REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

CRIMINAL APPEAL 375 OF 2005 & 384 OF 2005

DANIEL GITAU NJOKI …….....1ST APPELLANT

JOSEPH KINYANJUI .....2ND APPELLANT

- AND -

REPUBLIC …….....……..……RESPONDENT

(An appeal from the judgment of Senior Magistrate Mrs. D. Mukyo dated 20th July, 2005 in Criminal Case No. 427 of 2004 at Kiambu Law Courts)

JUDGEMENT

Daniel Gitau Njoki and *Joseph Kinyanjui*, 1st and 2nd appellants herein, had been charged with a third person (who, however, was acquitted) for the offence of robbery with violence contrary to s. 296 (2) of the Penal Code (Cap 63, Laws of Kenya). The particulars were that the accused persons at Gicumi Village in Kiambu District, Central Province, jointly with others not before the Court and while armed with dangerous weapons namely clubs and iron bars, on the night of *17th - 18th November, 2003* robbed *Daniel Wanjema Kahuri* of motor vehicle Reg. No. KAM 230T, an Isuzu lorry; cash in the sum of Kshs.15,000/=; and a wrist-watch, Roma by make – all valued at Kshs.3,542,767/= – and at or immediately before, or immediately after the time of the robbery, wounded the said *Daniel Wanjema Kahuri.*

The accused persons also faced the alternative charge of handling stolen goods contrary to s. 322 (2) of the Penal Code. The particulars were that the appellants herein, on 18th November, 2003 at Kisii Dam Hotel in Kisii, within Nyanza Province, otherwise than in the course of stealing, dishonestly received or retained one motor vehicle, Isuzu lorry registration No. KAM 230T knowing or having reason to believe it to be stolen goods.

PW1 who was the driver of the said lorry testified that on the material night he had reported to work at 1.30 a.m. and set out in Isuzu lorry, registration No. KAM 230T accompanied by his turn-boy, *Nderitu* (PW2). PW1 was collecting milk supplies along an assigned route which covered places known as Kihanya, Jamaica, Gathanji, Ikinu and Githunguri. PW1 after collecting milk at Kihanya, was driving towards Kiria and, as he approached a quarry, he came up against boulder and timer road-blocks. When he stopped the lorry, attackers emerged from the coffee bushes on the right-hand side of the road; four of these men came to PW's door, while three went to the turn-boy's side. One attacker armed with a "Big gun" stood in front of the lorry while others forced the lorry-door open and started battering PW1. These attackers concealed their faces in hoods; and so PW1 did not identify any of them. PW1 was pounded with iron bars, then bound with ropes at the wrists, and dumped into the coffee bushes. The intruders stole from PW1 Kshs.15,000/= and a Roma wrist-watch; and thereafter they cleared the road-blocks and

drove off in PW1's lorry. When subsequently PW1 and his turn-boy who had also been tied-up, managed to remove the fetters and to report to Githunjuri Police Station, they learned that a lorry had been recovered several hundred kilometres away, in Kisii.

PW1's testimony was corroborated by the said turn-boy, *James Nderitu Ngunyi* (PW2). The lorry had collected milk at Kihanya and was approaching a river-bend, when boulders and timber were found blocking the road. PW2, as he wondered aloud what was up, saw a man in the front pointing a gun at the lorry's occupants.

Joseph Mbugua (PW3) who is transport manager, received a call on the morning of *18th November, 2003* informing him that motor vehicle reg. No. KAM 230T had been stolen; and he then reported the matter to Cartrack and to Githunguri Police Station. The lorry was recovered in Kisii.

PW4, *Police Constable Charles Mumo* of Cartrack (K) Ltd. received a report on the morning of *18th November, 2003* that the said lorry had been stolen. PW4 received information that the sides of the stolen lorry were painted with the writing "Maziwa"; and he activated the car-track gadget in the motor vehicle, and circulated the information to other car-trackers; and at 8.00 a.m. information was received that a signal had been picked up in Nakuru. PW4 and his colleagues followed the said signal on to Kericho, ending up in Kebirigo, Kisii, where they found the lorry packed in the yard off Damside Inn. PW4 and his colleagues found two men in the driver's cabin, and they identified them as the two appellants herein; and it was 1st appellant who was seated in the driver's seat. When PW4 interrogated the occupants of the lorry's cabin, they said they *had been given* the lorry to take to Kisii – but they did not disclose *who had given* the lorry to them. Six milk-cans were found in the lorry. The appellants herein were brought to Githunguri Police Station.

