IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 57 OF 2011

BETWEEN

POLYCARP OCHIENG OBALA ….....1ST APPELLANT

STEPHEN OTIENO ONYANGO …..... 2ND APPELLANT

AND

REPUBLIC ….....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisii

(Makhandia & Sitati, JJ.) dated 15th March, 2011

in

H.C.CR.A. NO. 101 & 102 OF 2010)

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JUDGMENT OF THE COURT

On the night of 29th/30th October 2009, Rongo Township in the then Rongo District, now Migori County in Nyanza Province was under siege by a gang of robbers who harassed and robbed a number of residents and carried out burglary in a number of houses at their own pace and with abandon without being at any time intercepted in the course of such criminal activities, notwithstanding that a police station was situated within the township. To be more specific, in the same night two robberies and four burglaries were carried out and apart from a feeble attempt by one victim to identify the culprits, none of the other victims could identify the thugs. That feeble attempt was rightly rejected by the trial court and the first appellate court. That in effect meant that, notwithstanding the long time that the culprits carried out their escapade, none identified them and no police officers arrested them in that act as one would have expected, the police station being within the small township.

At midnight of that date, ***John Omoria Nyangangi*** *(PW1)*, a resident of Rongo Township was sleeping. His wife was also there and tenants were in the out houses. He heard somebody knocking his door, but before he could respond either-way, the intruders hit the door with a stone; the door broke and they entered the house. They were three people. They had a panga and hit him with that panga on the head, left hand and lower back as they demanded money. He told them he had no money. They took his phone and radio. His phone was Motorola C117. He identified the three people by use of his torch but as

that allegation was rejected, we will not discuss it further. The same night, ***Dorothy Ochieng Onyango*** *(PW2)* was also asleep in her house in the same township. She heard noise at her door. Before she could react either-way, people entered her house. They did shine spotlight on her eyes, so she could not see them for purposes of identification. One hit her on the stomach and she fell down. They picked her phone from the bed-sheet, and they took the radio. They then kicked her and left. She never identified any of them. It is noteworthy that notwithstanding what Dorothy said as narrated here which one would have thought would have taken a matter of five minutes or less, she said they were in her house for one hour. We however attach no importance to that as whether they were in her house for one hour or much less, she did not identify them. Her phone was also Motorolla C117. The thugs also took away her electrical fluorescent lamp. Nyangangi and Dorothy later went for treatment as they were injured. They were later given P3 forms and were examined by ***Darglas Ombati*** *(PW5)* who confirmed that they were injured during the respective robberies on them that same night.

At 2.00am ***George Odhiambo*** *(PW3)* was sleeping together with his family. He heard something hit his door. Three people entered the house, one of them was armed with a panga, spear and something that looked like a gun. They took battery, and TV and left. His TV was Orion and was black. He did not identify those people. Earlier, at midnight, ***Edwin Onyango*** *(mistakenly recorded as PW6 but we think he was PW7 because as Darglas Ombati was PW5, PC Samson Sangoi should have been PW6 but was erroneously marked as PW5 again)*, was asleep in his house, three people broke his door and entered the house. They were armed with pangas and they demanded money, but on being told by Edwin that he had no money, they settled for a baby shawl and curtains which they took and which were in total valued at Ksh.2000/= and they went away. ***Richard Kioko*** *(PW4)* was a jua kali businessman in Rongo at the relevant time. On 29th October 2009, at 10.00pm he left his house to go and watch football match. He returned at about 11.00pm and found his house broken into and his Sony-tech radio, battery, shirts, trousers, two pairs of shoes and Ksh.3000/= were stolen. All these items were valued at ksh.11.000/=.

