



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL APPEAL NO. 47 OF 2017**

**BETWEEN**

SAMSON OCHIENG OGEJA.....1<sup>ST</sup> APPELLANT

JOSEPH ODHIAMBO OENGA .....2<sup>ND</sup> APPELLANT

**AND**

REPUBLIC..... RESPONDENT

*(Being an appeal from the original conviction and sentence of Hon. K. Ngomo, PM dated 16<sup>th</sup> November 2001 at the Chief Magistrate's Court at Kisumu in Criminal Case No. 137 of 2001)*

**JUDGMENT**

1. Before the subordinate court, the appellants, **SAMSON OCHIENG OGEJA** and **JOSEPH ODHIAMBO OENGA** were charged and convicted of several counts as follows. In Count 1, both appellants were charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars are that on the 13<sup>th</sup> March 2001 at Obare beach in Rachuonyo District jointly being armed with dangerous or offensive weapons namely a pistol, robbed Andrew Limo Owino of a generator S/No. EZEE-98-02084 make Honda, a radio cassette make Lonico and a video deck Panasonic S/No. GONE 14435 all valued at Kshs. 126,000/- and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence on said Andrew Limo Owino.

2. Alternative to Count 1, the appellants were charged with the offence of handling stolen goods contrary to **section 322(2)** of the **Penal Code**. The particulars are that on the 14<sup>th</sup> March 2001 at Oriang Kogweno Sub-location Rachuonyo District and at Manyatta estate in Kisumu District jointly otherwise than in the cause of stealing, they dishonestly received and retained one generator make Honda frame No. EZER 9024454 radio cassette make Lanico and one video deck make Panasonic S/No. GONB 14435 knowing or having reasons to believe them to be stolen goods.

3. In Count 2, both appellants were charged of personating a public officer contrary to **section 105(b)** of the **Penal Code**. The particulars are that on 13<sup>th</sup> March 2001 at Obare beach in Rachuonyo District, they falsely represented themselves to be persons employed in the public service namely police officers and assumed to arrest Andrew Limo Owino and Caroline Akoth Obel.

4. In Count 3, the 1<sup>st</sup> appellant was charged with keeping in a building public stores contrary to **section 324 (2)** of the **Penal Code**. The particulars were that on the 14<sup>th</sup> March 2001 at Kogweno Oriang Sub-

location in Rachuonyo District, he was keeping in a building namely, a house public stores namely Chief's helmet, a police baton, a military jungle bag No. 44, Military water container porch and a military container No. 373 MK C.H.L such properties being reasonable suspected of having been stolen or unlawfully obtained.

5. Both appellants were charged in Count 4 for being in possession of a firearm magazine without a firearm certificate contrary to **section 4(2) (a)** of the *Firearms Act (Chapter 114 of the Laws of Kenya)*. The particulars are that on the 14<sup>th</sup> March 2001 at Manyatta Estate in Kisumu District jointly and without reasonable cause or excuse the appellants were found in possession of one magazine for a Ceska Pistol without a firearm certificate in force at the time.

6. In Count 5, the appellants were jointly charged of being in possession of a firearm without a firearm certificate contrary to **section 4(2) (a)** of the *Firearms Act*. The particulars were that on the 14<sup>th</sup> March 2001 at Manyatta Estate in Kisumu District the jointly had without reasonable cause of excuse Pistol Serial No. 2935 without a firearm certificate in force at the time.

7. In Count 6, the appellants were charged with being in possession of ammunition without a certificate contrary to **section 4(2) (a)** of the *Firearms Act*. The particulars are that on the 14<sup>th</sup> March 2001 at Manyatta Estate in Kisumu District jointly without reasonable cause of or excuse were found in possession of fifteen rounds of 9mm caliber ammunition without a firearm certificate in the force at the time.

8. After a full trial, the appellants were convicted on all counts. They were sentenced to death on Count 1, 5 years' imprisonment on count 2, 4, 5 and 6 while the 1<sup>st</sup> appellant was sentenced to serve 5 years' imprisonment on Count 3. The appellants appealed to the High Court but the appeal was dismissed. The filed a second appeal to the Court of Appeal. By a ruling dated 28<sup>th</sup> June 2016, the Court of Appeal, in *Criminal Appeal Nos. 81 of 2004 and 63 of 2007* ordered a re-trial of the appeal as the judgment from the second appeal was missing. I would also add that the original court file has been missing but this does not mean that this appeal cannot be heard as the full proceedings and judgment of the trial court are available (see *John Ooko Otieno v Republic CA KSM Crim App No. 137 of 2002 [2005]eKLR*).

9. As this is a first appeal, the duty of the appellate court is to review all the evidence and reach an independent conclusion as to whether to uphold the conviction and sentence. In doing so, the court must make an allowance for the fact that it did not hear or see the witnesses testify to assess their demeanour (see *Okeno v Republic [1972] EA 32*). To fulfil this duty, it is necessary to set out the material facts that emerged before the trial court.

10. Andrew Limo Owino (PW 1) testified that he was running his father's video hall on the night of 13<sup>th</sup> October 2010. After closing the business, two men came in and identified themselves as police officers. One of the men removed a police identification card. They ordered all the people to get out of the hall leaving PW 1, Pamela Akoth (PW 3) and another lady. The assailants told them to gather the video deck, cassette player and generator and follow them outside. They all left together and on the way PW 3 was released while PW 1 and the assailants continued to walk towards Kendu Bay. Along the way, the men told PW 1 to leave them with the items but he refused. One of the men threatened to shoot him with a gun whereupon he jumped into the bush while the men took off with the stolen items. He immediately went to Kendu Bay Police station to report but was told to come back later in the morning. After PW 1 informed his father Kennedy Owino Ondiege (PW 2) of the incident, they went back to Kendu Bay Police Station to report it.

11. P.C Paul Macharia (PW 4) of Kendu Bay Police Station was informed of the incident and once he received information that one of the suspects had been seen in the area he proceeded to the homestead of the 1<sup>st</sup> appellant with other officers and PW 2. They were shown the 1<sup>st</sup> appellant's house by his brother where they recovered the Honda generator belonging to PW 2. They also recovered TV's and a military container, a Chief's helmet, police baton, military sack and magazine case.

12. PW 4 also testified the 1<sup>st</sup> appellant's brother took them to Kisumu where they found the 1<sup>st</sup> appellant and arrested him. They searched his house at Manyatta, Kisumu but did not recover anything. The 1<sup>st</sup> appellant took them to the 2<sup>nd</sup> appellant's house where they recovered a certificate of appointment for Ag. I.P Cheboi, a toy pistol, a Ceska Pistol final got No. F 2935 which had a magazine and 15 rounds of ammunition. PW 2 was also present when they recovered his video deck and radio cassette player. The 2<sup>nd</sup> appellant told the officers that the items were taken to him by the 1<sup>st</sup> appellant. Both appellants were arrested and later charged.

13. Ag I.P Stephen Kemboi (PW 5) testified that he on 8<sup>th</sup> March 2001 he lost his pistol and wallet containing his ID card and a police certificate of appointment which were subsequently recovered by PW 4.

14. In his sworn testimony, the 1<sup>st</sup> appellant elected testified that he was arrested on 14<sup>th</sup> March 2001 while at work and taken to Kondele Police Post. He was taken to his home at Manyatta estate where the police searched the house and got nothing. He further told the court that on 29<sup>th</sup> March 2001, he attended an identification parade but he was not picked. He was charged thereafter.

15. The 2<sup>nd</sup> appellant made an unsworn statement., he told the court that on 13<sup>th</sup> March 2001, some boys came to his home in the evening and asked him to keep two handbags for his employer who was going on safari. At about 9.00pm, the 1<sup>st</sup> appellant, knocked the door and identified himself and when he opened the door, he found the 1<sup>st</sup> appellant was accompanied by police officers who asked for the bags and items that had been left on behalf of his employer. He was later taken to the police station and charged.

16. The key issue in this appeal is whether the prosecution established its case beyond reasonable doubt. On the principal charge of robbery with violence, the Court of Appeal in the case of **Ganzi & 2 Others v Republic [2005] 1 KLR 52** elaborated them as follows: -

***The offence of robbery with violence under section 296(2) of the Penal Code is committed in any of the following circumstances namely: -***

***(a) The offender is armed with any dangerous or offensive weapon or instrument; or***

***(b) The offender is in company with one or more other person or persons; or***

***(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.***

17. The testimony of PW 1 and PW 3 is that two men identifying themselves as police officers, rounded them up and ordered them to leave with the generator, video, deck and radio cassette player. Along the way PW 1 was threatened with a gun while they took off with the stolen items. From this evidence, the elements of robbery with violence were proved. The question for resolution in this appeal is whether the appellants were involved in the robbery as the assailants.

18. The appellants' conviction was based on identification of the appellants and the fact that they were found in possession of the stolen property which the appellant's contest. I have reviewed the evidence and I am not satisfied with the evidence of identification. The appellants were strangers to PW 1 and even though the circumstances obtaining at the time of the robbery were favourable for positive identification, the description or identity of the suspects was not tested through an identification parade. Likewise, the other key witness, PW 3, who stated that that she was familiar with one of the appellant said that she would identify him though she did not know his name. Her knowledge of him was not established in the evidence and tested in an identification parade. In short, the identification of the appellants was amounted to dock identification and was therefore unsafe. ***In James Tinega Omwenga v Republic NKU CA Criminal Appeal No. 143 of 2011[2014]eKLR, the Court of Appeal expressed the view that:***

*The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless.*

19. The doctrine of recent possession entitles the court to draw an inference of guilt where an accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal summarised the essential elements of the doctrine of recent possession in ***Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006]eKLR***, where the court stated as follows:

*In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.*

20. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. While the law is that in a criminal trial, the prosecution bears the burden of proving the case against the accused throughout the case, in a case where one is found in possession of recently stolen property like in this case, the evidential burden shifts to him to explain his possession. That explanation need only be a plausible one but one needs to put it forward for the court's consideration (see ***Malingi v Republic [1988] KLR 225***).

21. PW 1 and PW 3 confirmed that the assailants on the material night took the PW 2's Honda generator (Exhibit No.1), Panasonic Video Deck (Exhibit No. 2) and Lonica Radio Cassette Player (Exhibit No. 3). PW 2 produced that receipts for all these items confirming that they were owned by him. The generator was recovered by PW 4 in presence of PW 2 at the home of the 1<sup>st</sup> appellant at Obare Beach. Although the 1<sup>st</sup> appellant was not present, the items were found in his house and under his bed hence they were in his possession within the meaning of **section 4(a)** of the ***Penal Code*** defines possession as follows:

*“be in possession of ” or “have in possession” includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person.”*

22. Since the stolen generator was found in the 1<sup>st</sup> appellant's house, he could not explain how it came into his possession, the direct and only possible inference is that he one of the two people who robbed the PW 1 on the night of 13<sup>th</sup> March 2001.

23. The recovery of the Panasonic Video deck and the Lasonic Radio Casette player is related to the recovery of arms and ammunition in Manyatta Estate. The prosecution evidence from PW 1 and PW 4 is that the 1<sup>st</sup> appellant is the one who took them to the 2<sup>nd</sup> appellant's house where the other items and the arms and ammunition subject of the Counts 4, 5 and 6. These items were found in possession of the 2<sup>nd</sup> appellant and when called upon to account for their possession, he stated that he was given by his employer. He did not identify the person who left him with the property that belonged to PW 2. He could also not account for the possession of firearms and ammunition. Likewise, the only reason that the 1<sup>st</sup> appellant could have known about PW 2's stolen items, the magazine, ammunition and firearm is that he was involved in the robbery. Additionally, PW 2's property was found in two places, the 1<sup>st</sup> appellant's home and with the 2<sup>nd</sup> appellant means that the two appellant are the ones who robbed PW 1 and that they were acting together and knew of the stolen items. The appellants did not furnish any firearms certificate or authority to show that they had authority to possess the firearms, magazine and ammunition.

24. In summary, the prosecution proved its case against the appellants. I affirm the respective convictions and sentences. I would only add that since the appellants were sentenced to death on Count 1, the other sentences ought to have been held in abeyance (see *Hamisi Mungale Burehe v Republic* MLD CA Crim. App. No. 37 of 2013 [2015]eKLR). I accordingly hold the sentence on Counts 2, 3, 4, 5 and 6 in abeyance.

25. The appeal is dismissed.

**DATED and DELIVERED at KISUMU this 27<sup>th</sup> day of November 2017.**

**D.S. MAJANJA**

**JUDGE**

Appellants in person.

Ms Barasa, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.