IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO.45 OF 2014

BETWEEN

FRED WESONGA KIZITO……………………………………….1ST APPELLANT

PATRICK OKUMU MOTARI ....2ND APPELLANT

AND

REPUBLIC..RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Kakamega (Chitembwe & Dulu, JJ.) dated 21st March, 2014

in

HCCRA NO. 154 OF 2012

****

JUDGEMENT OF THE COURT

In the evening of 6th October, 2009 ***David Siali Makhaya*** *(PW1) (Siali),* ***Navisi Stanley Mugurane*** *(PW2) (Navisi),* ***Patrick Munyendi Savai*** *(PW3) (Savai),* ***John Kungu Chege*** *(PW4) (Chege),* ***Alfred Kisanya Ambuzi*** *(PW6) (Kisanya)* and ***Erick Ayodi Amusavi*** *(PW7) (Ayodi)* together with about fifty others boarded bus No. KBB 235 M christened "**Eldoret Express" travelling** from Nairobi to Serem in Vihiga County. There were a number of stop overs along the way to effect repairs to the bus and for refreshments of passengers. The journey was otherwise uneventful until they reached Shiru/Musasa area. There trouble started. The above witnesses all testified that seven *(7)* of the passengers rose from their seats and took strategic positions in the bus. The witnesses stated that they were certain of the seven because each had a torch which they switched on.

One of the seven who, according to the witnesses, was armed with what looked like a pistol, ordered the driver of the bus to drive slowly. The others took various items from the passengers including mobile phones, money, ID Cards, voters cards, purses, personal items etc. Siali lost his Nokia 1100 mobile phone and Kshs.500/=. The attackers were not known to him prior to the incident. Navasi lost his Nokia 1200 mobile phone and Kshs.l50/=. Savai, lost a sweater and a comb. Chege lost his ID card, voter's card and ATM card. Kisinya lost a wallet with Kshs.5,000/=, a voters card, a sim card, business cards and tickets. Ayodi lost a wallet with Kshs.6,000/=.

When the thugs left, one of the passengers telephoned police officers who immediately swung into action**.** ***Cpl Silvery Kokey*** (PW5) (Cpl Kokey) and ***P.C. Titus Nzoka (****PW8) (PC. Nzoka)* were among police officers who were apparently separately instructed to attend to the case. The two officers were among teams which were dispatched to the scene. P.C. Nzoka's team carried out a search in the nearby forest and apprehended the 1st appellant who, according to P.C Nzoka, was carrying a white bag on his back and could not give a satisfactory explanation of himself. In the bag, according to P.C. Nzoka, several items were found: three mobile phones: two, motorolla- C 117 and one Safaricom Kambambe 225, shs2,710/=, Equity ATM card, ID card in the name of ***Rogern Shisekwa,*** a plastic comb, a packet of sweets , a pair of used socks and driving licence in the name of Savai.

P.C. Nzoka's team then drove to Cheptulu police base where the bus had been driven to. It is at that time the witnesses identified the 1st appellant while he was in the police vehicle. The witnesses claimed they identified the 1st appellant as one of the passengers who turned into a robber. A feature which set him out was his earring which the witnesses alleged he domed on one of his ears.

Cpl Kokey's team carried out a search in a different part of the forest and at about noon of 7th October, 2009 apprehended the 2nd appellant who, according to Cpl Kokey, was carrying a black bag in which the team found several items including ID cards for Chege, Rogem Shisekwa, ***Timothy Ambundo, Chanzu Nelson, Samwel Mugambi, Alfred Mbati, Aoron Mburie, Elizabeth Wanjiru, Linnet Musimbi,*** voter's cards of Chege, Linnet Musimbi, Elizabeth Wanjiru, Cleophas Bushiru, Timothy Ambundo, Alfted Kisanya; driving licence of Savai; mobile phone-make motorolla Cl17 and cash sum of Kshs.2790.

We shall revert to the recoveries allegedly made by both PC Nzoka's and Cpl Kokey's teams later on in this judgment.

CIP ***Albert Tawaya*** *(PW9)* on 8th October, 2009 collected the two appellants from Serem Police Station where they had been taken from Cheptulu police base and ferried them to Vihiga Police Station where they were subsequently charged with twelve counts each of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. They denied all the twelve counts and the trial proceeded with the prosecution calling nine *(9)* witnesses.

At the close of the prosecution’s case, the trial court found that the appellants had a case to answer and put them on their defence. In his defence, given on oath, the 1st appellant contended that he was arrested on 3rd October, 2009 for a different robbery offence which was withdrawn before he was charged with offences in the case which gave rise to this appeal.

In his defence, the 2nd appellant, on his part, contended that he was arrested on 3rd September, 2010 for riding a motorcycle without proper documents by a police officer with whom he had disagreed and he complained against the police officer to his seniors in Kakamega where he was given a letter and when he took it to Cheptulu police base, he was arrested and later charged as already stated. He denied knowledge of the offences.

The learned trial Magistrate, in a judgment dated 2nd July, 2012, found the appellants guilty of four offences of robbery with violence, and sentenced them to death on the 1st count but left the sentences on the other three counts in abeyance. In convicting the appellants the learned trial magistrate rendered herself thus:-

> *"The court has considered the evidence adduced by the prosecution witnesses and the defence of the two accused persons. It is not in dispute that the robbery took place at night at about 4.00 a.m. to 5.00 a.m. in a bus and the complainants are all passengers, but the complainants vividly identified the accused persons as being amongst the six (6) people who posed as passengers all the way from Nairobi and robbed them at Yala bridge on the Kaimosi Kapsabet road. The police were informed and they swung into action and arrested just (sic) accused in the nearby forest those were hours (sic) and. he was in possession of some of the items stolen from the complainants. The case against both accused persons in respect of count (sic) (1) (8) (9) and (11)*

have (sic) been proved beyond reasonable doubt and both accused persons are found guilty and convicted as charged. "

The appellants moved to the High Court vide High Court Criminal Appeal Nos. 188 and 189 of 2012 which were heard together. The appeals were dismissed by the High Court ***(Chitembwe and Dulu, JJ.)*** stating in so doing that:-

"The 1st appellant was arrested by PW8 that morning. Some of the items were recovered from the appellant. The witnesses identified him through his earring and PW8 informed the court that the appellant had an earring when he was arrested. We therefore find that apart from the evidence on identification the appellant was arrested shortly after the robbery and items recovered. The victims identified the recovered items as theirs. We do find that the prosecution proved its case against the 1st appellant as is required in law. The defence does not raise doubt that the appellant was one of the robbers. There is no evidence that the appellant was arrested even before the robbery occurred...... "

……

With regard to the 2nd appellant it is the evidence of PW7 that he identified the 2nd appellant as he saw him at Nakuru when the passengers entered a hotel. It is also the evidence of PW6 that he lost his brown wallet and other personal items. He identified some of the items when 2nd appellant was arrested and taken to the police station that afternoon. It is the evidence of PW5 Cpl Silvery Kokey that on the 7.9.2009 at about 6.00 a.m. he received a call from the OCS Serem police station who informed him about the robbery...

The police officers went to search for the robbers in the forest and at about midday they arrested the 2nd appellant inside the forest..........

The appellant had a bag which had sim cards and identity cards. He was taken to cheptulu police petrol base and the victims identified the appellant as one of the robbers. Some of the victims identified some of the items recovered from the appellant. In his defence the appellant testified that he was arrested by a police officer with whom he had differed on 3.9.2009 and later charged with the offence. Given the evidence in record we are satisfied that the 2nd appellant was arrested on the 7.9.2009 at about midday in the forest. He was found with some of the stolen items and was identified by some of the passengers.. The defence evidence does not cast doubt on the prosecution evidence. "

With those findings, the learned Judges of the High Court dismissed the appellants' appeals hence this appeal before us premised on five (5) grounds which are in a nutshell that the High Court failed in its duty to re-evaluate the evidence afresh; that evidence of identification was not positive; that the doctrine of recent possession was improperly applied and that the defence of alibi was not given proper consideration by the two lower courts as the same was not dislodged by the prosecution.

Mr. Mochere, the learned counsel for the appellants, addressed us on the above grounds which he argued together. He contended that the evidence of identification amounted to mere dock identification and that there was confusion as to which items were recovered from who of the appellants and by which police officer. Counsel referred us to the charge sheet which supported the appellants' defence that they were arrested on 3rd October, 2009 before the subject robbery happened.

