IN THE COURT OF APPEAL

AT MALINDI

(CORAM: W. KARANJA, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 346 OF 2010

BETWEEN

SUNDAY LEWA DANIEL.…...…………………...........…… APPELLANT

AND

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

(Being an appeal from the judgment of the High Court of Kenya at Malindi, (Omondi & Odero, J J.) dated 21st September, 2010

in

H.C.Cr.Appeal Nos. 77, 79 & 81 of 2009 consolidated)

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JUDGMENT OF THE COURT

On the night of 2nd November, 2007 a spate of robberies were committed at **Katendwa** and **Kidemu** trading centres in **Bamba** village of the then **Kilifi District** of the then **Coast Province.** Those robberies were allegedly committed by the appellant and four others namely **Justice Bokoro Mwazunga, Kesi Katana Karisa alias Kigombe, Mboja Bunju Mwamuye** and **Safari Karisa Mbulla** *"the co-ccused*". The victims of the robberies were **Stephen Safari Kazungu (PW1), "***Kazungu***" Benard Kahindi Katana (PW2),** *"Katana"* **Henry Shujaa Kahindi (PW3),** *"Kahindi"* and **Lawrence Katana Nguru (PW4),** *"Nguru"*. These victims were in that order the complainants in counts 1, 2, 3, and 4 that were subsequently laid against the appellants and the co-accused. The robberies were committed in the dead of the night of 2nd and 3rd November, 2007 when all the complainants were fished out of their beds and forced to part with their monies, mobile phones, personal effects. Some were even frog marched to the shops they operated in those shopping centres and assorted shop items stolen therefrom. The items aforesaid formed the particulars of the four main counts of robbery with violence contrary to **section 296(2)** of the Penal Code that were subsequently preferred against the appellant and co-accused when they were eventually arrested and arraigned before the Senior Resident Magistrate's court at Kilifi.

Thinking that they had successfully pulled off the spectacle, the appellant and co-accused dispersed the same way they had come. However, the appellant was not so lucky. Soon after the robberies, Kazungu

with the assistance of the neighbours and other members of the public who had responded to his distress call immediately launched a manhunt for the robbers. The foot prints left behind by the robbers helped them in this mission. Those footprints led them to the appellant whom at about 6 a.m. they found hiding in the bush with a polythene bag which contained coins. The bag and the coins were some of the items stolen from Kazungu during the robberies. Kazungu had lost more than Kshs.3,000/- in coins which the robbers took from his shop and staffed in polythene bag. It was the same polythene bag that the appellant was found with in the hideout. It was positively identified by Kazungu. When the paper bag was opened it had in excess of Kshs.,3,000/- in coins. The appellant was then arrested, beaten and frog marched to Bamba police station. Kazungu then opted to go to Kilifi police station to lodge a formal complaint regarding the robbery incident.

On reaching Kilifi, he found the co-accused already arrested and placed in cells in connection with the said robberies and had in their possession goods suspected to have been stolen during the robberies. How were they arrested? According to **Henry Japheth Kithi (PW3)**, *"Kithi"* a matatu conductor, he was on 3rd November, 2007 at about 6.30 a.m. going about his normal business in the matatu enroute to Kilifi from Bamba when he came by information that some people who had been on a robbery spree the previous night were lurking in the neighbourhood. He was soon thereafter flagged down at Dangicha stage by two people who had some bags hidden in the nearby bush. These people retrieved the bags and boarded his matatu claiming they were headed for Kilifi town. They proceeded to the next stage, Baraka stage, where again two people stopped the matatu. Each had a bag and they all boarded the matatu and claimed too that they were headed for Kilifi town. Suspicious that these could be thugs he had been alerted about some moments ago, he asked the matatu driver to proceed straight to Kilifi police station.
P.C. Mark Mossop (PW5) *"Mossop"* was on duty at Kilifi police station on 3rd November, 2007 when at about 8.50 a.m. a matatu drove into the station and he was there upon informed that there were four suspects inside the matatu. He ordered the suspects out and booked them. When the bags allegedly belonging to them were opened, they contained various items that were suspected to have been the proceeds of the robberies of the previous night. The complainants soon thereafter arrived at the scene and were able to positively identify the items as theirs and which they had been robbed of the previous night. The OCS, Kilifi police station then assigned the case to P.C. Chrispus Mwakamba (PW8) *"Mwakamba"* to investigate and take appropriate action. Having been informed by the same OCS that another suspect had been arrested and was currently locked up at Bamba police post, Mwakamba proceeded to the police post and re-arrested the suspect and brought him to Kilifi police station. That suspect was none other than the appellant.

