



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Criminal Appeal 162 & 166 of 2003**

**DAVID KIPSAND MALEL.....1<sup>ST</sup> APPELLANT**

**DAVID KIPRONO SIGEI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants were charged with two counts of robbery contrary to Section 296(1) of the Penal Code. The particulars of the offence in the first count are that on the 4<sup>th</sup> day of October 2002 at Sogoo Trading Centre, Mulot in Narok District within the Rift Valley Province the appellants jointly with others not before court robbed David Korir of Kshs.20,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said David Korir. In the second count the particulars were that on the 4<sup>th</sup> day of October 2002 at Sogoo Trading Centre in Narok District, within the Rift Valley Province, the appellants jointly with others not before court robbed Rose Koech of two dresses, one petty coat, two under pants, one shirt, two loaves of bread, 25 grams of valon baby jelly and two pairs of rubber shoes all valued at Kshs.3000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Rose Koech.

They were convicted and each sentenced to 5 years imprisonment together with 4 strokes of the cane on each count and the custodial sentences were to run concurrently. They were aggrieved by the said conviction and sentence and each appealed against the same.

The prosecution can be summarised as hereunder:-

**PW1, David Korir** testified that on 4/10/02 at 6.00 p.m. he was walking with PW2 from a place known as Olmengeyu to his home at Ngaram area. They arrived at Sogoo shopping centre at about 7.00 p.m. and he did some shopping there. He bought a baby dress, one kilogramme of meat and two loaves of bread. PW2 bought a sweater and then they had supper at white hotel in Sogoo and proceeded with their journey. About 100 metres away from the shopping centre they saw many torches being flashed ahead of them. It was about 7.30 p.m. and PW1 saw about 20 men who confronted them and ordered them to sit down. The men were armed with swords and clubs. He said that the second appellant, David Kiprono Sigei moved to where PW2 was and the rest of the men approached him. The second appellant then left PW2 and joined the other men in ransacking PW1 and they stole some Kshs.20,000/- from him. He said

he had sold two bulls to raise that money. As they were doing that PW2 escaped. It would appear that after they robbed him of that money they left him alone because shortly thereafter they ran and followed PW2 and caught up with her about 40 metres away from the scene of the attack. She told him that the goods that she had were stolen and he also told her about the theft of the money. PW1 said that he was ransacked by the two appellants and said that he identified them by the aid of torch light. He said he was also wearing a jacket that could reflect some light. He said that prior to that incident he knew the second appellant very well because they were schooling together between 1980 and 1986 at Mogoiyot Primary School. He was therefore able to recognise him. He said that the first appellant was a stranger to him. PW1 and PW2 went home and on the following day they reported the case to Mulot Police station. He told the police that one of their assailants was the second defendant who was a driver operating within Mulot. The police asked PW1 to help in tracing him and after a few days he saw the second appellant in a vehicle and went and called the police who arrested him and took him to the police station. The police searched him and found Kshs.2600/- in his pockets.

In, cross-examined, PW1 confirmed that he knew the second appellant very well and he even talked to him during the robbery incident. He further stated that the second appellant had a sword and the first appellant had a rungu.

**PW2, Rose Koech**, stated that she had carried some clothes in a paper bag and they included two shirts, one petty coat, two pants and valon jelly. At the shopping centre she bought a sweater and two loaves of bread. She further stated that after supper in a hotel as they walked with PW1 some people directed torch light at them from the front and they were ordered to sit down and they stood in shock. She was then held by the chest but was soon thereafter released and as the assailants held PW1 she ran away, but the assailants had already stolen her belongings. She said that they were taken by the second appellant and further stated that she was able to see him because of the torch light that was on. She saw that he wore a red jacket. She said that she was also able to identify the first appellant because of the torch light. After they reported the matter at Mulot Police station, she was called a few days thereafter and she identified her stolen goods which she said had been recovered from the second appellant.

**PW3** was a cook at Sunshine Hotel in Sagoo shopping centre and he knew the appellants and PW1. On 4.10.02, PW3 and PW4 were walking home from the hotel when they found PW1 and PW2 being held by a group of people and PW3 recognized the appellants among the group and even spoke to them. He asked the second appellant what he was doing but he told him that it was not his business to know. PW3 and PW4 proceeded on but later got to know what had happened and they recorded a statement at the police station. PW4 corroborated the evidence of PW3. He said that they could not assist PW1 and PW2 because their assailants were many and were armed with knives and rungu.

**PW7**, a police officer, told the court that after the second appellant was arrested, he led them to his house where all the items stolen from PW2 except a pair of shoes and a shirt were recovered. The witness said that he was given the name of the first appellant as a suspect. **PW8**, the Chief of Sogoo Location testified that on 6.11.02 PW2 went to see him on instructions of the OCS Mulot and she alleged that the first appellant was a suspect in the robbery case. PW8 summoned the first appellant and when he was interviewed in the presence of PW2 he said that he found the second appellant and PW2 arguing as he went home. The first appellant was then arrested by the police.

The appellants gave sworn statements of defence. The first one denied having committed the offences as charged with and stated that on 4.10.02 as he was going home at about 7.15p.m, he found the second appellant together with PW1 and PW2 talking somewhere near Sogoo shopping centre. He said he was with three men; Julius, Bernard and William. He heard about the robbery incident the following day. He also learnt that the second appellant had been arrested.

He said he was later arrested and PW8 wanted to force him to admit having committed the offence but he refused. He said that he knew the second appellant and also PW1. In cross examination, he said that one of the men he was with, Bernard, was the one who took the clothes that belonged to PW2 to the second appellant's house.

The second appellant also denied the charges. He alleged that he knew PW2 before 4.10.2002 and on that day he met her at Sagoo shopping centre and she told him that she was looking for a place to sleep as it was late and could not reach Olbutio where she was going to see a sick relative. He said that she agreed to spend the night at his house but after he left to go and off load some diesel, he went back to the hotel where they had met and found that she had left and actually he found her with PW1 and they began to quarrel over her and some people from Travellers Hotel heard. He then said a group of people came from behind them as he was talking to PW2 and then he retreated to join them and PW2 escaped. He said the group of people was with PW1, one Benard, Richard and the first appellant. He said nothing else happened. The second appellant further testified that the following day he met PW1 who asked him about PW2 and the second appellant told PW1 that PW4 and the first appellant had taken the clothes of PW2 to his house and they told him they found the paper bag that contained the clothes in the scene of the quarrel. PW1 then showed in the scene of the quarrel. PW1 then showed the second appellant to the police and he was arrested. He confirmed he took the police to his house where they recovered most of the items stolen from PW2. He also confirmed that they were in the same school with PW1.

The appellants argued through their Counsel, Mr Kilel that there was no sufficient evidence to sustain a conviction. The issue of identification of the appellants and recovery of PW2's items was also raised. The complainants testified very clearly how they were robbed by the appellants together with others who were not before the court. Their evidence agreed in all material respects. It was proved that both appellants were at the scene of the robbery on the material night. Both appellants did not dispute that, what they denied was that they robbed the complainants as stated in the charge sheet. The issue of identification and/or recognition of the second appellant does not arise at all as the appellant was well known to PW1 and the two talked to each other at the time of the robbery. There was therefore no possibility of mistaken identity and PW1 promptly reported to the police that the second appellant together with others had robbed them. When the second appellant was arrested and interrogated by the police he readily admitted that he had been with the complainants the previous night but alleged that he quarreled with PW1 over PW2 and the latter fled as the two disputed over her. However, the stolen items belonging to PW2 were found in the second appellant's house and he did not dispute that. The explanation that he had for that was that the first appellant and PW4 were the ones who collected the paper bag from the scene and took it to him so that he could forward it to her. That explanation is ludicrous.

The doctrine of recent possession as was well stated in REPUBLIC VS LOUGHIN 35 CO.APP R.69 is truly applicable in this case – in that case, 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.”***

The Court of Appeal in MATU VS REPUBLIC [2004] K.L.R 510 applied the said doctrine in rejecting an appeal where the appellant was found in possession of goods which had recently been stolen the complainant and the appellant could not offer any acceptable explanation of how he had come by the property.

In this present matter, the goods stolen from PW2 were recovered from the house of the second appellant the following day and that was not denied by the second appellant. The second appellant said that the first appellant and PW4 were the ones who took the said items to his house. In turn, the first appellant said that a man by the name Benard (PW4) whom they were with at the scene of the crime was the one who took the stolen items to the house of the second appellant.

The explanation given by the appellants was that the clothes had been collected from the scene and they were being given to him so that he could deliver them to PW2. That was obviously not true, PW2 testified that she had been robbed of her belongings. In any event, the second appellant had not made any effort to hand over the said items to PW2, assuming their explanation was true.

All in all, I am satisfied that the appellants' conviction was proper and the sentence that was handed down

to them was appropriate.

The appeal is without any merit and I dismiss the same and confirm the conviction and sentence pronounced by the trial court.

**DATED, SIGNED & DELIVERED at Nakuru this 31<sup>st</sup> day of March, 2005.**

**D. MUSINGA**

**JUDGE**

**31/3/2005**

**Judgment delivered in open court in the presence of Mr. Gumo, Assistant Deputy Public Prosecutor and N/A for the appellant.**

**D. MUSINGA**

**JUDGE**

**31/3/2005**