IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & GATEMBU JJ.A)

CRIMINAL APPEAL NO. 158 OF 2007 (R)

BETWEEN

MUSA ADAM NJUGUNA ……. …… APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Appeal from the sentence of the High Court of Kenya at Nairobi (Mutungi & Ochieng, JJ) dated 21st April, 2005

in

HC. CR.A NO. 892 OF 2002)

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JUDGMENT OF THE COURT

1. Morgan Kipruto Kwalla, PW1, ("Kwalla") was at the time material to this appeal an accountant employed by Nairobi Serena Hotel and a resident of Embakasi Nairobi. On 28th November 2001 at about 1.00pm, Kwalla was running on some personal errands. He collected his letters from the General Post Office along Kenyatta Avenue, Nairobi. From there he went to his bank, the Cooperative Bank of Kenya, University Way branch where he drew some money. On his return trip from the bank, he was walking along Loita Street near the Grand Regency Hotel when a gang of assailants accosted and held him. The assailants took his mobile telephone, the cash he had withdrawn from his bank, his personal documents that he had collected from the post office and his eyeglasses were damaged. Kwalla lost his memory momentarily.

2. The assailants then freed Kwalla and took to their heels. Kwalla, alongside members of the public who responded to his distress call, pursued and chased the assailants. Two of the assailants were arrested near the Uhuru Highway/Kenyatta Avenue roundabout. The others got away. Kwalla, who said that he did not lose sight of the assailants as he pursued them, identified the first and second accused as members of the gang that accosted and robbed him. Some of Kwalla's documents and letters that he had earlier that day collected from the post office were recovered from the person of the 2nd accused, who is the appellant in this appeal. With the assistance of police officers, the accused were escorted to Central Police Station after which they were charged with the offence of robbery with violence and arraigned before the Magistrate's Court at

Makadara Nairobi.

3. On 28th November 2001 at about 1.30 p.m. Police Constable Dominic Kariuki (PW2) and Police Constable Mwenda were on patrol along Kenyatta Avenue, Nairobi when Police Constable Dominic Kariuki received a report from the controller to proceed to the junction of Uhuru Highway and Kenyatta Avenue. On getting there, they found two persons, the accused persons, under arrest by members of the public. Kwalla introduced himself to the police officers and reported that the accused persons were part of a gang that had robbed him of his mobile telephone, letters and documents, some of which were recovered from the appellant and cash in the amount of Kshs. 6,000.00. They re-arrested the accused persons and escorted them to Central Police Station.

4. Kennedy Kimutai Langat, (PW3) a car sales person in Nairobi was near the Grand Regency Hotel in Nairobi on 28th November 2001 at about 11 am minding his business when he heard a cry for help from a victim of robbery that was in progress. He responded to the distress call and came to the assistance of the victim. He chased the assailants. He caught up with the first accused and arrested him. He also witnessed letters/envelopes being recovered from the trouser pockets of the appellant.

5. In his defence, the 1st accused stated that he was on his way to Grand Regency Hotel at about midday on 28th November 2001 to buy dog food when he saw people running. Curious to find out why people were running, he ran in the same direction as the crowd only to get arrested in the process near Nyayo House, near the junction of Uhuru Highway and Kenyatta Avenue. He was then taken to Central Police Station and charged alongside the appellant.

6. The appellant, Musa Adan Njuguna, who was the second accused before the trial court, on his part stated that he is a matatu tout. On 28th November 2001, he was at work in the matatu that was plying route 8. The matatu was en-route when traffic police flagged it down. When asked for his PSV license he was unable to produce it, as he did not have one. He was ordered out of the vehicle, ordered to sit near Nyayo House and subsequently taken to Central Police Station and later charged

7. It was against that background that the appellant and Mohammed Abdullah Ocheing, were charged, tried and convicted for the offence of robbery with violence by the Magistrate's Court at Makadara in Nairobi. Judgment was delivered on 6th August 2002.

8. Both accused persons appealed to the High Court against the conviction on grounds that they were victims of mistaken identity and that the identification was not free from error; that the charge sheet was defective in that the evidence was at variance with the charge; that the trial was a nullity as the prosecutor was unqualified and that their defences were not duly considered by the trial court.

9. The High Court (O. K. Mutungi and Fred A. Ochieng JJ.) upheld the conviction of the appellant on the basis of having been found in possession of Kwalla's documents but quashed the conviction of the 1st accused on the grounds that there were doubts as to whether he was involved in the robbery.

10. In this second appeal, the appellant has challenged the decision of the High Court on grounds that the High Court as the first appellate court did not subject the entire evidence to fresh and exhaustive scrutiny; that the High Court erred in failing to appreciate that the charge was not proved against the appellant; that the High Court failed to note that the offence committed was one under section 297(2) of the Penal Code and that the evidence on record was of a single identifying witness which should have been weighed against the defence of the appellant.

11. At the hearing of the appeal Mr. A. L. Kariu, learned counsel for the appellant, confined his

arguments to the complaints that the High Court failed to subject the evidence to a fresh and exhaustive scrutiny; that the offence was not proved and that the High Court failed to appreciate that the evidence on record was that of a single identifying witness which should have been weighed against the appellant's defence.

12. Mr. Kariu argued that the charge sheet and evidence did not support the conviction; that the conviction was based on the fact of certain items having been recovered from the appellant, yet the items allegedly recovered from the appellant were not the ones stolen from the complainant; that the defence put forward by the appellant at the trial, if considered, should have created reasonable doubt as to the appellants involvement in the omissions of the offence and the appellant should have therefore been acquitted; that there is no evidence of where the appellant was arrested as no one was able to testify before the trial court regarding where the appellant was arrested; that the only evidence on record regarding the arrest is that of the appellant who gave an account of his arrest; that having regard to the appellant's defence and failure by the prosecution to call the arresting officer, the prosecution did not discharge the burden of proof and there is doubt as to whether he is the one who had the documents; that the appellant and his co-accused, whose conviction was set aside by the High Court on appeal, were arrested at different locations and the victim could not identify any of his assailants and that had the High Court carefully considered his defence, it would have allowed the appeal and set him free.

13. Regarding the issue of recent possession on the basis of which the High Court upheld the appellant's conviction, counsel submitted that the doctrine of recent possession did not apply in this case as the things that were allegedly recovered from the person arrested were different from the things allegedly stolen as set out in the charge sheet. Counsel concluded by saying that an injustice was occasioned to the appellant and that the appeal should be allowed.

14. Mr. V. S. Monda, learned Senior Principal Prosecuting Counsel, in opposing the appeal submitted that there was proper evaluation of the evidence by the lower courts; that the charge sheet was properly framed; that the ingredients for the offence under section 296(2) of the penal code were properly brought out in the charge sheet; that there are concurrent findings by the lower courts that the appellant and another were involved in the robbery and accordingly one essential ingredient of section 296(2) was satisfied in that there were more than one person involved in the robbery ; that the recovery of stolen goods from the appellant provided corroboration that he was amongst those who robbed the complainant.

15. Counsel for the State went on to say that it was not prejudicial not to list items recovered in the charge sheet; that under section 111 of the Evidence Act the burden was on the appellant to demonstrate, or provide a reasonable explanation, of how he came into possession of stolen items and that in the absence of that explanation, there was corroboration that he was involved in the robbery; that the items that were stolen and recovered from the appellant comprising an ATM card notification, bank statements, and a letter to PW 1 from KASNEB are not common items and were specific to the complainant and the recovery of those documents from the appellant corroborates the fact that the appellant was amongst the people who robbed PW1.

16. Mr. Monda further submitted that contrary to the complaint by the appellant that the High Court did not consider the complaint regarding a defective charge sheet, the High Court dealt with that issue and made a finding on it.

17. Counsel went on to say that the doctrine of recent possession was properly applied in this case; that the appellant did not give a reasonable explanation of how he came into possession of the stolen items and the recovery of the items from the appellant provided corroboration that the appellant was among the people involved in the robbery. Mr. Monda concluded his submissions by urging that taking the case as a whole, the trial court and the first appellate judges of the High Court came to the correct finding and that the defence put forth by the appellant was considered by both courts and properly rejected.