As Kazungu had been seriously injured during the robbery, Mwakamba directed him to Kilifi district hospital for treatment as well as filling of the P3 form. Kazungu was attended to by **Dr Gachiri (PW9),** *"Dr Gachiri"* who assessed the degree of injury sustained as harm. In the course of the investigations Mwakamba attempted to arrange for a police identification parade through C.I.P. Samuel Bore (PW7) *"Bore"* on 11th November, 2007. The appellant and co-accused proved unco-operative and refused to participate.

Arising from the incidents narrated the appellant and the co-accused were then as already stated charged with four counts of capital robbery. They also faced two but separate alternative counts of handling stolen property contrary to **section 322(2)** of the penal code.

Put on their defences, the appellant and co-accused gave unsworn statements with no witnesses to call. Save for the appellant, the co-accused all claimed to have boarded the matatu headed for Kilifi town on different errands when instead they were driven to Kilifi police station where they were arrested and subsequently charged for the offences they knew nothing about. As for the appellant, he claimed that whilst herding livestock at Kibaoni stage, he was confronted by a group of people who assaulted him until he became unconscious. When he came to he found himself at Bamba police post. He was later taken to Kilifi police station where he was charged for an offence he had no knowledge of and with people he did not know.

Hon. **J.M. Nduna**, the learned Senior Resident Magistrate who presided over the case having carefully evaluated the evidence tendered by both the prosecution and the defence, was persuaded that the appellant

and the co-accused had committed the offences featured in the main counts and convicted them. In convicting them, Hon. Nduna stated:

> *"I have considered their respective defences. None of them exonerates them from the overwhelming evidence adduced by the prosecution. The doctrine of recent possession of stolen goods presumes that if one is found with recently stolen property he will be preserved (sic) to be the thief unless he is able to satisfactory (sic) account for the possession. These goods were recovered in the early morning of 3rd November, 2008 (sic). They are alleged to have been stolen from the shops at Katendewa shopping centre and Kidemu trading centre which are not far away from the Bamba-Kilifi road where all 4 accused persons were awaiting to board a matatu that morning. None of the accused persons have given a satisfactory explanation as to how they came into possession. I am prepared to apply this principle and concluded that it is the 5th accused person (sic) together with others not before court who violently robbed the complainants. I am satisfied that notwithstanding that no identification parade was done because the accused persons refused to attend all 5 accused person (sic) participated in the robbery with violence against the 4 complainants (sic) …"*

Upon convicting them as aforesaid, Hon. Nduna sentenced them to death in respect of all the counts. The learned magistrate correctly made no finding in respect of the alternative counts.

Aggrieved by their conviction and sentence, the appellant and co-accused individually and separately lodged respective appeals to the High Court in Mombasa. Those appeals were subsequently consolidated and heard by **Omondi** and **Odero**, **JJ.** In a reserved judgment delivered on 21st September, 2010, the learned Judges allowed the co-accused appeals but dismissed the appellant's. In so doing, they held in respect of the co-accused that it was not clear how Kazungu had identified 2nd co-accused, Kesi Katana Karisa alias Kigombe although he claimed to have done so. That it was not proved that the co-accused had been in possession the bags since when the matatu was driven to Kilifi police station, rather than police ordering each passenger to alight while holding his or her bag, they simply ordered the co-accused out of the matatu and then later received the bags from Kithi. They wondered how Kithi would have known which bag belonged to which co-accused as there were other passengers in the matatu as well. They concluded:

> *"With all due respect to the police officers – their investigations and handling of what was otherwise a well patterned chain link, was shoddy and casual, and this becomes the prosecution's undoing …"*

On that basis the co-accused appeals were allowed.

