REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 229 of 2009

JESKA GEUSI KAKAMU…….APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

(From original conviction and sentence in Criminal Case No.46 of 2009 of the Principal Magistrate's court at Nyahururu – T. MATHEKA, PM)

JUDGMENT

JESKA GEUSI KAKAMU, the appellant, was charged with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code.** In the alternative he was also charged with handling stolen goods contrary to **Section 322(1)** of the **Penal Code**,

The particulars of the first count of robbery were that on the 2nd day of December 2008 at Nyahururu town, in Laikipia West District within Rift Valley Province, while armed with pangas, the Appellant, jointly with others not before court, robbed Stephen Mwangi Wahome of a bag, a camera, five jeans trousers, a black cloth material, four T-shirts, mobile phone make Vodafone 225, four pairs of shoes, one green short and cash of Kshs.1,300/- all valued at Kshs.20,180/- and at, immediately before or immediately after the time of such robbery threatened the said Stephen Mwangi Wahome with actual violence. The complainant in the second robbery and rape charges did not testify. There was therefore no evidence on those charges and the trial court dismissed them. The appellant was, however, convicted of the first count of robbery with violence and sentenced to death.

The major evidence against the appellant was that of Stephen Mwangi Wahome, PW1, who was the complainant in the first robbery charge. He testified that on

22nd December 2008 he was travelling from Nairobi to Rumuruti. In the same vehicle was a lady who was going the same direction. They got to Nyahururu Town at about 7.30 p.m. While ahead of the lady as they walked to the Rumuruti bus stage, he heard her scream and rushed to her aid. He found five men holding her. They turned against him and robbed him of a bag, 5 jean trousers, 5 shirts, boots, camera, school documents, 5 pairs of shoes, Kshs.1,300/- and Vodafone 225 phone. He managed to escape and reported the matter to police who went with him to the scene. The lady told them she had been robbed and gang raped.

Two weeks later PW1 saw the appellant at the Nyahururu bus stage wearing his shirt and trousers. He informed police officers, PW2 and PW3, who arrested him and later charged him with the above stated offences.

From the above account, it is evident that the appellant's conviction is based only on the testimony of PW1. That is evidence of identification. Though "…a fact can be proved by the evidence of a single witness,"- Ogeto-Vs-Republic, [2004] 2 KLR 14, "it is the law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction." Wamunga Vs Republic [1989] KLR 424 at p. 426.

It is also an established point of law that for any night identification to be relied on, it must be shown that the source and intensity of light was sufficient to have enabled the complainant to make a positive identification.

In this case we are unable to accept PW1's claim that he was able to identify his attackers that night. This is because we are not told the source or intensity of the light that enabled him to make that identification. In the circumstances we reject his testimony that he identified the Appellant as one of the people who robbed him.

The appellant's conviction based on the doctrine of recent possession cannot be allowed to stand either. For that doctrine to apply the Court of Appeal stated in the case of Isaac Nganga Kahiga Vs Republic Criminal Appeal No. 272 of 2005 (CA Nyeri) that:-

> "…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 the property is positively the property of the complainant; thirdly, the property was stolen from the complainant; and lastly, that the property was recently stolen from the complainant.**"**

We have no doubt in this case that the Appellant may have been found with a torn shirt and a jeans. What we have doubt in is whether those pieces of clothing actually belonged to PW1. He claimed he identified as his the shirt the appellant was found wearing merely because it had a torn breast pocket and the jeans because it had an orange waist line. We cannot accept those identifying marks to support such a serious charge. Those are marks that can be found in many similar pieces of cloth.

Taking all these factors into account we are satisfied that there was no credible evidence to justify the conviction of the appellant. Consequently we allow this appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED and DELIVERED at Nakuru this 20th day of July, 2010.

D. K .MARAGA

JUDGE.

W. OUKO

JUDGE.