REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

(CORAM: OMOLO, O'KUBASU, JJ.A. & DEVERELL, AG.J.A.)

CRIMINAL APPEAL NO. 175 OF 2003

BETWEEN

STEPHEN NJENGA MUKIRIA

BERNARD KIPKOSKEI KURGAT ……..…… APPELLANTS

AND

REPUBLIC ……..…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Lesiit, J) dated 2nd July, 2003

in
H.C.CR.APPEAL. NOS. 24 & 25 OF 2001)
****

JUDGMENT OF THE COURT

This appeal has a long history. The two appellants, **Stephen Njenga Mukiri** and **Bernard Kipkoskei Kurgat** were arraigned before the learned Senior Resident Magistrate, (Mrs. S. Muketi) jointly charged with four counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The 2nd appellant, (Bernard Kipkoskei Kurgat) who was the 2nd accused in that original charge sheet was separately charged with escape from lawful custody contrary to ***section 123*** of the Penal Code. The 3rd accused, one, James Mwaura Kariuki in that original charge sheet was separately charged with accessory after the fact to a felony contrary to **section 396(1)** as read with section 397 of the Penal Code. So that in that original charge sheet before the trial court, we had the following accused persons:-

1. Charles Oduor Orendo

2. Bernard Kipkoskei Kurgat

3. James Mwaura Kariuki

4. Florence Karimi Njeri

5. Lea Wairimu Wanjiku

6. Susan Amolo Akinyi

7. Stephen Njenga Mukiria

It should be observed that the 1st appellant herein, **(Stephen Njenga Mukiria)** was the 7th accused person during the trial while the 2nd appellant, **(Bernard Kipkoskei Kurgat)**, as already stated was the 2nd accused at the trial.

The particulars of the charge in respect of the first count were that all those seven accused persons on the night of the 20th and 21st July, 1999 at Beach Hotel Stem jointly with others while armed with dangerous weapons namely simis, bolt-cutter, hammer, chisels, swords and torches robbed **James Ikenye Ngugi** of K.Shs.210,000/=, a wrist watch make shaft valued at K.Shs.500/= and at or immediately before or immediately after the time of such robbery used personal violence to the said **James Ikenye Ngugi.**

The particulars of the second count were that on the same night and at the same place jointly with others not before court, while being armed with dangerous weapons namely simis, bolt-cutter, hammer, chisels, swords and torches robbed **Hudson Karega Muiruri** of K.Shs.28,020/= a wrist watch Seiko, an apron, a shaving machine, Smirnoff, bond seven, one calculator, Taksum, one radio cassette make Yoshita, one gas cylinder, a TV black and white Orion, castle beer, one quartz wall clock, one carrot grinder and dish, one gas cooker make Ramee, cigarettes, 76 tablets of actal, 44 tablets of panadols and at or immediately before or immediately after the time of such robbery used personal violence to the said **Hudson Karega Muiruri.**

The particulars of the third count were that on the same night and at the same place jointly with others not before court, while being armed with dangerous weapons namely simis, cutters, hammer, chisels, sword and torches robbed one, **Lucy Wanjiru Kahing'a** of her cash K.Shs.800/= and at or immediately before or immediately after the time of such robbery used personal violence to the said **Lucy Wanjiru Kahinga.**

The particulars of the fourth court were that on the same night and at the same hotel jointly with others not before court while being armed with dangerous weapons, namely, simis, bolt cutters, hammers, chisels, swords and torches robbed **Mary Njeri Njuguna** of her cash KShs.300/= and immediately after the time of such robbery used personal violence to the said **Mary Njeri Njuguna.**

All the seven accused persons were charged with an alternative charge of handling stolen goods contrary to **section 322(2**) of the Penal Code. The particulars of this alternative charge were that on the 21st day of July, 1999 at Kenland Estate Nakuru township in Nakuru District of the Rift Valley Province, jointly otherwise than in the course of stealing dishonestly received or retained one apron, one sewing machine, 3x1 Smirnoff, 4x½ bond seven, 1x½ bond seven, one calculator make Taksun, T.S.568, 19 guinness, 6 redds cans, radio cassette make Osaka, one radio cassette Yoshita, one gas cylinder, three bottles of castle beer, one carrot grinder, one dish, one gas cooker make Remee, three packets of Embassy cigarettes, one Seiko, five wrist watches, one packet of SM cigarettes, 78 tablets of actals, 44 tablets of panadols, 18 tablets of hedex, and four broken tricycle locks, all valued at K.Shs.150,000/= knowing or having reasons to believe them to have been stolen goods.

