REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 21 OF 2014

(Formerly Nakuru HC.CR.A. No.s 93, 95 and 96 of 2014)

(Being an Appeal from Original Conviction and Sentence in Criminal Case No.2016 of 2012 of the Chief Magistrate's Court at Naivasha before S. M. Githinji - CM)

OBADIAH KARIUKI WANGUI..1ST APPELLANT

SAMUEL NDIRANGU GACHOHI..................................2ND APPELLANT

KENNEDY OCHIENG ODHIAMBO.................................3RD APPELLANT

VERSUS

REPUBLIC...RESPONDENT

J U D G M E N T

1. **Obadiah Kariuki Wangui, Samuel Ndirangu Gachohi** and **Kennedy Ochieng Odhiambo** (the 1st to 3rd Appellants herein) were the 5th, 3rd and 2nd Accused, respectively in the lower court. They were charged jointly with three others with Robbery with violence contrary to Section 296 (2) of the Penal Code.

2. In that on the 12th day of July 2012 at Kabati estate in Naivasha Municipality within Nakuru County, jointly with others not before the court, they robbed **Irene Nduta Ng'ang'a**, of one television set make Phillips, one Singer sewing machine, one pressure lamp, one steering wheel box, one pair of brown leather shoes, one hammer, one blue mattress of 4 x 6 inches, one slasher, one machete, two pliers all valued at Kshs 53,500/= and at or immediately after the time of such robbery threatened to use actual violence to the said **Irene Nduta Ng'ang'a**.

3. In the alternative charge of Handling stolen goods contrary to Section 322 (2) of the Penal Code, the 2nd Appellant was charged that on the 12th day of July 2012 at Kabati estate in Naivasha Municipality within Nakuru County, otherwise than in the cause of stealing, dishonestly he retained one pair of brown leather shoes valued at Kshs 1,500/= the property of **Irene Nduta Ng'ang'a,** knowing or having reason to believe it to be stolen goods or unlawfully obtained.

4. The 3rd Appellant also faced an alternative charge of Handling stolen goods contrary to Section 322 (2) of the Penal Code. The particulars stated that on the 12th day of July 2012 at Kabati estate in Naivasha Municipality within Nakuru County, otherwise than in the cause of stealing, he dishonestly retained one blue mattress of 4 x 6 inches and one hammer, all valued at Kshs 5,000/= the property of **Irene Nduta**

Ng'ang'a, knowing or having reason to believe it to be stolen goods or unlawfully obtained.

5. The Appellants denied the charges and were unrepresented at the trial. At the close of the trial, the three Appellants herein, and another who absconded were found guilty on the main charge and sentenced to life imprisonment. Other Accused persons in the case, namely the 1st and 4th Accused were acquitted by the trial court.

6. The three Appellants independently lodged their appeals against the decision. On 13/12/2016 their respective appeals, namely **High Court Criminal Appeal 30 of 2014**, **High Court Criminal Appeal 32 of 2014** were consolidated with **High Court Criminal Appeal 21 of 2014**, the latter which became the leading file. On the same date, the court admitted the Appellants' newly filed amended grounds of appeal.

7. The relevant grounds presented by the 1st Appellant are:

> **"1. THAT the learned trial magistrate erred both in law and fact when he convicted me in the present case yet failed to find that the doctrine of recent possession was unapplicable in the present case.**
>
> **2. ……….;**
>
> **3. THAT the pundit trial magistrate erred both in law and fact when he convicted me in the present case yet failed to find that the charges drawn and labelled against me are defective.**
>
> **4. THAT the learned trial magistrate erred both in law and fact when he dismissed my plausible defence." (sic)**

8. Admitting that he did not contest the fact of robbery at the complainant's home, the 1st Appellant through written submissions challenged the application of the doctrine of recent possession in his case by the trial court, arguing that there was no conclusive evidence that the subject item, a car battery, was proved to have been stolen. Nor was it listed among the stolen items stated in charge particulars.

9. He also highlighted the contradictions and insufficiency of evidence given by **PW1** to **PW3** regarding the circumstances of the theft, recovery and identification of the said car battery. Regarding the 2nd and 3rd grounds he reiterated the variance between the charge particulars and the prosecution evidence in respect of the battery and value of goods stolen. Thus he asserted that the charge sheet was defective. Finally he asserted that his defence did not receive adequate consideration.

10. For his part, the 2nd Appellant raised amended grounds as follows:

> **"1. THAT the pundit trial magistrate erred both in law and facts when he convicted me in the present case yet failed to find that the evidence adduced do not affirm/support the doctrine of recent possession.**
>
> **2. ………..;**
>
> **3. THAT the learned trial magistrate erred both in law and fact when he convicted me in the present case yet failed to find that the evidence adduced was unsatisfactory and could not support a safe conviction.**
>
> **4. THAT the learned trial magistrate erred both in law and fact when he dismissed my plausible defence."**

11. These, he supported by written submissions. Grounds 1 and 3 attack the adequacy of the evidence tendered by the prosecution, and in particular the application of the doctrine of recent possession. On

these grounds, the 2nd Appellant submitted that the pair of brown shoes whose possession was the basis of his conviction were not proved as stolen. That they were not even included in the complainant's statement, or charge sheet as part of the stolen goods. Nor did the complainant give conclusive evidence of ownership or that the Appellant had the shoes on, upon arrest. Thus in his view, the doctrine of recent possession was erroneously applied. He also complained that the trial court failed to consider his defence.

12. The third Appellant also had four amended grounds of appeal. As follows:

> **"1. THAT the trial magistrate erred in law and fact when he relied on the doctrine of recent possession on recovery of the exhibits to connect me to the crime commission yet failed to find that the evidence surrounding recovery exonerates me from the crimes commission.**
>
> **2. THAT the trial magistrate erred in law and fact when he convicted me on the present case yet failed to find that the crucial and vital witnesses were withheld from testifying.**
>
> **3. THAT the trial magistrate erred in law and fact when he convicted me in the present case yet failed to find that the investigations carried out were shoddy and faulty.**
>
> **4 THAT the trial magistrate rejected my plausible defence erroneously without points of determination contrary to Section 296 (1) of the Criminal Procedure Code."**

13. Grounds 1 to 3 challenge the prosecution evidence and particularly emphasise the alleged contradictions upon the circumstances of the recovery of the mattress regarding which the court justified the application of the doctrine of recent possession. The 3rd Appellant pointed out that no connection was made between him and the house where the recovery was made, and beside there was no proper identification of the mattress.

14. In his view, police carried out shoddy investigations and the resulting evidence did not support his conviction. He complained that the trial court erred by ignoring his defence. All the Appellants therefore urged the court to allow their appeals quash the conviction and set aside their sentence.

15. The duty of the first appellant court is to consider the trial evidence afresh and to draw its own conclusions. In **Pandya -Vs- Republic [1957] EA 336** the Court for Appeal of Eastern Africa summarized this duty in the following words:

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

16. The prosecution case at the trial was that on the night of 11th and 12th July, 2012 a gang of about 8 men, who were armed with knives, forcefully entered the house of **Irene Nduta Ng'ang'a** (**PW1**) at Kabati Estate at 12.30am. They demanded that **PW1** hands over her mobile phone and cash. Having taken these items, they ransacked the entire house collecting valuables, which included electronic appliances, beddings utensils, sewing machines and other household goods, all valued about Shs 180,000/=. As they left the home the robbers gagged **PW1** on the mouth and trussed her hands behind her.

17. **PW1** managed to free herself with a child's help and raised an alarm, attracting neighbours. The neighbours escorted **PW1** to the local Administration Police Post to report the incident. **APC Irungu** (**PW3**) accompanied by a colleague visited the home on the same night. **PW1** spent the rest of the night at a neighbour's home. It was the prosecution case that **PW1** while returning to her house on the next morning spotted the 1st Appellant carrying a Chloride Exide car battery which had been stolen from her house during the robbery. He was arrested and handed over to **PW3**, along with the car battery.

18. **PW1's** husband, **Samuel Magoiya (PW2)** on arrival from Nairobi at 6.00am on 12/7/2012, went directly to the Naivasha Police Station. He witnessed the Kabati Administration Police Officers deliver the 1st Appellant to Naivasha Police Station. He went home and decided to make his own inquiries in the course of which he recovered several of the stolen items, including a television set, sewing machine, radio, pressure lamp and gas cylinder. He said the items were at a scene where the car battery was earlier recovered, near his home.

19. **PW2** then proceeded to Kabati Mosque and met the 2nd Appellant. He noted that the Appellant wore shoes stolen from his house. He questioned him. The 2nd Appellant led the complainants to a house where the 3rd Appellant was sleeping on a mattress, which was identified to be part of the **PW1's** stolen goods. There was a further recovery in connection with the 6th Accused in the trial, who absconded. Seemingly, a large crowd had been drawn to the scene and at 2.30pm, **PW3** was notified by a member of public that the arrested suspects were almost being lynched. He rushed to the scene and rearrested the 2nd and 3rd Appellants. **PW3** said he was present during the recovery of the mattress and eventually escorted the suspects, and recovered items to Naivasha Police Station.

20. In their defence, the Appellants made unsworn statements. The 1st Appellant said he was arrested on 12/7/2012 at his place of work at Kabati, and denied committing any offences. The second Appellant stated that on the day of his arrest, he had been involved in a scuffle with one Bob, a relative of **PW2**. That **PW2** came to the scene and assaulted him. He denied the offences preferred against him. The 3rd Appellant stated that he was arrested at Kabati after a fight with a colleague, one Simon, over a spade. He too denied culpability.

21. From the trial evidence and submissions on this appeal by the Appellants and the prosecution, there is no dispute that **PW1** was robbed on the material night of a variety of household goods by a group of men. And that, the matter was reported to police. The arrest of the Appellants on the next day is not disputed albeit there is contention regarding the circumstances thereof.

22. In his judgment, the learned magistrate correctly found that the purported identification of the robbers by **PW1** could not, in the circumstances of the robbery be relied upon. He therefore proceeded to consider the evidence of possession by the Appellants of stolen goods, and founded the convictions thereon, consequent to the application of the doctrine of recent possession.

23. On this appeal, the Appellants have taken issue with the recovery evidence and contested the application of the doctrine in this case. This appeal therefore turns on that issue primarily. The trial court correctly referred to the case of **Malingi –Vs- Republic (1989) KLR, 225** in founding the convictions upon the recovery evidence.

24. In the recent case of **Simon Kangethe –Versus- Republic [2014] eKLR** the Court of Appeal, stated in connection with the doctrine of recent possession that:-

> ***"Section 111 of the Evidence Act*** **provides that:** ***existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him…***
>
> **In** ***Ogembo -Versus- Republic, [2003]1 EA,*** **it was held that:**

> ***"For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen."***

Recently, this Court in *Moses Maiku Wepukhulu & PAUL NAMBUYE NABWERA -Versus- Republic CR.A NO. 278 OF 2005* (Koome, Mwera & Otieno-Odek, JJ.A.) quoted with the approval what constitutes the doctrine of recent possession in the case of *Malingi -Versus- Republic, [1989] KLR 225*:

> ***"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 has proved certain basic facts. That the item he has in his possession has been stolen; it has been stolen a short period prior to their 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 and the circumstances of the case) recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items."***

The doctrine is a rebuttable presumption of fact. Accordingly, 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 or was a guilty receiver.

As was aptly stated in the case of *Hassan -Versus- Republic, (2005) 2 KLR 151*:

> ***"Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver."***

25. In the instant case, having reviewed the prosecution evidence, it is correct, as the 1st Appellant has argued, that the prosecution evidence regarding theft, recovery and identification of the concerned goods is problematic.

26. Concerning the chloride car battery said to have been found by **PW1** and other villagers on the morning after the robbery in the 1st Appellant's possession, the same is not stated in the charge particulars as one of the stolen items. Besides, during her evidence-in-chief **PW1** was not shown the said exhibit for purposes of identification. But she said that the said car battery was ordinarily kept outside the house and must have been taken therefrom by the robbers. As for **PW2,** he identified a car battery (marked MFI 12), for the first time in the trial and referred to marks thereon namely, a number **"1190".** He asserted that it was the car battery he saw when Administration Police Officers from Kabati escorted the 1st Appellant to Naivasha Police Station where **PW2** happened to be at the time on 12/7/2012.

27. However, **PW3** the officer who first received the 1st Appellant and the recovered car battery at Kabati Administration Police Post before escorting the suspect to Naivasha Police Station in his testimony stated when shown the battery **MFI 12**.

> **"This is not the battery we got. The one we got had a crack. It was a scrap." (sic)**

28. For his part, the investigating officer, **PC Orono (PW4)** produced the car battery **MFI 12** as **Exhibit 1** asserting that it was **PW1's** recovered car battery. The loose ends surrounding the theft, recovery and indeed the identification of the said car battery introduce doubt whether the prosecution had marshalled sufficient evidence to establish a factual presumption justifying an answer from the 1st Appellant. It is noteworthy in this case that several items were found in a bush close to **PW1's** house on the day after the robbery pursuant to search efforts by **PW2**. **PW1** said she lost three car batteries in the robbery. The list of items retrieved from the bush by **PW2** in the absence of police was not presented in court.

29. To my mind therefore the evidence against the 1st Appellant is too tenuous and could not properly found a conviction against him for the offence charged.

30. As regards the 2nd Appellant, the prosecution relied on the recovery of a brown pair of shoes by **PW2.** **PW2** said he met with the 2nd Appellant on 12/7/2012 while wearing the same and that upon questioning, said he had purchased them from the 3rd Appellant. This pair was supposedly part of the crate of shoes taken away during the robbery at **PW1's** house. In identifying them **PW1** simply stated that she used to *"clean them"* and said they were stolen from her house. **PW2** said that he found the 2nd Appellant wearing the shoes at Kabati Mosque area. The shoes were handed over to **PW3**.

31. No special marks, brand or other form of identification of the shoes were highlighted at the trial. Brown shoes are common piece of footwear. As with the car battery, the brown pair of shoes is not listed in the charge particulars as part of the items stolen in the robbery. Indeed **PW1** admitted in cross-examination that her statement to police did not mention the theft of a crate containing shoes. While it is possible for a robbery victim to fail to list all missing items, it was duty of the prosecution to justify its reliance on the possession of the brown pair of shoes by the 2nd Appellant, such possession being the basis *interalia* of the prosecution. Further, it seems from the evidence of **PW3** that the 2nd and 3rd Appellants were both arrested at the same time from members of public and that the 2nd Appellant allegedly led the team to his own house.

32. However, according to **PW2** after separately arresting the 2nd Appellant, **PW2** took him to Kabati Administration Police Post where **PW3** took over and proceeded to the house where the 3rd Appellant was found sleeping on the mattress said to belong to **PW1**. **PW2** said the purpose of the visit was for the 2nd Appellant to show the search party the seller of the shoes (3rd Appellant). These contradictions destroy the evidence of **PW2** and **PW3** on this score and no inference of guilty knowledge regarding the 2nd Appellant's stated possession of **PW2's** stolen shoes or in connection with the mattress recovered from the house for that matter, can be based thereon.

33. Regarding the said house, the prosecution did not prove that either the 2nd or 3rd or both Appellant were tenants, owners or occupiers of the same. In my considered view, the evidence against the 2nd Appellant did not conclusively support a factual presumption sufficient to warrant any rebuttal by the 2nd Appellant.

34. Concerning the 3rd Appellant, **PW3** told the court that when he rushed to a scene of reported attempted lynching, he found the 2nd and 3rd Appellants who had been arrested by and were about to be lynched by members of public. He said that it is the 2nd Appellant who led the team to his own house where a mattress was recovered and identified by the complainants.

35. Clearly therefore, at the time, the 2nd and 3rd Appellants were already under arrest according to **PW3**. Hence it cannot be true as **PW1** and **PW2** purported in their evidence, that the 2nd Appellant led them to the house where 3rd Appellant was found sleeping on the mattress in question and arrested. The 2nd and 3rd Appellants indirectly admitted that they were both arrested from assault scenes, most likely an oblique reference to the lynching attempt by the public as described by **PW3**.

36. The contradictory evidence led by **PW1, PW2** and **PW3** raises questions on the identity of the occupant or owner of the house where the stolen mattress was recovered and who was arrested in possession of the mattress at the time. The prosecution having failed to adduce proof regarding the tenant, owner or occupant of the premises in question. While the mattress (**Exhibit 2**) may or may not have been part of the property stolen from **PW1's** house, no credible evidence was led to connect it with the 3rd Appellant, in my view.

37. In the circumstances the trial court erred by applying the doctrine of recent possession irrespective of

the weak and contradictory prosecution evidence regarding possession of the mattress in question. In light of this, the conviction against the 3rd Appellant is not based on solid evidence.

38. In the result, I am persuaded that the convictions against the 1st, 2nd and 3rd Appellants are not safe and cannot be upheld. Consequently I do quash the convictions and set aside the sentence imposed against the three Appellants. The Appellants are to be set at liberty unless otherwise lawfully held.

Delivered and signed at Naivasha, this **16th** day of **June, 2017.**

In the presence of:-

Mr. Koima for the DPP

Appellants: 1st – present

2nd – present

3rd – present

C/C: Barasa

C. MEOLI

JUDGE