IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 152 OF 2004

BERNARD OCHIENG ODUOR……..1ST APPELLANT

VINCENT AYUMA LISUKA…….2ND APPELLANT

JOSENTA SYLVESTA KARANJA …….3RD APPELLANT

AND

REPUBLIC……. RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Kitale Gacheche & Dulu, JJ.) dated 24th March, 2004

in

KTL. H.C.CR.APPEALS Nos. 64, 65 & 66 OF 2002)

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JUDGMENT OF THE COURT

On the night of 30th/31st December, 2000 there was a spate of robberies in Maili Tatu area of Trans-Nzoia District. At least three different families were hit by a gang of several robbers armed with pangas, hammers, rungus, sticks and big red torches. The victims were beaten up and suffered injuries. A large number of assorted household items and clothing were stolen. The various victims reported to Kitale Police Station and some of them told the police that they could identify the attackers if they saw them again.

Three days later on 3rd January, 2001, information was received at the police station that there were suspicious characters in a mud house at Mitume area. The police headed there at 11 a.m. and found three people: ***Vincent Ayuma Lisuka***, ***Bernard Ochieng Oduori*** and ***Josenta Sylvesta Karanja***. They were busy repairing several torches and one was cutting meat. On seeing the police the three started running away but were chased and apprehended. A large quantity of items were found in the house and were ferried to the police station. Many of them were subsequently identified as having been stolen from the three families. A fourth person, ***Eliud Simiyu Khamala*** was arrested on 11th January, 2001 and an identification parade was arranged for all four of them. They were identified as part of the gang that had terrorised the three families in Maili Tatu and were charged on three counts of robbery with violence contrary to ***section 296(2)*** of the ***Penal Code***. They also faced alternative charges of handling stolen goods contrary to ***section 322(2)*** of the ***Penal Code***. Upon their trial before Kitale Senior Principal Magistrate, Mrs. Ong'udi, three of them: ***Vincent Lisuka***, ***Bernard Oduori*** and ***Josenta Karanja*** were

convicted on the principal counts of robbery with violence and were sentenced to death. ***Eliud Simiyu Khamala*** was acquitted for lack of sufficient evidence. On appeal to the superior court, (Gacheche & Dulu JJ.) their appeals were dismissed and they now come before us on a second appeal.

Bernard Ochieng Oduori (hereinafter "*Oduori"*) was the 2nd accused at the trial but is the 1st appellant here. ***Vincent Ayuma Lisuka*** (*Lisuka*) was the 1st accused but is the second appellant here, while ***Joseph Sylvesta Karanja*** (*Karanja*) was the third accused and is the 3rd appellant before us. They all drew up their memoranda of appeal in person but the three learned counsel who appeared for them before us basically raised two issues of law for each appellant:

1) Identification.

2) The doctrine of recent possession.

The circumstances surrounding the issue of identification are as follows:

Mary Atamba (PW1) was at her Ex-Prison farm in Kitale when she was woken up from her sleep by barking dogs on the night of 30th/31st December 2000. Her husband was on safari but returned at 2 a.m. Her 9-year-old son was sleeping. When she went to the sitting room she found some robbers had already broken in and entered the house. They beat her up as they asked for money and forced her to face downwards. Ultimately she was tied up on a bed and the robbers took away all the household items they could get. She was categorical that she could not, and did not, identify any of the robbers as it was at night and the belated screams from her and her son which brought in Prison Officers from nearby found the robbers had already gone. When identification parades were conducted at the police station on 8th January, 2001 however, ***Mary*** purported to identify the three appellants but her evidence in that respect was discounted by the two courts below, and rightly so.

Florence Lihalei Luhunza (PW2) who was the wife of ***Sammy Peter Onami*** (PW5) was also asleep in her house with young children when she was awakened by barking dogs at about midnight on 30th December, 2000. She peeped through her bedroom glass-window and saw a group of people heading towards the house holding a big red torch. She went to the sitting room and saw the people outside the outer glass-door. She asked them to identify themselves and one of them, whom she said was ***Lisuka***, flashed the torch at ***Karanja*** and said "*see this one is a policeman"*. The others in the group had torches too. Suddenly they broke down the door and six of them entered the house. They started beating up ***Florence*** asking for money which she did not have. It was ***Oduori*** in particular who was asking for money. She was dragged into the children's bedroom. For the next half hour, the gang ransacked the house with their torch lights on and took a large number of household items. As the robbery was going on, her husband (PW5) was driving back home at about 12.45 a.m. At about 100 metres from his house, the car's headlights illuminated two people hiding behind a tree near the gate. He hooted and put on full lights but then the two people headed towards him holding a big red torch and a weapon trying to hit him. He quickly reversed the vehicle and headed to Kitale Police Station where he collected and returned with two policemen. They found ***Florence*** and the children outside, the house windows and doors vandalised, and many household items stolen. PW5 did not identify any of the robbers. ***Florence*** however told the police that she had seen three of the robbers and could identify them if she saw them again. And so she did when an identification parade was conducted by ***Chief Inspector Alfred Etyang*** (PW11) on 8th January, 2001. She identified the three appellants.

