



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 455 OF 2010

BETWEEN

NICHODEMUS OSORO MEDA.....APPELLANT

AND

REPUBLIC..... RESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Kakamega (Mbogholi Msagha & Ochieng, JJ) dated 4<sup>th</sup> November 2008)*

*in*

*H. C. Cr. A. No. 40 of 2003)*

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JUDGMENT OF THE COURT

**Nicodemus Osoro Meda, (the appellant)** was charged with five counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code** and one count of handling stolen goods contrary to **section 322 (2)** of the **Penal Code** He was convicted of counts one and two.

The particulars of the first count were that on the night of 21<sup>st</sup> and 22<sup>nd</sup> April 2000 in Lumino village, Mumias township sub location, Nabongo location in Butere Mumias District of the former Western Province, the appellant robbed Leonard Bukachi of one radio, three long trousers, one jeans jacket, one brown wallet, cash Kshs 525/-, his national identity card number 1303410, his employment identity card, Cooperative Bank plate, his pay slips, one cap black and red in colour, one shirt with stripes, and that immediately before or immediately after the time of such robbery caused actual violence to the complainant, **Leonard Bukachi (Leonard)**.

The second count was that he robbed Bounes Bukachi of Kshs. 1,300/-, of her national identity card number 20567814, two crochet cloth materials, a green bag, an empty sack and assorted shop goods, and that immediately before or immediately after the time of such robbery caused actual violence to the complainant, **Bounes Bukachi (Bounes)**.

Upon consideration of the entire evidence, the learned trial magistrate, found the charges against the appellant proved to the required standard, convicted and sentenced him to death as by law prescribed.

The appellant was aggrieved and appealed to the High Court against both the conviction and sentence. The High Court was satisfied with the decision of the trial court and dismissed the appeal and upheld the conviction and sentence.

The appellant was further aggrieved by the High Court's decision and lodged this appeal setting out five grounds of appeal which were that the prosecution failed to prove its case beyond reasonable doubt; that the courts below failed to find that the identification and recognition of the appellant was not safe; that the High Court failed to reevaluate the evidence; that the courts below erred in law by shifting the burden of proof to the appellant; and that the appellant's defence was not taken into consideration.

**Ms. M. Onyango**, learned counsel for the appellant, addressed all the grounds together. The conviction was on the basis of possession of a wallet containing the identity cards of the complainants, Leonard and Bounes. From the abstract of the Occurrence Book (OB) that was produced, there was no mention of the stolen identity cards, or the recovery of the wallet. The only items recovered were the shop goods and money. In his testimony, the appellant had stated that the wallet and the identity cards were not recovered from his possession. Furthermore, counsel pointed out that the High Court had concluded that the shop goods had not been found with the appellant. It was counsel's contention that, since **PC Kennedy Osando, PW 3**, who was the arresting officer had not recorded the recoveries in the OB, the evidence could not be relied upon as a basis of conviction, and the appellant ought not to have been convicted on the basis of the doctrine of recent possession.

**Mr. Ketoo**, learned prosecution counsel for the State, opposed the appeal. Counsel submitted that, though the OB did not state that the wallet and the identity cards were found in the appellant's possession, the evidence showed that they were recovered from the appellant. Furthermore, PC Osando stated under oath that he found the appellant in possession of the stolen items belonging to Leonard and Bounes. Both Leonard and Bounes stated that they knew the person who had robbed them. Counsel further submitted that in addition, **Evans Wekesa PW9 (Evans)**, the matatu conductor had testified that the appellant, who was wearing a jacket with army colours and carrying a bag, was a passenger in the matatu on the material night.

We have considered the grounds of appeal, the rival submissions by counsel on both sides and carefully read the record of appeal. The issue for our determination is whether the appellant was properly convicted on the basis of the doctrine of recent possession.

The appellant's case is that the doctrine of recent possession was not established as the evidence that he was found in possession of the identity cards belonging to Leonard and Bounes was not recorded in the OB at the time of recovery.

Leonard's evidence, which was corroborated by his wife, Bounes, was that on the material night they were woken up by a sound outside of their house. When Leonard looked out of the window he saw people armed with weapons. As he made to arm himself the intruders broke the door down and entered the house. As the first assailant entered the house, Leonard got hold of him and a struggle ensued. The second assailant upon noticing the struggle cut Leonard's head with a panga, causing him release the first assailant. The second assailant then slashed the fingers of Leonard's right hand as he tried to shield himself. As Leonard made to escape out of the house, a third assailant threw a panga after him slashing his back. He ran to seek help from his neighbours, and from the nearby administration police. He was eventually taken to Mumias Hospital where he was admitted for three weeks.

Bounes testified that after the robbery, she made a report to Mumias police station where she recorded the various items that had been stolen including shop goods and personal items. She returned home, and later received information that some stolen items had been recovered, which she was required to identify at the police station. She stated that at the police station she found her husband's wallet with his identity card, bank documents, her own identity card and money. Upon leaving the hospital, Leonard also identified his stolen items that had been recovered. The items were produced as exhibits in court.

Evans, the matatu conductor, stated that on the morning of 22<sup>nd</sup> April 2000, at about 4.00 am, their

Nissan Matatu had left Bungoma via Mumias. At Likoye roundabout just outside of Mumias, they picked up one passenger, who Evans identified as the appellant. As the matatu was leaving Mumias for Kisumu, police officers, amongst them PC Osando, diverted it to Mumias Police Station, where the passengers were requested to disembark and to identify their luggage.

**PC Osando**, testified that when he noticed that the appellant, who was amongst the passengers that disembarked from the Kisumu bound matatu, was wearing wet clothes and muddy shoes, he decided to search him. He then stated,

***“I searched the 1<sup>st</sup> accused. In the behind pocket of his trouser, I got this brown wallet (MFI 4 identified). Inside the wallet was Bonnes Bukachi’s identity card Leonard Bukachi’s employment card and his cooperative bank card (MFI 6, 8, 7 and 9 identified There were also pay slips for Leonard Bikachi. There are the ones (MFI 13 identified). There was Kshs 525.00 inside the wallet. This is the money (MFI 5(a), (b) and (c) identified). The money was two notes of Kshs 200.00 Two notes of shs 50.00 on (sic) coin of Kshs 20.00 and one coin of shs. 5.00.”***

**Peter Joseph Makokha, PW6**, a neighbor who was awakened by his neighbours’ shouts of distress, corroborated this evidence as he was also at the police station when PC Osando removed the stolen wallet from the back pocket of the appellant’s trousers.

From these facts, it is evident that only a few hours after Leonard was violently attacked and injured by robbers, the appellant was found in possession of stolen items that belonged to him and Bounes, including his wallet comprising their national identification cards, his employment and Cooperative Bank card, his pay slips and Kshs. 525/-.

In his defence, though the appellant admitted that he was one of the passengers in the Matatu Nissan, he did not offer any explanation as to how the stolen items came to be recovered from his trousers’ pocket.

In the case of ***Maina & 3 Others vs Republic [1986] KLR 301*** this Court cited with approval the oft cited case of ***R vs Loughlin 35 Criminal Appeals R 69***, the Lord Chief Justice stated,

***“If it is proved that the premises had been broken into and that certain property had been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which a jury infer that he is the house breaker or the shop breaker.”***

In the case of ***Hassan vs Republic (2005) 2 KLR 11***,

***“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”.***

In the circumstances, we are satisfied that the courts below properly applied the principles of recent possession, and by virtue of **section 119** of the **Evidence Act**, were entitled to conclude that the appellant was one of the robbers who robbed Leonard and Bounes on the night in question. We also find that, the omission to include the recovered items in the OB was not fatal, and did not in any way water down or assuage the weight of the evidence against the appellant.

For these reasons, we find that the appellant’s appeal is without merit, and we order that the same be and is hereby dismissed.

We so order.

**DATED and delivered at Kisumu this 27<sup>th</sup> day of May, 2016.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy  
of the original.

**DEPUTY REGISTRAR**