Act.**

38. Counsel urged the court to quash the conviction and set aside the sentence on the grounds that both were illegal.

39. Prosecuting Counsel for the State made no submission on this issue.

40. We have perused the court record and have noted that there were a total of three (x3) pleas taken.

41. The first plea was taken by the Hon. Soita, Principal Magistrate and he referred to the appellant as a ***"subject".***

42. On the 31st November, 2011 another plea was taken after the consolidation of criminal cases numbers 833/2011 and 1187/2011 with that of the appellant's case whereby a 2nd accused and a 3rd accused were added. The record shows that the appellant was referred to as an ***"Accused."***

43. A further consolidation was done on the 24th January, 2012 when the above cases were consolidated with criminal case No.2489/2011 and a 4th accused was added. A final plea was taken and the appellant was therein referred to as an ***"Accused."***

44. Thereafter, we note that the trial proceeded for hearing and at all times when the appellant was invited to cross-examine the prosecution witnesses, the trial court referred to the appellant as an ***"Accused"*** and not as a ***"subject."***

45. We note also that in the appellant's unsworn statement of defence, the appellant alludes to the fact that **P.W.5** implicated him because he had refused to have a relationship with her.

46. We opine that such relationships alluded to by the appellant are in the ambit of adults only.

47. From the above statement and the evidence on record, we are satisfied that the appellant was not a minor and was properly tried, convicted and sentenced by the trial court as an adult.

48. The ground of appeal is found to have no merit and is disallowed.

49. On the last issue relating to violation of the appellant's rights due to unlawful detention, counsel for the appellant submitted that the appellant was arrested on the 24th April, 2011 and arraigned in court on the 28th April, 2011 after four (4) days and that this violation of the appellant's rights vitiated the entire

trial and the trial ought to be declared a nullity.

50. Prosecuting Counsel for the State again chose not to make any submission on this issue.

51. This court takes cognisance of the fact that a lot of jurisprudence has emerged on this issue of violation of persons' rights by unlawful detention.

52. We state that The Court of Appeal on many occasions has declined to entertain this ground on breach, where it was found that the accused had failed to raise such a complaint at the initial trial.

53. The law is that the accused person must be treated as having waived his right to complain about the alleged violations of his Constitutional rights, if he did not raise the issue at the initial trial

54. In most cases, the courts have held that such a breach does not render a trial a nullity but entitles the appellant to pursue compensation in damages.

55. We have noted from the record that the appellant did not bring this issue to the attention of the trial court and therefore must be treated as having waived his right to complain about the alleged unlawful detention and violation of his Constitutional rights.

56. We need not belabour this issue further as we find no merit on this ground of appeal and the same is hereby disallowed

FINDINGS:

57. For the reasons stated above, we find:

(i) That in the absence of an identification Parade being conducted by the police, the appellant was therefore not positively identified by the two (2) complainants that is P.W.1 and P.W.2.

(ii) We find that the appellant was properly tried, convicted and sentence as an adult.

(iii) We find that on the issues of identification and recent possession, the prosecution failed to prove its case beyond reasonable doubt and find the conviction to be unsafe.

(iv) By being kept in unlawful custody for four (4) days, we find that such violation does not render the trial a nullity. If aggrieved by such breach, the appellant is at liberty to seek compensation in damages.

CONCLUSION

58. The appeal is found to have merit and is hereby allowed.

59. The conviction is hereby quashed and sentence set aside.

60. The appellant to be set at liberty forthwith, unless otherwise lawfully held.

It is so ordered

Dated, Signed and Delivered at Nakuru this 3rd day of February, 2014.

A. MABEYA

JUDGE

A. MSHILA

JUDGE