IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 71 OF 2010

BETWEEN

RASTO MUYELA ……..……..……..APPELLANT

AND

REPUBLIC …….RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kakamega(Ombija & Kariuki, JJ.) dated 28th April, 2008*inCR.A. NO. 108 OF 2005)AND CONSOLIDATED WITH*CR. A. Nos. 109 & 110 OF 2005)**

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JUDGMENT OF THE COURT

The genesis of the entire saga giving rise to this second appeal goes back to the 8th day of March, 2004 at 2.00 a.m. On that day the complainant in the first count ***James Ondego Oyoko (PW1) (Ondego)***, then a teacher at Kayato Primary School, Esiandumba Sub-location of South West Bunyore in Western Province, was asleep at his house at Kamokowa village. His children were also asleep in the same house. His wife had gone to a funeral and so was not around. He heard a bang on the door. Before he could respond effectively, he saw torches in his bedroom. He sensed danger and screamed for help but all was too late. The invaders reached him and he was hit with a panga. He held one of the invaders and they fell down in his bedroom. Three of the invaders were in the bedroom and they beat him up mercilessly. They cut him on the head, cut his right fingers and as he felt he would die, he stopped raising alarm. They asked for money and when he said he had none, they beat him even more. He was thereafter ordered around all over his house and eventually to his mother's house. As they did all these and made all those orders to the complainant, they were taking items from his house. Eventually, he was ordered back to his house and was told to go under the bed where he went and became unconscious. He was later woken up from there by his younger brother. As he woke up he found himself bleeding profusely.

At about 4.00 a.m. he was taken on a stretcher to Rabuor clinic nearby. He was thereafter referred to Busia hospital where he was admitted for five days. On his return he found several items which were his properties had been taken away by the robbers. These included one mattress, two bed sheets, one camera, radio make National, a pair of shoes, a pair of sandals, panga, two jerricans, one pair of new socks and one pair of old socks. He continued with treatment and thereafter reported the incident at Luanda Police Station. He also alerted radio repairers to be on the lookout for his radio. As his torch was taken by the thieves as they continued flashing their torches on his face, he was unable to identify any of the many

robbers who invaded his house that night.

In the month of May, 2004, on his way to Kisumu, he visited a radio repairer's shop where he saw his radio. He went to the police station and made report to the effect that his stolen radio was at the shop. The person he later came to identify as the appellant was at that time waiting at the same shop. The repairer ***Phillip Opiyo*** (PW3) pointed out the appellant as the one who had taken the same radio there for repairs. ***P.C Otyang Odeke (PW4) (P.C Otyang)*** who had responded to complainant's report and had gone to the repairer's place together with two other police officers arrested the appellant who had confirmed to them that the radio was his and he had taken it to the repairer for repairs. He was taken to the police station but at the police station, P.C Otyang says, and it was admitted in evidence, that the appellant pointed out another person as the person who had given him the subject radio. That other person was known to the police and was also arrested. That other person also on being asked what he knew about the radio also said a third person he named had sold the radio to him. That third person was also arrested. All the three were charged before the Senior Resident Magistrate's Court at Vihiga. In our view, this is the stage where the entire case started losing the direction. We say so because, in arresting and charging all the three, the police and the prosecution was in effect blocking out any evidence that would have led to the conviction of any of them. This is common sense for once the appellant had pointed out the person who gave him the radio and once that person, the then second accused had accepted that allegation, the appellant should have been left as a witness and again if the second accused said third accused gave him the radio then if third accused denied it then the first two would have been used as witnesses to establish the true origin of the radio. That was not done and hence debacle apparent in the entire case.

Be that as it may, ***Mercy Siasi*** (PW2) confirmed the complainant's evidence that there was indeed robbery with violence upon them but she also could not identify the attackers; and ***Gerishon Opiyo*** (PW5) also confirmed that a report of the same robbery was made at Luanda Police Station on 9th March, 2004 at 8.00 a.m***.*** ***Dr. Jonathan Binis*** confirmed that Ondego was injured during the robbery.

The appellant together with the other two were thereafter charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code, as we have stated, at the Resident Magistrate's Court at Vihiga. The appellant was also charged alone with the offence of handling stolen goods contrary to ***Section 322 (2)*** of the Penal Code. The particulars of the offence of robbery with violence read: -

> **"On the 8th day of March, 2004 at Kamakowa village, Esiandumba Sub-location South West Bunyore Location in Vihiga District of the Western Province jointly with others not before court robbed one James Ondego of his one mattress, one National radio cassette, two bed sheets, two blankets, pair of shoes, a camera, two pairs of socks, a panga, one jerrican of twenty litres, and a spot light all to a total value of Kshs.13,900/= and at or immediately before or immediately after the time fo such robbery used personal violence on the said James Ondego."**

Whereas the particulars of the second charge against the appellant above were that:

> **"On the 19th day of May, 2004 at Luanda township, Ebusikami West Bunyore Location of Vihiga District of the Western Province otherwise in the cause of stealing dishonestly retained one radio cassette of make National type property of James Ondego knowing or having reason to believe it have** *(sic)* **been stolen."**

On the first charge being read to the appellant and his two former co-accuseds, the appellant replied "Not true", but on the second charge being read out to him alone, his response was: -

> **"I did not know it was stolen radio. Sylvanus borrowed from me with it as security."**

Thus, the appellant was up to that stage consistent that the subject radio was given to him by another person whose name was Sylvanus and who was indeed the second accused having been arrested and charged as a result of the appellant's assertions to the police earlier on at the police station.

At the hearing, however, in a sworn statement he denied having been one of the robbers and denied knowing anything about the radio which he said he had never seen before. He also apparently denied having been at a radio repairer's shop. He said he was arrested on his way to where he was working splitting timber with a power saw.

At the end of the trial, the learned Senior Resident Magistrate (R.A. Oganyo), in a judgment delivered on 29th June, 2005, found all the accused guilty, convicted them of the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code, and sentenced each to suffer death as by law provided. The learned Senor Resident Magistrate, for some reason made no finding on the second count and thus did not enter any sentence in respect of that offence although at the commencement of her judgment she rightly set it out as the second charge. We note that in convicting the accused, the learned Magistrate stated *inter alia*:

> *"When plea was taken accused 1 in the alternative charge admitted but justified and stated that he was holding it as a security for a loan he advanced to accused 2. However while testifying the accused 1 has not shown that he made an agreement to advance a loan to 2nd defendant and no written acknowledgment is in court. It is unlikely then that if the radio was a security to accused 1 for a loan advance, then there was no necessity to take it for repair. I find that accused 1 was found with a stolen property recently tolen (sic). By pleading in court that he did not know it to be stolen but that accused 2 had borrowed money using it as security is enough a confession linking accused 2 to the case."*

In our view, these findings were in law untenable in that first, the learned Senior Resident Magistrate, in requiring the appellant to avail an agreement between him and the second accused, was in effect and in law shifting the burden of proof in a criminal case of this nature on to the accused person. Secondly, in holding that the appellant confessed his guilt by pleading that he did not know the radio was stolen, the learned Senior Resident Magistrate clearly misapprehended the law and misdirected himself as to the applicable law particularly as regards the required defence in a charge of handling stolen property knowing or having reason to know it was stolen. We shall revert to these hereinafter in this judgment.

The appellant together with the other two co-accuseds were not satisfied with that decision and understandably so. They appealed to the High Court. The High Court (Ombija and Kariuki, JJ.) considered the appeal and on the doctrine of recent possession, they upheld the appellant's conviction and sentence, but allowed the appeal lodged by the other two appellants. In applying the doctrine of recent possession to the appellant's case the learned Judges of the High Court found on facts as follows: -

> *"In these appeals, the radio was in possession of 1st appellant on 19th March, 2004 when he took it for repair to PW3. There is no evidence as to when he came by the radio and it can be assumed that he had it before 19/3/2004. But in this appeal we shall treat 19/3/2004 as the date the 1st appellant came into possession of the radio.*

And having computed time as above, the learned Judges proceeded in their judgment and made the following far reaching finding: -

> *"There was no evidence that the 1st appellant was one of the gang members on the night of 8th March, 2004. But since he was in possession of the radio 11 days after the robbery, can it not be deduced that he was one of the robbers on the strength of this and on the basis of the doctrine of recent possession propounded, inter alia in R. vs. Loughin 35 Cr. App. 69 ……"*

They then applied the decision of this Court in the case of **Samuel Munene Mayu vs. Republic Criminal Appeal No. 108 of 2003** at Nyeri where this Court stated: -

> "In the particular circumstances of the case, the time lag between the date of the robbery and the discovery of the goods was not such that it would be unreasonable to hold that the appellant's possession thereof on that date was sufficient to found a conclusion that the

appellant participated in the robbery.

Having stated as above, the High Court dismissed the appellant's appeal and confirmed his conviction and sentence. That is what has prompted this appeal before us premised on seven grounds cited in the Memorandum of Appeal. As we think the appeal can be disposed of by considering the second ground only we will not reproduce the other six grounds. The second ground of appeal states: -

> *"2. (a) The appellate court misconstrued the dates relevant to the radio and thoroughly, grossly misdirected itself in finding in fact and in law that the appellant had the radio for 11 days when in fact he had had it for 72 days.*
>
> *(b) Had the appellate court assessed the relevant dates correctly it may, in all probability at worst have held that the appellant was a handler and not a robber."*

When the appeal was called out for hearing, Mr. Abele the learned Assistant Director of Public Prosecutions conceded the appeal on the conviction of robbery submitting that the learned Judges erred in fact in their computing the period that had lapsed from the date the subject radio was stolen in a robbery to the date when the appellant was found with it. He said the robbery took place on 8th March, 2004 and the radio was found in possession of the appellant on 20th May, 2004, which was after a period of 72 days and not 11 days as the first appellate court computed. He contended that that period was too long for the application of the doctrine of recent possession as the radio is an item that can move from hand to hand easily, as there is no need for a license to possess it. Its possession 72 days after the robbery cannot mean the person in possession must have been the robber. In his view such a person would be a handler but certainly not a thief.

Mr. Menezes the learned counsel for the appellant, echoed the sentiments of Mr. Abele but relying on the case of **Kipsaina vs. Republic (1975) EA 253**, he maintained that the explanation given by the appellant in his plea and to the police, should have been accepted and thus the appellant should be set free on both counts.

We have anxiously considered the appeal. In our view, the learned Assistant Deputy Public Prosecutor, is plainly right in conceding this appeal. The learned Senior Resident Magistrate, as we have hinted above, clearly misapprehended the law and the High Court, though analysed the law as regards the doctrine of recent possession very well, did so on the premises of wrong facts and ended in wrong conclusion.

It is not in dispute that the appellant was convicted at his trial only on the allegation that he was found in possession of a radio cassette which was one of the items stolen from Ondego on the night of 8th March, 2004. That that robbery took place and Ondego was seriously injured was never in dispute. It was further not in dispute that the appellant on his being arrested pointed out the person who was later arrested and was second accused in the trial court as the person who gave him that radio as a security for a loan. Again on their being arraigned in court, his plea was the same, i.e that the radio had been given to him by Sylvanus who was at that time in court. Later in his defence, he gave a different story but we too think as did Mr. Menezes that that was perhaps the result of their being represented by one advocate who for some unknown reasons forgot all ethics and decided to represent three people with conflicting interests. That was clearly improper but it did happen with consequences that the appellant was clearly prejudiced as his main defence had to avoid that conflict of interest.

Nonetheless, the trial court did well to consider that defence that the radio was given to appellant as security but rejected it on grounds that no agreement for such a transaction was availed. As we have stated, this was shifting the burden of proof. At no time should a burden of proof be shifted to an accused person unless the case falls under the provisions of ***section 111*** of the Evidence Act. In any case the law as to explanation required in handling offences is clear, and it is found in the case of **Kipsaina vs. R**. (supra) in which this court stated:

> **"The law in East Africa on this point is well settled. Where an accused person is charged with receiving stolen property, his guilt is not established if the explanation that he has**

given is one which is reasonable and might possibly be true, even if the trial court is not convinced that it is in fact true."

In this case, the appellant stated that Sylvanus is the person who had given him the radio as security for a loan and that was stated in court at the plea level. It was stated to the police earlier on and led to Sylvanus being arrested. In our view the learned trial court needed not turn the entire case into a civil trial whereby agreements were necessary to establish the truth. The allegation was in our view reasonable and could have been true. It explained his possession of the radio and that being the case, as none saw him at the scene of the robbery, in our view even if he had been found with that radio eleven days later, which was not the case, he was entitled to the benefit of doubt and could not be convicted of robbery on the doctrine of recent possession as that possession was explained; neither could he be convicted of handling stolen goods as that handling was explained.

The High Court proceeded on wrong facts when it found that possession was established eleven (11) days after the robbery. That was not so. The radio was stolen on 18th March, 2004 and was recovered with the appellant on 19th May, 2004 according to Philip Opiyo (PW3) the radio repairer. Opiyo said in evidence that it was on 19th May, 2004 when the radio was taken to him by the appellant. Ondego did not specify the date he saw it at Opiyo's repair shop but he said it was in May. P.C. Otyang received a report about the radio on 21st May, 2004. If the date 19th May, 2004 when Opiyo received the radio from the appellant is accepted as the date the appellant was seen in possession of it, then that would be 72 days after the robbery and certainly not eleven (11) days as the High Court put it.

In law, we would be reluctant to intervene on findings of fact by the first appellate court except where such findings are based on misapprehension of those facts. This is one such finding. The learned Judges were clearly wrong in holding that the appellant was found in possession of the stolen radio eleven days after the robbery and were consequently wrong in holding as they did that as a result the possession was recent. It was not. It was 72 days after the robbery. In the case of **Maina & 3 others vs. Republic (1986) KLR 301** to which we were referred, this Court held *inter alia*: -

"The time lapse of two and a half months between the date of the theft of the pistol at the factory and the discovery of it on the appellant was so much that it would be unreasonable to hold that the mere possession of the pistol was sufficient to found a conclusion that the appellant participated in the robbery at the factory under the doctrine of recent possession."

We note that in that case a pistol is an item that may take long to pass from one person to the other as a license to hold it is needed unlike in this case of a radio which can pass from one person to the other very fast as now no such licence is required.

Again in this case, the possession, notwithstanding the long time lapse as discussed above, was explained and the trial court together with first appellate court noted the explanation but on account of non-appreciation of the law as regards the standard of such an explanation, rejected it. In our view, had the High Court realised that the period within which the possession was discovered and the robbery date was so long or was 72 days and not 11 days, it would have come to a different conclusion on the matter. This is the time to come to such a conclusion and the appellant was entitled to acquittal and would now realize that right.

Before the appeal is allowed, as we must do, we need to state that as the trial court and the first appellate court made no finding on the second count, we would not in law have jurisdiction to make any pronouncement on it as there would be nothing to either allow or dismiss as concerns it. However this judgment has in effect taken care of it and we need not say anymore.

This appeal has merit. It is allowed. The conviction is quashed and the sentence set aside. The appellant shall be henceforth set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 7th day of June, 2013.

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