



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 338 OF 2010**

**BENARD KINYATTA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in criminal case Number 4192 of 2007 in the*

*Chief Magistrate's Court at Makadara – Mrs. T. Ngugi (PM) on 9<sup>th</sup> June 2010)*

**JUDGMENT**

**Introduction**

1. The appellant, **Benard Kinyatta** was convicted and sentenced to suffer death for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

**Particulars of the charge**

2. The particulars of the offence were that on 15<sup>th</sup> September 2007 at Mwiki Estate Kasarani within Nairobi, jointly with others not before the court, being armed with dangerous weapons namely pangas, iron bars and rungus they robbed Benson Masai Kitela of cash Kshs. 15,000, gas cylinder, cloths, kitchen ware, three mattresses, coffee table, three padlocks and bags, all valued at Kshs.75,450/= and at, or immediately before the time of such robbery threatened to use actual violence against the said Benson Masai Kitela.

**Grounds of Appeal**

3. The appellant subsequently filed an appeal in which, in sum, he argued that the identification by voice was an error since **PW1** was not familiar with him; the exhibits were not recovered in his possession and that **PW3** should have been treated as an accomplice. He also urged that the Investigation Officer did not testify, which was fatal to the prosecution case and lastly that his defence was rejected for no good reason.

**Respondent's Reply**

4. Mr. Kaddebe, learned state counsel opposing the appeal on behalf of the state submitted that **PW1** and **PW2** who were husband and wife were the victims of the robbery and that **PW1** looked at the appellant for four seconds under sufficient light. Mr. Kaddebe pointed out that although **PW1** suffered memory loss because of the injuries to his head, his evidence was corroborated by that of **PW2** who identified the appellant properly in sufficient light.

5. Mr. Kaddebe further urged that the goods recovered were of a personal nature and were identified by their owners from their distinct marks. Mr. Kaddebe also contended that there was no evidence that **PW3** was an accomplice, and further that the doctrine of recent possession was properly applied. Lastly he submitted that the Investigation Officer did testify as **PW4**.

### **Case summary**

6. This case started denovo before Mrs. Ngugi, Principal Magistrate after Mr. Muneeni who was the initial trial magistrate was transferred out of the station. The prosecution case was that on 15<sup>th</sup> September 2009 at about 2 a.m, **PW1**, Mr. Benson Masai Kitela, the complainant herein was asleep in his house with his wife when people who identified themselves as police officers on patrol smashed his door and broke the window panes. The complainant opened the door when they threaten to cut off his head if they had to come in through the roof. **PW1** told the court that one of those making threats and issuing orders had a distinct voice which he was able to identify.

7. When they entered the intruders assaulted him and made off with the household items listed in the charge sheet, valued at Kshs.65,450/=. After the robbery **PW1** was taken to hospital where he was treated and thereafter he made a report to the police. Acting on information, the police arrested the appellant in the afternoon of that same day and recovered a gas cylinder and two mattresses. The appellant was subsequently charged as read.

### **Defence**

8. In his unsworn defence the appellant testified that he was arrested by a police officer who was incensed that he had knock at the door of a fruit vendor while the police were inside conducting serious business. He said that he was forced to help carry the goods which had been recovered in the vendor's house to the police station where both he and the vendor were locked up. The vendor was released upon paying Kshs.15,000/= He did not have money and that is why he was charged.

### **Analysis**

9. Upon a careful scrutiny and reassessment of the evidence as is our duty as the 1<sup>st</sup> appellate court, we came to the conclusion that this appeal must succeed for several reasons.

10. The first reason is on the question of identification, on which we have considered the decision in **KARANI -vs- REPUBLIC, CR. APP. NO. 181 OF 1984 [1985] KLR 290**. In the said case Nyarangi, Platt & Gachuhi JJA of the Court of appeal, sitting at Kisumu, rendered themselves thus:

**1. (Following *Roria v Republic* [1961] EA 583) A fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances there is need for other evidence.**

We have therefore tested with care the evidence and circumstances of identification in the case before us.

11. According to **PW1** he saw the appellant among a group of 10 people through the window before they came in. It is however instructive to note that the only light available came from a hurricane lamp that was inside the house. It is therefore, not evident how **PW1** was able to see and identify anyone in the gang of robbers who were outside through his window.

12. **PW1** also testified that one among the robbers hit him on the head immediately they entered the house. He fell down and lost consciousness. He seemed to have remained on that state on the ground till his wife carried him off to hospital after the robbers had left. It is therefore not clear, at what time he heard and identified the appellant's voice.

13. In any case in dealing with evidence of identification by voice, the court should ensure that the voice was that of the accused, the witness was familiar with the voice and recognised it, the conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who said it. – **See Mbelle v Republic [1984] KLR pg 626**. In this case the appellant was in a gang and **PW1** did not know him prior to this incident.

14. The conviction was therefore based on the testimony of a single identifying witness, who purported to have identified the appellant in very difficult circumstances. The robbers who numbered about ten according to **PW1**, struck at about 2.00 a.m. when the family had already retired to bed. **PW2** who was with **PW1** testified that she did not identify any of them. The intruders startled **PW1** out of sleep and by his own admission the appellant was not a person who was known to him before the attack. We also observed that when they made their report to the police **PW1** and **PW2** did not give a name or description which might lead to the conclusion that they had identified the appellant on the fateful night.

15. The court placed great reliance on the two mattresses and a gas cylinder recovered where the appellant was arrested and applied the doctrine of recent possession. Issues that must be considered before a court can rely on the doctrine of recent possession as a basis for conviction in a criminal case were set out in the case of **Arum vs Republic 85 of 2005 KLR [2006] Vol. I Pg 233**. The court of Appeal stated that before a court can rely on the doctrine of recent possession it must be established that:

*a. That the property was found with the suspect;*

*b. That the property was positively the property of the complainant;*

*c. That the property was stolen from the complainant;*

*d. That the property was recently stolen from the complainant.*

*2. The proof as to time will depend on the easiness with which the stolen property can move from one person to another.*

*3. In order to prove possession there must be acceptable evidence as search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot suffice, no matter from how many witnesses.”*

16. The gas cylinder was recovered from the house of **PW3** who testified that the appellant was her tenant. She did not see him bring the gas cylinder into her house and relied on what she was told by her child who was not called as a witness. The two mattresses were said to have been recovered from a makeshift structure within **PW3**'s compound, inhabited by the appellant. One mattress was identified by stitches sewn in to it and the other by urine stains appearing on it.

17. We are of the humble view that this manner of identification of the mattresses falls below the threshold of positive identification as the property of the complainant. Further the appellant denied being a tenant of **PW3** and we note that there was nothing to connect him to that makeshift structure in the compound of **PW3** except her word. It is therefore her word against the appellant's word.

18. For the foregoing reasons we find that the evidence as a whole was not reliable and was too tenuous to sustain the conviction. The doubt arising therein is reasonable and it goes to the appellant. We **allow** the **appeal** and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED** and **DELIVERED** in open court this 31<sup>st</sup> day of **March 2014**.

**A.MBOGHOLI MSAGHA**

**JUDGE**

**L. A. ACHODE**

**JUDGE**