IN THE COURT OF APPEAL
AT NAKURU
(CORAM: BOSIRE, ONYANGO OTIENO & NYAMU JJ.A)
CRIMINAL APPEAL NO. 85 & 86 OF 2007

BETWEEN

MORRIS OCHIENG JUMA ..... 1ST APPELLANT
BENSON SALIM HASSAN ..... 2ND APPELLANT
JACOB MAUNDA LUSENO ..... 3RD APPELLANT
SAMUEL MUYA BENSON ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a conviction, and sentencing of the High Court of Kenya at Nakuru (Kimaru, Koome JJ.) dated 15th March 2007

in
H.C.CR.A. NO.527 OF 2003
****

JUDGMENT OF THE COURT

Following the dismissal of their respective first appeals, **Morris Ochieng Juma** (*1st appellant*), **Benson Salim Hassan** (*2nd appellant*) **Jacob Maunda Luseno** (*3rd appellant*) and **Samwuel Muya** (*4th appellant)* have come to this Court on their second and possibly last appeals, challenging their respective convictions for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. Each of the 1st, 2nd and 3rd appellants faced an alternative count of handling stolen property contrary to **section 322 (2**) of the Penal Code, but no finding was made on that alternative count. So the appeals herein are confined to the robbery count, particulars, as material, which are that:-

"On the 13th day of July 2003, at Sublet Farm Elburgon in Nakuru District of the Rift Valley Province jointly with others not before the court while armed with dangerous weapons, namely, pangas, swords and rungus robbed Ann Bor of one radio, two batteries, one car radio - national star, two batteries, seven blankets, one suit case box, one TV make great wall, 12 mugs, one small bag, three trousers, one shirt, one jacket, four bedsheets, assorted family clothings and cash Kshs.6000/= all valued at Kshs. 50,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ANN BOR."

The facts upon which the charge was based are brief. On 13th July 2003, at about 2 a.m. Ann Bor (PW1), a resident of Sublet Farm Elburgon, and a livestock farmer, was asleep in her house when robbers attacked her. They were masked, and so PW1 could not identify any of them. They threatened to kill her if she failed to give them some money. She gave them Kshs.6000/= but they were not satisfied arguing

that they had been informed that she had about Kshs.100,000/=. When it was not forthcoming they promised to return for it within two weeks. The robbers then went away with several items as itemized in the particulars of the charge. Before they did so, they tied the hands of PW1 and her daughter together. PW1's milkman untied them at dawn after which the police and PW1's husband were notified. PW1's husband, one Samuel Kiptoo Bor, (PW4) an employee of Telkom Kenya, suspected the 4th appellant who used to buy milk from his family. On the basis of that suspicion the 4th appellant was arrested.

The 4th appellant upon interrogation disclosed that he resided at Kasarani Estate, Elburgon and admitted having participated in the aforesaid robbery. The 4th appellant led the police to the residence of the 1st appellant who was collected from a neighbour's home where there was a funeral function. A search in his house led to the recovery of a briefcase, car radio and a battery. All those items were later identified by PW1 and her husband (PW4) as part of the items which had been stolen from their house in the course of the robbery thereat. A search of the 1st appellant led to the recovery of Kshs.3,150/= comprising 3 Kshs. 1000 notes, a Kshs. 100 note and a Kshs.50/= note.

The 1st appellant in turn led the police to the house of 3rd appellant, Jacob Luseno, and a search therein led to the recovery of 2 blankets, one shirt, a jacket, 3 pairs of long trousers, mugs and a small bag. These too were identified by both PW1 and her husband as part of the items which were stolen from their house in the course of the aforesaid robbery.

The 4th appellant thereafter led the police to Ndimu farm where he allegedly had taken some of the stolen items to be kept by his brother who was a resident of that farm. The brother however escaped when he saw the police approaching. His house was searched but nothing relevant to this case was recovered. The matter did not end there. The 4th appellant in the company of the 1st appellant led the police to Kaptembwa, in Nakuru town, to a house from which the 2nd appellant was arrested. A search in that house led to the recovery of a blanket which PW1 identified as hers. The 2nd appellant in turn led the police party to Mwariki Estate in Nakuru to a house belonging to his sister from which a battery was recovered. That too was identified by PW1 and her husband as theirs and as part of the property which was stolen in the course of the aforesaid robbery.

