



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GATEMBU, SICHALE, KANTAI J.J.A)

CRIMINAL APPEAL NO. 113 OF 2013 (R)

BETWEEN

RICHARD LENGURO RAMACHA.....1<sup>ST</sup> APPELLANT

LONKIYA LELIKAT.....2<sup>ND</sup> APPELLANT

JACOB LELEMEUWA.....3<sup>RD</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Nakuru (Wendoh & Emukule, JJ) dated and delivered on 31<sup>st</sup> May, 2013 In*

**H.C.CR.A NO. 417, 420 & 421 OF 2010)**

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JUDGMENT OF THE COURT

This is a second appeal emanating from the judgment of **Wendoh & Emukule, JJ** delivered on **31<sup>st</sup> May, 2013**.

A brief background to this appeal is that **Richard Lenguro Ramacha**, (the 1<sup>st</sup> appellant herein), **Lonkiya Lelikat**, (the second appellant herein) and **Jacob Lelemeuwa** (the 3<sup>rd</sup> appellant herein) as well as **Fred Lontis** and **Loiramiram Lolmodon** were charged with two (2) counts of robbery with violence contrary to Section 296 (2) of the Penal Code in count I & II. The particulars of count I were that on **26<sup>th</sup> March, 2009**, at Kisima area along Kisima - Suguta Marmar Road in Samburu Central District of the then Rift Valley Province, the appellants together with others not before court and while armed with a G3 Rifle S/No. 77097794, AK 47 S/No. BA 0560- A7832 and Ceska Pistol S/No. A116789 robbed **Gladys Njeri Kinyanjui** of her mobile phone make 6280, one pair of safari-boots, one t-shirt, 3 pairs of socks, three packets of Mango juice, Kshs 400/= and snacks all valued at Kshs 25,000. In count II, it was alleged that at the same time and at the same place, they robbed **Moses Nduyu Mwangi** of his mobile phones make Samsung M620, (2) Samsung x550, (3) Nokia 1112, (4) Nokia 2760, (5) Nokia 6085 and Samsung x 550 charger and cash Kshs 100 and at the time of the robbery threatened to use personal violence to the said **Moses Nduyu Mwangi**. Then there was an alternative charge of handling stolen goods contrary to Section 322 of the Penal Code, the particulars being that on **26<sup>th</sup> March, 2009**, at Lolmolok village, Suguta location in Samburu Central District of then Rift Valley Province, otherwise than in the course of stealing, jointly and dishonestly retained four Nokia mobile phones, 2 Samsung mobile phones, 1 Samsung charger, a pair of Safari Boots and a suit knowingly or having reasons to believe them to be stolen goods. In Count III, they were charged with being in possession of firearm without a firearm certificate contrary to section 89(1) of the Penal Code, the particulars being that on **26<sup>th</sup> March, 2009**, at Lolmolok Sub-location, Samburu Central District of the then Rift Valley Province, the appellants were found in possession of firearms make G3 Rifle S/No. 77097794, AK 47 S/No. BA 0560-A7832 and Ceska Pistol S/No. A116789 without a firearm certificate. In count IV, the appellants were charged with being in possession of ammunition contrary to Section 89(1) of the Penal Code, the particulars being that on the same day (**26<sup>th</sup> March, 2009**) at the same place (Lolmolok Sub-Location in Samburu Central District of the then Rift Valley Province), the appellants were found in possession of 17 rounds of 7.62 mm ammunitions, 4 rounds of 7.62 mm special ammunition and 14 rounds of 9 mm ammunitions.

The appellants denied all the charges and a trial ensued.

In a judgment delivered on **8<sup>th</sup> December, 2010**, the three appellants were found guilty in respect of counts III & IV and were each sentenced to ten (10) years imprisonment. They were also found guilty of the alternative charge and each was sentenced to seven (7) years imprisonment. The sentences were to run concurrently.

The appellants filed independent appeals to the High Court which were later consolidated (**H.C.CR.A No. 417, 420, 421 of 2010**). The State filed a cross-petition of appeal complaining of the acquittal of the appellants from the charges of robbery with violence and that the trial court had failed to apply the doctrine of recent possession which proved the charges of robbery with violence. In the end, the High Court dismissed the appellants' appeal but found merit in the State's cross-petition of appeal.

After quashing the conviction of the alternative charge of handling stolen property and setting aside the resulting sentence, the appellants were each convicted for the offence of robbery with violence and sentenced to **thirty-five (35) years** imprisonment.

Aggrieved, the appellants have lodged this second appeal, (**Criminal Appeal 113 of 2013**) and raised several grounds as contained in their supplementary grounds of appeal.

On **18<sup>th</sup> March, 2019**, the appeal came before us for plenary hearing. Learned counsel, **Mr. Bichanga** for the appellants reduced the 10 grounds in the Memorandum of Appeal into three main grounds. Firstly, counsel submitted that the High Court should have remitted the matter to the trial court for retrial instead of reversing the convictions in counts III & IV and in the alternative charge and substituting them with a conviction for the offence of robbery with violence by relying on the doctrine of recent possession. The High Court was faulted for enhancing the sentence to 35 years, especially given the contention that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were never served with the cross-petition of appeal. It was also submitted that the cross-petition of appeal challenging the decision of the trial court to acquit the appellants of the offence of robbery with violence was time-barred as per **Section 349 of the Criminal Procedure Code**.

Secondly, counsel submitted that the High Court failed to re-analyse the evidence and proceeded to highlight from the record instances of inconsistencies in the evidence of **Leusa Londungokiok** (P.W.3) as to whether the appellants were known to him or not or at what point the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were arrested.

Lastly, on identification, counsel submitted that the offence of robbery with violence could not be proved without proper identification of the appellants. Further, as against the 2<sup>nd</sup> appellant, counsel pointed out that he was arrested long after the 1<sup>st</sup> and 3<sup>rd</sup> appellants had been arrested and since none of the complainants could identify him, his conviction is unsafe.

The appeal was opposed by **Mr. Baraka**, the learned State Counsel who stated that the High Court in reversing the acquittal and enhancing the sentence meted was acting as empowered by **Section 354 of the Criminal Procedure Code**. Counsel pointed out that as evidenced by the record, not only did the State seek leave to file the cross-petition of appeal but it applied, in the presence of the appellants' counsel, namely **Mr. Kipkenei**, who objected to have the cross-petition of appeal apply to all the appellants.

On the same day of the application (26<sup>th</sup> July, 2012), the court eventually allowed the respondent's cross-appeal. Counsel therefore refuted the appellants' contention that they did not have notice of the cross-petition of appeal.

The undisputed facts of this matter are that on **26<sup>th</sup> March 2009**, **Moses Mwangi** (P.W.1) and **Gladys Njeri Kinyanjui** (P.W.2) had hired motor vehicle registration number KAW 663R to take them to Maralal from Nairobi. At a place called Kisima, they were ambushed by robbers who stole all their valuables and escaped into the night.

They were unable to identify their assailants.

The then DCIO of Samburu, **William Kiptum** (P.W.4) arrived at the scene to investigate the robbery. He was given two names by other police officers of persons suspected to have been involved in the robberies. One of the suspects was **Fred Lontis**, a nephew to **Lousa Londungokiok** (P.W.3), a councillor of Suguta Marmar Ward. The other was **Richard Lenguro Ramacha** (the 1<sup>st</sup> appellant). According to P.W.3, he had not seen **Fred Lontis** in two months but agreed to lead the DCIO and his officers to the home of the 1<sup>st</sup> appellant, **Richard Lenguro Ramacha**. According to P.W.4, when they got there they found the appellants in the homestead of the 1<sup>st</sup> appellant who upon seeing the police fled from the Manyatta. A chase ensued and the 1<sup>st</sup> appellant was apprehended. As regards the 3<sup>rd</sup> appellant, it was said that he was found hiding in the 1<sup>st</sup> appellant's house whilst the 2<sup>nd</sup> appellant managed to evade capture but was arrested at a later date. The victims of the robberies were able to identify their stolen items recovered in the house. Firearms, that is, an AK-47 rifle and a G3 rifle were also recovered in the house. There was also a recovered stolen mobile phone from P.W.1 which it was alleged the appellants had used to take photographs of themselves posing with the recovered weapons. It soon after emerged that the G3 rifle was a government firearm issued to P.W.3. P.W.3's explanation was that he had given it to his nephew **Fred Lontis**.

Ultimately, the three appellants together with **Lolmodon** were charged with multiple counts of **Fred Lontis** and one **Loiramiram** robbery with violence, illegal possession of firearms and in the alternative handling stolen goods. **Fred Lontis** was eventually discharged under **Section 87(a) of the Criminal Procedure Code** and **Loiramiram** was reported to have died in an attempted escape from lawful custody.

According to P.W.1, **Moses Mwangi**, a Nokia 2760 was stolen during the night of the robbery. On the following day, he was called to Maralal Police Station where he identified the Nokia 2760. It was his further evidence that he helped the police print the pictures taken on his phone. There were pictures of several men, (some hooded), including pictures of the three appellants.

P.W.2 **Gladys Njeri Kinyanjui**, another victim of the robbery told the trial court that on **27<sup>th</sup> March, 2009**, at Maralal Police Station, she too identified her Nokia 6280, a suit and Safari boots.

P.W. 3, **Leusa Londungokiok**, a councillor of Sugata Marmar Ward was also a police reservist and had been issued with a G.3 rifle which he gave to his nephew, **Lontis** who although had been charged with the appellants, was discharged on **21<sup>st</sup> December, 2009** under the provisions of Section 87 (a) of the CPC. On **26<sup>th</sup> March, 2009**, P.W.3 was in company of a search team and when they got to a Manyatta, the 1<sup>st</sup> appellant on seeing them fled. The 1<sup>st</sup> appellant was chased, arrested and taken to his house where the police recovered an AK 47 rifle, G.3 rifle that P.W.3 had given **Lontis** and a pistol. In his examination in chief, P.W.3 told the trial Court that he knew the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. However, upon cross-examination by the 2<sup>nd</sup> appellant, he denied knowing him. Further, when he was cross-examined by the 3<sup>rd</sup> appellant, he stated “*I did not see you at 1<sup>st</sup> accused person’s house*”. He however, admitted having had a case with the 1<sup>st</sup> appellant before.

Acting on a tip off, P.W. 4, Ag. **SP William Kiptum** together with P.W.6, **CIP Samuel Chacha Okongo** visited a Manyatta, a day after the robbery whereupon they arrested the 1st appellant and the 3<sup>rd</sup> appellant. According to P.W.4, the 3<sup>rd</sup> appellant was wearing safari boots. They also recovered several phones and firearms from the 1st appellant’s house. It was P.W.4’s evidence that the 2<sup>nd</sup> appellant fled away and that in one of the phones, they found pictures of the 3 appellants. The 3<sup>rd</sup> appellant cross- examined him at length as regards who took the photographs allegedly found in one of the stolen phones.

P.W. 5 **IL**, a 12 year boy told the trial court that in March, 2009, the 2<sup>nd</sup> appellant went to the house of **Lontis** and took a gun from therein.

In their defences, all the 3 appellants gave unsworn statements of defence. The 1<sup>st</sup> appellant denied being found in possession of the alleged items, that on 5th April, 2009, he was removed from the station, taken to a place where they were made to hold guns and pictures taken of them. He spoke of a long standing grudge between him and P.W.3. The 2<sup>nd</sup> appellant was arrested on **2<sup>nd</sup> April, 2009**. He stated that he was also taken to a forest and pictures taken of them. The 3<sup>rd</sup> appellant equally denied the commission of the offence.

The appeal before us is a second appeal. Our mandate as a second appellate Court as regards a second appeal is as set out in **Section 361 (1) (a)** of the **Criminal Procedure Code** which provision enjoins us to consider only matters of law. It provides:

**“ 361 (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-**

**(a) on a matter of fact, and severity of sentence is a matter of fact; or**

**(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”**

In **Kados vs. Republic Nyeri Cr. Appeal No. 149 of 2006 (UR)** this Court delivered itself thus on this issue:

**“...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ...”**

In **David Njoroge Macharia vs. Republic [2011] eKLR** it was stated that under **Section 361 of the Criminal Procedure Code**:

**“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (see also Chemagong vs. Republic [1984] KLR 213.)”**

It is important to note that the alleged recovered items were found in the house belonging to the 1st appellant. The 2<sup>nd</sup> appellant was not

arrested from this house as it was said that he fled on seeing the police. None of the witnesses testified of his arrest.

As regards the 3<sup>rd</sup> appellant, if indeed the house belonged to the 1<sup>st</sup> appellant, and that the 3<sup>rd</sup> appellant was found there a day after the robbery, can it be said that he was in possession of the items stolen during the robbery? Further, although it was alleged that P.W.3 was wearing safari boots, P.W.2, the alleged owner of the safari boots did not give any specific identifying marks. Safari boots are common shoes in Kenya and it is possible for the 3<sup>rd</sup> appellant to have owned a pair of safari boots. It is also crucial to point out that P.W.3 categorically stated that he did not see the 3<sup>rd</sup> appellant in the 1<sup>st</sup> appellant's house on **26<sup>th</sup> March, 2009**. It is our view that given the clear evidence of P.W.3 that the 3<sup>rd</sup> appellant was not found in the 1<sup>st</sup> appellant's house on **26<sup>th</sup> March, 2009**, his conviction was unsafe. As regards the 2<sup>nd</sup> appellant and as earlier stated, it is not known when and where he was arrested from. P.W.3 did not say that he saw him in the house of the 1<sup>st</sup> appellant on the **26<sup>th</sup> March, 2009**, yet he was one of the members of the search team. It is in view of this that we find that the 2<sup>nd</sup> appellant's conviction was also unsafe.

On the other hand, the items stolen on the night of the robbery were found in the house of the 1<sup>st</sup> appellant. He offered no reasonable explanation as to how those items came to be in his house. The robbery took place in the early hours of the morning of **26<sup>th</sup> March, 2009**. Barely a few hours later, these items were found in the house of the 1<sup>st</sup> appellant. At the time of the robbery, the 1<sup>st</sup> appellant was armed with firearms, the subject of counts II & III. The ingredients of the offence of robbery with violence were established and we cannot fault the 1<sup>st</sup> appellate court in coming to that conclusion.

As regards the enhancement of sentence, it is not disputed that the State filed a cross-appeal dated **5<sup>th</sup> August, 2011**. On **26<sup>th</sup> July, 2012**, the State applied to file the cross-appeal. **Mr. Kipkenei** for the appellants opposed the filing of the cross-appeal. The application by the State was allowed. It is in view of this fact on **27<sup>th</sup> October, 2011**, **Ouko, J** (as he then was) directed that the appeal be heard by two Judges. We therefore find no merit in the appellant's contention that there was no notice of the cross-appeal.

The upshot of the above is that the conviction and sentence of the 1<sup>st</sup> appellant is hereby affirmed and his appeal is dismissed. The conviction and sentence of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants are however quashed and set aside. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants are to be forthwith set free unless otherwise lawfully held.

It is so ordered.

*Dated and Delivered at Nakuru this 21st day of November, 2019.*

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**