



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 27 of 2006

*(From original conviction and sentence in Criminal Case No.1567 of 2004 of
the Senior Resident Magistrate's court at MOLO – R. K. KIRUI, SRM)*

JOSEPH MAKEE OBIMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant was jointly charged with one Peter Mwangi with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 17th and 18th May, 2004, at Muinjo farm, Molo in Nakuru District jointly with others not before court, while armed with dangerous weapons namely pangas and rungun, robbed Geoffrey Munyinyi cash Kshs.14,460/-, a television set, video deck, mobile phone, a radio cassette, iron box and other household goods all valued at Kshs.66,460/-, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Geoffrey Munyinyi.

The evidence before the trial court can be summarized as hereunder:-

On 17th May, 2004, at about 8.00 p.m., **Geoffrey Munyinyi, PW1**, was in his house when he heard some people talking. He recognized their voices. One of them was that of his nephew, though he did not disclose his name. One of the people asked whose house that was, referring to the house of PW1. The other person said that it belonged to the complainant. PW1 heard somebody calling him out but he did not respond. One of the people called out the name of PW1's wife and she responded. Shortly thereafter, the assailants broke into the house of PW1. They were armed with pangas and sticks. They smashed the lamp that was lit and one of the robbers hit PW1 with the flat side of a panga and ordered him to lie down. They had torches and demanded that they be given money. PW1 gave them Kshs.14,000/-. Thereafter they stole household items including a television set and ordered the occupants therein not to scream as they took off. One person was left guarding the house occupants. PW1 identified the appellant as one of the robbers who had hit him with a panga. He said that he knew him as he had been meeting him in their neighbourhood. After sometime the appellant was arrested. PW1 was able to identify him as one of the people who had robbed him. PW1 had made a report to the police on the night of the robbery. He told the police that he knew the appellant. He however did not name or describe them to the police.

Miriam Wambui Gathumi, PW3, the wife of PW2 corroborated her husband's evidence in all material aspects. The evidence of PW1 was also supported by that of **Ann Ruguru Mbai, PW5**, and

John Kibe, PW6 who were in the house of PW1 at the material time.

Robert Kabiro Njenga, PW2, testified that on 17th May, 2004 at about 10.00 p.m., he was at home when robbers struck. They stole his clothes but when he switched on the alarm the robbers ran away. On the following day, police officers arrested some of the assailants. The appellant was found wearing clothes and shoes that belonged to PW2.

John Nami, PW4, a watchman employed by PW2 also testified about the robbery. He said that the robbers were armed with pangas and when they went to his employer's home they tied and beat him up. However, he was not able to identify any one of them.

Corporal Julius Omari, PW7, testified that on the night of 17th and 18th of May, 2004, he was at Molo police station when the robbery was reported. He proceeded to the house of PW1 together with other police officers. PW1 told the police that he recognized one of the robbers as the appellant herein. On their way back, the police recovered some of the stolen items. They included a television set and two bags containing clothes. On the following day, the police arrested the appellant who was wearing clothes and shoes that had been stolen from the house of PW2. The appellant led the police to the house of PW2. PW2 identified the clothes and the shoes that were worn by the appellant as his (PW2's). He also identified the clothes that were found in one of the bags.

In his unsworn defence, the appellant stated that he was residing at Munju area, Molo, and that on 17th May, 2004, he went to his place of work at a construction site. At about 10.00 a.m., police officers arrested him and said that he was one of the people who robbed the complainants herein. He denied any knowledge of the robbery.

The learned trial magistrate held that the appellant was seen and recognized by PW1, PW5, PW6 and PW8 who said that they knew him well and were able to recognize him because there was sufficient light. The learned trial magistrate further held that the appellant was found wearing clothes that had been stolen from PW2, a day after the robbery. On the basis of evidence of recognition and possession of recently stolen goods, the trial court convicted the appellant. The appellant submitted written submissions and we have taken the same into consideration.

In *Okeno Vs R. [1972]EA 32*, the duty of a first appellate court was well stated. The court has to re-consider all the evidence that was tendered before the trial court, re-evaluate the same and reach its own conclusion as to whether the appellant is guilty of the offence as charged. The court must, however, remind itself that it did not have the benefit of seeing the witnesses who testified before the trial court.

PW1 testified that he recognized the voice of one of the people who were talking outside his house as being that of his nephew. However, he did not state the name of his nephew. When he went to report the matter to the police, he did not tell them that he knew one of the robbers as being his nephew. After the police arrested some suspects, they organised an identification parade and PW1 was called to identify the assailants. He identified the appellant herein. The identification parade was of no value if the appellant was well known to PW1 as was held in *Ajode VS Republic [2004] KLR 81*. In the same decision, it was held that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. The court further held that before such a parade is conducted a witness should be asked to give the description of the accused and the police should then conduct a fair identification parade.

The purported identification of the appellant by PW1 was therefore unreliable as a basis of founding a conviction. The same can be said of the appellant's identification by PW5, PW6 and PW8. PW5 said that he knew the appellant as he had seen him earlier in the day, that he had bandages on his right cheek. However, he had not given that description to the police. PW6 said that he saw the appellant clearly on the night of the robbery. However, there was no evidence that there was sufficient light. PW6 did not participate in any identification parade. PW8 said that he recognized the appellant as a person whom he knew well yet he did not give that report to the police. It would be unsafe to uphold the appellant's conviction on the basis of identification or even recognition. The robbery was committed at night and the

only source of light in the house of PW1 was a lamp but it had been smashed by the robbers. It is not clear whether there was sufficient light in the house of PW2. The circumstances were not favourable for positive identification.

However, the appellant was found wearing clothes and shoes belonging to PW2, a day after the robbery. The appellant did not give any explanation at all as to how he came into possession of the said items. The principles that govern the circumstances under which an accused person can be convicted on the basis of the doctrine of recent possession are well settled. In a recent decision of the Court of Appeal in *Isaac Nganga Kahiga VS Republic* Criminal Appeal No. 272 of 2005 at Nyeri (unreported), it was held that:-

“It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, 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; that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another. In order to prove possession, there must be acceptable evidence of search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.”

The evidence on record clearly shows that the appellant was found wearing clothes and shoes that had been stolen from PW2 a day after the robbery. He also led the police to the house of PW2. The police recovered some of the stolen items in the vicinity of the house belonging to PW2. The learned trial magistrate was right in convicting the appellant under the doctrine of recent possession. There was sufficient evidence that he was one of the people who robbed the complainants. For this reason, we dismiss this appeal and confirm the conviction and sentence that was passed by the trial court.

DATED at Nakuru this 20th day of December, 2007.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE

Judgment delivered in open court in the presence of the appellant and N/A for the stated.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE