IN THE COURT OF APPEAL

AT NYERI

(SITTING IN MERU)

CRIMINAL APPEAL NO. 318 OF 2006

(CORAM: WAKI, NAMBUYE, & KIAGE, JJA)

BETWEEN

GREGORY MUTUMA MBAKA.....…….....….....APPELLANT

AND

REPUBLIC.....….…..……..……...….... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Meru (Lenaola, Sitati, JJ.) dated on 26th day of October, 2006

in

H. C. Cr. A. No. 82 of 2004

****

JUDGMENT OF THE COURT

1. The appellant's last name has mutated to **"Mpaka"** in our records although he has been **"Mbaka"** in the charge sheet and throughout his trial and first appeal. We have previously cautioned about carelessness in typing proceedings, as this is a court of record. Henceforth, we shall maintain **'Mbaka'** as the appellant's last name.
2. On the night of 8th/9th August 2002, a gang of about 20 people visited and terrorized the residents of Giaki market in Meru Central District. For about two hours between 1 a.m and 3 a.m, they broke into, and robbed the owners of seven shops in the market and a watchman guarding one of the shops, taking away several shop goods, assorted coins of money and personal items of their victims, some of whom they attacked and injured. They took off in a Datsun Pick up vehicle of one of the shopkeepers which they abandoned later after running out of petrol. The police arrived soon after the robbers had left and commenced investigations, in the process recovering the vehicle and some items inside the vehicle.
3. Coincidentally, at about 6 a.m, three police officers who were not aware of the robbery at Giaki, were patrolling Jua Kali area of Meru Town when they saw three young men carrying some polythene paper bags and looking suspicious. The officers stayed out of sight and watched them entering a house. They followed them, entered the house and searched the paper bags. They found assorted shop merchandise therein as well as some coins in the suspects' pockets. The suspects

could not explain their possession of those items and so the officers arrested them but one of the suspects escaped through the window, only to be rearrested later that morning. They were handed over to Meru Police Station where an identification parade was organized and the appellant was identified as one of the robbers who had struck Giaki market.

4. The appellant and the two others were jointly charged and tried before Meru Chief Magistrate's Court on five main counts of robbery with violence against four shopkeepers and one watchman contrary to **Section 296 (2)** of the **Penal Code;** three main counts of failing to account for possession of suspected stolen property, to wit, coins of different denominations, contrary to **Section 323** of the **Penal Code**; and nine Alternate counts of handling stolen property contrary to **Section 322 (2)** of the **Penal Code**.
5. After hearing evidence from 13 prosecution witnesses and the accused persons, the trial magistrate **(W. M. Muiruri, CM)** was not satisfied that the prosecution had proved their case against the other two accused on all the main charges and the alternate counts and they were given the benefit of doubt and acquitted. The appellant was however convicted on three main counts of robbery with violence, but was acquitted under **Section 215** of the **Criminal Procedure Code** on the three main counts charged under **Section 323** as well as the one alternate count of possession under **Section 322 (2).** Upon conviction, he was sentenced to death.
6. On appeal to the High Court **(Lenaola and Sitati JJ.)** the conviction of the appellant on two main counts of robbery with violence were set aside but the conviction on one count was retained on the basis of identification of the appellant by one witness supported by evidence of recent possession of stolen goods. It is to that charge we now turn as the appellant still challenges his conviction thereon.
7. **Count 5** on which the appellant was convicted stated as follows:

> ***"1. GREGORY MUTUMA MBAKA 2. BONIFACE KIMATHI THIAINE 3. MARTIN KIRIMI MUGAA***
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> ***On the 9th day of August, 2002 at Giaki Market, Meru Central District, Eastern Province, jointly with others not before court while armed with offensive weapons namely pangas and rungus robbed PAUL ETANGATA one Sunny Japan radio, one panga, one axe, one Kaida Torch all to the total value of Ksh. 1,550/- and at or immediately before or immediately after such robbery threatened to use personal violence to the said PAUL ETANGATA."***

8. The sole witness on that count was the complainant himself, **Paul Etangata** (PW4) (Paul). He was the watchman on duty at a bar and restaurant owned by his employer, **John Peter Kirea** (PW3) (John) in Giaki market. When the robbers struck at about 3 am, they banged the entrance gate and Paul stood up thinking they were customers for their lodgings. He shone his small two-battery torch at them from a distance of about 1 meter. Then they shone back at him about twenty powerful torches which blinded him before he was slapped hard and fell down unconscious. In his evidence however, he stated that, when he shone his torch, he saw the appellant who was leading the gang, holding a small *panga.* They carried him inside the bar and lay him down as they started stealing beers. As they did so, Paul said he monitored what was happening as he was *"looking at them with one eye while lying down"*. They took his Kaida torch, small Sony radio and a small axe he used at work and asked for his employer, John, who lived in a house 300 yards away from the bar. The appellant carried Paul on his shoulders as they headed there and kept him on the ground when they arrived. He was then frog-marched to the window of John's house and was hit on the head by the appellant as he was ordered to talk to his employer to give them money, phone and motor vehicle keys lest they kill Paul. Paul pleaded with John to do so and John opened his window curtains and gave out the three items to the appellant through the wire mesh. The robbers left in his vehicle. Ten minutes later, some Administration Police Officers came to the scene. The whole robbery involving Paul and John had taken about 1 hour.
9. The vehicle was recovered at about 10 a.m and inside it was Paul's radio . Paul also told the villagers who came to the scene that he had identified the appellant, who was a stranger to him, as a *"young brown man"*. He also informed the Administration police officers that *"there was one young man who was brown"… "not very fat and not very tall"*. Later on the same day Paul was asked to attend an identification parade at the police station where he picked out the appellant.

10. The evidence of the appellant's arrest came from **PC Stephen Makokha** (PW9) (PC Makokha) and **PC Abdullahi Wako** (PW9) (PC Wako) who, with another officer, were on normal patrol duties in Jua Kali area of Meru Town at 6 am on 9th August 2002. They hid themselves when they saw three men suspiciously carrying polythene bags and entering into a house which was partially open. They followed, entered and found the three seated down with a woman. They demanded to see what was contained in the bags. According to PC Makokha, they found the following in the bag carried by the appellant:-

"The paper bag with the panga and torch was with Gregory Mutuma. He is the 1st accused (identified). I can identify the goods now. This is the panga and the torch which was in this paper bag. There were also cigarettes and wheat flour. …

Gregory Mutuma had in his possession one pair of blue batteries. One packet Safari one, tin of 500 gms chipo cooking fat, one packet of 200 gms Omo, 5 packets of Horseman cigarettes. Those items are here. There are the 5 packets of cigarettes (Horseman). This sufuria, omo, tin of chipo. Gregory had 1,220/- in coins and notes (showing it)."

11. In cross examination by the appellant he stated:-

"I have said I cannot categorize each and every item in your possession when we arrested you. It was shop goods. It is true I said I arrested you in possession of a panga, chipo, oil, omo –200 gms of Farina, 1 pair of Eveready Batteries. The items you had are in the charge sheet."

12. PC Wako in his recollection found the following items:-

"In the one carried by 1st accused – Mutuma, I got one pair of batteries, 500 gms of chipo, 200 gms of omo soap and 5 packets of horseman cigarettes and one panga. Accused 2 Boniface Kimathi, he was carrying 500 gms of chipo, 500 gms of....., 1 torch-make Kaida torch with Bell Batteries, 10 packets of Safari cigarettes. 3rd accused – Martin Kirimi in his paper bag was carrying one small radio make Sanyo, sorry Sonny, 500 gms of omo satchet, 500 gms of chipo cooking fat, 5 packets of Horseman cigarettes, one bottle of Guinness beer."

13. In his sworn defence, the appellant who is a blacksmith, said he was about to wake up from his house in Jua Kali area when three police officers knocked the door and his wife opened. They searched the house without talking to him and asked whether he sold chang'aa. He said his wife did. Then they asked his name which he told them, and they told him he was wanted at the police station. He dressed up and they went to the station but on arrival, he was asked about a gun he knew nothing about whereupon he was locked up in a cell. Later that morning he was taken out and was shown to one man whom he said he had never seen before. He was returned to the cells only to be taken out again with 8 others and the same man picked him out of a parade. He was then charged with offences he knew nothing about. He called his wife **Edith Kananu** (DW2) who testified that they were together with the appellant in their house when he was arrested. She thought the policemen were after illegal *chang'aa* liquor brewers as she was one and told them so. They then asked for her husband's name before taking him away and later charged him with offences she knew nothing about.
14. The trial court found that the appellant was visually identified by four other persons apart from Paul (PW4), hence the conviction on three counts of robbery. It stated thus:-

"I find the main counts 2, 3 and 5 proved beyond reasonable doubt as against 1st accused. There is chain evidence. The offences were committed in the course of the same transaction especially in counts 2 and 5. It seems to me that PW4 was able to identify the 1st accused through torchlight. He was carried shoulder high up to his employer's place and this gave him opportunity to look at 1st accused closely. The 1st accused held him and guarded him

closely while holding an axe threatening to kill him. PW4 also testified he saw the 1st accused being given money, mobile phone and vehicle keys by his employer, PW3. It seems to me that the testimony of PW4 almost amounts to recognition. It will also be remembered that each PW1, PW2, PW3 and PW6 identified the 1st accused. It is quite true that none of these witnesses seems to have had the physical description of the 1st accused noted in the 1st report made yet this chain evidence convinces me that the 1st accused was among the robbers who committed these offences. His defence is against the weight of the prosecution evidence. His wife (DW2) did not tell the court if 1st accused was in their house the whole night. So an alibi defence is not well made out."

The charges of possession of stolen items were dismissed.

15. After re-evaluating the evidence, the High Court did not support the finding on visual identification of the appellant by any other persons except Paul because such persons *"did not give any description at the first instance to either their neighbours or the police to enable them thereafter to test that description at the identification parade"*. The court added that the four witnesses on identification had confessed to having been blinded by the powerful torches flashed by the assailants.
16. As for Paul, the court found as follows:-

"Only PW4's evidence is credible in the circumstances. He had clearly told his neighbours that he could identify a particular robber whom he saw when he focused his torchlight on, who hit him with an axe and carried him on his shoulders to PW2's house. He informed the first officers to arrive at the scene of this fact which fact was corroborated by PW11 who visited the scene after the robbery and in his evidence PW4 stated as follows;

> ***The police officer who came with the vehicle asked if we could identify the robbers. I said yes.***

In cross examination he stated thus;

> ***When APs came I explained to them. They came at the same time as the villagers there. The villagers came after you went away. I told them the robbers had attacked us. They asked me if I could identify the robbers. I said yes, it is the villagers who asked me. I told them I had seen a young brown man.....After villagers went away APs came and they followed the robbers.....I told them there was one young man who was brown with other people.***

Having given that report and having positively identified the appellant at the parade which we find to have been properly conducted by PW9, we can only find that the identification by PW4 was emphatic and was in proper circumstances and we so hold"

17. Having so found the court went further to apply the doctrine of recent possession of the items recovered during the appellant's arrest which resembled those stolen from the complainants. The court found he had possession of *"5 packets of cigarettes, cooking fat and satchets of omo washing powder together with a panga and torch"* whose possession he did not explain. It concluded:

"It is clear that on the basis of the evidence of identification by PW4 and the supporting evidence on the application of the doctrine of recent possession, the conviction on count 5 for robbery with violence must be upheld and we have said that save for the evidence on the suspected stolen goods in counts 1, 2, 3 and 4, we cannot sustain the conviction of the appellant on those counts."

18. It is those findings that the appellant through learned counsel **Miss Jacqueline Nelima** challenges

on four grounds culled from the original and the supplementary memoranda of appeal as follows:

> ***"1). That both the lower court and the High Court erred in law and in fact in finding that the appellant was properly identified when the circumstances and conditions prevailing at the time of the attack did not favour a positive identification.***
>
> ***2). That they further erred in law by revisiting the charges on recent possession and alternative charges, yet the learned trial magistrate had earlier dismissed the same for lack of sustainable proof.***
>
> ***3). That the High Court Judges ignored the law when they failed to consider that Section 85 (2) is contravened since there was no coram entered on several pages of the trial court proceedings.***
>
> ***4). That the same Section 85 (1) and (2) of CPC is further violated because CPL Maichera is unqualified to prosecute during the initial plea when trial commenced. To rule that charges are substituted and a fresh plea was taken before a competent prosecutor does not cure the breach of law under Section 85 (1) and (2)."***

19. Miss Nelima introduced but quickly abandoned grounds 3 and 4, and we must say for good reasons. That is because the record was clear that when the trial commenced on amended charges and proceeded, the prosecution was conducted by **Inspector Mate** and **Chief Inspector Njeru.** There is no dispute that both police officers were qualified to prosecute under **Section 85 (2)** of the **CPC**. Another ground of appeal broached, but abandoned by Miss Nelima as it was not listed in the memoranda of appeal, was that the appellant was treated in a discriminatory manner when he was convicted but his two co-accused acquitted in the same trial. The case of ***Fatehali v. Republic [1972] E.A 158*** was cited in aid of that submission, where it was stated that:

> ***"care should always be taken not to discriminate between two accused persons when all the circumstances and facts are the same."***

As will shortly become apparent, the facts and circumstances under which the appellant in this case was convicted were different from those obtaining in the acquittals of his colleagues. That leaves the two main grounds of identification and inappropriate application of evidence of recent possession.

