



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT SIAYA**  
**HIGH COURT CRIMINAL APPEAL NO. 75 OF 2015**  
**(CORAM: J.A. MAKAU – J.)**  
**FABIAN OUMA OLAWO.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*(Being an appeal against both the conviction and sentence  
dated 17.11.2014, in Criminal Case No. 981 of 2013 in  
Bondo Law Court before Hon. C.A. Kutwa – AG. P.M.)*

**JUDGMENT**

1. The Appellant **FABIAN OUMA OLAWO** was charged with an offence of **Robbery with Violence contrary to section 295 (2) as read with Section 296 (2) of the Penal Code**. The particulars of the offence are that on the night of 26<sup>th</sup> day of September 2013 at unknown time in Bondo Township within Siaya County jointly with others not before court, while armed with dangerous weapons namely pangas and axes robbed **LUCAS OOKO** of 20 packets of Supermatch, Sportsman, SM and Rocket, 5 cartons of Red Everyday battery, 2 cartons of “Blue Everyday” and cash KShs.10,000/=, one Navy Blue dust coat all valued at KShs.122,000/=, and immediately before the time of such robbery fatally injured **LUKAS OOKO**.

The Appellant also faced an alternative charge of **Handling Stolen Property Contrary to Section 322 (1) (2) of the Penal Code**. The particulars of the offence are that on 28<sup>th</sup> day of October, 2013 at around 11.30 hrs at Bondo Town in Bondo District, within Siaya County otherwise than in the course of stealing, dishonestly retained one navy blue dust coat having reasons to believe it to be as stolen property.

2. After full trial the appellant was found guilty, convicted and sentenced to suffer death.

3. The conviction and sentence provoked the appellant to lodge this appeal setting out several grounds of appeal however at the hearing he relied on the amended grounds of appeal being as follows:-

*i. That he was convicted on a defective charge.*

*ii. That the Judgment was defective as it did not contain the counts that the appellant was*

***charged under and convicted.***

***iii. The trial court erred in law in making wrong application of the doctrine of recent possession.***

***iv. That the trial Magistrate erred in law in shifting the burden of proof from the prosecution to the defence.***

4. At the hearing the appellant appeared in person whereas the State was represented by Mr. E. Ombati Learned State Counsel.

5. The appellant in support of his appeal relied on the written submission which he submitted to the court covering the grounds of his amended grounds of appeal.

6. Mr. E. Ombati opposed the appeal submitting that the charge was not defective and the contradiction on the amount stolen was not material contradiction that would have gone into the root of the case, that the offence with which the appellant was convicted was specifically stated, on doctrine of recent possession he submitted all necessary ingredients required to be proved were proved and relied on the case of **Erick Arum V. R CRA 85 of 2000**, on defence he conceded the same was not considered but the offence was proved.

7. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the Court of Appeal case of **Okeno V. R. (1972) E.A. 32** where the Court set out the duties of a first appellate court thus:-

***“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434”***

8. The facts of the Prosecution's case are that on 26<sup>th</sup> September 2013 Robbers broke into the shop of Sohil Patel (PW2) and Nelson Otiende Odhiambo (PW6) from which shop assorted items and cash was stolen, that at the time of robbery the watchman one late Lucas Ooko was killed by the robbers, that amongst the stolen items they included one navy blue dust coat, that on 28<sup>th</sup> October 2013 PW1 Dan Omondi Omolo spotted a man wearing his dust coat which was stolen from the shop of PW2 Sohil Patel. PW1 apprehended the man and confirmed from him where he had gotten the coat from . The man asked him to let him go and deliver the load he was carrying in his handcart and he will return and tell him. On return the man told him he was given the dust coat, that PW1 then informed PW2 his boss who reported to the Police who came and arrested the Appellant. The dust coat was recovered tied on the appellant's handcart. The dust coat was branded “Blue Triangle”. Nothing else was recovered from the appellant. He was subsequently charged with this offence.

9. The appellant in this appeal contends that the charge is defective in that there is variance in the evidence tendered by the prosecution witnesses and the charge sheet. The particulars of the charge sheet are as follows:-

***“The particulars of the offence are that on the night of 26<sup>th</sup> day of September 2013 at unknown time in Bondo Township within Siaya County jointly with others not before court, while armed with dangerous weapons namely pangas and axes robbed LUCAS OOKO of 20 packets of Supermatch, Sportsman, SM and Rocket, 5 cartons of Red Everyday battery, 2 cartons of Blue***

***Everyday and cash KShs.10,000/=, one Navy Blue dust coat all valued at KShs.122,000/=, and immediately before the time of such robbery fatally injured LUKAS OOKO.***

