



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: MAJANJA J.**

**CRIMINAL APPEAL NO. 73 OF 2017**

**DENNIS KIRUI KIPKOECH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from the original conviction and sentence of Hon. R.M Oanda – PM dated 15<sup>th</sup> September 2017 at the Principal Magistrate’s Court at Kilgoris in Criminal Case No. 1268 of 2015)***

**JUDGMENT**

1. The appellant, DENNIS KIRUI KIPKOECH, was charged alongside his co-accused with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code (Chapter 63 of the Laws of Kenya). The particulars of the offence were that;

*On the night of 19<sup>th</sup> and 20<sup>th</sup> day of July 2015 at Kimintet Location in Trans Mara West District within Narok County, jointly with others not before court while armed with dangerous weapons namely Maasai swords, metal bars and beer bottles robbed Geoffrey Kaleke Kamoye of his Kshs. 7,500/=, solar panel, radio make Sontec, mobile make Techno, a Somali sword, ten fireworks, padlock, a binocular, power bank and assorted shop goods all valued at Kshs. 41,700/= and immediately before or immediately after the time of such robbery used actual violence to the said Geoffrey Kaleke Kamoye.*

2. The co-accused jumped bail during the trial leaving the appellant to face the charges alone. He was convicted and sentenced to death. He now appeals against conviction and sentence. The State has conceded the appeal on the ground that the items found as a result of the robbery were not connected to the appellant in any way.

3. The testimony of the complainant, Geoffrey Kamoye Kaleke (PW 1) is that he was attacked on the night of 20<sup>th</sup> July 2015. He did not see or identify the attackers. Nevertheless they injured him and stole Kshs. 7,500/= cash, mobile phones and a power bank, a Somali sword, ten pieces of fireworks, a padlock and assorted goods. He was taken to the hospital having sustained injuries including a cut on his right thumb and soft tissue injuries on the face, head and chest. Those were confirmed by Samuel Sankey Jasur, PW 6, a clinical officer at Transmara Hospital who filled and produced the P3 medical report.

4. The robbery was not in dispute. What was contested is whether the complainant’s items were recovered from the suspects to satisfy the doctrine of recent possession. In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic Criminal Appeal No. 272 of 2005*** the Court of Appeal held;

*It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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 the 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 the other.*

5. PW 1 identified his Somali sword, four pieces of fireworks and a padlock and key as the items that were stolen from him when he was called to the AP Camp on 7<sup>th</sup> September 2015 to identify them. PW 1 told the court in cross examination that he was informed that the fireworks were recovered from the appellant.

6. Joseph Kimutai, PW 3, who attended to the AP’s office after the items recovered, recalled that it is the co-accused who identified the knife as belonging to him. The local chief, David Mugun, PW 4, stated that it is only the co-accused house that was searched but that he mentioned the appellant as an accomplice. APC Rob Kibet Jamal, PW 5, who conducted a search of the co-accused home, testified that the co-accused was found with the Somali sword, fireworks and padlocks in his house. In cross examination, he stated that the co-accused is the

one who mentioned the appellant's name and when they searched his house nothing was recovered therefrom.

7. The investigating officer, PC Benson Chirchir, PW 7, gave an account of investigation and in cross examination he stated that the appellant agreed that he participated in the robbery but refused to record a confession.

8. Having considered the evidence, I agree with counsel for the State that nothing was recovered from the appellant or his house to connect him with the robbery. PW 5, who conducted a search of the appellant's house, did not recover anything. The only evidence implicating the appellant were hearsay statements of his co-accused to PW 4 and PW 5 and an inadmissible confession to PW 7. The appellant ought not have been put on his defence as the element of possession was not proved as stated by the trial magistrate and there was no other evidence implicating him. In short, doctrine of recent possession was not established as a basis for conviction.

9. I allow the appeal. I quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

**Dated and delivered at Kisii this 5<sup>th</sup> day of October, 2018.**

**D.S MAJANJA**

**JUDGE**

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.

Appellant in person.