IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 304 OF 2012

BETWEEN

1. ROBERT ACHAPA OKELLO)

2. LEMECK EVANS ODERO)

3. COLLINS RAMADHAN ISSA)..... APPELLANTS

4. OBADIA OTIENO ODUOR)

AND

REPUBLIC …..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisumu

(Mwera & Karanja JJ) dated 9th December, 2008

in

H.C.CR.A. NO. 179, 180, 181 & 182 OF 2005)

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JUDGMENT OF THE COURT

As on 21st December, 2004 ***Shadrack Opiyo Ochieng*** *(PW3)* of Manyatta, a carpenter, was working at his workshop within Manyatta area in Kisumu. On that day, he worked upto 7.00 pm and went home having securedly locked his workshop with a padlock. The next day, 22nd December 2004, he reported on duty but found the padlock missing from the door. He pushed the door open and on entering the workshop, he

found two (2) beds, tool box, five (5) screws, paint and shelf were missing. He went and reported the breaking into his building and commission of a felony therein to Kondele Police station. He gave the police a list of his stolen items. He also reported the incident to the Chief of Manyatta location. Before that incident was fully investigated and anybody arrested and charged in respect of it, another incident and only about four days later of a more serious magnitude occurred. On the night of 25th/26th December 2004 ***Nancy Ondeng*** *(PW1)* who was working for FIDA Kenya and was staying at Corner Legio in Manyatta, was asleep in her house together with her cousin ***Dorcas Otieno*** *(PW2)* who had

visited her from Kakamega and Nancy's son aged 7 years, was also asleep in the same house. She heard commotion in another room within the house. She alerted Dorcas, but before Dorcas could join her she saw a flash of a torch and knew there was someone in the house. Before long, an assailant approached her and ordered her to get out of bed and go and open the door. She obliged and gave him the key to the main door. The man had a panga which appeared like was smeared with blood. He threatened to cut Nancy if she made noise. Nancy and her son went back to the bed and covered themselves. After a short time more people entered the house and as Nancy was in bed, she could hear voices in the house and torches being flashed around the house. Some of the intruders threatened Nancy in various ways mainly threatening to physically injure her and her son and one kept hitting her on her

buttocks to turn but Nancy did not and kept on praying hard. The intruders stayed around the house for about two hours during which time they were removing and taking away several items. They then left and Nancy and Dorcas went round the house and discovered that the intruders had cut wire-mesh to the kitchen and that was what enabled the first attacker to enter the house before the main door was opened. Several items were stolen and these included Compaq Computer, TV L.G. 14 inch, Blue carpet (flowered), Sandals, passports, VCD DVD player, L.G. (40 discs), white Fan, Baby bicycle, Bird Mobile phone, Meko Cylinder, (green), two (2) big suitcases, two (2) leather bags, two (2) tins of paint and one (1) carpet cover. Nancy's sister was a District Officer. She informed her of the incident and one of the Chief's vigilante responded. She gave him the list of the stolen items. Nancy did not know and could not identify any of the assailants.

