IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO. AZANGALALA & KANTAI. JJ.A)

CRIMINAL APPEAL NO. 248 OF 2012

BETWEEN

D A M…….....……1st APPELLANT

GEOFREY MUHANDA FELIX ……2nd APPELLANT

CHRISTOPHER NDUSI KHALUMBA…….3rd APPELLANT

AND

REPUBLIC …….RESPONDENT

(Appeal from a Conviction and Sentence, Judgment of the High Court of Kenya at

Kakamega (Lenaola & Onyancha,JJ.) delivered on 25th

January, 2012

in

H.C.CR.A. Nos.102, 103 & 104 OF 2010

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JUDGEMENT OF THE COURT

D A M (hereinafter "the 1st "appellant") ***Geofrey Muhanda Felix*** (hereinafter "the 2nd "appellant") and ***Christopher Ndusi Khalumba*** (hereinafter "the 3rd "appellant") were, charged with five (5) counts of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code. They also faced alternative counts of handling stolen property contrary to section 322 (2) of the same code. After a trial spanning a period of over a year they were acquitted of the 1st count of robbery with violence but convicted on four (4) principal counts of robbery with violence. They were then sentenced to death but the sentences on counts 3, 4 and 5 were left in abeyance.

Their first appeals to the High Court of Kenya at Kakamega ***(Onyancha and Lenaola JJ.)*** were dismissed on 25th January, 2012 and hence this second appeal

The particulars of the 2nd count were that on the 1st day of March, 2009 at Bishop Stam in Kakamega

Central District of Western Province, the appellants, jointly with others not before court, while armed with dangerous weapons namely a pistol and rungus, robbed ***Santulino Ekanda*** of a laptop-make Toshiba, a flash disk, a mobile phone-make Nokia 1110, an electronic watch- make timex, a cash sum of Kshs.5000/=, a travelling bag, two pairs of shoes-all valued at Kshs.113,000/= and immediately before the time of such robbery used actual violence to the said Santulino Ekanda.

The particulars of the third count were that the appellants, jointly with others not before court, on the same date, at the same place, while similarly armed, robbed ***Raymond Muotath*** of cash sum of Kshs.4,000/=, a mobile phone, car keys, a torch, sandals-all valued at Kshs.15,000/= and immediately before the time of such robbery, used actual violence to the said Raymond Muotath.

The fourth count carried the following particulars: that the appellants in consort with others not before the court, on the same date, precisely at the same place, while similarly armed, robbed ***Francis Xavier Opondo*** of cash sum of Kshs.10,155/=, three mobile phones-make 2 Nokia phones and 1 Samsung phone valued at Kshs.32,500/=, a driving licence, an identification card, ATM cards, a brief case, a torch, ignition keys- all valued at Kshs.50000/= and immediately before the time of such robbery used actual violence to the said Francis Xavier Opondo.

The fifth count carried the following particulars: that the appellants, in consort with others not before the court, on the very same date and precisely at the same place and while similarly armed, robbed ***Getrude Isendi*** of one mobile phone-make Nokia 6080 valued at Kshs.7,000/= and immediately before the time of such robbery used actual violence to the said Getrude Isendi.

The brief facts of the case were as follows: On 1st March, 2009 at about 9.30 p.m. Santulino Ekanda (PW1) (Ekanda), Getrude Isendi (PW2) (Isendi), George Pororwo (PW5) (Pororwo), Raymond Muotath (PW 6) (Muotath), Xavier Opondo (PW9) (Opondo) and others were at Bishop Stam Centre on the outscarts of Kakamega town when they were attacked by thugs. One of the attackers had a pistol, another a rungu and yet another pliers. The thugs robbed the people mentioned in the charge sheet of various items items stated in the charge sheet. The thugs locked the victims within the premises and then escaped. Isendi managed to gain freedom and informed the centre watchman ***Mariko Handa*** (PW3) (Handa) of the robbery. Handa blew his whistle and together with another watchman, ***Jonathan Opedi*** (PW4) (Opedi), carried out a search of the premises which produced no useful results. The two watchmen however found that part of the fence around the premises had been cut.

The father-in-charge arrived shortly afterwards and opened for the other victims of the robbery. He also telephoned Kakamega police officers who visited the premises and arrested the two watchmen to assist them in their investigations. They were however later released.

The next day, 2nd March, 2009 at 9.00 a.m. a shopkeeper, ***Cedrick Mukangai Munyembere*** (PW 7) (Munyembere) was at his shop at Shinyalu market when the 1st appellant visited him. In their earlier lives they had been schoolmates. The 1st appellant had a briefcase from which he removed a laptop from which he started showing a movie as he purchased a scratch card. According to Munyembere the appellant left his shop leaving his laptop when he saw his (Munyembere's) father approach the shop. As he was suspicious, he sent for APs from Shinyalu District Headquarters.

APC ***Joseph Kemei*** (PW10) (APC Kemei) was one of the APs then stationed at Shinyalu District Headquarters. He independently received a report of a suspect carrying suspected stolen property, and acting on that report, visited a barber's shop at Shinyalu market with other APs. According to APC Kemei, when the person who had been described to them saw them he started running a way leaving a bag. They gave chase and arrested him. Acting on some information, APC Kemei and his team visited Munyembere's shop and collected the laptop. According to APC Kemei, the brief case contained a pair of long trousers, a jacket, a matchbox, material for making explosives and keys. He then handed the suspect and the recovered items to CID officers. The suspect according to APC Kemei was the 1st appellant.

PC ***Reuben Tamba*** (PW11) (PC Tamba) was one of the CID officers who received the 1st appellant from APC Kimei and took possession of the recovered items. PC Tamba's team carried out their own search upon the 1st appellant and recovered two mobile phones. According to PC Tamba, the 1st appellant disclosed that he was with others who had given him the laptop to sell. He then asked him to call his colleagues who disclosed that they were at a place called Roastman. PC. Tamba's team went there and arrested the 2nd and 3rd appellants.

On 3rd March, 2009 ***IP Godfrey Mangara*** (PW8) (IP Mangara), mounted identification parades at Kakamega police station at which some witnesses identified the appellants who were then charged as stated.

The 1st appellant's defence was that he was arrested on 2nd March, 2009 at 11.00 a.m. by Shinyalu APs and shown a basket alleged to have been in his possession which allegation he denied. He was then handed over to police officers from Kakamega Police station where identification parades were conducted at which two witnesses identified him. He denied leading police officers to the other appellants and submitted that the complainants had not proved they reported the robbery to the police as the relevant OB entry was not produced in evidence. He further submitted that essential witnesses had not been called to testify at the trial and that those called gave conflicting evidence.

On his part, the 2nd appellant testified that he was arrested on 2nd March, 2009 as he ran away from police officers who had raided a beer drinking out-fit where he had been. He was then taken to Kakamega police station where he was placed in cells. The next day he was identified by different witnesses at three separate identification parades. He discredited the parades which in his view were improperly conducted. He also discredited the witnesses who testified at the trial.

The 3rd appellant testified that while partaking of busaa at Roastman, police officers raided the outfit and as consumers ran away he could not and was arrested. He was then taken to Kakamega Police station where he was placed in cells. At some stage he was removed from cells and shown to some people two of whom later identified him at a subsequent identification parade. He too discredited the evidence of witnesses who testified at the trial. He submitted that he had been charged by mistake as the robbery charge was substituted for a liquor related offence. To buttress that submission he referred to the O.B. extract produced at the trial which related to suspects who had been released.

In his judgment the learned Principal Magistrate ***(J.M. Githaiga)*** set out, in outline, the evidence which was before him and having done so concluded that counts 2, 3, 4 and 5 of robbery with violence had been proved beyond reasonable doubt. He however said nothing about the alternative counts of handling stolen property. He also found that the appellants had been identified at properly conducted identification parades. He held that the 1st appellant had been found in possession of recently stolen property.

The learned trial magistrate accordingly convicted the appellants on the four counts aforesaid and sentenced them to death as already stated.

That was the decision which was the subject of the first appeal before the High Court. The High Court considered the appellants' appeals which were consolidated and concluded as follows:-

> *"27. The appellants made powerful submissions on all the above issues and in their defences before the trial court they meticulously dissected the case for the prosecution and asked that the same be dismissed. All those matters are on record and we have read them but in our humble view, there was sufficient lighting at the scene and each of the witnesses were able to see the appellants who were not disguised at all ……. We find no reason to deny that identification and as was held in Kariuki -Vs- Republic, Criminal Appeal No.41/1994 where a Court is unable to find fault in the evidence of identification, then the appeal must fail. We subscribe to that view.*

28. The visual identification was amply corroborated by the identification at the Parade conducted by PW8. The parade was properly conducted and we have shown above that save for PW6 who was said to be old and unable to see properly all the other witnesses namely PW1, PW5 and PW9 were able to pick the Appellants in the parade with considerable ease.

29. To add the evidence of recovery of the laptop and shoes as well as PW1's mobile phone would only serve to reiterate that this case was watertight on all facts."

The High Court in the end dismissed the appellants' appeals as already stated.

The appellants appealed against that decision. Eight grounds of appeal were filed by the 1st appellant's advocates M/s Onsongo and Company Advocates and seven grounds of appeal were filed by M/s Anziya & Company Advocates for the 2nd and 3rd appellants. Mr. Onsongo, learned counsel who represented the 1st appellant at the hearing of this appeal argued the appeals for all the appellants with the consent of ***Mr. Munyendo*** learned counsel who appeared for the 2nd and 3rd appellants. Learned counsel condensed the grounds of appeal into four clusters namely:-

1) ***Failure of the_High Court to re-evaluate the evidence***

2) ***Identification***

3) ***Failure to call essential witnesses***

4) ***Inappropriate sentence.***

Counsel submitted that the High Court failed to analyze the evidence afresh as required in law - (See the case of ***Okeno -Vs- Republic*** [1972] EA page 32). In counsel's view the High Court merely read the record and agreed with the findings of the subordinate court but did not infact re-evaluate the evidence.

It was also counsel's submission that the evidence of identification was not positive as the circumstances were difficult, which circumstances were compounded by the fact that the appellants were not previously known to the complainants. Related to that argument, counsel submitted that the evidence of identification parades was discredited.

The 3rd cluster of the grounds raised before us was that essential witnesses were not called at the trial of the appellants. These, according to counsel, included the father of Munyembere who was alleged to have gone to his (Munyembere's) shop when the 1st appellant left a laptop at the same shop and the barber from whose shop the 1st appellant was allegedly chased to and subsequently arrested.

With regard to sentence, counsel submitted that the record showed that the 1st appellant was 17 years of age and could not therefore have been sentenced to death.

Counsel invoked several authorities of this Court in support of his submissions. We shall refer to some of those authorities in this judgment.

Mr. Abele, the learned Assistant Director of Public Prosecutions, conceded the appeal on the grounds that inadmissible evidence was relied upon in convicting the appellants; that the failure to produce the relevant OB prejudiced the appellants; that the doctrine of recent possession was improperly applied and that the High Court failed to re-evaluate the evidence as by Law required. With regard to the sentence meted out to the 1st appellant, Mr. Abele agreed with the appellant's counsel that given the age of the 1st appellant, the sentence of death was improperly passed upon him and further that the 1st appellant, as a minor, should have been accorded legal representation as required under The Children Act.

We propose to consider the issue of identification first. It is common ground that the complainants did

not know the appellants prior to the robbery. We believe that is why the prosecution found it necessary to mount identification parades for some of the witnesses. Evidence of an identification parade may however be relied upon only when the identification parade has been properly conducted. Even before an identification parade is mounted, the participating witness or witnesses should have given a description of the suspect to the police officer conducting the identification parade for the resultant identification to have any probative value. In ***Francis Kariuki Njiru & 7 others -Vs- Republic [Cr. Appeal No.6 of 2001] (UR)*** this Court differently constituted stated:-

> ***"The law on identification is well settled and this Court has from time to time said that the evidence of identification must be scrutinised carefully and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R -Vs- Turnbull [1976] 63 Cr. App. R. 132). 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. This Court in Mohamed Elibite Hibuya & Another -Vs- R Criminal Appeal No.22 of 1996 (unreported) held that:***
>
> ***"..... It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity."***

In the matter before us, the record shows that the appellants were not arrested on the basis of the description of the complainants. Ekanda did not know the 1st appellant and did not identify him at all. He answered both the 2nd and 3rd appellants, in cross examination, that he did not know what they were wearing during the raid. Isendi similarly, in cross-examination, by the 2nd appellant admitted that she did not indicate in her statement to the police the description of the robbers. Handa and Opedi denied seeing any robber. Pororwo too did not describe what the appellants were wearing during the robbery in his first report and Muotath did not identify any appellant.

So, of all the victims only Opondo testified that he described the appellants to the police in his statement. It is however significant that it was not his description of the appellants which led to their arrest. The alleged description was also weakened by other factors we shall shortly discuss.

The 3rd appellant applied for the relevant OB entry regarding the complainants' first report but none was availed and the one which was indicated in the charge sheet related to a different case involving other suspects. We are puzzled that a first report of a crime as serious as robbery with violence could not be traced at the police station where the report was allegedly made. In the premises the 3rd appellant's complaint that he was charged by mistake deserved closer scrutiny which both the trial court and the High Court failed to do.

The evidence of identification was further weakened by the identification parade evidence itself. Besides the failure by the complainants to describe the attackers before mounting the parades, the record shows that the parades were not conducted in accordance with Police Force Standing Orders. Ekanda said of the parade in which he was involved:

> "*There was a mixture of fat tall and short people in the parade"*
>
> Pororwa, another identifying witness, said in cross-examination by the 1st appellant:
>
> *"In the parade I saw tall, black and brown people"*
>
> The same witness answered the 3rd appellant while being cross examined by him as follows:-
>
> *"The members of the parade were wearing a mixture of clothes.*

There were tall fact and slim members of the parade."

And what did the appellants say of the parades? The 2nd appellant testified that the parades were not fair and comprised of "mixed people" and the 3rd appellant stated that the witnesses who identified him had seen him just before the parades were mounted and that the members of the parades were not of similar physique as himself.

Police Force Standing Orders provide as follows in paragraphs 6 (iv) (c) (d) and (n)

> *"6 (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail*
>
> *(c) the witness or witnesses will not see the accused before the parade;*
>
> *(d) the accused/suspected person will be placed among at least eight persons as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement steps should be taken to ensure that it is not especially apparent;*
>
> *(n) the parade must be conducted with scrupulous fairness, otherwise the value of the identifications as evidence will be lessened or nullified;"*

Given the above provisions of the Police Force Standing Orders, we are unable to find that the identification parades mounted by IP Mangara in the case before us where members of the parades were fat, tall, short, black slim "mixed" and of different physique was free from the possibility of error. That leaves the identification of the appellants as being of mere dock identification which was worthless as the complainants did not know the appellants prior to the robbery. (See ***Fredrick Ajode Ajode -Vs- Republic [20041 2 KLR 81) and Gabriel Kamau Njoroge -Vs- R [1982 - 88] KAR 1134 among others.)***

Our above findings further show that the High Court, with all due respect, failed to carry out the duty imposed upon it by the Law to re-evaluate, reanalyze and review afresh the evidence which was adduced at the trial and draw its own inferences and conclusions of course bearing in mind that it neither saw nor heard the witnesses testify and make allowance for that (See ***Okeno -Vs- Republic [1972] EA 32 and Gabriel Njoroge -Vs- Republic*** (Supra) among others).

We are certain that if the High Court had directed itself to the matters discussed above it might have reached a different conclusion.

What we have discussed above is sufficient to dispose of this appeal. However we think another matter argued before us deserves our brief consideration. That is the propriety of the police officers using information obtained from the 1st appellant to effect the arrest of the 2nd and 3rd appellants and the recovery of several items produced at the trial. The record shows that the investigation officer, PC Tamba testified in part as

follows:-

> ***" We interrogated the 1st accused……***
>
> ***APs Shinyalu said they had recovered this laptop MFI -1 make Toshiba. The 1st accused said he was with his colleagues who gave him the laptop to go to sell and they would share the proceeds. We told the accused to call his colleagues. He called them and they told him they were at Roastman club where busaa was sold. The 1st accused told them he had sold the laptop. They told him to take the proceeds to them. They warned him not to take police officers to them. We proceeded to Roastman. The 3rd accused ran into a toilet when he***

> ***saw us. We arrested him. The 2nd accused ran away. He was chased by members of the public for 15 minutes. They beat him up and arrested him. I rescued the 2nd accused. The 2nd and 3rd accused were pointed out by 1st accused……***
>
> ***The 1st accused was wearing these brown open shoes MF1- 6 which I suspected were stolen. The 2nd accused was wearing these open shoes MF1 - 14 which I suspected were stolen."***

On this type of evidence we said as follows in ***Raphael Isolo Echakara & Another -Vs- Republic [Kisumu Criminal Appeal No.44 of 2013] (UR):***

> ***"...the law is now well settled that as Section 31 of the Evidence Act Chapter 80 Laws of Kenya was repealed, the Court can no longer act on the evidence related to items recovered as a result of a confession extracted from an accused person. In this case Senior Sergent Benson could not take an inquiry statement or even charge and caution statement from the first appellant because he was below the rank allowed to do so even before the entire repeal of these provisions. Court could not in law act on the evidence obtained as related to what was recovered through such evidence. What happened there was not in law proper. The evidence leading to the recovery of the alleged jacket was not admissible in law and evidence obtained, through such confession was not admissible."***

In the matter before us, PC Tamba extracted what amounted to a confession from the 1st appellant. Yet he was only a police constable and was therefore not qualified to take an inquiry or cautionary statement from the 1st appellant. The evidence so extracted was accordingly not admissible and the trial court should not have relied upon the same to convict the appellants. The position in this case was worsened by the fact that if the inadmissible evidence had not been extracted from the 1st appellant, the 2nd and 3rd appellants would probably not have been arrested and certain recoveries could not have been made.

As we have found that the evidence of identification was not positive and could not have been relied upon to enter a conviction and further that the learned Judges of the High Court failed in their duty to analyze the evidence afresh to reach their own independent conclusion and further as inadmissible evidence was relied upon to convict the appellants, we need not consider the other cluster of complaints raised by the appellants in their memoranda of appeal. The conviction of the appellants was not safe and Mr. Abele in our view rightly conceded the appeal. Accordingly the conviction in respect of each appellant is quashed.

On sentence the record shows that on 23rd March, 2009 the 1st appellant informed the trial court that he was 17 years of age. The court ordered that he be escorted to Kakamega Provincial General Hospital for age assessment. The record does not have the age assessment report but the same record shows that at one time the 1st appellant escaped from a juvenile remand home where he was kept in custody. Neither the trial court nor the High Court considered this issue at all in their Judgments. As the 1st appellant could very well have been under the age of eighteen 18 years, he could not have been sentenced to death but should have, under ***Section 25(2)*** of the Penal Code, been detained at the pleasure of the President. We have however quashed his conviction and the issue is now moot. There is also the possibility that the 1st appellant's right under ***Section 77 (1)*** of the Children Act may have been compromised. The subsection reads:-

> ***"77 (1) where a child is brought before a court in proceedings under this Act or any other written law, the Court may, where the child is unrepresented, order that the child be granted legal representation."***

In the end the sentences in respect of the appellants are set aside. Each appellant is set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF MAY, 2014.

J.W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

F. AZANGALALA

……..

JUDGE OF APPEAL

S. ole KANTAI

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR