IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MWILU & OUKO JJ.A.)

CRIMINAL APPEAL NO. 122 OF 2004

BETWEEN

DANIEL NJIHIA NJUGUNA …..................................... 1ST APPELLANT

NIXON OMONDI OKOTH …....................................... 2ND APPELLANT

HESBON KIVAIRO AMAGORA …............................. 3RD APPELLANT

AND

REPUBLIC ….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Mbaluto & D.A. Onyancha, JJ) dated 13th October 2003

in

HC. CR. C. NOS. 1157, 1158 & 1217 OF 1998

CONSOLIDATED)

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JUDGMENT OF THE COURT

It is necessary that we explain why a matter that began in 1997 before the subordinate court is being decided on a second appeal sixteen years later.

For reasons that are not clear from the record, though the offence was committed in Vihiga District in the former Western Province, the appeal to the High Court was filed and heard in Nairobi. The trial in Vihiga Senior Resident Magistrate's Court took almost 1½ years, between 4th March, 1997 and 13th August, 1998 when the judgment was delivered. The appeal to the High Court was filed without delay on 24th September, 1998. Again for reasons that are not recorded, it would appear that that appeal was heard twice; first by **Oguk and Mitey, JJ** on 15th June, 2000 and judgment reserved for 27th July, 2000.

The next record is that of 16th May, 2003 before **Mbaluto,J** allocating 26th June, 2003 as the hearing date. On the scheduled date, the appeal was heard by him (**Mbaluto, J)** and **Onyancha, J**. and the judgment giving rise to this appeal rendered on 13th October, 2003 instead of 17th July, 2003, the

date it was reserved to be delivered.

Following that judgment, this appeal was once more promptly filed on 24th October, 2003. Up to the year 2010, a period of seven years, the High Court record was not forwarded to this Court and the first time the appeal came up for hearing was on 31st June, 2011. Between that date to 6th May, 2013, when it was argued before us, it had been adjourned several times for various reasons to do with representation of the appellants by counsel, ill health of the 3rd appellant and non-availability of a Judge to complete a bench.

Clearly from this background, the trial itself was concluded within, what we consider, reasonable time (1½ years). The first appeal dragged for five years. It took another seven years for the first appellate court record to be forwarded to this Court. The appeal hearing has been pending before this Court for the last two years. That explains the 16 years, the period this matter has been in Court.

Without expressing ourselves one way or the other on this, it must concern all of us that such delays are likely to contribute to the loss of public confidence in the courts as they heighten the anxiety of the accused persons or appellants.

The three appellants before us brought this second appeal to challenge the confirmation of their conviction and death sentence by the High Court.

They were tried, as explained earlier, by the Principal Magistrate, Vihiga Court (O. **Miseda**) for the offence of robbery with violence contrary to section 296 (2) of the Penal Code and assault causing actual bodily harm contrary to section 251 of the Penal Code. It was alleged that on the night of 17th & 18th February, 1997, the appellants jointly robbed **Peter Okova** of several shop goods belonging to **Rakesh Budhev**, the complainant; that in the course of the robbery four people were killed. In the alternative, the 2nd and 3rd appellants were charged that on 19th February, 1997 at Chavakali Trading Centre, they handled goods suspected to have been stolen. The three were further charged jointly in the second count with assaulting **Ayiera Mbunda**.

After the trial in which 12 prosecution witnesses testified and each of the appellants defended themselves, the learned trial Magistrate found the charge of robbery with violence proved and upon conviction sentenced the appellants on the first count (robbery with violence) to death and on the second count (assault) to 1 year imprisonment.

Their appeal to the High Court was dismissed prompting this appeal. The combined effect of the 17 grounds of appeal preferred by the appellants can be summarized thus:-

1. That the circumstantial evidence relied on by the High Court was not sufficient;
2. That there was no proof that the 1st appellant was found with any of the stolen goods;
3. That the Court relied on an accomplice evidence without corroboration to uphold the conviction;
4. The appellants' grounds of appeal were not adequately considered;
5. That the exhibits produced were not properly identified as those stolen from the complainant's shop;
6. That the investigating officer was not called as a witness;
7. That the High Court erred in confirming the death sentence, which was not mandatory.