On 27th December, 2004 at 9.00 am. ***George Barasa*** *(PW6),* a youth at Kondele location, was one of the youths or vigilante, working under the Chief of Manyatta location. He said in evidence that his work was to gather information concerning criminal activities in the location. He could arrest those involved and take them to Kondele Police Station. We presume this was in respect of cognisable offences. He is one of the youth Nancy had left the list of stolen items with on 27th December, 2004, soon after the incident. While she was together with another vigilante known as ***Emmanuel Ouko*** and the Chief, they received some information that some things had been transported in a handcart at Gor Mahia Project nearby, The Chief asked them to go and investigate and confirm if the information had basis. He, together with Emmanuel and two others namely ***Francis*** and ***George Otieno***, went to the house identified in the information. They found three people in that house and these three people were cooking. On entering the house they saw carpet, Fan, bicycle, a video disc on which was written the name Nancy. Under the bed, they found three pangas which had blood. There was also a bed and tool box in that house. The three people found cooking in the house resisted arrest but they were overcome and were arrested and taken to the chief's office. Those people found cooking and who were arrested were identified by Barasa as the second, fourth and third appellants in this appeal who were the first, second and fifth accused before the trial court. The items were taken by the youths to the chief's office and the three appellants were also taken to the Chief's office. Shadrack went to chief's office after being informed by the youth of his stolen properties' whereabouts. He found his bed and tool box. According to Shadrack , he saw only two people arrested at the Chief's office. The Chief called Nancy and when Nancy responded and went to the Chief's office, she saw her Fan, Blue flowered carpet, two tins of paint and a filler. She saw three (3) men arrested there. Both Shadrack and Nancy agree that the men they found already arrested at the Chief's office alleged that some other stolen things, whether stolen from Shadrack's building on 21st December, 2004 or stolen on 25/26th December, 2004 in the course of robbery upon Nancy, were with another person. Shadrack who reached Chief's office earlier than Nancy was more explicit. He said that the two people

he found at the Chief's office already arrested said that the handcart's man who carried their things knew the house where he took some of the things and those arrested people took them to handcart's man; who in turn took them to the house of the first appellant in this appeal. ***Christopher Omuka Onsano*** *(PW 8)* who was staying at Obunga at the relevant time was the handcart's man. On 25th December, 2004 at 6.00 am, he was on duty at Kondele when a customer approached him and asked him to carry for him household goods from near Jamal Security, Kondele to Manyatta at the market . He described the things he carried as a bed, four stools and a stand. He took them, together with the customer upto the place he showed him, which was his house. He was paid kshs.100/=. He identified that customer as the first appellant in this appeal who was the fourth accused at the trial Court. Christopher identified the things he

carried to the house of the first appellant. In that house i.e the house of the first appellant, Shadrack found his bed, three stools, shelf and tins of paint. Nancy found in that house of the first appellant, her computer. The first appellant was in the house when the earlier team led by the handcart's man entered the house. Computer identified by Nancy as hers, was in the same room in which Robert the first appellant, was. The first appellant was also arrested and all the goods found in that house were taken to the Chief's office. Chief **Philip Omondi Omindo** (PW5) the Chief of Kondele location took part in all these and confirmed the evidence of Nancy, Shadrack, Barasa and Christopher, on the recovery of the items allegedly stolen from both Shadrack and Nancy. Dorcas confirmed robbery on

Nancy and ***PC David Wehulo*** of DCIO's office was a scenes of crime officer. He took photographs of the beds, paint and tool box as these were to be released to the owners before the completion of the trial, whereas ***PC Gichuki Dabili*** *(PW7)* received report of the robbery, rushed to the scene together with corporal in charge and driver. They met Nancy, interviewed her, and she narrated to them what happened and the properties taken from her house by the thugs. They investigated the incident and later the second appellant led them to his house where more items were found such as a bucket and plates and some goods. These were identified by Nancy who identified plates among other things because some remains of food were still on them. One other person was arrested only because he was mentioned by co-accused but nothing was found with him.

After all the above, the four appellants herein, together with two others were taken to court and charged with two counts of robbery with violence Contrary to ***Section 296 (2)*** of the Penal Code and several alternatives to those counts and one charge of Breaking into a building and committing a felony Contrary to ***Section 306 (A)*** of the Penal Code. As all appellants were found guilty of the first count of robbery with violence and the first appellant was, in addition also found guilty of the offence of Breaking into a building and committing a felony therein, we will reproduce here only the two counts. They were acquitted on the second count of robbery with violence as the complainant in that count did not show up in court at the trial of the appellants and their co-accused. All the other appellants were acquitted in respect of the third count.

The particulars of the first count read as follows:-

> **"On the 26th day of December, 2004 at Corner Legio, Manyatta Estate, in Kisumu District, within Nyanza province, jointly with others not before the court, while armed with pangas robbed Nancy Ondeng of one VCD make LG, TV set make LG., two watter (sic) buckets, one computer make Compaq, one bicycle make mountain, one mobile phone make bird, one blue carpet, one meko gas, 3 pairs of Masai Sandals, two suit cases, assorted clothings, cash Kshs.1,000/= all valued at Kshs.97,000 and at or immediately before or immediately after the time of the robbery, used actual violence to the said NANCY ONDENG."**

And the particulars of the offence of Breaking into a building and committing a felony Contrary to ***Section 306 (A)*** of the Penal Code were that:-

> **"On 21st day of December, 2004 at Manyatta Estate in Kisumu District within the Nyanza Province, broke and entered a building namely a Workshop of Shadrack Opiyo Ochieng and steal (sic) therein two wooden Beds, one open shelf, four stools, and a tool box all valued at Kshs.30,000 the property of Shadrack Opiyo Ochieng."**

All the six appellants denied the first count, and five of the appellants who were charged with the offence of Breaking into a building and committing a felony which was the third count also denied that count. These five included one ***Linah Awino*** who was acquitted of both counts at the close of the prosecutions case. She was also acquitted of the offence in the first count in which one co-accused ***John Paul Ondeng***, the then third accused was also acquitted. Both being acquitted on no case to answer in respect of both counts.

On the appellants being put on their defence, by the trial court, the first appellant, who was the

fourth accused, in the trial court stated in unsworn statement that he reached Kisumu from home on 27th December, 2004, and asked his wife to meet him in his Kisumu house over lunch time as he anticipated travelling to Nairobi the next day, so as to discuss the new supplies to her business at Kondele. Other matters concerning supplies were sorted out except two bales which had been given to one ***Rehema***. At 4.00 pm he went to Manyatta market to see Rehema. He met Rehema talking to three men and counting money. Beside Rehema was George Barasa and Christopher Omuka Onsano, the handcart man in a landrover with property. He tried to talk to Rehema but she was continually engaged by the people she was talking to. This made the first appellant shout at Rehema asking her to clear with him first. One of those people talking to Rehema sought to know if the first appellant knew them and the answer infuriated them. One of those people talking to Rehema was a Sergent and he said his boss had instructed him to visit first appellant's house for a search. All went to his house but nothing was recovered. One of them called ***Odundo*** reminded the first appellant of his misbehaviour when they were talking to Rehema. These people then took several items from his house. He gave a list of the items that were taken from his house but which he said were his own properties, and not the stolen properties that were being searched for. These items were loaded into a landrover and taken to chief's office. He was also taken there. Many people were invited to go and identify their stolen properties and the first appellant saw Nancy and her brother in law there. None of the items taken from his house were identified as stolen properties. He was thereafter charged after he had been asked for receipts for properties he alleged to be his properties. He sent for his wife who responded with the receipts. He told her to take them to Mr. Odundo but she returned to him claiming that Mr. Odundo wanted money. The first appellant learnt of his wife's arrest the next day. On 31st December, 2005, he was produced in court. He added that he had known Nancy for over 20 years within the neighbourhood. He denied having been a tenant in the house where the subject goods were found.

The second appellant who as we have stated, was the first accused in the trial court gave a sworn statement to the effect that he was a conductor in a Nissan registration Number KAN 036U, owned by one Ogutu. On 17th December, 2004, while on duty, he received information that his wife was sick. At 5.00 pm he went to his rural home and found she had died. He then started funeral arrangements which were finalised on 26th December 2004. He returned to the town on the same date and slept. On 27th December, 2004, he went to Changaa house. While there a person approached him and held him by his shirt and asked him to accompany him. That person poured out his changaa. The second appellant punched that person in return. He raised alarm and people responded who beat him up and took him to the Assistant Chief's office. The Assistant Chief told him, he would retaliate as the second appellant had assaulted his youth with a bottle. Next morning he found himself at the Police Station.

On 28th December, 2004, he was beaten and ordered to take the police to his house. Some ladies joined them to his house. His house was searched thoroughly but nothing was recovered. He was surprised that his plates were taken and alleged to belong to Nancy. He denied the charges. In cross-examination he said he was drunk when he was arrested and taken to Police Station. He conceded that a search was carried out in his house and his properties were taken and that Nancy claimed the plates to be hers and conceded finally that he had no receipts for what he said were his properties. The third appellant ***Collins Ramadhan Isaa*** gave unsworn statement in his defence. On 27th December, 2004, he left his house for his place of work at Kondele. As he was going for lunch he went to a stall and bought soda and some rolls of bhang. Two people joined him but later five people approached them and started beating them. They fought back and the two people escaped. He was arrested and taken to Chief's office. Later he was taken to Kondele Police Station. On 28th December, 2004, he was called by one Odundo and he led them to his house. They searched his house but nothing, the subject of the search was found in his house. He was taken back to Kondele Police Station. They were together with others taken to Kasule, but once there, he remained in the vehicle while the investigation officer went with others to a house and returned with utensils, mattresses, and suit-cases. Next day he was taken to court. He denied the charge. The last appellant, ***Obadia Otieno Oduor***, was the second accused at the trial. In his unsworn statement, in defence, he said that at the relevant time, he was a hawker. On 27th December, 2004, his mother had sent him to their plot in Kondele to collect money. While there they heard screams. He went to the place where screams were coming from to check what was happening. He found a tenant's wife being arrested and doors being broken. He told the invaders that he was the landlord of the plot and enquired as to why they were breaking the doors. Those people told him they would require him to record a statement. He

was taken to Assistant Chief's office. He was arrested and later was taken to Kondele Police Station. They went to where things were allegedly recovered from but he saw none there. Next day, they were put in a vehicle and taken to Kasule. Once there, some items were brought to the vehicle. They went back to Police Station and on 31st December, 2004, they were taken to court and charged.

The above were, in a summary the entire evidence that was before the learned Senior Principal Magistrate (H.I. Ongudi). Because of the nature of the offence and the evidence upon which the learned Magistrate based her conviction of the appellants and the evidence upon which the same conviction was confirmed by the first appellate court, we found it necessary to go into details on the defence that each of the four appellants advanced. We do not apologise for this. The learned Senior Principal Magistrate, after detailed consideration of the same evidence found each of the four appellants herein guilty as charged on first count and convicted them of the same charge and sentenced each to death. She also found the first appellant guilty of third count, convicted him and sentenced him to serve a sentence of three years imprisonment. That was the evidence that the first appellate court analysed and evaluated and then confirmed the convictions and the sentence in respect of the first count but ordered that the sentence of three years against the first appellant be held in abeyance.

In convicting the appellants, the learned Senior Principal Magistrate had this to say:

> **"Though the accused were not identified in C 1 and C 3 they were found in possession of stolen items within two (2) days of the robbery and a few days after the workshop breaking. I find that the Doctrine of "Recent Possession" would be applicable here.**
>
> **The accused persons are found to have participated in the offences as charged. For my part I find them guilty and convict them as charged on the principal counts as follows:-**
>
> **C1 - A1, A2, A4 & A5 are convicted under S. 215 CPC.**
>
> **C3 – A4 convicted while A1, A2 & A5 are acquitted under**
>
> **S. 215 CPC."**

And, as is clear from the above, they appealed to the High Court and that court had this to say in dismissing the appeal:-

> **"The foregoing ingredients of possession are herein established by the prosecution's evidence against the appellants such that if each was not in direct possession of the stolen goods then he was in indirect or constructive possession of the same.**
>
> **None of them attempted to explain their possession of the stolen goods, instead, they vehemently denied such possession with appellant one denying tenancy of the house where some of the goods were recovered and appellant four implying that he was merely a landlord of the house in which some of the goods were recovered.**
>
> **The appellants recent possession of the items stolen from the two complainants is incapable of explanation upon any other reasonable hypothesis than that of guilt. Consequently, we must and hereby hold that the doctrine of recent possession was correctly applied by the trial Magistrate in convicting the appellants after having keenly considered their respective statements of defence."**