With regard to the appellant though, they were satisfied that his conviction on the basis of the application of the doctrine of recent possession was sound. They stated:

> *"… It is with regard to the 5th appellant that the doctrine of recent possession was appropriately invoked, indeed he could offer no explanation as to how he came to have the items which PW1 identified as his and which we note the 5th appellant staked no claim on. The time lapse between the robbery and recovery was so soon, that the word "recent" aptly applies and yes for 5th appellant he had actual possession of the items …"*

Following that dismissal, the appellant lodged the instant and perhaps last appeal to this Court on the grounds that the 1st appellate court failed to notice that the charges were defective on account of failure to include the words "dangerous or offensive weapons" in the particulars thereof, that the first appellate court upheld his conviction when the prosecution case was at variance with the charges, the doctrine of recent possession was inapplicable in the circumstances of the case and lastly, that his defence which was reasonable was not given due consideration.

Urging the appeal before us on 25th June, 2014, Mr Gicharu Kimani, learned counsel for the appellant

chose to abandon all the other grounds of appeal and devote his energies on ground 3 and rightly so in our view. In that ground the appellant questions the applicability of the doctrine of recent possession in the circumstances of the case. Counsel submitted that the evidence on record did not support the doctrine. That the evidence of PW3 was relied on to convict the appellant. However that evidence was inconsistent and contradictory. That the conviction of the appellant was based on the evidence of PW4 as well. In his testimony, he suggested that the appellant was found in possession of other items and not coins or a battery. In respect of count 1, counsel submitted that the robberies were committed on 2nd October, 2007. Yet the appellant was allegedly arrested on 3rd November, 2007 with the alleged items in his possession. The period in between was therefore too long to invoke the doctrine of recent possession. On the whole, counsel maintained, the appellant was not placed at the scene of crime, in which case the doctrine could not apply.

Responding, **Mr Wohoro**, Senior Assistant Deputy Director of Public Prosecutions submitted that there was no doubt at all that the appellant was found in possession of the stolen items which were positively identified by the complainant. The appellant did not claim that the said items were his. The two courts below were therefore right in drawing the inference that the appellant was the thief. Counsel further submitted that the time lapse from the time of the robberies and when the appellant was found in possession was a matter of hours and not a long period as suggested by counsel for the appellant. Finally, counsel submitted that the appellant was found hiding in the bush with the items. That could not have been a conduct of an innocent person.

This is a second appeal. By dint of the provisions of **section 361(1)(a)** of the Criminal Procedure Code, our jurisdiction is circumscribed to not considering matters of fact but law only unless we are satisfied that the first appellate court and the trial court failed to consider matters they should have or matters they should not or that looking at their decision as a whole it was plainly erroneous in which case such matters cease to be matters of fact and become matters of law to which our jurisdiction at this level as already stated is limited to considering. It is in the light of this that we propose to consider this appeal.

The matter of law that arise and which is common ground in this appeal is the application of the doctrine of recent possession. The appellant's position is that given the circumstances obtaining in the case, the doctrine should not have been invoked to find his conviction. On the other hand, the State is of the view that this was a classic case for the application of the doctrine.

So what is the doctrine of recent possession and how is it invoked? As we understand it, the doctrine of recent possession is a rule of law that permits an inference that where it is proved that property was stolen and the same property, recently after the robbery, is found in the exclusive, physical or constructive possession of another person, that person is deemed or presumed to have participated in the crime that resulted in the theft or robbery of that property. This doctrine is buttressed further by the provisions of **section 119** of the Evidence Act. The presumption is however a rebuttable one but the burden shifts to the accused person as soon as all the elements are proved to properly invoke the doctrine. To invoke the doctrine, the State must prove beyond reasonable doubt each of the following four elements:-

- *That the property was stolen*
- *That the stolen property was found in the exclusive, physical or constructive possession of the accused*
- *That the property was positively identified as the property of the complainant; and*
- *That the possession was sufficiently recent after the robbery. As to what constitutes "recent" possession is a question of fact depending on the circumstances of each case including the kind of property, the amount or volume thereof the ease or difficulty with which the stolen property may be assimilated into legitimate trade channels, the property's character, and so forth.*

See **R v Lought** in **35 CR App. 1269; (1951) WN 325; 49 LGR 545** and **Matu v Republic (2001) I KLR 510**.

Once the foregoing ingredients are proved, the burden shifts from the prosecution to the accused to explain his possession of the item complained of. The doctrine is a rebuttal presumption of facts. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do then an inference is drawn that he either stole or was a guilty receiver.

How then does the principle fit the facts of this case? Evidence shows that the appellant was arrested by members of the public led by Kazungu hiding in a bush at around 6 a.m. in the morning of the robbery with a grey paper bag containing over Kshs.3,000/- in coins. Kazungu positively identified the paper bag as his and which the appellant and co-accused had taken from him and used it to stuff the coins. The robbery on Kazungu was committed at 11 p.m. whereas the appellant was arrested at 6 a.m. This was hardly six hours after the robbery. The appellant has advanced the argument that according to count 1, the robbery was committed on 2nd October, 2007. Given the timeframe, the doctrine could not apply, as the recovery if at all could not be said to be recent. This submission is not entirely correct. It is common ground that the spate of robberies were committed on the night of 2nd and 3rd November, 2007 and not 2nd October, 2007. The reference to the later date is therefore an inadvertent typological error. Indeed all the witnesses called to testify all referred to the night of 2nd and 3rd November, 2007 as the date of the commission of the offences. All the suspects including the appellant were arrested soon after the robberies on 3rd November, 2007. The appellant in his own defense confirms that indeed he was arrested on 3rd November, 2007. But even assuming that the argument was true, would it be a mere coincidence that the appellant is found on 3rd November, 2007 hiding in a bush with a paper bag containing lots of coins and which paper bag is positively identified by Kazungu. We think not!

The appellant too has attempted to wade out of culpability by making reference to the contradictions in the prosecution case as to whether he was arrested in the bush or was among the passengers in the matatu who were driven straight to Kilifi police station from where he was arrested and placed in the cells. We are satisfied just like the two courts below that the appellant was arrested separately from others. In his own defence, he does not allude to having boarded and subsequently disembarked from any matatu at any time on the material day. Indeed he proclaims that on 3rd November, 2007 he was at Kibaoni herding livestock when a group of people descended on him and beat him unconscious. When he came to he found himself at Bamba police post. Further **PW8 P.C. Mwakamba** confirmed to the trial court that he left Kilifi police station to go and collect the appellant at Bamba police post. The contradictions were therefore inconsequential. In any event, where, when and how the appellant was arrested is really a matter of fact.

From the facts of this case, it is readily obvious that all the elements of the doctrine of recent possession apply with particular force against the appellant. Evidence is unmistakable that there were violent robberies, some items were stolen from the victims during the robberies; some of these items were found on the appellant, the items found on the appellant were positively identified by the victim, Kazungu and the period of time that lapsed before the recovery of the items on the appellant was so short that it is implausible that the appellant acquired the items through other legitimate channels.

With this permissible inference, it was incumbent on the appellant to explain how he came to be in possession of the items. No such explanation was forthcoming. If anything he claimed to have been arrested for no apparent reason and without anything that could have implicated him in the crime. In our view, it was quite alright for the trial and first appellate courts to refuse to accept this explanation and dismiss it as implausible. First, we do not see how where and when the said items would have been planted on the appellant, if at all and by whom. Further, although the appellant had a chance to cross-examine Kazungu, Katana and Mwakamba over the recovery of the items, and he did so, but he did not ask any questions which would have brought out any different narrative.

For these reasons, we find just like the two courts below that the appellant did not discharge his burden of rebutting the permissible inference that he was one of the people who participated in the spate of robberies. The inevitable conclusion, therefore, is that the appellant was in possession of goods stolen from Kazungu so soon after the robbery but could not offer any acceptable explanation of how he had come by them. The two courts below came to the same conclusion, and rightly so in our view, that the

appellant was one of the robbers. On the consideration of the entire evidence tendered in the trial court, we think that the two courts below were perfectly entitled to find the appellant guilty as charged and they cannot be faulted. The appellant's conviction and sentence is therefore sound and safe and must stand. Accordingly, we conclude that this appeal is unmeritorious and is hereby dismissed.

Dated and delivered at Malindi this 25th day of September 2014.

WANJIRU KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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