On second appeal, this Court is only concerned with points of law. It is bound by concurrent findings of fact made by the two courts below unless those findings were not based on evidence – see **Njoroge V. R.** (1982) KLR **388**. It is necessary, before considering the appeal, to briefly set out the background.

On the night of 17th & 18th, February, 1997, a gang of four robbers descended on the residents of Majengo Market in Vihiga, breaking into shops and stealing several shop goods. At the end of the terror, three watchmen and a taxi driver were left dead. The only eye witness, P.W. 3 **Ayiera Mbunda,**

a watchman guarding the shop adjacent to that of the complainant saw four men cutting the lock of the complainant's shop at about 1.30 a.m. (erroneously recorded as 1.30 p.m.). When they noticed him they attacked him. He fought back, hitting one of the attackers on the forehead with an iron bar before he (Ayiera) ran into a banana farm. He did not identify any of the robbers.

The appellants denied involvement in the robbery. The 1st appellant only explained how he was arrested on 19th February, 1997. The 2nd appellant admitted that several shop goods were recovered from his house, but maintained that they belonged to P.W. 8, Phineous Kadima Msasi (Phineous), who he claimed had employed him to hawk them; that when he took the police to Phineous, the latter escaped; that Phineous was subsequently arrested but later set free. The 3rd appellant raised an *alibi* defence that he was in Nairobi on 18th February, 1997 and arrived in Vihiga on 19th February, 1997. The police arrested him because of a bag which he had bought in Kisumu.

That being the case, the two courts below correctly found that only circumstantial evidence was presented by the prosecution as there was no direct evidence linking the appellants to the robbery. The circumstantial evidence relied upon can be summarized as follows:-

(i) After the robbery on the night of 17th and 18th February, 1997, that very morning, the local area Assistant Chief, P.W. 5, **Eliakim Luwayi** (the Chief) got information of 3 suspicious people in the village. He followed them to a shop where he witnessed the 2nd appellant sell some goods to Phineous – as the 1st and 3rd appellants stood by. He also noted that the 2nd appellant had a wound on the forehead.

(ii) Phineous confirmed that it is the 2nd appellant who sold to him shop items at Kshs 3,320/= and that he only had Kshs 1,320/= which he paid him with the balance to be paid the next day. But the next day, the 2nd appellant did not show-up. The three men were not known to the Chief or Phineous.

(iii) P.W. 7, **Patrick Mboya David (Mboya)**, another shop owner was also approached by the 2nd appellant with a view to selling to him some goods, but they could not agree on the price. From this shop the Chief trailed them to a house which he learned belonged to the 2nd appellant. Later, the Chief was approached by the police who he informed about the suspicious movements of the three. With the police the Chief returned to the house where he had seen the three enter.

(iv) In the house, they only found the 2nd appellant and a lady identified as P.W.4 **Nancy Aluviza (Nancy)** the other two men who had been with the 2nd appellant having left. They recovered from the house several assorted items, including weighing scale, crown bar, battery cells and a bag. The 2nd appellant explained that he was involved in a wholesale business. After he failed to satisfy the police on this claim, he was arrested together with **Nancy.** After interrogation, **Nancy** was released and treated as a prosecution witness.

(v) According to her, she was a girl friend to the 2nd appellant having met him three months prior to the robbery. They lived together as lovers. She recalled that on 16th February, 1997, the 1st appellant visited the 2nd appellant in his house where he found **Nancy**, the 1st and 3rd appellants. The 1st appellant went away, leaving the 3rd appellant in the 2nd appellant's house where he spent the night. The 1st appellant returned the next day, 17th February, 1997 at about 3.00 p.m. After dinner, all the three appellants left at 7 p.m., carrying a crow bar and a paper bag allegedly to travel to Kisii to visit the 2nd appellant's sister. The 2nd appellant returned the next morning at 5 a.m. carrying a gunny bag and a traveling bag containing several shop items. He had a swelling on the face and left ear. Shortly he was joined by the 3rd appellant who too had a crow bar and a big paper bag containing other shop items. The 1st appellant arrived at 10 a.m. dressed in **"filthy"** clothes. After lunch, the 1st and 3rd appellants left, each carrying a bag. Later that evening, the police went and arrested both **Nancy** and 2nd appellant. They also collected all the goods the appellants had brought to the house.

(vi) The 2nd appellant led the police to arrest the 1st and 3rd appellants.

(vii) The police also recovered from the 3rd appellant's grandmother, P.W.2, **Lena Sabakho,** Golden Fry cooking fat and a handbag suspected to be part of the stolen shop goods.

From the foregoing, the circumstantial evidence presented by the prosecution and upon which the two courts below based their decisions can further be summarized as follows:-

i. That the three appellants were together on the evening of the incident and the next day;
ii. That they were found the next day after the incident with goods identified by the complainant to have been stolen from his shop;
iii. That the appellants sold some of those goods to Phineous and attempted to sell others to **Mboya**; and
iv. That the 2nd appellant had an injury on the face which must have been inflicted by *Ayiera* on the night of the incident.

We were urged to disregard the evidence of **Nancy, Phineous** and **Mboya** as, in the opinion of the appellants' Counsel, their testimony amounted to accomplice evidence, which required corroboration. Counsel also argued that the entire trial was vitiated by reason of prosecution by Senior Sergent Sirengo, an unqualified prosecutor in terms of section 85 of the Criminal Procedure Code.

It is now settled on the authorities of **R. V Kipkering Arap Koske & Another (1949) 16 EACA 135** and **Simoni Musoke V R (1958) EA 715** that in order to justify a conviction based on circumstantial evidence, that evidence must irresistibly point to the guilt of the accused person and that there should be no co-existing factor that may weaken or destroy the inference of guilt. We have, in the preceding paragraph set out the evidence relied on. We start with the evidence of recent possession and reiterate that there was concurrent findings of fact by the two courts below that following the robbery on the night of 17th and 18th February, 1997, several shop goods were stolen. It is also not in contention that certain shop items were recovered from the 2nd appellant's house the next day. The two Courts below found as a fact that the 1st and 3rd appellants' roles with regard to the suspected stolen goods point to their close association with the 2nd appellant.

The guiding principle on the doctrine of recent possession that has been followed in this country for many years was laid down by Lord Chief Justice of England, Justice Lynskey, in **R V James Loughlin** (1951) Criminal Appeals Report of 1951 – 1952 at page 69, as follows:-

> **"If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of the property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop breaker"**

In **Stephen Njenga Mukiria & Another V. R.** Criminal Appeal No. NAK. 175/2003, this Court clarified that the doctrine is applicable in cases of robbery with violence, manslaughter or murder, among other charges, and that before relying on the doctrine of recent possession,

1. possession must be positively proved i.e that the recently stolen property was found with the suspect;
2. the ownership of the property by the complainant must be proved;
3. there must be evidence that the property was recently stolen.

See also **Isaac Khalinga V R. Cr. Appeal No. 272 of 2005.** The word **"recent"** is relative and the proof as to time will depend on the easiness with which the stolen property can move from one person to another.

Upon our own evaluation of the evidence in totality, we are satisfied that the complainant was able to positively identify the exhibits recovered from the appellants as those stolen from his shop. Some of the items had unique marks, even though some were ordinary shop products. For instance, he was able to point out marks he had put on the 4 bags of 50kg; there was a label on his stolen purse while the

calculator had the company name inscribed on it. He also produced receipts to prove that he had purchased the recovered items.

The goods were recovered less than 24 hours following the robbery. There is credible evidence that the three appellants had been together on the night of the robbery – 17th February, 1997, returning the next morning (18th) with the exhibits. They were together that morning and sold some of these items to **Phineous** but failed to convince **Mboya.**

The learned magistrate, who had the opportunity to observe the demenour of the appellants was not persuaded by their respective defences. It was incumbent upon the appellants to provide an explanation as to how they came to be in possession of those items but they did not. See **Section 111** of the Evidence Act. In the absence of a plausible explanation the rebuttable presumption in law based on the provisions of **Section 119** of the **Evidence Act,** is that they were part of the gang that robbed the complainant's shop and in the process killed four people.

The 2nd appellant's defence that he was employed by **Phineous** to sell the items on his behalf was belated and unhelpful as no such questions were put to Phineous when he testified. His contention before us in that regard is therefore rejected.

We now turn to consider three points of law argued by counsel for both appellants, namely, that **Nancy, Phineous** and **Mboya** were accomplices whose respective evidence was not capable of corroborating each other's evidence.

The only reason why we are being asked to consider the three witnesses as accomplices is because they were picked up by the police and **Nancy** was in the 2nd appellant's house where the stolen goods were found. **Phineous** purchased some of the goods from the appellants and **Mboya** declined to transact with the appellants.

What legally constitutes an accomplice is not defined in any of our statutes, but **Section 20** of the **Penal Code** makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. **Section 396** of the Penal Code also defines an accessory after the fact as a person who assists a person who to his knowledge, is guilty of an offence.

We reiterate what this Court said in 1981 in the case of **Obiri V R (1981) KLR 493** that:-

" An accused person who was at the crime scene but found not to have been involved in the crime is not an accomplice and his evidence is not accomplice evidence".

On the authorities, there appears to be no one accepted formal definition of an **"accomplice".** Only examples of who may be an accomplice are given. Whether a witness is or is not an accomplice will depend on the facts of each case. It is however, important to emphasize that the evidence of an accomplice is not entirely without value. **Section 141** of the Evidence Act provides that:

> **"141. An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeded upon the uncorroborated evidence of an accomplice."**

As held in the case of **Joseph s/o Jeremiah V. Reginam** [1954] EALR 27 a court can convict on the evidence of an accomplice, but as a rule of practice which has the force of law, the court must warn itself of the danger of relying on such evidence without corroboration.

We hold that one would be an accomplice if one participated as a principal or an accessory in the commission of the offence, the subject of the trial. A person who merely acquiesces in what is happening or fails to report a crime cannot be an accomplice.

From the evidence on record, we do not see how the three witnesses were accomplices. **Nancy**

was merely in the 2nd appellant's house when the stolen items were recovered. She did not leave the house from the time the appellants set out for their mission on 17th February, 1997 until they returned the next day. The allegation that **Phineous** had employed the 2nd appellant to hawk the recovered goods was without basis and as we have stated, raised belatedly in the 2nd appellant's defence after **Phineous** had testified. He innocently purchased some of the goods in the presence of the Chief. In the result, we reject the ground of appeal that the testimony of Nancy and Phineous was accomplish evidence.

Regarding the prosecution by an unqualified prosecutor, we observe that indeed **Senior Sergent Sirengo** who led the evidence of **Phineaus** and **Mboya.** Was a person not qualified under **Section 85** aforesaid. Can that alone vitiate the entire proceedings? In **Elirama & Another V R.** **(2003) KLR 537** this Court held that where proceedings in a criminal trial are conducted by a person below the rank of an Assistant Inspector of Police, such proceedings are a nullity. That section has now been amended **by L.N. No. 7 of 15th October, 2007** effectively doing away with the requirement that prosecution must be conducted by Assistant Inspector of Police and above.

Reverting to the question we have posed above, whether the entire trial was vitiated by the participation of Snr Sgt Sirengo, the answer was provided by the Court in **Peter Kirima Mwaniki V R. Criminal Appeal No. 280 of 2005** as follows:-

> " **In the matter before us, CPL Osiemo, who by virtue of the aforesaid provision was not qualified to prosecute the appellants' case, did not conduct the whole trial. He only participated in leading the evidence of one prosecution witness. What would be the legal effect of his aforesaid action? The invalidity of what he did may only properly affect the proceedings relating to the time he prosecuted. In our view, the invalidity should not extend to what was done according to law. We think the evidence of the fourth prosecution witness can be expunged from the record without doing violence to the rest of the proceedings. The question which then follows would be whether once that evidence is expunged, the remaining evidence is sufficient to sustain the appellant's conviction".**

In this case, we have come to the conclusion, as the Court did in the above case, that even without the evidence of the two witnesses which Senior Sergent Sirengo led, there was still sufficient evidence to sustain the appellants' conviction.

Following the robbery of 17th February, 1997, in which innocent lives were lost, the appellants, acting with common intent, were found to be in possession of the goods looted from the complainant's shop the previous night. We find no fault in the proceedings and findings of the two courts below. We accordingly dismiss the appellants' consolidated appeals as lacking in an iota of merit.

Dated and delivered at Nairobi this 14th day of June 2013.

D. K. MARAGA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

I certify that this is a true Copy of the original

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