18. In his brief reply, Mr. Kariu for the appellant reiterated that the appellant's appeal should be allowed; that this Court should have regard to the fact that the appellant's co-accused, who was at the scene of crime and who was pursued and caught red-handed was acquitted by the High Court; that the doctrine of recent possession does not apply to this case as the necessary constituents, namely, possession, loss and recovery were not present for the doctrine to apply; that the onus was not on the appellant to discharge the burden of how he came by the items which were not part of the charge sheet.

19. We have considered the content of the record of appeal and the rival submissions by learned counsel. The issue for our determination in this appeal is whether the High Court discharged its duty as the first appellate court and whether the High Court properly upheld the conviction of the appellant on the basis of the doctrine of recent possession.

20. The High Court, as the first appellate court, was under a duty to review and re evaluate the evidence and to draw its own conclusions bearing in mind that it did not hear the witnesses or have an opportunity to observe the demeanor of the witnesses.

21. We have on our own revisited the content of the record and considered it in the light of the findings of the High Court and in our view, the High Court carefully reviewed and analyzed the evidence and came to the conclusion that the complainant, PW1 could not, with any degree of certainty have positively identified any of his attackers. It was on that basis that the High Court concluded, correctly in our view, that the conviction of the appellant could not be supported on the basis of the evidence of identification alone.

22. The High Court stated:-

> **"Meanwhile, on the part of the 2nd appellant, it is not clear as to who exactly arrested him. PW1 said that he was arrested by police. However, if that was so, the policemen did not testify in court. On the other hand, PW2, PC Dominic Kariuki, said that the controller reported to him (and his colleague, PC Mwenda) that the appellants had been arrested by members of the public. In the light of these two versions, it is not clear just who exactly arrested the appellant. But PW1 categorically stated that he saw letters being removed from the pockets of the appellant. The said "letters" were comprised of:-**

i. **PW1's bank statement.**
ii. **A letter for PW1's ATM card, with PIN number notification.**

iii. **Empty envelope, in which PW1 had earlier carried photocopies of his certificates which he had taken to Nyayo House.**
iv. **A letter from KANSEB to PW1.**

> **As those documents were recovered so soon after the complainant had been robbed; and as they were recovered from the pocket of the appellant those facts bring into play the doctrine of recent possession."**

23. Later in the judgment, the High Court went on to observe this:

> ***"Applying that doctrine to the facts of this case, it is clear that the appellant was in possession of documents which were later identified by the complainant as his. The appellant could not offer any acceptable explanation as to how he came by them. Therefore, the inevitable conclusion must be that the appellant was involved in the robbery on the complainant."***

24. We agree with the High Court. The learned judges of the High Court were right in the application of the doctrine of recent possession and in upholding the conviction on that basis. In **Odhiambo v**

R [2002] 1 KLR 241 at page 247, this Court stated:

> ***"The law on identification is not in doubt. It has been stated and restated in several judicial decisions by this Court and by the High Court. The Court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. Where evidence of identification rests on a single witness, and the circumstances of identification are known to be difficult, what is needed is other evidence either direct or circumstantial, pointing to the guilt of the accused persons from which, the court may reasonably conclude that identification is accurate and free from the possibility of an error."*** (our emphasis)

25. And later in the same judgment, this Court stated that "***it is settled in law, that evidence of recent possession, is circumstantial evidence, which, depending on the facts of each case, may support any charge, however penal***." The Court referred to earlier decisions in R v Bakari (1949)16 EACA 84; Andrea Obonyo v R [1962] EA592 and Samwel Gichuru Matu v R Cr. App. 88 of 2000.

26. In the circumstance of this case, we consider the lower courts were right in holding that the evidence of recent possession was sufficient to sustain the conviction. In a matter of minutes after the robbery, almost immediately after the robbery, the appellant was found in possession of documents or letters that the complainant had collected from the post office. The appellant did not attempt to explain how he came into possession of those documents. We agree with the High Court that in those circumstances the inevitable conclusion must be that the appellant was involved in the robbery.

27. We are in the circumstance unable to interfere with the conviction and sentence as confirmed by the High Court was well-founded and safe. The appeal is accordingly dismissed.

Dated and delivered at Nairobi this 22nd day of November, 2013.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR