



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MARAGA, GATEMBU, MURGOR, JJ. A)**

**CRIMINAL APPEAL NO. 17 OF 2012**

**BETWEEN**

**PATRICK KAMAU MWANGI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from judgment of the High Court of Kenya at Eldoret (Mshilla & Karanja, J.R., JJ) dated 15<sup>th</sup> November 2009*

*in*

***H.C.CR.A. No. 193 of 2009)***

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**JUDGMENT OF THE COURT**

***Patrick Kamau Mwangi***, the appellant was charged with eleven counts of robbery with violence contrary to the ***Section 296(2)*** of the Penal Code (Chapter 63 Laws of Kenya).

The particulars of the offences are that on 11<sup>th</sup> April 2005 at the Chemoset area, along the Kitale- Eldoret road in Lugari District, the appellant jointly with others while armed with a pistol and two knives robbed Joseph Ndegwa Nduturi, Amina Mohamed, David Kipngeno Cheruiyot, Elizabeth Wangare, Josiah Karanja Ngatia, Joseph Cheptarus Kanguka, John Mwangi Waweru, Musoke Muliro, Charles Osemo, Francis Bunyali and James Musa Taboyo of their respective properties which included money, mobile phones, a car-radio, shoes, log books, jackets, T-shirt, bag, umbrella, wallet and two note books and in the process, some of the victims were assaulted.

According to ***James Musa Napoyo, (PW 3) (Musa)*** the complainant in count 11, whilst he was travelling in an Eldoret Express Bus towards Kitale from Nakuru along with other passengers, upon reaching the Chemoset area, Musa noticed that the bus had suddenly turned off the main road and was headed into the bush. He was seated in the 2<sup>nd</sup> last seat, and saw the other passengers being herded towards the back of the bus. He too was ordered to move, but he refused, following which, the person who ordered him cut him on his face with a knife, and then demanded his jacket, mobile phone, wallet which contained Kshs 6,000/- and ATM card and a service ID card. The person also robbed him of his black bag which contained Kshs 50,000/- of which Kshs 31,000/- was in denominations of Kshs. 500/- notes, whilst the

rest was in Kshs 1000/-, an umbrella, notebook, bunch of keys, mobile charger, sports shoes and a heavy black jacket. After the robbery the bus driver drove the passengers to Matunda Police station where they made their respective reports.

**PC George Morara (PW1)** attached to Matunda Police station received the report of the robbery of passengers of the Eldoret Express Bus registration no. KAQ 804 S, where upon together with other police officers, they visited the scene, but did not find the robbers. They mounted a road block near Moi Barracks along the Eldoret- Kitale road to search for the robbers in motor vehicles heading in the direction of Eldoret. At about 7.00 am they stopped and searched a motor vehicle registration number KAB 826 S, a Nissan minibus, in which they noticed that one of the passengers, the appellant, was wearing wet and muddy clothes. When a search was conducted of this person, two wallets, one with a notebook inside it, 3 handkerchiefs Kshs 7,000/=, were recovered. A further search of his underwear recovered Kshs. 31,000 in Kshs 500/- denominations. This evidence was corroborated by the testimony of **IP Kazungu Charo (PW2)**, while **CI Esau Ochorokodi (PW5)** conducted the identification parade. The appellant was arrested and subjected to an identification parade conducted by CI Esau Ochorokodi (PW 5). He was subsequently charged with this offence.

In his defence, the appellant testified that he was a businessman dealing in maize and that on 12<sup>th</sup> April 2005 he went to Matunda to buy maize. At Matunda, he was taken to one Mama Ciku's home who had agreed to sell him maize, but as he did not have any gunny bags, he was forced to go back to Eldoret, and return to Matunda with gunny bags and a motor vehicle to transport the maize.

It was when he had boarded the minibus to Eldoret that they came upon the road block at Moi Barracks at about 7.15pm. The appellant testified that when asked if he had money, he confirmed that he had and removed Kshs. 31,000/- in denominations of Kshs 500/- notes from his underwear, and Kshs. 7000/- from his back pocket. It was his testimony that a police officer searched him further and removed 3 handkerchiefs and a wallet from his back pocket. He was then arrested and taken to Matunda Police station. While at the police station an identification parade was conducted, following which he was charged with the offence. He concluded by stating that he wanted his money, wallet, 3 handkerchiefs and cash returned.

The appellant was convicted and sentenced to suffer death on counts 10 and 11 by the Chief Magistrate at Eldoret and acquitted on the remaining counts.

Being aggrieved by the decision of the trial court, the appellant filed an appeal in the High Court against both the conviction and sentence. The appeal was heard by Mshilla and Karanja J.R., JJ, who being equally satisfied that the prosecution had proved the case against the appellant, dismissed his appeal and upheld the conviction and sentence.

Being further aggrieved by the decision of the High Court, the appellant has lodged this appeal which is before us where the main ground of appeal is that the High Court fell into error when it upheld the conviction based on the doctrine of recent possession.

**Mr. D.O. Mbeja** learned counsel for the appellant stated that he agreed with the finding of the High Court that the evidence of identification was wanting and as such rejected it. The issue was whether the doctrine of recent possession was applicable. It was counsel's submission that when the appellant was arrested, he was found with some cash and two wallets, and that the appellant was not in possession of the two wallets and note book belonging to the complainant. Out of the 11 persons who were robbed, it was only the wallets and note book which were recovered, which items were not positively identified by the complainant, and that that evidence was not considered by the High Court. The link between the notebook and PW1 was not established. That the notebook had contacts none of whom were called to testify in court. Counsel continued that there was doubt as to whether the wallets were found on the person of the appellant, as the wallets were planted on him. The wallets were not also positively identified.

**Ms. B. Odour**, learned Senior Prosecution Counsel, opposed the appeal, and also concurred with the High Court that the evidence on identification was unsatisfactory, given that the lighting in the bus was

insufficient. On the issue of recent possession, however, counsel submitted that the appellant was found in possession of two wallets, cash and a notebook, Kshs.7,000/- was recovered in his pocket and Kshs. 31,000/- in Kshs. 500/- notes was found in his underwear. The appellant was unable to provide an explanation as to how Musa's wallet and notebook came to be in his possession.

We have considered these submissions and carefully read the record of appeal. This being a second appeal and by dint of the case of *M' Riungu v Republic [1983] KLR* and a contingent of other authorities, as well as **Section 361(2)** of the *Criminal Procedure Code*, this court can only address a point or points on law, and not interfere with the finding of facts as made by the two courts below, unless such findings are not supported by the evidence on the record and or they are indeed perverse.

On the applicability of the doctrine of recent possession, the appellant has argued that firstly, the cash and two wallets were not found in his possession, and secondly, even if they were, there were no identifying marks on the wallets to link them with Musa.

On the question of conviction of the appellant on the doctrine of recent possession, the High Court had this to say,

***“However, the appellant’s conviction on the basis of having been in recent possession of some of the stolen property was proper. This is because the property was recovered from the appellant a few hours after it had been stolen. The appellant did not give a satisfactory explanation of how he came by the property which included a wallet and a note book belonging to James (PW3). The note book contained contacts of (PW 3s) friends. It could not therefore have been possible that the property found with the appellant belonged to him as implied in his defence. It was clearly evident that the appellant was found in possession of stolen property for which he could not properly and credibly account. He failed to rebut the presumption that since he was found in possession of stolen property, he must have been one of the robbers.”***

By **section 4** of the *Penal Code*, “**possession**” is thus defined:-

***“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....”***

The pre requisites for applying the doctrine of recent possession were set out by this Court in the case of *Isaac Nanga Kahiga alias Peter Nganga Kahiga v/s Republic, Criminal Appeal No. 272 of 2005* (unreported), in these terms:

***“..... It is trite law that 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 proved. In other words, there must be positive proof first, that the property was found with the suspect, and secondly that, the property is positively identified the property of the complainant, thirdly 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 another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses .....*”**

In this case, there is no doubt that cash, 2 wallets, one with a note book in it, 3 different coloured handkerchiefs, white, gray and red were recovered from the appellant. One of the wallets was positively identified by Musa, particularly as it contained within it a note book with his friend's phone numbers,

which was stolen from him during the robbery. The distinctive feature of the note book inside the wallet which contained contact numbers of Musa's friends was sufficient proof that the wallet and note book must have belonged to Musa, and which items, the appellant was unable to explain how they came to be in his possession. No purpose would have been served by calling, as witnesses, any of the persons whose names appeared in the notebook.

We are satisfied that the courts below appropriately applied the principles of recent possession to the circumstances of this case, and rightly reached the conclusion that the appellant was among the robbers that robbed Musa. Accordingly, this ground has no merit.

For the aforesaid 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 Eldoret this 29<sup>th</sup> day of October, 2015.*

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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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**