***The Appellant also faced an alternative charge of Handling Stolen Property Contrary to Section 322 (1) (2) of the Penal Code. The particulars of the offence are that 28<sup>th</sup> day of October, 2013 at around 11.30 hrs at Bondo Town in Bondo District, within Siaya County otherwise than in the course of stealing, dishonestly retained one navy blue dust coat having reasons to believe it to be as stolen property.”***

10. The charge as drawn clearly points out the appellant jointly with others not before court while armed with dangerous weapons namely pangas and axes robbed Lucas Ooko, the assorted items as listed in the charge sheet and immediately before the time of such robbery fatally injured Lucas Ooko. PW1 testified that the assorted items were stolen from the shop after it had been broken into. That the navy blue dust coat belonging to PW1 was stolen from the shop of PW2 Sohail Patel. PW2 testified that PW1 was his employee and his employee used to wear dust coat branded Blue Triangle. He identified the dust coat MFI-P1. PW2 testified on opening his shop he found that Robbers gained entry through cutting the roof of his shop from where some of the assorted items were stolen including the dust coat. PW6 Nelson Otiende Odhiambo testified his shop has been broken through the roof and assorted items stolen. PW4 Evans Nyarangi Nyangau testified that Lucas Ooko was one of their guards guarding Salanji Stores. PW5 testified that he was guarding the premises with Lucas Ooko before he left him alone as he was unwell. PW6 confirmed the deceased was guarding his shop called Mbuye General Stores as an employee of Mega Security. Similarly PW7 No. 92800 PC Florence Kanini testified that Lucas Ooko had been wounded by robbers who gained entry to the shop through the roof and that the appellant was found in possession of a navy blue dust coat stolen from Salanji Enterprises P exhibit 2. That the coat belonged to one of the workers of Salanji Enterprises.

11. It is clear from the above the stolen items belonged to either PW1, PW2 and PW4, and that Lucas Ooko was a guard from Mega Security. The items were stolen from the shop of PW2 and PW4 and not from Lucas Ooko who was a guard. From the evidence it is clear that the complainants should have been PW1, PW2 and PW4 and not Lucas Ooko, however I find the charge was properly drawn.

12. Whether the charge as drawn is defective? In the case of **Johana Ndungu V R Criminal Appeal No. 116 of 1995**. The ingredients for charge of **robbery with violence** were stated:

***(i) If the offender is armed with any dangerous or offensive weapons or instrument or***

***(ii) If he is in company with one or more other person or persons or***

***(iii) If, or at immediately before or immediately after the time of robbery, he wounds, beats strikes, or uses any other violence to any person”***

13. The charge as drawn is not defective as all ingredients of an offence of robbery with violence are satisfied however, the evidence is at variance with the particulars of the charge in that the complainants in this case have not been included amongst the complainants. The deceased Lucas Ooko was murdered in the process of robbery but as a guard nothing was stolen from him, it was improper for the prosecution to have indicated the two items were robbed from the said deceased person, to that extent, I agree with the appellant that there is variance of the charge with the evidence and therefore the charge was defective. The trial court did not comply with **Section 214 of the Criminal Procedure Code** which provides:

***“214. (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***

***Provided that: –***

*(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;*

*(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.*

*(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.*

*(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.”*

14. The appellant contends that the judgment was not sound because it did not comply with **Section 169 (2) of the Criminal Procedure Code.**

**Section 169 (1) (2) of the Criminal Procedure Code** provides:

*“169. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.*

*(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.”*

15. The trial Court in its judgment stated partly:-

*“I find the prosecution has proved its case beyond reasonable doubt Accused is guilty as charged under Section 296 (2). I therefore convict him under Section 215 of CPC.”*

16. The Appellant was charged with the main count being Count 1 with an alternative count as count II. The Court though it did not state appellant was convicted under Count I, there is no doubt as to the count under which he was convicted as the Section of the offence, thus **Section 296 (2) of Penal Code** is clearly stated in the judgment. I therefore find no merits in this ground of appeal.

17. The Appellant contends the trial Court erred in applying the doctrine of recent possession to convict him. In this case the offence was committed at night. There were no other guards or witnesses at the material time save Lucas Ooko the deceased. PW1, PW2, and PW4 did not witness who broke into the shop of PW2 and PW4 nor did they see who killed the guard. In this case the trial court invoked the doctrine of recent possession.

18. In the case of **Erick Arum V R CRA No. 85 of 2000**, the Court stated thus:-

*“To invoke the doctrine of recent possession the prosecution must prove beyond reasonable doubt each of the following:*

*a. That the property was stolen.*

***b. That the stolen property was found in the exclusive possession of the accused.***

***c. That the property was positively identified as property of the complainant and***

***d. The possession was recent after robbery”***

19. What constitutes recent possession is a question of fact that depend on the circumstances of each case including the kind of property, the amount or value of the property, the ease or difficulty with which the said property may be assimilated into legitimate trade channels and the character of the property.

20. In the instant case it is not clear who is the owner of the navy blue dust coat between PW1 and PW2 since none of them is a complainant, but that notwithstanding, a navy blue dust coat was stolen from the shop of PW2 and which PW1 claimed to be the owner. No explanation was given why PW1 or PW2 was not indicated as the owner of the navy blue dust coat. I however find at the material night of robbery a navy blue dust coat was stolen from the shop of PW2. On issue of possession PW1 saw the appellant wearing the navy blue dust coat and on being questioned about it the appellant went away promising to return, which he did but without the dust coat which he left tied on his handcart, PW1 immediately informed PW2 who called Police. The Appellant was arrested immediately and the navy blue dust coat recovered from his handcart. From evidence of PW1 and PW2 I find that the appellant was found in exclusive possession of the Navy blue dust coat.

21. I now turn as to whether the property was positively identified as property of the complainant. In the charge sheet the complainant is said to be Lucas Ooko however from the evidence PW1 and PW2 claim ownership of the dust coat. PW1 identified the blue dust coat because in the course of his duties he usually wears as blue dust coat. The said dust coat had no exclusive mark to distinguish it from any other blue dust coat. Whereas PW2 could identify it by being branded “Blue Triangle.” Blue Triangle in this country is a company specializing in manufacturing cement. Blue triangle Aprons are common in this country and are supplied to customers of the company for various purposes. PW1 and PW2 did not give any specific mark to distinguish the blue dust coat they claimed belonged to them from the one recovered from the appellant. Blue dust coat, branded “Blue triangle” can be found in open markets and in various places and PW1 and PW2 cannot claim to be the only people who have access to such dust coats. I therefore find and hold that the prosecution failed to prove that the blue dust coat was property of the deceased or PW1 or PW2, whoever claimed ownership of the same. As regards recent possession after robbery, I note the blue dust coat was stolen on the night of 25th September 2013 and was found with the appellant. one (1) month after robbery. Recent possession is a question of fact, that depends on the circumstances of each case and the kind of property, the amount or value of the stolen property, the ease or difficulty with which the said property may be assimilated into legitimate trade channels and character of the property. I find that in this country with so many secondhand dealers, in second hand clothes, in open markets, the type of the property, the value of dust coat, and ease with which clothes are assimilated into legitimate trade channels and the character of the dust coat, one month after robbery, is not recent possession. I therefore find and hold the prosecution failed to prove beyond reasonable doubt, and every ingredient of an offence of robbery with violence as required. I find the trial court was in error in invoking the doctrine of recent possession as there was no basis to convict the appellant with this offence, whose standard of proof should be high in view of the sentence, which is mandatory death sentence.

22. Whether appellant’s defence was given due consideration? The Appellant defence is that on the material date of his arrest, he stated that on reporting on his duty, he found his handcart surrounded by people whom he greeted and asked them to move away, that the people moved away and as he was pushing it away, one of the people arrested him and took him to Bondo Police Station. He was put in the cells, after which he was taken to his house and later charged with this offence. He denied stealing from Lucas Ooko or killing him. He denied knowledge of the dust coat produced in court and denied that it was recovered from him. The trial Court did consider the defence of the appellant and found that he was found in possession of the dust coat on 28<sup>th</sup> October 2013. I have considered the appellant’s defence and have found that he was found in possession of the dust coat herein, but the prosecution failed to prove beyond any reasonable doubt that the dust coat belonged to the complainant or complainants. I further find that the doctrine of recent possession, was not applicable in this case and in my view I find

the appellant had no obligation to explain how he came about to acquire the dust coat, as the prosecution had not satisfied all the ingredients that are required to be proved so as to involving the doctrine of recent possession.

**23. The upshot is that the appeal is merited. Accordingly the Appeal is allowed, conviction is quashed and sentence set aside. I order the Appellant to be released forthwith unless otherwise lawfully held.**

**DATED AND SIGNED AT SIAYA THIS 24TH DAY OF NOVEMBER, 2016.**

**J.A. MAKAU**

**JUDGE**

**Delivered This 24th Day of November, 2016.**

**In Open Court in the Presence of:**

**Appellant present in person.**

**Mr. M. Ombati for State.**

**C.A.1. K. Odhiambo**

**2. L. Atika**

**J. A. MAKAU**

**JUDGE**