On the basis of the recoveries, the police charged the appellants as earlier on stated. Each of the appellants denied the respective charges they faced. In his defence the 1st appellant admitted stolen items were recovered from his house. As material, this is what he said:

"On 15/7/03 in the evening after taking supper I went out to a funeral function with friends. Then were (sic) arrested by police officers who took me to my house and found the stolen things. I told them my brother brought them and led them to look for him. My brother was with others in that act. The things were in my house from (sic) one day. We did not find my brother in Nakuru and we returned. That is all."

The 2nd appellant, Benson Salim Hassan, stated in his defence, that on 16th July 2003 he led police to Mwariki Nakuru, where one Joseph Temba, lived. He was his brother in law. A search there led to the recovery of several items belonging to the complainant. Joseph Temba, was not in, but his wife was. She was arrested and taken to Elburgon Police Station. Later her husband came and secured her release leaving behind the 2nd appellant. The 3rd appellant, likewise, admitted items belonging to the complainant were recovered from his residence as the prosecution had alleged. He did not explain how those items came to be in that house. All he said was that they belonged to his brother but who was not found by the police.

The 4th appellant, while denying participating in the robbery, confirmed the recoveries of the complainant's properties from the other appellants as earlier on outlined. It is however, noteworthy that the police would not have gone to the 4th appellant's co-accused had it not been that 4th appellant mentioned them and led the police to their respective residences.

On the basis of the recoveries aforesaid the trial magistrate Mr. Kirui, Senior Resident Magistrate, found each of the appellants guilty of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code, convicted each and sentenced each of them to death. He believed each of the prosecution witnesses.

The High Court (Koome and Kimaru, JJ.) on first appeal, held that the appellants' respective convictions were based on the doctrine of recent possession. The learned Judges relying on this Court's decision in the case of **Isaac Nganga Kahiga v. Republic, Cr. A. No. 272 of 2005**, held that the evidence on record clearly showed that the complainant and her husband positively identified the items recovered from the respective appellants as part of the items which were stolen from their house by robbers; that the possession was recent, the recovery having been made within 3 days of their theft; that the respective explanations of the appellants as to how they came to be in possession of the property of the complainant, were not cogent nor reasonable; that the 4th appellant having led the police to his co-accused he could not possibly be said to be innocent in the matter. The learned Judges therefore affirmed the decision of the trial court and accordingly dismissed the appellants' first appeals.

Before us, Mr. Nyongesa for all the appellants attacked the decisions of the two courts below relying on **section 25A** of the **Evidence Act Cap 80 Laws of Kenya**, which makes confessions and admissions by suspects in criminal offences inadmissible unless made before a Judge or Magistrate or police officer above the rank of inspector and who is not the investigating officer of the case. Information given by a suspect leading to recovery of stolen items is in the nature of an admission or confession. In Mr. Nyongesa's view the evidence leading to the recovery of the complainant's property was inadmissible by reason of **section 25A**, above, and for that reason the two courts below improperly relied on it to support the respective convictions of the appellants.

Mr. Nyakundi, senior State Counsel, relying on this Court's decision in the case of **Douglas Thiongo Kibocha v. Republic Criminal Appeal No.335 of 2006** opposed the appeals and urged us to dismiss the same.

We have carefully considered the appellants' respective appeals. There are concurrent findings of fact by the two courts below, that through the 4th appellant the 1st, 2nd and 3rd appellants were arrested and with them were found several items which the complainant positively identified as part of the property which was stolen from her in the course of a robbery. The recovery was made within three days of the robbery complained of, and the lapse of time was recent enough to invoke the doctrine of possession of recently stolen property. It is a doctrine which operates on the basis of the rebuttable presumption of fact under **section 119** of the Evidence Act that the person in possession is either the thief or a guilty receiver. Being a rebuttable presumption, if a suspect offers a reasonable explanation as to how he came into possession of the property the presumption would be displaced.

Both courts below having rejected the respective appellant's explanations, the presumption applies. But there is the issue concerning **section 25A** of the Evidence Act. However, as this Court stated in the **Douglas Thiongo Kibocha v. Republic** (supra) that section is in conflict with **section 111** of the Evidence Act, and it cannot be said that Parliament by enacting **section 25A,** intended thereby to amend **section 111** of the same Act, to deny the court the right to get an explanation from an accused of facts especially within his knowledge unless he does so in terms of **section 25A** aforesaid. Relying on the aforesaid authority, we are unpersuaded by Mr. Nyongesa's submission and accordingly find no basis for interfering with the decision of the two courts below. The appellants' respective convictions were based on sound and acceptable evidence, and consequently we affirm them and dismiss their respective appeals. It is so ordered.

Dated and delivered at Nakuru this 23rd day of February 2012.

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR