REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 623 & 626 of 2007

HUSSEIN SALIM SHABANI.....1ST APPELLANT

IBRAHIM OSMAN NDEI.....2ND APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

(From the original conviction and sentence in Criminal Case No.1893 of 2006 of the Chief Magistrate's Court at Makadara by E.K. Usui– Senior Resident Magistrate)

J U D G M E N T

IBRAHIM OSMAN NDEI and **HUSSEIN SALIM SHABANI,** theAppellants herein were convicted for the offence of Robbery with violence **contrary to Section 296 (2) of the Penal Code.** The particulars of the offence, as set out in the charge sheet, were that the 2 appellants, together with the 3rd accused, **ANTONY IRUNGU NYAGAH,** robbed the complainant, LUCY WAMBUI NGUNJIRI **(PW 1).** The robbery took place on 20th March 2006 at Majengo, in Nairobi, whilst the 2 assailants were armed with a metal bar.

The 3 assailants are said to have robbed **PW 1** of Kshs.59,500/- cash; 4 US Dollars; a "Sendo" mobile phone; a bag; a pouch; an Identity Card serial number 111877365; a voter's card; 3 notebooks; 2 lesos; 3 K-Rep Bank withdrawal slips; a Co-operative Bank ATM card No. 0110019682500; 2 registration forms for a business permit; and other personal documents.

The value of the stolen items was specified as KShs.67,354.

It was alleged that during the robbery incident, the assailants used actual violence on the complainant.

At the conclusion of the trial, the 3rd accused was acquitted. However, the 2 appellants were convicted.

The learned trial magistrate sentenced both the appellants to suffer death as by law prescribed.

In the appeal before us, the appellants asserted that their alleged identification was doubtful. The incident occurred at about 6.00a.m, and the appellants contend that the attack was so sudden that **PW 1** cannot have had proper opportunity to properly identify the assailants.

Although **PW 1** said that the lighting was sufficient, the appellants asked the court to disbelieve her, as **PW 2** (who was in the company of **PW 1** when the complainant was attacked), said that it had been dark.

Mrs. Rashid, the learned advocate for the appellants, further submitted that **PW 2** was in a better position than **PW 1**, to identify the assailants, as she stood nearby watching the attack unfold. Yet, **PW 2** said that she could not identify the assailants.

In contrast, **PW 1** was said to have been struggling with the assailants, thus making it more difficult, (in the assessment of the appellants), to identify those who were attacking her.

The appellants also faulted the police for failing to conduct any Identification Parades. Instead, the police appear to have arranged for **PW 1** to meet with all the accused persons, in the hope that they could reconcile.

According to the 1st appellants, he was only described, by **PW 1**, as being mono-eyed because **PW 1** had already seen him at the police station.

Meanwhile, as regards the items which **PW 3** allegedly recovered from the house of the 1st appellant, the said appellant submitted that there was no proof that the house was his.

Had the house been his, the 1st appellant says that he would have counter-signed an Inventory confirming the goods recovered therefrom.

Such a requirement is said to be provided for in **Section 19 of the Police Act.**

In any event, when the police allegedly recovered the exhibits from the house in question, the 1st appellant says that he was not inside that house. Therefore, the prosecution should have proved that he (the 1st appellant) had had exclusive use of the house in question.

Instead, the prosecution is said to have failed to lead evidence to connect the 1st appellant to the house.

The appellants also highlighted the variance between the value of the items cited in the charge sheet and the value that the witness testified about. As an example, the charge sheet talked of Kshs.59,500/- plus 4 US Dollars. However, **PW 1** said that she was robbed of KShs.58,000/- plus 3 to 4 Dollars.

Thereafter, **PW 3** told the trial court that **PW 1** had reported at the police station, that she was robbed of KShs.40,000/-.

The said variances are said to have been fatal to the prosecution case.

Mr. Mulati, learned state counsel, opposed the appeal. He submitted that the variances in the values of the items cited in the charge sheet, from the values that the complainant cited in her evidence, was not fatal. In his view, such variances were curable pursuant to **Section 382 of the Criminal Procedure Code.**

The respondent also submitted that whereas **PW 1** had not described the assailants, **PW 6** did describe them. It was the respondent's position that **PW 6** was only able to describe one of the assailants as having one eye because he had identified him.

But the appellants responded to that contention by submitting that the alleged identification by **PW 1** was only dock identification. The appellants added that the only way that the alleged identification could have been put to the test would have been through an Identification Parade, in which there were some mono-eyed members. As no such parade was conducted, the appellants reiterated that there had been no positive identification.

The respondent further submitted that the doctrine of recent possession was correctly applied by the trial court, after the stolen items were recovered from the 1st appellant's house.

But when the appellants reminded the respondent that there was no proof of ownership of the house, the respondent argued that the 1st appellant was found inside the said house.

In the discharge of our mandate as the first appellant court, we have re-evaluated all the evidence on record. We have also given due consideration to all the legal authorities cited together with the other relevant law.

PW 1 testified that she was in the company of two (2) other ladies on the morning of 20th March 2006. The 3 ladies alighted at the Chief's stage.

Shortly thereafter, someone grabbed the paper-bag which **PW 1** was carrying. **PW 1** said;

"I heard someone grab me. He was facing me as he turned me. It was the 2nd accused. He was trying to snatch my handbag. I saw 2nd accused very well as there was very strong light from a nearby building"

When **PW 1** was resisting the efforts of that person, she was hit on her leg, from behind. It is that, that prompted **PW 1** to drop her back, as she fell down.

PW 1 did not see the person who hit her, because she was only facing the 2nd accused.

The 2nd accused picked-up **PW 1's** paper-bag and he ran off with it. As he was running away, his 3 accomplices blocked the path of **PW 1's** colleagues and of **PW 6**, to stop them from pursuing the 2nd appellant.

PW 1 was so seriously injured that she was unable to walk for 3 weeks.

Meanwhile, two (2) days after the incident, **PW 1** was informed that some people had been arrested with the items which had been stolen from her. She went to the police station, where she identified her 3 stock books; 3 bank slips for depositing money; one withdrawal slip; National Identity Card and Voter's card.

PW 1 said that when she reported to the police, she told them that she could recognize the 2nd appellant, who is the person who had stolen from her.

When **PW 1** was asked why an Identification Parade was not conducted, she told the court that it was because the 1st appellant had called for **PW 1**, seeking reconciliation.

PW 1 also told the 2nd appellant that he had sent his parents to **PW 1,** with a view to reconciliation. However, the money being offered was not enough.

PW 1 did recognize the parents of all the 3 accused persons when they were sitting in court.

PW 2 was one of the other 2 ladies who were with **PW 1** when the complainant was robbed.

She said that when she saw some people hit PW 1, and then snatch her paper-bag, she (**PW 2**) ran away. After the assailants disappeared, **PW 2** returned.

According to **PW 2**, the light was not very bright.

PW 2 did not identify any of the persons who robbed PW 1.

PW 3 was a police officer attached to the District Officer's Office, Pumwani.

On 21st March 2006, **PW 3** received information that **PW 1** had been attacked and had been robbed of KShs.40,000/-.

PW 3 heard the screams and rushed to the scene. He found that PW 1 had been rushed to hospital. However, **PW 3** was told by an informer that he knew one of the assailants. The informer then led **PW 3** to the 1st appellant's house.

Upon conducting a search, **PW 3** recovered documents belonging to **PW 1**. Later, **PW 1** identified the said documents at the police station.

During cross-examination, **PW 3** said that the informer pointed at a mud house which was the abode of the 1st appellant. PW 1 added the following;

"We were only police officers when we did the search. We did not need a search warrant. I booked you with robbery with violence and the recoveries made. I had not been given your description as the complainant left for hospital. The informer had watched what was happening when you attacked the complainant."

