



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Appeal 156 of 2007

(From original conviction and sentence in Criminal Case No.430 of 2004 of the Senior Resident Magistrate at Narok – S.M. GITHINJI, SRM)

**JOHN NJOROGE GITAU.....1ST APPELLANT
JOSEPH NGUGI NJOROGE.....2ND APPELLANT
SIMON MUGO MWANGI.....3RD APPELLANT
VERSUS
REPUBLIC.....RESPONDENT**

JUDGMENT

JOHN NJOROGE GITAU, JOSEPH NGUGI NJOROGE and SIMON MUGO MWANGI, the appellants, were with others charged with fourteen counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. After trial before the Principal Magistrate at Narok the others were acquitted for lack of evidence but the appellants were convicted on all the counts and sentenced to death. They have appealed against both the conviction and sentence. The facts giving raise to the case were that on 21st April 2004 the appellants and their confederates boarded Otange bus registration number KAP 769N at Nairobi which was bound for Migori. At Eor-Ekule junction along Mai Mahiu Narok Road one of the accused persons suddenly shot through the windscreen shattering it. That made the driver almost lose control but he was soon calmed down and was told to turn to Eor-Ekule Trading Centre. Before getting to that Centre due to the muddy road following a heavy down pour the bus was stack on the way. The accused and their confederates got out of the bus and commanded the passengers to come out one by one. After searching and stripping them of all valuables as they came out, they disappeared in a taxi which they called from Narok Town. The stranded passengers saw headlights of that taxi which turned and disappeared towards the main road.

At the road block on the main road police who had been informed of the robbery by one of the passengers who had jumped of the bus at the junction stopped the taxi and upon searching found some of the items stolen from the passengers in it. Soon thereafter the stranded passengers got some help and went to the main road where they identified the appellants as having been in the gang that had robbed them. The appellants were immediately arrested and later charged with the stated offences.

Due to the insufficient light at the scene of robbery the learned trial magistrate found, and we entirely agree with him, that the identification of the appellant by the passengers could not be relied upon. Having been found with some of the stolen items, he convicted them on the basis of the doctrine of recent possession.

At the hearing Mr. Mugambi for the state conceded the appeal against the 1st appellant, John Njoroge Gitau on the ground that the evidence on record clearly demonstrated that he was merely a taxi driver who was called by the 2nd appellant to go and rescue him from a spot near

Eor-Ekule Trading Centre where his vehicle had been stuck in the mud.

Having perused the record we agree with him that the 1st appellant's conviction cannot be allowed to stand. In his defence he had said that he was during that night called at about 1.00 a.m. by the 2nd appellant to go and rescue him from where his vehicle had been stuck in the mud. On his way there he was stopped by police at a road block near Eor-Ekule junction. His vehicle was searched and when he explained where he was headed he was left to go. After a few minutes he returned with the 2nd and 3rd appellants and by that time as we have said the police had already been informed of the robbery. They searched his vehicle and recovered some items which had been stolen from the passengers. Even though those items were found in his vehicle we agree with both his counsel and the learned state counsel that he cannot be said to have been in possession of them. We therefore allow his appeal, quash the conviction and set aside the sentence. He shall be set free forthwith unless otherwise lawfully held.

With regard to the 2nd and 3rd appellants, we also concur with the learned trial magistrate that their identification by the passengers cannot be relied upon. That leaves us with the issue of whether or not they were found in possession of the items stolen from the passengers to support their conviction on the doctrine of recent possession.

In their written submissions the appellants have made heavy weather of and strongly denied their alleged possession of the stolen items. They contended that the items allegedly found in the vehicle were planted by the police and some of the robbery victims.

Mr. Mugambi for the state submitted that the 2nd and 3rd appellants having been found with the stolen items soon after the time and not far from the scene of robbery, the learned trial magistrate was right in convicting them on the doctrine of recent possession. He therefore urged us to dismiss their appeals.

Having carefully read the evidence on record, we find that the police had a very good case but they muddled it. We agree with the appellants that the police witnesses who alleged that they were in possession of the stolen items badly contradicted themselves. APS Anneth Cheron, PW12, testified that when the 1st appellant's vehicle returned from where it had allegedly gone to pick a customer, the police ordered the occupants out and frisked them. Cpl Livingstone Turgut PW14 who was in charge of the road block then took the ignition keys from the 1st appellant and went with it to the scene of robbery leaving the other police officer behind guarding the appellants and the vehicle they had come in. When he had gone and the remaining police officers had got reinforcement they once again frisked the appellants and found each of them with a mobile phone which they took and then searched the vehicle. She claimed that they found Kshs.44,300/- and Tanzanian shillings 20,000/-, an umbrella and 5 mobile phones in the vehicle. According to her the money and the mobile phones were in the boot of the vehicle and the umbrella was on the dash board. According to Simon Kibet Mutai, PW13, a forest guard who was also at the road block with the police officers, some of the money was found strewn in the boot of the car and the rest was well arranged in the graph compartment while the mobile phones were near the hand break river.

The evidence of these two witnesses was sharply contradicted by that of Cpl Livingstone Turgut, PW14, who was in charge of the road block. He was categorical that the vehicle was searched at the police station and not at the road block and all the money and the phones were in the boot.

If this was the only issue we could have dismissed the appellants' contentions and upheld their conviction. As we have pointed out the appellants contended that the money and the other stolen items were planted in the taxi they were in by the police and some of the robbery victims. Given what followed after their arrest, we think this complaint is not without foundation. The appellants were transported from the road block to the police station in a police land rover while their taxi was driven by PC Sirma, PW15, with some of the robbery victims in it. At the police station the vehicle was again searched and photographed in the appellants' absence. No inventory was made either at the road block or at the police station of the items found in the vehicle. The police witnesses also conceded that the

OB entry relating to the arrest of the appellants never made any mention of the recovery of those items. Their evidence about the ownership of the umbrella was hearsay as Helen Atieno, the alleged owner, was not called to testify. In these circumstances we are uncomfortable with the appellants' conviction only on the doctrine of recent possession. Consequently we allow this appeal, quash the conviction and set aside

the sentence. All the appellants shall be set at liberty forthwith unless otherwise lawfully held.

SIGNED, DATED and DELIVERED at Nakuru this 23rd day of March, 2010.

D. K. MARAGA

JUDGE.

J. A. EMUKULE

JUDGE.