**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 17 OF 2017**

**RUBEN WAMBUA PETER.....1ST APPELLANT**

**STEPHEN MUOKI PETER.....2ND APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTION**

**JUDGEMENT**

## INTRODUCTION

1. The Appellants were charged with the following offences:-

**COUNT 1: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.** On the night of 8th May 2014 at Utangwa girls secondary school, Utangwa Location in Mbooni West District within Makueni County jointly with others not before court robbed David Nzioka torch valued at Kshs.200/= and immediately before was robbery wounded the said David Muendo Nzioka who later died while being taken to hospital.

**COUNT 2: OFFICE BREAKING AND COMMITTING A FELONY CONTRARY TO SECTION 306(A) OF THE PENAL CODE**. On the night of 8th May 2014, at Utangwa Girls Secondary school, Utangwa Location in Mbooni west District within Makueni county jointly with others not before court broke and entered into the Deputy Principal's office with intent to steal from therein and did steal one CRE text book and one exercise book all valued at Kshs.379/= the property of Utangwa Girls Secondary school.

**ALTERNATIVE CHARGE: HANDLING STOLEN GOODS CONTRARY TO SECTION 322(2) OF THE PENAL CODE.** On the 8th day of May 2014 at Katunyoni Village, Utangwa Location in Mbooni West District within Makueni County otherwise than in the course of stealing jointly handled one CRE text book and one exercise book all valued at Kshs. 379/=, the property of Utangwa girls Secondary school knowing or having reason to believe them to be stolen goods.

2. The Appellants were found guilty with respect to all the charges after full trial and were convicted accordingly. Accused No. 2, Irene Kamene Mutua was acquitted of all the charges. Both Appellants were sentenced to death.

3. The way the court arrived at the conclusion thus convicting the 2 Appellants appears to have convicted them for Count 1 Robbery contrary to Section 296(2) penal code, office breaking contrary to Section 306(a) penal code and handling stolen goods contrary to Section 322(2) penal code.

4. But when it came into sentencing, the court only dealt with the robbery contrary to Section 296(2) penal code but never said anything on the other 2 counts.

5. Being aggrieved by the above verdict, the Appellant lodged an appeal jointly and set out 9 grounds in their petition of appeal namely:-

> ***1. <u>THAT</u>*** *the learned trial Magistrate erred in fact and in law in failing to find that there was no sufficient evidence to sustain the Appellants conviction.*
>
> ***2. <u>THAT</u>*** *no sufficient proof was tendered to establish the ingredients of the charges against the Appellants.*
>
> ***3. <u>THAT</u>*** *the charge sheet was defective.*
>
> ***4. <u>THAT</u>*** *the learned trail Magistrate erred in fact and law in admitting and relying on exhibits that were of no evidentiary value.*
>
> ***5. <u>THAT</u>*** *the learned trail Magistrate erred in fact and law in failing to find that the evidence presented to court was at variance with the charges preferred against the Appellants.*
>
> ***6. <u>THAT</u>*** *the learned trail Magistrate erred in fact and law by relying on prosecution witnesses whose testimonies were inconsistent.*
>
> ***7. <u>THAT</u>*** *the learned trial Magistrate erred in fact and law by failing to find that the Appellants testimony unassailably contravened the prosecution's evidence, irreparably dented the veracity of the prosecution's case and irredeemably shaking the credibility of the prosecution's witnesses.*
>
> ***8. <u>THAT</u>*** *the learned trail Magistrate erred in fact and law in upholding the prosecution witnesses' testimonies which prima facie was incredible whilst proceeding on extraneous considerations, which were not before the court to disregard the defence evidence, which was verifiable.*
>
> ***9. <u>THAT</u>*** *the learned trial Magistrate erred in fact and in law in convicting the Appellants while the prosecution had not proved its case beyond reasonable doubt.*

6. The parties agreed to canvass the appeal by way of submissions.

The Appellants filed and served their written submissions and the Respondent opted to tender oral submissions.

7. This being the first Appellate court, it is enjoined to look at the evidence before the trial court afresh, re-evaluate and examine the same and reach its own conclusion whether or not to uphold the conviction of the Appellant. See **<u>KINYANJUI –VS- R (2004) LKLR 364.</u>**

**<u>EVIDENCE</u>**

8. The summary of prosecution is as hereunder:-

> PW1 principal of Utangwa Secondary School testified that on 07/05/2004 at 9.40 p.m. she went to sleep in her house in school compound.

9. There were two Securicor officers on duty. At 2.30 a.m. she received a call from PW3 saying that the office was being broken into.

10. She called a B.O.G member, a neighbour and police. Police came to the scene. They found that the staffroom, her office and that of the deputy principal PW2 were broken into. The items in her office were scattered on the floor.

11. The next day PW2 told her two books PMFI 1 and 2 were missing. She found the 2nd watchman Dano had been injured in the head and he was taken to hospital where he was pronounced dead. She knew Appellant no.1 as ex-casual laborer of the school.

12. PW2 Deputy Principal testified that on 08/05/2014, at 2.15 a.m. while in her house got call from PW3 watchman saying that there were thieves in the school compound. She informed some people of the same. She called village elder, chief and a shopkeeper.

13. PW1 informed her that the police were at the scene. She went to school at 5.40 a.m. and found the door to her office was broken into. Things were scattered on the floor.

14. She discovered two books were missing PMFI 1 and 2. She informed Principal of the same. She recorded statement on 11/05/2014.

15. PW3 Kimuyu Kithokoi watchman testified that on 08/08/2014 at 2.00 a.m. while with fellow watchman David Nzioka deceased he went to lower dormitories and came back to form 2H.

16. He saw three people one with hammer wearing blue and white markings jacket MF15; they entered the principal office. He called principal and Deputy Principal. He whistled and police came. The other watchman was hit on the head and he died the following day.

17. He did not know the attackers. On cross examination by the Appellant No. 2 he said that he could not identify him.

18. PW4 deceased watchman wife stated that her husband had torch in the material day. She also was issued with postmortem report of her husband.

19. PW5 assistant chief testified that on 08/05/2014 at 9.30 a.m. he was told the school was broken into.

20. He went to school and found PW1 and PW2 and a BOG member. He witnessed damage done. The police found him at the scene. They told him they had arrested Appellant.

21. They proceeded to Appellant house where they found Appellant no.1 wife in the house. They searched it and found – one jacket Nike which was muddy, muddy shoes, they were wet, military clothes and on bed an exercise and text book. Also closed brown shoes were recovered.

22. They went to working place and recovered a hammer and a piece of steel metal plus a green apron. It was muddy. Black shoes were also recovered at Muoki's place. He was with Deputy County Commissioner, Deputy OCPD and chief.

23. Appellant 1 was arrested by police officers. Appellant 2 was found at home and he was arrested by PW5 and his team. On cross examination by Appellant 1, he said boots were recovered under his bed.

24. The principal PW1 did not tell them of what had been stolen. He said that they used three people when they did search to Appellant 1 house. On cross examination by the Appellant1's wife who was 2nd accused, he said that they found the books on her bed.

25. In cross examination by the Appellant No.2 he said that he was arrested because he was a suspect. He said it had rained that day. On re-examination by the prosecutor he said he did not take anything from his house. He found blue jacket in his house. PC Kamau was present when they went to Appellant 2 house.

26. PW6 was the doctor who produced the postmortem of the deceased watchman. This was PEXH 6. PW7 Inspector of police Kalume Ndalo who arrested Appellant 1 near school outside compound and took him to his (Appellant 1) house. The wife was asleep therein. They recovered two books bearing school stamp. They recovered PMF1 – 1, 2, 3, 4 and 5 in Appellant 1 house.

27. In Appellant 2 house, they recovered hammer and iron rod and green overall. In cross examination by appellant 1, he said that PC Kamau took away all recovered items. He did not have inventory of things taken from his house.

28. On cross examination by Appellant 2 he stated that his door was opened by wife of Appellant1 and hammer and apron were recovered.

29. PW8 PC George Kamau the investigation officer stated that on 08/05/2014 was called by OCS asked to join them in the school. Near the school gate a customer pointed Appellant1 and they arrested him.

30. They went with him into school. They found footprints from school offices to the fence. They went to Appellant1 home. They found wife and searched the house.

31. Under the mattress they recovered an exercise book and a text book. Also a blue black jacket was recovered also shoes which were muddy were recovered.

32. They proceeded to Appellant 2 house which was opened by Appellant 1. They recovered shoes, metal rod and hammer stained with fresh blood. Appellant 2 was arrested at his place of work. He stated that he wished to produce all exhibits.

33. On cross examination by Appellant1, he said he took inventory in the occurrence book. He found books in appellant No.1 house. The wife was in the house.

34. On cross examination by Appellant 1wife who was accused 2 who was later acquitted he said that she removed books under the mattress.

35. On cross examination by Appellant 2 he stated that they took shoes from his house. Also apron was found in his house and had fresh blood. The teacher did not tell him that there were items which were lost. He said they followed footprints to the roads.

36. The prosecution closed case and Appellants were put in their defence after court found they had a case to answer.

37. Appellant 1 testified on oath that on 07/05/2014, at 4.30 p.m. he closed shop; went home at 6.30 p.m. He found wife was unwell and stayed with her to take care of her. They slept.

38. The following day he went to buy her medicine, then prepared breakfast and then went to look for his cows. He came back at 7.30 a.m. He removed jacket and went to the market.

39. Before reaching the market, he saw area chief, police, assistant chief and other people. Chief identified him and he was hand cuffed and taken to school then he was taken to his house where his wife was. She said that there were no books in the house. They took away his jacket and shoes.

40. Then they broke into his brother's (Appellant) house. He did not know what they took therein. They also went to Munyao's place. They arrested Mumo Munguti.

41. They took him to police station and locked him for a week before being taken to court. He denied the charges.

42. On cross examination by the prosecution, he said that he did not know the Utangwa Secondary School. He was taken there by police it rained that night. His wife who was accused 2 testified on oath that she was a business woman.

43. On 07/05/2014 at 6.30 p.m. she went home as she was unwell. She found Appellant 1 home. She requested him to prepare supper which he did. They ate and slept.

44. In the morning she sent him to buy her pain killers which he did and then he prepared breakfast and went to look after the cows. He came back at 9.00 a.m.

45. He removed jacket he was wearing. Later she heard a knock on her door and ongoing out he saw police officers and her husband hand cuffed. She was to move.

46. The Deputy OCPD asked her where Appellant 1 was at night. Later PC Kamau and assistant chief told her to enter the house she saw him holding two exercise books.

47. She told them the books were not hers. She was left to sleep. They went to Appellant 3 house and she did not know what they took therein.

48. The following day she took the food to her husband. She was later arrested and charged along with the two Appellants. She was later acquitted.

49. In cross examination by the prosecutor she said PC Kamau got books from his jacket. Appellant 2 also testified on oath that he worked in a hotel. On 07/05/2014 at 9.30 p.m., he closed hotel and went home. That day it rained. He slept up to 5.00 a.m.

50. He went to work and at 10.30 a.m. the police accompanied by chief and his assistant took him to their vehicle. He was asked to identify his items in a paper bag and did identify – shoes, hammer and apron. They said they got them from his house. He told them the shoes were muddy because it rained previous night.

51. He saw his brother in the vehicle. He was arrested and taken to another place where Jeremiah Munyao was arrested. Also arrested was Mumo Munguti. They were all taken to Mbooni police station. He was locked for a week and later charged in court.

52. On cross examination by the prosecutor, he said PC Kamau asked him to confess but he declined. He said he did not know the Utangwa School. He said hammer, iron rod and apron were his. He said his father had differed with chief.

