



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 112 AND 133 OF 2010 (CONSOLIDATED)

BETWEEN

**SAMUEL OMAE.....1st
APPELLANT**

**STEPHEN MAKORI OMOSA2ND
APPELLANT**

AND

**REPUBLICRESPONDE
NT**

**(Being an appeal from the original conviction and sentence of the SRM’s court at Kilgoris
in criminal case number 664 of 2008 by Hon. Rose Oganyo, dated 14th December, 2009,)**

JUDGMENT

1. The two appeals were consolidated by an order of this court dated 20th January, 2011.
2. The two appellants, **Samuel Omae** and **Stephen Makori Omosa** were the 2nd and 1st accused persons respectively before the trial court. They were jointly charged with the 3rd accused therein, **Richard Ombui Muranga** with 12 counts ranging from robbery with violence to stock theft. At the close of the prosecution case, counts 3,4,5 and 9 facing the two appellants were withdrawn under **section 87 (a)** of the **Criminal Procedure Code** because the complainants in those counts had absconded.
3. In count 1, the 2 appellants were charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars being that on the 4th October, 2008, at Kaburini area Kilgoris in Transmara District of the Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely pangas, maasai swords and rungus robbed **SALIM ORAMAT NGURUMWA** of a pair of black reebok shoes, a cap and cash Kshs.850/= all valued at Kshs.1,700/= and at or immediately before or immediately after the time of such robbery used actual violence to the said

ORAMAT NGURUMWA.

4. In count, the appellants were also charged with the offence of robbery with violence where it was alleged that on the 4th October, 2008 at Kaburini area, Kilgoris District in Transmara District in the Rift Valley Province jointly with others not before court, they robbed **BEN NAIRENGE** of a belt, a walking stick, wallet and cash 40/= all valued at Kshs.550/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **BEN NAIRENGE**.

5. In count 6, the appellants together with their co-accused **Richard Ombui Muranga** faced a charge of breaking into a building and committing a felony contrary to **section 306 (a)** of the **Penal Code**. The particulars of the offence were that on the 7th October, 2008 at Kibera Estate Kilgoris in Transmara District of the Rift Valley Province, jointly with others not before court, broke and entered a tailoring shop of one **BERNARD OLALE RWENGA** with intent to steal and did steal from therein two singer sewing machines, fourty (sic) (40) suitings (sic) materials, seven pairs of suits, seven long trousers, two skirts and two blouses all valued at Kshs.55,300/=.

6. In the alternative to count 6, the 2nd appellant and Richard Ombui Muranga were charged with handling stolen goods contrary to **section 322 (2)** of the **Penal Code**, the particulars being that on the 10th October, 2008 at Kibera estate in Transmara District of the Rift Valley Province, jointly otherwise than in the course of stealing dishonestly received or retained one singer sewing machine, one coat and two long trousers knowing or having reason to believe them to be stolen goods.

7. In count 7, the appellants, together with their co-accused, **Richard Ombui Muranga** were charged with breaking into a building and committing a felony contrary to **section 306 (a)** of the **Penal Code**. It was alleged that they committed the said offence on diverse dates between 15th and 27th days of September 2008 at Majengo estate Kilgoris in Transmara District of the Rift Valley Province, when, jointly with others not before court, they broke and entered the shop of **PRISCILLAH MUSEMBI** with intent to steal therein and did steal [from] therein one sewing machine make South china and a sewing machine stand all valued at Kshs.8000/= the property of the said **PRISCILLAH MUSEMBI**.

8. In count 8 the appellants were charged with burglary and stealing contrary to **section 304 (2)** and **279 (b)** of the **Penal Code**, the particulars being that on the 3rd October, 2008 at Kaburini estate Kilgoris in Transmara District of the Rift Valley Province jointly with others not before court broke and entered the dwelling house of **MUSA ROMBO** with intent to steal and did steal therein 20 bags of maize, one mattress, a pair of bed sheets, a blanket and weighing machine and assorted clothing all valued at Kshs.50,000/=.

9. The appellants also faced a charge of burglary and stealing in count 10. It was alleged that on the 8th October, 2008 at Majengo estate Kilgoris in Transmara District of the Rift Valley province jointly with others not before court broke and entered the dwelling house of **OBET NYANGWARA** with intent to steal and did steal therein one bicycle, make RAJA, one mattress and assorted clothing all valued at Kshs.5000/=.

10. In count 11, the appellants faced a charge of attempted robbery with violence contrary to **section 297 (2)** of the **Penal Code**. It was alleged that on the 8th October 2008 at Majengo Estate Kilgoris in Transmara District of the Rift Valley Province jointly with others not before court attempted to rob **SAMSON NYACHAE** of unknown amount of money and at or immediately before or immediately after the time of such robbery used actual violence to the said **SAMSON NYACHAE**.

11. In count 12, the appellants were charged with stock theft contrary to **section 278** of the **Penal Code**,

the particulars being that

on the 27th July, 2008 at Kaburini Area Kilgoris in Transmara District of the Rift Valley Province jointly with others not before court stole ten (10) sheep and two (2) goats all valued at Kshs.26,000/= the property of **MARGARET NASHIPAI KIRIONGI**.

12. The appellants pleaded not guilty to all the counts, thereby forcing the prosecution to marshal evidence from its 11 witnesses in an effort to prove its case against the two appellants and their co-accused in counts 1, 2, 6,7,8,10,11 and 12.

13. Because of the varied nature of the offences and the diverse dates on which these offences were committed, the facts of the case will emerge from the prosecution evidence.

14. PW1 was **Bernard Olale Rionga**. He stated that he is a tailor in Kibera area of Kilgoris town and owned three sewing machines. On the 7th October, 2008 at about 6.30 p.m., he closed his business, secured the door with a padlock and went home. Inside the shop, he left three (3) sewing machines, over 40 pieces of cloth material, seven (7) complete suits, six (6) trousers, two (2) skirts and two (2) blouses. There were also other assorted items used in the business of tailoring. When he returned to work the following day at about 7.00 a.m., he discovered that his shop had been broken into and all the items mentioned above stolen. He reported the matter to the police. Three days after the incident, he was called to the police station where he identified one sewing machine (MF1-1), one coat (MF1-2) and two trousers (MF1-3 and 4 respectively). PW1 could not say who had broken into his shop, but he said that he easily identified his goods because he had put marks on them.

15. PW2 the complainant in count 7 was **Priscillah Musembi** a tailor at Majengo area of Kilgoris town. On the morning of 16th September, 2008, she got information that the shop where she had left her china make sewing machine, had been broken into and her machine stolen therefrom. She reported the matter to the police. Later on the 27th September, 2008, the same shop was broken into a second time. During this time, the stand for her sewing machine was stolen. She could not say who had stolen her goods, but she was able to identify the machine when she was called to the police station. She said the machine had a scratch mark she had made on it using a razor blade – **MF1-6**.

16. **Samson Nyachae** testified as PW3. He is the complainant in count 2. He stated that on 8th October, 2008 he was at home at about 9.00 p.m. when he heard his son Obed screaming. There was bright moonlight on that night. He rushed out of the house and found his son struggling with 2 people. The people cut his 3 fingers of the left hand. The people were armed with pangas. He called out for help from the neighbours who came and chased away the 2 people from his home. After going to the hospital, PW3 reported the matter to the police and recorded a statement. He was issued with a P3 form which was duly filled and signed by **Dr. Humphrey Hinga Mwaura** (PW7). The same was produced in court as **P. Exhibit 1**.

17. PW3 identified the 2nd appellant at an identification parade.

He said he was able to see the 2nd appellant well on the night of the attack because there was bright moonlight; that the 2nd appellant was wearing a jacket and jumper and had no cap on his face. He was carrying two sharp pointed bars in his left hand while he carried a torch in his right hand. PW3 had never seen any of the appellants before, but he stated that the 2nd appellant seemed to be acting in a cowardly manner on the night of the attack. PW3 also stated that when he got out of the house to answer the screams of his son, he came out with a torch which he also used to see the attackers. He also testified that when he made a report to the police, he told the police that he could identify his attackers, and that it took

only 2 days for the appellants to be arrested.

18. PW4 was **Margaret Nashipai Kiriongi**, the complainant in count 12. She sells bananas and other items in the market at Kilgoris. On the 27th July 2008 at about 2.00 a.m. she was asleep in her house when people broke into her house which she shared with her goats and sheep though in separate rooms. Her ten (10) sheep and two (2) goats were stolen. The night was wet.

19. On discovering the theft, PW4 screamed for help from her neighbours and her son. On the following day, she went and reported the matter to police. The animals were never recovered, though the 2nd appellant confessed to having stolen them. On the 10th October, 2008, some other robbery took place at PW4's neighborhood when the 2nd appellant was arrested by members of the public and he confessed to having stolen many things from that neighbourhood. She said she saw the 2nd appellant well because there was moonlight and there were also many torches which the neighbours shone on the 2nd appellant's face.

