REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL 237 & 239 OF 2009

MOHAMMED GULO JIRMA…….....……1ST APPELLANT

MOHAMED MAALIM…….....…….2nd APPELLANT

V E R S U S

REPUBLIC…….RESPONDENT

(Being an Appeal against both conviction and sentence of the learned trial magistrate Hon. M. Maundu P. M. dated and delivered on 22/10/2009 in Isiolo Criminal Case No. 1522 of 2009)

The Appellants were the 1st and 2nd accused persons in the case before the lower court. The two were jointly charged with two others with two counts of robbery with violence contrary to section 296(2) of the Penal Code. The 1st and 2nd Appellants each faced an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. They were both convicted of both counts of robbery with violence and each sentenced to death in the first count. No sentence was preferred for the 2nd count.

The Appellants were aggrieved by the conviction and sentence and therefore filed these appeals which we have consolidated because they arose out of the same trial. The 1st Appellant filed several grounds of appeal but relied on the amended grounds in which has seven grounds of appeal were raise as follows:

1.That the learned trial magistrate erred in law and fact in making a finding that the prosecution had proved the case against the Appellant beyond reasonable doubt.

2. That the learned trial magistrate erred on a point of law in making a finding that the Appellant was properly identified and in failing to test the evidence regarding identification and the circumstances under which the identification was done.

3.That the learned trial magistrate erred in law and fact in making a finding that the recovereditems of belonged to the complainants and further erred in relying on the doctrine of recent possession of stolen items in convicting the Appellant.

4.The learned trial magistrate erred on a point of law and fact in relying on the prosecution

evidence that the Appellant led the complainant and the police to the house of a co-accused person where stolen items were recovered.

5.That the learned trial magistrate erred on a point of law and fact in relying on the evidence of the prosecution which was full of major contradictions and failing to resolve the said contradictions.

6.That the learned trial magistrate erred on a point of law and fact in disregarding the Appellant's dafence.

7.That the learned trial magistrate erred on a point of law and fact in failing to take into account that the prosecution failed to avail vital witnesses.

The 2nd Appellant also filed several grounds of appeal however relied on the supplementary grounds which are as follows:

1.The Learned Magistrate erred in law and fact in failing that the circumstances obtaining at the time of the alleged robbery could not have favoured a positive identification.

2.The Learned Magistrate erred in law in failing to interrogate further the evidence of PW1 and 2 as regards the identification of the assailants and make an inquiry on the circumstances obtaining at the time of the alleged robbery.

3.That the Learned Magistrate erred in law and fact by failing to find that the evidence of PW1 and 2 as regards identification of the assailants was worthless in the absence of an identification parade.

4.That the learned trial magistrate erred in law and fact in failing to find that the evidence of PW1, 2, 3 and 6 as regards the recovered cassettes was marred with glaring inconsistencies and loopholes and therefore find the same was wholly unreliable

5. That the Learned Magistrate erred in law and fact in failing to resolve the inconsistencies and loopholes in the prosecution case in favour of the Appellant.

6.That the Learned trial Magistrate erred in law and fact in disregarding the sworn testimony of the Appellant without assigning any reason for doing so.

7.That the Learned Magistrate erred in law and fact by failing to interrogate the testimony by the Appellant in the light of the evidence by the prosecution that the Appellant was arrested through the 1st Appellant

The Appellants appeal was opposed. Mr. Motende learned Counsel for the State appeared for the State in this appeal.

The facts of the case are that the two complainants were delivering *miraa* or *Khat* to Wajir from Maua in Meru in a motor vehicle registration number KAY 015 F. They left Maua at 7pm PW1 driving and PW2 as the turn boy. At about 9pm both were attacked by three men armed with a rifle, 12 kilometers after Garbatula town. They were robbed of money, mobile phones, chargers, caps, cassettes, *pangas*, torches, milk and water. They were held hostage for three hours when police approached in another motor vehicle sending the robbers to flee. The Appellants and two others were eventually arrested and charged with the offences. It was alleged some of the stolen items like the chargers, cassettes, lighter, brufen tablets and caps were recovered from the 1st and 2nd Appellants.

The 1st Appellant put forward an *alibi* as his defence. He said he had been to Nairobi until the date of the alleged offence when he travelled back to Isiolo. He gave receipts for his hotel charges for the 22nd June 2007. He also claimed ownership of the chargers and lighters claimed by the complainants and produced a receipt for both. He also said that the brufen tablets PW2 claimed were his belonged to him and that he

bought them at Maua. He also said that the house where the exhibits were recovered belonged to the assistant chief and that he even gave police the key which opened the house.

The 2nd Appellant denied the charge and said that the 1st Appellant caused his arrest at his house where the police found him with his wife. The 2nd Appellant said that the 1st Appellant had a grudge against him because the 1st Appellant had an affair with his wife.

This is a first appeal. Being the first appellate court we have subjected the entire evidence adduced before the lower court to a fresh analyses and evaluation while bearing in mind that we neither saw nor heard the witnesses and giving the due allowance. We are guided by **AJODE VS REPUBLIC (2004) 2 KLR 81**.

Regarding the duty and the role of a first appellate court we are guided by the Court of Appeal decision of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No. 272 of 2005**. It was stated as follows:

"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno vs . Republic [1972] EA 32 will suffice. In this case, the predecessor of this court stated:-

"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). 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 that fact that the trial court has had the advantage of hearing and seeing the witnesses."

The first and most important issue raised in this appeal is that of identification. Mrs. Ntarangwi for the 1st Appellant urged that the evidence of the two identifying witnesses could not be relied upon for several reasons. Counsel urged that the lighting conditions at the scene of robbery were not properly tested because the incident occurred at night. Yet the distance at which PW1 and 2 saw the assailants and the strength of the moonlight were both not given. Learned Counsel for the 1st Appellant urged that there was no proper identification of the 1st Appellant because PW2 entered the vehicle in which the 1st Appellant was travelling and pointed him out. Mrs. Ntarangwi relied on the case of **NJIRU Vs. REPUBLIC (2002)1 EA 218** where the court of appeal held:

"Through the correctness or otherwise of identification of a suspect entailed the examination of evidence, the issue of identification was a matter of law entitling a court of appeal to re-examine the circumstances surrounding the identification of the Appellants. Evidence relating to identification had to be scrutinized carefully and could only be acted upon if the court was satisfied that it was positive and free from possibility of error. The factors to be considered in making this determination included the surrounding circumstances and whether the eyewitnesses gave a description of the suspects to the police at the earliest opportunity (Republic v. Turnbull [1976] 63 criminal appeal number 132 and Hibuya v. Republic [1996] LLR 425 CAK applied)

We earlier held that conditions favouring a correct identification of the complainant's attackers were good. But whereas here the only evidence linking the fifth Appellant is visual identification at night time, this court has from time to time emphasized that identification parade evidence or other evidence is essential to test the correctness of the identification by the eye witnesses. In the instant case two witnesses testified that they picked the Fifth Appellant in an identification parade at a police station. The officer who might have conducted the parade was not called as a witness for the prosecution and no explanation was offered for not calling him. In view of the authorities on dock identification the evidence of Dr. Muthuri and his wife Martha is barely sufficient to sustain the

Fifth Appellant's conviction. On the authority of Bukenya v. Uganda [1967] EA 341 a rebuttable presumption is raised that had the prosecution called the officer who conducted the identification parade in which the Fifth Appellant was the suspect his evidence would have been adverse to the prosecution".

Counsel also relied on the case of **SAMUEL MUCHOKI Vs REPUBLI CCA NO. 54 OF 2002** where the court of appeal held:

More importantly, the superior court cannot be faulted in the manner it handled the evidence of visual identification of the appellant by the three witnesses. The court was alive to the decisions of this court to the effect that dock identification without an earlier identification without an earlier identification parade is almost worthless (see Kiarie v. Republic [1984] KLR 735; Njoroge v Republic [1987]KLR 19). The superior court was however, convinced that the evidence of dock identification was reliable. That the superior court adapted the correct approach with regard to the evidence of dock identification is supported by a later decision of this Court in Muiruri & 2 Others v. Republic (2002) KLR 274 where this court in effect held that not all dock identifications are worthless, and further that, a court might base a conviction on the evidence of dock identification if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court warns itself of the possible danger of mistaken identification (see page 277 paragraphs 25-35).

Mr. Kariuki for the 2nd Appellant urged that the learned trial magistrate failed in his duty when he failed to interrogate the lighting conditions in order to satisfy himself that it was sufficient to enable the witnesses to identify the assailants. Counsel relied on the case of **SIMIYU Vs. REPUBLIC 2005 KLR 192** where the court of appeal held:

" Further there was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity.in the absence of any inquiry, evidence of recognition may not be held to be free from error."

Counsel urged that PW1 had told the court that he and PW2 were ordered to lie down and further that he was very shocked and terrified by the incident. Mr. Kariuki wondered how in those circumstances he could have been able to identify anyone.

Mr. Motende, learned State Counsel urged that there was sufficient moonlight to enable PW1 and 2 identify the assailants. Learned State Counsel urged that the cabin lights in the vehicle were also on and that they too provided more light for purposes of identifying the assailants.

We have carefully scrutinized the evidence of identification by PW1 and 2, the only identifying witnesses in this case. There is no dispute that the incident took place at night in a remote part of the country where there was no form of lighting. PW 1 and 2 testified that there was moonlight at the time of the incident. PW1 said he was told to alight from the vehicle and was told to lie down facing the ground. PW2 testified that he was told to switch on the cabin lights which he did. He said that he spoke at length with the 1st Appellant who was speaking to him in the Borana language, and who robbed both of them of all their valuables. He said he was able to see and identify the 1st Appellant since he had a good opportunity to see and identify him.

We have tested the evidence of identification adduced by PW1 and 2. The two witnesses were very clear that they did not know the Appellants before. It was also very clear that no identification parades were conducted in this case for the two to identify the Appellants. The proper procedure was for the two to give a description of their attackers and thereafter to be called for ID parades to identify them. There was no evidence of a first report simply because the arresting officers in this case went with PW2 to effect the arrest. In the case of **TEREKALI & ANOTHER –VS- REPUBLIC [1952] E.A** it was held:

"Evidence of first report by the complaint to a person in authority is important as it often provides a good test by which the truth and accuracy of sub-sequent statement may be ganged and provides

a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others……"

The court was denied the opportunity to test the evidence of PW1 and 2.

We considered the circumstances of the Appellants arrest to determine whether it could render credence to the complainants' allegation that they could identify their assailants. We found inconsistencies in the prosecution case. PW1 was not involved in the arrests but PW2 was. PW3 said that he was led to the 1st Appellant by an informer whose identity remained unknown up to the close of the case. PW2 contradicted that evidence by saying he led police to a bus where he identified the 1st Appellant to the m and they arrested him. At the same time PW2 changed his evidence from saying he had never seen the assailants before to claiming he knew them before and that it was the reason he was able to lead police to them.PW2 had also not been candid to PW5. He told W2 he knew the assailants before and gave him the full names of the 1st Appellant.

The inconsistencies in the prosecution case in the evidence of PW2, 3 and 5 could not be resolved. It could have been simple to do so if the first report was before the court. For that we agree with Mrs. Ntarangwi that the reports made to the Police at Garbatula and Edara Police Stations were vital pieces of evidence.

The lighting conditions at the scene of incident were clear. PW 1 said there was bright moonlight. At the same time he said he was shocked and terrified of the incident and was made to lie facing down throughout the robbery. We are not satisfied that PW1 had ample time to see and identify his attackers. Had the police conducted ID parades for the witness, PW1 to identify the Appellants, the situation could have been different. Discussing ID parades and the importance of that evidence the court of appeal, in the case of **GABRIEL KAMAU NJOROGE -V- REPUBLIC [1982-88] I KAR 1134** held:

"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."

Further the police did not conduct an ID parade for PW1 to identify anyone, which should have been organized since PW1 was not involved in the arrests. In absence of other evidence to support the evidence of identification by PW1, his was weak and of little probative value.

PW2 was exposed to the Appellants at the time of their arrests and in absence of the evidence of first report, and due to inconsistency between his evidence and that of the vehicle owner, PW3, it was difficult to test the veracity of his evidence.

The other issue raised by the defence was that of recovery and identification of exhibits. PW3 arrested the 1st Appellant at a bus. His evidence was that he recovered medicine, brufen tablets and a lighter which PW2 claimed were his. PW 6 recovered more exhibits from the 1st Appellant he identified these as three cassettes bearing the markings "Msoyo", "Juma 110" and "Ali". He also recovered 2 charges bearing the marks "Moha" and "KAY 298", and two caps.

The evidence of the recovered items and the markings on them was controversial. PW2 testified that the three cassettes were recovered from the 2nd Appellant and that they bore markings "bamboon", and "Mohamed". PW3 on his part said that the 1st Appellant had a charger bearing the marking "KAY 5".

We find the evidence of recovery of the exhibits from the 1st and 2nd Appellants controversial. The alleged markings on each of the exhibits were contradicted. The Appellant from whom they were recovered was contradicted. The only conclusion to draw from this is that the evidence of recovery of these exhibits and the alleged identification of some of them as the complainants' evidence was

unreliable. Even though the exhibits were recovered few days after the robbery, the doctrine of recent possession could not be applied to the case.

The 1st Appellant put forward an alibi as his defence. The 2nd Appellant denied the charge. He even produced receipts to support his case that the exhibits he admits were recovered from him were actually his. The receipts he produced were for the medicine, the lighter and the charger. We are of the view that their defences were reasonable and given the weak nature of the prosecution evidence against them, the learned trial magistrate ought to have given both of them the benefit of doubt.

We think we have said enough to show that the Appellants appeal have merit. We accordingly allow the appeal of both Appellants, quash the convictions and set aside the sentence. The Appellants should be set free unless they are otherwise lawfully held.

Those are our orders.

DATED SIGNED AND DELIVERED THIS 12TH DAY OF JULY 2012

LESIIT, J
JUDGE.

J. A. MAKAU
JUDGE.