



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL CASE NO. 287 OF 2001**

BOKI BOKI RETI .....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

**J U D G E M E N T**

Boki Boki Reti hereinafter referred to as the Appellant was tried and convicted by the Principal Magistrate Isiolo for the offence of Robbery with violence contrary to Section 296(2) of the penal Code.

The particulars of the charge were that on the 28th day of October, 2000 at L.M.D village in Isiolo, with others not before the court, whilst armed with rifles, they robbed Joshua Thiane of a jacket, shirt, belt a pair of shoes, pair of socks and a wallet containing Ksh.200/- all valued at Ksh.2,600 and at or immediately before or after the time of such robbery used personal violence to the said Joshua Thiane.

The appellant was also charged in the alternative with handling suspected stolen goods contrary to Section 322(2) of the Penal Code in respect of which court no finding was made since he was convicted of the main charge.

In proof of the prosecution case 6 witnesses testified before the trial Magistrate. Their evidence was briefly as follows:-

On 28th October 2000 the Complainant Joshua Thiane (P.W.1) and Boniface Kaberia (P.W.2) both of whom work as loaders in lorries fetching sand, loaded sand in an Isuzu lorry Registration NO. KYB 562. The lorry was being driven by Mwangi Gatuta (P.W. 4) As they were leaving the riverbed a group of 6 men armed with guns accosted them, stopped the vehicle and ordered them to alight. The six men who were in police uniform then forced the complainant and his colleagues to strip naked and they took their clothing's and items. They thereafter ordered complainant and his colleague to go away. The complainant however, pleaded with the robbers and they returned back to complainant his trousers, the trouser P.W.4 as well as his keys and ID card. Among the items that were taken away from the complainant by the robbers were his jacket, belt shoes, wallet and Ksh.200/-

On 10th March, 2001 P.W.2 was at the market when he saw the Appellant and recognized him as one of the 6 men who had robbed them on 28th October, 2000. P.W.2 also notice that appellant was wearing a jacket which he identified as that of the complainant. P.W.2 alerted the complainant and P.W.5 Nelson Mworira who sought assistance from P.C. George Mwara (P.W.6). P.W.6 arrested the Appellant and handled him over to P.C. Patrick Karobia 9P.W.3 who caused the appellant to be charged.

In his defence the Appellant explained how he was arrested when complainant claimed the jacket he was wearing was his.

The trial magistrate having considered the evidence found that the Appellant was positively identified as one of the persons who had participated in the robbery. He therefore convicted the Appellant of the main charge and sentenced him to the mandatory death sentence thereby giving rise to this appeal.

At the hearing of this appeal, it was conceded by learned state counsel that the trial in the lower court was a nullity as it was conducted by a Police Constable contrary to Section 85(2) of the Criminal Procedure Code which provides for police prosecutors not to be below the rank of Assistant Inspector. Learned State Counsel Mr. Muteti urged us to order a retrial. He maintained that the offence against the Appellant was serious particularly since guns were used and offence was committed in Isiolo where insecurity is prevalent. He further submitted that the evidence against the Appellant was overwhelming.

It is evident that the trial in the lower court having been a nullity the appellant's conviction cannot stand and this appeal must succeed. The issue that remains for determination is whether a retrial should be ordered as proposed by learned State Counsel.

The principle upon which an order for a retrial may be granted was stated in the case of Fatehali Manji VS Republic (1966) EA 343 as follows:-

**“In general a retrial will be ordered only when the original trial was illegal or defective.....even where a conviction is initiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interest of justice require it.**

In the instance case it has been submitted that the evidence adduced in the lower court against the Appellant was overwhelming such that it would be prejudicial to security to allow him to go free. We have re-considered and re-evaluated the evidence that was adduced in the lower court. We find that the issue of identification was not properly settled. There was no evidence that the prosecution witnesses gave an initial report implicating the Appellant nor was there any evidence of a description of the Appellant or any there any evidence of a description of the Appellant or any of the other robbers given by the witnesses prior to the Appellant's arrest. Although the offence took place during the day and the complainant had the opportunity to see his assailants, given the fact that the men were 6 and these were people he was seeing for the first time, and the fact that there was a 4 ½ month lapse between the commission of the offence and the arrest of the appellant, the possibility of a genuine mistaken identification cannot be ruled out. P.W.2 purported to have identified the Appellant as one of the robbers and alerted P.W.1 and 5. It is evident however, that the focus of the witnesses was on recognition of the jacket belonging to the complainant and it is the Appellant's possession of this jacket that led to his identification and arrest as one of the robbers. What nailed the Appellant was therefore his possession of the jacket. Nevertheless the Appellant was found in possession of the jacket about 4 ½ months after the robbery. Had the trial magistrate considered the doctrine of recent possession he would probably have found that a jacket is not an item that would be difficult to dispose off. A possessor of such a jacket 4 ½ months after the robbery was not likely to be a robber or thief but either a handler of stolen item or an innocent recipient. The appellant's possession of the jacket was not thus sufficient to provide corroboration to the witnesses purported identification of the Appellant's as one of the robbers.

Moreover, the alternative charge against the Appellant was handling “suspected” stolen goods contrary to Section 322(2) of the Penal Code. Obviously no such a charge exists in the Penal Code and the alternative charge was therefore defective as it was a “hybrid” of the offence of handling stolen goods contrary to Section 322(2) of the Penal Code and that of Being in possession of suspected stolen property contrary to Section 323 of the Penal code. No proper conviction could therefore have been arrived at on the alternative charge.

The case against the Appellant was therefore not watertight nor the evidence so overwhelming as to justify a retrial.

Secondly, the offence was allegedly committed about 3 ½ years ago. The appellant has been in custody

for about 3 years. Notwithstanding the gravity of the charge we are of the considered view that the circumstances of this case are such that an order for a retrial would not meet the ends of justice. We therefore refuse to order a retrial would not meet the ends of justice. We therefore shot of the above is that we do allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set free unless otherwise lawfully held.

Dated, signed and delivered this 20thDay of February, 2004

**D.A. ONYANCHA**

**J U D G E.**

**H. OKWENGU**

**J U D G E.**