20. On identification, counsel submitted that it was not free from error considering the evidence by Paul that it was at night, his torch was small, he was immediately blinded by stronger light from 20 torches. Paul simply had no time to observe the appellant. That is why he was unable to give an accurate description in his first report other than a *"brown young man"*. Furthermore, that first report was given to Administration Policemen who did not testify. The case of ***Simiyu & Another v. Republic [2005] 1 KLR192*** stating that *"the omission to mention the attackers to the police goes to show that the complainants were not sure of the attacker's identity"* was cited in aid.
21. On the second ground, Miss Nelima submitted that the only property lost by Paul was a torch and radio. But those items, according to the charge sheet were in possession of the two co-accused who were acquitted on all counts. Furthermore, counsel observed, the shop goods mentioned in the judgement as having been in possession of the appellant were not in the charge sheet and in any event, the trial court had acquitted all accused persons, including the appellant, on charges of possession of shop goods for want of identification by the complainants. There was no basis therefore for applying that evidence in the judgement.
22. In response to those submissions, learned Senior Assistant Director of Public Prosecutions (SADPP), **Mr. Onderi** supported the concurrent findings made by the two courts below on identification. The High Court warned itself that Paul was the sole witness on such identification; appreciated that the circumstances were difficult; considered the nature of light and its intensity; and the time the appellant was under observation by the witness. In SADPP's view, there was sufficient time for Paul to identify the appellant before he was blinded by brighter torches. The

identification was fortified by the time taken with the appellant as he and the others stole beers from the bar; when the appellant carried him on his shoulders for a distance of 300 meters; when the appellant was demanding money from John; and generally for the one hour they were together. To crown it all, he gave the description of the appellant to the villagers and the APs who arrived first on the scene and proceeded to confirm it at an identification parade.

23. As for the issue of recent possession, the SADPP submitted that the evidence was properly applied by the High Court. That is because there was proof that the two accomplices were found in possession of Paul's radio and torch and since they were all together, the appellant is deemed to have also been in constructive possession of those items.

24. We have considered the entire record of appeal as well as the submissions of counsel. As always we may only deal with issues of law on a second appeal and the two issues raised by the appellant fall into that category. It is also important to remind ourselves that:

> ***"an invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so. And the only compelling reason(s) would be that no reasonable tribunal could on the evidence adduced have arrived at such findings, or in other words, the findings were perverse and therefore bad in law." See Christopher Nyoike Kangethe v Republic [2010] eKLR.***

25. We shall first deal with the application of the doctrine of recent possession in this case. The particulars of Count 5 upon which the appellant was charged jointly with others asserted that they stole a torch and radio from their victim, Paul. But the alternative charge asserted that the persons found in possession of the torch and radio were the two co-accused who were acquitted. There was also a finding by the trial court that the evidence relating to handling or possession of any stolen property was wanting and was therefore dismissed and the appellant was acquitted on those charges. The question would thus arise as to whether the appellant can be said to have been in possession of the two stolen items. Put another way, can possession of stolen property over which the appellant and his co-accused were acquitted be invoked to support other evidence on record relating to the robbery?

26. There were concurrent findings that Paul lost the two items in the course of the robbery. Since the charge was framed as *"jointly with others not before court"*, if it be proved that the appellant was part of the robbery, it would not matter that he was not in physical possession of any of the stolen items. For the definition of possession in **Section 4** of the **Penal Code** is wide in the following terms:

> ***"(a) be in possession of or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place whether belonging to or occupied by oneself or not for the use or benefit of oneself or of any other person."***

In our view, it was unnecessary, indeed improper, for the High Court to revisit the evidence on possession after the acquittal of the appellant and his co-accused on such charges since there was no cross appeal or notice by the prosecution challenging the acquittals. We would set aside the findings in that respect.

27. Which leaves for discussion the issue of identification of the appellant. Paul was believed as a credible witness by the trial court and we have no reason to differ from that assessment since that court had the advantage of seeing and hearing him. The two courts below were concurrent in finding that Paul took about one hour with the robbers and was particularly close to the appellant. The first person he saw when he flashed his torch was the appellant who was one meter away. Admittedly it was a brief moment before he was blinded by brighter torches. But it is not beyond comprehension that Paul was able to notice that the appellant was a "young brown man" who was leading the others. He stayed with them as they took time stealing beers from the bar, although in his words he was 'using one eye' to monitor the events. The appellant was the man who carried Paul on his shoulders and guarded him as he demanded and collected money from Paul's

employer. Furthermore, Paul was consistent about the description of the appellant and told the first villagers and APs to arrive at the scene. It is not correct to submit as counsel did that none of the APs testified. **AP Corporal Samuel Njagi** (PW8) was one of the officers at the Chief's camp who received the report of the robbery at 1.30 am and proceeded to the scene. The visual identification of Paul was also tested in a properly organized identification parade and it was positive. In those circumstances, we have no reason to interfere with the concurrent finding on the identification of the appellant. We uphold it and dismiss the appeal on this ground.

28. On the whole, the appeal is for dismissal and we so order.

Dated and delivered at Meru this 18th day of July 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify this is a true copy of the original.

DEPUTY REGISTRAR