IN THE COURT OF APPEAL

AT KISUMU

CORAM: ONYANGO OTIENO, AZANGALALA & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 49 OF 2009

BETWEEN

AKIM AZED WAKOLI..... 1ST APPELLANT

EDWIN WAFULA KILIMA.....2ND APPELLANT

JOSEPH STEPHEN JUMA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

(Mwera & Karanja, JJ.) dated 24th February, 2009

in

H.C. CR. APP. NOS. 17, 18 & 19 of 2008)

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JUDGMENT OF THE COURT

The three appellants, ***Akim Azed Wakoli, Edwin Wafula Kilima*** and ***Joseph Stephen Juma*** were charged on 14th November, 2006 before the Principal Magistrate's Court at Siaya with robbery with violence contrary to ***section 296(2) of the Penal Code.*** The particulars of the offence were that on 22nd October, 2006, at Ligega Village, Siaya District, within Nyanza Province, jointly with others not before the court, and while armed with dangerous weapons, namely firearms, rungus and pangas, they robbed ***George Ochieng Kadega*** of an Ahuja amplifier, a pocket radio, a Yashika camera and a wrist watch all valued Kshs 28,000/=, and at or immediately before or immediately after the time of the said robbery, they used actual violence on the said George Kadega.

The third appellant was separately charged with handling stolen goods contrary to ***section 322 (2) of the Penal Code;*** the particulars of that offence being that on 1st November, 2006 at Kitale Town in Trans Nzoia District within Rift Valley Province, otherwise than in the course of stealing, he

dishonestly received or retained an Ahuja amplifier Serial No. 555913 knowing or having reason to believe that the same was stolen or unlawfully obtained.

Broadly, the facts of the case against the three appellants were that on 27th October, 2006, at about 7.30 pm, ***George Ochieng Kadega (PW1)*** and his ***wife Sarah Ochieng*** alias ***Hilda Anyango Oluoch (PW2),*** returned to their home at Ligega Village. While PW1 was in the bedroom, PW2 rushed in and informed him that their home had been invaded by robbers, after she had espied a stranger struggling with their house-help, ***Roselyn Auma, (PW3),*** in the kitchen. Terrified and in despair, PW1 and PW2 locked themselves in their bedroom and managed to alert, by cell phone, a neighbour and the police of their predicament. Soon thereafter, one of the robbers broke the bedroom window, pointed a gun at them and ordered them to open the door. Three other robbers shortly succeeded in breaking down the bedroom door, after which they assaulted PW1, tied him up and demanded money from him. The robbers took Kshs 3,000/= from PW1 as well as the properties particularized in the charge sheet.

To make their getaway, the robbers forced PW1 to start for them his Motor Vehicle Registration No. KAP 938 R, but at the gate, they were confronted by the arriving police, upon which they abandoned the vehicle and made their escape on foot. The police directed PW1 and his family to stay away from the vehicle pending investigations.

Acting on information, the police arrested the three appellants on 1st November, 2006 at Kitale. None of the stolen property was recovered from them, save the Ahuja amplifier which the police alleged to have recovered from the third appellant. The appellants were subsequently charged with the offence as particularised above.

In the meantime, the day after the robbery, ***Corporal David Ongwenyi, (PW5),*** of the Provincial CID scenes of crime support services office visited the *locus in quo* and lifted finger impressions from among other places, the rear door of the house, the door of the store, window panes and the inside and outside of the Motor Vehicle No. KAP 938 R. Those impressions together with the finger prints of the three appellants were analysed by ***Barrack Odero, (PW 1O),*** a gazetted fingerprints expert working at Criminal Investigations Department (CID) Headquarters, Nairobi. He prepared a report which showed that each of the appellants' fingerprints matched some of those that had been lifted from various places at the *locus in quo*. In total the prosecution called 11 witnesses, including ***Peter Amoth, (PW8)*** who testified to the injuries sustained by PW 1.

In their defence, in which they gave sworn evidence and called no witnesses, the appellants denied commission of the offence. The 1st appellant's defence was, in the main, that the charges against him were fabricated because of a land boundary dispute between him and a senior police officer; that of the 2nd appellant was that he had been framed by his brother- in- law, a police officer after he, the 2nd appellant, had quarrelled with his wife (the sister of the police officer); while that of the 3rd appellant was that he was in Nairobi at the time of the robbery and that was never found in possession of the amplifier as alleged by the police.

On 14th March 2008, the trial magistrate convicted the appellants of the main charge and sentenced them to death. The third appellant was acquitted of the charge of handling stolen property. The conviction of the appellants was based solely on identification by fingerprint evidence, after the trial magistrate rejected the evidence of their identification in identification parades.

Aggrieved by the decision of the trial court, the appellants lodged separate appeals in the High Court, contending that the evidence upon which they were convicted was contradictory and insufficient. The three appeals were consolidated and heard together by ***Mwera, J.*** (as he then was) and ***Karanja, J.,*** who, on 24th February, 2009 dismissed the appeals and upheld the conviction, thus precipitating the present appeal.

Before us, ***Mr Lore***, learned counsel appeared for the appellants while ***Mr Abele*** the learned

Assistant Director of Public Prosecutions appeared for the respondent. The appellants' memorandum of appeal raised four grounds of appeal, but upon closer scrutiny, it really raised only one issue, namely the identification of the appellants, although the issue had two limbs to it. The first limb is identification of the appellants by the witnesses at the *locus in quo* and the second is identification of the appellant's through the fingerprint evidence.

We need not spend time on the first limb of identification, because the trial court rejected all the evidence of purported identification of the appellants at the *locus in quo* as well as the evidence of the purported identification in subsequent identification parades. The first appellate court similarly concluded that that evidence was unsafe and unreliable and that the trial court had properly rejected the same. The first appellate court expressed itself thus, on the issue:

"Regarding the crucial issue of identification, the learned trial magistrate found that the complainant's wife (PW2) and his house-help (PW3) who incidentally were the identifying witnesses for the prosecution were unable to identify the robbers at the scene of the offence. The learned trial magistrate was of the view that the evidence of identification by the aforesaid witnesses was not reliable thereby rendering the identification parades useless. He therefore found no need to analyse the evidence of the officers who carried out the parades (i.e. PW9 and PW 11). We cannot agree more with the foregoing findings of the learned trial magistrate regarding the identification of the offenders at the scene. The evidence of PW2 and PW3 regarding the same was inconsistent and contradictory to be relied upon. In effect, the entire evidence of identification at the scene of the offence during the robbery was such that the prosecution failed to establish that favourable conditions and adequate opportunity for the identification of the offenders existed at the time."

We do not intend to say more on that limb of the ground of appeal. That leaves the issue of identification of the appellants through the fingerprint evidence.

Mr Lore submitted that the trial court and the first appellate court had erred in convicting the appellants on the basis of the fingerprint evidence which was inconclusive and unreliable. Learned counsel further contended that it was not clear who had lifted the fingerprint impressions at PW1'S home and what the result of that exercise was. Counsel urged that the Scenes of Crime Report (C.I.D Form No. C. 46), was not properly filled, and in his view, that suggested that it was a concocted report.

Mr Lore criticised the prosecution for failure to lift fingerprint impressions from the bedroom door, doubting the veracity of the explanation that it was not possible to do so from a wooden door. Counsel concluded by submitting that the fingerprint evidence was incomplete because there was no report relating to the fingerprints of PW1, PW2 and PW3 which were taken for purposes of elimination as persons who were legitimately at the *locus in quo.*

Mr Abele, on his part opposed the appeal and supported the conviction and the sentence. Counsel submitted that both the trial court and the first appellate court had arrived at correct concurrent findings of fact which, on the facts of this appeal, this Court could not interfere with. Mr Abele invoked ***section 48(1)*** of the ***Evidence Act*** regarding opinions of experts, and submitted that the provision renders admissible opinions of persons specially skilled in, for example, finger or other impressions, when the court is required to form an opinion on such matters. Counsel concluded by submitting that the fingerprint evidence was not challenged by any other expert evidence and that the same remained cogent and consistent.

We have perused the record of the proceedings before the trial court and the first appellate court, as well as the exhibits that were produced by the police regarding the fingerprint evidence. We have also considered the submissions by learned counsel.

Fingerprint impressions have been accepted for a long time as reliable means of personal identification; some people would assert, may establish conclusively the presence or absence of a suspect at the scene of crime or the identity of the person whose finger or palm prints have been found

at the scene of crime. Once that is done, all that remains is primarily the determination of whether the suspect was at the scene for an innocent purpose or otherwise.

In this appeal, contrary to the submissions of learned counsel for the appellants, PW5 testified that he was the one who took the fingerprint impressions at the *locus in quo* from the rear door of the house, the door of the store, window panes and the inside and outside of the Motor Vehicle No. KAP 938 R. His evidence was particularly detailed and he produced those impressions as Exhibits 9, 13 and 15. Those impressions, together with the finger and palm prints were despatched to PW 10, a gazetted fingerprints expert with two years experience in identification of people through fingerprints impressions, who, after analysing and comparing the impressions and the appellant's prints found as follows:

i) The 1st appellant's left thumb prints were identical to the impressions taken from window pane;

ii) The 2nd appellant's left forefinger prints were identical to the impressions taken from the door of the store and several other places at the scene; and

iii) The 3rd appellant's right forefinger prints were identical to impressions taken from the motor vehicle.

From the evidence of PW 10, he was able to identify, in respect of each appellant sixteen (16) matching marks or characteristics between the fingerprints of each appellant and the corresponding impressions collected from the scene of crime. We do not think from that evidence and the exhibits that PW 10's report was a concocted report as submitted by Mr Lore.

The evidence on the identification of the appellants was circumstantial. In ***ABANGA ALIAS ONYANGO VS REPUBLIC, Criminal Appeal No 32 of 1990,*** this Court stated as follows regarding circumstantial evidence:

" "lt is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

In our opinion, the evidence of identification of the appellants through their fingerprints was safe evidence upon which to found their conviction. Their fingerprints were found at the *locus in quo,* only hours after the robbery. Those fingerprints were found at the very places where, according to the evidence of PW1, PW2 and PW3, the robbers had visited or on property they had come into contact with. The indeed, an infallible method of identification. The small ridge formations or patterns on fingertips or palms of the hand are said to be personal to each person, so that no two persons have exactly the same arrangement of the ridge patterns. In addition those patterns remain unchanged for life. Those are scientifically undisputed facts which a court can take judicial notice of under ***section 60*** of the ***Evidence Act***.

Way back in 1911, the Supreme Court of Illinois in the USA, delivered its landmark decision in the ***PEOPLE VS. JENNINGS,*** **252 III. 534, 96 N.E. 1077 (1911),** in which it ac epted fingerprint evidence as a means of legally identifying individuals, in the following words:

*"We are disposed to hold from the evidence of the four witnesses who testified, and from the writings we have referred to on this subject, that there is a scientific basis for the system of fingerprint identification, and that the courts cannot refuse to take judicial cognizance of it... "*Here in Kenya, in ***NAZIR AHMED S/O REHAMAT ALl & ANOTHER VS R, (1962) EA 345,*** the former Court of Appeal for East Africa upheld the conviction of an appellant for theft of motor vehicle on the basis of his finger and palm prints that were found on the stolen motor vehicles

soon after the theft.

By comparing the fingerprints found at the scene of crime with those of a suspect therefore, an expert, whose evidence is properly admitted by the court under ***section 48*** one of ***the Evidence Act,*** evidence irresistibly placed the appellants at the scene of the robbery and their presence there had no innocent explanation as they did not give any explanation of the same presence as would be required under **section 111** of the **Evidence Act**. We do not see any basis for concluding that those fingerprints were at the scene of crime accidentally.

In ***NAZIR AHMED S/O REHAMAT ALl & ANOTHER VS R, (supra)*** the Court reasoned as follows:

"The possibility of accidental contact by the same person (being a person unconnected with the owners) with the three cars stolen on different occasions does not warrant serious, or indeed any, consideration. It is plain then that the first appellant had deliberate contact with cars mentioned in counts 4 and 5 either at the time of the thefts or within a matter of hours...We therefore think that the magistrate was fully justified in convicting the first appellant on the evidence before him."

We would adopt the same reasoning in this case and find that the appellants were properly identified through their fingerprints.

We do not think much turns on the complaint on lack of a report relating to the fingerprints of PW 1, PW2 and PW3. In our understanding, the purpose of taking the fingerprints of PW1, PW2 and PW3 was purely for eliminating or excluding their presence at the locus in quo, which was undoubtedly legitimate or innocent. That there was no report on the analysis of the places where their fingerprints were found cannot form the basis for impeaching a report on the presence of the fingerprints of the appellants at the locus in quo. The real issue was not whether PW1, PW2 and PW3 were at the locus in quo; it was whether the appellants were there.

We have ultimately come to the conclusion that we have no basis for interfering with the concurrent findings by the two courts below. The identification of the appellants through their fingerprints was sound and safe. This appeal is accordingly dismissed.

Dated and delivered at Kisumu this 13th June 2014.

ONYANGO OTIENO

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JUDGE OF APPEAL

F.AZANGALALA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR