IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 606 OF 2010

BETWEEN

REUBEN NYAKANGO MOSE …..... 1st APPELLANT

JAMES KIRIAGO OSIEMO …..... 2nd APPELLANT

AND

REPUBLIC …..RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisii,(Musinga, Muchelule, JJ) dated 18th November, 2009

in

HCCRC NO. 147 & 148 OF 2004)

****

JUDGEMENT OF THE COURT

The appellants, Reuben Nyakango Mose and James Kiriago Osiemo were charged before the Principal Magistrates' Court, Nyamira, with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code particulars being that on the 24th day of March, 2004 at Boisanga Sub location of Ekerenyo location, Nyamira District of Nyanza Province jointly with others not before court while armed with pangas, whips and an imitation firearm, robbed Evans Morara Mose of one suit, three shirts, one television set make Samsung, three mattresses, seven bed sheets, one blanket, one metal box containing assorted clothes, one somali sword, half a sack of maize, one pressure lamp, one lantern lamp, two black coats, one battery charger machine, two thermos flasks, one hot pot, three plates, spanner for a posho mill, one forked jembe, one spade, one slasher, Kshs. 2,730/=, one wrist watch and a driving license all valued at Kshs. 49,000/= the property of the said complainant and that at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said complainant.

There was a second count of burglary contrary to Section 304 (2) and stealing contrary to Section 279 (b) of the Penal Code, particulars being that on the same day, time and place jointly with others not before court broke and entered the dwelling house of Jacquiline Nyamato with intent to steal therein and did steal three mattresses, three blankets, thirty two iron sheets, twenty pieces of table clothes, five bed sheets, two pillow cases, seven pieces of table clothes, a cardigan, two jackets and assorted clothing

belonging to the said Jacquiline Nyamato valued at Kshs. 32,400/=.

The third count was also burglary contrary to Section 304 (2) and stealing contrary to Section 279 (b) of the Penal Code, particulars being that on the same day, time and place jointly with others not before court broke and entered the dwelling house of George Mwaniki with intent to steal and did steal from therein one mattress, two blankets, two bed sheets and a pair of slippers the property of the said George Mwaniki valued at Kshs. 3,600/=.

An alternative charge to the second count charged the second appellant with the offence of handling stolen property contrary to Section 322 (2) of the Penal Code particulars being that on 31st March, 2004 at the said place, the second appellant otherwise than in the course of stealing received or retained four blankets, one bed sheet, seven iron sheets, two ridges, a slasher and two mattresses knowing or having reasons to believe them to be stolen goods.

The alternative charge to the third count charged the first appellant with the offence of handling stolen property contrary to the said provision of law, particulars being that on the 31st March, 2004 at the said place otherwise than in the course of stealing received or retained seven iron sheets, one wall clock, one pressure lamp, six cushions, one lantern lamp, one black coat, one pillow and twenty pieces of table clothes knowing or having reasons to believe them to be stolen goods.

The trial was conducted before the learned Principal Magistrate (Kiarie Waweru Kiarie) who in a judgement delivered on 9th June 2004 convicted the appellants on the three main counts but made no findings on the alternative counts. The learned trial magistrate sentenced each appellant to suffer death in respect of the first count and to serve three years imprisonment on each limb in respect of and on each of the second and third counts. The latter sentences were to be served before the sentence of death was executed.

The appellants appealed to the High Court of Kenya at Kisii (D. Musinga, J (as he then was) and A. O. Muchelule, J) but the appeal was dismissed in the judgement delivered on 18th November, 2009. The appellants were dissatisfied with the findings of the High Court and filed this appeal.

Being a second appeal we are legally constrained to consider only issues of law raised in the appeal and not to consider matters of fact tried by the trial court and the appellate court on the first appeal. This is what Section 361 (1) (a) of the Criminal Procedure Code provides and the position has been restated in the many decisions that have come from this court on that point like **Njoroge v Republic [1982] KLR 388** where the appellant had been convicted in a magistrates court of robbery with violence and sentenced to death. The first appeal to the High Court was dismissed and he filed a second appeal to the Court of appeal. The two courts found as fact that the charge had arisen from a bank robbery involving a gang of robbers in broad day light. Two eyewitnesses identified the appellant as one of the robbers and they had subsequently picked him out in identification parades. One of the witnesses had, however, also picked out an innocent man. It was submitted for the appellant that by having picked out an innocent man and having seen the person whom he had identified as the appellant for a very short time, the witness was unreliable and his evidence would have been rejected. It was held that on a second appeal the Court of Appeal is only concerned with points of law. On such an appeal the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence.

See also **Stephen M'Riungu & others v Republic (1982-88) I KAR 360 and Thiongo v Republic [2004] IEA 333 .**

When this appeal came up for hearing before us on 15th October, 2013 learned Counsel for the appellant Mr. M. M. Omondi abandoned the original Memorandum of Appeal filed herein and relied on Supplementary Memorandum of Appeal dated 17th May, 2013 drawn by M/s Otieno, Ragot & Company Advocates. Three (3) grounds of appeal are taken, the first being that the judges on the first appeal erred in law and fact in upholding the conviction of the trial court despite the fact that the charge preferred against the appellant was totally defective for being duplex having charged the appellant with two

separate distinct and mutually exclusive offences within the same count.

The second ground of appeal complains that the judges on the first appeal erred in law and fact in upholding the decision of the trial court that the offence had been proved to the required standard of proof which is proof beyond reasonable doubt, that the allegedly stolen items recovered from the appellant were the property of the complainant when the complainant did not avail to court distinguished proof of ownership of the allegedly stolen items which were also claimed by the appellant.

The third and final ground of appeal taken by the appellant was to the effect that the first appellate court erred in failing to critically re-evaluate the evidence presented before the trial court and thus failed to appreciate that there was no positive identification of the appellant and that it was therefore unsafe to convict the appellant.

Let us therefore look at the case that was before the trial court and examine how the first appellate court evaluated the same (if at all) as we find out whether the appeal before us falls within the strictures placed by the said Section 361 (1) (a) of the Criminal Procedure Code.

The case for the prosecution was through the evidence of ten witnesses and was that on 24th March, 2004 at about 9:30 p.m. Evans Morara Mose (PW2), a caretaker in the home of David Kimori Omare, was in the house watching television when a man suddenly entered the room. This man who was armed with a gun ordered PW1 to lie down. He complied with the order. The intruder switched off the lights that were on in the room and placed some blindfold on PW2s' face. Other intruders then entered the room and ordered PW2 to produce keys which the intruders used to open up areas where goods were stored. PW2 was led to a bedroom where he was held under armed guard for three hours. The intruders meanwhile ferried goods outside the house literally stripping the house bare. PW was later led on his knees to the sitting room where the watchman was brought and they were tied together. The intruders left. PW2 and the watchman managed to untie themselves and raised the alarm. PW2 telephoned Jacquiline Nyamota (PW1) and George Mwaniki (PW3) who were in Kisumu and informed them of the incident and also reported to the clan elder, the local Chief and Nyamira Police Station. The next day the police informed PW1, PW2 and PW3 that some items had been recovered in the house of the first appellant Reuben Nyakango. The incident led to the village elder Zephania Mokua Kabinga (PW4) – calling a baraza attended by the said witnesses amongst others. The first appellant attempted to run away from the meeting but was caught by those present.

The first appellant led the witnesses and police to his home where at the garden recoveries of cushions, one coat, a home made gun, a pressure lamp, some table clothes and a lantern were made. Thirteen iron sheets were recovered in the first appellants house. The party then left for the second appellants house where the following items were recovered: seven iron sheets, two bed sheets, a slasher and other items which PW2 could not remember.

Next ports of call were the homes of one Omoti Sweti and the watchman Mchumbe Omaigwa where more recoveries were made. These two people had apparently fled and were at large during the trial.

PW2 did not recognize any of the intruders who entered the house that night. PW1 upon being telephoned by PW2 and accompanied by her brother in law PW3 proceeded from their Kisumu base to their homes where they established that the homes had been cleaned out during the robbery that had taken place. PW1 and PW3 were in the party that visited the homes of the appellants where recoveries were made as already stated. PW1 identified her items amongst those recovered including two bowls with the initials “DK” which according to this witness stood for “David Kimori” her late father in law.

The evidence of PW3 was more or less a recapitulation of what we have gone through as related by PW1 and PW2.

PW4 after receiving report of robbery visited the homes of the complainants and verified the information. This witness was at the baraza called on 30th March, 2004 where the first appellant attempted to flee. He was amongst those who made recoveries of the stolen items.

Patrick Rema Nyamaro (PW5) and Benson Kiriago Ongoko (PW6) participated in a chase where the first appellant was arrested and led police and witnesses to his house where recovery of stolen items was made.

Assistant Chief Philip Masenge Mongiti (PW7) organized the baraza we have already discussed and witnessed the first appellant attempt to run away from the same baraza.

No. 90091596 APC Samson Onyango (PW8) and No. 7807148 AP CPL Joseph Maranda (PW9) received robbery report, arrested the appellants and made the said recoveries while No. 51069 James Owuor (PW10) of Criminal Investigations Department, Nyamira, was the investigations officer. PW10 produced all the recovered items as exhibits in the case.

The trial magistrate held that there was sufficient evidence requiring the appellants to answer and therefore put the appellants on their defence. The appellants elected to give sworn statements and called one witness.

The first appellant testified that he could not recall where he was on the day of the robbery. On the two bowls with letters "DK" found in his possession and bed sheet and table cloth the appellant stated that these items had been given to him by one Agnes Kemori who was deceased. The donation according to the first appellant had been made to him in May 2001. On iron sheets found in his house the first appellant stated that he had purchased the same on 8th May, 2003 at a place called Obwari. He produced a receipt for the said purchase and denied the charges facing him.

On cross – examination the first appellant testified that he had purchased six iron sheets from a shop of one Mberesi and on why he had fled from the baraza the first appellant testified that he had been threatened.

The second appellant denied the charges stating that he was at home with his wife on the night of the robbery.

Gladys Nyamusi (DW3), wife of the first appellant, testified that the first appellant was at home on the night of robbery and did not leave the house at all. She stated that her husband had bought thirty six iron sheets in 2002 and upon erecting their house six iron sheets had remained. These were the ones taken by the police. All the iron sheets had been bought at a shop owned by one Hezbon who had a wife called Jane. The shop was at Nyabambo, also called Karota which, according to DW3 was very far from the place called Obwari. She denied that any iron sheets had been bought at Obwari.

After reviewing the entire prosecution case against the defence offered by the appellants the learned trial magistrate came to the conclusion that the defences offered were after thoughts, could not hold and thus dismissed them. On the specific issue of how items claimed by complainants and recovered from the appellants came to be claimed by appellants this is how the learned magistrate expressed himself:

> **" The defence of the first accused when viewed together with the entire evidence on record cannot hold together. Whereas he contended that the 2 bowls, a bed sheet and a table cloth were given to him by Agnes Kemori (now deceased) in the year 2001, his wife Gladys Nyamusi (DW3) testified that the accused informed her that the items were given to him by Zipporah Mecha and this was in the year 2002. These two versions cannot be reconciled as to the source and when the same were given to him. The only inference to make is that the accused and his wife are attempting to raise a non-existent defence.**
>
> **This accused claimed ownership of the iron sheets recovered from his house and he produced a receipt. His evidence on how he came to the possession of the iron sheets was contradicted by that of his wife in all aspects. The accused said he bought the iron sheets at Obwari at Mberesi's shop and he produced a receipt showing six pieces of iron sheets were bought. However the receipt is a general cash sale receipt which has no**

indication as to where they were purchased. His wife's evidence on the other hand is that they bought 36 iron sheets at Nyambambo also known as Karota which is in Luo Land in the shop of Hezbon and the six iron sheets remained after her husband had roofed their house. This therefore means no receipt would have been issued for the six but for 36 iron sheets. This is why the date on the receipt that the accused produced is interfered with to read the date he purported to have bought the iron sheets. It is worth noting that Gladys Nyamisi (DW3) testified that Obwari and Karota are very far from each other.

I also have on record evidence that other items stolen from the complainants' houses during the robbery were recovered in his garden concealed in a hole. I have no evidence to make me doubt the recovery. I therefore dismiss his defence in its entirely.

James Kiriago Osiemo's (accused 2) defence cannot also stand the test of its authenticity. I have overwhelming evidence against him from the point of his arrest, how the stolen items were recovered in his house and garden. I have no evidence on record to make me doubt the prosecution witnesses on how the items recovered were linked with this accused."

In the first appeal to the High Court the appellants raised similar grounds of appeal relating to alleged insufficient evidence to prove the charge of robbery with violence. The appellants also raised issues on the finding by the trial magistrate that they had been found in possession of recently stolen items and complained that their defences had not been properly considered by the trial court. It was the duty of the first appellate court to reconsider and re-evaluate the evidence that was adduced before the trial court and make an independent assessment whether to uphold the conviction. The first appellate court found that the appellants conviction was entirely based on the doctrine of recent possession of the items that were robbed on 24th March, 2004. The court found that the appellants were found in recent possession of the items stolen from the complainants and were actually the thieves who stole those items.

When the appeal came up mfor hearing before us learned counsel for the appellants Mr. Omondi submitted that the entire trial before the magistrate was a nullity because the charge sheet was duplex. Counsel submitted that combining the offence of burglary and that of stealing in the same charge was fatal to the charge for the reason that ingredients of the offences were different. Counsel cited a decision of this Court differently constituted in **Selimia Mbeu Owuor & Another v Republic Criminal Appeal No. 68 of 1999 (ur)** for the proposition that a duplex charge would not hold and would be a nullity. Also cited was the case of **David Beya Aziz (alias Ngarama) v Republic Mombasa Criminal Appeal No. 100 of 1999 (ur)** where it was held that the charge on which the appellant was convicted was incurably bad for duplicity and the consequence was that the appeal was allowed and conviction quashed.

On the second and third grounds of appeal counsel for the appellant submitted that the first appellate court erred in law by failing to evaluate evidence of the trial court. Counsel further submitted that it was wrong for conviction to be upheld when there was no identification of the intruders by any person. Counsel also submitted that for the doctrine of recent possession to be established possession must be proved positively and there must also be proof that the property belonged to the complainant. For this proposition counsel cited **Christopher Rabut Opaka v R Kisumu Criminal Appeal No. 82 of 2004 (ur)** a decision of this court differently constituted.

The learned Assistant Public Prosecutor Mr. C. A. Abele opposed the appeal and submitted that the charge sheet was not duplex as according to him the law allowed the offence of burglary and that of stealing to be combined. He cited Section 304 of the Penal Code which provides as ingredients constituting the offence, entering a vessel or dwelling house and committing a felony therein. The learned Counsel submitted that the first appellate court had properly re-evaluated the evidence and that the conviction, which was based on the doctrine of recent possession, was safe. Counsel pointed out that robbery took place on the night of 24th March, 2004 and stolen items were recovered as early as the next morning.

The first point of law raised by the appellant in the supplementary Memorandum of Appeal already referred to was that the first appellate court erred in upholding a conviction on a charge that was duplex. Was the charge sheet presented before the trial magistrate duplex to render the entire proceedings invalid for duplicity?

The relevant counts of the charge sheet complained of are counts two and three of the charge sheet presented before the trial magistrate in Nyamira Principal Magistrate's Court Criminal Case No. 276 of 2004. These counts were framed in the following terms:

" **COUNT TWO**

CHARGE **BURGLARY CONTRARY TO SECTION 304 (2) AND STEALING CONTRARY TO SECTION 279 (b) OF THE PENAL CODE**

PARTICULARS OF THE CHARGE **(1) REUBEN NYAKANGO MOSE (2) JAMES KIRIAGO OSIEMO On the 24th day of March 2004 at around 9:30 p.m. at Boisanga I sub -location, Ekerenyo location in Nyamira District within Nyanza Province, jointly with others not before Court, broke and entered a dwelling house of JACQUILINE NYAMATO with intent to steal therein and did steal (1) Three mattresses (2) Three blankets (3) 32 iron sheets (4) 20 pieces of table clothes (pink) (5) Five bed sheets (6) Two pillow cases (7) Seven pieces of table clothes blue in colour (8) A cardigan (9) Two jackets and assorted clothing the property of the said JACQUILINE NYAMOTA being of the value of Kshs. 32,400/=**

K. W. KIARIE, pm

7.4.04

" **COUNT THREE**

CHARGE **BURGLARY CONTRARY TO SECTION 304 (2) AND STEALING CONTRARY TO SECTION 279 (b) OF THE PENAL CODE**

PARTICULARS OF THE CHARGE **(1) REUBEN NYAKANGO MOSE (2) JAMES KIRIAGO OSIEMO On the 24th day of March 2004 at around 9:30 p.m. at Boisanga I sub -location, Nyamira District within Nyanza Province, jointly with others not before Court, broke and entered a dwelling house of GEORGE MWANIKI with intent to steal and did steal from therein (1) Oner mattress (2) Two blankets (3) Two bed sheets (4) Pair of**

slippers red in colour the property of the said GEORGE MWANIKI being of the value of Kshs. 3,600/=

K. W. KIARIE, pm

7.4.04"

Learned counsel for the appellants contended that the charge sheet was fatally defective because it combined the offence of burglary contrary to Section 304 (2) of the Penal Code with the offence of stealing contrary to Section 279 (b) of the said Code. Section 304 of the Penal Code on "House breaking and burglary" provides that:

> **"(1) Any person who**
>
> **(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or**
>
> **(b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof,**
>
> **is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.**
>
> **(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years."**

Section 279 of the said Code on "Stealing from the person; stealing goods in transit, etc" provides in the relevant part that:

> **" If the theft is committed under any of the circumstances following, that is to say-**
>
> **(a ….**
>
> **(b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;**
>
> **(c) ….the offender is liable to imprisonment for fourteen years."**

In a persuasive authority of the High Court of Kenya in the case of **Laban Koti v R [1962] EA 439** the appellant was charged with and convicted of wrongfully attempting to interfere with or influence witnesses in a judicial proceeding, either before or after they had given evidence, contrary to Section 121 (1) (f) of the Penal Code. On appeal it was suggested that the charge might be bad for duplicity, firstly because it alleged that the appellant "wrongfully attempted to interfere with or influence" witnesses, and secondly because it alleged that such attempt occurred "either before or after" the witness had given evidence. It was held that in deciding whether there is duplicity in a charge the test is whether a failure of justice has occurred or the accused has been prejudiced. It was further held in that case that the appellant had been left in no doubt, from the time the first prosecution witness gave evidence, that the alleged attempt made before the witness gave evidence and his defence could not be said to have been prejudiced in any way. Accordingly, there was no miscarriage or failure of justice on the ground that the charge was duplex in alleging that the attempt was made either before or after the witnesses had given their evidence.

In another persuasive authority of **Kababi v R (1980) KLR 95** the charge presented before the trial court was causing death by dangerous driving. Three deaths were alleged in one count. However no objection

was raised at the trial by the appellants counsel to the fact that there was only one count. It was held that since counsel had not objected to the single charge it could not have occasioned any miscarriage of justice.

Then there is a decision of this court differently constituted in the case of **Mahero v R [2002] 2 KLR 496** where the appellant was charged with three offences the first being causing death by dangerous driving contrary to Section 46 of the Traffic Act. The charge was couched in the words of that section. The other counts were failing to report

1. an accident and driving a motor vehicle without a driving licence contrary to Sections 73 (3) and 30 (1) of the said Act. The appellant was convicted on all counts and the first appeal failed. It was submitted for the appellant in the second appeal that the charge on the first count was defective for duplicity because its particulars alleged two offences, namely, causing death by driving a motor vehicle at a speed and, secondly, driving the motor vehicle in a manner that was dangerous. The appellant also argued in respect of the second count that Section 73 (3) which was quoted in the charge sheet did not create an offence. It was held that an offence under Section 46 of the Traffic Act is in actual fact a charge of manslaughter in connection with the driving of a motor vehicle. The section does not create more than one offence, but does set out different ways of managing a motor vehicle which may give rise to the offence. The different modes of driving are in themselves offences under different provisions of the Traffic Act. It was further held that the legislature appeared to have sanctioned that in cases falling under some provisions of law, particulars could be worded in duplex terms.

The court in the **Mahero** (supra) case considered the English case of **Ministry of Agriculture Fisheries & Food v Nunn Comm & Coal (1987) Limited [1990] L. R. 268** where it was emphasized that the question of duplicity is one of fact and degree and that the purpose of the rule is to enable the accused to know the case he has to meet.

In the case of **Amos v DPP [1988] RTR 198** it was held that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed and to counter a true risk that there may be confusion in the presenting and meeting of charges which are mixed up and uncertain.

Section 134 of the Criminal Procedure Code provides that:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

Section 135 of the said Code provides:

> **" (1) Any offences, whether felonies or misdeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or are part of a series of offences of the same or a similar character.**
>
> **(2) Where more than one offence is charged in a charge or information, a description of each offences so charged shall be set out in a separate paragraph of the charge or information called a count.**
>
> **(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information."**

Then there is Second Schedule of the Criminal Procedure Code on "Forms of stating Offences in Informations". Form 9 is on Burglary and gives the form of the offence as follows:

" 9 – BURGLARY

Burglary, contrary to Section 304, and stealing, contrary to section 279 of the Penal Code.

PARTICULARS OF OFFENCE

A.B., in the night of the …..... day of …..... 19 …....., in..... District within the …..... Province, did break and enter the dwelling- house of C.D., with intent to steal therein, and did steal therein one watch, the property of S.T., the said watch being of the value of Sh. 200."

The appellants were represented by counsel in the trial court. The issue of alleged duplicity of the charge was not raised at all. The matters raised in the first appeal were mostly complaints relating to findings on the robbery with violence charge.

Can it therefore be said that the appellants were unaware of the case that they were to meet when they were charged before the trial court and were prejudiced leading to a miscarriage of justice?

It will in any event be seen that the framing of the charge of burglary in the Criminal Procedure Code envisages that another offence may be committed in the course of burglary. That is why the relevant form is couched to include burglary and stealing in the same charge. The authorities we have visited and all relevant law envisage that because a thief who breaks into a dwelling house or a vessel will have had ulterior motives when he formed the intention to break into the house or vessel then what follows – this will ordinary but not necessarily be stealing – should be included in the burglary charge. There cannot therefore be duplicity when the offence of burglary and stealing are combined in the same charge.

The other ground of appeal raised by the appellants is that the offence was not proved to the required standard because the complainant did not, according to this complaint, produce proof that the items were those of the complainant.

We have already set out the findings by the trial magistrate on the items that were found either in the houses or compounds of the appellants. The first appellant appeared to lay claim to the bowls which had distinguishing marks "DK" and other items of clothing which the first appellant claimed to have received as a donation from a deceased person. In addition the first appellant claimed that the six iron sheets found in his house were purchased by himself from a certain shop. We have set out in full the trial magistrate's findings in respect of the appellants claim to the recovered items. This, then, brings us to the doctrine of recent possession on which the first appellate court concluded the appellants conviction to have been based on.

The principles of law upon which the doctrine of recent possession is based were well laid out in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v R Criminal Appeal No. 82 of 2004** which was cited with approval by this court differently constituted in the **Christopher Rabut Opaka (supra)** cited to us by counsel for the appellants. The principles are that:

> **"... It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view, any discredited evidence on the same cannot**

suffice no matter from how many witnesses."

In the persuasive authority in **Malinga v R [1989] KLR 225** Bosire, J (as he then was) expressed himself thus at page 227:

> **"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of the fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."**

The first appellate court applied these principles and found that the stolen items were found in the custody of the appellants so soon after the robbery that it was safe to conclude that the appellants were the robbers. The first appellate court also found as fact and thus agreed with the trial magistrate that the explanation by the first appellant regarding the two bowls and bedsheets was contradicted by his wife.

The evidence before the trial court and as confirmed by the first appellate court was that it was the appellants who led the prosecution witnesses, members of the public and the police to their homes where the items produced as exhibit in court were recovered. Thus he had knowledge of where the stolen goods were and so was in constructive possession of the same goods.

We have carefully considered the totality of the evidence as relates to recent possession and are satisfied that the two courts below were entitled to reject the defences offered by the appellants. The stolen items were sufficiently described and identified by PW1, PW2 and PW3 and were recovered so soon after the robbery that the trial court was entitled to draw an inference that the appellants stole the items.

The final ground of appeal complains that the first appellate court erred in not re-evaluating the evidence and failed to appreciate that there was no positive identification of the appellants.

This ground of appeal must fail. This is because the trial before the magistrate did not proceed on the basis of identification of the intruders at all. PW2 indeed stated that he did not recognize or identify any of the robbers. The trial proceeded on the doctrine of recent possession on which conviction was based and on which we have pronounced ourselves.

This appeal has no merit and it is accordingly dismissed.

Dated and Delivered at Kisumu this 29th day of November 2013

J. W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a truecopy of the original.

DEPUTY REGISTRAR