That means that the 1st appellant was not found at home when the police officers were searching the house where the stolen items were recovered. The police officers were on their own.

They did not have any independent witness with them. By an independent witness, we mean any person who was neither a suspect or the police officers who were conducting the search.

A neighbour, a parent, a son, an employee or an employer of the suspect could, for the purposes of the search, be deemed to be an independent witness to the said search.

The danger of conducting a search in the absence of the suspect and also in the absence of independent witnesses could result in the suspect disowning knowledge of anything that might be recovered.

PW 4 is the doctor who examined the complainant about a week after the incident. He found that she was tender on the left buttock, and also that she had pain on the left leg.

The degree of injury was assessed as harm.

In our assessment, the injuries noted by the police doctor were consistent with the assault which the assailants visited upon the complainant. Therefore, **PW 4** corroborated the testimony of **PW 1**, regarding the assault upon her, when she was being robbed.

PW 6 was the Investigating Officer. On 22nd March 2006, he called out the 1st appellant from the cells. **PW 6** interrogated the 1st appellant concerning the allegations and the exhibits.

The information provided to **PW 6**, by the 1st appellant, "excited" him, as the information led **PW 6** to the place where the 2nd and 3rd accused persons were.

However, when **PW 6** searched that house, he made no recoveries.

PW 6 also testified that the items which were exhibited before the trial court were found in the possession of the 1st appellant. Indeed, his testimony was that the items were found with the said accused.

PW 6 testified that **PW 1** identified the 2nd and 3rd accused when she saw them walking. At that time, **PW 6** had not even talked to **PW 1**.

PW 6 used to work at an hotel in Gikomba, at the material time. He alighted from a matatu and was walking towards his place of work on the fateful morning. He heard a woman screaming and rushed towards the direction where the screams were emanating from. He saw a woman being attacked by 3 men.

He thought of going to the help of the lady, but hesitated when he noticed that the men were armed with an iron bar.

PW 6 noticed that one of the assailants had a bad eye. He did so when the men were only about 4 metres away from him. And, according to **PW 6**, the 1st appellant was the person who had a bad eye; the 2nd appellant had the metal bar; whilst the 3rd accused ransacked **PW 1**.

Was there light?

PW 6 said that it was "already bright." As a result, **PW 6** was able to witness all that happened.

That was the sum total of the prosecution case.

When the 1st appellant was put to his defence, he said that he was arrested when he was reading a newspaper. The reason for his arrest is that his business rival pointed him out to some police officers.

On his part, the 2nd appellant said that he was arrested when he had gone to visit his cousin, Jona, at Majengo. He found Jona with the 3rd accused, who is the boyfriend to Jona's sister.

The 3rd accused corroborated the evidence of the 2nd appellant about the place and time when they were arrested.

Having re-evaluated the evidence we note that **PW 2** never said that there was darkness at the time of the robbery. Her words were;

"It was not very bright"

In contrast, both **PW 1** and **PW 6** said that it was already bright, because it was morning. **PW 1** said it was 6.00a.m. whilst **PW 6** said it was about 6.30a.m.

In the result, we find that the evidence of **PW 2** about the lighting did not contradict the testimony of **PW 1** and of **PW 6**.

On her part, **PW 1** said that the 1st appellant was facing her when he was struggling with her. She was therefore able to clearly see his face.

The person who attacked **PW 1** from behind was not the 1st appellant. It was one of the other 2 accomplices of the 1st appellant. Therefore, although the complainant was attacked with an iron bar, from behind, that could not make it difficult for the complainant to identify the 1st appellant who was facing her directly.

What was the source of the lighting at the scene of crime?

PW 1 talked of bright light, presumably from the sun. **PW 6** also said that there was bright light. But **PW 2** said it was not very bright.

And whilst **PW 1** also talked of "very strong light from a nearby building", both **PW 2** and **PW 6** were silent in that regard. Is that reason enough to therefore hold that the complainant was not trustworthy? We do not think so, because the other two eye-witnesses at least said that there was light. Had those other witnesses said that there was darkness, the court would have concluded that there was inconsistency or

contradictions between the prosecution witnesses. In such a scenario the court may then have been obliged to either choose to believe one witness against another (for reasons to be specified), or alternatively the court could conclude that it could not determine which of the witnesses should be believed.

In this instance, all the three witnesses said that there was lighting. The court therefore does not need to choose between the witnesses, as to who should be believed.

In any event, this court did not have the opportunity to see the witnesses as they were testifying. We did not observe the demeanor of the witnesses. Therefore, there would be a difficulty in determining which witness should be believed, and which witness should not be believed.

We say that it would be difficult, not impossible. We say so because, apart from demeanour of witnesses, the court may analyse the circumstances and other pieces of evidence tendered, and ultimately determine the evidence that was improbable or was more probable than not.

PW 1 and **PW 6** said that they identified the 2nd appellant. And **PW 6** also identified the 1st appellant. Yet **PW 2** did not identify any of the three assailants. Is that because the lighting was insufficient or because the circumstances prevailing were difficult?

PW 2 made it clear that as soon as **PW 1** was attacked, she ran off. It is thus not surprising that she did not identify any of the assailants.

In contrast, **PW 6** was intent on going to the assistance of **PW 1**. He only hesitated because the assailants were armed with an iron bar, which they used to assault **PW 1**. However, **PW 6** observed the assailants from about 4 metres away. That would explain why he was able to identify them.

Was the Identification of the appellants' positive?

Both **PW 1** and **PW 6** describe a scenario which leads us to believe that they did identify the appellants. But neither of them led to the arrest of the appellants.

Indeed, it is not clear who arrested the 1st appellant, or where he was arrested.

The evidence shows that **PW 3** was with other police officers when an informer directed them to a house. The officers were alone when they searched that house. In effect, the 1st appellant was not at the said house.

In those circumstances, what evidence was there to prove that the 1st appellant either owned or lived in that house?

We have no evidence to that effect. All we were told is that an informer directed the police officers to the house of the 1st appellant.

As there was no proof that the 1st appellant owned or was living in that house, the learned trial magistrate erred in applying the doctrine of recent possession, because it had not been established that the said appellant was in actual or constructive possession of the recovered items.

We also find that the police ought not to have exposed the 3 suspects to the alleged eye-witnesses before conducting Identification parades. In this instance, both eye-witnesses testified that they had not known the 3 assailants before the material day. Then the suspects were arrested in the absence of the eye-witnesses.

The most efficacious way of verifying whether or not the eye-witnesses had positively identified the suspects at the time of the incident, would be through a meticulously conducted Identification Parade.

As no such parades were conducted, we cannot say with any degree of certainty that **PW 1** and **PW 6** had positively identified the appellants.

Of course, if the parents of the appellants sought reconciliation with **PW 1**, that implies that there was an element of guilt on the part of the appellants. Notwithstanding the said implication, the law presumes every accused person to be innocent until and unless the prosecution proves otherwise.

In the event, we find that the prosecution did not prove the case against the appellants to the required standard. Therefore, the convictions cannot be sustained. We quash the convictions and set aside the sentences for both the appellants.

We also order that the appellants be set at liberty forthwith unless there are or either of them is otherwise lawfully held.

Finally, we feel obliged to emphasize the importance of the police officers who are investigating any criminal offence, to conduct identification parades at which alleged eye-witnesses will be afforded an opportunity to demonstrate that they had positively identified the suspects. Identification Parades provide an important safeguard to suspects as well as to the process of justice.

There is no justification for the police showing suspects to witnesses before identification parades have been conducted to try and ascertain if the eye-witnesses had identified the suspects as the persons they had seen earlier, during the incident giving rise to the criminal charges preferred against such suspects.

Dated, Signed and Delivered at Nairobi, this 6th day of November, 2012.

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FRED A. OCHIENG	**LYDIA A. ACHODE**
JUDGE	**JUDGE**