53. The trial court relying on the case of Arum supra held that the books recovered were recently stolen properties of the complainant and thus the doctrine of recent possession applied and therefore safe to convict Appellants as prosecution proved all charges as against them beyond reasonable doubt as required by law.

**SUBMISSIONS**

54. The Appellants focused their complaint and submission on the following issues:-

- ***That the charges were defective.***

- ***That there was no proper identification of the Appellants.***

- ***That no exhibits were produced by the prosecution.***

- ***That the offences were not proved beyond reasonable doubt.***

- ***That the Appellant defences were ignored.***

55. On the first issue, the Appellants via their advocate submit that the charge sheet was defective as in the Count 1 on Robbery contrary to Section 296(2) penal code; the person robbed is deceased watchman whose lost item was only a torch.

56. The listing of 2 books as part of items robbed from him in the charge sheet was wrong as they were

not his property but school's properties. The school was not robbed of the same 2 books.

57. On issue of identification, the Appellants were not identified neither at night of robbery nor at the identification parade by any of the prosecution witnesses.

58. On issue of non-production of prosecution exhibits the Appellant submit that the items recovered were marked as MFI 1 to 9 but they were not produced as exhibits.

59. The Appellants rely on the case of **KENNETH NYAGA MWIGE –VS- AUSTIN KIGUTA & 2 OTHERS (2015) eKLR** where court of appeal held; ***"that the mere marking of a document for identification does not dispense with the formal prove. The document has to be produced and the court has to admit the same in evidence and thus it seems part of the judicial record of the case and constitutes evidence"***

60. The above procedure was not followed thus produced exhibits were not part of the evidence. The books MFI 1 and 2 were not produced as exhibits only postmortem which was produced as PEXH 6.

61. On the issue as to whether the prosecution proved its case beyond reasonable doubt, the Appellant submit that the same was not proved as required by law.

62. First, the items recovered were never produced as exhibits. The same is fatal to prosecution case. The 2 books which the court relied on to convict on the theory of doctrine of recent possession were not produced as exhibits as stipulated by the authority of MWIGE Supra.

63. Further, the parameters of application of **ARUM –VS- REPUBLIC (2006) eKLR** on doctrine of recent possession were not established namely that:-

- ***Property must be found with the suspect.***
- ***It must be complainant property.***
- ***Must have been stolen from the complainant.***
- ***The stealing must have been recent.***

64. The 2 books were not owned by the complainant (watchman) nor were they recovered from the Appellants as Appellants had no possessions of the same. In any event they were not produced as exhibits.

65. On the issue of non-consideration of their defence, firstly, the Appellant raised the defence of alibi which was not weighed vis a vis the prosecution evidence in terms of the case of **ELIZABETH WAITHIEGENI GATIMU -VS- REPUBLIC [2015] eKLR** which held that (relying on Nigerian case of **OZAKI & ANOTHER –VS- THE STATE)**.

> ***"Thus it is settled law that the defence of ALIBI must be proved on balance of probabilities and that for it to be rejected it must be incredible……."***

66. In response, Mr. Orinda assistant DPP submitted that the prosecution proved its case beyond reasonable doubt via the evidence of witnesses.

67. PW3 was the principle witness who was at the scene of crime and witnessed the incident. He was not able to identify the attackers/robbers.

68. However, there were other witnesses who witnessed the recovery of exhibits mainly 1 text book and 1 exercise book bearing schools rubber stamp. PW2 deputy principal identified the same.

69. The deceased watchman had a torch which disappeared during the attack. There was also a charge on office breaking where the 2 books were stolen.

70. Thus the Appellants faced the 2 charges. There was also an alternative count of handling stolen goods. The subject matters were the books.

71. The deceased and PW3 were watchmen of the school and thus in watch and control of the school items. No law required recovery of all items to establish offence of robbery.

72. The offence in the instant case was proved via circumstantial evidence and direct evidence. The recovery of the stolen items was done in Appellant No. 1 house. The identity of the suspect was given by an informer.

73. Appellant No.1 led PW5, 7 and 8 to his house where recovery of stolen items was done upon search being conducted. His wife opened the house door. Thus court applied the doctrine of recent possession to convict.

74. The second Appellant was searched and a hammer, (metal) iron bar, and wet shoes were recovered. The evidence was compelling and the Appellant were not prejudiced.

75. The offence of robbery was proved. The torch of deceased was lost and doctor proved the death of the watchman who was attacked during the robbery; the torch, and boots were robbed.

76. The defence did not contest robbery the Appellants only stated that the charges were frame up. They claimed the people who were recovering things went with them to the house.

77. The trial court observed the demeanor of the witnesses and on that basis determined their credibility. The court compared and weighed defense's visa vis prosecution evidence. PW8 produced all the exhibits. The error on production can be cured. The cited authorities can be distinguished and do not apply in the instant case.

78. After going through the evidence on record and parties submissions, I find the following issues arising:-

**ISSUES**

- ***Whether the charges were defective?***

- ***Whether the prosecution case was proved beyond reasonable doubt in view of the complaints on nonproduction of exhibits and misapplication of doctrine of recent possession?***

- ***Whether the defenses were considered as required by the law?***

**ANALYSIS AND DETERMINATION**

79. On the issue of whether the charge was defective, the Appellant complained that the charge of robbery under Section 296(2) penal code stated that the person robbed was the watchman who was killed. He lost only the torch.

80. The listing of two books as part of items robbed from him in the charge sheet was wrong as they were not his properties but were owned by the school. The school was not robbed same two books.

81. Count 1 stated in part ***"…..robbed David Nzioka torch valued at Kshs.200/= and immediately before was robbery wounded the said David Muendo Nzioka……"***

82. Count 11 – under Section 306(a) penal code, on offence of office breaking, the same stated in part

***"…… did steal one text book and one exercise book property of Utangwa girls' secondary school."*** In Alternative charge under Section 322(2) penal code handling stolen goods the same stated in part **"… handled one text book and one exercise book property of Utangwa girls' secondary school. ……."**

83. The robbery count did not list the 2 books as amongst the robbed items, thus the complaint has no substance and thus same has no defect whatsoever.

84. On issue number 2, whether the charges were proved beyond reasonable doubt? The trial court based conviction on the doctrine of possession of recently stolen properties. Further, the parameters of application of **ARUM –VS- REPUBLIC (2006) eKLR** on doctrine of recent possession the court held that the elements to be established are namely that:-

- ***Property must be found with the suspect.***
- ***It must be complainant property.***
- ***Must have been stolen from the complainant.***
- ***The stealing must have been recent.***

85. The recovery of the two books is covered by pieces of evidence tendered by PW5, assistant chief, PW7 Inspector of police Kalume Ndalo and PW8 Police Constable George Kamau and Appellant No.1 wife who was accused 2 in trial court.

86. PW5 says the text books were recovered on the bed in Appellant one house. The wife was in the house. When they recovered the same together with other items, he was in company of Deputy OCPD, Deputy County Commissioner and the chief.

87. None of the above three persons were called to testify. He said Appellant 2 was in his house where they arrested him.

88. On cross examination by Appellant 2, he stated that they used three people to do the search. When questioned by Appellant 1 wife, who was accused 2 during the trial, he stated the books were on bed.

89. PW7 Inspector of Police Kalume Ndolo said that they took Appellant 1 to school and then his (Appellant 1) house after they arrested him. They found wife in the house and she was a sleep.

90. They recovered items MF1 (1) - (5) which were taken by police constable Kamau PW8. PW8 did not take inventory of recovered items.

91. PW8 P.C George Kamau (investigation officer) testified after they arrested Appellant 1 that, they took him to school then to his house where they found his wife in the house. On doing search they recovered two books among the recovered items.

92. On cross examination by Appellant No.1 he said he took inventory in the Occurrence book. The books were found in Appellant 1 house and the wife was in the house.

93. On cross examination by Appellant 2 wife he said he removed books under the mattress.

94. On cross examination by Appellant 2 he said only items recovered in appellant no 2 house were shoes and apron with fresh blood stains.

95. He said the teacher did not tell him of lost items. When he testified he said he wished to produce the recovered items but same were not produced according to the court record.

96. It is manifestly clear that the recovery of the two books relied on by the trial court to convict the

second Appellant were allegedly recovered in appellant no 1 house.

97. Thus appellant no 2 could not be convicted on the evidence of recent possession of stolen properties. None of the items recovered in Appellant 2 house were alleged to be stolen by the school or the deceased.

98. The recovery of the two books evidence is contradictory. PW5 talks of the books being recovered on the bed. PW8 talks of the same books having been retrieved under the mattress.

99. The appellant wife who was accused 2 during trial said that the two books were removed by PW8 from his own jacket. These are the books allegedly lost from PW3 office.

100. PW3 discovered loss of the same books by 5.40 a.m. but when PW7 and 8 went to school with Appellant 1 no report of loss or theft of the books was made.

101. The PW8 did not produce inventory of items recovered during the search. The two books together with other allegedly recovered items were not produced as exhibits.

102. In the case of **KENNETH NYAGA MWIGE –VS- AUSTIN KIGUTA & 2 OTHERS (2015) eKLR** ,the court of appeal held that;

> ***"That the mere marking of a document for identification does not dispense with the formal prove. The document has to be produced and the court has to admit the same in evidence and thus it seems part of the judicial record of the case and constitutes evidence"***

103. The above procedure was not followed thus produced exhibits were not part of the evidence. The books MFI 1 and 2 were not produced as exhibits only postmortem report which was produced as PEXH 6 thus no prove of Count 2.

104. The court finds that the evidence on recovery of alleged stolen goods is doubtful and unsafe to found conviction. The trial court seems to have appreciated same facts as she acquitted Appellant 1 wife who was charged on the basis of recovery of allegedly stolen items in their house.

105. In any event some items recovered in Appellant 2 house were allegedly stained with fresh blood. Why didn't the police take same for testing to confirm where same was a human blood and whether same had any connection with deceased watchman murdered? No explanation was offered for that omission.

106. On issue No.3 whether court failed to consider tendered defence, in the case of **ELIZABETH WAITHIEGENI GATIMU -VS- REPUBLIC [2015] eKLR** the court held that (relying on Nigerian case of **OZAKI & ANOTHER -VS- THE STATE.**

> ***"Thus it is settled law that the defence of ALIBI must be proved on balance of probabilities and that for it to be rejected it must be incredible……."***

107. In the instant case, the court observes that Appellant 1 tendered sworn defence. The same was *alibi*; it was corroborated by his wife's evidence. He explained how he returned to his house at about 6.30 p.m. after closing his shop on the material day.

108. He went home and found his wife unwell. Stayed with her and slept till next morning. He prepared breakfast next day and went to buy her medicine. He went to look for his cow. He came back at 7.30 a.m.

109. He removed jacket and went to the market but was arrested on his way to market. His wife who also testified on oath confirmed the above statement. The prosecution did not shake the above defence in cross examination nor establish that it was incredible.

110. The Appellant No 2 also tendered defence of alibi. He left his place of work in a hotel at 9.30 p.m.

He went and slept up to 5.00 a.m. He went to work and at 10.30 a.m., the police came and arrested him. He identified items recovered from his house and confirmed they belonged to him.

111. The same defence was not shaken by the prosecution in the cross examination.

112. The trial court just dismissed the Appellant defences as unsatisfactory. The court erred in disregarding the tendered defence and thus the conviction was unsafe. The totality of the evidence of the prosecution did not meet the threshold of prove beyond reasonable doubt to warrant conviction.

113. The court thus makes the following orders:

**1) The appeal is allowed.**

**2) Conviction is quashed.**

**3) Appellants are to be released forthwith unless otherwise legally held.**

**SIGNED, DATED AND DELIVERED THIS 21ST DAY OF AUGUST, 2017.**

**C. KARIUKI**

**JUDGE**

**……**