REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Criminal Appeal 165 of 2010

BARNABAS CHEPYEBEI LETING …….. APPELLANT

=VERSUS=

REPUBLIC ……..RESPONDENT

{Being an appeal arising from the judgment of the Learned Trial Magistrate

J. NJOROGE, Principal Magistrate, Kapsabet on 1/11/2010 in

Kapsabet Criminal Case No. 4266 of 2009}

JUDGMENT

The appellant, **Barnabas Chepyebei Leting** and **Samuel Kipkemboi Koech** (hereinafter "**the co-accused**"), were jointly charged with robbery with violence contrary to section 296(2) of the Penal Code. The co-accused was acquitted of the charge. The allegation was that the two, on 25th September, 2009, at Iruru Forest in Kapsabet Municipality, jointly with others not before the Court, robbed **Emmanuel Kipruto Tabut** (hereinafter, "**the deceased**"), of motor vehicle registration number KBF 464 H make Toyota Saloon, valued at Kshs 600,000/= and at or immediately before or immediately after the time of such robbery, killed the said deceased.

The appellant was convicted and sentenced to death. He was not satisfied with his conviction and sentence and has appealed to this Court on some fifteen (15) grounds. Those grounds have raised the following issues:-

ØInsufficient and conflicting evidence;

ØIdentification;

ØFailure to call essential witnesses; and

Ø Failure to consider the defence.

When the appeal came up for hearing, before us, the appellant was represented by **M/s Orina** who submitted at length on the said issues. **Mr. Kabaka,** the learned State Counsel represented the respondent State and opposed the appeal contending, in the main, that the appellant was convicted on sound evidence

and was positively identified in a properly conducted parade.

Being a first appeal, we have the duty of re-considering and re-evaluating the evidence which was adduced before the Lower Curt in order to draw our own conclusions in deciding whether the judgment of the Lower Court should be upheld. We however bear in mind that we did not see or hear the witnesses testify and should give allowance for that (See **Okeno =vrs= Republic [1972] EA 32).**

Briefly, the facts of the case before the Lower Court (**J.N. Njoroge)** – P.M.) were as follows:-

Sgt **Hillary Birgen**, P.W.1 owned vehicle registration number, KBF Toyota DX Station Wagon, Silver in colour, which he used in his taxi business. For that business, he employed the deceased who plied between Kapsabet and Lessos.

On 24th September, 2009, the deceased could not be reached on phone and the police were informed. The vehicle was recovered at a garage in Eldoret Town and the body of the deceased found in Iraru Forest, beside a road on 25th September, 2009.

Fredrick Kiptoo (P.W.5), a boda boda operate, recalled that on 24th September, 2009 at 3.00 p.m., he had found a motor vehicle registration number KBF parked near the forest. Someone, whom he identified as the appellant, came out of the vehicle and sent him for cigarettes. The next day, the body of the deceased was found 100 metres from the place he had seen the appellant the previous day.

David Mukangala (P.W.7), a mechanic, recalled the 25th September, 2009 at 10.00 a.m., when a person he identified as the appellant parked motor vehicle registration No. KBF 464H at West Indies garage where P.W.7 worked. The person returned at 5.00 p.m. and took the said vehicle to another garage called Masai, owned by **Marko Nyongesa Burudi** (P.W.6).

P.W.6 testified that he was indeed at his said garage at 5.00 p.m. on 25th September, 2009, when motor vehicle registration number KBH 464 H Toyota Station Wagon was parked in his garage by the appellant and the co-accused who then left.

P.C. **Johnson Maranda Wepukhulu** (P.W.3), on 26th September, 2009 made a visit to the garage of P.W.6 and found motor vehicle registration KBF 464 H, Toyota Station Wagon, Silver in colour. Its altered windows attracted him and P.W.6 identified the appellant as the owner. The appellant, according to P.W.3, introduced himself as the owner but shortly took off. He therefore suspected the vehicle and towed it to Eldoret Police Station. He found a green coat in the vehicle which he produced at the trial.

CPL **Linus Mugambi** (P.W.8) recalled the 25th September, 2009. He was then stationed at Kapsabet Police Station. A report was made at that police station of a body found at Iraru Forest beside a road. In the company of other officers, they collected the body and took it to Kapsabet District Mortuary. They also took possession of the said motor vehicle and arrested the appellant. In the vehicle, they recovered a greenish coat and two court bonds in the appellant's name.

Ag. **I.P. John Bosire** conducted an identification parade at which witnesses identified the appellant. **Dr. Kazimoto**, P.W.12, performed the postmortem on the body of the deceased which was identified by P.C. **David Njogu**, P.W.13 and the deceased's relatives.

In his defence, the appellant gave a sworn statement in which he denied committing the offence. He discredited the parade at which he was identified and highlighted the fact that one **Erasto Wanyama,** who had given the names of the people who took the vehicle to Eldoret Town, was not called to testify.

On the basis of the above evidence, the trial magistrate made findings of fact that the appellant escaped when challenged by P.W.6 and that he also failed to explain why his jacket and personal documents were found in the motor vehicle which had been stolen and the driver killed, which vehicle was found in his possession. The Learned Magistrate therefore found that the prosecution had proved its case against the

appellant beyond reasonable doubt.

The Learned Magistrate, (although he did not expressly say so), relied upon circumstantial evidence and the doctrine of recent possession.

It is trite that for a conviction to be based exclusively upon circumstantial evidence, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. (See **Simon Musoke =vrs= R [1958] E.A 715**). We have perused the statement of one **Rasto Wanyama Juma** which is part of this record. It is not clear how the statement was produced but as it is part of this record, it must be considered along with the rest of the evidence which was placed before the Learned Magistrate. In the statement, the persons who had vehicle registration number KBF 464 H in which an Army Major was interested were **Maise** and **Sammy**. In the statement, it is also apparent that the coat which was in said motor vehicle belonged to **Maise** and **Rasto Wanyama Juma** kept it for him. The same was later collected from him by a youth who had been sent by the said **Juma**. The youth took the coat to another garage where the police recovered it.

This record also has the statement of Cpl **Linus Mugambi**. The said Officer stated inter alia, that when he checked the subject motor vehicle, he found a coat on the driver's seat. In its pocket, he recovered two court bonds in the name of one **Barnaba Letting** and Further investigations revealed that another suspect **Sammy** had escaped. Later, he received one photograph of the suspect from an informer.

In convicting the appellant, the Learned Magistrate believed that the appellant's personal documents and jacket were found in the recovered motor vehicle and that the appellant had not explained the recoveries. According to **Rasto Wanyama Juma's** statement, however, the coat which he found in the motor vehicle belonged to one **Maise.** The prosecution did not adduced evidence to demonstrate that **Maise** was also the name of the appellant. The photograph, which would appear to have connected the appellant to the coat, was given to **Cpl Linus Mugambi** by an informer. The photograph, according to **Cpl Mugambi,** was not recovered in the recovered coat. **Another nexus would have been furnished by the two court bonds which were said to be in the name of the appellant**. The two court bonds were however, not produced at the trial. We also do not lose site of the fact that the prosecution did not call **Juma** and **Cpl Mugambi** to testify. We now know that if the two witnesses had been called, their testimonies would have been prejudicial to their case.

Given the statements of the two witnesses, the appellant did not have to explain anything as the Learned Magistrate wrongly, in our own view, seemed to suggest. The jacket belonged to **Maise** according **to Juma** and **Cpl Mugambi** was not availed to produce the court bonds. We do not therefore find that the case against the appellant could have been decided exclusively on the basis of circumstantial evidence since, as we have attempted to show, the exculpatory facts were not incompatible with the innocence of the appellant and in capable of explanation upon any other reasonable hypothesis than that of his guilty.

The same statement of **Juma,** showed that the recovered vehicle was found with **Maise** and **Sammy.** It was never suggested at the trial that the two names belonged to the appellant. The doctrine of recent possession applies when the following prerequisites are demonstrated:

(a) The property must have been found with the suspect;

(b) The property must be positively identified as the property of the complainant;

(c) The property must be proved to have been recently stolen from the complainant.

All the three ingredients have to be demonstrated to prove recent possession. In this case, it was, in our view, not positively proved that the subject vehicle was found in the appellant's possession. It did not help matters that **Marko Nyongesa Bundi** (P.W.6) in whose garage the vehicle was found did not produce documentary evidence, such as a job card or instructions note, from the persons who left the vehicle at his garage. We also find that **Fredrick Kiptoo**, (P.W.5) and **David Mukangala**, (P.W.7) could have been mistaken in their identification of the appellant. We say so, because, they did not know the

appellant prior to the commission of the offence. Our conclusion is buttressed by their own testimonies at the trial. In P.W.5's own words:-

"You had dark teeth at the time I met you with the motor vehicle but now must have washed".

AND in P.W7's own words**:-**

"In my statement, I have said you were slightly tall, brown, the 2nd accused is slim and appeared like an athlete … At that time, you were slim but you are now stout."

In the end, we have come to the conclusion that the appellant's conviction is not safe. We allow his appeal, quash the conviction and set aside the sentence of death imposed upon him. The appellant should be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 22nd DAY OF MARCH, 2012.

F. AZANGALALA
JUDGE

A.B. MSHILA
JUDGE

Read in the presence of:-

F. AZANGALALA
JUDGE