**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 74 OF 2013**

**(CONSOLIDATED WITH HCRA 75 OF 2013)**

DICKSON MBOGO IRERI Alias MAPENGO......... 1ST APPELLANT

ALI JUMA MUSALI Alias "J"..............................2ND APPELLANT

VERSUS

REPUBLIC........................................................RESPONDENT

***(An Appeal from the Sentence and Conviction of M. WACHIRA Chief Magistrate Embu in Criminal Case No. 1287 of 2013 on 22nd November, 2013)***

**J U D G M E N T**

The appellants filed separate appeals which were consolidated on 20/11/2014 challenging the judgment of the Chief Magistrate Embu where they were jointly charged with robbery with violence contrary to Section 296(2) of the Penal Code in count 1 among other charges. Count II was against the 2nd appellant of being in possession of narcotic drugs contrary to Section 3(1) of the Narcotic Drugs & Psychotropic Substances Act. The 2nd appellant in count III was charged with being in possession of public stores contrary to Section 324(3) of the penal code. The appellants were both convicted of the alternative charges of handling stolen goods and sentenced to serve ten (10) years imprisonment. The 2nd appellant was convicted of counts II and II and sentenced to serve five (5) and two (2) years respectively.

The grounds of appeal in the petitions of appeal in HCCRA No. 74 and 75 both of 2013 may be condensed as follows:-

1. That the appellants were convicted on evidence which was inconsistent and uncorroborated;

2. That the case of the prosecution was not proved beyond any reasonable doubt against the appellants;

3. That the magistrate disregarded the inconsistencies regarding the OB entries and the unprocedural preparation of the inventories;

4. That the magistrate did not give reasons to reject the defence of the appellants, and if she did, the reasons were not sufficient.

The appellants in their written submissions raised the following arguments in support of their grounds of appeal:-

(a) *That the investigating officer prepared the inventories at the police station instead of at the scene which was contrary to the law and further that there was to independent witness to the inventory.*

*(b) That the transfer of the 1st appellant from Embu Police Station to Itabua Police Station was not backed by any documentary evidence.*

*(c) That there was contradictions in the time the appellant was booked at Embu police station.*

*(d) That the complainant did not give the name of the 1st appellant in the first report (OB entry).*

*(e) That it was not explained how the police came to know that the beer the appellant were taking was stolen.*

(f) *That police arrested 9 people yet only two were taken to court without an explanation of that decision;*

*(g) That there was no evidence to connect the appellants with the offence.*

*(h) That the dates in the inventories 29th were not consistent with the dates of recovery and especially of the radio S/No.3114265 which PW1 claimed to have seen on 27th;*

*(i) As for counts II and III the 2nd appellant argued that since the totality of the evidence was contradictory, even the convictions on these two were not safe.*

The facts of this case are that there was a robbery in the night of the 26th and 27th September 2012 at Mariot Travellers Inn where various types of alcoholic drinks, electronics, cigarettes, pool table equipments and credit cards were stolen. During the robbery the watchman guarding the premises was fatally wounded and died as he was being taken to Chogoria Hospital for specialized treatment. The manager of the Inn reported the case to Embu Police Station the following morning. This was after taking the watchman for treatment to Embu Provincial General Hospital and organizing for him to be taken to Chogoria Hospital.

Police officers including PW8 visited the scene of crime on 27th September 2012 in the morning. They found that the timber fence surrounding the premises had been damaged to facilitate the gang to gain access to the compound. The door of the main bar had also been forced open to access th bar and restaurant. The same day at around 4.00 p.m., information was received by the officers that a group of people had been spotted in a home enjoying alcoholic drinks. About 20 police officers raided the home and recovered 42 empty crates of various beers matching the brands stolen from PW1's premises the previous night. Some unused richot 25 mls drinks, an afrigas cylinder, a somali sword and a pool fishing rod were recovered during the raid.

Some of the suspects arrested in the home gave the names of the appellants and later led PW8 and other officers to their houses where recovery was made of more alcoholic drinks, a radio an afrigas cylinder and other items which PW1 identified as the property stolen including the items recovered earlier in the house where a group of people had been found drinking.

From outside the house of the 2nd appellant where police found him seated, police recovered 12 rolls of bhang and 50 grams in a polythene bag. Search was carried out inside the house and some electronics, speakers, a hammer, a spray pump, a weighing machine, a military sleeping bag and other items recovered. He was arrested and taken to Embu police station. The 1st appellant led police to a place called Mwambai within Gathoge area, Kirinyaga County where various types of alcoholic drinks were recovered in an abandoned house.

The duty of the first appellate court was stated by the court of appeal in the case ***JOSEPH NJUGUNA MWAURA & 2 OTHERS VS REPUBLIC [2013] eKLR*** where the case of ***OKENO VS REPUBLIC [1972] EA*** was cited. The court said:-

*“The duty of the first appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that that evidence without overlooking the conclusions of the trial court.”*

PW1 testified that he was the manager of Mariot Bar and Restaurant in Embu. In the evening of 26th September 2012 around 9.00 p.m., he left the premises and business proceeded as usual. The following morning he received a report of a robbery that had taken place in the premises where the watchman was seriously injured and several items including alcoholic drinks were stolen. He made a report to the police the same morning and was subsequently informed that the watchman had succumbed to the injuries as he was being ferried to Chogoria Hospital.

