



**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 82 OF 2007**

PAUL LITUNYA TUNDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein, Paul Litunya Tundo was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of offence were as follows;

“On the 3rd day of March 2006 at Emaholia village, Muchobewa Sub-Location, Kisa North Location, in B/Mumias District within Western Province jointly with others not before Court, while armed with rungas, pangas, robbed Everlyne Obonyo Tundo of one sufuria, 2 pangas and four plates all valued at Kshs.780/- and at or immediately before or immediately after the time of such robbery wounded the said Everlyne Obonyo Tundo.”

2. The evidence tendered was that on the night of 3rd February 2006, PW1, Everlyne Obonya Tundo was attacked when she went to relieve herself and when she flashed her torch, she recognized the Appellant. As she was being hit on the back and head, she screamed and among those who came to her rescue was PW2, Peter Bulimoi and PW4, Samwel Okoko Alubala. The latter stated that he confronted the robbers and using torchlight recognized the Appellant. As the robbers fled, a sufuria and a bag as well as a hat were abandoned and according to the two witnesses, it was the Appellant who did so.

3. PW5, Jonathan Tundo Sichonya like PW2 and PW4 stated that when the robbers fled, his wife, PW1, informed him that the Appellant was one of the robbers. It is instructive that the Appellant was PW5's son.

4. PW7, P.C. Gilbert Chebii of Khwisero Police Station was the one who re-arrested the Appellant because the villagers arrested him on the same night of the robbery and PW2 was one of those who escorted him to the Police Station.

5. In his defence, the Appellant stated that on 3rd March 2006, he was arrested and taken to Khwisero Police Station and later charged with the present offence.

6. The learned trial Magistrate found him guilty, convicted him and sentenced him to death and having heard the Advocate for the Appellant and learned Senior Principal State Counsel, the only questions to address are;

i) Whether the Appellant's alleged recognition at the scene was proper.

ii) Whether the doctrine of recently stolen items can be invoked.

7. On the first issue, it is worth noting that the Appellant and PW1 were related and knew each other quite well. PW2 also knew him quite well and they saw him at the scene in different instances using torchlight. PW1 also informed other witnesses including PW5, father of the Appellant that the Appellant was one of the robbers and he was apprehended soon thereafter. It has not been suggested in the defence that PW1 or even PW5 had any reason to frame a member of their family and why PW2 who was a neighbour would similarly frame him. Recognition is credible if done in proper circumstances and in this case we do not see that either of the witnesses may have been mistaken in that recognition – see Kingori vs Republic [KLR] 2003 at page 289 where the recognition of a robber by a close relative using torchlight was upheld.

8. On the second issue, in this case, PW1 identified one of the stolen sufurias as belonging to her and which had been abandoned by the fleeing robbers. The matter would have been easily dismissed but for another item found with it; a bag belonging to the Appellant and which contained some personal effects that all witnesses confirmed as his. **How did his bag find its way to be with a stolen sufuria moments after a robbery had the Appellant not been among the robbers?** The witnesses who retrieved the items were chasing the robbers and moments later, found the Appellant whose house was in the vicinity of PW1's house and we are convinced that the doctrine of recent possession can be invoked in this case.

9. In the end, we see no reason to allow the Appeal but will instead dismiss it on all the grounds raised.

10. Orders accordingly.

D. A. ONYANCHA

JUDGE

I. LENAOLA

JUDGE

**DELIVERED, DATED AND COUNTER-SIGNED BY S. CHITEMBWE, JUDGE AT
KAKAMEGA THIS 23RD DAY OF FEBRUARY, 2012**

S. CHITEMBWE

JUDGE