



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 4 OF 2014

BETWEEN

DAVID MUGO KIMUNGE..... APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu

(Ong'undi, Majanja, JJ.) dated 16th December, 2013

in

H. C. CR. A No. 145 & 146 of 2012)

JUDGMENT OF THE COURT

1. The appeal before us raises only one issue of law: **the doctrine of recent possession and its application**. It was well argued by learned counsel for the appellant, **Mr. C. M. Kingori**. So well that learned Assistant Director of Public Prosecutions **Mr. Kaigai** conceded the appeal. Despite the concession, however, this court has the duty to re-examine the issue and satisfy itself that the findings of the two courts below were indeed erroneous. What are the underlying facts?

2. The appellant, **David Mugo Kimunge** was initially jointly charged with five others before Embu Chief Magistrate’s court with two counts of the offence of Robbery with violence contrary to **Section 296 (2)** of the **Penal code**. The particulars of the 1st count were as follows:

“On the 18th day of August, 2010 at Evurore, Kiamachaki village in Embu County jointly with others not before court while armed with offensive weapons namely axe, pangas and rifle, robbed SIMONDA IGOKI of her 40 shirts, 35 meters of curtains, 2 women suits, 1 lessa, 2 tops and one Nokia phone make 1680 all valued at Kshs 38,300/= and or immediately before or immediately after the time of such robbery murdered the said(sic) FREDRICK MUGENDI NJUKI”

3. The particulars of the 2nd count were that at the same time, place and similar circumstances they:

“...robbed MICHAEL IRERI of his motor vehicle Reg. No. KBH 122 N, make Mitsubishi Cedia, Multi-purpose pliers, make SHANG XING, a wrist watch, make JAZ-MA, a mobile phone make Nokia 2612 all valued at Kshs 707,500/= and at the or immediately before or immediately after the time of such robbery used actual violence to the said MICHAEL IRERI”

4. There were two alternate counts of handling stolen goods contrary to **section 322(2)** of the **Penal code** directed at the Appellant alone in that:-

- i. ***On the 28th day of September, 2010 at Kathiga sub-location, otherwise than in the course of stealing, (he) dishonestly retained 33 pairs of shirts, 35 meters of curtains, knowing or having reasons to believe them to be stolen goods or unlawful obtained.***
- ii. ***On the 24th day of September, 2010 at Kathiga sub-location, otherwise than in the course of stealing, (he) dishonestly disposed off 3 shirts to ANN WANJIRU MUTHEE knowing or having reasons to believe them to be stolen goods or unlawfully obtained.***

The latter count was belatedly allowed by the trial court on application by the prosecution to amend the Charge sheet.

5. At the plea, all the main counts were denied but the appellant admitted the 1st alternate count stating that he was found in possession of the items stated therein but did not know they were stolen. Pleas of **‘not guilty’** were entered.

6. After a full trial before the Principal Magistrate, (**L. K. Mutai**), who heard 11 prosecution witnesses as well as the six accused persons, four of the appellant’s co-accused were acquitted for lack of evidence while the appellant and one of the co-accused were convicted on the two main counts and sentenced to suffer death on the first count while the sentence on the second count was left in abeyance. On appeal to the High court (**Majanja and Ong’undi JJ.**) the appeal of the co-appellant was allowed but the appellant’s appeal was dismissed on account of evidence that he was found in possession of part of the items stolen during the robbery.

7. The concurrent findings of fact in relation to the appellant’s case were that on the 18th day of August 2010, **Simendo Igoki Nyaga (PW4) (Igoki)** travelled to Nairobi from her home in Embu. Her mission was to buy some uniforms for her Church-choir and other items for a thanks giving ceremony scheduled for 21st August 2010. She bought 20 light blue shirts, 20 cream shirts, 10 coloured, 35 metres of cream curtains, 2 women suits, 1 lessa and 2 cream tops. She returned to Embu where she was to link up with her husband, **Michael Ileri Njeru (PW11) (Ileri)** at Wonderland in Ishiara market, to go to their home. She arrived at about 10pm and they left at about 11pm driven by **Philip Mugendi Matero (PW1) (Matero)** in their car Reg No. KBH 122N, Mitsubishi Cedia. On arrival at their home, their watchman **Joseph Munyi Nyaga (PW2) (Munyi)** opened the gate and Matero drove in. As Munyi closed the gate, he was felled to the ground when he was hit hard and cut on the head. His screams made Matero jump out of the car and attempt to escape but he was caught by four hooded thugs armed with an axe and they cut him and dragged him into a room . The car keys and his phone were taken. Igoki was also dragged out of the car by a gun- toting thug who beat her up demanding the house keys. She was dragged into the same room as Matero and locked up. As Ileri tried to get out of the car, he was ordered to lie down and was shot in the head. He lost consciousness. In the course of the robbery another worker known as **Frederick Mugendi Njuki** was shot dead.

8. The thugs took off with the car and everything in it. Igoki soon after screamed for help and neighbors came and assisted in taking the injured to hospital and the deceased to the mortuary. None of the victims identified any of the assailants.

9. In the course of investigations led by **Cpl Reuben Rwambi (PW10)**, police officers from Embu Police

station went to the home of the appellant in Kutus and in his presence made a search in his house. This was on 28th September 2010, about 40 days after the robbery in Ishiara. They recovered 19 light blue shikibo shirts, 14 cream shikibo shirts, 1 long cream net, one multipurpose pliers, and a jaz-ma wrist watch. Cpl Rwambi took possession of the items after preparing an inventory signed by the appellant and his wife. He also found a message in the appellant's mobile phone, relating to a lady in Wanguru market to whom the appellant had given some shirts to sell. The lady was traced and she confirmed that it was the appellant who had given her 5 shirts to sell and she had already sold one. Cpl Rwambi recovered the remaining shirts from her. The lady was **Ann Wanjiru Muthee (PW7) (Ann)** who testified that she had known the appellant as a taxi driver, but on 24th September 2010, they had met in Kerugoya and the appellant had informed her that he had started a cloth selling business and had some shirts to sell. He gave her 3 shirts, 2 cream shirts and 1 skyblue shirt to sell for him and she had sold two items when the police came calling. All the recovered cloth items were identified by Igoki as the ones she had bought in Nairobi and she produced the purchase receipt for them. Ireri also identified the jaz-ma watch as his, which he bought in Dubai and the multipurpose pliers as having been inside his stolen, but unrecovered, motor vehicle.

10. The appellant in his sworn defence testified that he was in the business of selling clothes in his shop where he was on 18th August 2010, the alleged date of the Ishiara robbery. On 20th September 2010, he went to Eastleigh in Nairobi and spent Kshs 19,500 buying more stock for his shop. He produced a cash sale receipt in evidence to confirm the purchase. He further stated that he went to Kerugoya on 24th September and met Ann to whom he gave some samples of clothes to sell for him, as she had stated in her evidence. On 28th September 2010, the police came to his house and carried out a search, in the process taking away several clothes despite telling them that they were part of his stock. In cross examination, he said the shop was in the compound of his house and has no licence. He confirmed that he was a taxi driver when Ann knew him two years earlier and she was his customer. As for the jaz-ma watch, he claimed it as his which he bought in Embu at Kshs 480 and produced a cash sale receipt for it.

11. As stated earlier, there was no visual identification of the appellant during the robbery. However, the two courts below were in agreement that the items found in his possession were part of the items stolen from Igoki and Ireri during the robbery and that the appellant's explanation of the possession was not plausible. The reasoning of the trial court, with which the High court agreed, was as follows:-

“The court has looked at all these items keenly from the court stores. The shirts and curtains are rather ordinary items that could be found in many shops. However on the other hand, there is a unique aspect of these items. For the shirts, they are all in cream colour and the others have light blue colour. A person selling shop goods would surely be having assorted garments of assorted colours. P.W. 4 on the other hand has given a plausible explanation as to why she had bought these garments. Her husband had come from Dubai and she wanted to celebrate with the church. She had hence bought the garments for the church choir members, for the occasion. As for the particular curtains, the court found that it was very lengthy it must have been acquired for a particular purpose. There is no logical explanation as to why accused was having such a curtain.

As regards the watch, I find that this is a very personal item. The owner of such an item would ordinarily be wearing it unless it is for sale. Why was 3rd accused having the wrist watch in his personal items? There is no explanation advanced. However, PW II has stated that he had bought this watch from Dubai.

Finally, 3rd accused was also found with a multi-purpose(sic) (pliers). This is a common item. However, it is also an item that P.W.II had lost. There is not the slightest logic 3rd accused was found with all these different items along with pliers which happens to be the very same things that P.W.4 and 11 had lost during the robbery attack. The recovery of these items including pliers was made at the same time some shirts were found with P.W.7. As such, none of these items should be considered in a solitary manner considering the claim of P.W.4 and 11. They must be considered in relation to each

other. Even if 3rd accused was not identified at the time of the commission of the crime, I find that the fact of being found with all the items of P.W.4 and 11 is indeed circumstantial evidence that implicates 3rd accused”.

12. As for the applicable law, the High court relied on the case of **Isaac Ng’ang’a Kahiga alias Peter Ng’ang’a Kahiga v. Republic Cr App. No. 272 of 2005(UR)** and held that all the elements necessary to establish recent possession were proved and the defence of the appellant did not raise any reasonable doubt. The defence was dismissed on the following reasoning:-

“The 2nd appellant’s defence that he was in business of selling clothes was rightly disregarded. Although he stated that his shop was within his house, he did not have a trading licence and there was nothing in the evidence of P.W.10, who searched the house, that demonstrated that indeed the house was a shop. Even though he had receipts for the clothes he had allegedly purchased, he could not explain how he had in his possession all the items that had been stolen from P.W.4 and P.W.11. We also find that in light of the events particularly the time it took to investigate and locate the 2nd appellant, we do not think the length of time taken from the time the robbery was committed until he was arrested displaces application of the doctrine of recent possession’.

13. It is such reasoning that Mr. Kingori attacked in his submissions as a misapplication of the doctrine of recent possession. In his view, the issue of ownership of the recovered items was not resolved since the complainants produced only one receipt relating to the shirts. More fundamentally, counsel submitted, only an explanation by the appellant was necessary and it did not, as understood by the two courts below, have to be believable or truthful. In his submission, the items in issue here were common items and there was no cogent reason for disbelieving the appellant. The fact that the appellant had some receipts; that the recovery was made more than one month later and that the recovery was far from the scene of the robbery, destroyed the circumstantial evidence adduced against him as they pointed to his innocence. Furthermore, he observed, the items stolen from the complainants were in a motor vehicle which was never recovered but the investigating officer purported to testify that he found the receipt issued to Igoki among the items recovered from the appellant, while Igoki herself produced yet another receipt in evidence. Counsel relied on several decided cases and in particular the Canadian Supreme court case of **Republic v. Kowkyk (1988)2 SCR 59** which we shall examine presently.

14. All those arguments found support from Mr. Kaigai because, in his view, there was a plausible explanation by the appellant for possession and the doctrine of recent possession did not therefore lie in this case.

15. We have anxiously considered the record of appeal and the submissions of counsel. It is not in contention that Igoki and Ireri , as well as their workers, one of whom was killed, were attacked by a gang of armed robbers who stole the various items listed in the charge sheet. The only issue is whether the appellant was connected with that robbery, as a principal offender, through the items found in his possession.

16. The doctrine of recent possession has been applied in numerous decisions of this court and the High court properly cited the **Kahiga case** (supra) as one for the elements necessary for proof. We may reproduce the elements from that case:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.

In other words, there must be positive proof:

i). that the property was found with the suspect;

ii). that the property is positively the property of the complainant;

iii). that the property was stolen from the complainant;

iv). 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.”

17. Has the doctrine been properly summarized in that case, or to ask a more fundamental question, is it a doctrine at all? That question was explored at length in the case of **Kowlyk (supra)**, which involved the offence of ‘*break, enter and theft*’ under Canadian law, and the only issue was possession of recently stolen items. The items were found in a house the appellant shared with his brother, some in his bedroom. On entering the house with the police, his brother shouted “*They got us*” and the appellant tried to leave through the window but was restrained. Delivering the judgment for the majority, **McIntyre J.** explored at length the history of the doctrine in various decisions from its roots in the nineteenth century in England and Canada and said in part:

“Before going further, it will be worthwhile to recognize what is involved in the so called doctrine of recent possession. It is difficult, indeed, to call it a doctrine for nothing is taught, nor can it properly be said to refer to a presumption arising from the unexplained possession of stolen property, since no necessary conclusion arises from it. Laskin J. (as he then was) (Hall J. concurring) in a concurring judgment in R. v. Graham, supra, said at p. 215:

“The use of the term 'presumption', which has been associated with the doctrine, is too broad, and the word which properly ought to be substituted is 'inference'. In brief, where unexplained recent possession and that the goods were stolen are established by the Crown in a prosecution for possessing stolen goods, it is proper to instruct the jury or, if none, it is proper for the trial judge to proceed on the footing that an inference of guilty knowledge, upon which, failing other evidence to the contrary, a conviction can rest, may (but, not must) be drawn against the accused.”

He went on to point out that two questions, that of recency of possession and that of the contemporaneity of any explanation, must be disposed of before the inference may properly be drawn. He made it clear that no adverse inference could be drawn against an accused from the fact of possession alone unless it were recent, and that if a pre-trial explanation of such possession were given by the accused and if it possessed that degree of contemporaneity making evidence of it admissible, no adverse inference could be drawn on the basis of recent possession alone if the explanation were one which could reasonably be true. Implicit in Laskin J.'s words that recent possession alone will not justify an inference of guilt, where a contemporaneous explanation has been offered, is the proposition that in the absence of such explanation recent possession alone is quite sufficient to raise a factual inference of theft.”

18. In the end, the majority of that Supreme court accepted the following summary of the doctrine:-

“Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.”

19. There is no significant disparity between the English /Canadian position and what has been accepted as the applicable doctrine in our courts. Applying that learning to the case before us, we are of the view

that the inference arising from the unexplained possession of stolen goods is one of fact. The trier of fact in this case was the Principal Magistrate's court which had the advantage of seeing and hearing the witnesses testify before it. As always, the first appellate and the second appellate courts must of necessity give allowance for this advantage and be slow to interfere unless there was no evidence to support the findings or the findings were perverse. It is also clear from the decisions that the truth of the explanation alluded to in the doctrine is not the standard applicable. Nor is it acceptable that any fanciful or concocted explanation will suffice. The explanation must pass the muster of reasonableness and plausibility. Did it do so in the case before us?

20. Firstly, the trier of fact was positive that the property was in possession of the appellant. That included the property actually recovered from his house and the property he had admittedly given to **Ann** (PW7). Under the **Penal code**, 'possession' is defined as either actual or constructive, thus:

(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;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

21. Secondly, the trial court was positive, upon evaluation of the evidence and credibility of the witnesses, as well as physically checking the clothing items in issue, that they belonged to Igoki. So too the two items claimed and identified by Ireri. The reasoning, which the first appellate court accepted has been reproduced above. Being so satisfied, it would have been unreasonable, indeed non-sensical, for the same court to accept that the same items belonged to another person. The argument was that the two courts below were seeking a truthful explanation from the appellant. We take a different view. There was no finding that the explanation given by the appellant was untruthful. On the contrary, the two courts weighed the explanation and found it devoid of reasonableness and plausibility. There was no logic in the appellant having in his possession stolen items which were also his!

22. Thirdly, the property was stolen from Igoki and Ireri during a violent robbery. And finally, the time taken, the nature of the items in issue and the time taken to investigate, do not negate the doctrine in this case. The findings on these elements were factual and there was evidential material upon which the findings could reasonably be made.

23. We are satisfied, on the basis of the applicable law, that the two courts below were entitled to arrive at the conclusions they did and we have no reason to disturb them. This appeal is therefore lacking in merit and we order that it be and is hereby dismissed.

Dated and delivered at Nyeri this 13th day of May, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR