



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

Criminal Appeal 84 of 2006

JUMA MOHAMED ROBA APPELLANT

-AND-

REPUBLIC RESPONDENT

(An appeal from the Judgment of Principal Magistrate J.G. King'ori dated 4th May, 2005 in Criminal Case No. 680 of 2004 at Garissa law Courts)

JUDGMENT OF THE COURT

The appellant faced a charge of robbery with violence contrary to s. 296(2) of the Penal Code (Cap. 63, Laws of Kenya).

The particulars were that the appellant and four other accused persons, on 20th July, 2004 at about 8.00p.m., at Mororo Village, Mororo Location within Tana River District, in Coast Province, jointly robbed **Sammy Kilonzi Mwangangi** of cash in the sum of Kshs.5,000/-, a jacket, a pair of shorts, a pair of trousers, a pair of shoes, and a national identity card, all valued at KShs.14,000/-, and at, or immediately before, or immediately after the time of such robbery, wounded the said **Sammy Kilonzi Mwangangi**.

PW1, **Sammy Kilonzi Mwangangi**, who is a mason working in Garissa, testified that on 20th July, 2004 at about 8.00 p.m., he left Mororo Bar in Garissa, where he had been having a drink known as **Makole**. As he walked alone to the main road, he met a group of about six people. Just as he was going to pass the six men, they lodged an attack on him; he was hit on the back of his head with a heavy object, and he fell and lost consciousness. Only on the following day, at about 10.00 p.m., did PW1 regain consciousness. It is then that he found that several personal items had been stolen from him – his shoes, jacket, pair of shorts, pair of trousers, identity card, and KShs.5,000/-. When he was discharged from the health facility, PW1 reported the incident to Madogo Police Station; and he there found that the police had recovered some of his stolen property; his pair of shoes, identity card, pair of shorts, and jacket. The jacket and shorts clearly bore PW1's distinctive, sewn marks.

PW2, Police Force No. 99019680 A.P.C. **John Ngare** of Mororo Administration Police Post, was at the camp at 6.30 a.m. on 21st July, 2004 when two ladies came to make a report that there was a man lying stark naked in a gully, at Mororo. PW2 and his colleagues, **Jackson Mwirari** and **Michael Mutuku** proceeded to the **locus in quo**, finding a crowd gathered there. The recumbent man, PW1 herein, was breathing. One woman took PW1 to hospital, while her two colleagues went to make a report to PW2 at the A.P. Camp.

When PW2 and his colleagues interviewed people at the **locus in quo**, they were informed that PW1 had

been seen the previous day wearing a jacket imprinted with the word “Opel”. The villagers were asked to report, if they should see anyone wearing a jacket bearing such a mark. On 22nd July, 2004 PW2 received information from an informer, that the appellant herein was wearing the track jacket with the “Opel” mark. PW2 and his colleagues received information on the whereabouts of the appellant as he wore the said jacket; and they went and, indeed, found him wearing the said jacket. The appellant was also wearing the track shorts which had been stolen from PW1. PW2 and his colleagues arrested the appellant and took him to camp; they carried out a search on the appellant, and found PW1’s identity card on him, bearing the same, **Sammy Kilonzi Mwangangi**; this was in the pocket of the pair of shorts. PW2 and his colleagues then took the appellant to Madogo Police Station, and handed him over to the O.C.S.

PW3, Police Force No. 77693 **P.C. Douglas Nyange** of Madogo Police Station was at the station at about 3.00 p.m. on 22nd July, 2004, and thereafter left to arrest a co-accused to the appellant herein. The said accused, who was wearing P.W. 1’s stolen shoes, was arrested and taken to the Police Station.

PW4, Police Force No. 99018969 **A.P.C. Jackson Burali** was attached to Mororo A.P. post at the material time. On 21st July, 2004, at 6.30 a.m. he was at the camp when two woman arrived to report of a naked man lying at the **locus in quo**. PW4 and his colleagues rushed to the scene, finding P.W. 1 not dead, but unconscious. P.W. 1 was known to a number of people in the neighbourhood of the **locus in quo**; they took him to hospital; the matter was reported to Madogo Police Station. As investigations continued, two women came to the camp the following day, and reported that they had seen someone wearing the complainant’s track suit. PW4 and a colleague proceeded to Mororo Village, arrested the man wearing the said track suit, searched him and found the complainant’s identity card. PW4 and his colleagues took the appellant herein to Madogo Police Station.

PW5, Police Force No. 56517 **P.C. Kamau** of Madogo Police Station testified that on 21st July, 2004 at 12.40 p.m., as he worked at the Crime Office, he received a report that a man had been found half-dead at Mororo. PW5 went up to the hospital, where the complainant had been taken, and he found P.W. 1 with a bloody and swollen body. PW5 gave instructions for the arrest of the suspects, and took custody of the exhibits – which he now produced in Court. He charged the suspects accordingly.

PW6, **Dr. Aden Sheikh Mohammed** of Garissa General Hospital had seen the complainant on 21st July, 2004 at 6.00p.m. PW1 was in a coma, when he was brought to hospital by two relatives. PW1 had a bruise on the right cheek, and a swelling on the right orbital area. Both of his lips were swollen, and his injuries appeared to have taken place some six hours earlier. The injuries were caused by a blunt object. PW6 assessed the degree of injury as harm, and he filled in the P3 form for medical reporting.

After the trial Court put the appellant herein to his defence, he opted to make an unsworn statement and to call no witness. He said he lives in Mororo. He said he was in the course of selling water jars, when the clothe - exhibits in the case were sold to him by somebody; and he immediately put them on. He said he could show the man who sold these clothes to him, and that he was arrested that same day. He denied the charge.

Was the appellant one of those who injured the complainant while robbing him of his personal effects?
Yes, in the findings of the learned Magistrate:

“Regarding whether the accused [appellant herein] was one of the culprits, there is absolutely no doubt. I was unable to put the 4th accused [to his defence] because I did not consider the identification of the shoes quite reliable. But with the 1st accused, a track jacket and shorts were recovered from him which the complainant quite positively identified to be his. He showed the court a white thread on them which he had used to mend them. Besides, and more importantly, the complainant’s identity card was found inside the shorts..... The presence of the complainant’s identity card in the shorts goes a long way to fortify the finding that indeed, the jacket and shorts belonged to the complainant. Obviously the complainant did not identify his attackers, as apparently there was no lighting at the scene of the robbery, and he passed out in the course of the same; but two days later....., a time very proximate to the robbery, the 1st accused was found in possession of some of the [property] stolen from

the complainant. He has given the explanation that he was sold these clothes the [very]day he was arrested as he had put them on. He claims he can show the man who sold them to him. He had the opportunity to call that person. He did not. I do not find his explanation persuasive at all. It does not amount to a reasonable explanation at all. The doctrine of recent possession operated against the accused. The only [inference] to draw from the circumstances of this case is that he was one of the robbers who attacked the complainant on the night of 20th July, 2004 at Mororo and robbed him of his..... items. I find him guilty as charged in the principal count and convict him”

The learned Magistrate treated the appellant herein as a first offender aged 17, and sentenced him to be detained at the pleasure of the President.

In his grounds of appeal the appellant stated *inter alia*,

- (i) that the trial Court had not taken his defence into account; and
- (ii) that the evidence upon which the Court had relied, was inconclusive.

During the submissions, the appellant contested the fact that he had been with four other persons at the *locus in quo*, but the others were not mentioned in the trial.

Learned State Counsel **Mr. Makura** urged that there had been overwhelming evidence in support of the prosecution case, and hence the appeal should be dismissed. Counsel urged that by applying the doctrine of recent possession, the trial Court had found the appellant well linked to the commission of the offence charged. The appellant had not shown how he came to be in possession of the items robbed, only so soon after the robbery took place.

We have reviewed all the evidence in this case, as we are required to do as a first appellate Court. The testimonies are well recorded, and they illuminate the crucial point at which the prosecution has laid its finger on the appellant herein as the robber on the material night. The complainant’s personal effects are an excellent circumstantial proof of linkage between the appellant and the robbery. That evidence cannot be faulted and it would rightly have led to the conviction of the appellant. But there is, besides, a legal inference which confirms the appellant as one of the robbers on the material night. Only so recently after the robbery incident, the appellant is found with the items seized by the robbers – and of this, there is proof beyond reasonable doubt.

Of the doctrine of recent possession in criminal trials, the Court of Appeal for Eastern Africa thus said, in ***Bakari s/o Abdulla v. Rex*** (1949) 16 EACA 84:

“Cases do often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or breaking and entering but of murders as well, and if all the circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal”.

In this particular case, in our Judgment, all the circumstances point to the appellant’s role in the robbery in question.

Therefore, we dismiss the appellant’s appeal, uphold conviction, and affirm sentence as pronounced by the trial court.

Orders accordingly

DATED and DELIVERED at Nairobi this 19th day of February, 2008.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang

Court clerks; Tabitha Wanjiku & Erick

For the Respondent: Mr. Makura

Appellant in person