The above decision is what has prompted this appeal before us filed by the first and the second appellants through their firm of Advocates M/S Otieno Ojuro and Company, and by the third and fourth appellants through their firm of Advocates M/S Onsongo and Company. The first and second appellants, in their joint Memorandum of Appeal raise six grounds of appeal which are in a summary that the learned judges of the High Court erred in the admissibility of circumstantial evidence; that they erred in failing to appreciate that the appellants' conviction was unsafe as the circumstantial evidence upon which it was

based was weak; that they failed to note and consider the effect of the contradiction of witnesses' statements to the police and in evidence in court; that the learned judges failed to give proper interpretation to the doctrine of recent possession; that they failed in the performance of their duty and that the decision was contrary to the law and to the evidence on record. For the third and fourth appellants two separate but similar Memoranda of Appeal were filed. This is as it should be for each appellant is entitled to appeal on his own even if eventually the appeals are consolidated during the time of hearing. As we have stated, the grounds were similar and a summary of one would suffice. They were that the first appellate court failed to analyse the evidence independently and reach its own conclusion; that much of the evidence upon which the conviction was based was founded on repealed ***Section 31*** of the Evidence Act and was thus inadmissible; that material contradictions in the prosecution's case which reduced its strength were not appreciated by the High Court; that the High Court rendered the standard of proof to that of within probabilities to the prejudice of the appellants; that the High Court shifted the burden of proof to the prejudice of the appellants; that the circumstantial evidence relied on for conviction was not watertight; that the prosecution failed to call material witnesses and the trial court and High Court failed to appreciate that aspect; that the High Court misdirected itself in regard to the principles of sentencing given the circumstances of the commission of the alleged offence.

In support of the above grounds both Mr. Otieno and Mr. Onsongo, the learned counsel for the first, second appellants and the third, fourth appellants respectively addressed us at length. In summary, Mr. Otieno submitted that on first appeal, the learned judges had a duty to revisit the evidence afresh, analyse it and evaluate it before reaching their own conclusion, a duty they failed to perform. He referred us to parts of the proceedings which he submitted indicated contradicting evidence that he felt were not considered by the High Court. He further stated that, the two courts below failed to consider the defence of the first and second appellants such as that the second appellant had said in his defence that the plates allegedly recovered from his house were his plates, but the courts did not appear to have considered that defence, and further their alibi defence was also not considered by both the trial court and the first appellate court. Mr. Otieno was of the view that the way the judgment was written did not meet the requirements of ***Section 169*** of the Criminal Procedure Code as circumstances obtaining in the entire case were according to him not considered and serious inconsistencies in the entire case were also not considered by the two courts. He asked us to allow the appeal as against the first and second appellants. Mr. Onsongo on his part, also argued on the main that the first appellate court failed to analyse and re-evaluate the evidence that was before the High Court and to reach its own conclusion on the same before it could confirm the conviction and sentence as it did. He also referred us to the evidence on record and gave an example of the evidence of Shadrack who said he found only two people already arrested at the Chief's office whereas Nancy said she was shown three men and one lady at the Chief's office. He referred us to some decided cases and submitted that the appellants were on the basis of these inconsistencies entitled to acquittal. Mr. Onsongo also added that the definition of possession as provided in ***Section 4*** of the Penal code was not applicable to the relevant case as the High Court dealt with prosecution as relates to definition as relates to ***Section 4 (a)*** only, whereas in this case more than one person was allegedly involved when recovery of the allegedly stolen properties was made. Hence there was need to demonstrate that each appellant had the knowledge that the goods allegedly in their possession were stolen goods. He also submitted that vital witnesses such as the Assistant chief were not called to give evidence and in his view that omission affected the weight of evidence and meant that the resultant inference was that those witnesses evidence would have weakened the prosecution's case. Lastly, he stated that ***Act No. 5 of 2003***, ousted and repealed ***Section 31*** of the ***Evidence Act*** so he maintained that the two courts erred in relying on the evidence that was secured out of the appellants leading the police or the youths to the places where stolen properties were recovered.

Mr. Abele, the learned Assistant Director of Public Prosecutions supported the conviction and sentence accepting that the High Court had a duty to re-evaluate the evidence on record, afresh and reach its own independent conclusion, but in his submission, that court obediently discharged that duty. He stated that the evidence on record demonstrated that the first appellant was found at his home and Nancy gave evidence to that effect as she recovered her computer in the same room where the first appellant was. He submitted further that the other appellants were found with several other stolen items and they did not challenge that evidence. The inconsistencies alleged if any, did not go to the root of the case. In his view, the convictions were rightly based on the principle of being in possession of recently stolen

properties and added that in any case under the provisions of ***Section 111***, the appellants did not explain their

possession of the recovered properties which were stolen properties. He urged us to dismiss the appeal.

We have anxiously considered the judgment of the trial court, that of the High court, the Memorandum of Appeal, the able submissions by the learned counsel for the appellants and by the learned Assistant Director of Public Prosecutions and the law.

That the building where Shadrack Opiyo Ochieng was carrying out his carpentry work was broken into and his goods stolen on 21st December, 2004, is not disputed. That on the night of 25th/26th December, 2004, only four days later robbers invaded Nancy and Dorcas together with Nancy's seven (7) year old son and took away several items belonging to Nancy is not disputed. The robbers were more than one, and had dangerous weapons namely a panga. Thus the ingredients of the offence of robbery with violence were all proved and that those who broke the building of Shadrack and those who perpetrated the robbery upon Nancy were not identified at the two scenes is also not in dispute and lastly that some or almost all the stolen items were recovered was also not challenged. All the parties to this saga agree that the appellants were found guilty and convicted only on basis of the application of the legal principle commonly known in legal jargon as the doctrine of recent possession.

The first appellant was allegedly found in possession of Nancy's computer stolen on the night of 25th/26th December, 2004, on 27th December, 2004, hardly two days after Nancy was robbed of it. He was also found in possession of Shadrack's bed, three stools and shelf stolen from Shadrack's building broken into on 21st December, 2004 on 27th December, 2004, only six days after the same bed and tool box were stolen from the same house. He denied both, but the concurrent finding of the trial court and first appellate court is that the witnesses were reliable on that aspect and their evidence was accepted. Equally, the second, third and fourth appellants were also found cooking in a house where video disc (CD) on which Nancy's name was written, fan and carpet all belonging to Nancy were found. The appellants denied that but on the same doctrine the two courts found them guilty of the first count of robbery with violence Contrary to ***Section 296 (2)*** of the Penal Code.

The main issues raised by the appellants were that the evidence adduced by the prosecution witnesses was inconsistent that on proper analysis and evaluation, could not be relied upon for a conviction; that the evidence relied upon to convict the appellant was inadmissible evidence as the provisions of the repealed ***Section 31*** of the ***Evidence Act Chapter 80*** were no longer applicable having been repealed; that as to the third and fourth appellants ***Section 4 (a)*** of the Penal code should not have been invoked, as ***Section 4 (b)*** was the appropriate Section, and that vital witnesses were not called and so the case was not proved within the standard required in law.

On inconsistencies, Mr. Otieno cited the evidence of Nancy who said that she found three people at the Chief's office against the evidence of Shadrack who said he saw two people. The concurrent findings by the trial court and the first appellate court was that the second, third and fourth appellants were all arrested by Barasa and his team and taken to the Chief's office. That was a finding made after analysis of evidence by both courts. In law, as this is a second appeal, by dint of the provisions of ***Section 361 (1) (a)*** of the Criminal Procedure Code, we have no jurisdiction to entertain it as it is a matter of fact and there is evidence upon which those two courts could conclude that the three were arrested in a house by Barasa and his team and were taken to the Chief's office. In the well known case of **M'Iriungu v. Republic (1983) KLR 455**, this Court stated as follows:-

> **"Where a right of appeal is confined to questions of law an appellate court has loyalty to accept findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent in the evidence that no reasonable tribunal could have reached that conclusion which would be the same as holding that the decision is bad in law – Martin v Glyneed Distributors Ltd t/a MBS Fastenings (The Times of March, 30, 1983.)"**

In this case, it was only Shadrack who talked of having seen two people arrested at the Chief's office. Nancy said *"It was A1, A2 and A5 whom we found at the chief's office."* Those are three people and unlike Shadrack, she identified those people in court whereas Shadrack merely said they found two people under arrest. Chief Phillip Omondi Omindo saw four people and that included the first appellant who was arrested later after Christopher, the handcart man led them to his house. All this evidence was before the two courts and they settled on their concurrent version after analysing it all. That is the purpose of analysing the evidence. It is essentially an exercise of sifting evidence before the court which will always be in various versions and after sifting it, coming to a conclusion as to which version is to be relied upon. This was done in this case admirably. We are not persuaded even in respect of other aspects of alleged inconsistencies that they go to the root of the entire case, neither do we accept that they are of such a serious nature that no reasonable tribunal could have reached the decision that the two courts did reach after their analysis and evaluation. We see no merit in that ground.

The next main issue was raised by Mr. Onsongo and that was that the evidence relied upon was inadmissible as it was evidence of confession that led to recovery of the stolen goods whereas the provision which erstwhile allowed such evidence to be admitted i.e ***Section 31*** of the ***Evidence Act Chapter 80*** Laws of Kenya, had been repealed way back in the year 2003. We readily agree that the evidence of recovery of goods as a result of confession which was admissible under ***Section 31*** of the ***Evidence Act*** when the provision existed is no longer admissible. However in this case there were recoveries of various items at various times and not all those recoveries were initiated by confession by the appellants. Barasa was clear in his evidence that on 27th December, 2004 at 9.00 am while he was in office with one ***Emanuel Ouko*** as the Chief was around, Nancy reported robbery with violence upon her and left them with a list of stolen items. They received a report of a handcart which had taken stolen goods somewhere and was with three youths. Barasa and Emanuel were asked to investigate the matter. He, one Francis, Emanuel and George Otieno went to the house where they found the second, third and fourth appellants cooking. On entering the house, they saw carpet, fan and bicycle and they became suspicious. They also saw Nancy's video disc with Nancy's name on it. This evidence was not as a result of any confession from the appellants. The goods recovered which belonged to Nancy were not recovered as a result of any confession by the appellants. The evidence of Barasa was clearly admissible. When the same properties were recovered, the three appellants had not been arrested and were not the ones who pointed out where the goods were as a result of any confession. Again as to the first appellant, it was Christopher the handcart man who led the police officers to the place where Shadrack found his bed, stools and stand. That is where the appellant was found sleeping. That is where Nancy also found her computer in the same house and in fact in the room where the first appellant was. This again was not a recovery as a result of any information given by the appellant. It was recovery as a result of evidence provided by the handcart man. Whereas we agree that later other items were recovered as a result of the appellants leading the youths and Assistant chief to various homes where the same were found, nonetheless, it is clear to us as demonstrated above that the first recovered items which were identified by Nancy and Shadrack as their stolen properties during robbery with violence on Nancy and breaking in and stealing from Shadrack's work place and which were recovered in possession of the appellants were not recovered as a result of information received from any of the appellants. That part of the evidence was clearly admissible and we reject that argument. In any case even where goods are recovered as a result of information during a confession, still such information would indicate that the appellant had knowledge of the stolen items and would be required to explain his knowledge under ***Section 111*** of the ***Evidence Act*** as Mr. Abele rightly said. But in this case, that was not necessary except in respect of goods recovered later as a result of the appellants leading the police to such recoveries.

We now move to the issue of whether or not each of the appellants were in possession as defined under ***Section 4*** of the Penal Code. Mr. Onsongo, in arguing grounds 4 and 5 submitted that the learned Judges in considering whether the appellants were in possession or not only considered part of the definition as spelt out in ***Section 4***, which deals with possession in case of one person but did not consider possession as relates to more than one person which is spelt out in part 2 of that definition and so did not consider whether each of the appellants had knowledge and consent of the others as regards what was allegedly possessed. In grounds 4 and 5 of each of the Memorandum of Appeal filed on behalf of the third and fourth respondents, the complaint relates to standard of proof and the allegation is that the High Court lowered the standard of proof to one of the balance of probabilities and that the court shifted the

burden of proof to the appellants. There is no specific complaint that the allegation that the appellants were found in possession of the stolen goods was not proved within the definition of the word possession as defined by law. Be that as it may and in any case we do not with respect agree with Mr. Onsongo that the learned Judge applied the definition in part ***1*** of ***Section 4***. The definition of ***"possession"*** is given in ***Section 4*** of the Penal Code. It is divided into two parts namely (a) and (b). Part (a) states: -

> **"(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 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."**

That definition relates to one person and, on our reading of the record this is not the definition relied upon by the High Court in its judgment. The second definition states: -

> **"(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."**

This was the provision invoked by the learned Judges of the High Court. At page 16 of their typed judgment, the learned Judges stated: -

> **"Prior to the recovery of the aforementioned items, some other items had already been found in a house occupied by the second, third and fourth appellants. The three were found in one house containing the first complainant's C/D video disc (P.E. X1), fan (P.E. X2), flowered carpet (P.E. X3) and bicycle (P.E. X7).**
>
> **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 (See Section 4 of the Penal Code).**
>
> **If there are two or more persons and any one or more of them with the knowledge and consequent (sic) 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 foregoing ingredients of possession are herein established by the prosecutions evidence against the appellants such that if each was not in direct possession of the stolen goods then he was in indirect or constructive possession of the same."**

The above reflects the consideration the first appellate court gave to that issue and it will be clear from the above that that issue was given full consideration both on matters of fact and of law. We only need to add that knowledge and consent are not matters that the prosecution needed to prove by calling evidence of any communication between the appellants. They are matters that are proved through the circumstances obtaining and conduct of the accused persons. In this case, as the learned Judges of the High Court rightly, in our view, observed, having been found in the same house cooking and stolen goods in the same house, not hidden as otherwise Barasa and his team would not have seen them so easily, the second, third and fourth appellants did not explain whose goods they were. We see no merit in this complaint.

The next and last issue for our consideration is that vital witnesses were not called and that being so, we were invited to draw an inference that the evidence of those witnesses would have been adverse to the prosecution case. In particular Mr. Onsongo mentioned the Assistant Chief who was alleged to have received the report of the incident. We have considered the entire record against this complaint. ***Section 143*** of the ***Evidence Act*** states: -

> **"No particular number of witnesses shall, in the absence of any provision of law to the**

contrary, be required for the proof of any fact."

We agree that where the evidence tendered is barely adequate to prove the case, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. That was one of the holdings in the case of **Bukenya and others vs. Uganda (1972) EA 549** heard by the predecessor of this Court.

In this case however, the Assistant chief did not accompany Barasa and his team on the first visit to the house where some stolen items of Nancy and Shadrack were first recovered and as to recoveries of the items from the first appellant's house, there was overwhelming evidence from Shadrack, Barasa and Nancy. We do not see what weight the Sub-chief's evidence would have added to the evidence that was already before the court. In any case, as to the part played by the administration in the matter, Philip Omondi, the Chief under whom Barasa and the Assistant Chief were working gave evidence in court on the issue. In our view, evidence of the Assistant Chief would have meant the court receiving superfluity of evidence which was not necessary for purposes of a conviction in the case.

We think we have said enough to demonstrate that in our view, this appeal lacks merit. The sum total is that it is dismissed.

Dated and delivered at Kisumu this 24th day of October 2013.

J.W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is the

true copy of the original

DEPUTY REGISTRAR