20. **Salim Sialo Oramat Ngurumwa** testified as PW5. He is the complainant in count 1. He works as a driver. On 4th October, 2008, he left Kilgoris town in the company of **Ben Nairenge (PW6)** for their home at Endonyo Onkopit. When they got to cemetery area, they were accosted by a group of 8 people who were beside the road. The two were ordered to sit down and they complied. The 8 men asked the two to surrender all their valuables. There was moonlight on that night. Before the pair could take out anything to give to the 8, they were pounced upon by their assailants who took a pair of reebok shoes worth Kshs.650/=, a pointed peek cap and cash of Kshs.850/= from him. The assailants hit them and then chased away the two.

21. PW5 went and reported the matter to Kilgoris police station. The report was received by **No. 61814, Corporal John Olima** who testified as **PW11**. PW5 also went to the hospital for treatment. After the report, PW11 went to the scene in the company of both PW5 and PW6. The national identity card for PW6 was recovered therefrom. According to PW5, it was the 2nd appellant who removed cash from his trouser pockets; he was the one who was armed with a panga and it was also him who threatened to cut PW5. PW5 said he identified the 1st appellant at the scene – a black man. He carried a panga and a stick. PW5 was able to identify each of the appellants at two identification parades conducted by **No. 232473 Inspector of Police, Lawrence Nalo (PW8)**. PW5 stated that there was bright moonlight on the night of the attack and was thus able to clearly identify the appellants as being among the gang of 8 that attacked him. PW5 also stated that he had seen the 2nd appellant before scooping sand in a lorry in town.

22. PW6 was **Ben Saroni Nairenge**. He was together with PW5 on the night of 4th October, 2008 at about 10.00 p.m. when they were attacked around cemetery area along the Kilgoris – Enosaen route. The attackers were armed with pangas, swords and hoe handles. While 4 of the 8 attacked him, the other 4 went for PW5. The attackers stole from him one ornamental belt, his ID, a wallet which had Kshs. 40/= in it. After the attack, they made a report to the police and later went for treatment. On the next day, the police visited the scene from where they recovered PW6's ID. There was much moonlight on the night of the attack. Out of the 8 people, one of them had not covered his head. This one was armed with a panga and a jembe handle. PW6 identified that man as the 2nd appellant herein.

23. **Dr. Humphrey Hinga Mwaura** testified as PW7. He confirmed that PW3 had suffered computation of the 3 and 11 digits on his left hand, while digit 5 of the same hand had a healed scar on the front side. He examined PW3, filled and signed the P3 from (**P. Exhibit 1**). He classified the injury suffered by PW3 as grievous harm; and that the probable weapon of attack was sharp and could have been a panga or

a knife.

24. PW8 was **Number 232473, Inspector of Police, Lawrence Nalo**. He conducted identification parades in respect of the 2nd appellant on 19th October, 2008. The witness was PW3. The identification parade form for the 2nd appellant was produced as **P. Exhibit 2**. The other parade in respect of the 1st appellant was conducted on the same day 19th October 2008. PW3 could not identify the 1st appellant. The identification report form in respect of the 1st appellant was produced as **P. Exhibit 3**.

25. Another parade was conducted on the 19th October, 2008 in respect of the 2nd appellant. The witness was PW5. PW5 was able to identify the 2nd appellant in this parade. The identification report form for this parade was produced as **P. Exhibit 4**.

26. On the same 19th October, 2008, PW8 conducted another identification parade for the 1st appellant herein. The witness was again **Salim Oramat (PW5)**. He identified the 1st appellant. The identification form in respect of this parade was produced as **P. Exhibit 5**. PW8 confirmed that he conducted all the parades in accordance with the rules and that each of the appellants expressed his satisfaction with the process.

27. PW9 was **Musa Agengo Rombo**, a cereals businessman in Kilgoris town and complainant in count 8. On 3rd October, 2008 at about 4.00 p.m., he left his house in Kilgoris securely locked as he went on a trip to Nyamira. The house also doubled up as a maize store which at the time had 25 bags of maize. When he got back to Kilgoris on the 4th October, 2008, he found his house had been broken into and the following items stolen:- a mattress, 2 bedcovers, all his personal clothes, weighing scale machine and 20 bags of maize. He reported the matter to the police who undertook to carry out investigations.

28. Some 2 weeks later, another theft was reported around the cemetery area of Kilgoris town. As a result of that theft, the 2nd appellant was arrested. It was him who led the police to Nyangusu where PW9's weighing machine was recovered – **P. Exhibit 10**.