All the above victims, namely Nyangangi, Dorothy, George, Edwin and Richard reported the various incidents concerning them respectively early next morning to the police at Kamagambo Police Station and each of them, except George was shown some or all of what were stolen from them. George was not shown his stolen properties on first report to the police station, but later, he was called back to the station and he was shown his TV, stolen earlier and he identified it as his. Those stolen items were later recovered at the police station by the witnesses because, ***PC Samson Sangoi*** *(PW6) (erroneously marked PW5)* and ***PC Francis Njoroge*** *(PW8)* both of Kamagambo Police Station on perusing the occurrence book at the station, noted that a report had been entered at OB No. 6 to the effect that robbery had taken place that night. They mounted road block with PC Njoroge saying the road block was mounted at 3.00am and PC Sangoi saying it was at 4.30am. Whatever time it was, they mounted road block early on the morning of 30th October, 2009. In their words as they were manning the road block, a motor vehicle registration No. KBH 939V approached the road block and they stopped it. There were three people in the vehicle excluding the driver. Of those two were having wet trousers. On searching the vehicle they recovered Panasonic radio, two speakers, one TV, two batteries, two phones, small box, electrical lamp and eight ties in a small bag. This was according to PC Sangoi, but PC Njoroge said the vehicle, KBH 939V Toyota Matatu Hiace had *"three occupants the conductor and two passengers totaling to three. Two passengers were wet as if it had rained a lot, this was with mud."* PC Njoroge further said they conducted search on the two wet persons and recovered Motorola C117 which were switched off. PC Njoroge also said they found Sony radio, small bag with ties, big bag containing clothes and two batteries. Those two who ended up being the appellants herein were then arrested, and escorted to the police station. The recoveries were put onto police vehicle as well and taken to the police station. In the morning, the witnesses mentioned hereabove, each identified his/her property stolen that previous night. We note that one person who was also an alleged victim as appears in the charge sheet, did not turn up in court and thus may not have identified his property if any of his properties were stolen. That however is the subject of a later part of this judgment. We add here that two other people were later arrested and also charged so that in all four people were charged.

The charges that were preferred against the appellants were in total six. As all offences allegedly took place on the same night and at the same time we will only produce one charge of robbery and one of burglary but will not go into the particulars of each of the other charges save to indicate what each charge

was, the complaint and the properties allegedly stolen by the alleged culprits.

The first count was that of Robbery with Violence contrary to ***Section 296 (2)*** of the Penal Code and the particulars were that:

> *"On the 29th day of October, 2009 at Rongo Township in Rongo District within Nyanza Province robbed John Omoria Nyangangi of mobile phone make Motorola C117 vlaued at Kshs.2000/= and at or immediately before or immediately after the time of such robbery wounded the said John Omoria Nyangangi."*

The second charge was also of Robbery with Violence contrary to ***Section 296 (2)*** of the Penal Code; the complainant was Dorothy Ochieng Onyango who was robbed of one mobile phone make Motorola C117 valued at Ksh.2000/= and was wounded in the course of the same robbery. The third count was that of Burglary contrary to ***Section 304 (2)*** and Stealing contrary to ***Section 279 (B)*** both of the Penal Code. The particulars were that:

> *"On the 29th day of October, 2009 at Rongo Township in Rongo District within Nyanza Province jointly broke and entered into a house used as a human dwelling of George Odhiambo Oyier with intent to steal and did steal from there in, one TV set make Orion, one Battery Chloride Exide all valued at Kshs.12200/= the property of the said George Odhiambo Oyier."*

The fourth, fifth, and sixth counts were all of Burglary contrary to the same ***Section 304 (2)*** and Stealing contrary to ***Section 279 (B)*** both of the Penal Code with basic particulars as in the third count above except that in count 4, the victim was Edwin Onyango Odhiambo, and items stolen were one wallet containing Ksh.150/=, two trousers, two skirts, one baby shawl, and one wall curtain all valued at Kshs.5000/=, whereas in the firth count, the complainant was Richard Kioko Nzioka and what was stolen from his house were cash Kshs.3000/=, one radio make Sony tech, one battery, two pairs of shoes, eleven suits and two pairs of trousers all valued at

Kshs.11,000/= and lastly in respect of the sixth count, the victim was ***Kennedy Ochieng Kisuge,*** and from his house what was stolen were one radio make Sony, six ties, three batteries, one bag assorted clothes and Kshs.8000/= all valued at Kshs.20000/=.

The appellants, together with the other two accused pleaded not guilty to all the charges. After the learned Senior Resident Magistrate *(Z.J. Nyakundi)* had considered the prosecution's case, a summary of which we have narrated above, he put the appellants and the other two to their defence in compliance with the provisions of ***Section 210*** of the Criminal Procedure Code. He also in compliance with ***Section 211*** informed them of their rights and the appellants elected to give sworn statements in their respective defences.

The first appellant's defence was that on 29th October 2009, he left his place of work at 6.00pm for his house. On reaching the plot where he was staying, he met people some standing and some seated. They called him but he did not respond to their call. They then called him a second time as one of them approached him and asked why he was not responding. He told them he could not respond as he did not know them. Those people took him away to the police station and was placed in the cells where he stayed for some time after which he was taken to court and charged with the offences he knew nothing about. On cross-examination, he admitted that he was arrested by police officers but denied that the officers who arrested him were PC Sangoi and PC Njoroge who had given evidence in court.

The second appellant's defence which was also given on oath was that he was on duty on 29th October, 2009, till late in the evening. After the duties, he went to watch football match at Nature Yard. The match ended at 10.30pm and he left for his house but on the way he met three police officers who were on patrol duties. They stopped him and asked him where he was coming from. Despite his explanation, they arrested him, took him to the station and put him in the cells and after some days, he was taken to court and charged. He also said the officers who arrested him did not appear in court to give

evidence.

The above was the entire case which was before the learned Senior Resident Magistrate. In a lengthy judgment delivered on 10th May, 2010, the learned Senior Resident Magistrate found the two appellants before us guilty of all counts, convicted them and after considering mitigating factors he sentenced each to suffer death in respect of the first count and ordered sentences in respect of all the other counts to be held in abeyance. The other two jointly charged with them were acquitted of all counts.

The appellants felt dissatisfied with the learned Senior Resident Magistrate's verdict both on conviction and sentence. They appealed to the High Court at Kisii vide *Criminal Appeal Nos. 101 and 102 both of 2010*. The two appeals were at the hearing, consolidated and heard together by Makhandia, J. *(as he then was)* and Sitati, J. sitting together. In a judgment dated and delivered on 15th March, 2011, the two appeals as consolidated were dismissed.

The appellants are still dissatisfied, hence this appeal which was originally based on one home-made Memorandum of Appeal drawn and filed by both appellants but which on an advocate being assigned to the appellants, has been replaced by one supplementary Memorandum of Appeal filed on 31st January, 2014, filed by Soire & Co. Advocates in which only two grounds are preferred. These two grounds are:-

> *"1. That the learned High Court appellate Judges and the Magistrate as much they mainly relied upon the doctrine of recent possession to convict the Appellants of all counts charged, the said doctrine would not safely be applied to this case as some vital witnesses i.e the driver and the conductor alleged to have been in motor vehicle Registration No. KBH 939V were not called to testify.*
>
> 2. *The sentence imposed upon both Appellants in (sic) manifestly harsh and excessive in the circumstances."*

As we have stated, this Memorandum of Appeal is the one that was canvased before us by Mr. Soire, the learned counsel for the appellants who in his address, abandoned the home-made grounds that was filed by both appellants. In his submissions, Mr. Soire referred us to several parts of the record and contended that without the conductor and the driver of the vehicle in which the prosecution alleged the appellants were found with alleged stolen properties giving evidence, there remained a serious doubt as to whether indeed, the appellants were the people who had the alleged stolen properties in the matatu and thus it could not be safe to conclude that the appellants were indeed in recent possession of the alleged goods. On the issue of sentence, Mr. Soire, abandoned that ground upon the court referring him to the provisions of ***Section 361 (1) (a)*** of the Criminal Procedure Code. In response, Mr. Abele, the learned Assistant Director of Public Prosecutions, was of the view that the case against the appellants was proved beyond reasonable doubt much as it would have been appropriate and prudent to call the conductor and driver of the matatu to give evidence. In his submissions, he stated that the fact that the appellants were found in the vehicle with wet clothes and the other fact that when the police approached them they attempted to escape and were apprehended as they were doing so, were clear grounds that they were indeed the thieves and were in recent possession of stolen properties having been stolen only four hours prior to their being found with them. He submitted lastly that though it was not clear as to who was in actual possession of the stolen goods nonetheless, he felt they were part of the thugs that participated in the robberies and burglaries the subject of the charges that were before the trial court.

This is a second appeal. Pursuant to the provisions of ***Section 361 (1) (a)*** of the Criminal Procedure Code, we have no jurisdiction to entertain matters of fact. If however, the trial court and the first appellate court in their judgments fail to consider matters of facts which they should have considered or if they consider matters they should not have considered or if looking at the entire judgments it is clear that there were no ground upon which they could have reached the decision they reached, then this Court will treat such omission or such action as matters of law mainly because the trial court has a duty in law pursuant to ***Section 169 (1)*** of the Criminal Procedure Code to base its judgment on reasons and the first appellate court is enjoined in law to revisit the evidence adduced at the trial court, analyse it, evaluate it and arrive at its own independent conclusion having given room to the fact that the trial court had the

advantage of seeing the demeanor of the witnesses and seeing them give evidence. See **Okeno vs. Republic (1972) EA 32,** and thus if the first appellate court failed to comply with that requirement which is a point of law, then this Court will treat that non compliance as an issue of law.

In this case, it is not in dispute that the thugs that raided Rongo Township in the night of 29th October, 2009, wounded Nyangangi, and Dorothy and committed burglary in the houses of George, Edwin and Richard were not identified at the time of the incidents. Nyangangi, said he saw them with the help of a torch and could identify them but as we have said, the trial court rightly rejected that evidence of identification as it could not meet the standards required in law. The trial court, upon the evidence of PC Sangoi and PC Njoroge was persuaded that the two appellants were found in possession of the stolen items which were shown by Nyangangi, Dorothy, George, Edwin and Richard to have been stolen from their respective houses in the night of 29th October, 2009, and the two did not explain their possession of the properties, he therefore found that a case was established against the appellants on the doctrine of being in possession of recently stolen properties and so found each of them guilty. The High Court, on first appeal readily confirmed that conviction. That is the decision that is challenged in this appeal before us. Mr. Soire contends that that conclusion could have been reached only after hearing the conductor and the driver of the vehicle in which the subject recently stolen properties were found. Mr. Abele, on the other hand says that much as that would have been the ideal approach in law, in this case there were other evidence that did point at the appellants and none other as the people who were in possession of those properties, these other evidence being the allegation that the appellants attempted to escape when confronted by police and that the appellants were wet.

To base a conviction on the doctrine of recent possession, the court must be satisfied, beyond reasonable doubt, first that the property of which possession the accused had, was stolen property; second that that possession was recent possession which will depend on the nature of the thing stolen. If it is a thing that can move from hand to hand quickly then the possession will need to be after a short period of the theft of the item. If it is a property that would take a long time to change hands then a longer period would be acceptable. Thus a property like a mobile phone may take a much shorter time to pass from one hand to the other whereas a property like a trailer may take longer time to pass from one had to the other. Thus the word *"recent"* will depend on the nature of the thing stolen and how quickly it can move from one hand to the other. Third, the accused must have been found in possession of it, that is either in physical control of it for example in his pockets or in a place to which he is the only person who has access like in a room in respect to which the accused is the person holding the keys or the accused must have been shown to be in constructive possession of the property, that is to say that although he was not physically found in possession of the property, there was evidence beyond reasonable doubt that he is the person who left the property where it was eventually found. For example, a watch is stolen, and is found with a watch repairer who gives acceptable evidence that the watch was taken to him by the accused and that was after the watch had been stolen. In that case though the accused was not physically found in possession of the watch, yet he was seen in possession of it by the watch repairer soon after theft of the watch and so he was in what is known as constructive possession of recently stolen property and fourth, the accused has no reasonable explanation for his possession and thus he would be the thief or would be having in his possession stolen property knowing or having reason to believe it to be stolen – see case of **Leonard Chege Njagu vs. Republic**, Court of Appeal Criminal Appeal No. 348 of 2010 (ur).

In this case before us, there is no doubt that the goods recovered from the matatu were recently stolen. Even going by the evidence of Richard, PC Njoroge and PC Sangoi, the subject properties were stolen between 10.00pm when Richard left his house to go and watch a football match and were found in the matatu at around 4.30am as stated by PC Sangoi. That was clearly soon after they were stolen and so the issue as to whether the possession was recent is not an issue. The main issue is whether the appellants, even if their contention in their defences are rejected as they were, were the people in possession of the same properties in that matatu. To unlock this puzzle one has to consider the evidence of PC Sangoi and PC Njoroge, the two police officers who intercepted the matatu and carried out a search in the matatu that ended in the recoveries. PC Sangoi states in his evidence in chief *inter alia*:

> *"On 29th/10/2009 I was manning a road block at Kamagambo TTC at around 4.30am, interupted (sic -most likely intercepted) MV KBH 939V, upon searching the vehicle I found at*

the 1st seat near the door, I found two accused with wet trousers..... In searching the vehicle I recovered the items before court and I arrested the accused persons. I recovered panasonic radio, two speakers, 1 T.V., 2 batteries, 2 phones, the small box and electrical lamp, 8 ties in a small bag. All these items were recovered in the motor vehicle..... The items before the court were wet. In the motor vehicle there were two other people and a driver."

And in answer to cross-examination by another accused person who was acquitted, this witness stated:

"The conductor and driver told me the two accused are the people who had the items."

PC Njoroge, on the same issue stated as his evidence in chief:

"On 29/10/2009, Corp Changoro, PC Wanje and I proceeded on a road block along Rongo Kisii at Kamagambo stage. This was at 3.00am while there we stopped a motor vehicle KBH 939V Toyota Matatu Hiece which had three occupants the conductor and two passengers totaling to three.

On checking the vehicle we found two passengers wet as if had rained a lot this was with mud..... In the vehicle the wet person had a T.V. wrapped with a cloth, that is the 1st accused, we took them out and handcuffed them. The first accused was with the second accused. We found Sony radio, small bag with ties, big bag containing clothes, two batteries. We conducted search on 1st and 2nd accused. We recovered Motorolla C117 both were switched off. We reased (sic) the motor vehicle. We retained them while at the scene and while handcuffed they ran away. PC Wanja fired at the air (sic) and they stopped, we arrested them and escorted them to the police….. We interrogated the two but they never told us whom they were with …..... Through an informer that the 3rd accused and 4th accused are the ones who led the outsiders to come and commit robbery."

On a close look at the evidence of the two police officers who were the only witnesses on the arrest and recovery of the stolen properties, one readily sees serious contradictions on various aspects. Few examples would suffice. First whereas PC Sangoi manned road block at 4.30am, Njoroge's road block was manned at 3.00am. Second Njoroge does not mention PC Sangoi as one of the officers in his team, as his team was composed of Corp Changoro, PC Wanja and himself. Third, according to PC Njoroge, the total number of people in the intercepted matatu were three whereas Sangoi saw driver and conductor in the vehicle. Fourth, whereas Njoroge witnessed the two people running away till PC Wanja fired in the air when they stopped, Sangoi apparently did not witness the same. This is important. Fifth and important also whereas Njoroge said they searched the two appellants and recovered two Motorola C117 both switched off without specifying from which appellant, Sangoi merely said they recovered two phones without saying that any search was done on the two and lastly on the examples, whereas Sangoi said the two appellants gave him more information that third accused and fourth accused also participated in the robberies, Njoroge said none of the appellant offered any information on those who accompanied them when the incident took place. In fact, the evidence of these two police officers would leave an impression that the road blocks were two till one considers that the two appellants were arrested at the same time which fact negates the impression of two road blocks. These are matters that the two courts had a duty in law to ventilate but apparently neither of the two courts did that. These facts show that whether the two tried to escape is not certain as PC Njoroge's evidence on that aspect is contradicted by PC Sangoi's evidence.

