IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, GBM KARIUKI & MWILU, JJ.A)

CRIMINAL APPEAL NO. 182 & 202 OF 2007

JOHN MUSYOKA MUTHENGI ……...….1ST APPELLANT

ALEX MUSYOKA MAKAU ……..…..2ND APPELLANT

PETER MUTHUI MWENGA ……..……3RD APPELLANT

VERSUS

REPUBLIC ……....……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi by (Justices Mutungi & Ochieng) dated 15th March, 2005

in

HC.CR.A. NOs. 549, 550, 551 & 552 OF 2002)

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JUDGMENT OF THE COURT

1. The appellants herein were among five persons charged before the Thika Chief Magistrate's Court with three counts of robbery with violence, another of burglary and stealing and yet another of rape. These three appellants, **John Musyoka Muthengi** (1st appellant), **Alex Musyoka Makau** (2nd appellant) and **Peter Muthui Mwenga** (3rd appellant) were found guilty of robbery with violence on two counts and sentenced to suffer death as by law provided.

All three appellants were found guilty of robbery with violence as charged under Count 2 of the charge sheet. The 2nd and 3rd appellants were further found guilty of robbery with violence as charged under Count 3 of the Charge Sheet.

The 1st and 2nd appellants together with another were also convicted of burglary and stealing and sent to prison for three years.

2. The three appellants herein being dissatisfied with their convictions and sentences filed appeals to the

High Court below which court found the consolidated appeals lacking in merit and dismissed them hence these, their second appeals.

3. The appellants' separate grounds of appeal can safely be summarized as raising the issues of insufficiency of evidence of identification, coupled with the improper identification parade exercise; lack of consideration of the appellants' defences and the process of the recovery of the offending gun and the other stolen items.

4. Learned Counsel Mr. A. L. Kariu represented the 1st appellant in this appeal before us. He adopted the 1st appellant's Amended Supplementary Grounds of appeal and submitted that the 1st appellant's conviction was unsafe as, according to counsel, there were contradictory findings on identification as stated by PW2, whereas the

High Court found that the source of light was a hurricane lamp. Counsel added that the High Court relied on the evidence of PW7 which related to Count 3 of which the 1st appellant had been acquitted.

Mr. Kariu further submitted that the identifying evidence was that of a single witness and the trial court never warned itself of the dangers of convicting on only that evidence. Counsel added that the 3,500/= said to have been stolen in the robbery from PW2's husband's trouser pocket was not proved to have indeed been stolen as that husband was never called as a witness.

Counsel doubted the evidence that a G3 riffle was stolen from PW1's house as no formal report of its theft/loss was ever made.

Additionally, counsel stated, the arrest of the 1st appellant was more than two weeks after the commission of the offence as he left his place of work after being pointed out by the co-accused persons. He concluded his submissions by stating that the 1st appellant denied knowing his co-accused persons, and more importantly to counsel was the fact that the 1st appellant was acquitted of all other charges. He emphasized that in these circumstances the 1st appellant's conviction was unsafe.

5. For the 2nd and 3rd appellants, learned counsel Mr. Rombo submitted that identification of these appellants was not proved because PW2 did not describe the nature of light at the time of the commission of the offence. He added that it was not enough for PW2 to state that the 2nd appellant was one of her customers at her food kiosk as she did not make the report first to the police that she had recognized one of her attackers. Mr. Rombo stated that PW2's husband was not called to prove that his Kshs.3,500/= had been stolen. He said further that there was no evidence of light coming from a hurricane lamp being used to identify the 2nd appellant, adding indeed nothing was said about the state of lighting of the *locus in quo*.

6. As regards evidence in support of count 3 Mr. Rombo submitted that PW7 was as an incredible a witness as PW5 whose evidence was rejected by the trial court as she was not present during the robbery and could therefore not say or identify what was stolen. Counsel urged that his evidence should also have been rejected as worthless.

7. Attacking the evidence on recovery of the stolen items, counsel submitted that there was no independent evidence on how recovery was made, no photographs were taken, no accompanying witnesses, no scenes of crime officers present and the appellants all along denied ever having led police to any recovery. The recovery of the raincoat and the radio were seen to be as poorly done as that of the gun and therefore being of no value. Even the appellants denied the alleged mode of arrest, added counsel, who concluded by urging us to allow these appeals.

8. On his part Mr. Omirera the Senior Assistant Public Prosecutor (SADPP) opposed the appeals on the grounds that identification, and recent possession were proved and that the appellants' defences had been given due consideration. Counsel submitted that there were concurrent findings on identification that

PW2 had identified the 1st and 2nd appellants; that there was sufficient light to enable identification and it did not matter whether the source of light was a torch or a hurricane lamp.

On the issue of recent possession of the stolen items counsel's submission was that the two courts below found that PW1's house was broken into and certain items were stolen therefrom, these being a G3 riffle, a coat and a radio; that PW1 indeed booked a report of the theft at the police station on 22nd May 2000. As concerns recoveries of the stolen items, counsel's submission was that the 1st appellant together with the 2nd appellant led PW10 to the recovery of the gun and that it was the 2nd appellant who entered the army compound and recovered the gun, while the 1st appellant led to the recovery of the radio. Counsel urged that both issues of identification and recent possession must be considered together.

9. Mr. Omirera was of the view that the availed evidence was sufficient to found the conviction and there was no basis for making an adverse inference on the failure to call the husband of PW2 as a witness because PW2 herself was present when the robbery occurred. He therefore asked us to reject the appeals.

10. Mr. Omirera did not support conviction on count III as the same was unsupported by evidence and therefore he conceded the appeal to that extent.

11. In a short reply Mr. Kariu, learned counsel for the 1st appellant, submitted that the complainant in count II had nothing stolen from her and it was her husband who should have been called as a witness to prove that Ksh.3,500/= was stolen from him. Counsel considered that the doctrine of recent possession could not apply due to the lapse of time between the date of alleged robbery the 2nd May 2000 and 1st of June 2000 when there was recovery. Mr. Kariu described the recovery of the radio as unproved as the same was done in the absence of the 1st appellant and concluded that the convictions were unsafe.

12. Mr. Rombo for the 2nd and 3rd appellants had a short reply too, that his clients had been booked for having a pistol and not a G3 riffle. He said that the mode of arrest of his client was different from how the appellants said they had been arrested. Mr. Rombo joined Mr. Kariu in stating that count II was unproved as the complainant had nothing stolen from her.

13. The above is a fair summary of the grounds of appeal and submissions of all counsel herein appearing for their respective clients and the basis upon which our determination is made.

This is a second appeal. Our involvement therefore is limited to points of law only as per the dictates of the provisions of **361** of the **Criminal Procedure Code** in the following words;

"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; -----"

This Court will therefore accept the lower courts' concurrent findings of fact unless those finding cannot be supported by the availed evidence, see **M'Riungu V Republic [1983] KLR 455** wherein we stated as herebelow:-

"where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

14. The cross-cutting issues in all the appeals and which make for the points of law for our determination, as we see them, are identification both of the appellants and the stolen items, recent possession and recovery of the stolen items, and the weight, relevance and sufficiency of evidence.

15. The best point to start from has to be at the scene of crime. The 1st and 2nd appellants herein were convicted of the offence of burglary and stealing a gun, ammunition, a raincoat and a radio from the house of PW1. The 3rd appellant was acquitted. Now, what sort of identification of the appellants was made?

The uncontested facts are that no one witnessed the burglary. No one gave the number of persons said to have broken into the house of PW1 and stolen therefrom a gun, raincoat and radio. No form of identification of the appellants was therefore availed on the count of burglary and theft. The circumstantial evidence relied on to convict was of the weakest type and could not lead to the only hypothesis of guilt of the 1st and 2nd appellants, as there were no credible circumstances connecting the appellants to the commission of the offence.

