REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL 43 OF 2009

DEDAN KIMATHI CHABARI……..…….....……..…1st APPELLANT

PHINEAS KAARIA ……...…….2ndAPPELLANT

CHABARI M'RUARE……..3rd APPELLANT

V E R S U S

REPUBLIC……..….RESPONDENT

(An appeal against both conviction and sentence by Hon. P. Gesora Principal Magistrate in Chuka Criminal Case No. 1270 of 2008.).

The three Appellants are two sons and their father respectively. They were jointly charged before the lower court with one count of robbery with violence contrary to section 296(2) of the Penal Code. The 3rd Appellant faced an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. The three were tried and convicted of the main count of robbery with violence and each sentenced to death. Being aggrieved by the conviction and sentence, they all filed their appeals to this court. Their appeals have been consolidated as they arose out of the same trial.

The 1st Appellant's Amended Petition raises the following grounds:

0. **That the trial magistrate erred in law by convicting me without making a finding that the charge sheet was defective in its contents.**

0. **That the trial magistrate erred in law and facts in convicting me upon the evidence of recognition while the factors supporting such evidence were not proved beyond any reasonable doubts. This included the first report to the person in authority, one PW7.**

0. **That the trial magistrate erred in law and facts in convicting me without making a finding**

that the prosecution case was riddled with many contradictions. The trial magistrate himself contradicted the officer who took the action against the accused persons.

0. **That the trial magistrate erred in law and facts while convicting me relying as well on the evidence tendered by PW6 one medical officer without making a finding that none of the two complainants, PW1 and PW2 ever got any treatment or examination from PW6 of the hospital he stated to had come from.**

0. **That the trial magistrate erred in law by rejecting my defence testimony without giving a cogent reason for its rejection and which defence was perfect and detailed.**

The 2nd Appellant's Amended Petition raises the following grounds:

1. That the trial magistrate erred in law and facts in convicting me without making a finding that there was a material discrepancy with regard to the charge sheet. The charge sheet was at variance with the evidence adduced.

2. That the trial magistrate erred in law and facts in convicting me upon the evidence of identification by recognition without making a finding that the evidence was not free from possibility of error or mistake.

3. That the trial magistrate erred in law and facts while convicting me relying as well on the evidence tendered by PW6 the medical officer without making a finding that PW1 and 2 were never attended by PW6 and never went for any medical attention to that end.

4. That the trial magistrate erred in law in rejecting my defence without giving a cogent reason for its rejection.

The 3rd Appellant's Amended Petition raises the following grounds:

0. **That the trial magistrate erred in law in convicting me on robbery with violence contrary to section 296(2) of the Penal Code without making a finding that the ingredients and factors supporting my involvement in the alleged act were not disclosed in the trial.**

0. **That the trial magistrate erred in law and facts in convicting me without making a finding that the prosecution case was riddled with many conflicting evidences.**

0. **That the trial magistrate erred in law and facts while convicting me considering the evidence tendered by PW6 the medical officer from Tharaka District Hospital without making a finding that PW1 and PW2 never went for any medical attention to that end.**

0. **That the trial magistrate erred in law and facts in convicting me considering the exhibit (maize) tendered in the trial, while PW1 and PW2 were not able to prove their ownership before the court.**

0. **That the trial magistrate erred in law and facts while convicting me rejecting my defence testimony, which defence was detailed and credible to secure me an acquittal**.

The prosecution called 8 witnesses. The facts of the prosecution case disclose that the complainants and the Appellants are neighbours. The facts are that at around 3.a.m on the 30th September, 2008 people gained entry into the home of PW1 and robbed him of cash 30,000/-, 2 bags of maize and 2 bags of cowpeas. They also severely injured PW2, wife of the complainant PW1 leaving her unconscious. She was eventually taken to hospital for treatment. Witnesses, PW1 and 2 claim that they were able to see and identify the three Appellants as those who robbed them. The complainant, PW3 and 4 followed maize grains which had dropped on the ground, from the complainant's compound to the Appellants' home. Following the fallen grains of maize led to the recovery of the two bags of maize and two bags of

cowpeas from the home of the Appellants but more particularly from the house of the 3rd Appellant.

The Appellants put forward the defence of alibi and denied committing the offence. They claimed the recovered maize as their property, especially the 3rd Appellant.

The learned State Counsel, Mr. Mungai opposed the Appellants appeals on behalf of the State.

We have considered the Appellants' appeals, the various grounds of appeal in the Petitions filed herein, together with the submissions made by the Appellants and Mr. Mungai, the learned State Counsel.

This is a first appellate appeal. As a first appellate court we are required to subject the evidence adduced before the lower court to a fresh analyzes and evaluation, and to draw our own conclusions. We are guided by the court of appeal decision of **OKENO Vs REPUBLIC (1972) EA 32** where the court stated as follows:-

"**An Appellant on a 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 the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. [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 finding and conclusion; 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 Vs Sunday Post [1958] E.A. 424."**

We have considered the grounds by the Appellants and have found that there is a pertinent issue raised by all the Appellants. This is the issue of the discrepancy between the charge and the evidence. The Appellants took issue with the disparity between the name given in the particulars of the charge and the complainant's name in evidence. In the charge the complainant's name is given as CHABARI NTARIBERIA. In evidence the complainant was PW1 and he gave his name as CHABARI MATI.

The learned State Counsel did not address the issue. We do not blame him because he was served with the submissions by the Appellants in court at the appeal hearing. The learned trial magistrate did not address the disparity either.

The disparity in the names is serious as the names are so glaringly different and needed to be explained. In the absence of any explanation the issue to determine is whether the discrepancy is material or whether the same can be cured. We shall get back to this later.

The learned trial magistrate found the Appellants guilty of the main count of violent robbery on the basis of the evidence of identification by PW1 and 2. We have thoroughly re-analyzed the evidence adduced before the court and find that soon after the attack PW1 told PW3 that he did not recognize anyone during the robbery. That statement was made before the bags of cereal was recovered. PW1's position changed after the maize was recovered from the Appellants home. In the face of PW1's confession to PW3, we find that the evidence of identification by PW1 was not reliable.

Regarding PW2, she was severely injured during the robbery to the extent she lost her consciousness until her admission in hospital. Her evidence that she was able to recognize her attackers cannot be given much weight given the fact that PW1 who never lost consciousness was not able to identify any one and yet both of them were in the same room at the time of attack.

The other evidence against the Appellants is partly direct and partly circumstantial. The principle applicable when considering circumstantial evidence was discussed in the case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)**, at page 5 where the learned Judges of the Court of Appeal stated:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

There was important evidence adduced by PW4. This witness can be regarded as an independent witness. PW4 said that he was awake and working within but outside his home when he saw the 1st and 2nd Appellants and their wives walking on the road. PW4 testified that he saw the two Appellants and their wives carrying sacks of something on their backs. He said he noted that one of the women walked behind and was distorting the foot prints with her foot. PW4 said he did not give what he saw any thought until PW3 and 5 told him about the attack on PW1 and 2. PW4 said that he saw the 1st and 2nd Appellants go to PW1's home and return carrying luggage. PW4 was in the group which followed the maize grains from PW1's home to the home of the Appellants where the recovery was made.

We find that the evidence of PW4 was reliable and safe. PW4 saw the 1st and 2nd Appellants at 5am. By 5am when he saw them PW4 was busy doing his home chores meaning it was already lighted. Even if the evidence of identification may need corroboration, we find ample corroboration from the fallen grains leading to the Appellants home and the recovery of PW1's cereals. PW1's evidence that he saw the 1st and 2nd Appellants leaving the home of PW1 received support from the evidence of recovery of the cereals.

The Area Assistant Chief, PW7 told the court that she went to the scene and led the search for the robbers. She confirmed that some grains led them from PW1's home where the robbery had taken place to the home of the 3rd Appellant, 350 meters away, where they found his wife and the maize. Only the 1st and 2nd Appellants and their wives were home but that 2nd Appellant ran away.

The Appellants claimed that the maize was theirs. However the Appellants needed to explain the fallen grains of maize which led from the home of PW1 to their home. The 2nd Appellant ran away from home when he saw the Police approaching. His explanation that he ran away because he brewed illicit brew is not a reasonable explanation. Running away from the Assistant Chief was conduct of a guilty person.

The evidence adduced before the court especially by PW4, shows clearly that the 3rd Appellant was not seen either in the complainants home, or carrying the stolen luggages or at home when the stolen items were recovered. The learned trial magistrate convicted him only because the recovered cereals were found in his house. That was not sufficient evidence to found a conviction because the recovery was so soon after the robbery. The 3rd Appellant was neither at the scene of theft nor at scene of recovery. The 3rd Appellant's wife is the one who was home when the recovery was made. It was made within hours of the theft. Surely there was not even the remotest iota of evidence against the 3rd Appellant. He ought to have been given the benefit of doubt.

We find that the evidence before the court taken cumulatively leads only to one conclusion that the 1st and 2nd Appellants are the ones who broke into the home of PW1 and robbed him and his wife PW2.

Regarding who the complainant in this case is, we find that the evidence of the Assistant Chief PW7 who was the first government officer to visit the scene, confirms that PW1 was the complainant. PW7 visited the home and confirmed the robbery had taken place, and PW2 injured by the thugs. PW6 the Clinical Officer who examined PW2 confirmed her injuries. There is no doubt in our view as to who was attacked and robbed on the material night. Even though the last name of the complainant given in the charge does not match PW1's last name, we find the same was a mistake which was curable under section 382 of the Criminal Procedure Code. We are also satisfied that the Appellants were not in an illusion as to the charge facing them or the person alleged to have been robbed. Nothing turns on this point.

We find sufficient direct and circumstantial evidence against the 1st and 2nd Appellants. The fallen grains leading to the Appellants home, the recovery of the stolen grain which PW1 identified as his, and the conduct of a guilty mind; taken together with the evidence of PW4 who saw the 1st and 2nd Appellants and their wives carrying luggage is taken together strong direct and circumstantial evidence against the 1st and 2nd Appellants. We find that the prosecution has cogently and firmly established the circumstances from which an inference of guilt could be drawn. We have explained the circumstances herein above. We find that the same unerringly points to the 1stand 2nd Appellants guilt. We find that the circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the 1st and 2nd Appellants and none else.

We have considered the appeals by the three Appellants and find that the appeal by the 3rd Appellants succeeds. We allow his appeal quash the conviction and set aside the sentence. The appeals by the 1st and 2nd Appellants fail. We dismiss their appeals uphold the convictions entered against the 1st and 2nd Appellants and confirm the sentences.

Those are our orders.

Right of appeal explained.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JULY, 2012

LESIIT, J.

JUDGE.

J. A. MAKAU
JUDGE.