Police visited the scene and saw the broken doors and damaged fence through where access had been gained. A few days later, PW1 was called to the police station where he identified the following as some of the stolen property from the business premises:

*(a) a radio S/No. 3114265*

*(b) Afrigas cylinder*

*(c) Regulator*

*(d) crates of beer*

*(e) 8 bottles of richot*

*(f) 5 bottles of bond*

*(g) 2 bottles of viceroy*

*(h) 7 bottles of 250 mls of popov vodka*

*(i) 4 bottles of 250 mls Smirnoff vodka*

*(j) 3 bottles of 350 mls ..*

*(k) Kane 250 mls 23 bottles*

*(l) Kenya cane 1 bottle*

He was informed that that there were two suspects who had been arrested in possession of the items and were in police custody.

The recoveries were made by PW8 and PW9 who were police officers from Embu police station. Acting on information, the two witnesses accompanied by other officers went to a home where they arrested several suspects. Recovery was made of 42 empty crates of beer, other brands of alcoholic drinks plus other items which PW1 later identified as the property robbed of his deceased watchman in the material night. The officers were led to the houses of the appellants where they recovered a host of alcoholic drinks and other exhibits. The 1st appellant led police to recover other items from an abandoned house in Kirinyaga county which were also identified by the complainant.

The appellants gave unsworn statements of defence. Each of them gave an alibi in regard to the material day. The 1st appellant said he was selling his hawkers items in his kiosk at home on 26/9/2012 and was arrested the following day in the evening. He denied the offence. The 2nd appellant said he had taken his mother to Kyeni Hospital on 26/9/2012 and returned at 4.30 p.m. when he found many people in his home and was arrested.

The appellants were arrested by PW8 and other police officers from their houses with the help of an informer. They argued that the informer was not availed in court. The police are not obligated to disclose the identities of their informers. Neither can they be compelled to call them as witnesses. The appellants raised issues on when and where the inventory was prepared. It was their contention that the police ought to have prepared the inventories of the recovered properties at the place of recovery but not at the police station.

However, there is no law which prohibits the officer from preparing the inventory at the police station. It is not a requirement that an independent witness signs the inventory the signatures of the suspects and the police officer making the recovery is sufficient. In this case, the appellants and the police officer who recovered the items signed the inventory. It is true that there was a discrepancy on time indicated at 4.00 p.m., while the appellants say he was taken to the station at 7.20 p.m. and 8.00 p.m. respectively.

The magistrate addressed this issue in her judgment and came to a conclusion that the discrepancy was minor and did not affect the evidence of the prosecution in the case. Even if it was the date of the offence which was wrongly stated, the court will always weigh all the evidence before it and reach a conclusion as to the correct date when the offence was committed. In the case before me, the evidence of PW8 and PW9 is very clear on how the recovery was done and how the suspects were taken to the police station. It leaves no doubt as to the chain of events regarding recovery and booking the appellants in the police cells.

I agree with the trial magistrate that the issue of time is a minor one and does not affect the substance of the prosecution evidence. On the issue of the recovery of the radio and the date of the inventory, this is another minor discrepancy and the magistrate was correct to disregard it.

The most important issues herein are the fact that recovery was made; that evidence was tendered on how and where the stolen property was made and whether the appellants had a good defence to shake the prosecutions evidence in respect of the alleged possession. I find that the defences of both appellants did not in any way diminish the credibility of the evidence of PW8 and PW9 on recovery.

It is trite law that cogent evidence on recovery of stolen goods is sufficient to convict even in the absence of an inventory. In this case all the exhibits recovered were produced in court. The evidence of PW8 on how he transferred the 1st appellant to Itabua police station and what transpired there was found credible by the trial court and did not require to be backed by any transfer or re-location documents.

The appellant argued that PW1 did not give the police their names as suspects to be included in the occurrence book report. The evidence of PW1 was very clear that he did not know who broke into his premises and robbed his watchman of the properties listed in the charge sheet. This being the case the witness did not have the names of any suspect and would not have given any to the police in his report. The trial court was very categorical in its judgment that there was no evidence of identification.

The police arrested nine (9) people some of whom assisted them in the investigations. It is the investigations which revealed who were involved in committing the offences charged. Contrary to the appellant's contention, the police will not charge all suspects they arrest in the course of their investigations. The suspects charged will be those against whom sufficient evidence has been gathered.

The appellants were acquitted of the joint charge of robbery with violence in count I and convicted of the separate charges of handling stolen goods. The second appellant was also convicted and sentenced of counts II and III.

The magistrate acquitted the appellants of the charge of robbery with violence on the grounds that there was no identification and that the prosecution did not avail forensic evidence from the scene of crime. However, she found that the prosecution had proved that the appellants were found in possession of most of the items stolen from the premises of PW1 during the raid on his watchman now deceased. This possession was recent in that most of the stolen properties were found only one day after the robbery.

It is established law that recent possession based upon the laid down principles is sufficient to convict on a charge of robbery with violence. The principles were set out in the case of ***ARUM VS REPUBLIC in the Court of Appeal at Kisumu Appeal No. 85 of 2005.*** The court stated that for the court to rely on the doctrine, the prosecution have to prove:-

1. *That the stolen property was found in possession of the suspect.*

2. *That the property was positively identified by the complainant;*

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

4. *That the property was recently stolen.*

The evidence of PW8 and PW9 was that they recovered the following items from the houses of the appellants;

<u>1st appellant</u>

- 2 crates of beer
- 3 bottles of richot
- 1 empty crate of beer
- 16 bottles of senator beer
- Afrigas cylinder
- 1 gas cylinder regulator

<u>2nd appellant</u>

- 8 bottles of richot liqour
- 7 bottles of popov vodka 250 mls
- 23 bottles of Kenya cane 250 mls
- 1 packet of supermatch king cigarettes
- 4 packets of supermatch menthol cigarettes
- 3 speakers
- 1 wooden speaker

In addition to what was recovered from the houses of the appellants and in the abandoned house in Kirinyaga County, there were also 42 empty crates of beer and other brands of alcoholic drinks in the home where people had been seen drinking the day after the robbery. 9 suspects arrested from that house assisted the police to get hold of the appellants in their houses where more recoveries were made.

PW1 was called to the police station by the investigating officer where he identified the items as property stolen from his premises on the material night. PW8 and PW9 testified that they recovered the items on 27/9/2012 which was only one day after the robbery. The items were released to the complainant on 19/9/2013 after the investigating officer produced them in court. The appellant did not object to the release.

In their defence the appellants gave no explanation as to how they came to be in possession of the items. The prosecution satisfied the principles for application of the doctrine of recent possession. It was a misdirection by the magistrate to acquit the appellants on the charge of robbery with violence contrary to Section 296(2) which had been proved beyond any reasonable doubt.

I rely on the case of ***Court of Appeal at Nakuru ANTHONY KARIUKI KARERI VS REPUBLIC [2004] Criminal Appeal No. 110 of 2002*** where the court upheld the conviction by the superior court for the offence of robbery with violence which was solely on evidence of possession with relevant facts. The stolen items were recovered nine days after the robbery. The appellant in the case had been arrested only two days after the robbery. While in police custody the appellant led the police to a house where he had hidden the stolen radio cassette. It was held in this case

*"The doctrine of recent possession was comprehensively dealt with in the case of* ***ANDREA OBONYO VS REPUBLIC [1962] EA 542*** *relied on by the appellant's counsel.The presumption is that a person in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. That is a presumption of fact and not an implication of law which presumption is merely an implication of the ordinary rule relating to circumstantial evidence".*

In the house of the first appellant were recovered other items which did not belong to the complainant. Some were house breaking implements and weapons namely an improvised house breaking tool, blue metal pipe and a somali sword. In the house of the second appellant was recovered house breaking implements namely a hammer, an axe, a pipe range and a wedge. From the house of the 2nd appellant were more recoveries namely cannabis sativa and a military sleeping bag which were produced as exhibits in counts II and III. The second appellant in his defence did not explain how he acquired the military sleeping bag which is a government article. Neither did he explain the possession of the cannabis sativa. The evidence of PW8, PW9 and PW10 was sufficient to convict the 2nd appellant on counts II and III.

On the issue of corroboration, I find that there is no legal requirement for corroboration of evidence of adult witness in the charges of this nature. However, the recovery which forms the backbone of the prosecution's case had two credible witnesses who testified as having jointly with other officers carried out the exercise together. The magistrate found the prosecution witnesses credible. It is important to note that the learned magistrate had the advantage of observing the demeanor of those witnesses. Apart from the negligible discrepancies in the inventory which have been addressed, I find no material inconsistencies in the prosecution's evidence.

It is my finding that this appeal has no merit. In dismissing it I make the following orders:-

*1. That the convictions and sentences against both appellants in the separate alternative charges of handling stolen goods contrary to Section 322(1) of the Penal Code are hereby set aside and substitute with a conviction in the joint charge of robbery with violence contrary to Section 296(2) of the Penal Code in respect of the appellants.*

*2. That the appellants are sentenced to suffer death in the manner authorized by the law in Count I;*

*3. That the conviction and sentences in counts II and III in respect of the 2nd appellant are hereby upheld;*

**4.** *That the appeal stands dismissed for lack of merit.*

**DELIVERED, SIGNED AND DATED AT EMBU THIS 16TH DAY OF DECEMBER, 2014.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Manyar for State**

**Both appellants**

**F. MUCHEMI**

**JUDGE**