The gang of robbers found ***Doreen Adhiambo Obino*** (PW3) with her husband ***Lawrence Obino*** (Pw4) at their Syuna Farm asleep. They were awakened by barking dogs at about 4.30 a.m. ***Lawrence*** went to the bedroom window and found a group of about 10 people who said they were policemen. But they were armed with pangas, iron bars and sticks and they demanded that the house be opened. When ***Lawrence*** refused, they broke down the door and windows and entered the house. ***Lawrence*** climbed into the ceiling and hid there. ***Doreen*** went to the children's room to hide there but the robbers fished her out. They had a big red torch and they also took another torch she had. She was beaten up and forced to give out some Shs.8,000/= which was counted in her presence by ***Karanja*** who had a panga. She also saw

Lisuka who was holding a stick. They demanded more money which she did not have but she told them her mother-in-law and a visitor were also in the house. They went with her and took Shs.800/= and Shs.200/= respectively from them. They then collected various household items and took them out but continued to beat ***Doreen*** asking for car keys which she looked for in the company of ***Oduori*** and gave them to ***Lisuka***. ***Lisuka*** tried to start the car without success as a torch was flashed inside the car. ***Oduori*** was left guarding her. As he lay shaken 8 ft above in the ceiling, ***Lawrence*** said he peeped through a hole and identified ***Lisuka*** and ***Oduori*** because the robbers were flashing torches around and he could see them. His evidence of identification was however rejected by the courts below. But ***Doreen*** told the police that she could identify the thieves if she saw them again since she had stayed with them for one hour. She did so on 8th January, 2001 at the identification parade organised by ***Chief Inspector Etyang*** (PW11) when she picked out the three appellants.

The trial court believed the evidence of ***Florence*** (PW2) and ***Doreen*** (PW3) on identification, both at the scene of crime and at the identification parade and concluded:

"The next issue for determination is who committed these offences. All the three complainants P.W.1, P.W.2., and P.W.3. have testified that there was light from the big red torches. They say there was sufficient light which enabled P.W.2. and P.W.3. to see these people. They have explained that the attackers would flash at each other and that is how they were able to identify some of the attackers.

They told the police they were able to identify the attackers if they saw them. I.D. Parades were conducted by C.I. Alfred Etyang (PW11) and PW 2 and PW3 were able to identify Accused 1, Accused 2, and Accused 3 (Exb 28, 29 and 30). The witnesses explained very well how the I.D. parades were conducted and I am satisfied they were properly conducted."

In that conclusion she was supported by the superior court. She was also supported by learned state counsel Ms. Oundo before us. All three learned counsel for the appellants however challenged that finding on the basis firstly; that the circumstances surrounding the three robberies which took place at night were so stressful and terrifying to the two identifying witnesses that the identification was not free from the possibility of error. The main source of light in both cases was torchlight but there was no evidence on its intensity or length and direction of shining it. The evidence was that it was "*flashed"* which meant only momentary lighting. Secondly, they submitted, the identification parade was incurably flawed. The parade was held on the same day and possibly used the same members of the parade. There was also no guarantee that the identifying witnesses had not seen the appellants before the parade. All these, they submitted, were matters which the superior court did not re-evaluate as it was bound to on a first appeal, thus rendering the conviction of the appellants unsafe.

The issue of identification is, of course, one of fundamental importance and this Court has, in matters without number, underscored the necessity of careful consideration of such evidence particularly where the conviction is dependent on it. We need only refer to one of our more recent decisions for emphasis of the principle; **Paul Etole & Anor. vs. R**. Criminal appeal No. 24/00

"**The appeal of second appellant raises problems relating to evidence on visual identification. Such evidence can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but even when a witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.**

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater danger. In the present case, neither of the two courts below

demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no inquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It was essential that there should have been an inquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size, and its position *vis a vis* the accused would be relevant."

