REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 21 OF 2009.

RICHARD GICHANA GETANGE..APPELLANT.

VERSUS

REPUBLIC..RESPONDENT.

(From the original conviction and sentence in Criminal Case No. 719 of 2009 of the P.N. Gichohi – PM

delivered on 31/3/2009.)

J U D G M E N T.

1. The appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the charge stated that on the 22nd day of February, 2007, at Laini Moja Estate in Trans Nzoia District within the Rift Valley Province, jointly with others while armed with offensive weapons namely iron bars robbed **SILVESTER SIMIYU MASINDE** of one mobile phone make, NOKIA 6070, 1A4 diary , 3 pairs of trousers, 2 T-shirts, 1 shirt, 3 pants, I pair of socks, I hand kerchief, I mobile charger, 1 tooth paste, 1 tooth brush, 1 scratcher, I imperial leather soap and two certificates and one bag all valued at Ksh. 16,270/= and at the time of said robbery used actual violence to the said **SILVESTER SIMIYU MASINDE**.

2. The appellant was tried, convicted and sentenced to suffer death. Being aggrieved by the conviction and sentence, he has appealed and in his petition of appeal, he has challenged both the quantity and quality of the evidence adduced before the trial magistrate which in his submission was insufficient to support the conviction. He has also faulted the conviction on the grounds that crucial witnesses were not summoned and there were glaring gaps in the prosecution's evidence which should have been resolved in his favour. It is further pointed out that the items that the appellant was alleged to have been found in his possession were not produced as exhibits. No investigations were carried out to establish whether the alleged items were found in possession of the appellant.

3. This appeal was opposed; Ms**. Bartoo**, the learned state counsel supported the conviction and sentence. She submitted that the appellant was found in possession of goods that were stolen and the T-shirt that he was found wearing was produced as an exhibit. Moreover, the appellant was found carrying a green paper bag which contained a pair of jeans trousers that were identified by the complainant as belonging to him. The appellant's house was searched and more items that were stolen from the complainant were found in that house. Thus the doctrine of recent possession applied in this case because the only inference that could be drawn from the fact that the appellant was found in possession of the complainant's stolen items was that it was the appellant who had just robbed the complainant.

4. This being a first appeal, this court is mandated to re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to allow the appeal. In so doing, the court must always caution itself that it never saw or hear the witnesses and give due allowance for that. The appellant was convicted based on the evidence by 5 prosecution witnesses. The appellant also gave unsworn statement of defence and did not call any witnesses.

5. Briefly stated, **SILVESTER SIMIYU MASINDE**, PW1, who was also the complainant in this case, testified that on 22nd February, 2007, he had arrived at Kitale Town at about 11.30 p.m. He realized that it was too late and he decided to book himself in lodging for the night. While walking towards Mombasa Club to look for a room, he was accosted by a group of 8 people and decided to enquire from them whether there was room in that club but before he could do so, they accosted him, fleeced his trouser pockets, and took away his wallet. They knocked him down and assaulted him as they stole from him all his personal items that are stated in the charge sheet. He was rescued by *boda boda* operators who took him to the police station where he reported the matter.

6. The complainant was issued with a P3 form and on 27th February, 2007, he was examined by **Reuben Bunyasi**, a clinical officer at Kitale District Hospital. It was noted that the complainant had tenderness on the left side of the neck and complained of neck pains, he also injuries on the knees which were caused by a blunt object. The degree of injury suffered by the complainant was classified as harm. The evidence that led to the arrest of the appellant was put together by **P.C. Eliud Othiambo**, who received the report of the robbery from the complainant. He visited the scene and after interviewing some people on the scene he got a tip off that **Dennis Munga Getange**, who was the 1st accused person was implicated in the robbery. PW2 laid an ambush and arrested the 1st accused person who led the police to his home and on the way they spotted the appellant who was wearing a T-shirt that the complainant identified as one of the items that were robbed from him. The appellant was also carrying a paper bag which contained a pair of jeans that the complainant identified as his own. The search was extended to a house that the 1st accused person identified to the police as belonging to the appellant. From that house the police recovered other personal items which the complainant identified and were produced as an exhibit.

7. Put on his defence, the appellant gave unsworn statement of defence and denied the offence of robbery. He contended that on 28th February, 2007, when he was arrested, he was attending to a customer at a garage when **PC Vincent Owino**, PW4, arrested him and together with PW2 they informed him that he had in his possession a stolen camera. The two police officers demanded to be paid a sum of Ksh. 10,000/= so that he was not charged with the offence of robbery with violence and when he could not raise the money he was charged with an offence he claimed he knew nothing about.

8. After considering the above evidence the learned trial magistrate was satisfied that the charge against the appellant was proved to the required standards. The trial court found the appellant was arrested in possession of a T-shirt and a pair of jeans trousers which belonged to the complainant thus the doctrine of recent possession applied. The learned trial magistrate was satisfied that the appellant did not offer any explanation as to how he came to be in possession of the two stolen items. However, the learned trial magistrate found there was insufficient evidence to link the 1st and 3rd accused persons with the offence of robbery with violence. This was because, although there was evidence that the house where the stolen items were found belonged to the three accused persons, the 3rd accused person was not present during the recovery. Moreover, there was no material to prove that he had seen a mobile telephone set belonging to the complainant.

9. The trial court further noted that during the recovery, there was a woman who was mentioned as a suspect. She was found in the house where the stolen items were recovered but the prosecution failed to call her as a witness and it was for that reason the 1st accused person was also not found guilty of the offence. It is only the appellant who was convicted. We have subjected the above evidence to fresh analysis. The conviction of the appellant was based on the evidence that he was found in possession of a T-shirt and a pair of jeans which according to the opinion of the learned trial magistrate, were positively identified by the complainant.

10. Upon our re- evaluation of this evidence, it is not clear in our minds how the complainant demonstrated by evidence that he was the owner of the T-shirt and the pair of jeans. For instance, no receipts were produced for purchase and no identification marks were noted in evidence. In our opinion the same items could have been bought or belonged to somebody else. There were no distinctive marks that the complainant used to identify these items. As it was held in the case of; **Isaac Nganga Kahia vs. Republic Court of Appeal Cr. Appeal No. 272 of 2005 (Nyeri)**. The Court of Appeal restated the circumstances under which a court can convict an accused person based on the doctrine of recent possession in the following words;

"It is trite law 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 positive proof, first; that the property was found with the suspect, secondly that; that property is positively 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 another. In order to prove possession, there must be acceptable evidence of 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."

11. We are of the view that the conviction of the appellant may not be safe considering the noted discrepancy in the prosecution's evidence that led to the acquittal of the two co-accused persons. The learned trial magistrate found that a crucial witness who was found in the house where some items belonging to the complainant were recovered was not called as a witness. It was further testified that the house where the items were recovered was not locked and more importantly no evidence was led to show the house belonged to the appellant. The appellant should also have been acquitted just like his co-accused persons. Our opinion is reinforced further when we consider the circumstances under which the appellant was arrested. PW4, the investigating officer testified that they packed the first accused person in the boot of a motor vehicle and while they were driving to his home, he identified the appellant who was riding on a bicycle. This evidence is inconsistence and lacks credibility or common sense and although it was pointed out to the learned trial magistrate, and it was never resolved.

12. For the aforesaid reasons, we allow the appeal, quash the conviction and set aside the death sentence. Unless the appellant is otherwise lawfully held, he is to be set at liberty forthwith.

Judgment read and signed this 13th day of May 2011.

M. KOOME.

JUDGE.

F. AZANGALALA.

JUDGE.