On his part, ***Mr. Sirtuy,*** learned Principal Prosecution counsel, opposing the appeal, submitted that the appellants were properly convicted mainly on the doctrine of recent possession and that the conviction is safe.

The evidence which was accepted by the two courts below clearly shows that the appellants were convicted, in the main, because they were allegedly visually identified as some of the attackers who frisked the passengers in the subject bus on the early morning of 7th October, 2009 and on the doctrine of recent possession. We shall consider the twin bases of conviction seriatim.

It is now well settled that before a court of law can convict an accused person on the evidence of visual identification, which he denies, the court is enjoined to consider with the greatest caution such evidence for, as stated in the case of **R - Vs -. Turnbull [1976] 63 Cri App. R 132,** mistakes are occasionally made by witnesses in identification to the extent that even in cases of recognition, mistakes still occur even when the identification is purportedly made by close relatives and friends.

In the case of **Roria -Vs -Republic [1967] EA 583**, the predecessor of this Court stated thus:-

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardn.er, L.C. said recently in the House of Lords in the course of a debate on section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:-***
>
> > ***'There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten if there are as many as ten – it is in a question of identity'."***

And in the case of **Wamunga -Vs -Republic [1988] KLR 424**, this Court stated:-

> *"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence be examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. "*

This is a second appeal and our jurisdiction is delineated by ***section 361 (1) (a)*** of the Criminal Procedure code. Only matters of law fall for our consideration. We said so, in the case of **Mriungi -Vs Republic [1983] KLR 455:-**

> ***"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 on the evidence that no reasonable tribunal could have reached that conclusion, which would be the same thing as holding that the decision is bad in law."***

We have considered the record to satisfy ourselves that the trial court was alive to the need to exercise great care and to examine cautiously the evidence of identification which was before it and whether the first appellate court did revisit the evidence, analyse the same, re-evaluate it and after doing so, come to its own independent conclusion having of course, given due allowance to the fact that the trial court had the advantage of having seen and heard the witnesses testify. We however, have jurisdiction to interfere where it is demonstrated that the two lower courts considered matters they should not have considered or failed to consider matters which they should have considered or that considering the decision as a whole a miscarriage of justice occurred.

In this case, the 1st appellant, on being arrested, was driven to where the passengers were at Cheptulu police patrol base whereupon Savai, Kisanya, Ayodi Siali and other passengers purportedly identified him. The purported identification was made even before the witnesses had described their attackers in their first report to the police. Siali stated, in part:-

> ***"We proceeded on with journey and the police telephoned a lady we were with that we go to Cheptulu police patrol base <u>because one of the suspects had been arrested</u>."*** *(underlining ours)*

Navisi testified, inter alia:-

> ***"While there police vehicle came and <u>we were told one of them had been arrested</u>. I saw him in the police vehicle and I came to know that he was the one who was near me."*** *(underlining ours)*

Savai stated, inter alia, as follows:-

> ***"While we were at Cheptulu many other members of public came and gathered there. <u>As we were being attended to a police vehicle came carrying one suspect</u>."*** *(underlining ours)*

Chege said, in part;

"we reached Cheptulu and we were told to record what people had lost. In the process the officer from Serem came in with land cruiser <u>with one person whom they had arrested."</u> *(underling ours)*

Kisanya testified, ***inter alia,*** that when they (passengers) were at Cheptulu:-

> ***".... the police came with the person .... I could not identify my items............ I saw the person at that time....."***

And Ayodi stated, in part;

> ***"Then in the morning while we were at Cheptulu police post they came with the first accused ......"***

The purported identification at the police patrol base by the above witnesses, in our view, could not be free from the possibility of error. We say so, because it was easy for the witnesses to conclude that the 1st appellant, being already in the hands of the police, was one of the attackers. Siali infact stated that they were told to go to Cheptulu police patrol base where one suspect had been arrested. That in our view was improper. What the police officers should have done was to keep the 1st appellant away from the witnesses on his being arrested and then arrange a well conducted identification parade with a qualified independent police officer. If the 1st appellant had been identified at such a parade by the said witnesses after their description of him in their first reports to the police, such identification, in our view, would have been of great value. The mode of identification adopted by the police in this case greatly weakened the subsequent evidence of identification given by the witnesses.

The evidence of Chege regarding his identification of the 2nd appellant suffers from the same defect. He visited Serem police station in the evening of 7th October, 2009 and found the 2nd appellant having been arrested. He was standing at the report office and he purported to identify him. That identification, as already discussed, could not be free from the possibility of error.

The two courts below also accepted the evidence that the appellants were found with recently stolen property. If such evidence demonstrated such possession without ambiguity, it could indeed have been the basis of the appellants' conviction. In the case of ***<u>Hassan -Vs -Republic</u> [2005] 2 KLR 11***, we said:-

> ***"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or receiver."***

There are however, conditions which must be satisfied before conviction can be founded on the doctrine of recent possession. In ***Isaac Nganga Kahiga -Vs -Republic (CA Criminal Appeal No. 272 of 2005)***

(UR), this court stated:-

> ***"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; secondly that the property is positively the property of the complainant thirdly that the property was recently stolen from the complainant...***
>
> ***In order to prove possession, there must be acceptable evidence of search of the suspect and recovery of the allegedly stolen property and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."***

In this case, the evidence of recent possession was primarily given by P.C. Titus Nzoka and Cpl Silvery Kokey. The former arrested the 1st appellant and the latter arrested the 2nd appellant. It was P.C. Titus Nzoka's evidence that his team recovered from the 1st appellant the following items:-

1. *A white bag*
2. *Three mobile phones: 2 make*

    Motorolla C 117 1 make Safaricom Kabambe
3. *Wallet with 2,710/=*
4. *Equity Bank ATM card*
5. *ID Card in the name ofRogern Shisekwa*
6. *Plastic comb*
7. *Sweets*
8. *A pair of used socks*
9. *A driving licence of Savai Patrick*.

Cpl Silvery Kokey, on his part, testified that he recovered, from the 2nd appellant, the following items:-

1. *A black bag*
2. *Safaricom Sim cards*
3. *Nine identity cards (including that of Rogern Shisekwa)*
4. *voter's cards*
5. *A driving licence of Patrick Savai*
6. *One mobile phone make motorolla C117 serial No. CEO 168*
7. *16 purses*
8. *Wallet with 2790/=*

9. *A comb*

The above evidence of recovery of the stolen items has caused us great anxiety for two main reasons. The first reason relates to the alleged recovery of items from the 2nd appellant by Cpl Silvery Kokey. The record does not show that he produced those items. The second reason is the appearance of certain items in the two recoveries. We take judicial notice of the fact that only one identity card is issued per

adult person. Yet the two police officers purportedly recovered the identity card of Shisekwa from both appellants. We also take judicial notice of the fact that only one driving licence is issued per driver. Yet the two police officers purportedly recovered the driving licence of Patrick Savai from each of the appellants. How could that be? The appellants were arrested by different teams of police officers at different times and in different parts of the forest. Surely it could not be possible to find a witness' identity card or driving licence with each of the appellants at separate times by different police officers in different places considering that when the first recovery was made, the 1st appellant was placed in police custody. Were the police officers so determined to fix the appellants that they were prepared to use the recoveries made from one appellant against the other? or did they make up the allegation of

possession?

The evidence of recovery was compounded by the evidence which the appellants gave in their defences. They both alleged that they were arrested before the robbery of the passengers on the Eldoret Express bus. The charge sheet appeared to support the appellants as it indicated that they were arrested on 3rd October, 2009 when the robbery, the subject matter of this appeal, occurred on 7th October, 2009.

The 1st appellant indeed furnished the court with the number of a previous case which led to his arrest and the 2nd appellant urged the trial court to consider the O.B. entry of 17th August, 2009 at Serem Police Station and alleged that he had been in custody since 17th August, 2009.

The two courts' below unfortunately did not consider the discrepancies we have identified above. We do not know what conclusion the two courts below would have reached if they had considered the same discrepancies. There is therefore doubt as to whether the appellants would have been convicted and their convictions confirmed if the discrepancies had been considered. That doubt should be resolved in favour of the appellants. We do so. We allow the appeal, set aside the order of the High Court dismissing the appellants' appeals, quash the convictions and set aside the sentences by the trial magistrate. The appellants are set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF OCTOBER, 2014

D.K.MARAGA

………………………

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