The most important omission however, even if we ignore the above, is that whether only the conductor was found in the vehicle together with the two appellants making a total of three people or the driver, the conductor and the two appellants were found in that vehicle, all the same more than two people were found in that vehicle when it was intercepted. As is clear above the goods were in that vehicle and there is no evidence that any of them were found in the pockets of the appellants or of either of them as PC Njoroge's evidence on recovery of Motorola's does not state from who specifically they were found. That in effect meant that more than the two persons could have been in control of the properties and much

as in the course of the same contradictions alluded to above, Sangoi in answer to another accused person not the appellants said the conductor and driver told him the two appellants were the people who had the items, there was need for that issue of who was the person or persons in physical control or constructive possession of the properties to be established beyond reasonable doubt. That could only have been ventilated by the driver and the conductor being called as witnesses if the police felt they were not involved at all. This was not done. This omission is disturbing us in this appeal. It is even more disturbing because, having carefully perused the trial court's judgment, we have not seen any part of it considering this aspect. In our view it should have in law been considered even if eventually rejected. It is even more disturbing when considering the first appellate court's judgment because, the omission to call these two witnesses and its effect on the conviction was raised in that court in the Petition of Appeal dated 20th May, 2010, filed by the second appellant which stated at paragraph 3 as follows:

> *"3. There was no evidence of witnesses (operators of the alleged said vehicle) neither was there proof that it was taken to police station nor was it presented before court to solidify the arresting officer's claim."*

This ground of appeal was cited by the first appellate court in its judgment, but was throughout the rest of the judgment never alluded to. We think the first part of this complaint which said there was no evidence of the operators of the matatu produced in court at the trial and therefore challenging the conviction, called for consideration. In the case of **Bukenya and Others v. Uganda, (1972) EA 549** the Predecessor to this Court held *inter alia*:-

> **"(ii) the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;**
>
> iii. **the court has the right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case;**
>
> iv. **where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

In our view, this was a case where the driver and or the conductor of the subject matatu should have been called as a witness to establish who was in control of the properties found in their vehicle and thus to remove any lingering doubts as to whether the properties were placed in the vehicle by themselves or by other people or by the appellants as only four of them were in the vehicle at the time the same vehicle was intercepted. That omission was fatal. In any case, the two courts needed to consider that fact of the failure to call either or both of these two people and its effect on the entire case. As they failed to do so, we would not know what decision they would have arrived at had they considered it. That being the case, the benefit of doubt arising from the effect of that omission must go to the appellants.

Before we allow the appeal as we are bound to do, we note that the appellants were also convicted of the offence in respect of count 6 which was of Burglary contrary to ***Section 304 (2)*** and Stealing contrary to ***Section 279 (B)*** of the Penal Code. The complainant in that court was Kennedy Ochieng Kisuge. That complainant did not give evidence in court and was thus not a witness. He could not have identified his alleged properties to the court and thus there was no evidence, even if any of his alleged properties were recovered, that it was stolen property as the owner never stated in court that such property was indeed stolen. As we have stated above, for the application of the doctrine of being in possession of properties recently stolen to operate, the property must be proved to have been stolen. In respect of this Count there was no proof of the recovered properties having been stolen and hence that conviction was erroneous in law.

In conclusion, this appeal is allowed, convictions quashed and sentences set aside. Both appellants are set at liberty unless otherwise lawfully held.

Dated and Delivered at Kisumu this 19th day of September, 2014.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR