



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, MAKHANDIA & OUKO, J.J.A)**

**CRIMINAL APPEAL NO. 69 OF 2016**

**BETWEEN**

**JUSTINE MUCHANGI IRERI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at*

*Nairobi (Mboghli & Achode, JJ.) dated 25<sup>th</sup> March, 2014*

*in*

*H.C.C.R.A. No. 339 of 2010)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

On 20<sup>th</sup> March 2008 at about 5.00 am **John Neru Kanyingi**, the complainant, was walking to a bus stage and when he got to Kahawa Wendani Academy, Nairobi he was suddenly accosted by two people who ordered him to stop. One was harmed with a panga and the other with a piece of metal. They proceeded to frisk his pockets and help themselves to his mobile phone, black bag which contained a toothbrush, tooth paste, one light brown checked long sleeved shirt, 5 pieces of material and cash Kshs 16/=. He was cut in the process on the left side of the face below the eye and he fell down. They then removed his shoes, a pair of Bata Safari boots that he was wearing. The robbers then left him for dead.

However he managed to get himself to Kiambu Hospital where he was treated and discharged. He later reported the incident to Kahawa Police Post and was issued with a P3 form which was filled by *Dr Sephania Kamau* (PW5) who classified the injuries sustained by the complainant as harm.

Two weeks later, on 2<sup>nd</sup> April 2008 at about 10.00 pm some members of the public including *Benson Njeru Ngare* (PW2) and *Rutho Kelvin* (PW3) came to the complainant's house in the company of a police officer, *PC Charles Kyaa* (PW4) and informed him that some people had been arrested and was asked whether he could identify them. Apparently, PW2 had been a victim of a similar robbery as the complainant on that night, but had managed to have the robbers arrested. When he got out of his house, he was able to identify his safari boots shoes which one of the suspects was wearing. He had a special

mark on the shoes which enabled him to positively identify them as his. The following day they proceeded to the appellant's house and found his black bag hanging on the wall. He checked the contents and found the toothpaste and toothbrush. His light brown checked long sleeved shirt was also hanging on the wall in the house.

*PC Paul Cherotich* (PW 6) took over the investigations of the case. He re-arrested the appellant and his co-accused. The co-accused was the one wearing the complainant's shoes at the time of arrest. Eventually the duo were charged before the Chief Magistrate's court at Makadara law courts with one count of robbery with violence, contrary to section 296(2) of the Penal Code. The particulars being that on the 20<sup>th</sup> March 2005 at about 5.00 am while armed with dangerous weapons namely, pangas the robbed the complainant of his mobile phone make C115, one pair of safari boot shoes, one travelling bag containing 5 pieces of materials, one toothbrush, tooth paste, one shirt and Kshs 16 and at or immediately before or immediately after the time of such robbery, used actual violence on the said complainant. In the alternative count, the appellant alone faced a charge of handling stolen property contrary to section 322(1) (2) of the Penal Code. The particulars given being that on the 3<sup>rd</sup> April 2008 otherwise than in the course of stealing, the appellant dishonestly received or retained one black travelling bag, one light brown checked long sleeved shirt and toothpaste, the property of the complainant while knowing or having reasons to believe them to be stolen.

The appellant and his co-accused denied both charges and tried. Unfortunately the co-accused passed on as the trial was still ongoing. In his sworn statement of defence, the appellant claimed that he was arrested by police officers while on his way home after having drinks at a local club. He was then charged with an offence he knew nothing about. He also denied that the complainant's properties were found in his house. He maintained that the charges were framed against him by the police as a way of keeping him behind bars. He denied being arrested with any other person and claimed that he never saw his co-accused wearing shoes belonging to the complainant.

The trial court was not persuaded by his defence. In a judgment rendered on the 9<sup>th</sup> June 2010, the appellant was convicted on the main count. Upon conviction, the appellant was sentenced to death. Aggrieved by the conviction and sentence, the appellant lodged an appeal in the High Court of Kenya at Nairobi. The appeal was heard by **Mboghli Msagha** and **L. A. Achode JJ**. In a reserved judgment delivered on 25<sup>th</sup> March 2014 the two judges dismissed the appeal thereby provoking this second and perhaps last appeal.

In his supplementary Memorandum of Appeal dated 18<sup>th</sup> April 2017 filed through *Messrs Amutallah Robert & Co Advocates*, the appellant sought to impugn the judgment of the High Court on four grounds: identification, the application of the doctrine of recent possession, failure to re-evaluate and re-analyse the entire evidence on record as duty bound and in holding that the prosecution had proved its case beyond reasonable doubt.

Urging the grounds, Mr Amutallah, learned counsel for the appellant submitted that there was no proper identification of the appellant by any of the witnesses who testified. That in fact the evidence of PW1, 2 and 3 with regard to the identification of the appellant was contradictory. Counsel further submitted that the appellant never led the police to the house where the items belonging to the complainant were recovered. Indeed, there was a lady in the house whose relationship with the appellant was not established. It was submitted further on behalf of the appellant that the two courts below did not properly evaluate the evidence before invoking the doctrine of recent possession. Had they done so, they would have inescapably come to the conclusion that there was no evidence of possession and the recovery of the stolen property on the appellant. For this proposition counsel referred us to the case of *Erick Otieno Arum vs Republic (2006) eKLR*.

Opposing the appeal *Ms Maina*, Senior Principal Prosecution Counsel submitted that the doctrine of recent possession was properly applied since upon arrest, the appellant led the police to his house where a black bag belonging to the complainant was recovered. The complainant was able to positively identify the contents of the bag and indeed the bag as belonging to him. The said recovery was in the presence of

PW1, 2, 3 and 5, observed counsel. Finally counsel submitted that the two courts below properly analysed the evidence and came to concurrent findings on the application of the doctrine of recent possession. The concurrent findings should not be disturbed by this court, she submitted.

This is a second appeal, and by dint of section 361 (1) (a) of the Criminal Procedure Code, only matters of law fall for our consideration unless its demonstrated that the two courts below failed to consider matters they should have or looking at the entire decision, their holding on such matters of fact were plainly wrong in which case this court will consider such omissions as matters of law. See *Kavingo vs Republic (1982) KLR 214*, where this Court held that a second appellate court will not generally interfere with the concurrent findings of facts of the two courts below unless they are shown not to have been based on evidence . See also the case of *David Njoroge Macharia vs Republic (2011) eKLR* where this Court reiterated that:

***“Only matters of law fall for consideration and the court will not normally interfere with the concurrent findings of facts by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings”***

To our mind, only two issues of law call for our determination in this appeal; identification of the appellant and the application of the doctrine of recent possession. This is even evident from the submissions of counsel for the appellant. Although the appellant has made his identification an issue in this appeal, his conviction really did not turn on his identification at the scene of crime, rather that he was found in possession of items recently stolen from the complainant for which he could not account, hence the invocation of the doctrine of recent possession against him. This is how the first appellate court dealt with the issue of identification:

***“The attack upon the complainant PW1 appears to have been sudden. This is because while walking the appellant is said to have appeared suddenly and went ahead of him while the co-accused was behind him. The complainant was ordered to stop whereupon his pockets were ransacked by the assailants. He was disposed (sic) of the bag and cut on the left side of the face below the eye and fell down. He did not know the two assailants before and came to know them when they were brought to his house after arrest. That is when he saw the first accused wearing his shoes. He could only say that one was tall and one was short.***

***Under normal circumstances that is not positive identification of anybody”.***

We entirely agree with this rendition of the facts and the conclusion reached. On the part of the trial court it made no specific findings regarding the identification of the appellant. It chose to proceed on the basis of the doctrine of recent possession. Accordingly, we find no merit at all in the complaint by the appellant that he should not have been convicted on the basis of identification.

On the doctrine of recent possession, this Court in the case of *Erick Otieno Arum (supra)* observed thus:

***“In our view, 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. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version”.***

Both courts below were alive to the fact that after his arrest, the appellant led the complainant, PW2 and 3 to his house where a travelling bag belonging to the complainant was recovered. On emptying the contents a tooth brush and toothpaste belonging to the complainant were recovered. There was also a light brown checked long sleeved shirt hanging on the wall. All these properties were positively identified by the complainant as his and which had been stolen from him about two weeks earlier. Further, when he led the said witness to his house, it was him who opened the door for them to get in. The two courts below were also of the view and rightly so in our view, that the appellant could not have led the police and the other witnesses to the house where the properties were recovered if he did not know the house or did not have control over it. These conclusions were reached after exhaustive evaluation and re-evaluation of the evidence by the two courts below contrary to submissions by the appellant.

Though there was evidence that a lady was found in the house who claimed to be the appellant's wife, and this may well have been the case, nonetheless it does not lessen the presumption that the appellant had control over the house. After all it was him and not the alleged wife who opened the door to the house with the keys he had on his person. He could not have had the keys unless he was somehow connected to the house. The appellant was therefore, as correctly observed by the two courts below, in control of the house and had constructive possession of the properties recovered there from. The recovery of the stolen properties from the appellant's house at his direction was hardly two weeks after the robbery. The appellant did not claim ownership of the same nor did he offer an explanation as to how he had come into the possession. Instead, he claimed in his defence that the properties were never found in his possession nor had he ever led the witnesses to his house. However, based on the evidence on record the appellant's position is clearly untenable. In the premises the two courts were right in holding that the denial of the offence by the appellant could not withstand the evidence adduced by the prosecution. The fact that the appellant was found with personal effects of the complainant only days after the robbery points to the irresistible conclusion that he was involved in the robbery.

The doctrine of recent possession was accordingly properly invoked to found the conviction. The appellant's forlorn cry that the prosecution did prove its case beyond reasonable doubt cannot thus hold.

The appeal lacks merit and is dismissed in its entirety.

**Dated and delivered in Nairobi this 22<sup>nd</sup> day of September, 2017.**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**ASIKE- MAKHANDIA**

.....

**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**