



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 57 OF 2016 "A"**

**JOSHUA NYALUMBA ORUKO.....APELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An Appeal from the Judgment of the Senior Principal Magistrate Honourable C. Obulutsa in Eldoret Criminal Case No. 2038 of 2014 dated 28<sup>th</sup> August, 2016)***

**JUDGMENT**

*JOSHUA NYALUMBA ORUKO*, the appellant herein was charged in the lower court jointly with another who was eventually acquitted, with two offences of Robbery with violence, contrary to *Section 296(2)* of the *Penal Code*.

The particulars of the offence in the first count are that on the 16<sup>th</sup> day of April 2014 at Kapsoya Estate, in Uasin Gishu County, the accused jointly with others not before court while armed with offensive weapons namely Iron bars, axe, swords and stones, robbed *Magdaline Wamukoya* of her 21 inch LG TV, Sony Radio Mini Hi-fi, one speaker, remote control, carpet and 15 Kgs Africas gas cylinder and cash KShs. 600/- all valued at KShs. 86,600/- the property of *Magdaline Wamukoya* and immediately before the time of such robbery threatened to use actual violence to the said *Magdaline Wamukoya*.

The particulars of the offensive in the 2<sup>nd</sup> count are that on the 16<sup>th</sup> day of April 2014 at Kenya Service village, in Uasin-Gishu County, the appellant jointly with others not before court, while being armed with offensive weapons namely stones, Iron bars, swords and an axe, robbed *Leah Wamaitha Kimani* of her 32 inch Sony TV, 3CD Changer Radio make Philips, two speakers make Philips, 15 kgs gas cylinder from BOC company and a Nokia mobile phone, all valued at KShs. 76,000/-, the property of *Leah Wamaitha Kimani* and immediately before the time of such robbery threatened to use actual violence to the said *Leah Wamaitha Kimani*.

The appellant herein, alone, faced an alternative count of handling stolen goods, contrary to *Section 322(1)* as read with *Section 322(2)* of the *Penal Code*.

The particulars of this offence are that on the 16<sup>th</sup> day of April, 2014 at Kenya Service village in Uasin-Gishu County, the appellant otherwise than in the course of stealing, dishonestly retained one 32-inch TV, make Sony and two speakers, make Philips, having reasons to believe them to be stolen goods.

Initially the appellant herein was charged together with another called *Daniel Gitau Wanjiru*, who was the 2<sup>nd</sup> accused person in the case and who was eventually acquitted of the offences for lack of enough evidence.

The proceedings of 9<sup>th</sup> October, 2015 marks the hearing of the case De-Novo as was earlier on ordered by the court. Adan Ibrahim was therefore PW-1 and not PW-2 as indicated in the proceedings. The prosecution case is that *Leah Wamaitha*, the complainant in count number 2, was on 16<sup>th</sup> April, 2014 at night asleep in her house at Kapsoya, near Kenya Service, Wareng. She was woken up by a loud bang on her home door. When she woke up she saw light in the house and thought it was her girl *Njeri*. She asked if it was *Njeri* and three people appeared. They said they were armed to kill her. She pleaded with them not to. One had already started beating her. They had an axe, crowbar and pangas. They took her TV, Speaker, radio and phone. She screamed and they left behind the gas cylinder and radio as they fled. Neighbours were woken by the screams and pursued the assailants.

That very same night PW-1 was on patrol at Kapsoya at 2 a.m. He was with some other police officers. They were called by their boss and informed of a robbery which had taken place at Kapsoya near Kapsoya secondary. PW-1 called PW-2 to accompany him to the scene. PW-1 was given the phone number of the reportee and they rushed to the scene. PW-4, also a police officer joined them. They reached the scene and met a lady with her children. She said a TV, Sanyo Radio, 2 speakers, carpet, gas cylinder and wallet with personal documents were taken away. The officers patrolled the area and OCPD Eldoret called them and reported another incident of burglary in the same area. They were given directions of the scene and noted *APC Komen* was living in the area. PW-1 called him and he said he was one of the victims.

They were attracted by screams in a neighbouring house. They met the victims and returned to Kapsoya. After about 20 minutes they heard screams emanating from SOS, next to Kenya Service. They went there and found a group of people beating a suspect. They rescued him. He said he was Joshua. He had a flat screen TV and 2 speakers. It had rained and the items had mud and blood on them. Those mostly attacking the suspect were students from the nearby RVTI. They were out to kill him. The suspect was taken aside and said he was with 2 other persons and that some items had been taken away. He said he was waiting for the rest to be collected. He was told to call the person and the police laid an ambush. Shortly a motor cycle appeared with the other suspect and he was arrested. Police wanted to search their homes. The appellant said he was residing in Langas and the other in Ngunja. They went to Langas and searched the house. They found nothing. The motorcycle rider said some items were hidden near a go down. With the help of DCIO the go down was opened by the caretaker. From therein they recovered a TV, Radio, Speaker, Gas cylinder and carpet. The suspects were taken to the police station as well as the recovered items.

PW-3 was informed of the arrest of the suspects and recovery of the items. She went to the police station. She was shown the appellant, who had a cut on the head as the suspect. She also saw her recovered TV and Speaker. The two were then charged with the offences.

Each of the accused gave sworn evidence in their defence and called no witness. The appellant's defence is that he lives at SOS and is a mason. The co-accused was a stranger to him and also the complainants. He was working at Rivatex in Eldoret. On the material night he woke at 4.30 a.m and headed for work. Along the way he met a group of people. They demanded for his ID of which he produced. They took his money, slapped him on the head and frog marched him to the police station. He was locked in cells. People were called to identify him. He was then charged together with a stranger.

The trial court evaluated the evidence and acquitted the 2<sup>nd</sup> accused for lack of enough evidence. However, invoking the doctrine of recent possession, found that the appellant herein was found shortly after the robbery in count two, in possession of some of the items robbed, and offered no reasonable explanation on how he got into their possession. He was therefore convicted of the offence and sentenced to death.

The appellant dissatisfied with the said conviction and sentence appealed to this court on the following grounds;

- (1) That the case was poorly investigated and no identification parade was conducted.
- (2) That the court relied on dock identification.
- (3) That the recovered items were not in his possession.
- (4) That finger prints evidence was not availed to show he was in possession of the recovered exhibits.
- (5) That members of the public who allegedly arrested him were not called to testify.

The appellant submitted written submissions of which I have gone through and weighed. The state prosecutor opposed the appeal on the ground that that doctrine of recent possession was rightly invoked and all ingredients of robbery with violence established beyond reasonable doubt.

Having gone through the charges, evidence, judgment and submissions by each side, I have noted that the only issue for determination is whether the doctrine of recent possession was well applied by the trial court. The "*doctrine of recent possession*" refers to possession of property that has been recently stolen or robbed, of which the suspect is found in possession and where such is proved by the prosecution beyond reasonable doubt, and the suspect fails to offer a reasonable explanation on how he or she got into possession of the goods, the court may infer that he or she took part in their theft or robbery. However, it is important to note as was held in the case of ***Republic V Abramovitch [1914-15] AK ER 204***, that the court is not bound to draw such an inference and must only do so if satisfied that the accused committed the offence charged with.

In the case of ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic Criminal Appeal No. 82 of 2004*** the court stated clearly the principles upon which the doctrine of recent possession is based, in 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 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. 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".***

The inference can therefore only be drawn if the suspect was found in possession of the alleged recently stolen or robbed items. The three police officers, that is, PW-1, PW-2 and PW-4, were explicit in their evidence that they found the appellant already held, mostly by students from RVTI, who were beating him with intention to kill him. Though the witnesses allege he was in possession of the TV and 2 speakers belonging to the complainant in count 2, and of which together with some other items had hours before been robbed from her, the circumstances under which he was arrested was not disclosed, given that none of those who had arrested him and were beating him was availed as a witness. The trial court in its judgement rightly acknowledged this fact on page 43 where the magistrate observed that, "***The court has considered the testimony of the 3 police officers moments after they got report of the robbery. While on patrol they found the 1<sup>st</sup> accused having been found with a TV and Speaker***". This shows the police appeared after the appellant had been arrested by members of the public allegedly with the TV and Speaker. Those who arrested him were not called as witnesses and we do not know circumstances of his arrest. It can't therefore be said that the three police officers found him in possession of the TV and the two speakers. Failure to call those who initially arrested the appellant, forms the Achilles' heel to the prosecution case. There is no evidence that the appellant was in

possession of the TV and the two speakers and consequently the doctrine of recent possession could not have been rightly invoked in the circumstances. On the ground I do find the appeal merited. It is allowed. The conviction and sentence are quashed. He is set free unless otherwise held.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 11<sup>th</sup> day of October, 2018**

In the presence of:-

Appellant

Ms Mokuu for the state

Mr. Mwelem - Court assistant