IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 180 OF 2012

BETWEEN

PETER OGOLA MAINA .... 1ST APPELLANT

HUMPHREY SANGALE LICHWA .... 2ND APPELLANT

AND

REPUBLIC... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kakamega (Kimaru &Thuranira, JJ.) dated 8th December, 2011

In

H.C.CR.A. NO. 88 OF 2007)

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JUDGMENT OF THE COURT

1. **PETER OGOLA MAINA and HUMPHREY SANGALE LICHWA** (the appellants) were arraigned before the Senior Resident Magistrate at Kakamega for the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code.

The particulars of that charge alleged that on the 3rd day of March, 2006, at Shikoti Market, Shikoti location of Kakamega District within Western Province jointly with others not before Court and while armed with dangerous weapons, namely, swords, pangas and iron bars, the appellants robbed one Shiundu Asirandai of cash and an assortment of shop goods all valued at Kes. 150,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Shiundu Asirambai.

2. The second appellant was, in addition, charged with the offence of being in possession of suspected stolen property contrary to **Section 323** of the Penal Code. The particulars of that charge were that on 4th day of March, 2006 at Kifingo Estate, Kakamega town of Kakamega District within Western Province, having been detained by No.47332 Sgt. Benson Naibei as a result of the exercise of the powers conferred by **Section 26** of the Criminal Procedure Code had in his possession three empty crates of beer reasonably suspected to have been stolen or unlawfully obtained.

3. The appellants pleaded not guilty to both offences but after trial, they were convicted and on count 1, they were both sentenced to death. The sentence on count 2 for the 2nd appellant was held in abeyance in view of the one on count 1. Being aggrieved by those convictions and sentences, the appellants appealed to the High Court but their appeals were dismissed thus provoking this second appeal to this Court.

4. In their joint Memorandum of Appeal, the appellants faulted the learned Judge for failing to notice that their identification was flawed; that their defences had not been adequately considered; and that there was no evidence to support their conviction. They also faulted the first appellate court for failing to properly re evaluate the evidence on record thus arriving at a clearly wrong decision.

5. Urging these grounds of appeal before us, Mrs. Onyango, learned counsel for the appellant, submitted that upon seeing four armed men approaching the shop premises he was guarding (the shop), the complainant PW1 ran away and returned with police officers. He was neither injured nor threatened with violence. In the circumstances, she urged us to find that the offence of robbery with violence was not committed.

6. On identification, Mrs Onyango urged us to find that there was no evidence pointing to the appellants as having been among the people who broke into PW2's shop. She concluded that had the first appellate court properly re-evaluated all this evidence, it would have found that the offence charged had not been committed and that the appellants' identification was flawed.

7. Opposing the appeal, Mr. Sirtuy, the Principal Prosecution Counsel, dismissed it as unmeritorious contending that as the robbers were more than one, they were armed and they were arrested while stashing PW2's shop goods into gunny bags, the offence of robbery with violence was complete. He therefore urged us to dismiss this appeal.

8. We have considered these rival submissions and read the record of appeal. The appellants were caught red handed stealing PW2's shop goods and arrested. The issue of their identifications does not therefore arise. We however agree, with Mrs. Onyango that the evidence on record did not support the offence of robbery with violence. **Section 295** of Penal Code provides that:

> **"Any person who steals anything, and, *at or immediately before or immediately after the time of stealing it,* uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery." *[Emphasis supplied]***

9. PW1, the complainant in the robbery charge, testified that on 3rd March, 2006 at about 12.30 a.m., he saw four people who were armed with a panga, a somali sword, and a piece of metal approaching the shop. He ran and stopped about thirty meters away. When he saw them breaking into the shop, he ran to Shikoti Administration Police Camp where he reported the matter. Upon his return with two Administration police officers, he found the thugs stashing PW2's shop goods into gunny bags.

One of the thugs escaped but police shot and killed one of the them and injured the second appellant. The first appellant surrendered after which the two of them were arrested.

10. It is clear from this evidence that the thugs neither threatened PW1 with violence nor injured him. As a matter of fact they did not even confront, let alone even see, him. In the circumstances, we agree with Mrs. Onyango that the evidence on record did not support the offence of robbery with violence and that had the High Court properly re-evaluated the evidence on record, it would have come to a different conclusion.

11. As we have stated, when PW1 saw the thugs breaking into the shop, he ran to Shikoti Administration Police Camp, about 100 meters from the shop to report the matter. When he returned to the scene with Administration police officers, he found that the thugs had gained entry into the shop and

were in the process of stashing PW2's shop goods into gunny bags.

12. In our view this evidence proves the offence of shop breaking and stealing contrary to **Section 306** of the **Penal Code** and, as we have stated, not robbery with violence. In fact had PW2 who went to the shop a little later not testified that he lost cash of Kes. 30,000/= and scratch cards worthy Kes. 25,000/=, the offence would have been one of shop breaking and attempting to steal.

13. In the circumstances, we quash the conviction of the appellants on the charge of robbery with violence and, pursuant to the provisions of **Section 179(2)** of the **Criminal Procedure Code**, substitute therefor a conviction on the offence of shop breaking and stealing contrary to **Section 306** of the Penal Code and sentence each of the appellants to seven (7) years imprisonment on each limb from the date of their conviction.

14. As we have stated the second appellant was also convicted for the offence of being in possession of suspected stolen goods but the imposition of sentence on that count was suspended.

Having dismissed his appeal on that count, we sentence him to two (2) years imprisonment also from the date of conviction and order that this sentence runs concurrently with the one on count

15. As the appellants were convicted on 11th November 2007 which is more than the maximum sentence of seven years which we have imposed upon them on count 1, it follows that they have already served their sentences. We accordingly order that they be set free forthwith unless they are otherwise lawfully held

DATED and delivered at Kisumu this 20th day of November, 2014.

D.K.MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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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