REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

(CORAM: OMOLO, ONYANGO OTIENO & VISRAM, JJ.A.)

CRIMINAL APPEAL NO. 178 OF 2005

BETWEEN

1. DAVID KINYUA KABURU
2. BENJAMIN NKUNJA KIRIAMANA ………………APPELLANTS

AND

REPUBLIC ……………...……………………………………….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Onyancha & Sitati, JJ) dated 14th March, 2005

in

HCCRA. NO. 114 & 121 OF 2001)
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JUDGMENT OF COURT

The appellant in this appeal, ***Benjamin Nkunja Kiriamana***, was, together with another, charged before the Chief Magistrate's Court at Meru with seven counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and one count of being in possession of dangerous weapon contrary to ***section 11(1)*** of the Penal Code. He was further charged alone with one count of handling stolen property contrary to ***section 322(2)*** of the Penal Code which alleged he dishonestly received or retained stolen property. They pleaded not guilty to the charges but after full hearing, the learned Senior Resident Magistrate (D.K. Gichuki) acquitted both of them in respect of counts 2, 3, 4, 5, 6, 8, 9, 10 and 11, those being five counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code, the count of being in possession of dangerous weapon contrary to ***section 11 (1)*** of the Penal Code brought against each of them and the count of handling stolen property preferred against the appellant alone. The appellant was the second accused in the trial court. They were however found guilty and convicted on two counts of robbery contrary to ***section 296 (2)*** which were counts 1 and 7 in the charge sheet. They were thereafter sentenced to suffer death as by law established in respect of each count. We note that the learned Senior Resident Magistrate did not order a stay of death sentence imposed in respect of count 7 as should have been done, but as far as this appeal is concerned that is now of no consequences for what will be apparent hereinafter. Both appellants were not satisfied with the conviction and sentence awarded and they each appealed against the decision to the superior court at Meru vide Criminal Appeal No. 114 of 2001. The superior court (D.A. Onyancha and R. N. Sitati JJ.), after hearing the appeal, allowed the appeal on count 1, quashed the conviction, and set aside the sentence as to that charge, but dismissed the appeal against conviction in respect of count 7, and confirmed the conviction and sentence of death. We were informed from the bar that the sentence has since been commuted to life imprisonment by His

Excellency the President. Both were still not satisfied with that decision of the superior court and thus appealed to this Court against it. Unfortunately, before the appeal could be heard, the other appellant, David Kinyua Kaburu, who was the first accused in the trial court and was also the first appellant in both the first appellate court and this Court died. Thus this appeal is only against conviction, and sentence awarded by the trial court in respect of count 7 in which the appellant was arraigned in the subordinate court with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code; the particulars of which were that:-

"On the 15th day of February 1999 at around 7.30 p.m., along Makutano Hospital Road in Meru Township of Meru Central District within Eastern Province jointly with others not before court while armed with dangerous weapons namely swords and knives robbed Julius Gikunda M'Muthiri Barclays Purse containing identity card and voters card, 12 green maize, 18 bananas, and cash Ksh.1,800/= all valued at Ksh.1,950/= and at or immediately before or immediately after the time of such robbery wounded the said Julius Gikunda M'Muthiri."

As we have stated, he pleaded not guilty. On 15th February 1999 at about 7.30 p.m. Julius Gikunda M'Muthiri (PW3) was on his way home from Makutano Area of Meru District. On reaching the Post Office, near newspaper vendor stand he met four people. These were the appellant and his former co-appellant and two others. The two groups were apparently not together as the appellant and his former co-appellant were in front while the other two were following them but apparently on their own mission. The first appellant (now deceased) held him by the collar and demanded that he produces all what he had. Before he could talk the person he identified as the appellant before us, held him around the waist. As they held him, they ransacked him and took from his rear trouser pocket Ksh.1,400/=. They also took Barclays Bank account card, elector's card and Ksh.400/= from his upper coat pocket. They took other items from his inner coat pocket on the right side. He struggled to resist the attack and theft but the appellant's colleague stabbed him on the outer side of his left thigh and on the back of his head. He was then ordered to sit down and he complied. As he sat down the appellant and his colleague released him and fled away. He screamed saying thieves had robbed him. That attracted police officers who were around laying ambush immediate response. The police came barely two minutes thereafter. He showed them the direction the appellant and his colleague had taken. PC Alex Kinyua (PW7) was one of the police officers who responded to the alarm raised by Julius. On that evening at about 7.15 p.m. he had been instructed to go and lay ambush along Meru Kaaga Road. He was together with PC Ngii, PC Mati and another police constable. The ambush was necessitated by a series of robberies that had been committed along that road previously. As he reached telecommunication offices, he met a person who complained of having just been attacked by three people near the entrance to the post office. Before he finished handling that report, he heard screams at the exit road to the post office. This was the screams from Julius. They responded and saw three men sandwiching Julius. Upon those men seeing PC Alex and his team, they fled. PC Alex and other police officer ordered them to stop, but they did not stop. Then PC Ngii shot the appellant's colleague's left leg and he was immobilized and arrested. The appellant was then pursued upto Brotherhood Estate. PC Alex says he never lost sight of him and kept on shouting for help. Members of the public who had heard the gunshot and shouting intercepted the appellant and held him. The police officers including PC Alex re- arrested him. PC Alex said in evidence that carrying out a quick search on the appellant, he recovered a pen knife which he produced in court as Exh. 3. The appellant was then escorted to police station where on thorough search, a bunch of keys were recovered from the appellant. The search went on in the presence of Julius and according to Julius, the police recovered bank card in his name and purse in which it was together with banking slip from the appellant. Also recovered from the appellant were deposit slips for Account No. 5155942 which was account number of Julius. Several other documents such as photostat copy of Julius's identity card and his national identity card, were all in the purse. Elector's card in the name of Julius was also found with the appellant. PC Alex, however gave a different version but the first appellate court accepted the evidence of Julius on the issue of recovery and we have no reason to interfere with that aspect as indeed Julius was present when the search was carried out on the appellant, and the issue as to who was more credible between Julius and PC Alex was a matter on which the trial court which saw and heard both witnesses had advantage and the first appellate court's finding on it on fresh analysis and evaluation, which was, in our view, properly done was proper. The appellant was thereafter charged with the offence as we have stated above. In his sworn statement in defence the appellant said on 15th February 1999 he stayed at his

place of work at Gikumene till 6.00 p.m. He then went to Meru town and proceeded to his estate. He realized he had no paraffin and decided to go to town to buy it. On his way to town, he met police officers who asked him for his identification documents. He explained his position but he was arrested and taken to police station. His jacket was taken, his keys were taken and he was interrogated about robberies which he denied. He was then charged with the offences which he continued to deny. On cross-examination, he denied being arrested in the course of any chase by police officers. He admitted that he was identified at an identification parade and that he duly signed the identification forms, but contended that the witness who identified him was shown to him before identifying him much as he did not complain to the police. He also admitted that the night was not very dark.

The above is a summary of the facts that gave rise to this appeal. The appellant filed five grounds of appeal which were that the conviction was not proper as the evidence adduced was contradictory, scanty and inconsistent and thus could not sustain a conviction; that the learned Judges of the first appellate court erred in convicting him relying on the doctrine of recent possession whereas the evidence of the alleged recovery was not reliable; that the courts below erred in shifting the onus of proof on to the appellant and that his defence was not considered adequately. His firm of advocates later filed supplementary memorandum of appeal raising three grounds which were:-

"1. That the learned Judges of the superior court erred in law in failing to appreciate that identification of the appellant was not proved beyond any reasonable doubt.

2. That the learned Judges of the superior court erred in the law in affirming the conviction of the appellant whereas the evidence of PW3 and PW7 in the respect (sic) of identification of the appellant and all the surrounding circumstances cast doubt as to whether the appellant was one of the attackers.

3. That the learned Judges of the superior court erred in law in failing to come to the conclusion that after reviewing all the evidence on record it was doubtful as to what if any, was recovered from the appellant as evidence on recovery was contradictory."

Before us, Mr. Njuguna, the learned counsel for the appellant in his submissions raised, on the main, two issues. These were issues as to whether the appellant was properly identified as one of the perpetrators of the offence in respect of count 7 and whether the doctrine of recent possession could apply in the case. He contended that only evidence of Julius and that of PC Alex implicated the appellant in the entire saga. As to Julius, Mr. Njuguna, submitted that first, his evidence as to how many people attacked him was contradicted by the evidence of PC Alex for whereas Julius said he was attacked by two people, PC Alex said he saw Julius sandwiched between three people. Further, whereas Julius said PC Alex and his team arrived at the scene about two minutes after the attack, and therefore there was no chasing the appellants and his colleagues, PC Alex was certain that they heard screams as they were laying ambush, responded immediately and gave chase, shooting one person and eventually arresting the appellant with the help of the members of the public. He said further on identification that Julius said in court that he identified the appellant at an identification parade, yet the parade forms in respect of that parade were not produced in the record before the court and the only identification parade form annexed to the record is that in which the appellant was allegedly identified by another person in respect of an offence that took place on a different date. Lastly, Mr. Njuguna maintained that no reliance could be attached to the source of light which was allegedly a distance from the scene as there was no evidence of the witnesses' position *vis a vis* the source of light and neither was its strength stated.

Mr. Kaigai, the learned Principal State Counsel on the other hand supported the conviction and sentence and the superior court's affirmation of the same. He submitted that the appellant was arrested immediately after committing the offence as PC Alex chased and re-arrested him from members of the public who had apprehended him as he was escaping from the scene. On his being searched at the police station, he was found in possession of recently stolen properties namely items of personal nature belonging to Julius and other items like pocket knife identified by Julius as the same as the knife used for stabbing him during the robbery. He urged us not to disturb concurrent findings of the trial and superior

courts on facts and thus to uphold the conviction. On sentence, Mr. Kaigai told us, the appellant was a beneficiary of Presidential amnesty and his death sentence was commuted to life imprisonment.

Two main issues were raised in the appeal. These are first whether the appellant's identification by Julius and PC Alex could be relied on to sustain a conviction and second, whether there was in any event evidence to support the conviction on the basis of the doctrine of being in possession of recently stolen properties.

The issue of identification in cases where an accused person denies being at the scene is a matter of law and has been considered by this Court and other courts in past cases at length. It is an important issue and requires greatest care before a court of law can base a conviction on such evidence pointing to an accused person as the perpetrator of an offence when he maintains, like in this case, that he was not properly identified as one of the attackers. In the case of ***Roria v. R* (1967) EA 583,** Sir Clement De Lestang V. P. delivering the judgment of the predecessor to this Court said:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER, 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.

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

In this case Julius said in evidence as concerns the appellant:-

"The people I met are the 1st and 2nd accused plus two others ………The 1st and 2nd accused were ahead of the other two. I was by the tarmac road along the road going to Meru Hospital. The 1st accused held me by the collar of the neck. …………… The second accused held me round the waist. As they held me, the 1st accused dipped his hand in my right rear trouser pocket. I had Ksh.1,400/- there. He took the same.

In my right upper pocket, I had a Barclays Bank Account card, Ksh.400/- and electors card. The 2nd accused dipped his hand in the inner coat pocket on the right side and took the Ksh.400/- Electors card, and Barclays Bank Account card……………

When I sat down, the 1st and 2nd accused released me and fled towards where I had come from along Meru Makutano road beside the road. The 1st accused led first. He was followed by 2nd accused.

When I was left, I screamed that thieves had robbed me. Police came immediately in a salon car; barely two minutes before 1st accused and 2nd accused fled. I showed the police the direction the two people fled to. Some police ran on foot towards the direction accused ran to."

He said further that he was told to go to police station. He did so and was told to wait for a vehicle to take him to hospital. He then continued:-

"As I waited, both accused were brought to station. ………..They found me at the report office. I told the police that these are the people who robbed me."

The accused were searched. My bank card in the name of Julius Gikundi was found with 2nd accused. The bank card, purse is before court. The bank card was inside the purse case.

…………..Brown jacket was worn by 2nd accused…………

When I met with 1st accused, there was light from the Kenya Posts and Telecommunication building. It has several security lights which were on. The Kenya Posts and Telecommunication building was 15 feet from where I was attacked. There was sufficient light which was bright enough for anybody to see anything."

We do not think a source of light at distance of 15 feet or 5 yards away can be described as being far to hamper proper identification of an attacker and particularly if that light is bright as Julius said it was. Mr. Njuguna attacked this evidence of Julius on the main ground that although it was stated that Julius identified the appellant at an identification parade, the form for that identification parade was not produced in court. That is true. However, as the appellant was chased and arrested by PC Alex and thereafter escorted to police station where he met Julius who identified him as one of his attackers few minutes back, we do not think identification parade was necessary for Julius to identify the appellant as he had seen him few minutes after the offence and after his arrest and had told the police that he was one of the robbers. Such a parade would have been successfully attacked and rendered of no consequence. We agree that had the appellant been arrested, taken to police station and not seen and pointed out by Julius as one of the attackers that night, the identification parade would have been necessary - See the case of ***Gabriel Njoroge vs. Republic*** ***(1982-88) 1 KAR 1134***. We think, however that this case falls within the cases such as ***Muiruri & 2 others vs. Republic, (2002) 1 KLR 274*** where this Court was of the view that the statement of the law in ***Gabriel Njoroge's case*** (supra) was too broad and it stated at page 277 as follows:-

"We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances each case (sic), the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification."

The circumstances of this case as stated by Julius demonstrate that he could not have identified a wrong person when the appellant together with his colleague were brought to the police station soon after the offence and the chase by PC Alex. PC Alex said as the police team laid ambush, they heard screams from Julius. They rushed there and found three men having sandwiched Julius. Upon seeing them, the attackers fled. One of the team, PC Ngii shot on the leg. That was appellant's colleague. They arrested him and proceeded to pursue the appellant who was still within sight. He followed the appellant to Brotherhood Estate as they were shouting for help. Members of the public intercepted the appellant and he was arrested. When taken to the police station where Julius was, Julius confirmed that the appellant was one of the attackers. We think the issue as to whether they were three *"sandwiching"* Julius as said by PC Alex or two as said by Julius is explained when Julius said four people approached him but only two got hold of him. Alex could have mistaken one of those other two to have been one of the attackers. We do not attach much importance to that minor contradiction. In our view, the appellant was properly identified and there was no need for identification parade as Julius had pointed him out as one of the attackers at the police station immediately after the offence and after his arrest.

On the issue of whether or not the doctrine of being in possession of recently stolen property was applicable to this case, we note as we have stated above, that there was contradiction in evidence between Julius and PC Alex. Julius stated as we have reproduced above that when the appellant was searched in his presence at the police station, his bank card and purse in which it was were found with the appellant. That purse also contained some banking slip dated 22nd October 1998 and deposit slip from his Bank Account No. 5155942, and photostat copy of his identity card, his national identity card, and elector's card. PC Alex however stated that before taking the appellant and his colleague to the police station, he carried out a search and recovered from the appellant a pen knife. At the police station he said he did a thorough search and recovered bunch of keys from the appellant but said he recovered a pocket purse, a Barclays Bank pouch from the appellant's colleague. He then talked of having recovered Bank Deposit receipt dated 22nd September, 1998 and a further receipt dated 22nd October 1998 but he did not state from whom he recovered those receipts. Further he recovered elector's card of Julius No.

0708851570 but again he did not state from where he recovered it. However, in cross-examination by the appellant, PC Alex said he recovered bunch of keys and documents. The trial court in its judgment considered the evidence that was before it on this issue and stated:-

"Upon being searched by PC Alex (PW2), the 2nd accused was found with a pen knife (mfi3) dagger (mfi(4) and four bunches of keys (mfi.12 and mfi.13).
Also recovered from 2nd accused were Barclays Bank pouch (mfi.4) some deposit slips (mfi.5) and (mfi.9) plus an elector's card (mfi.7). A torch was also recovered from 2nd accused. There were several other property (sic) recovered from the 2nd accused."

And the superior court considering the apparently contradictory evidence of Julius and PC Alex stated:-

"Although this piece of evidence would appear to be contradicted by PW7 who appears to suggest that the purse containing the complainant's evidence (sic) was found in the 1st appellant's evidence (sic), we have considered the same and have come to the conclusion that the search which was done at the police station in the presence of the complainant is not denied by the 2nd appellant nor are the findings of the search also denied by the 2nd appellant. We would otherwise choose to rely on PW3's evidence on this issue."

Thus the trial court who saw the witnesses and heard them and the first appellate court both believed Julius and relied on his evidence. That was on a matter of fact. In law, we see no reason to interfere as we have stated above for there were two versions before the trial court and the decision on whose evidence to accept depended on who was more credible. We would not as we have stated, disturb that concurrent finding of the two courts below.

The result is that on application of the doctrine of being in possession of recently stolen property, it is clear to us that the appellant was found with properties stolen from Julius only few moments previously. He never explained his possession and he was therefore rightly deemed to be the thief.

Thus, in our view, the appellant was properly identified as one of the attackers of Julius. Further and in any event, he was immediately thereafter found in possession of properties recently stolen from Julius during the attack and robbery of Julius. The evidence that was adduced clearly ousted his defence of alibi.

In the result, this appeal has no merit it is dismissed.

Dated and delivered at Nyeri this 7th day of July, 2011.

R. S. C. OMOLO
………………………….
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
…………………………..
JUDGE OF APPEAL

ALNASHIR VISRAM
………………………….
JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR</u>