29. **Daniel Ledama Shoshoroi** testified as PW10. He worked as a clinical officer at Transmara District Hospital. He filled the P3 forms in respect of Oramat (PW5) and Nairenge (PW6). The P3 form for PW5 was produced as **P. Exhibit 7** while that for PW6 was produced as **P. Exhibit 8**. According to him, PW5 was injured by a blunt object.

30. PW11 was **Number 61814 Corporal John Olima**, the investigating officer in this matter. On 10th October, 2008, he received a report of the robbery at cemetery area in which some suspects had been caught and were badly beaten. He rushed to the scene in the company of P.C. Musungu. The 2nd appellant herein had been beaten and was lying down while another suspect had been killed through mob justice and dumped into the river. The 2nd appellant was arrested and led the police to a house in Nyangusu where a sewing machine – **P. Exhibit 9** and a weighing machine – **P. Exhibit 10** – were recovered. PW11 also produced as exhibits a singer sewing machine recovered from the appellant's co-accused Richard Ombui Muranga – as **P. Exhibit 11**. The black and grey trousers stolen from the shop of Bernard Olale Rionga (PW1) and identified by him were produced as **P. Exhibits 12 and 13** respectively. A coat, also stolen from PW1's shop was produced as **P. Exhibit 14**. The same was said to have been recovered from the house of Richard Ombui Muranga. PW11 stated that apart from the complainants in this case, nobody else lay claim on the items that were recovered from the two appellants.

31. At the close of the prosecution's case, the trial court was satisfied that the prosecution had established a *prima facie* case against each of the appellants herein and their co-accused and accordingly put them on their defence. The 1st appellant, as accused 2 gave unsworn testimony. His story was that on 10th October 2008, while he was walking in the market at Nyangusu, police officers from Kilgoris arrested him, took him to his house, broke the door and carried out a search. Nothing was recovered from the house. He was then taken to Kilgoris police station where he was joined by other people he did not know and charged with the numerous counts. He denied knowledge of any of his co-accused and of the complainants and the charges preferred against him.

32. The 2nd appellant also gave an unsworn statement and told the court that he was a charcoal burner and a resident of Kibera Estate in Kilgoris. On 10th October, 2008 at about 8.00 p.m., he was in his house at Kibera when he heard neighbours screaming "**Thieves! Thieves!**" He went out of the house to see what was happening and near the cemetery he saw one person who had been beaten and lying down. When he sought to know what had transpired, the irate mob turned on him alleging that he might be one of the thieves. They beat him badly and beat the other man to death. Soon thereafter, the police arrived at the scene and saved his life. He was then taken to the police station as the complainants herein demanded that he returns the items he had allegedly stolen from them in the past. At the station he was joined by other people who were unknown to him. The police took him to his house at Kibera and took away his singer sewing machine alleging that the same had been stolen. He had no receipt for the same. He was then charged with these numerous counts. He urged the court to consider the evidence well and to acquit him.

33. After going through the whole evidence on record, the trial court was satisfied that the prosecution had established its case against each of the two appellants on counts 1 and 2 of the charge and convicted each one accordingly. The 2nd appellant was also found guilty as charged on counts 7 and 8. The 2nd appellant was also convicted of the lesser charge of assault contrary to **section 251 of the Penal Code on count II**, having reduced the same under **section 179 of the Criminal Procedure Code**. The appellants were however acquitted of counts 10 and 12. Each of the appellants was convicted to suffer death as by law provided on counts 1 and 2. The 2nd appellant was also to serve four (4) years in prison on count 7 and two (2) years in prison on each limb of count 8. The sentences were to run concurrently. He was also to serve one (1) year in prison on count 11(Eleven).

34. Being aggrieved by both the conviction and the sentence, the appellants have come before this court seeking a reconsideration and evaluation of the evidence that was placed before the trial court with the hope of being set free on all the counts. The 5 grounds of appeal are similar in each case and we reproduce them verbatim as hereunder:-

"1. That the learned trial magistrate erred in both law and facts by not finding that the prosecution evidence was riddled with contradiction, inconsistency and discrepancies.

2. That the learned trial magistrate erred in both law and facts in not finding that the prosecution failed to prove the case against the appellants beyond any reasonable doubt.

3. That the learned trial magistrate misdirected herself grossly in Rejecting the very mitigation by the appellants.

4. That the learned trial magistrate erred law and facts in not taking into consideration the circumstances surrounding the alleged offence and in particular that the offence took place at night.

5. That the death sentence as imposed herein is overly harsh and excessive in the circumstances.”

35. When this appeal came before us for hearing on the 20th January, 2011, the appellants chose to proceed by way of written submissions. We have read and considered their detailed and well written submissions.

36. We also heard submissions from Mr. Mutuku, Senior Principal State Counsel who contended that the prosecution evidence against each of the appellants on counts 1 and 2 was overwhelming and therefore the conviction on these 2 counts was safe. He argued that both PW5 and PW6 clearly stated that there was bright moonlight on the night of the attack and that each one of them was able to clearly identify each of the appellants at the scene. The two witnesses also picked out the two appellants from separate identification parades which were conducted in keeping with the rules. Mr. Mutuku however submitted, and rightly so in our view, that the sentences were improperly imposed, as there was no indication on which charge the same were to be executed. He urged us to rectify the anomaly.

37. In his reply, the 2nd appellant submitted that the intensity of the light from the moon was not given and that it was not stated whether the moon was half moon or full moon. He also submitted that the witnesses who picked him out of the identification parade were familiar with him because of his charcoal business.

38. We shall deal with the preliminary issue on sentencing before we get into the more difficult issue of reconsidering and evaluating the evidence. In the case of **Muiruri & others –vs- Republic [1980] KLR 70**, it was held that:-

“Where a person is charged with a number of corporal charges, it is preferable to proceed on one capital charge only and to leave the other capital charges in abeyance, even if the other charges appear to be linked.”

39. In light of the above, the trial court ought to have proceeded on only one of the two capital robbery charges of which the appellants were convicted and sentenced to death. Equally, once the appellants were convicted and sentenced to death on the robbery charge, the sentences on the other counts should have been in abeyance pending the execution or otherwise of the death sentence. In the instant case, the appellants were each sentenced to two death sentences in addition to the prison terms. What we know is that a person can only die once and once dead, always dead, except at the time of resurrection when Jesus returns for the believers. The trial court thus imposed the sentences wrongly.

40. We note however that contrary Mr. Mutuku’s contention that the trial court did not say on which count the sentences were imposed, the record clearly shows that each of the appellants was to suffer death on counts 1 and 2. The submission by Mr. Mutuku is therefore not correct.

41. Having said the above, we now turn to the evidence. It is our duty as the first appellate court to reconsider and evaluate the evidence with a view to reaching our own conclusions in the matter. The conclusions we reach will also determine whether, in our view, the conclusions and findings by the trial court were made on a sound footing. This duty has been thrust upon us by the decisions of our forefathers such as **Okeno –vs- Republic [1972] EA 32** and **Kiilu & another –vs- Republic [2005] 1 KLR 174** among others. The appellants herein expect us to submit the entire evidence to a “fresh and exhaustive examination” so that we can reach our own decision on the evidence. We are thus expected to weigh the conflicting evidence and to draw our own conclusions.

42. We have set out the entire evidence in full and we have reconsidered it *vis-à-vis* the appellants' complaints. We agree with the appellants that the convictions on counts 1 and 2 case revolve around identification of each of them on the night the alleged attack took place. According to the appellants, the trial court fell into error in not considering the circumstances surrounding the alleged offence and in particular that the offence took place at night and when there was not enough light for proper identification. According to counsel for the Respondent, the moonlight was very bright, such that there would have been no problem identifying the appellant.

43. The critical evidence is that of **Oramat (PW5)** and **Nairenge (PW6)**. Both of these witnesses were walking home together at about 10.00 p.m. They had no torches. PW5 said in his evidence in chief:-

“There was moonlight on that night. They had swords and clubs.”

When cross-examined by the 2nd appellant, as to whether he had given details of his attackers to the police, PW5 said:

“I said I would identify my assailants by appearance. The report is showing that two people attacked me and they were booked in OB. I mastered your facial appearance and voice and as you speak in court, I hear the voice.”

In answer to a question from the 2nd appellant PW5 stated:- **“I used moonlight to see you.”** On his part, PW6 stated thus regarding the intensity of the moonlight on the night in question:-

“As we were going home, there was moonlight. It was much.”

44. Both PW5 and PW6 were able to identify the 2nd appellant using that much moonlight. Both PW5 and PW6 were able to identify the 1st appellant at the identification parade at Kilgoris police station. PW5 was able to identify both appellants at the parade. When the ordeal was over, the appellants and their cohorts ordered the duo of PW5 and PW6 to rise up and run. They did so. PW5 stated that unlike the rest of the gang, the appellants herein did not have masked faces.

45. Taking all the evidence together, we are satisfied that each of the two appellants was clearly identified by both PW5 and PW6 during the attack as the two of them ransacked the duo and removed valuables from them. The face of the second appellant was familiar to PW5. We are of course mindful of the applicable principles on identification as set out in the cases of **Maitanyi –vs- Republic [1986] KLR 198**; **Wamunga –vs- Republic [1989] KLR 424** and **Republic –vs- Turnbull [1976] 3 All ER 549** among others. We have carefully re-examined the evidence adduced by PW5 and PW6 and we are satisfied that the circumstances were favourable and free from possibility of error. The duo could not have been chased by the appellants in the dark, nor could PW5 and PW6 have run if there was no sufficient light to enable them see where they were running to.

PW6 appeared to have run very fast but PW5 was not able to run very fast because his leg was hurting. PW5 also testified that the ordeal took about half an hour. In our humble view, half an hour, on a bright moonlit night, was sufficient time for PW5 and PW6 to take a mental note of the appearance of each of the appellants.

46. We have also carefully reconsidered and evaluated the defences put forward by each of the two

appellants. In our view, those defences are mere concoctions of the appellants' own imagination and do not in any way diminish the strength of the prosecution's case against each of them. We accordingly reject those defences.

47. We therefore find no reason to interfere with the findings of the trial court. The conviction on both counts 1 and 2, was safe, save that in light of *Muiruri & others –vs- Republic* (above) the conviction on count 2 ought to have been left in abeyance and shall be left in abeyance.

48. We now turn to the conviction of the 2nd appellant on counts 7 and 8. The relevant testimonies in this regard are those of Priscillah Musembi (PW2) and Musa Agengo Rombo (PW9). PW2 stated that she did not know the people who broke into her shop and stole her sewing machine. It was PW11, Number 61814 Corporal John Olima, the arresting officer of the 2nd appellant who stated that on being arrested, the 2nd appellant led the police to a house in Nyangusu and from therein a sewing machine was recovered. The sewing machine was later identified by PW2 as hers. The same was produced in court at **P. Exhibit 9**.

49. The 2nd appellant in his defence alleged that the machine was his. He however did not adduce documentary proof of ownership. Piecing the strips of evidence together, we are satisfied that PW2's sewing machine that was recovered from the 2nd appellant's house belonged to PW2. Applying the doctrine of recent possession to the circumstances of this case, we are satisfied that the findings of the trial court regarding count 7 were well founded and the conviction safe.

50. The evidence in support of count 8 was that of Musa Agengo Rombo (PW9). He was not at home when his house was broken into. Two weeks after the break in, his weighing machine – **P. Exhibit 10** – was recovered from the house of the 2nd appellant at Nyangusu. PW9 identified his weighing machine as one of the items he had left secured in his house before it was broken into. The weighing machine was inscribed with PW9's names.

51. It is worth noting that the 2nd appellant did not lay any claim to PW9's weighing machine, nor did he explain how the same ended up in his house. It was found in the house only after days after the house of PLW9 had been broken into and the weighing machine among other items stolen. It is our considered view that this is a proper case in which to apply the doctrine of recent possession. We proceed to do so and to find that the conviction of the 2nd appellant on count 8 was safe.

52. The trial court reduced the charge against the appellants in count II to one of simple assault. The complainant in that count was Samson Nyachae, PW3. We have reconsidered and evaluated afresh the whole of the evidence adduced by PW3 in support of this count. We find that the said evidence was not sufficient to sustain either the main or substituted charge. The person who is alleged to have assaulted PW3 was killed by the mob. Neither the 1st nor 2nd appellant was said to have been the one who assaulted PW3. In the circumstances, we quash the conviction of the 2nd appellant on count 8 and set aside the sentence of one (1) year's imprisonment.

53. The upshot of what we have said above is that this appeal in respect of counts 1, 2, 7 and 8 lacks merit. The appeal succeeds on count II. However, the sentences on counts 2, 7 and 8 are to be held in abeyance pending execution of the sentence in count 1.

54. It is so ordered.

Dated and delivered at Kisii this 07th day of April, 2011.

ASIKE-MAKHANDIA

RUTH NEKOYE SITATI

JUDGE.

JUDGE.

In the presence of:

Both present in person for the Appellants

Mr. Mutai (present) for the Respondent

Mr.Bibu (present)- Court Clerk/ also interpreting.

