



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA  
OF KISII**

**Criminal Appeal 147 & 148 of 2004**

**(CONSOLIDATED)**

**(Being an appeal from the original conviction and sentence of the SRM's Court at Nyamira in criminal Case No. 276 of 2004 by Kiarie K. Kiarie, SRM)**

**REUBEN NYAKANGO MOSE ) ..... APPELLANTS**

**JAMES KIRIAGO OSIEMO )**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellants herein were charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence were that on 24<sup>th</sup> March 2004, at about 9.30 p.m. at Boisanga I sub location, Nyamira District within Nyanza Province, jointly with others not before court, while armed with pangas, whips and an imitation firearm the appellants robbed **Evans Morara Mose** of one suit, 3 shirts, one television set, 3 mattresses, several bed sheets and many other household items all valued at Kshs. 49,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Evans Morara Mose**.

In count 2 the appellants faced the charge of burglary and stealing contrary to **sections 304 (2) and 279 (b)** of the **Penal Code**. It was alleged that on the same date and time as hereinabove stated, they broke and entered into the dwelling house of Jackline Nyamoita with intent to steal and did steal from therein 3 mattresses, 3 blankets, 32 iron sheets, 20 pieces of table clothes and several other household items valued at Kshs. 32,400/=.

In count three the appellants were also charged with burglary and stealing contrary to **sections 304 (2) and 279 (b)** of the **Penal Code**. They were alleged to have broken and entered into the dwelling house of George Mwaniki with intent to steal and did steal from therein one mattress, two blankets, two bed sheets and a pair of slippers. The offence was committed on the same day at about 9.00 p.m.

The appellants also faced an alternative charge of handling stolen property contrary to **section 322 (2)** of the **Penal Code**, in that on 31<sup>st</sup> March 2004, at Boisanga I sub location, Nyamira District, were found in possession of some of the aforesaid stolen items namely seven iron sheets, one wall clock, one pressure lamp, one black coat, one pillow and 20 pieces of table clothes, knowing or having reasons to believe that they were stolen goods.

After a full trial the appellants were convicted in counts one, two and three.

In respect of count one, each appellant was sentenced to death as by law prescribed. In respect of counts two and three, they were sentenced to three years' imprisonment. The learned trial magistrate ordered that they first serve the sentences in counts two and three and thereafter suffer death in respect of count one.

The appellants were aggrieved by the aforesaid conviction and sentence and each preferred an appeal to this court. Their grounds of appeal were more or less same.

They stated that there was insufficient evidence in proof of the charge of robbery with violence contrary to **section 296 (2) of the Penal Code**. They also faulted the learned trial magistrate for holding that they had been found in possession of the stolen items. They further stated that their defences were not properly considered by the trial court.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence that was adduced by the prosecution witnesses so as to arrive at its own independent determination whether or not to uphold the conviction. In reaching its determination, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified, and must therefore make due allowance for that. See **NJOROGE –VS- REPUBLIC**, [1987] KLR 19. We will proceed to examine, albeit briefly, the evidence that was adduced before the trial court.

**Evans Morara Mose, PW2**, was a care taker in the home of David Kimori Omare. On 24<sup>th</sup> March 2004 at about 9.30 p.m. he was in the sitting room of his employer's house watching television. Suddenly he saw a person entering from the door leading to the kitchen and he ordered him lie down. The person was holding a gun and he proceeded to put off the lights. He covered the face of PW2. While PW2 was lying down he heard other people coming into the house. They ordered him to tell them where the keys were and he pointed out the keys. PW2 was left with one person guarding him as the others began to take out nearly all the household items. The robbery took nearly three hours.

After the robbery they tied him together with a watchman known as Muchumbe Obaigwa. PW2 and the watchman managed to untie themselves. PW2 put on the lights and raised an alarm. Neighbours came in response to the alarm and PW2 told them what had happened. On the following morning the robbery was reported to the clan elder and at Ekerenyo Administration police post. PW2 telephoned the owner of the home, **Jackline Nyamoita, PW1**, and **George Mwaniki, PW3**, who were at Kisumu and informed them about the robbery. The two arrived after some time and together with PW2 proceeded to Nyamira C.I.D. office and recorded statements.

When they returned from Nyamira they were informed by the Administration police at Ekerenyo that some of the stolen items had been recovered in the house of **Reuben Nyakango**, the 1<sup>st</sup> appellant.

On 30<sup>th</sup> of March 2004, the area Chief called a

Meeting (baraza) and during the meeting the 1<sup>st</sup> appellant was questioned about the robbery and in the course of the questioning he ran away. The people who were in the meeting chased and arrested him. He led people to his home where six cushions, one coat, a home made gun, a pressure lamp, table clothes and a lantern lamp were recovered. These items were not in his house but were in a garden outside the house. From his house 13 iron sheets were recovered.

From the home of **James Kiriango Osiemo**, the

2<sup>nd</sup> appellant, seven iron sheets, two bed sheets, a slasher and several other stolen items were recovered. The 2<sup>nd</sup> appellant was present during the said recovery. Some of the items were in his garden.

In the home of **Omoti Sweti** and **Muchumbe**

**Obaigwa** who had been named by the 1<sup>st</sup> appellant as their accomplices, a television set, a battery charger, a pair of sandals, five blankets and several other items which had all been stolen on the material night were recovered. Omoti Sweti and Muchumbe Obaigwa disappeared and were not arrested.

PW1 and PW3 positively identified the recovered

items as belonging to them.

**Zephaniah Mokuu Kabinga, PW4**, is the village

elder to whom the robbery was reported in the morning of 25<sup>th</sup> March 2004. He corroborated the evidence of PW2 by saying that when a Chief's baraza was called, the 1<sup>st</sup> appellant was questioned and he decided to run away. He was chased and arrested and he led villagers to his home where several items which PW2 had been robbed of on the material night were recovered. That evidence was also corroborated by **Patrick Rema Nyamaro, PW5, Benson Kiriago Ongogo, PW6, and Philip Masenge Mongiti, PW7**, the area Assistant Chief.

**Administration police Constable Samson**

**Onyango, PW8**, was attached to Ekerenyo District Officer's Office and was the one who received a report regarding the robbery on 25<sup>th</sup> March 2004. He testified that on that day after PW3 made the report, together with other police officers, proceeded to arrest PW2 and some other suspects. They then proceeded to the house of the 1<sup>st</sup> appellant and recovered six pieces of table clothes and one bowl which were identified as some of the stolen items. PW8 was also in the baraza when the 1<sup>st</sup> appellant ran away. The witness was among the people who arrested the 1<sup>st</sup> appellant and proceeded to make recoveries from his home and from the homes of the 2<sup>nd</sup> appellant and the other suspects who are at large.

In his defence, the 1<sup>st</sup> appellant stated that he

could not remember where he was on the night of 24<sup>th</sup> March 2004. But on the following day he heard about the robbery. He denied that he was found in possession of any of the aforesaid stolen items. He alleged that one Agnes Kemori who was deceased at the time of trial, had given him two bowls, one bed sheet and a table cloth sometime in May 2001. They are among the items which he was alleged to have been found in possession of. He said that the iron sheets were his and he produced a receipt to prove that he had actually purchased them. He said that he was first arrested on 25<sup>th</sup> March 2004 and later released. He admitted that he attended the Chief's baraza and said that he ran away because he was being threatened. He said that after his subsequent arrest he did not lead administration police and other people to the places where they recovered some of the stolen items.

The 2<sup>nd</sup> appellant stated that on 24<sup>th</sup> March 2004

he was at his home with his wife and that he knew nothing about the alleged robbery. He said that he was arrested on 20<sup>th</sup> April 2004 and as regards the items that were allegedly recovered from his home, he only saw them in court. He denied having led the police to the place where they were recovered from.

The 1<sup>st</sup> appellant called his wife, **Gladys**

**Nyamusi, DW3**, as a witness. She said that on 24<sup>th</sup> March 2004 the 1<sup>st</sup> appellant was with her at their home. She admitted that police recovered a bowl and a bed sheet from their home. She said that the said items had been given to her husband by one Zipporah Mecha (not Agnes Kemori as stated by the 1<sup>st</sup> appellant). She further stated that the iron sheets that were recovered from their home had been bought by her husband.

The appellants' conviction was entirely based on

the doctrine of recent possession of items that PW2 was robbed of on 24<sup>th</sup> March 2004. There were two instances of recovery of the said items. On 25<sup>th</sup> March 2004, a day after the robbery, two bowls and a bed sheet, among other things, were recovered from the house of the 1<sup>st</sup> appellant. PW1 said that the two bowls had initials "D.K." written on them by paint. These initials meant "David Kemori", who is her father-in-law. These special marks were not denied by the 1<sup>st</sup> appellant. All he said was that the two bowls and the bed sheet had been given to him by one Agnes Kemori, deceased. On the other hand, his wife alleged that they had been given to the 1<sup>st</sup> appellant by one Zipporah Mecha.

The second recovery was made on 30<sup>th</sup> March

2004 after the Chief's baraza when the 1<sup>st</sup> appellant ran away and was chased and arrested by the police who were assisted by members of the public. He led them to his house and garden where some other stolen items were recovered from. The 1<sup>st</sup> appellant implicated the 2<sup>nd</sup> appellant and two other people and when the police proceeded to the home of the 2<sup>nd</sup> appellant, they also recovered some of the stolen items which were also positively identified by their owners.

Concerning the application of the doctrine of

recent possession, Bosire J., (as he then was), in MALINGI –VS- REPUBLIC [1989] KLR 225 at Page 227 stated as follows.

**“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of**

**the fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.”**

Applying the aforesaid principles, it is not in dispute that the appellants were found in possession of the stolen items so soon after the said robbery that unless they gave a reasonable explanation as to how they came by the recovered items, it could safely be presumed that they were among the robbers.

The explanation that was given by the 1st appellant regarding the two bowls and the bed sheet contradicted that of his wife. The two bowls had a special mark, “**D.K.**” meaning **David Kemori**, the father-in-law of PW1. The 1<sup>st</sup> appellant admitted that they were recovered from his house a day after the robbery.

As regards the other recovered items, there was sufficient evidence that it was the two appellants who led the police and members of the public to the places where they had hidden them. The appellants’ defences were therefore rightly rejected.

In view of the evidence on record, we are satisfied that the learned trial magistrate rightly applied the doctrine of recent possession to convict the appellants. We reject the appellants’ appeals against conviction.

As regards sentence, the trial court, having convicted the appellants in count one and sentenced them to death, the sentences in respect of counts two and three should have been left in abeyance. We therefore set aside the sentences in respect of counts two and three though this does not make much difference considering that the appellants have been in prison for more than three years from the date when the sentences were passed. But as regards sentence on count one, it was the only lawful one and was rightly passed by the trial court. Consequently, we dismiss this appeal.

**DATED, SIGNED AND DELIVERED AT KISII THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2009.**

**D. MUSINGA**

**A.O. MUCHELULE**

**JUDGE.**

**JUDGE.**

**18/11/2009**

Before D. Musinga, J.

A. Muchelule, J.

Mobisa – cc

Mr. Mutai for the State

Appellants – present

**Court:** Judgment delivered in open court.

**D. MUSINGA**

**JUDGE.**

**A.O. MUCHELULE**

**JUDGE.**