REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 104, 105, & 106 of 2002

(From original conviction and sentence in Criminal Case No.1249 of 2002 of the Chief Magistrate's Court at Nakuru – J.S. KABURU, SPM)

SAMSON ETYEYENG…….....……..1ST APPELLANT

DAVID MBUGUA…….....…….2ND APPELLANT

JEREMIAH MACHARIA……..…….....…….....3RD APPELLANT

VERSUS

REPUBLIC……....…….....……RESPONDENT

JUDGMENT OF THE COURT

The appellants have appealed against the original conviction and sentence in **CMCC No.1249 of 2001**. In that case the appellants had been charged for the following offences:

Count I: Robbery with violence contrary to Section 296(2) of the Penal Code.

Count II: Burglary and stealing contrary to Section 304(2) and 279(b) of the Penal Code.

The third appellant was also charged for the alternative charge of handling stolen goods contrary to **Section 322(2)** of the **Penal Code**.

The second appellant was also separately charged with the alternative charge of handling stolen goods contrary to **Section 322(2)** of the **Penal Code**. After a full trial, the learned magistrate viz, Mr. J. S. Kabururu (then SPM) found all the appellants "***Guilty"*** of count 1 and sentenced each of them to death. For Count II, the learned magistrate found all the three appellants "***Guilty"*** and sentenced each of them to 3 years imprisonment. He also ordered that each of them to receive 2 strokes of the cane on each count and that the imprisonment was to run concurrently.

During the hearing of the appeal, all the appellants, with leave of the court, opted to hand in written submissions. Since the grounds of appeal by the appellants were similar, we hereby list them briefly.

a) That the learned magistrate erred in law and fact when he was impressed by the mode of arrest which was entrenched with fundamental layers of doubt.

b) That the learned magistrate erred in matters of law and fact by convicting the appellants on insufficient evidence.

c) That the learned magistrate erred in law and fact by invariably putting much reliance on the evidence of the alleged stolen radio (Ex.9) and pouch (Ex.7).

d) That the learned trial magistrate erred in law and fact when he based his conviction on highly contradictory evidence.

e) That the appellants' defence were not intrinsically weighed against the prosecution evidence.

On the other hand, the state through Mr. Koech, State Counsel, supported the convictions and the sentence. According to Mr. Koech, the appellants were convicted under the doctrine of recent possession, immediately after the commission of the offence. Besides the above, Mr. Koech also submitted that the third appellant was arrested at around 1.00 a.m. while ferrying chemicals. He was later reported by administration police officers before the robbery report was made. Subsequently, the third appellant claimed that the chemicals were from Kinoru Farm where the robbery took place. Consequently, the third appellant implicated the first and second appellants as his accomplices and hence they were arrested on the following day. Thereafter, the first appellant was arrested with a stolen radio that was later identified by PW3, Hassan Salah. Mr. Koech also submitted that the second appellant was found with a pouch that belonged to PW3 who later identified the same. He further submitted that the third appellant was arrested just some hours after the offences had been committed. Mr. Koech was of the view that the lower court had properly convicted the appellants and hence the appeals should be dismissed.

This court has carefully considered the above together with the entire record of appeal. Being the first appellate court, we are aware and alive to our duty and obligation to re-evaluate and analyse the evidence afresh before reaching our own independent conclusion. In doing so, we also appreciate the fact that we never had the opportunity to observe the demeanour of the witnesses. See ***OKENO VS REPUBLIC [1972]EA pg 32***. During the trial in the lower court, **PW1, Anthony Barraw** who is a wheat farmer, stated that on 10th June, 2001 while he was in Timau, he received a phone call from his workers that his store had been broken into and chemicals stolen. In response, PW1 reported the matter to Bahati Police Station where he was informed that some chemicals had been recovered. On being shown the said chemicals – Ex.1, 2, 3 & 4, he managed to identify them positively. PW1 estimated the value of the chemicals to be around Kshs.65,000/-. In his evidence, PW2, AP Josiah Kipkoech Mutahi who was attached to Bahati D.O.'s office recalled that on the night of 9th and 10th June, 2001 while on patrol with Corporal, Munge, they received information that some people were seen carrying jerry cans suspiciously. On being led to the house of the third appellant, they found him arranging jerry cans. On enquiring from him, the third appellant stated that he had got the said jerry cans from Kinoru Farm. Later, the third appellant implicated one Samson Mbugua David who was not one of the accused. PW2 also testified that the employees at Kinoru Farm had also identified the chemicals and the briefcase – Ex.5 and the bag Ex.6. Significantly; the owner of the bag stated that there was a pouch inside. When the same was opened, PW2 found a pouch 0 Ex.7. PW2 also stated that they had recovered a radio – ex.9, that belonged to the watchman. The witness further testified that they had recovered the pouch from the second appellant.

In his evidence, **PW3 – Hassan Salah**, who was a watchman at Kinoru Farm, testifed that on 9th June, 2001 at around 11.00 p.m. while he was going around the compound, he saw a group of people who charged at him and he ran away while screaming. Later, PW3 managed to run to the house of Fred Wabwire Kisianani, PW5, and entered the same. Thereafter some robbers came to the door of the house and threatened to kill him using a firearm if he dared to come out. Subsequently, PW3, and PW5 went to the house of PW4 and found that the same had been broken into while the store of Mr. Borrew also suffered a similar fate. Seeing the above, PW3, Abdi and Fred went to the police station and reported the matter. PW3 reckoned that he had seen John Oluoch, a co-accused, on that night. In his evidence, PW4 – Abdi Kuno Hassan, who was a store-keeper at the Kinoru farm, testified that on the night of 9th June, 2001 while he was sleeping, he heard an alarm outside. On coming out of his house, he saw very powerful torch lights and he escaped through the window and hid inside the wheat farm till 12.30 a.m.

On going back to his house, he discovered that the same had been broken into and a brief case bag, radio, pouch and cash Kshs.9,000/- had been stolen. On the next day, PW4 and his co-workers were told by the administration police that they had arrested the first and the second appellants together with another co-accused, John Oluoch Musula, now deceased. Thereafter, the administration police visited the house of the first appellant and recovered a radio, a long torch and a metal club. PW4 recalled that when the second appellant was arrested, he had a pouch on his belt. In his evidence, **PW5. Fred Wabwire Kisinani** who was a tractor driver at Kinoru Farm stated that on the material night, he was in his house at around 11.00 p.m. when he heard an alarm and his door was kicked open. Then he heard somebody threatening that if they made noise, he would deal with them. Subsequently, Abdi went and opened the door and they reported the incident to the police station. Earlier, they had gone to the house of Abdi where they found that some goods had been stolen. On the next day, the administration police informed them that they had recovered some chemicals. PW5 confirmed that in the house of the third appellant, they found the brief case and clothes of Abdi. PW5 also confirmed that the first and the second appellant and the late John Musula had been arrested together. He added that the second appellant had been found with a pouch that belonged to Abdi. Later, in the house of the first appellant they recovered a long torch, Ex.11 and a metal club, Ex.10. Though the court admitted a charge and cautionary statement, we will not refer to the same since the late John Oluoch is not among the appellants. In his medical evidence, **PW8, Dr. Kennedy Kahiga**, recalled that on 19th June, 2001 he examined PW3 – Hassan Salah, who alleged that he had been assaulted by a group of six people. On examining him, he found that the left upper arm had a swelling and tenderness. He was of the view that the probable type of weapon used was a blunt object and that the degree of injury was harm.

In his defence, the 1st appellant viz, Samson Etyeyeng, stated that he was a tractor driver. He recalled how he left home and went to Meru to plough with a tractor. Subsequently, he returned back on a Sunday – at 2.30 p.m. and informed his boss about the work that had been given to him by brokers. Thereafter, the 1st appellant said that he went to Bahati Centre where he was arrested by a policeman who claimed that he had caught up with him at last. According to the 1st appellant, he had earlier fought with that policeman over a barmaid. It was when the 1st appellant was taken to the police station that it was alleged that he was among the suspects who had stolen from a "***mzungu***". In his defence, the 2nd appellant viz, David Mbugua, explained that on 10th June, 2001, he went to his shamba where he worked up to 12.30 p.m. On the way home, the 2nd appellant me Corporal Murage who was accompanied by two women. When they met, they asked him where he had come from. Though the 2nd appellant explained, the group alleged that he had been making chang'aa. Despite the fact that they searched him and never found anything, they still took him to the DO"s office where they locked him up. Subsequently, the 2nd appellant was collected by police officers who took him to Bahati Police Station. In his defence, the third appellant, viz, Jeremiah Macharia, stated that he was engaged in the business of battery charging and repair. The third appellant explained that on 8th June, 2001 he got a customer who wanted to buy old battery cells. On 10th June, 2001, the customer paid for the cells and he went home. On his way home, the third appellant decided to pass through the house of one Mama Wangari who was selling chang'aa. The 3rd appellant ordered for a drink and he saw an old man and a woman. While there, administration police went and arrested him with the old man and they were taken to the D.O."s office. Subsequently, they were collected by police officers and charged.

From the evidence on record, it is crystal clear that none of the above witnesses saw the appellants committing the offences for which they have been charged. It is apparent that the prosecution relied entirely on evidence of recent possession. According to PW2, Josiah Kipkoech, a day after the offences were committed, he together with Corporal Munge went to the house of the third appellant whom they found with the stolen chemicals – Ex.1, 2, 3 & 4. In his defence, the third appellant never gave any explanation at all as how he came into possession of such a large amount of chemicals. After the third appellant was arrested and interrogated, he explained that he was able to carry the chemicals with the assistance of the first and second appellants. On the same day, the 2nd appellant was arrested while in possession of a stolen pouch that belonged to Abdi, the second complainant. The 1st appellant who was arrested in the company of the 2nd appellant later led the administration police to his house. When the house was searched, PW2 and Corporal Munge recovered a radio that belonged to the second

complainant. Apparently, both offences were committed on the same night. In the case of ***MALINGI VS REPUBLIC [1989] KLR 225,*** the court applied the doctrine of recent possession by stating the following:-

"The trial court has the duty to decided whether from the facts and the circumstances of the particular case under consideration the accused person either stole the item or was guilty or innocent receiver. 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 the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person having been in possession of the item. The doctrine being a presumption of 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."

In the case of ***WANDUE VS REPUBLIC [2003]KLR 26 at pg. 29*** the Court of Appeal stated as follows:-

"***The doctrine of possession of recently stolen property could not apply until possession by the appellant was satisfactorily proved."***

Apparently in their appeal, the appellants raised five ground of appeal. We have considered all the said grounds in the light of the evidence on record. Unfortunately, we do not find any merit at all in any of the said grounds. As far as the first ground is concerned, all the appellants were properly arrested within a day after the commission of the offence. As far as the fourth ground is concerned, the prosecution evidence was not contradictory as alleged. Thirdly, it is apparent that the learned magistrate had considered the defence case in his judgment before he reached his conclusion.

In this case, we are satisfied that all the basic principles of recent possession have been met. Having gone through the judgment by the learned magistrate, we are also satisfied that he had analysed the evidence properly and reached the correct decision. We are also satisfied that he imposed a valid and lawful sentence. The upshot is that we hereby reject the appeals since the same have no merits at all. In the same breach, we hereby confirm the death sentence that were imposed on all the appellants. With regard to the jail sentences that were handed down by the trial court as well as the corporal punishment of two strokes for each of the appellants, the same were improper, the appellants having been sentenced to death. We must set aside those subsequent sentences.

Right of appeal explained.

MUGA APONDI

JUDGE

DANIEL MUSINGA

JUDGE

Judgment read, signed and delivered this 13th day of November, 2006 in open court in the presence of Miss Opati for the State and the appellants.

MUGA APONDI

JUDGE