In this appeal the appellants were total strangers to the witnesses PW2 and PW3. The only source of light used to identify the appellants was from the robbers' own torches. Both witnesses said there was a "*big red torch"* and other smaller torches which were flashed around. The understanding of the appellants is that the torches were only momentarily put on and off. That may or may not be so. On the evidence however, a large number of household items were collected from the victims' houses and the source of light used was from torches held by the robbers. There can be no doubt that the prevailing conditions were stressful to the two helpless women whose young children were in the houses and one husband was away while the other was hiding in the ceiling. But the robbery in both houses took quite some time – half hour at ***Florence's*** house and one hour at ***Doreen's***. We find no merit in the complaint that the procedure adopted by ***Chief Inspector Etyang*** in organizing the identification parades was faulty. There is evidence that the members of the first parade in respect of ***Lisuka*** were 8 and were persons of similar physical characteristics who were visiting the police station at the time. The second parade for identification of ***Oduori*** had 10 other members while in respect of ***Karanja***, there were 8 members of similar physical characteristics. The evidence that the identifying witnesses had no opportunity to see the appellants before the parades was believed by the two courts below and we have no reason to depart from their findings. We think in all the circumstances that the proper identification of the three appellants was correctly upheld by those courts. At any rate, even if we were to entertain reasonable doubts in respect of that evidence, the matter does not rest there. The conviction of the appellants did not rest wholly or substantially on the evidence of identification but on the evidence that soon after the robberies, the stolen goods were found in possession of the appellants and there was no explanation put forward by the appellants to displace the presumption in law that they were either the thieves or the handlers. The finding by the trial court on that issue was this: -

"PW 9 confirmed that it is Accused 1, Accused 2, and Accused 3 whom they found in possession of these exhibits. (EXB 1-27 save EXB 15, 16 and 21). They even started running away when the police reached them, but they were arrested. I am convinced beyond doubt that they are the ones who were found with these exhibits. These were stolen goods. The owners have identified them. This recovery was barely five days after the robberies. The people found with these exhibits must have been among the robbers."

And the superior court upon reviewing the evidence afresh held: -

"The arresting officer PW9 also arrested the appellants in a house in which items were recovered which were later identified by the complainants as being the robbed items. The arrests and recovery of the items happened just three days after the robbery. We are of the view that the doctrine of recent possession is applicable to this case."

Those are concurrent findings of fact which we are not at liberty to depart from on a second appeal unless they were based on no evidence or on a misapprehension or perversion of it. It is contended by learned counsel for the appellants, nonetheless, that there was no evidence connecting the appellants either with the premises from which the stolen goods were recovered or the stolen goods themselves. Mr. Nyambegera for the 3rd appellant in particular pointed out portions of the record indicating that ***Florence*** (PW2) was shown the stolen goods at the police station on 2nd January, 2000 while ***Josephat Limisi*** (PW8) was informed about recovery of one of the stolen items on the same date. The evidence from the police officer (PW9) who made the recovery was that the stolen goods were recovered on 3rd January, 2000 and the inference is that the evidence was untruthful. We have carefully examined the record on this aspect of the matter and we find that the same issue was tested in cross-examination by production of the Occurrence Book (OB) which disproved the evidence of PW2 on the date of recovery and confirmed the consistent evidence of the arresting officer ***PC Kibagendi***, (PW9), ***Doreen*** (PW3), ***Lawrence*** (PW4) and ***Sammy Onami*** (PW5) who was the husband of Florence (PW2) and denied that ***Florence*** went to

identify the goods on 2nd January, 2000. We find no injustice arising from the variance in dates and reject the submission in that regard. We also reject the invitation made to us by Mr. Omboto for the 2nd appellant to make the finding that police witnesses are generally not reliable and therefore the sole evidence of ***PC Kibagendi*** on the recovery of the stolen items required corroboration. We find neither the requirement for corroboration in law nor the basis in fact for condemning police officers as generally unreliable. The veracity of the evidence of any witness must in each case be weighed on its own merits and for our part we have no basis for faulting the two lower courts below who believed ***PC Kibangendi***. Upon that evidence being believed, the *alibis* put forward by the three appellants dissipated.

Having satisfied ourselves that the two issues of law raised in this appeal are not meritorious we have only one recourse; that is to dismiss the appeal in its entirety, and we now do so.

Dated and delivered at Eldoret this 24th day of February, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR