REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 328 of 2003

[*From Original Conviction and Sentence in Criminal Case No. 839 of 2001 of the Principal Magistrate's Court at Nyahururu – Kathoka Ngomo -.P.M*]

DAVID LOTERITOI LOLOMUNYEI …….…..... APPELLANT

VERSUS

REPUBLIC ……..……..……....……..……..….RESPONDENT

JUDGMENT OF THE COURT

The appellant, *David Loteritoi Lolomunyei* was charged together with three other persons, with the offences of robbery with violence contrary to Section 296 (2) of the Penal Code before the Principal Magistrate's Court at Nyahururu. The appellant was among the four (4) accused persons who were charged before the lower court, but after a full trial, the 2nd, 3rd and 4th accused persons were acquitted and the appellant was convicted and sentenced to the mandatory death sentence.

The appellant faced two counts of robbery with violence and the particulars stated that, on the 29th day of March 2001, at 9.00 a.m. at Shade Garden Bar in Rumuruti Division, Laikipia District of the Rift Valley Province, jointly with others not before court, and while being armed with dangerous weapons namely; a firearm and Iron bars, robbed Paul Tairu Kamau, one wrist watch make Asahi, a carton of safari cane vodka, 4 cartons of Popov Vodka, 4 cartons of Richot Vodka, 4 cartons of bond 7 whisky, 5 cartons of Hunters Gin Whisky, one radio make crown star S/No.78603916, 8 bottles of beer, 4 bottles of fanta sodas, one pair of shoes, one leather jacket, one bicycle make explorer all valued at Kshs.31,625/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Paul Thairu Kamau.

The particulars of the second count stated that on the 29th day of March 2001, at 9.00 p.m. at Shade Garden Bar in Rumuruti Division, Laikipia District of the Rift Valley Province, jointly with others not before court, and while being armed with dangerous weapons namely; a firearm and iron bars, robbed Janet Nasimiyu Martin of cash Kshs.835/-, one jacket, two skirts, one T-shirt and one bag all valued at Kshs.3,935/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Janet Nasimiyu Martin.

The appellant also faced an alternative charge of handling stolen goods contrary to Section 322 (2) of the Penal Code and the particulars of the charge were that on the 5th day of April 2001 at Marmanet Trading Centre in Laikipia District of the Rift Valley Province, otherwise than in the course of stealing dishonestly received or detained one bicycle front carrier seat, empty packets of safari Vodka, hunters vodka, one jacket and one T-shirt knowing or having reasons to believe them to be stolen goods.

The appellant was convicted of both counts of robbery with violence and being dissatisfied with the

conviction and sentence, he has appealed to this court. He has raised several grounds of appeal which we summarize here below.

The appellant took issue with the identification by the prosecution witnesses which according to the appellant left a lot to be desired. The appellant challenged the conviction on the grounds that there was insufficient and unsatisfactory evidence by the prosecution witnesses which did not prove the charge against him to the required standard.

The appellant also faulted the trial court for failing to consider his sworn statement of defence which should have entitled him to an acquittal and for failing to follow the provisions of the Criminal Procedure Code especially Section 200.

During the hearing of this appeal, the appellant who was unrepresented applied to present written submissions in addition to oral submissions and he was duly allowed. This appeal was opposed by *Mr Koech*, the learned State Counsel. He supported both the conviction and sentence which he submitted was based on both the evidence of identification of the appellant by the two complainants who were victims of the robberies and recoveries of items that were robbed from the complainants in possession of the appellant. Thus, according to *Mr. Koech*, the conviction was safe and should be sustained.

It is important to set out the brief facts of the evidence that led to the conviction and sentence of the appellant.

On the 29th day of March 2001 at Shade Garden Bar in Rumuruti Division, Laikipia District *Paul Thairu Kamau,* (PW 1) and the owner of the bar who was at the time with *Margaret Nasimiyu* (PW 3), the barmaid were attacked by a gang of robbers. The robbers were armed with a gun, clubs and a knife. They were three of them. They ordered PW 1 and PW 3 to lie down. They ransacked their pockets, and ordered PW 3 to give them money. She showed them where they had kept the daily collection. They took Kshs.500/-. They ransacked PW 1 and took his wristwatch. They then took the spirits from the counter and cigarettes. They took assorted spirits from the store. They took a radio and a jacket belonging to PW 3. They also stole a bicycle belonging to PW 1, a carton of Safari whisky, four of Popov Vodka, four cartons of vodka and Pilsner beers. The matter was reported to the police and after investigations, PW 1 accompanied by police, raided a house at Marmanet where the 1st appellant was found with the bicycle carrier. PW 1 was able to identify the carrier as he had inscribed "K" on the inside. However, they did not recover the bicycle. They also recovered the jacket which belonged to PW 3 and which was one of the items that were stolen. The police also recovered three empty Pilsner beers and found wrappers and boxes of the whiskies and spirits that were stolen from PW 1's premises. The appellant led the police to Marmanet town at a house where a radio belonging to PW 1 was recovered from the 2nd accused in the lower court. PW 1 was able to identify the radio by a mark he had inscribed on it letter "K".

An identification parade was mounted and PW 3 who was also a victim of robbery was able to identify the 1st appellant and her jacket which was recovered from the house of the 1st appellant when he was arrested. Both PW 1 and PW 3 said they were able to identify the appellant with the light from a pressure lamp that illuminated the scene of robbery.

The other evidence that connected the appellant with the offence of robbery was given by Inspector of Police, Hudson Mukundi (PW 4) O.C.S Rumuruti Police Station, Police Constable, Richard Ndiwa Kemei (PW 6) and James Nganga, PW 7 who were the arresting and investigating officers in this matter respectively. They gave evidence of how they arrested and charged the appellant with the offence because they found him in possession of stolen properties.

PW 4 conducted the identification parade where PW 3 identified the appellant.

Put on his defence, the appellant denied having had anything to do with the robberies and alleged that PW 3 was known to him since childhood. He claimed the radio that was taken by the police was his property.

Upon the evaluation of the above evidence, the trial court convicted the appellant. It is important to highlight the findings of the trial court.

"So here is a situation where the 1st accused was seen by two people at the scene of the robbery. It is true that it was at night but it is also true as PW 1, PW 5 and PW 6 testified that the pressure lamp was producing enough light and they had no problems in identifying accused 1. PW 1 said that accused 1 has such distinctive eyes that it is hard to target him. I find this to be true.

Upon arrest he was found in his house with some of the stolen property. These were properly identified by their owners. Accused 1 told the court that was not his house but if that had been so the unidentified informer would not have led the police to that house. He would have led them to his house proper. I find that excuse untruthful and unbelievable.

He even leads the police to accused 2's house where PW 1's radio was. How would he have known it was there if he had not taken it there? Later at an identification parade he is properly and positively identified by PW 5, Jane Nasimiyu. I have no reason to fault the manner the parade was carried out. It was satisfactory and carried out properly and positively."

We have given due consideration to the entire evidence that was adduced before the trial court. This being a first appeal, this court is mandated to re-evaluate and subject the entire evidence to fresh scrutiny and arrive at an independent decision on whether to allow the appeal or not. (*See* case of Okeno vs Republic [1972] E.A 32).

This appeal raises three principle issues for determination. The issue of whether the appellant was identified, whether the appellant was found in possession of stolen items and whether the appellant sworn statement of defence exonerated him from the alleged offence.

On the issue of identification, it is clear from the evidence of PW 1 that he saw the appellant but he did not see the other accused persons. He described him as having very distinctive eye features. The scene of robbery was illuminated by a pressure lamp and a few days later PW 1 identified the appellant to the police where he was arrested and recoveries of the bicycle seat was made. PW 1 clearly identified the bicycle seat. Although this was identified at night, we find the evidence of PW 1 of identification of the appellant to be consistent, clear and cogent, there was light from the pressure lamp and the appellant had distinctive eye features.

Moreover, PW 3 who was also a victim of robbery, identified the appellant at an identification parade but more fundamentally the appellant was found in possession of the items that were stolen from PW 1 and PW 3. The appellant did not offer any explanation as to how the items which had been stolen from PW 1 and PW 3 where found in his possession. We are satisfied that the doctrine of recent possession applies in the circumstances of this case.

In a recent Court of Appeal decision, in the case of Isaac Nganga Kahiga Vs Republic CA Cri. Appeal No. 272 of 2005 (Nyeri) (*unreported*) at page 7

"*It is trite 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 property is positively the property of the complainant; thirdly, 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 as to 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."*

In the present case, all the items that were stolen from PW 1 and PW 3 were positively identified, they were positively found in possession of the appellant, they were positively proven stolen from the

complainants and the possession was recent.

Having considered the evidence on record and the submissions by the appellant and Counsel for the State, we are satisfied that the appellant was convicted on very sound evidence. His conviction on both counts was indeed safe. However, since the appellant was convicted and sentenced for the two counts, the appellant shall serve sentence in respect of only one count. The appeal is on conviction allowed in respect of the second count but the conviction in respect of the first count is confirmed. The appellant's conviction in respect of the first sentence is hereby confirmed. He shall serve the mandatory death sentence.

It is so ordered.

Judgment dated and delivered at Nakuru this 20th day of December 2006.

MARTHA KOOME

JUDGE

L. KIMARU

JUDGE