



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**Criminal Appeal No. 276, 277 & 278 of 2002**

**FRANCIS KARIUKI THUKU.....1<sup>ST</sup> APPELLANT**

**PETER MWANGI KAGUTHI.....2<sup>ND</sup> APPELLANT**

**DANIEL WAWERU NJOROGE.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT OF THE COURT**

The appellants were jointly 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 the 9<sup>th</sup> day of May, 2002 at Moto farm in Nakuru District of The Rift Valley Province, they jointly robbed Teresia Wangui Nganga of 65 table clothes, one radio, 4 travelling bags, one shirt, 5 ladies dresses, one wall clock, two trays, 4 wrist watches, one pressure lamp, two compact cassettes and one torch all valued at Kshs.40,800/= and at or immediately before or immediately after such robbery used actual violence to the said lady.

They all denied the charge and after a full trial, they were all convicted and sentenced to death as by law provided. They were aggrieved by the said conviction and sentence and preferred these appeals.

At the commencement of the hearing, the three appeals were consolidated and heard as one and the proceedings were recorded in criminal appeal file No.276 of 2002. Francis Kariuki Thuku who was the second accused before the trial court is the first appellant, Peter Mwangi Kaguthi who was the first accused before the trial court is the second appellant and Daniel Waweru Njoroge who was the 3<sup>rd</sup> accused before the trial court is the 3<sup>rd</sup> appellant. Each of the appellants chose to tender written submissions and were given liberty to reply to the submissions by Mr. Koech, State Counsel.

The appellants raised more or less the same grounds of appeal which can be simply stated as follows:

- That the trial magistrate erred in law and in fact in convicting them when there was no sufficient identification evidence.
- That the learned trial magistrate erred in law and in fact in convicting them on contradictory prosecution evidence.
- That the learned trial magistrate erred in law and in fact in convicting them on evidence of recovery of some of the stolen items.

- That the trial magistrate erred in law by disregarding the appellants' defences.

This being the first appellate court, it is under an obligation to re-examine and re-evaluate the evidence that was tendered before the trial court and analyse the same before reaching its own independent conclusion as was held in **OKENO VS. REPUBLIC [1972] E.A. 32.**

The Prosecution evidence briefly stated was as follows:

The complainant, **Teresia Wangui Nganga (P.W.1)** stated that on 7<sup>th</sup> May, 2002 at about 8.00p.m. she was sleeping in her house and she heard her servant, **Joseph Kariuki (P.W.2)** screaming in the sitting room and she decided to go and check why he was screaming. She saw three people whom she identified as the appellants pushing into the house and beating P.W.2. There was solar light in the sitting room and she said that one of the people had partially covered his face. She was then slapped by one of them and she fell down. The attackers were armed with swords and simis. The attackers also fell P.W.2. They started stealing her clothes and they demanded to be given money or else they would kill her. The second appellant held a knife on the complainant's neck and demanded to be told where the money was and she told them that it was in the sitting room and the 3<sup>rd</sup> appellant went there and took Kshs.9,000/=. They demanded to be given more money and when none was given they stole the various items as were stated in the charge sheet.

P.W.1 reported the matter to the police on the following day. One week later some of the stolen items were recovered from the houses of the three appellants and she was called to identify the items which she did. At the police station she found the appellants having been arrested. She said that she knew the 2<sup>nd</sup> appellant before the robbery as he used to work for one of her neighbours but she did not know the other two although she said that she clearly saw them on the material night. No identification parade was conducted.

The second prosecution witness **Joseph Kariuki (P.W.2)** corroborated the evidence of P.W.1 in all material respects but he said that he could not identify the attackers as he had been forced to lie down.

**P.W.3 Phillip Kirumba** was a shopkeeper in the area where the robbery was committed. He told the court that on 20<sup>th</sup> May, 2002 while he was in his shop, the 1<sup>st</sup> appellant whom he had known prior to that date went to his shop and borrowed him some money. He promised to refund the same and he pledged a radio in guarantee which he left with P.W.3. On 6<sup>th</sup> June, 2002 police officers accompanied by the 3<sup>rd</sup> Appellant when to the shop of P.W.3 and asked him about the radio which had been given to him by the 1<sup>st</sup> appellant. He took them to his house and handed over the radio to them. Thereafter they went to Molo police station where they met P.W.1 who identified the radio as being one of her items which had been stolen. The witness said that he did not know the second and third appellants.

**Peter Mwambi Maina (P.W.4)** testified that on the 5<sup>th</sup> of May, 2002 he was at his place of work when the 2<sup>nd</sup> appellant whom he had known before that date went and borrowed him Kshs.1800/= promising to repay the same on 11<sup>th</sup> May, 2002 but on that date, the second appellant went to see P.W.4 carrying a radio speaker in a paper bag and requested P.W.4 to keep the speaker as security as he had not yet managed to raise the money to refund him. The radio speaker was produced in court as an exhibit. The witness further stated that he even knew the house of the 2<sup>nd</sup> appellant as it was next to his.

On 16<sup>th</sup> May, 2002, P.W.4 was asked by police officers to accompany them to a certain slum area at Molo and he led them to the house of the 2<sup>nd</sup> appellant where they also found the 1<sup>st</sup> appellant. The police recovered there from several items that had been stolen from P.W.1.

**P.W. 6 p.c. Feisal Haji Lumumba** told the court that on 11<sup>th</sup> May, 2002 the complainant (P.W.1) reported that she had been robbed at her home. He then went there with another officer and recorded her statement. On 16<sup>th</sup> May, 2002 P.W.6 received a report that one of the suspects had been seen having in his possession one of the stolen items. He was later led to the house of the 1<sup>st</sup> appellant and they

recovered one speaker, two trays, a wall clock, table clothes, one wrist watch, a torch and three handbags. The witness picked all these items and took them to Molo police station. The following day P.W.1 went to the station and identified the said items as being hers. On 6<sup>th</sup> June, 2002 P.W.6 was informed that the 3<sup>rd</sup> appellant who had disappeared had been arrested. The 3<sup>rd</sup> appellant led P.W.6 to a place where some stolen items were recovered and which were identified by P.W.1 as having been stolen from her house. P.W.7 P.C. Phillip Rakwaru and P.W.8 Caspar Ratemo accompanied P.W.6 when he was making recovery of the said stolen items.

All the appellants gave unsworn statements of defence. The 1<sup>st</sup> appellant said that on the material day, he was at his place of work when the 2<sup>nd</sup> appellant called him and they went to his house and while they were there they were arrested and admitted that some of the stolen items belonging to P.W.1 were recovered from the house of the second appellant and thereafter both of them were taken to the police station.

Later, his house was searched and nothing was found therein.

The 2<sup>nd</sup> appellant said that on the material day he was selling eggs at Molo town upto 8.00p.m. when he went home. The following day at about 1.00p.m. he went to his house with the 1<sup>st</sup> appellant and while they were there some police officers came and arrested them and took them to a police station where they were asked to admit having committed an offence which they did not know anything about.

The 3<sup>rd</sup> appellant said that on 9<sup>th</sup> May, 2002, he was at his house and on the following day he left to go to a place known Mutirithia. On his way, he was stopped by police officers who arrested him and started asking him about a radio. Later they took him to Molo police station and he was charged with the present offence.

The trial magistrate held that P.W.1 knew the 2<sup>nd</sup> appellant well before the date of the robbery and further held that she had sufficiently identified the 1<sup>st</sup> and the 3<sup>rd</sup> appellant as there was sufficient light in the house at the time of the robbery. He further held that although there was no identification parade in respect of the 1<sup>st</sup> and the 3<sup>rd</sup> appellants, the complainant's evidence was corroborated by that of P.W.3, P.W.4, P.W.6 and P.W.8.

Having carefully analysed the above evidence, we are satisfied that the 2<sup>nd</sup> appellant was well known to P.W.1 prior to the date of the robbery and in our view, her identification of the appellant was free from any possibility of mistaken identity as there was sufficient solar light in the house. The second appellant did not even challenge the evidence of P.W.1. P.W.1 also explained the role played by the 2<sup>nd</sup> appellant during the robbery. She said that he stepped on P.W.2 as he lay down. The 2<sup>nd</sup> appellant was also well known to P.W.4 as he had borrowed a sum of Kshs.1,800/= and pledged as security a radio speaker which was one of the items that had been stolen from P.W.1. This was just 3 days after the date of the said robbery. The 2<sup>nd</sup> appellant did not explain how he had acquired that radio speaker. When the police were taken to the house of the 2<sup>nd</sup> appellant, they also found the 1<sup>st</sup> appellant therein and they recovered about ten items which had been stolen from P.W.1. The two appellants can be said to have been in joint possession of stolen items which were found in the house of the 2<sup>nd</sup> appellant.

P.W. 3 was given a radio by the 1<sup>st</sup> appellant as security for some money which he had led him. That radio turned out to be one of the items that had been stolen from P.W.1. The 1<sup>st</sup> appellant did not explain how he acquired that radio. This appellant was also well known to P.W.3. This happened about 11 days from the date of the said robbery.

Regarding the 3<sup>rd</sup> appellant, P.W.8 explained that the 1<sup>st</sup> and 2<sup>nd</sup> appellants led them to the house of the 3<sup>rd</sup> appellant and from the house of the 3<sup>rd</sup> appellant, the police recovered nine table clothes which were identified by the complainant as belonging to her and being some of the items that had been stolen on the material night.

The doctrine of recent possession was well applicable in convicting all the appellants. In **R V LOUGHIN** 35 Cr App R 69, the Lord Chief Justice of England said:-

***‘If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop breaker.’***

This doctrine has been applied in many decisions within our local jurisdiction. In **SAMUEL MUNENE MATU V REPUBLIC** Criminal Appeal No. 108 of 2003 at Nyeri (Unreported), the stolen goods in the matter were recovered 20 days from the date of the robbery. The court stated as follows:

***‘We think that in the particular circumstances of this case the time lag between the date of the recovery and the discovery of the goods was not such that it would be unreasonable to hold that the appellant’s possession thereof on that date was sufficient to found a conclusion that the appellant participated in the robbery. In our view, it can safely be said that the stolen goods were found in the appellant’s possession shortly afterwards.’***

The court went on to reject the appellant’s appeal.

Likewise in this matter, we are satisfied that the fact that the appellants were found in possession of the complainant’s stolen goods shortly after the robbery, in the absence of any reasonable explanation as to how they came into possession of those goods it can be concluded that they were the robbers.

The trial court considered the appellants’ unsworn defences but found them untenable particularly considering that they did not make any mention of the stolen goods that they were found in possession of. We find no merit in each of these appeals and we dismiss them in their entirety.

Dated at Nakuru this 10<sup>th</sup> day of March, 2006

M. KOOME

JUDGE

D. MUSINGA

JUDGE