Timothy Mwangi Njuguna (PW5) who works at Githunguri Health Centre, examined PW1 and PW2 on 19th November, 2003 when the two presented with a history of having been assaulted.

Joseph Mairi Mamboleo (PW6) who works with Cartrack (K) Ltd. corroborated the evidence of PW4. He testified that when the car-track vehicle following signals reached Keroka, the signal got stronger – and this was an indication that the stolen lorry was in the vicinity; and when he and his colleagues reached Damside Inn, they found the motor vehicle in the enclosed parking lot and, in the cabin, they fund the two appellants herein.

Police Constable Geoffrey Nyerere (PW7) testified that after the two appellants were arrested, 2nd appellant led to the arrest of 2nd accused (who won an acquittal), on the ground that this accused too was part of the gang of robbers. The 2nd appellant is the one who led PW7 to the place where the "gun" had been hidden – which was used in the attack on the lorry's occupants in Kiambu District – but the alleged gun turned out to have been a car-jack, which was exhibited in Court. On this basis, PW7 arrested and charged 2nd accused, along with the appellants herein.

The appellants herein both gave sworn evidence, and called witnesses to give alibi evidence. For 1st appellant, the evidence was that he had travelled to Kisii on *17th November, 2003* arriving there at *5.00 p.m.*, for the purpose of purchasing bananas; and he remained at the Kisii banana market until *1.00 p.m. on 18th November, 2003*, and at that time, he and 2nd appellant went to Damside Inn for lunch, but ended up being arrested by five men who brought them to Karuri, and then to Kiambu where they were charged with several offences. PW1 said he saw the subject lorry for the first time in Kiambu. The 2nd appellant's testimony was consistent with that of 1st appellant: that they had travelled to Kisii together, and were arrested inside the hotel where they had gone for lunch.

DW4, who described himself as *Stephen Momanyi Nyakundi* and sought to corroborate the defence evidence, was later charged with *conspiracy to defeat the course of justice*, and with *perjury*, and was *convicted* and *sent to jail*. This defence witness had testified that the 2nd appellant was known to him and had frequently purchased bananas from him; that on 17th November, 2003, 2nd appellant had travelled to

Kisii with 1st appellant who he (DW4) had met for the first time.

The learned Magistrate found that even though there was no *direct* evidence showing the appellants' complicity in the offence charged, there was substantial *circumstantial evidence* showing them to have been part of the gang of robbers who, while armed with dangerous weapons, deprived the complainant of his lorry, injuring him in the process; the evidence of PW4 and PW6 established that the appellants herein were *found* sitting in the stolen motor vehicle, after it was tracked down to Damside Inn in Kebirigo, Kisii. PW4 and PW6, the trial Court found, were positive, that 1st appellant was found seated in the lorry driver's seat, and there was no possibility that these witnesses had made any mistake of identification. By the *doctrine of recent possession*, the learned Magistrate held, the position is to be taken that the appellants herein were thieves, and had stolen the subject lorry.

In applying the doctrine of recent possession, the trial Court was alive to the relevant limitation of it, taking into account the principle stated by the Court of Appeal for Eastern Africa in *Jagat Singh v. Reg.* (1953) 20 EACA 283:

"*[It] is not in the law that proof of possession of recently stolen articles will necessarily or in every case justify an inference of guilt; what constitutes 'recent possession' depends upon the nature of the property and the circumstances of the particular case ....*"

In that case it had been cautioned that, in applying the doctrine of recent possession, the Court must "sufficiently direct itself on the *scope and limitation to be drawn*".

The learned Magistrate took into account the fact that the car-tracking facility had enabled the stolen lorry to be traced to Kisii within hours of the robbery; and that both appellants were found sitting in the driver's cabin. The trial Court held that the appellants' explanation that they had travelled to Kisii to buy bananas, "*falls flat [on] the face especially considering that their alibi witness was later arrested and charged with perjury after investigations revealed that he was not a Kisii and ... had never set foot in Kisii*". The learned Magistrate held that the circumstances of the case pointed to "*no other reasonable conclusion except that the [appellants herein] were part of the gang that stole the lorry*".

The learned Magistrate relied on the authority in *Oluoch v. Republic* [1985] KLR 549 as a basis for arriving at the conclusion that the offence of robbery with violence had in this instance been committed; in her words:

"In the instant case PW1 testified that four of the robbers went to his door while three went to the turn-boy. He also told this Court that one of the robbers who stood in front of the lorry [was] armed with a gun and that the robbers beat him before throwing him [into] a trench .... This evidence was corroborated to a word by PW2. It is this Court's opinion that the prosecution succeeded in establishing all the ingredients of the offence as against the 1st and 3rd accused. In arriving at this conclusion this Court also considered the evidence of PW7, that the 2nd accused led [the Police Officers] to the place where the 'gun' was hidden and that it turned out to be a car-jack. The question is whether this jack would be considered a dangerous weapon in the circumstances.... Both these witnesses testified that the robber standing in front of the lorry was armed with a 'gun' and that they saw him as the lorry head-lights were on. It is my considered opinion that the car-jack which bears the distinct appearance of a gun was intended (especially considering that it was dark) to make their victims believe it was a gun and therefore induce them to [yield to] the robbers' [demands] ... It was thus a dangerous weapon for [the] purpose of this offence".

The trial Court found the appellants herein guilty of the offence of robbery with violence, and duly convicted them, sentencing them to death as prescribed by law.

In the amended grounds of appeal filed by learned counsel *Mr. Ondieki* on 7th April, 2008 it was contended as follows:

(i) that, the trial Court erred in law, by failing to hold that the appellants' rights under ss. 70 (a), 72 (3) (b), 74 (1), 77 (1) of the Constitution as read with ss. 33 and 36 of the Criminal Procedure Code (Cap. 75, Laws of Kenya) had been, were being and were likely to be violated;

(ii) that, the trial Court erred in law and fact by entering conviction on the basis of the doctrine of recent possession which did not meet the required legal standards;

(iii) that, the trial Court erred in law by relying on evidence of identification that did not meet the required legal standards;

(iv) that, the trial Court erred in law and fact by convicting the appellants on the basis of evidence of similar facts and that such, occasioned injustice to the appellants;

(v) that, the trial Court erred in law and fact by failing to resolve material contradictions in favour of the applicants;

(vi) that, the trial Court erred in law by failing to comply with ss. 72 (2), 77(2) (b), (c), (d), (e) and (f) of the Constitution as read with s. 198 of the Criminal Procedure Code;

(vii) that, the trial Court erred in law by convicting the appellants on the basis of circumstantial evidence that did not meet the required legal standards;

(viii) that, the prosecution failed to discharge its legal burden of proof beyond reasonable doubts, and left out critical witnesses;

(ix) that, the trial Court erred in law by admitting "manufactured evidence" contrary to law;

(x) that, the trial Court erred in law and fact by failing to consider the plausible defence of the appellants;

(xi) that, the trial Court erred in law by convicting on the basis of suspicion, without cogent evidence;

(xii) that, the trial Court misdirected itself by misapprehending the facts and by applying wrong legal principles, to the prejudice of the appellants;

(xiii) that, the trial Court erred in law by shifting the burden of proof to the appellants contrary to common law principles, to the prejudice of the appellants;

(xiv) that, the trial Court erred in law, by relying on evidence of a co-accused which was worthless;

(xv) that, the offence of robbery with violence was never proved.

As this amended petition raised issues touching on facts which had not been canvassed at any time, the prosecution thought it necessary to have the Investigating Officer swear an affidavit focusing upon such facts. It is necessary to set out here the essence of the said affidavit, which was filed with the leave of the Court.

The Investigating Officer, *Corporal John Ndiga,* deponed that he played the same role in Criminal Case no. 2753 of 2003 (which was withdrawn) as in Criminal Case 427 of 2004 which is the basis of the appeal.

It is deponed that an offence of robbery with violence was reported at Githunguri Police Station on 18th November, 2003 at about 4.00 a.m., and booked in the Occurrence Book as No. 8 dated 18th November, 2003; it was alleged that a motor vehicle reg. No. KAM 230T an Isuzu Canter belonging to Githunguri Dairy had been car-jacked by a seven-man gang. Information on the incident was circulated within the Police network all over the country, and the stolen lorry was subsequently detected at Kisii while being in

the possession of the two appellants. It was deponed that the appellants were arrested on *19th November, 2003* and the stolen motor vehicle recovered. On 22nd November, 2003 the appellants were brought to Kiambu, and handed over to the officer-in-charge at Kiambu CID. The deponent was then instructed to conduct investigations into the matter, and the appellants were placed in Police custody as from that date *22nd November, 2003.* After investigations were carried out, the appellants were taken to Kiambu Chief Magistrate's Court, and charged in *Criminal Case No. 2753 of 2003* with the offence of robbery with violence. The deponent averred that the appellants had stayed in Police custody "*for only 13 days fore being taken for plea and they were then handed over to the prison warder in charge [of]Kamiti Maximum Prison where they were remanded."*

The deponent stated that the trial of the appellants herein did not proceed under Criminal Case No. 2753 of 2003, but instead, under *Criminal Case No. 427 of 2004* on the basis of a *new charge-sheet*, dated *5th March, 2004*. Criminal Case No. 2753 of 2003 was withdrawn under s. 87 of the Criminal Procedure Code (Cap. 75, Laws of Kenya), and a new charge brought against the appellants.

The deponent stated that "it is clear from the first charge-sheet that the appellants herein were taken to Court as soon as was reasonably practicable and the Police did not contravene any sections of the Constitution or the Criminal Procedure Code as alleged by the appellants".

Learned counsel *Mr. Ondieki* did not give any attention to the fact stated in the replying affidavit, that the Police had held the appellants for less than fourteen days before arraigning them in Court in Criminal Case No. 2753 of 2003, which was later withdrawn under the law and substituted with Criminal Case No. 427 of 2004 whereunder conviction resulted. Mr. *Ondieki* just stated in gross that the appellants had been in detention for 110 days over-and-above the fourteen-day period mentioned in s. 72 (3) (b) of the Constitution; so in all probability, he is only concerned with the time elapsed between the appellants' arrest in Kisii, on or about 22nd November, 2003 and the second plea-taking in Criminal Case No. 427 of 2004.

Without addressing the point mentioned in the foregoing paragraph, learned counsel urged that the appellants had been detained beyond the permitted duration, by the Police, and so should be acquitted on that ground. So he cited several judicial decisions, notably *Albanus Mwasia Mutua v. Republic,* Crim. Appeal No. 120 of 2004; *Paul Mwangi Murunga v. Republic,* Crim. Appeal No. 35 of 2006; *Ndede v. Republic,* [1991] KLR 567 as legal validation for his claim. He went further and urged that certain principles of law contained in the said authorities must now be applied; in *Mr. Ondieki's* words:

"*These decisions are binding on your Lordships. Therefore, this appeal should succeed. The delay in the instant case in more than 110 days"*.

Mr. Ondieki also urged that the appellants had been tried without the benefit of *language* interpretation; and he again cast at the Court a past judicial decision, as a legal basis for an acquittal: *Mbae Marijani & Another v. Republic,* Crim. Appeal No. 306 & 305 of 2006.

Mr. Ondieki submitted that the prosecution had failed to call as a witness the arresting officer; and on this account, "the charges were never proved"; and he attached to this contention an authority which he said dictated acquittal for his clients: *Edwin Wafula Keya v. Republic,* Crim. Appeal No. 54 of 2004. He urged that the time of the robbery-incident having been 3.30 a.m. there was no illumination in respect of which there was evidence on record. Counsel went on to urge:

"*The appeal be allowed. There were four people [i.e. the robbers?] There was no identification. The attackers were wearing masks. PW7 did not know who was found and where."*

The foregoing submissions, quite obviously, were questioning the element of *direct evidence,* even though the learned Magistrate had been quite clear, that the basis of the conviction was *circumstantial evidence*. Counsel must have been well aware of this fact, since he also devoted time to contesting the circumstantial evidence. He urged that the circumstantial evidence contained gaps which should have

been resolved in favour of the appellants. He urged that the failure to call the Investigating Officer and the arresting officer as witnesses, left gaps in the evidence which should have been viewed in the context of a plausible defence by the appellants herein: and on this point he invoked *Henry Kimathi v. Republic*, Crim. Appeal No. 10 of 2002 as stating the constitutional right of defence, which he urged, ought now to be applied to lead to the acquittal of the appellants.

Learned counsel *Ms. Gateru,* for the respondent, urged the Court to dismiss the appeal as wanting on merits. The basis of this submission was that the evidence had been properly assessed by the learned Magistrate, as definitively pointing to the appellants herein as robbers-with-violence on the material day; both PW1 and PW2 had given credible evidence on the night- attack upon them and the stealing of their lorry; it had been abundantly clear that more than one robber had been involved; the robbers were armed, and subjected their victims to violence; even though PW1 and PW2 had not identified the robbers, only a few hours later they were caught red-handed, with the self-same lorry which had been stolen, and confirmation in this regard came from the reliable evidence of PW4 and PW6; reliable detection methods were used by PW4 and PW6 to follow the stolen motor vehicle and to find it where it had been packed, several hundred kilometers away from the *locus in quo;* it was PW4's testimony that the appellants herein were founded sitting in the front cabin of the stolen lorry. Counsel submitted that it was clear from the evidence, the appellants herein had *no reasonable explanation* as to how they came to possess the stolen lorry. Counsel urged: "It shows beyond doubt that [the appellants] were among the persons who violently robbed the complainants".

Counsel submitted that the indication that the appellants had been in custody for some three months was not evidence of delay on the part of the Police, in bringing them before the Court to be charged. For the original case under which the charge had been laid, *Criminal Case No. 2753* had been properly withdrawn under s. 87 (a) of the Criminal Procedure Code, and a fresh charge substituted; so that in reality, the appellants had remained in Police custody for only 13 days, before being first charged.

On the question of language interpretation, learned counsel submitted that it was on record, that the language of the Court and of the witnesses was invariably shown; and the appellants through their counsel, *Mr. Njenga,* had the opportunity to cross-examine all the witnesses.

Ms. Gateru urged, on the contention that some of the prosecution evidence was contradictory, that the evidence was overwhelmingly consistent; and that any inconsistencies found were inconsequential.

We have carefully reviewed all the evidence, followed the learned Magistrate's assessment of the same, and considered all the contests to the substance of the findings, raised on appeal.

A lorry which was stolen in Kiambu District on the material night, had been moved fast, and in a few hours' time it was already parked in Kisii, several hundred kilometers away. Although no witness recognized the robbers at the *locus in quo,* this Court will take *judicial notice* that, in the normal course of events, the robbers would not have had sufficient time, in the night, to lawfully pass title in, possession of, or authority to convey the said commercial item to anyone else; for if they tried to do so, there would be no luxury of time for the inevitable ceremony; and if they tried to do so in the depth of night, they would only show the colour of a thief. This is the basis for our conclusion that the rapid movement of the subject lorry from Kiambu to Kisii could only have been under the *control and management* of the robbers themselves, or some of them.

The foregoing basis of the Court's persuasion is to be taken alongside the fact that PW4 and PW6 gave *direct,* and credible evidence that they used *reliable detection methods* which led them to the appellants herein sitting in the front cabin of the stolen lorry, in Kisii, only a few hours since the theft had taken place.

In our assessment, the learned Magistrate effectively and properly appraised the evidence, and came to the right conclusion, that the robbers at the *locus in quo* did include the appellants herein.

We also agree with the learned Magistrate, and do not agree with the submissions made for the appellants,

that this is a fit case for the application of the *doctrine of recent possession,* to determine the authorship the criminal incident.

Just as learned counsel *Mr. Ondieki* suggested, it is not in *all* cases in which an accused is found with goods recently stolen, that the doctrine of recent possession may be relied on to prove that the accused is the thief. This point was adverted to by the Court of Appeal for Eastern Africa in *Jagat Singh v. Reginam (*1953) 20 EACA 283 in which the following passage appears (p.286):

"*Lastly, we are of the opinion that the Magistrate's judgment is open to criticism in respect of his first 'fact' which he records as 'recent possession'. It seems to us that this doctrine that a presumption of guilty knowledge may be drawn from proof of possession of articles recently stolen is irrelevant to the offence of retaining, in which ... there is essentially a change in the mental element of possession. But as we are considering this appeal on the footing of whether there was sufficient evidence to found a conviction for receiving, the doctrine of recent possession becomes relevant. We are not satisfied, however, that the Magistrate did sufficiently direct himself on the scope and limitation of the presumption that may be drawn. It is not the law that proof of possession of recently stolen articles will necessarily or in every case justify an inference of guilt: what constitutes 'recent possession' depends upon the nature of the property and the circumstances of the particular case ....*"

In the instant case a distinctive commercial property in the shape of a lorry, emblazoned with dairy-milk colours, and bearing its conspicuous registration number, is taken in a robbery, and rapidly driven away into the distance, and then those occupying its driver-cabin are found to be the appellants herein; clearly, they are in possession of goods so recently stolen, that, in the absence of a *plausible explanation*, they will be held to be the thieves.

Although an *alternative charge* of handling stolen property (contrary to s. 322 (2) of the Penal Code) had been laid against the appellants herein, we are of the view that this was *inapplicable,* firstly in the light of the cogent evidence that the appellants were among the robbers of the material night; and secondly, because the *non-explanation* of the mode of coming into possession of the stolen lorry, a strategy which was an integral part of the defence case, brought up a defence case that did not at all shake the cogency of the prosecution evidence – and that evidence was that the appellants *were* among the robbers who attacked PW1 and PW2 in their lorry, and grabbed the lorry and drove it to Kisii.

The appellants' alibi defence, which counsel urged to be a plausible case, in our opinion, was not a plausible case, as it was squarely undermined by clear evidence that it was a case resting on perjury – and the resort to perjured evidence, we hold, could only have been motivated by the intent to *conceal* the appellant's complicity in the robbery-with-violence.

Although counsel placed case-authorities before this Court, urging that they carried principles that dictate acquittal as the outcome of this hearing, we were not convinced that the statement of legal principle was conscientiously linked to *the facts* on record. We do not think such legal principles should be urged *in vacuo,* as the foundation of a normal judicial decision, especially in criminal cases, must be the ascertained *facts on the record.*

On the *facts* before us, the Police offices had not detained the appellants for the alleged period of 110 days before bringing them to Court. The prosecution has satisfactorily explained that the appellants had been brought before the Court as required by law; and that it was on the basis of the law, that the first criminal case had been withdrawn and substituted.

We are unable to accept *Mr. Ondieki's* contention that the appellants could not have properly been convicted if there was no *direct* evidence of eye-witnesses. It is well known that *circumstantial evidence* sometimes gives the most cogent case against an accused person, and will be relied on in the same way as direct evidence is relied on. In the instant case, moreover, *part* of the evidence adduced in Court was direct evidence.

None of the many grounds of appeal raised has, in our view, shaken the integrity of the trial-Court

proceedings, nor dented the assessment of evidence and the findings of that Court.

In the result, we dismiss the appeal; uphold the conviction of both appellants; and affirm sentence as imposed according to law.

Orders accordingly.

DATED and DELIVERED at Nairobi this 3rd day of February, 2009.

J. B. OJWANG **M. WARSAME**

JUDGE **JUDGE**

Coram: Ojwang & Warsame, JJ.

Court clerk: Huka & Erick

For the Appellants: Mr. Ondieki

For the Respondent: Ms. Gateru