REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL 337 OF 2006

FREDRICK SILA NZUKI ……..……...APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

(From the original conviction and sentence in Criminal Case No. 858 of 2005 of the

Chief Magistrate's Court at Kibera by Mrs. Muketi – Principal Magistrate)

JUDGEMENT

The appellant was charged with five counts but convicted in counts one and two, hence sentenced to suffer death as prescribed by the law in both counts. In count one, he was charged with robbery with violence contrary to section 296(2) of the Penal code. The particulars were that on the 20th day of January 2005 at Kibera Laini Saba in Nairobi, within the Nairobi area province, jointly with others not before court while armed with offensive weapons, namely, iron bars robbed Magdaline Mukonyo Muli of one T. V. Set 14 inch make Sony valued at Kshs.8,500/= and at or immediately before or immediately after such robbery threatened to use actual violence to Magdaline Mukonyo Muli.

In count two the appellant was charged with robbery with violence contrary to section 296(2) of the Penal code. That on the 26th day of January 2005 at Kibera Laini Saba in Nairobi within Nairobi area province, jointly with others not before court, while armed with offensive weapons namely pangas, robbed Erick Lundu Dimbu of one sewing machine South China by make and a full dress, all valued at Kshs.3,500/= and at or immediately before or immediately after such robbery threatened to use actual violence to the said ERIC LUNDU DIMBU.

In count three, the appellant was charged with Burglary and stealing contrary to section 304(2) and 279(b) of the Penal Code. That on the 26th day of January 2005 at Kibera Laini Saba in Nairobi, within Nairobi area, province, jointly with others not before court broke and entered the dwelling house of Fabiano Ashiona with intent to steal therein and did steal one great wall T.V. 14 inches, one mobile phone Motorola T. 190, a sewing machine, make butterfly, all valued at Kshs.9,40/= the property of the said Fabiano Ashono.

In count four, the appellant was charged with handling stolen goods contrary to section 322(2) of the penal code. That on the 26th day of January 2005 at Kibera Laini Saba in Nairobi within Nairobi area

province, otherwise than in the course of stealing, dishonestly received or retained a National Star Radio, Thomson Television set 14 inch, a wall clock, one sewing machine, a side mirror, two bags, a Nokia mobile phone, a speaker and an iron bar knowing or having reason to believe them to be stolen goods.

In count five, the appellant was charged with the offence of possession of public stores contrary to section 324(2) of the Penal code. That on the 26th day of January 2005 at Kibera Laini Saba in Nairobi within Nairobi area province had in his possession public stores namely a military bayonet of the department of defence such property being suspected or having been stolen or unlawfully obtained.

After full trial the appellant was convicted in counts 1 and 2 in respect of robbery with violence contrary to section 296(2) of the Penal Code. He was also convicted of counts 3 and 5 as charged. The trial court concluded that there was insufficient evidence to convict the appellant in respect of count 4 which was in respect of handling of stolen goods contrary to section 322(2) of the Penal code. The appellant is aggrieved by the decision of the trial court and has now filed an appeal before us. The basis of the trial court's conviction is two fold;

(1) The complainant in the first count knew the appellant before the incident as he was related to PW1 and PW2 by marriage hence the evidence was that of recognition.

(2) The appellant was found with goods stolen from the complainants PW1, PW2, PW3 and PW5.

In essence the case of the prosecution is that the appellant was properly recognized by the complainants in counts 1 and 2 and that he was later found with various items allegedly stolen from the complainants.

The evidence of PW1 is that on the material night of 25th and 26th January 2005 some intruders broke into her house and stole her TV. She stated that at the time of the said breaking she was in the company of her son who fought with the intruders. She stated that the appellant was the one who was threatening her son with iron bar in order for her son to surrender the TV to the attackers. The following day the village elder asked her if she knew the attackers and she directed them to the house of the appellant. The appellant was found in the house with the same clothes he was wearing at the time of the attack. According to PW1 youth wingers removed two TVs from under the bed of the appellant. She also says two sewing machines, a shaving machine and various items were recovered from the house of the appellant. The appellant was then taken to the chief's office and officers from Kilimani Police station called. It is also the evidence of PW1 that she is the one who took five youth wingers from the chief's office to the house of the appellant and it is those people who arrested the appellant.

