**REPUBLIC OF KENYA**

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

**CR. APPEAL NO. 169 OF 2011**

**(CONSOLIDATED WITH CR. APPEAL NO. 170 OF 2011)**

1. **KENNEDY KAVUU KAMENE……..……..……..1ST APPELLANT**
2. **SYLVESTER KILEMBI MUSYOKI…….……2NDAPPELLANT**

**VERSUS**

**REPUBLIC……..……RESPONDENT**

*(AN APPEAL FROM THE CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 763/2006 IN THE SENIOR PRINCIPALMAGISTRATE'S COURT AT KITUI (HON. G. KIBIRU, SPM))*

**Judgment**

1. The two appellants, Kennedy Kavuu Kamene("1st Appellant") and Sylvester Kilembi Musyoki ("2nd Appellant"), together with a third person, Benson Musyoka Mutisya ("Benson"), were presented before the Principal Magistrate's Court at Kitui and charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. The two Appellants, also, were each separately charged with an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code.
2. The particulars of the offences as presented in the charge sheet were as follows. For the charge of robbery with violence, it was alleged that on 16/06/2006, at about 3:00 a.m., at Ivovoa village, Kavuta Sub-location, Itoleka Location in Kitui District within Eastern Province, the two Appellants, Benson, and two others, robbed Isaack Kimeu Syengo ("Syengo") cash in the amount of Kshs. 15,500/=, a radio of the make "Sony" worth Kshs. 700/=, a weighing machine worth Kshs. 2,000/=, a pair of suits (sic) worth Kshs, 1,750/=, a pair of safari boots worth Kshs. 2,000/=, 5 shirts worth Kshs. 1.750, and one cap worth Kshs. 150/=. The charge sheet also alleged that the Appellants and their accomplices were armed with dangerous weapons namely *pangas* and axes and further that at or immediately before or immediately after the time of such robbery, they wounded Syengo.
3. The Appellants also faced an alternative charges of handling stolen goods contrary to section 322(2) of the Penal Code. It was alleged that on the 16th June, 2006, at about 4 pm, at Katulani Market, Katulani Location, otherwise than in the course of stealing, the 1st Appellant dishonestly handled "one long trousers jeans dark blue in colour, and one greenish shirt knowing or having reasons to believe them to be stolen (sic)." It was also alleged that on the same day and place, the 2nd Appellant, "otherwise than in the course of stealing, dishonestly handled one redish cap in colour knowing or having reason to believe it to be stolen."
4. After a fully-fledged if torturous trial punctuated by an effort to transfer the case from the Kitui Law Courts through an application to the High Court, to a new magistrate assuming the conduct of the case after the original one was transferred, the Learned Alfred Kabiru ("Learned Trial

Magistrate") convicted the 1st and 2nd Appellants of the main count of robbery with violence and sentenced them to death as the law mandatorily stipulates. The two Appellants were dissatisfied with the conviction and sentence and have appealed to this Court. As we will outline later, one of their points of dissatisfaction is that they had filed a Constitutional Reference to the High Court and they had insisted in the Court below that it be heard first before the trial could proceed. However, after entertaining a number of adjournments, the Learned A. Kabiru proceeded with the case before the Constitutional reference was heard and delivered his judgment on 22nd September, 2011.

5. First, we will briefly appraise the evidence tendered before the trial Court and then evaluate it afresh as we are duty-bound to do being the first appellate Court – see ***Okeno v Republic*** **[1973] E.A. 32.**
6. On 16th June, 2006, Isaac Kimeu Syengo ("Syengo"), the complainant here, was asleep in his house at Ivovoa village. His sleep was brought to a rude and abrupt ending when a violent knock on the window asked him to open the door to the house or else they would set the house on fire. Syengo obliged; he went to the main door and opened it. Three people rushed in. They were armed with *pangas* and *rungus*. They did not hesitate to use the *panga* on Syengo as they forced him back into the house and to his bedroom. While there, they violently demanded money. Syengo pointed to a pair of trousers which had Kshs. 2,500/=. They took it but were enraged that it was too little. All the while, the only sources of light illuminating the house were the flash lights the assailants had. Even then, Syengo was able to recognize two of the assailants: a Sammy, who was later on lynched by a mob in connection with this robbery; and the Benson Musyoka Mutisya ("Benson"), who was charged in the court below as the 3rd Accused person but was acquitted. Syengo knew both Sammy and Benson as neighbours long before the incident.
7. Exasperated that there was no more money, Benson asked for a sharper *panga* to enlist more "cooperation" from Syengo. When it came, it was one of the assailants, whom Syengo came to recognize later was the 2nd Appellant who used it to inflict deep cuts on his right hand. Fearing for his life, Syengo told him about some Kshs. 15,000 he had hidden on the thatching grass of his outside kitchen. So two of the assailants held him by either sides and went outside to collect the money.
8. Outside, there was a bright moonlight and with the two assailants holding him side by side, propping him so that he would not fall or faint from the assault on his body, Syengo was able to recognize the two assailants who were propping him up as the 1st and 2nd Appellants. He says he had known the 1st Appellant for three months prior to the robbery; he had also known the 2nd Appellant for a long time as well. He showed them where the money was. They took it and the 1st Appellant escorted Syengo back to the house; the aim was to "finish" him there. Back in the house, he inflicted a deep cut on Syengo's head and left him for the dead. Syengo lost consciousness and only came to a day later at Kitui Hospital.
9. Mwende Kimeu Abigael, is Syengo's wife. She was also sleeping in the bedroom when the ordeal began. When her husband went to open the door as demanded by the assailants, she hid under the bed. She remained there until the assailants discovered her and removed her and locked her in a store. Even in that position, she testified that she clearly saw and identified Benson and a Mulei, one of the assailants who were later lynched by a mob, as one of the attackers.
10. After the assailants left, Mwende raise alarm and the neighbours responded. Syengo was rushed to hospital. The security apparatus of the area swung into action. The following morning, Syengo's relative, who had already learnt about the robbery was alerted that some of the assailants might be coming towards his house. Soon thereafter, he saw the 2nd Appellant carrying a green bag. He stopped him; interrogated him and called the police. Inside the green bag, there was a shirt and a pair of blue jeans trousers which Syengo would later identify as his. Remarkably, Syengo had marked his clothes with the letters "XXX" precisely because he had suffered another robbery in the past and he wanted to be able to identify his clothes more easily if they were ever stolen again. The 1st Appellant was arrested shortly thereafter. He was wearing a red cap belonging to Syengo. The Area Chief, Julius Kaula was present during both arrests and testified as such. When he left the hospital, Syengo was able to pick up the two Appellants at an Identification parade. The Investigating Officer and the Clinical Officer who treated Syengo also testified at the trial and corroborated the Prosecution Case.

11. This was the Prosecution case that emerged from the trial. The Learned Trial Magistrate considered the evidence sufficient to put the Appellants to their defence. Both gave unsworn statements. The 1st Appellant denied that he was involved in the robbery. He similarly denied that he was wearing a red cap when he was arrested. He even contested the arresting ground – testifying that he was arrested behind some plots and not at a *miraa* joint as alleged by the Prosecution. He testified that he had a grudge with PW3 about PW3's daughter with whom he was having a relationship to the chagrin of her father, hence the decision to frame him up.
12. The 2nd Appellant similarly denied any involvement in the robbery and blamed Nguli Isika, as well, for his predicament. He says he was minding his own business on 12th June, 2006 – walking to Katulani Market - when Nguli Isika stopped him, asked him about the robbery and threatened to have him lynched. He denied being found with any of Syengo's clothes at the time of the arrest.
13. Against this backdrop, the Learned Trial Magistrate had no hesitation in finding that the Prosecution had proved its case beyond reasonable doubt respecting the two Appellants. He concluded that the two Appellants had been positively identified and recognized by both Syengo and Mwende. The Learned Trial Magistrate also concluded that Syengo's stolen clothes were found in the possession of the two Appellants and this strengthened the finding of guilt. The Learned Magistrate, therefore, concluded that the identification by recognition by Syengo coupled with the evidence of recent possession of the stolen goods by the two Appellants were mutually reinforcing and duly convicted the Appellants.
14. On appeal, the Appellants have raised a number of grounds which we propose to analyze in seriatim. First, both Appellants complain that their constitutional rights were violated because they were held in custody for an excessively long period of time. The argument is that the Appellants were arrested on 16th June, 2009 but were never arraigned in Court until 11th July, 2009 – a delay of more than three weeks. They both argue that the State did not offer any reasonable explanation for the delay. Further, they complain that it was prejudicial for the Learned Trial Magistrate to proceed with the case while their Constitutional reference was pending before the High Court.
15. From the record, it appears true that the arrests indeed, took place on 16th June, 2009 and the first arraignment does not take place until 11th July, 2009. However, we believe that our case law is now quite clear that a trial is not automatically made a nullity because there was a constitutional violation in presenting an accused person to court. See, for example, ***Julius Kamau Mbugua v R*** **(Crim. App. No. 50 of 2008)("[E]ven where violation of right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not [necessarily] a nullity…")**
16. The ***Julius Kamau Mbugua Case*** suggests that unless it can be shown that the delay to present an accused to court was unreasonable and prejudicial to the criminal defendant's trial-related rights, it would be a disproportionate remedy to order an acquittal merely on that basis. Instead, the proper remedy could be compensation or some other form of relief in a separate petition to the High Court of Kenya. In other words, far from the Constitutional Reference compelling the staying of the suit against the Appellants, it was procedurally appropriate that the two proceeded in parallel fashion.
17. The Appellants next raise objections based on the evidence of identification proffered on behalf of the Prosecution. Rather than challenge the circumstances of identification, the 2nd Appellant raises a question of causality and chain of information. The trial record reveals that there is only a single identifying witness – namely Syengo. It is also undisputed that Syengo was rendered unconscious during the robbery and did not come to at the Kitui Hospital until the following day after 10 pm. Yet, by that time, someone had already informed the authorities and members of the public that the two Appellants were the assailants because they both were arrested at around 2:00 pm the same day – more than eight hours before Syengo could disclose who his assailants was.
18. This problem of a break in the sequencing of information is a serious one and is not fully salvaged by the Identification Parade that Syengo participated in at which he picked up the two Appellants. It introduces some serious doubts to the identification evidence offered by Syengo.
19. In our view, however, it is unnecessary to rely on the evidence of identification in this case. The Learned Trial Magistrate also relied on the doctrine of recent possession to convict the Appellants. We think that it was appropriate to do so.

20. The doctrine of recent possession is a rule of law that permits an inference that where it is proved that property was stolen and the same property, recently after the robbery is found in the exclusive possession of a person, that person is presumed to have participated in the crime that resulted in the theft or robbery of that property. The presumption is a rebuttable one but the burden shifts to the accused person as soon as all the elements are proved to properly invoke the doctrine.
21. To invoke the doctrine of recent possession, the Prosecution must prove beyond reasonable doubt each of the following four elements:
    a. First, that the property was stolen;
    b. Second, that the stolen property was found in the exclusive possession of the accused;
    c. Third, that the property was positively identified as the property of the complainant; and
    d. Fourth, that the possession was sufficiently recent after the robbery. As to what constitutes "recent" possession is a question of fact depending on the circumstances of each case including the kind of property, the amount or volume thereof, the ease or difficulty with which the stolen property may be assimilated into legitimate trade channels; the property's character, and so forth.
22. In the case of ***Malingi v Republic*** **[1989] KLR 225**, the Court of Appeal had this to say about the doctrine of recent possession:

***By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession.; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver.***

23. In the instant case, the Learned Trial Magistrate was persuaded that all the elements for the applicability of the doctrine were present. After a re-evaluation of the evidence, we cannot fault him and we agree. Although both Appellants contest the circumstances of their arrest, in our view, the Learned Trial Magistrate was entitled to believe the Prosecution witnesses particularly Nguli Isika (who testified as PW3) and Julius Kaula (who testified as PW4). We note that their testimonies remained intact on cross-examination. The Learned Trial Magistrate was entitled to believe that they told the truth about the arrests and the possession of Syengo's goods found in their exclusive possession. At that point, the onus shifted to the Appellants to explain how they had come into possession of the goods. They did not do so.
24. On our part, we feel confident that all the elements of the doctrine of recent possession were met here:
    a. First, it has not been in contention that property belonging to Syengo was stolen in the robbery. This included the red cap; the green shirt and the blue jeans which were produced as exhibits in the Court and which he positively identified using the marks he had placed on them;
    b. Second, despite the Appellant's vehement contestation, we are of the view that it is established beyond any reasonable doubt that the stolen items were found in the exclusive possession of the two Appellants;
    c. Third, the property was positively identified as Syengo's property; and
    d. Fourth, there is no question that the possession was sufficiently recent after the robbery coming as it did merely hours after the theft.
25. Having reached these conclusions, it follows that these appeals have no merit. They are both dismissed. The decision of the Principal Magistrate's Court at Kitui is hereby affirmed and left undisturbed.

**DATED, SIGNED AND DELIVERED this 10th day of December 2013.**

**JOEL NGUGI, Judge**

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**B. T. JADEN, Judge**

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