16. The 1st and 2nd appellants were convicted for count II – the robbery and theft of Kshs.3,500/= from PW2 one Priscilla Wanjiru Mbuthia. How did she identify the appellants? Five people were jointly charged with burglary and three counts of robbery with violence. However, PW2 said her attackers were three in number, the appellants herein. She said that she identified them from their voices as she knew them as her customers at her food shop. The length of that customer relationship was not given. The length of conversation at her house on the material night of attack was not given. The distinguishing element of the appellants' voice was not given.

PW2 mentioned that the attackers had torches which they flashed making it easy for her to identify the attackers. The attack was admittedly at 3 a.m. and PW2 was woken from her sleep by the invading attackers. Was that identification sufficient?

17. To answer para 16 above we here below set out the principles of a plausible identification. In the case of **Francis Kariuki Njiru & 7 Others V R [2001]eKLR Criminal Appeal no. 6 of 2001,** it was stated,

"The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."

Following that authority, we note that in this case no sufficient basis or at all was laid for PW2's recognition of voices of the appellants. Having been woken up at 3 am and not stating how the lights from the torch(es) made it possible for her to recognize her attackers, say for example were the attackers flashing the torches on themselves so as to be recognized/identified, we would find and hold that the circumstances were such that no positive identification of the appellants by PW2 was possible or probable.

18. There is more. PW2's husband was said to have been present during the attack and indeed it was his money, 3,500/= that was said to have been stolen from his trouser pocket. He was not called as a witness to buttress PW2's evidence. That failure served only to weaken PW2's evidence which, as we have already shown above, was weak at best. More importantly the charge sheet stated that it was PW2's money that was stolen during the robbery. Evidence by PW2 herself was that indeed the money was the husband's which was in his trousers, yet another ground to weaken the prosecution case as the evidence did not accord with the particulars of the offence – see **Jason Akumu Yongo V R [1983]e KLR**.

In the totality of the evidence before the two courts below, we are not satisfied that they assessed the evidence on identification as required and, had they done so, they would have found that the circumstances of identification were unfavourable and not free from the possibility of error – see **Wamunga V R [1989] KLR 424.**

19. Learned SADPP urged us to consider identification and possession together. What we would add to

the issue of identification is that even the evidence of arrest of the 1st and 2nd appellants and of their connection to the charges they later faced was not free of error. The appellants were connected to the alleged robberies because a raincoat was also allegedly recovered from a chase of the appellants. Who dropped the bag from which the raincoat was found? That never came out from evidence and it follows therefore that the possession of that raincoat could not rightly be attributed to any of the appellants.

The appellants all along denied knowing each other. Even the 1st accused who was said to be the gang leader who allegedly was pointed out by these appellants was acquitted for lack of evidence. The recovery of the gun in the army compound if at all, was based on weak and incredible evidence. That gun was not shown in evidence to have been stolen from PW1 in the alleged circumstances and if indeed it was issued to PW1 and it was stolen from his house, then it was not shown that it was stolen by these appellants.

20. The law on recent possession is that, if very shortly after a theft a person is found in possession of the property said to have been recently stolen, then he is assumed to be the thief if he does not offer a plausible explanation as to how he came by the stolen item/s - see **R V James Loughlin [1951] G. app report 1951-1952**. But, those were not the circumstances herein.

The robberies were on 22nd May 2000. Recoveries, which we have found to have been incredible, were said to have been made after 14th June 2000. On the night of 22nd May 2000 there were said to have been a spate of robberies in the area and no evidence connected these appellants to those other robberies; indeed they were acquitted of those other robberies.

In these circumstances we find no evidence on recent possession and must consequently allow the appeal on count II.

21. The robbery under count III involved PW7 whose evidence that he was with PW5, his wife, in bed during the attack was rejected as untrue, as in PW5's own admission she was not at home at the material time. The 3rd appellant was convicted under this count. The state concedes the appeal in count III, most wisely in our view, the effect of which is that all the appellants' appeals under counts II and III are successful.

22. In the end all the appellants' appeals on counts II and III are found meritorious and are allowed with the result that the appellants are set at liberty unless they be for any other lawful cause be held.

Delivered and Dated at Nairobi this 22nd day of May, 2015.

J. W. MWERA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR