



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL DIVISION**

**CRIMINAL APPEAL 286 OF 2002**

**DAVID KIBET BIRIR.....1ST APPELLANT**

**JAMES KIPYEGON KOSKEI.....2ND APPELLANT**

**FRANCIS KIBOR CHEPKWONY.....3RD APPELLANT**

**JOEL KOSKEI.....4TH APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

The appellants, David Kibet Birir, David Kipyegon Koskei, Francis Kibor Chepkwony and Joel Koskei were charged with four offences under the Penal Code. They were charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the first count were that on the night of 14th April 2002, at Londiani Farmers in Kericho District, the appellants while armed with dangerous weapons namely pangas jointly robbed Daniel Kamau Ngaruiya of one TV set make Great Wall, one solar battery and one bicycle make Hero Jet and at or immediately before or immediately after the time of such robbery used personal violence to the said Daniel Kamau Ngaruiya.

The appellants were alternatively charged with handling stolen property contrary to Section 322(2) of the Penal Code. The particulars were that on the 8th of June 2002, at Kapsirichet Farm, Londiani, Kericho District the appellants, were found in possession of one TV set, one solar battery and one bicycle in circumstances that suggested they knew it was stolen property. The particulars of the second count of robbery with violence were that on the 22nd April 2002 at Kahurura village, Kericho District, while armed with dangerous weapons namely pangas jointly robbed Ruth Wanjiku Chege of several items listed in the charge sheet all valued at Kshs 25,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Ruth Wanjiru Chege.

The appellants were alternatively charged with handling stolen property contrary to Section 322(2) of the Penal Code. The particulars were that on the 8th of June 2002 at Kapoenda Farm, Kericho District, the appellants were found in possession of the items stolen from the house of Ruth Wanjiru Chege. When the appellants were arraigned before the trial magistrate's court, they pleaded not guilty to all the four charges facing them. After a full trial, the appellants were convicted on the main charge of robbery with violence on the second count. They were sentenced to the mandatory death sentence as prescribed by the law. The appellants were aggrieved by their conviction and sentence and have appealed to this court against both the said conviction and sentence.

In their Petitions of Appeal, the appellants have raised basically three issues faulting the decision of the trial magistrate in convicting them for the offence charged. The first issue relates to identification at the scene of crime. The appellants were aggrieved that the trial magistrate had relied on the evidence of a sole identifying witness to convict them especially putting into consideration the fact that the said alleged identifications were made in circumstances which were difficult and thus not conducive to positive identification.

The second issue related to the recovery of the properties which were allegedly stolen from the two complainants. The appellants were aggrieved that they had been convicted based on the evidence that they were found in possession of the said properties of the complainants yet the prosecution failed to establish that the said properties were found in their exclusive possession. Finally, the appellants were aggrieved that the trial magistrate had not considered the evidence offered in their defence before arriving at the said decision convicting them. At the hearing of the appeal, the four separate appeals filed by the appellants were consolidated and heard as one. The 1st appellant, with the leave of court, presented written submissions in support of his appeal.

The 2nd, 3rd and 4th appellants presented oral submissions urging this court to allow their appeals. All the appellants argued that the prosecution had not established the charge of robbery with violence against them to the required standard of proof of beyond reasonable doubt. On his part, Mr Gumo, the Assistant Deputy Public Prosecutor supported the conviction and the sentence imposed by the trial magistrate. He urged the court to uphold the conviction of the appellants by the trial magistrate as the said convictions were based on the evidence of recent possession. Mr Gumo submitted that the items which were robbed of the complainants were recovered from the appellants soon after the said robbery and therefore the appellants were presumed to have stolen the said items from the said complainants.

We have carefully considered the submissions made. Before we give the reasons for our decision, we shall set out the facts of this case, albeit briefly. On the 22nd of April 2002, while Ruth Wanjiku Chege (PW1) was asleep in her house with her two children, she heard the dogs barking. Immediately thereafter a stone was smashed through the window. When PW1 went to investigate, a torchlight beam was directed at her face. She was ordered not to scream. One robber entered the house through the window and opened the door for the others. One robber remained outside.

The robbers ransacked the house and stole several items including clothes, shoes, two wall clocks, one wrist watch, a hammer, 2 torches, steel wool, 1kg salt, 2kg beans, 4 packets of sunflower seeds, table clothes, a sweater, a TV set, radio cassette and a jacket. PW1 testified that although it was the first time for her to see the appellants during the night of the robbery, she was positive that she had identified the appellants. She testified that she was able to identify the appellants by the light emitted by the lamp which she had put on when the robbers entered her house.

Although no identification parade was held, PW1 testified that she was able to identify the appellants when she saw them at the dock during her testimony before court. PW1 testified that at the time of the robbery the appellants were armed with pangas, bows and arrows. She recalled that the 3rd appellant even attempted to rape her but was prevented from doing so when her son ran to the neighbour's house and raised alarm. PW1 was later summoned to the police station where she was able to positively identify the items which were recovered by the police from the appellants. The said items were produced as exhibits by the prosecution.

PW2 Daniel Kamau Ngaruiya testified that on the 15th of April 2002 at about midnight, robbers broke into his house and stole from him his TV set, solar battery, a bicycle and Kshs 2,600/=. They also stole from him clothes and three sheep. As it was dark, PW2 was not able to identify his assailants. He further testified that he was unable to identify the robbers because during the robbery powerful torchlight were directed at him. Later he was called at the police station where he was able to identify his TV set, solar battery and the bicycle which was robbed from him on the material night of the robbery. The said recovered items were produced by the prosecution in evidence as exhibits.

PW3 Gabriel Rono Birir, the Senior Chief of Kipsichichet location, Londiani Division testified that he

had received information from an informer that a sheep which had been stolen had been seen with one of the appellants. He went to the 1st appellant's house on the 7th of June 2002 and was able to recover a Great Wall TV set and a solar battery. He recovered a sheep from the house of the 2nd appellant. He recovered a bicycle, a radio cassette and table clothes from the house of the 4th appellant. Some more clothes were recovered from the house of the 2nd appellant.

PW3 also recovered a handbag, a long trouser and a jacket from the house of the 3rd appellant. PW3 reiterated that he had recovered the TV set from a maize field near the house of the 1st appellant after undertaking a search the whole night. He further recalled that the clothes and a sheep were recovered from the house of the 2nd appellant. He testified that when the 3rd appellant was arrested, he was wearing a trouser which was identified by one of the complainants as the trouser which was stolen during the night of the robbery.

PW4 Police Constable Osman Mohamed Adam testified that on various dates between the 8th and the 15th of June 2002, PW3 assisted by the Administration Police arrested and took the appellants to the police station. PW4 booked the appellants and received the items which were recovered from the possession of the appellants. PW4 testified that the said items recovered from the appellants were positively identified by the two complainants in this case. PW4 produced the recovered items as exhibit in the case.

He charged the appellants with the offences which they were convicted. When the appellants were put on their defence, they denied involvement in the robberies which they were charged with. Other than narrating the circumstances of their arrest, the appellants said nothing in connection with the robbery. They denied that the properties which were recovered and produced in evidence by the prosecution were recovered in their possession. This is a first appeal. The duty of the first appellate court in criminal cases was restated in the case of Charles Mwita –vs- Republic, C. A. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, held that;

“In *Okeno v R* [1972]E.A. 32 at page 36 the predecessor of this Court stated:- “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya –v- R* [1957]EA. 336) and to the appellate court's own decision on the evidence.

The first appellate court must itself weigh conflicting evidence and draw its own conclusions, (*Shantilal M. Ruwala –v- R* [1957]EA 570) it is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E.A. 424.”

The above sets out the duty of the first appellate court. We are of the view that it is upon the first appellate court to carry out that duty by actually re-evaluating the evidence. It is not enough for the first appellate court to merely state that it has re-evaluated the evidence. Indeed, in *Gabriel Njoroge v. Republic* [1988-85]1 KAR 1134, at page 1136 this Court said:-

“As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see *Pandya v. R.* [1957] E.A 336, *Ruwala v. R* [1957] E.A. 570). If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly misdirections and non-directions on material points are matters of law.”

We heard considered the evidence which was adduced by the prosecution in this case. We have also considered the defence offered by the appellants. We have further considered the submissions made by the appellants and that made by Mr Gumo on behalf of the State. The issue for determination by this court

is whether the prosecution established beyond any reasonable doubt that the appellants robbed the complainants of the items stated in the charge sheet and in the course of the said robbery used violence against the said complainants.

Having re-evaluated the evidence, we found that the prosecution relied on basically two pieces of evidence in support of the charge of robbery with violence against the appellants. The first piece of evidence is that of identification by the 1st complainant (PW1), while the second piece of evidence is that of the recovery of the stolen items from the possession of the appellants. As regard the evidence of identification, PW1 testified that she was able to identify the appellants by the light of the lamp which she had put on when the appellants broke into and entered her house at night. Although PW1 testifies that she had not known the appellants prior to the robbery incident, she is positive that she was able to identify the four appellants during the period that she endured the robbery ordeal, including an attempted rape by one of the robbers.

PW1 testified that she saw the appellants for the first time during the night of the robbery. She further testified that the robbers had torches which they used to identify PW1's properties which they later took with them. She did not tell the court how she was able to identify the appellants. She did not give the description of the robbers and the clothing that they were wearing on the night of the robbery. No identification parade was held. When the appellants were arrested PW1, identified the appellants as the ones who robbed her when she was called at the police station to identify the recovered items. She later identified the appellants at the dock during the trial before the magistrate's court. Was this identification sufficient to convict the appellants for the charge of robbery with violence? We do not think so. The circumstances under which the said identifications were made were not conducive for positive identification. It was at night. The source of the light could not have enabled the 1st complainant to be certain about her identification of the appellants considering the fact that it was the first time that she alleges to have seen them. This fact, taken together with the hectic circumstances of the night of the robbery precludes this court from finding that the 1st complainant positively identified the appellants.

Further, it is trite law that an identification made at the scene of a crime is useless, unless the said identification is confirmed by an identification parade held by the police. In *Kiarie –versus- Republic* [1984] KLR 739 at page 744, the Court of Appeal held that an identification made in court by a complainant (i.e. dock identification) is almost worthless without an earlier identification parade. After reevaluating the evidence on record, we discount this evidence of identification. The appellants were not properly identified. It would be unsafe to convict the appellants based on PW1's evidence on identification.

As regard the second limb of the evidence relied on by the prosecution, (that of the application of the doctrine of recent possession), the prosecution adduced evidence to the effect that the properties which were robbed from the two complainants were recovered in the possession of the appellants. It was the prosecution's case that due to the fact that the said items were recovered from the appellants so soon after the robbery, then the appellants were presumed to have robbed the complainants. What are the applicable circumstances of the doctrine of recent possession? *Bosire J* (as he was then) held in *Malingi –v- Republic* [1989] KLR 225 at page 227 that:

“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 the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been 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.” This decision was cited with approval by the Court of Appeal in the recent case of *Joshua Otieno Dala –versus- Republic* C. A. Cri. Appeal No. 133 of 2002 (Nairobi) (unreported).

In Maina & 3 others –v- Republic [1986]KLR 301, the Court of Appeal held at page 306 that the doctrine of recent possession could not be applied in a case where a pistol was found in possession of the appellant two and a half months after the robbery. The court stated that; “The time lag between the date of the theft and the discovery of the pistol was so much that it would be unreasonable to hold that the mere possession of the pistol on this date is sufficient to found a conclusion that the appellant participated in the robbery.”

What is the prosecution’s evidence in support of its quest to have the doctrine of recent possession applied in this case? PW1 and PW2, the complainants in this case were robbed on the 15th of April 2002 and the 22nd of April 2002 respectively. Certain properties which were robbed from them were alleged to have been recovered from the possession of the appellants between the 8th of June 2002 and the 15th of June 2002. This was approximately seven weeks after the robbery committed at the homes of PW1 and PW2. PW3 testified that whilst some items were recovered in the house of PW4 and PW3, most of the items were recovered in a maize plantation outside the house of the 1st appellant. What the prosecution is stating is that the 1st appellant was in constructive possession of the said items which were stolen from the complainants.

Upon careful re-evaluation of this evidence we do not agree with the prosecution’s case that the appellants were in recent possession of the said properties so as to connect them with the robbery which took place seven weeks prior to the recovery of the items in possession of the appellants. The said items recovered from the possession of the appellants cannot be said to have been recovered in their possession so soon after the said robbery. As was stated by the Court of Appeal in Maina’s case (supra), soon has to be considered as the time approximate and close to when the robbery was committed.

In the circumstances of this case, although there is strong suspicion that the appellants could have participated in the robbery, the circumstances of this case excludes the application of the doctrine of recent possession. The time lapse is too great to enable this court, in good conscious, to apply the said doctrine of recent possession. We therefore hold that the prosecution failed to prove, to the required standard of beyond reasonable doubt, that it is the appellants who robbed the two complainants. We therefore allow the appeals filed by the appellants against their conviction of robbery with violence. We consequently quash their convictions and set aside the sentences imposed.

However we are not prepared to let the appellants go scot free. Having reevaluated the evidence on record, we do find that the prosecution did establish to the required standard that the appellants were found in possession of the properties of the complainants in circumstances that suggested they were aware that the said properties were either stolen or dishonestly received or obtained. The prosecution established that all the appellants were found handling properties belonging to the complainants which they knew to be stolen property.

We therefore convict each of the appellants for the two alternative charges of handling stolen property under Section 322(2) of the Penal Code. Considering the circumstances of this case, we hold that a custodial sentence is called for the offences which the appellants have been convicted. Each of the appellants is therefore ordered to serve seven (7) years imprisonment on each of the two counts. The said sentences are ordered to run concurrently with effect from the 13th of September 2002 when the appellants were convicted by the trial magistrate. It is so ordered.

**DATED at NAKURU this 14th day of July 2005.**

**DANIEL MUSINGA**

**JUDGE**

**L. KIMARU**

**JUDGE**

