REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 76 & 69 of 2009

PETER WANJOHI WANGECHI.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Judgment arising from the Chief Magistrate's Court at Nyeri in Criminal Case No.4025 of 2007 by E. J. Osoro– S.R.M.)

CONSOLIDATED WITH

CRIMINAL APPEAL NO.69 OF 2009

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-versus-

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(Judgment arising from the Chief Magistrate's Court at Nyeri in Criminal Case No.4025 of 2007 by E. J. Osoro– S.R.M.)

J U D G M E N T

The Appellant herein, **Peter Wanjohi Wangechi**, was tried on a charge of three counts with two alternative counts which are reproduced as follows:

In Count I, the Appellant was charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence are: ***that on the 19th day of November 2007, at Asian Quarters Nyeri in Nyeri District within the Central Province, jointly with others not before Court while armed with dangerous weapons namely: AK 47 Rifles and Pistols robbed Venichand Samat Shah of a motor vehicle registration number KAG 893N make Toyota Hilux Pick-Up and a mobile phone make Nokia 1110 all valued at Kshs.605,000/= and at or immediately before or immediately after robbery threatened to use actual violence to the said Venichand Samat Shah***.

In Count II, the Appellant was charged with the offence of **Robbery with Violence** Contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence are: ***that on the 19th day of November 2007, at Asian Quarters Nyeri in Nyeri District of the Central Province jointly with others not before Court while armed with dangerous weapons namely: AK 47 Rifles and Pistols robbed Rakccha Shah of two gold bungles, one gold necklace, one gold earring and one camera make Asaipentax all valued at Ksh.70,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Rakccha Shah***.

In Count III, the Appellant was charged with the offence of **Robbery with Violence** Contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence are: ***that on the 19th day of November 2007, along Nyeri-Nairobi Road at Wambugu Farm in Nyeri District within the Central Province jointly with others not before Court, while armed with AK 47 Rifles and Pistols robbed Felix Kebuka Wachira of a motor vehicle registration number KAJ 561X Toyota Corolla, two mobile phones make Motorola L6 Serial 359405-00-139898-9 and a Siemens serial number not known, a wallet containing Identity Card, Electors Card and personal documents, a wrist watch make not known, cash Kshs.4,000/= and 2 Kilograms of meat all valued at Kshs.275,400/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Felix Kebuka Wachira***.

In the Alternative Count I, the Appellant was charged with the offence of **Handling Stolen Property** contrary to **Section 322 (2)** of the **Penal Code**. The particulars of the offence are: ***that on the 21st November 2007, at Kangemi Estate Nyeri in Nyeri District within the Central Province, otherwise than in the course of stealing dishonestly retained 2 gold bangles and one gold necklace all valued at Kshs.35,000/= the property of Rakccha Shah knowing or having reasons to believe them to be stolen goods***.

In the Alternative Count II, the Appellant was charged with the offence of **Handling Stolen Property** contrary to **Section 322 (2)** of the **Penal Code**. The particulars of the offence are: ***that on the 21st day of November 2007 at Kangemi Estate Nyeri in Nyeri District within the Central Province, otherwise than in the course of stealing dishonestly retained one mobile make Motorola L6 serial number 359405-00-139898-9 valued at Kshs.8,000/= the property of Felix Kebuka Wachira knowingly or having reasons to believe it to be stolen goods***.

At the end of the trial, the Appellant was convicted in the main counts I, II and III. He was sentenced to suffer death in all counts. The Appellant appealed against the aforesaid decision hence this appeal. It would appear the Appellant filed in person ***Nyeri High Court Criminal Appeal Number 76 of 2009*** while Mr. Njuguna Kimani, Learned Advocate filed ***Nyeri High Court Criminal Appeal Number 69 of 2009***. The Appeals were consolidated. In High Court Criminal No.76 of 2009, the Appellant put forward the following grounds of appeal:

"1. The Learned Trial Magistrate erred in law and in fact in finding evidence leading to the arrest of the Appellant acceptable yet the informer who tip the police with the information or reasons to believe Appellant was a robber never identified the person to be arrested or testified in Court to have accepted such evidence.

2. The Learned Trial Magistrate erred in law and fact in finding Prosecution established any evidence to prove possession beyond all the reasonable doubts in absence of any valuable security produced in support of the allegation at the scene of the recovery and be accepted evidence of the ownership of any property or of the right to recover or receive any property from the suspect/prisoner or exhibit to be seized for investigation.

3. The Learned Trial Magistrate erred in law and fact in failing to find defence of the Appellant meritorious on omission by Prosecution to show Court proper and legal reasons to believe his participation to the crime.

In Nyeri High Court Criminal Appeal Number 69 of 2009, Mr. Njuguna Kimani, Learned Advocate for the Appellant put forward the following grounds in his Petition:

"1. The Learned Senior Resident Magistrate erred in law and in fact in relying on insufficient, uncorroborated and contradictory evidence of P.W.5, P.W.6 and P.W.7 hence arriving at the decision that the doctrine of recent possession applies in regard to the Appellant in the four main counts. A miscarriage of justice was occasioned.

2. The Learned Senior Resident Magistrate erred in law and fact in shifting the burden of proof of the Appellant's defence of Alibi to the Appellant thus rejecting the same unfairly. Prejudice and a miscarriage of justice was occasioned.

3. The Learned Senior Resident Magistrate erred in law and in fact in relying wholly on the case of RASHID DUBA JILLO versus REPUBLIC Criminal Appeal No.155 of 2006, as the circumstances of the said case are totally different and distinguishable hence arriving at a wrong decision. A miscarriage of justice was occasioned.

4. the Learned Senior Resident Magistrate erred in law and in fact in failing to consider that very vital witnesses were never called by the Prosecution and more particularly in the light of her holding that it was prudent to conduct an Identification Parade. Prejudice was caused to the Appellant."

When the appeal came up for hearing, Miss Maundu strenuously opposed the same.

We think it is convenient at this juncture to set out in brief the case that was before the trial court before embarking on the appeal. A total of seven witnesses testified in support of the Prosecution's case. Venichand Shamat Shah (P.W.1) closed his shop at 6.30 p.m. on 19th November 2007, and drove home in motor vehicle registration number KAG 893N in company of his mother Ganga Shah (P.W.2) and his wife Rakcha Venichand (P.W.3). Upon reaching his gate, P.W.1 alighted to open the gate. He was accosted by seven (7) men. One of those men was armed with a big gun while two were armed with pistols. The trio were ordered to enter their compound and their house where they were ordered to lie down as the thugs demanded to be given money. The gang ransacked the house and made away with a camera, golden necklace from P.W.3 and 2 pairs of gold bangles from P.W.2. P.W.1 was robbed of his mobile phone make Nokia 1100 and motor vehicle registration number KAG 893N. The incident was reported to the police who visited the scene. In the same evening at about 6.30 p.m., Felix Kebuka Wachira (P.W.4) who was driving home near Wambugu Farm was ordered at gunpoint by a gang of five men to alight and surrender his motor vehicle registration number KAJ 561X Toyota Corolla. The gang ransacked his pockets and stole from him Kshs.4,000/=, Identity Card, 2 Mobile Phones make Siemens A35 and Motorola L6 and a wrist watch. They also stole 2 Kilogrammes of meat which was inside P.W.4's motor vehicle. P.W.4 was forced into the boot of his car and driven upto *Kiamuiru* area where he was abandoned. Members of the public assisted to open the boot thus making P.W.4 come out of the vehicle. The police were notified of the incident and promptly arrived at the scene. The police took the motor vehicle and later returned the same to P.W.4. None of the victims i.e. P.W.1, P.W.2, P.W.3 and P.W.4 identified the thugs. On 21st November 2007, C.I.P. Kilemi (P.W.6) received a report to the effect that one of the robbers was residing at *Kangemi Estate* in Nyeri Town. P.W.6 said he mobilized Police Officers namely: Cpl. Mureithi (P.W.7), Cpl. Wesonga (P.W.5) plus two other Police Officers to visit the estate. On the way, the police stopped the Appellant who looked suspicious. P.W.6 and P.W.7 searched him and recovered mobile phone make Motorolla L6, one gold chain, one wrist watch make Geneva, 2 golden bangles and a consolidated Bank biro pen. The police arrested the Appellant and took him to Nyeri Police Station for interrogation. P.W.1, P.W.2, P.W.3 and P.W.4 were summoned and managed to identify the aforesaid items to be some of the properties they were robbed of during the robbery of 19th November 2007. When placed on his defence, the Appellant gave an unsworn testimony without calling for independent evidence. He denied committing the offence. He denied being in possession of the stolen items. He stated that he hails from *Kangemi Estate* and that during the date of the robbery he was at his place of work. He set up the defence of alibi. The Appellant further alleged that he was framed up by the police.

We now wish to consider the merits or otherwise of the appeal. Mr. Njuguna Kimani argued together all the five grounds of appeal. It is the submission of the Learned Advocate that there was no consistent evidence to prove how the stolen items were recovered from the Appellant. He pointed out that P.W.6 did

not specify which item was recovered from which pocket or part of his body. The Learned Advocate pointed out that there was no inventory made of the items recovered from the Appellant. Miss Maundu on her part was quite emphatic that the evidence of P.W.6 and P.W.7 were consistent on what was recovered from the Appellant. We have considered the rival submissions. We have also critically re-examined and re-evaluated the evidence tendered. We wish to state at this stage that this case is founded on the doctrine of recent possession. The Court of Appeal, restated the doctrine of recent possession in ***Isaack Ng'ang'a alias Peter Ng'ang'a Kahiga =vs= R CR. APP. NO.272 OF 2005 (unreported)*** at page 7 in part as follows:

"It is trite that before a Court of Law can rely on the doctrine of recent possession as a basis of conviction in a Criminal Case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively identified as the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to the search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."

The question which this Court must grapple with is whether the principles applicable to establish this doctrine manifest themselves in this appeal? There is no doubt the trial court convicted the Appellant on the evidence of P.W.6 and P.W.7. It is the evidence of P.W.6 that on 21st November, 2007, he together with P.W.7 and other Police Officers visited *Kangemi Estate* in Nyeri Township. The police stopped the Appellant and conducted a quick search on him. P.W.6 was categorical that he recovered from the Appellant a Motorolla handset L6 plus a pen. P.W.4 managed to positively identify Motorolla L6 to be his property which was stolen from him on 19th November 2007. P.W.6 also witnessed P.W.7 search and recover golden bangles, golden necklace and a wrist watch from the Appellant. P.W.6 was emphatic that he recovered the items from the Appellant's trouser pockets. P.W.6 admitted he did not prepare an inventory of the items he recovered. It is clear in our minds that P.W.6 was consistent in his evidence even when he was under intense cross-examination. P.W.7 on his part stated that he searched the Appellant and managed to recover from the pockets of his jacket one golden chain, two golden bangles and a wrist watch make Geneva. P.W.3 visited the Police Station and managed to identify the golden chain and the golden bangles to be hers. We are satisfied that the Appellant was found in possession of the complainant's stolen items. We are convinced that that there were no serious inconsistencies that would prejudice the Prosecution's case. In the circumstances, we are convinced that the doctrine of recent possession applies to this case.

The second main ground raised and argued by Mr. Njuguna is that the Prosecution failed to summon crucial witnesses who were named by P.W.7 thus prejudicing his client's (appellant's) case. Miss Maundu, was of the view that the witnesses who were not summoned had no useful evidence for or against either side. We have looked at the record and it is clear that P.C. Nyaga and P.C. Wachira being Police Officers who accompanied P.W.5, P.W.6 and P.W.7 to Kangemi Estate were not summoned to testify. We think the failure to summon them to give evidence did not prejudice the Appellant's defence. There is no evidence that the duo had vital evidence that would have assisted the Appellant in his defence. We think the Appellant's contention is unfounded. The third ground raised by the Appellant is to the effect that the police failed to take an inventory of the items recovered by the police from the Appellant. We agree with the submissions of Mr. Njuguna that it was necessary for the police to maintain the inventory of the items they recover from suspects. In this case the police did not deem it fit to keep an inventory. We are however, of the opinion that in straightforward cases like in this appeal, the omission is not fatal. The ground which was ably argued by the Appellant's Counsel is to the effect that the Appellant's defence of alibi was not given due consideration by the trial court. Miss Maundu, did not address us over this ground. We have re-considered the Appellant's defence. We have already stated that the Appellant gave unsworn statement in his defence. He stated that he was not found in possession of the stolen items when he was arrested by the police. He claimed that during the alleged robbery he was in his place of work where he is a casual labourer. The record shows that the Learned Trial Senior Resident Magistrate considered and critically analysed at length the Appellant's defence. His complaint therefore

cannot stand. It has been alleged that the Learned Senior Resident Magistrate shifted the burden of proof. We have looked at the manner in which the Trial Magistrate dealt with the Appellant's defence of alibi. The Trial Magistrate stated that the alibi defence cannot be established by merely stating that he was at his place of work. With due respect, we think the Learned Trial Magistrate fell into error when she made the statement. It is trite law that at all times the Prosecution is enjoined to discharge the burden of proof. In cases where the accused person sets up the defence of alibi, the accused is required to simply state that he was not at the scene of crime during the time of the robbery. It is upon the Prosecution to prove that the accused was at the scene. We are alive of the fact that the Appellant is entitled to a re-evaluation of the evidence, this being the first Appellate Court. We have re-evaluated the Appellant's defence and we find that the same was displaced by the evidence of P.W.5, P.W.6 and P.W.7 whose evidence established the doctrine of recent possession. We have come to the conclusion that though the Trial Learned Senior Resident Magistrate shifted the burden of proof, the same cannot be said to have affected substantially the Prosecution's case.

In the final analysis, we find the Appeal to be without merit. The same is ordered dismissed in its entirety.

Dated and delivered this 8th day of June 2012.

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J. K. SERGON
JUDGE

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J. WAKIAGA
JUDGE