



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)**

**CRIMINAL APPEAL NOS. 15 & 41 OF 2012(CONSOLIDATED)**

**BETWEEN**

**DISMUS ETYANG.....1<sup>ST</sup> APPELLANT**

**DAVID OUMA.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal from a Judgment of the High Court of Kenya at Busia,*

*(Onyancha & Muchemi, JJ.) dated 10<sup>th</sup> November, 2011*

**in**

**H.C.CR.A. NO. 39 OF 2009)**

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**JUDGMENT OF THE COURT**

1. **DISMUS ETYANG**, the 1<sup>st</sup> appellant and **DAVID OUMA**, the 2<sup>nd</sup> appellant, were charged with three counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. They were in the alternative charged with handling stolen property contrary to Section 322 of the Penal Code. After trial they were convicted on the first two counts and sentenced to death. No finding was made on the alternative charge of handling. Their appeals to the High Court having been dismissed, they have come to this Court on a second appeal.
2. The prosecution case was that during the night of 19<sup>th</sup> September 2008, three people entered the house of PW4 at Andungosi in Bungoma and ordered him to take them to his brother, PW1's house and tell PW1 that PW4 was with police officers and was under arrest for being in possession of bhang. PW4 complied and PW1's wife lit a hurricane lamp and opened the door. The thugs then entered PW1's house with PW4, tied PW1 and robbed him of Kes.2,600/= in cash, a Motorola C117 mobile phone, a bicycle and black boots and left. PW3, who resided in PW1's neighbourhood, was in the same style also robbed of a bag containing personal items.
3. At about 2.00 am the following morning, the appellants were arrested by PW10, a Ugandan police

officer, across the border at Buteba in Uganda as suspected thieves. At that time, the 1<sup>st</sup> appellant was riding a bicycle and the 2<sup>nd</sup> appellant was a pillion passenger. They had a bag containing, inter alia, black boots. The 2<sup>nd</sup> appellant was hiding a Motorola C117 mobile phone in the cap he wore on his head. On receiving information of the appellants' arrest in Uganda, Cpl Harun Kinyua, PW8, went with the complainants to Buteba Police Station where PW1 identified his Motorola C117 mobile phone and black boots. PW8 brought the appellants back to Kenya. Back in Kenya, the appellants led the Kenyan police to the 2<sup>nd</sup> appellant's residence at Andungosi from where the police recovered PW3's bag and a Kenya Revenue Authority P.I.N. Certificate which bore PW8's name.

4. After investigations, the appellants were arraigned in court with the said offences. As stated, after trial they were convicted on the first two counts and sentenced to death and their appeals to the High Court were dismissed thus provoking this second appeal.
5. In their memoranda of appeal, the appellants raised two main grounds: identification and recent possession. Mr. Adiso, learned counsel for the 1<sup>st</sup> appellant, submitted that the conditions at the scenes of robbery were not suitable for a positive identification. Neither the intensity of the hurricane lamp at PW1's house nor the descriptions of the appellants was given to the police. Moreover the witnesses saw the appellants in Uganda before they later purported to identify them. On recent possession, counsel argued there was nothing to show the stolen items were recovered from the appellants. Mr. Kouko, learned counsel for the 2<sup>nd</sup> appellant adopted his colleague's submissions and also urged us to allow these appeals.
6. Mr. Ketoo, learned Prosecution counsel, opposed the appeal. Although he concurred with the High Court that the evidence of identification was not reliable, he submitted that the appellants' conviction was based on the doctrine of recent possession as they never explained how they came to be in possession of the stolen items. He urged us to dismiss this appeal.
7. We concur with the High Court and counsel for the parties that the visual identification of the appellants by PW1, PW2 and PW3 cannot be relied upon. PW1 saw the appellants under arrest in Uganda and travelled with them back to Kenya. PW3 further confessed he saw them in the cells before the identification parade was mounted.
8. There was, however, other evidence against the appellants. PW1 and PW3 were robbed at around midnight of 19<sup>th</sup> September 2008. At about 2.00 am the following morning the appellants were arrested across the border in possession of PW1's bicycle and black boots. The 1<sup>st</sup> appellant was hiding PW1's Motorola C117 mobile phone in a cap he wore and was even unable to switch on the phone. A few days later, they led police to the 2<sup>nd</sup> appellant's residence where PW3's bag and P.I.N. Certificate were recovered.
9. The appellants never explained how they came to be in possession of those stolen items. They simply denied possession of them. They never gave any reason why both the Ugandan and Kenyan police would plant stolen items on them, if at all. On this evidence we are satisfied that the appellants' conviction on the doctrine of recent possession was well founded. In the circumstances, we find no merit in this appeal and we accordingly dismiss it.

**DATED and delivered at Kisumu this 4<sup>th</sup> day of March, 2016.**

**D.K. MARAGA**

**JUDGE OF APPEAL**

**D.K. MUSINGA**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

**JUDGE OF APPEAL**

I certify that this is the true copy of original.

**DEPUTY REGISTRAR**