PW2 Joan Vihenda stated that on the material night she went to sleep in her house but later discovered a sewing machine had been stolen from her. She reported the matter to the APs camp where she was given a letter to go to Kilimani police station. On arrival at Kilimani police station she found her items had been recovered but she did not know whether they had been recovered from the appellant or not.

PW3 on his part stated that on the material night at about 2 a.m. he was woken up by intruders who had gained entry into his house. He alerted his wife and armed himself with a *panga* in order to confront the attackers. By then he had discovered they had taken two chairs, his TV and sewing machine and locked him from outside. Later while at work he was informed that items had been recovered and were taken to DO's office. He then found his sewing machine which had earlier been stolen from him at the DO's office.

PW4 Bernard Mambo is the son to PW1 and on the material night he was sleeping in the same house with her. He stated that he saw the appellant with the help of electrical light and as the person who had entered their house after breaking the door. He said the attackers were five in number but he knew the appellant as they were cousins. The following day his mother left to the office of the chief but he says later that they saw people passing outside their house with their TV. He says that the person he saw carrying their TV was the appellant.

PW5 on his part stated that he lost items on the night of 25th January 2005 and on the following morning when he went to the chief's office to report, he was shown items and the appellant. But he says he did not recognize the appellant as one of the attackers.

PW6 PC Dephis Wanyonyi is the investigating officer and his evidence is as follows: That on 26th January 2005 he was informed by the OCS that a person has been arrested with various items allegedly stolen from the complainants in counts 1, 2, 3 and 4. He says he did not enter the house of the appellant and did not know how the goods were recovered from the appellant. However he said the first complainant told him that the appellant was related to her and with the help of the light she was able to recognize her. He then produced the items before court.

The appellant on his side gave unsworn testimony and stated that on the material day while at his place of work he was confronted by a large group and one of them stated that he is the one who had sent robbers to their houses. He was arrested and taken to the chief's office and put in cells. And that the first time he saw the items produced before court was when he reached the chief's camp. In short he denied the charges that were preferred upon him and complained that the charges were fabricated.

We have carefully analyzed and evaluated afresh the entire evidence adduced before the trial court while bearing in mind that we neither saw nor heard any of the witnesses and giving due allowances as required in law. The starting point is whether there is sufficient evidence to link or connect the appellant to the charges that were preferred against him. And secondly whether there is any basis for the trial court to convict the appellant. It is the contention of the trial court that the appellant was positively identified by PW1 and her son PW4 on the material night when the offence of robbery was committed against them. It is also the position of the trial court that the case of the appellant was that of recognition which is stronger than the evidence of identification because PW1 and PW4 were persons known to the appellant. Further the trial court also took the view that since the appellant and the two witnesses were related, then they had opportunity to correctly recognize him as one of the attackers. It is important for us to address our mind to the issue of recognition and whether the appellant was properly identified by PW1 and PW4. We appreciate that in cases of recognition the court is required to exercise sufficient care because some witnesses may have sustainable difficulties in differentiating between different persons who may have similar appearances. In our opinion such a difficulty can result in confusion in the minds of witnesses with the possibility of an innocent person being convicted for an offence he never committed. It is for that reason that we think evidence on recognition must be cogent, credible and watertight. We have noted that the incident took place at about 2 a.m. when it was raining and when there was no proper light in the house of PW1. The issue that comes straight in our mind is whether PW1 and PW4 had sufficient opportunity to see and recognize the appellant during the incident and in the course of the robbery. In our view the circumstances surrounding the robbery and the lack of evidence as to the intensity and source of light makes us to believe that the appellant may not have been properly identified. Another issue that also creates doubts in our mind is the lack of evidence to show that PW1 and PW4 made a report at the earliest time possible that they had seen the appellant as one of the attackers. There is no evidence to show that PW1 and PW5 made a report giving a proper description or possible description fitting the appellant before he was arrested by the law enforcement authority. There is no evidence before us to show the circumstances that led to the arrest of the appellant and the way the alleged items were recovered. And in the absence of evidence showing clearly as to how the appellant was arrested and whether he was arrested on evidence given by PW1 and PW4 then we are left with a situation where we are minded to speculate his arrest. In our view the failure of PW1 and PW4 to give to the police or to the Chief prior to the arrest a description of the appellant as one of the attackers, then the alleged recognition by them cannot be said to be free from mistake or error. It is for that reason we make a finding that the evidence of PW1 and PW4 cannot establish the guilt of the appellant. Furthermore the prosecution did not present before court any evidence as to the circumstances and how the appellant was arrested with items allegedly stolen from the complainants. In our view the trial court did not evaluate the evidence or give adequate consideration to the evidence on recognition. Had the trial court performed its cardinal duty, it would have reached a conclusion that the charges against the appellant was not established beyond any reasonable doubt.

The other issue that led the trial court to convict the appellant is the issue of recent possession. The trial

court contended that the items stolen from PW1, PW2 and PW3 were found in possession of the appellant and that the doctrine of recent possession speculates that if a suspect is found with stolen items within a span of time that can be defined as recent then he is either the thief or the handler. On that premise the trial court came to the conclusion that the appellant was the actual thief since he lived within the vicinity where the robberies and burglaries were committed. It was also the position of the trial court that the appellant had the opportunity to commit the offences charged and he used that opportunity against the complainants.

We have no doubt in our mind that the trial court analyzed the law as regards the principle of recent possession. But our problem is how the issue of recent possession was addressed by the trial court in respect of the evidence that was tendered before court. In our view where premises has been broken into and certain properties stolen therefrom and very shortly afterwards , a man is found in possession of that property that certainly evidence from which a judicial officer can infer that a suspect is the housebreaker or that he has dishonestly obtained the said goods. Under such circumstances the suspect is in law duty bound to offer reasonable explanation as to how he came to be in possession of the items otherwise than as the thief of guilty receiver. The doctrine of recent possession has been defined by the court of appeal in the case of **Isaac Nanga Kahiga alias Peter Nganga Kahiga v Republic Criminal Appeal No.272 of 2005** (unreported) as follows;

"**It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses."**

It would appear from the evidence on record that none of the witnesses gave evidence as to the mode and nature of possession which is central to the case of the prosecution. There is no evidence showing that upon evidence given by PW1 or another witness that a search was conducted on the house of the appellant which resulted in the recovery of the stolen items. The prosecution did not avail the persons who arrested the appellants with the items that he was allegedly found with. It is manifestly clear from the evidence of the investigating officer that the items were collected from the Chief's office without proper foundation as to the circumstances that led to their recovery. It is not possible to identify which items were collected or recovered from the house of the appellant and it is also not clear whether the items were actually recovered from the appellant. As a result of confusion and mix up of the prosecution as to the mode of recovery of the exhibits that resulted in the conviction of the appellant, then the conviction base of the recent possession cannot be sustained.

We agree that some of the items were identified by the complainant as being part of the stolen items, however, in the absence of proper evidence as to the way they were recovered, the appellant cannot be expected to give a reasonable explanation or rebuttal. In short the point we are making is that there is no evidence to show that the appellant was found in possession of items earlier stolen from the complainant. And in the absence of that evidence the appellant cannot be expected to give satisfactory explanation as to how he came by them. As a result we have come to the conclusion that the evidence on possession in which the trial court used as a foundation to convict the appellant was not sound and credible. For that reason we think the position taken by the trial court on the concept of recent possession is utterly misplaced and untenable.

In the case before us none of the prosecution witnesses testified to having searched and recovered the alleged items stolen from the complainants. In fact the evidence on record is that the items were found at the Chief's office and the circumstances of the recovery have not been clearly narrated by the prosecution. We think this aspect of the evidence was not considered by the trial court thereby resulting in misdirection that the appellant was found in possession of items stolen from the complainants. In our

view there is no evidence to support that contention, therefore the finding by the trial court that the principle of recent possession applies has no basis in law. Having thoroughly scrutinized the whole evidence we find that it would be unsafe to uphold the appellant's conviction on the issue of recent possession.

Another issue that attracted our attention is in respect of the conviction entered by the trial court in respect of count 5 which is in possession of public stores contrary to section 324(2) of the Penal Code. The trial court contended that the appellant was found with a military bayonet of the Department of Defence which was suspected of having been stolen or unlawfully obtained. In fact there is no evidence to show that the appellant was found in possession of the said item since none of the prosecution witnesses referred to the same exhibit. Apart from being produced by PW7 no witness testifies that an item allegedly stolen from the Department of Defence was found in possession of the appellant. We therefore think it was misdirection on the part of the trial court to convict the appellant in respect of a count where the prosecution led no evidence. The court as a matter of good practice is guided by evidence and when there is no evidence in support of a particular charge it is not the duty of the court to convict suspects simply because an exhibit is produced before court by the prosecution. We think the trial court in this case was not guided by the evidence on record but with respect based its conviction purely on speculation. The fact that the said exhibit was found among the items allegedly recovered from the appellant is not a good basis to sustain a conviction. The issue of whether it was planted or not is neither here nor there because the issue of possession was not correctly and properly proved before court.

Lastly what is of great concern to us is the manner in which the trial court sentenced the appellant. This was a grave matter where the trial court committed a fundamental misdirection. As stated earlier the trial court convicted the appellant in respect of counts 1, 2, 3 & 5. It is clear that counts 1 and 2 concern robbery with violence under section 296(2). Count 3 was a charge in respect of burglary and stealing contrary to section 304(2) and 279(b) of the Penal Code while count 5 was in respect of public stores contrary to section 324(2) of the Penal Code. The trial court sentenced the appellant to suffer death as prescribed by the law in respect of count 1 and 2. The procedure for sentencing where capital offences are charged together with lesser offences that attract term of imprisonment is very clear and it is incumbent upon trial courts to ensure the same is followed. We can do no better than to reiterate to what was said by the Court of Appeal in the case of **Abdul Debano Boye & another v Republic Criminal Appeal No.19 of 2001**(unreported) as follows;

"**We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice ever; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1st appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentences of death is carried out? We can find no sense at all in such proposition and the long practice which we are aware of is that once a sentence of death is imposed once, the other counts are left in abeyance so that if there was successful appeal on the count on which the death penalty has been imposed, the Court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. We hope that sentencing courts will take heed of these simple requirements and act appropriately."**

As indicated earlier the trial court ordered that the appellant would suffer death in count 1 and 2. The trial court did not appreciate that a convicted person cannot suffer death twice therefore, there is no sense or practical direction in ordering a convicted person to suffer death in two counts where he was convicted in those two counts. As ordered by the Court of Appeal the usual practice where an accused person has been convicted in more than one capital offence in the same trial he should be sentenced in the first count

only as a person cannot be hanged more than once. The conviction in the other counts whether it is capital or otherwise should remain in abeyance.

The other issue that also needs our attention is the decision by the trial court after conviction and during sentencing in discharging the appellant in respect of counts 3 and 5. We think that after conviction the trial court had no jurisdiction to discharge the appellant under section 35(1) of the Penal Code. That was a total misdirection which we think we must set it aside. As indicated hereinabove after conviction the trial court was required to hold in abeyance the issue of sentencing in respect of counts 2, 3 and 5 since she sentenced the appellant to suffer death as prescribed in law in count 1. In the premises we correct that misdirection and set aside the discharge order.

In short we are fully satisfied that there was insufficient evidence upon which to base a proper conviction against the appellant. The evidence forming basis of the trial court's conviction was purely contradictory and insufficient to sustain a conviction. We are therefore satisfied that the prosecution has not proved its case beyond reasonable doubt and that the appellant was not given the benefit of doubt. In the premises we allow the appeal set aside the conviction of the appellant in all counts and order his immediate release unless lawfully held.

Dated, signed and delivered at Nairobi this 3rd day June, 2009.

J. B. OJWANG **M. WARSAME**

JUDGE **JUDGE**