REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 505 OF 2007

CRISPO KINUTHIA NJERI……..…….....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. Crispo Kinuthia Njeri, the appellant, was tried and convicted by the Principal Magistrate at Kibera law courts on two counts of robbery contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death in count I while sentenced on count II was left in abeyance.

2. The appellant lodged his appeal in the High Court on 28th August 2007 on grounds that:

i) the learned trial magistrate did not comply with Section 169 Criminal Procedure Code,

ii) that the offence of robbery with violence had not been proved,against him,

ii) that the evidence of identification was insufficient,

iv) that the doctrine of recent possession was wrongly applied and,

v) that he was not accorded a fair trial under Section 77(1) and 77(2) of the repealed Constitution because he was denied a *chance to recall the two complainants,*

vi) that Section 169(1), Section 197, Section 198 and Section 329 of the CPC were not complied with.

3. The chief facts of the prosecution case were that the two complainants PW1 and PW2, were riding their bicycles in the Ngong Hills when the appellant who was in the company of another while armed with a panga and a hammer set upon them and robbed them of their bicycles and other valuables. The property stolen from the PW1 was altogether valued at Kshs.106,300/=while the property stolen from PWII was altogether valued at Kshs.135,200/-. It is further stated that in both counts they used violence against the complainants injuring PW1 and wounding PWII.

4. PWI sought assistance from members of the public who helped to carry PWII to the road to get transport to hospital, subsequently the police were informed and in the wee hours of that night they arrested two cyclists who looked suspicious and who could not explain how they came to be in possession

of the bicycles they were riding.

5. We have subjected the evidence adduced before the trial court to fresh analysis and re-evaluation bearing in mind that we neither saw nor heard any of the witnesses as they testified, and due consideration in line with the case of **GABRIEL KAMAU NJOROGE VS. REPULIC (1982-88) 1KAR 1134.**

6. The issues for determination are;

(i) whether the offence of robbery with violence under Section296(2) of the Penal Code was proved against the appellant,

(ii) whether he was properly identified,

(iii) whether the doctrine of recent possession was properly applied against the appellant in these circumstances and

(iv) whether he was accorded fair trial according to the law.

Section 296 of the Penal Code provides:

"(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

Any one of the three ingredients provided under Section 296(2) Penal Code, if present in a case, is enough to found a conviction for the offence of robbery with violence. There is no doubt from the prosecution evidence that there were two assailants, who were armed with a cutlass and a hammer and that they used these implements to hit and injure PW1 and wound PWII as they robbed them of the property listed in the charge sheet. The two witnesses corroborated each other on these material facts and PW5, Dr. Kamau who examined them on 19th December 2005 observed that they both had injuries that were two days old and that each had suffered injures amounting to harm. In this case all three ingredients were present, and the offence was therefore proved beyond reasonable doubt.

7. The Honourable trial magistrate did convict the appellant on the basis of ***visual identification*** by PW1 and PW2 as well as on the basis of the ***doctrine of recent possession.***

In her words the Hon. trial magistrate said:

"PW1 and PW2 were robbed in broad day light. The items stolen from them were recovered the same day in possession of accused and another who escaped. They were arrested at 3.00 a.m. The complainants further identified accused as the person who robbed them. This fact coupled with the recent possession of the complainant's items by the accused point to be accused as the robber".

In weighing the evidence of identification we exercised great caution bearing in mind the warning of the court of Appeal in **KARANJA AND ANOR. VS. REPUBLI [2004] 2 KLR pg 140** wherein the court stated:

"whenever the case against accused depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification".

We therefore warned ourselves thoroughly as regards the evidence of identification.

8. The evidence shows that the two witnesses were attacked at about 8.30 a.m. They had a face to face encounter with the assailants in broad daylight. The assailants did not disguise themselves or try to cover their faces in any way. PWI was able to identify the appellant the next day at the police station, while

PWII identified him five days later in court, during the trial.

9. As observed earlier the case against the appellant did not depend wholly on the correctness of identification. Just as weighty was the evidence of the circumstances of his arrest. The appellant and another were arrested that same night cycling towards Nairobi from the Ngong direction. The bicycles that the two were riding were positively identified by PW1 and 2 as the ones they had reported having been snatched from them during the robbery. Together with the bicycles several other personal effects belonging to the two witnesses were recovered from the appellant and his companion. From the appellant specifically, two mobile phones, one digital camera and some tools were also recovered.

10. The appellant said his uncle gave him the bicycle found in his possession. This being a criminal case we recognise that the burden of proof rests entirely with the prosecution and never shifts to the accused person. The appellant was found at 3.00 a.m. along Magadi road within Ngong area cycling towards Nairobi; and rather than explain the circumstances that necessitated the nocturnal journey for himself and his companion and especially at such an odd hour, his companion fled the scene leaving his bicycle in the hands of the police. The appellant on the other hand did not manage to flee but he had no explanation either.

11. Indeed as stated earlier, there was no obligation upon the appellant to offer any explanation whatsoever this being a criminal trial: What this meant however was that the overwhelming evidence tendered by the prosecution remained unchallenged.

12. Having established that the two complainants were robbed in circumstances that satisfied the requirements of Section 296(2) of the Penal Code at about 8.30 a.m., and that the appellant was arrested at 3.00 a.m., in possession of some of the items stolen from the complainants, we analysed the evidence further to establish whether the doctrine of ***Recent possession*** was applicable.

13. For an inference of guilt to be drawn from circumstances pertaining to recent possession it is necessary to establish that the goods were stolen recently, that the said goods were in the possession of the accused person at the time of recovery and that the accused person offered no reasonable or plausible explanation for being in possession thereof.

14. In the case before us the goods were recovered less than 24 hours from the time of theft. This satisfies the requirement that the theft must be recent for the doctrine to apply. Further, several of the exhibits were found in the possession of the appellant as indicated elsewhere in this judgment. The appellant said that the bicycle was given to him by his uncle. However, he did not offer any explanation as to how he came to be in possession of the rest of the property. Thereafter, when asked by the court whether he had any objection to the release of the exhibits, including the bicycle, to the complainants he categorically stated that he laid no claim to the goods.

15. It would be stretching credibility too far to expect us to believe that the appellant innocently came into the possession of the bicycle that was one of those robbed from the complainants just hours before in a violent robbery, that he also innocently came into possession of the other items belonging to the same victim and which were found in his possession at the time of arrest, that he was coincidently travelling with a companion who also had in his possession property stolen during the same robbery and that they just happened to find it convenient to cycle from Ngong to whatever destination at 3.00 a.m.

16. The appellant has a constitutional right to associate with whom-so-ever he pleases and to travel in whatever manner or fashion he pleases. However all these pieces of evidence taken together lay a firm basis for an inference of guilt to be drawn on the part of the appellant. We are therefore satisfied that the learned trial magistrate applied the doctrine of ***Recent Possession*** properly in this case. It is improbable that all the goods robbed from the complainants could and up in the possession of the appellant and his companion and within such short time. In **Abdalla Juma Okengo and another vs. Republic cr. App 50 & 51 of 2009** (unreported), theCourt of Appeal sitting at Kisumu applied the doctrine of recent possession where the complainant was robbed at 10 p.m. and the goods found in the possession of the appellant at 3.00 a.m. the same night. The court held that it was improbable that the goods had changed hands at

night.

17. on the issue of the provisions of the law that were not complied with, we examined the evidence on record afresh in relation to each section referred to. Section 77(1) and Section 77(2)(c) of the repealed Constitution provided that a person charged with a criminal offence shall be afforded a fair hearing, within a reasonable time by an independent and impartial court established by law and that they shall be given adequate time and facilities for the preparation of their defence. The appellant's ground is based on the fact that his application to recall PWI and PWII was not acceded to.

18. The court record shows that when the prosecution made a request that the evidence of the two complainants be heard, on the day of plea because the complainants were due to leave the country to return to the United States the appellant asked that the case be heard the following day when he would be ready to proceed. The learned trial magistrate granted his request and adjourned the case to the following day. The record does not reflect any indication that the appellant raised any issue concerning his health nor that he had any difficulty following the proceedings.

19. We note that he waited three months to demand the recalling of PW1 and PWII because he knew that they had left the country. From the evidence, the appellant filed an application in the High Court seeking orders to recall PW1 and PW2. The trial court indulged him for a whole year as he refused to proceed awaiting the hearing and determination of that application. Finally, when the court ordered that the case had been pending for too long and must now proceed, the appellant said he would not proceed and walked out of court. It is observed that no order from the High Court staying the lower court proceedings had been served upon the trial court and adjourning the case for a whole year at the behest of the appellant, most of the time, was merely to indulge the appellant.

20. The appellant was supplied with statements by order of court as he had requested. We are therefore satisfied that the appellant was heard within reasonable time in the circumstances and that he was heard by an impartial and independent court and was given adequate time and facilities to prepare his defence.

21. On Section 169(1), Section 197, Section 198 and Section 329 of the Criminal Procedure Code the appellant did not expressly state how these had not been complied with by the trial court. Section 169(1) provides that a judgment shall be written by or under the direction of the presiding officer of the court, in the language of the court, and shall contain the points for determination and the decision thereon and the reasons for the decision. The record of the court shows that Section 169(1) of the Criminal Procedure was complied with. Section 197 and Section 198 of the Criminal Procedure Code, on the manner of recording evidence before a magistrate and on interpretation of evidence to the accused person, were complied with. The record has no reflection of any request from the appellant for the evidence to be tendered in any specific language or to be interpreted to him in any particular language.

22. Section 329 of the Criminal Procedure Code concerns Victim Impact Statements and the appellant did not expressly state how in his opinion he had wanted this Section to be complied with by the trial court.

23. All in all the appellant elected to remove himself from the proceedings in an apparent bid to frustrate the trial. The law should not be used by the complainant or the accused to defeat the ends of justice. When typed proceedings were supplied to the appellant and he was given time to prepare his defence he did not offer any defence, stating that he was still not ready. We are therefore satisfied that in the circumstances of this case the learned trial magistrate acted within the law in bringing the trial to a conclusion. She did offer the appellant ample opportunity to state his case but he instead employed all manner of tactics to frustrate the trial.

For the foregoing reasons we find that the appeal has no merit, and consequently dismiss it in its entirety.

SIGNED DATED and **DELIVERED** in open court this **7th** day of **February 2012**.

F. A. OCHIENG **L. A. ACHODE**

JUDGE **JUDGE**