The trial of all the seven accused persons commenced before the learned Senior Resident Magistrate (Mrs. S. Muketi) on 7th October, 1999. The evidence adduced before the trial court was to the effect that on the material night of 20th and 21st July, 1999 a gang of robbers raided Beach Hotel Stem at about 2:00 a.m. and robbed the workers, owner and a guest of money, personal effects and goods plus foodstuff from the hotel. **Hudson Karega Muiruri,** (P.W.1.), one of the victims of the robbery testified to the effect that during the robbery the security lights were on and that he was able to identify two of the robbers. The two he identified were the two appellants. **James Ngugi Ikenye**, (P.W.2.) in his testimony stated that he too was able to identify the two appellants among the many robbers who raided the hotel.

This robbery was immediately reported to the police who commenced investigations. On the morning of 21st July, 1999 , **Cpl. Joseph Wambua** (P.W.3.) and other police officers reached a house in which there was loud music. It was about 6:00 a.m. The police officers acting on a tip off stormed the house in which they found three ladies and three men. The two appellants were among the men found in that house. The house was searched and a large amount of goods recovered. These items were identified by the victims of the robbery that had taken place at the hotel, only four hours earlier.

The learned trial magistrate considered the prosecution case and what each appellant stated in his defence and came to the conclusion that the two appellants were properly identified by two witnesses. In her judgment, the learned trial magistrate, dealing with the issue of identification of 2nd appellant (who was the 2nd accused at the trial court) stated:-

> ***"As for the 2 nd accused, P.W.1. stated that he identified him.***
>
> ***That he went to the room where he was and conversed with him***
>
> ***for about 10 minutes. This in the opinion of the court gave the witness***
>
> ***ample time to ide ntify the suspect. P.W.2. also stated that he was able***
>
> ***to identify him. The accused person was also arrested very early on the***
>
> ***morning in the house where the recovery was made. The court has no***
>
> ***doubt that this accused was one of the robbers. His defenc e that he was***
>
> ***going to work when he was apprehended cannot be true given that he***
>
> ***was identified by the witness and was where the recovery was made."***

As regards the identification of 1st appellant (who was the 7th accused at the trial) the learned trial magistrate stated:-

> **"As against 7 th accused he was identified. He was arrested in**
>
> **the house where the recovery was done. His so -called statement**
>
> **was not even an admission and is not of such help to the prosecution**
>
> **case. His statement that he was arrested as he was selling milk cannot be true."**

The learned trial magistrate having satisfied herself that the two appellants were properly identified at the scene of robbery and that they were in the house in which property stolen during robbery was found, was of the view that the facts constituted the offence of simple robbery and she proceeded to convict the two appellants on four counts of robbery contrary to **section 296(1**) of the Penal Code. The learned trial magistrate concluded her judgment thus:-

> ***"Though robbery occurred in the opinion of the court no violence was meted out. It is not clear how PW1 sustained his injuries from the evidence on record. The court therefore finds that the ingredients proved in counts 1, 2, 3 and 4 are those of simple robbery contrary to section 296(1) of the Penal Code. The court involves (invokes?) section 179 of the Criminal Procedure Code and finds the accused 2 and 7 guilty of simple robbery in counts 1, 2, 3 and 4 contrary to section 296(1) of the Penal Code and convict them accordingly."***

Each appellant was sentenced to seven years imprisonment plus one (1) stroke of the cane on the first count and four (4) years imprisonment plus one stroke of the cane each in respect of the second, third and

fourth counts. The sentences were ordered to run concurrently. There is a mention of count 5 in which it is stated ***"All seven (7) to serve 12 months imprisonment"***. This perhaps relates to the alternative charge of handling stolen goods but, in our view, there could be no conviction (and sentence) on the alternative charge of handling stolen goods when there was already a conviction on the main counts. Perhaps this 12 months imprisonment was in respect of the 1st appellant (as 7th accused) who was convicted of escaping from lawful custody contrary to **section 123** of the Penal Code. Hence reference to **"All seven (7)"** must have been an oversight as the trial magistrate must had in mind the 7th accused only who had been separately charged with escaping from lawful custody.

The two appellant's being dissatisfied with their conviction and punishment of imprisonment meted out to them filed separate appeals to the superior court which appeals were consolidated. The Attorney-General, upon receiving notice of appeal filed a notice of enhancement of sentence notifying the appellants of his intention to seek the enhancement of the appellants' conviction and sentence from that of robbery under **section 296(1)** of the Penal Code and Sentence of 7 years imprisonment to that of capital robbery contrary to **section 296(2)** of the Penal Code with the consequent mandatory death sentence.

The consolidated appeals came up for hearing before the superior court (Lesiit J) and the learned Judge came to the conclusion that the appellants were properly convicted in respect of counts 1 and 2 as they were, in her view, properly identified by two witnesses and also found in the house where items stolen during the robbery were recovered. The learned Judge considered the evidence as adduced in the trial court and in the course of the judgment stated inter alia:-

> ***"I have carefully considered this appeal, the grounds raised by the appellants in their petition and grounds of appeal, their submissions and those of the learned State Counsel. I have also scanned through the lower court record and evidence adduced before it. The issue of identification is the key issue, the offence had occurred at 2.00 a.m. in the night. The principles upon which courts are guided in cases of visual identification are clearly laid down i n the case of R. V. TURNBULL & OTHERS (1970) ALL E.R 559. This case has been followed by our Court of Appeal locally. The court must consider the circumstances under which an accused person has identified the nature and extent of light, the distance from which identified and the length of time under which the accused person was under observation.***
>
> ***I am satisfied in this case in regard to counts 1 and 2 that the two key witnesses, P.W.1. and P.W.2, in different rooms saw the two appellants at close distanc e. Both entered each of their rooms at different times. There was electric lighting on both outside and inside the rooms where the robbery took place. The appellants did not attempt to conceal their facial appearance . …….***
>
> ***I am satisfied that the tw o who were the complainants in count 1 and 2, P.W.1. and P.W.2., saw the appellants sufficiently under good lighting and a close distance enough to positively identify them."***

From the foregoing, the learned Judge was satisfied that the two appellants were positively identified during the robbery at the Beach Hotel. The learned Judge having been satisfied with the evidence of identification went further and considered the evidence of recent possession of the items stolen during the robbery. On this issue of recent possession of the property stolen during the robbery, the learned Judge in her judgment stated:-

> ***"Even if, which I do not find is, the position, the***
>
> ***identification by P.W.1. and P.W.2. is in doubt, there***
>
> ***was strong circumstantial evidence to fin d both appellants***
>
> ***guilty of the offence. The two were arrested at a house***

by P.W.3. and other police officers who were at Kenland

Area investigating a different offence. Inside the house

they were found was recovered exhibits 1 -29 including

gas cylinders , cooker, watches, cash money, cooked food,

beers, medicine, cigarettes and mobiles which both

complainants positively identified as stolen from them."

Having considered the evidence of identification of the two appellants by the two witnesses and the evidence of recent possession of the goods stolen during the robbery, the learned Judge came to the conclusion that the appellants were among the robbers and consequently, they were properly convicted on the first and second counts. But that was not the end of the matter. The Attorney General applied for enhancement of appellants' conviction and sentence.

The learned Judge considered whether the appellant's conviction was under simple robbery or capital robbery. She considered **section 296(2)** of the Penal Code and taking into account what the victims of the robbery stated in their evidence, came to the conclusion that the appellants ought to have been convicted on two counts of robbery with violence contrary to **section 296(2**) of the Penal Code.

In concluding her judgment the learned Judge said:

"***After considering the entire record of the lower court, I am satisfied that the ingredients of the charge of robbery with violence were proved as required by the provisions of that section.***

Accordingly, the learned Magistrate misdirected herself when she found the ingredients not proved and misapplied the law by invoking section 179 as the Criminal Procedure Code to reduce the charge as she did.

I will set aside her finding of guilt under section 296(1) of the Crim inal Procedure Code in counts 1 and 2 of the charge and substitute it with that of conviction under section 296(2) of the Penal Code.

On sentence, the law is very clear as quoted above that the sentence of death is the mandatory sentence in the charge of capital robbery under section 296(2) of the Penal Code.

According I set aside the sentence of 7 years imprisonment in counts 1 and 2 and substitute it with that of death as provided by the law. …….

The upshot of this is that the 1 st and 2nd appellant's appeal in count 1 and 2 have failed and consequently dismissed. Their appeals on counts 3 and 4 succeed, but that of count 5 has been overtaken by events."

That brought to an end the appellants' appeal in the superior court. The 1st appellant, **Stephen Njenga Mukiria,** was, however, not sentenced to death on account of his age as he was aged 15 years at the time of the offence. He was therefore ordered to be detained at the President's pleasure pursuant to **section 25** of the Penal Code.

The appellant's are now before this Court by way of second appeal. Only two issues were raised for consideration, viz, identification of the appellants and the doctrine of recent possession.

Mr. Githui, the learned counsel for the appellants, challenged the evidence of identification of the appellants on the ground that the circumstances under which the appellants were identified were not

conducive for a positive identification. He went on to submit that although the learned Judge correctly considered the principles in **R. V. TURNBULL** (supra), she however failed to apply those principles correctly.

Mr. Githui's second limb of submissions was that the doctrine of recent possession per se cannot be a basis for a conviction on an offence of robbery with violence. He was of the view that recent possession can only be basis for a conviction for the offence of theft or handling stolen property.

Mr.Gumo, the learned counsel for the State, supported both conviction and sentence of the appellants. He submitted that there was evidence of identification coupled with the fact that both appellants were found only a few hours after the robbery in a house where property stolen during the robbery was found.

We have endeavoured to give the background to this appeal by stating how the trial of the appellants (together with five others) commenced before the learned Senior Resident Magistrate, then the appeal to the superior court, and finally to this Court. The facts are now clear in that the offence took place at about 2.00 a.m. on 21st July, 1999. The complainants, (P.W.1. and P.W.2.), were attacked by a gang of robbers which raided Stem Beach Hotel. The two appellants were identified by two of the complainants. The robbers got away with a large number of items from the scene. By 6:00 a.m., the appellants were found in a house where a large number of the goods stolen during the robbery were found. The appellants were arrested and on being asked to explain how they came to be in that house failed to give any explanation.

The issue before us now is whether there was evidence of positive identification and whether the doctrine of recent possession applied to the appellants. We have anxiously considered the recorded evidence, the findings of the two courts below and the submissions made by Mr. Githui and Mr. Gumo and we are of the view that the appellants were convicted on very sound evidence. In the first place the appellants were identified by the two witnesses (P.W.1.) and (P.W.2.) at the scene of robbery. The robbery took place at 2.00 a.m. on 21st July, 1999 and by 6.00 a.m. the appellants were found in a house where a large number of items stolen during the robbery was found. On the issue of identification the learned Judge correctly considered the principles set out in **R V. TURNBULL** (supra) and applied them to the facts in this case. There were concurrent findings by the two courts below that the conditions favouring positive identification were present. The scene was Beach Hotel where there were electricity lights both outside and inside the rooms.

The submission by Mr. Githui to the effect that the doctrine of recent possession could not be a basis for a conviction on a charge of robbery with violence was novel but lacking in merit. The doctrine of recent possession may be relied upon not only to prove a charge of theft but other offences like robbery with violence, manslaughter, murder etc. What Mr. Githui referred to in **Archbold (1997) Criminal Pleading Evidence and Practice** related to theft only. Hence it has no application to the facts in this appeal.

In conclusion, we are of the view that the evidence against the two appellants was watertight and their conviction was inevitable. The learned Judge of the superior court directed herself correctly both in law and facts. She cannot be faulted in her judgment.

For the foregoing reasons, we must bring this long journey of the appellants to an end. We order that the appeal be and is hereby dismissed.

Dated and delivered and Nakuru this 25 th day of February, 200 5.

R.S.C. OMOLO

……

JUDGE OF APPEAL

E.O. O'KUBASU

……

JUDGE OF APPEAL

W.S. DEVERELL

……..……

AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR