BETWEEN

GEOFREY ONYANGO OPIYO..... 1ST APPELLANT

KEVIN MOMANYI BABU ..... 2ND APPELLANT

HARUN ONKENDI JOHN ..... 3RD APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisii (Karanja & Musinga, JJ) dated 17th May, 2009

Elizabeth Aketch Wandako.

<u>Count Three</u>: Robbery with Violence Contrary to section 296 (2) of the Penal Code, in that on the nights of 10th/15th January 2005, in Migori, Nyanza Province, with others not before Court while armed with pistol, pangas and axe, robbed Juliana Arum Wandeko of one hand bag, one pocket radio make Sanitec, two bottom track suits, one jeans trouser and one T-Shirt all valued at KShs.7,250/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Juliana Arum Wandako.

<u>Count Four</u>: Robbery with Violence Contrary to section 296 (2) of the Penal Code, in that on the nights of 14th/15th January 2005 in Migori, Nyanza Province, jointly with others not before Court while armed with pistol, pangas and axe, robbed David Okeyo Onyango of two radio Cassettes, make Sony and National Mobile phone, make Nokia 3310, personal documents and cash KShs.6,275/- all valued at KShs.29,270, and at or immediately before or immediately after the time of such robbery used actual violence to the said David Okeyo Onyango.

<u>Count Five</u>: Robbery with Violence contrary to section 296 of the Penal Code, on the night of 14th and 15th January, 2005 in, Migori, Nyanza Province, jointly with others not before court while armed with pistol, rungus and axe, robbed R.A.O of suit case, one spotlight and cash KShs.700/- all valued at KShs.2,700/- and at or immediately before or immediately after the time of such robbery used actual violence to the said R.A.O."

There were several alternative counts of handling stolen goods contrary to ***section 322 (2***) of the Penal Code affecting all the appellants. In addition to the counts of robbery with violence there were also counts in respect of ***Geoffrey Onyango Opiyo*** and ***Kevin Momanyi Babu*** for the offence of defilement contrary to ***section 141*** of the Penal Code as follows:-

"<u>Count Six</u>: That, on the nights of 14th/15th January 2005, in Migori, Nyanza province, the second Appellant had carnal knowledge of S.A without her consent.

<u>Count Seven</u>: That, on the nights of 14th /15th January, 2005, in Migori, Nyanza Province, the first Appellant had carnal knowledge of S.A without her consent."

Alternative to the two counts of defilement were two counts of indecent assault on female contrary to ***section 144*** of the Penal Code.

The appellants pleaded not guilty to all the main and alternative counts and after trial all the three appellants were convicted on the main counts of robbery with violence and sentenced to death. The appellants, Babu and Opiyo were further sentenced to serve 10 years imprisonment for the offence of defilement.

It is to be observed that the learned trial Magistrate did not impose the death sentence on each of the first five counts of robbery with violence but instead imposed a general death sentence which the first appellate court thought was erroneous. The High Court (as the first appellate court) corrected the error and imposed sentence on each count and ordered that the sentences on count two, three and five be held in abeyance together with the imprisonment sentence in respect of counts six and seven as was said in this Court's decision in **<u>Boru & Another vs. Republic</u> [2005] KLR 649**.

During the trial before the learned Principal Magistrate (E.O. Awino, Esq.), the prosecution called a total of ten witnesses. Joash Otieno Konyere (PW1) was the first complainant and it was his evidence that on the material night, he was asleep at his home when robbers struck. He was ordered to surrender K.Shs.20,000/- otherwise he would be killed. He saw a pistol, pangas and other weapons which the assailants carried. He was taken to the bedroom from where his mobile phone, K.shs.2000/- , wrist watch and other items mentioned in count one were stolen. He however did not recognize any of the robbers.

David Okeyo Onyango (PW2) was the fourth complainant whose evidence was that on the material night he was attacked by people who robbed him of the items specified in count four. He was injured in the course of the robbery and was able to identify the three appellants among the robbers.

S.A (PW3) was the complainant in the sixth and seventh counts of defilement. She was aged 13 years at the time the offences were committed but since the High Court quashed the convictions on these two counts, we need not narrate what the witness told the trial court, save to say that this witness claimed to have identified two of the appellants.

R.A (PW4) was the fifth complainant and the grandmother to S.A (PW3). It was her evidence that the robbers demanded money and when they searched her house they took away the items mentioned in count five.

Thiophilas Agamo Arum (PW5), testified that he returned home (Rongo) on 18th January, 2005 and found that his mother's house had been broken into and items stolen from therein. He proceeded to the local police station and found some of the items stolen from his home. These items included track suit and Puma T-shirt. He identified these items as his.

Elizabeth Aketch (PW6) was the second complainant and she too was attacked and items mentioned in count two stolen from her house. Aketch was injured during the robbery.

Raphael Kwala Arum (PW7) was in Nairobi when he was informed that his rural home in Rongo had been attacked by robbers who stole various items. He went home on 20th January, 2005 and while in a matatu from Kisii he saw a person wearing his (PW7's) Puma- T shirt. PW7 asked the matatu driver to stop so that PW7 could get hold of the person wearing his Puma – T shirt. The matatu stopped and the person wearing what PW7 identified as his stolen T-shirt was Kevin Momanyi Babu (2nd Appellant herein), who was the 2nd accused in the trial court. The 2nd appellant was handed over to the police and PW7 later identified his track suit and jeans trouser which were recovered by the police.

P.C Samuel Onyango (PW8) of Kamagambo Police Station is the officer who received the report involving these robberies and related offences. It was P.C. Onyango who received the 2nd appellant. The second appellant then took police officers to where the other two appellants were. The two appellants (1st and 3rd appellants) were found in possession of some of the items stolen during the wave of these robberies.

John Otieno Okuti (PW9), was the medical officer who produced the P3 forms in respect of the injuries received by various complainants.

Lastly, Inspector Lubanga (PW10) is the one who conducted the identification parades in which the three appellants were identified by some of the complainants.

In their defence, each appellant stated that he was not at the scene of crime but innocently in his respective home.

In convicting the appellants, the trial Magistrate concluded his judgment thus:-

"Considering that identification alone may be doubtful, the prosecution needs to look for other evidence. In this case there is the evidence of recovery of some stolen items.

The 1st accused was found wearing a stolen puma T-shirt. His arrest led to the arrest of the 2nd and 3rd accused – at Oyugis and the recovery of more items, the recovered items i.e. Sim card of telephone cannot be put to doubt as a T-shirt which can be bought anywhere.

The accused persons are blaming a non-existing person in the name of John Matoke as the author of the charges leveled against them. That defence is a sham measured against the evidence on record.

The robberies were committed in one village at Kodero bara Sub-location in one night between the hours of midnight to 3.00 a.m. These were the same robbers. I now enter a conviction against the 1st, 2nd and 3rd accused with the offence charged in counts 1, 2, 3, 4 and 5. I also convict the 1st and 2nd accused with the offence of defilement."

Being aggrieved by the foregoing, the appellants filed separate appeals to the High Court which appeals were consolidated and heard together. The learned Judges of the High Court (Musinga and Karanja, JJ) considered the matter and in a judgment delivered on 5th May, 2009 dismissed the appellants' appeal. In concluding their judgment, the learned judges expressed themselves thus:-

"The second Appellant's recent possession of the stolen property provided cogent circumstantial evidence of his involvement in the offence of robbery.

This condition by the learned (sic) trial on the basis of the doctrine of recent possession was proper.

The evidence by P.C. Onyango (PW8) showed that after his arrest, the second Appellant led the police to the first and third Appellants who were found in possession of additional items stolen from the complainants.

The items included a phone charger and sin (sic) belonging to PW2, bag, track suits and jeans belonging to the deceased third complainant and identified by her son (PW5) and brother (PW7), a suitcase belonging to the fifth complainant (PW4).

The explanation by the first and third Appellants that the items belonged to a person called Matoke was unsatisfactory and unacceptable. The items were recovered and found in their possession by P.C. Onyango (PW8) and his team of police officers.

The recovery and possession provided cogent circumstantial evidence that the first and third Appellants were also involved in the offences of robbery. Their conviction by the trial Magistrate in respect thereof was proper.

Consequently, we hereby uphold the conviction on counts one, two, three, four and five and confirm the sentence of death on each of the five counts. The sentences on counts two, three, four and five will however be held in abeyance.

For the reason that there was no proper identification of the persons who actually defiled the complainant S.A (PW3), the conviction (sic) on count six and seven against the first and second Appellants are hereby quashed and set aside.

Those are our orders."

It is the foregoing that provoked this appeal to this Court. This is the appeal that came up for hearing before us on 28th November, 2011, when Mr. David Otieno appeared for the three appellants, while Mr. P. Kiprop (State Counsel) appeared for the State. Mr. Otieno relied on the Supplementary Memorandum of Appeal which contained the following three grounds:-

"1. The learned Judges of the superior court erred in law in affirming part of the decision of the Trial Magistrate notwithstanding the fact that the Trial Magistrate had failed to consider the explanation that had been tendered by the 1st Appellant for his being in possession of the alleged stolen property (T-Shirt), in failing to consider the effect of the evidence of the owner of the property, the conduct of the 1st Appellant when the property was recovered, the evidence of the person from whom the property was allegedly stolen and in shifting the burden of proof to the 1st Appellant.

2. The learned Judges of the superior court erred in law in affirming part of the decision of the Trial Magistrate in spite of the fact that he had overlooked and failed to consider the effect of the omission

of the prosecutor to investigate and call John Matoke and Janet Moraa Matoke as witnesses and in dismissing the 2nd and 3rd Appellant's explanation as unsatisfactory and unacceptable and of John Matoke as non – existing.

3. The learned Judges of the superior court erred in law in failing to consider and address the issues of violation of constitutional rights which had been raised by the Appellants before them and in failing to consider the total omission of the Respondent to explain the violations."

In his submissions, Mr. Otieno took issue with the evidence of identification. He pointed out that the learned Judges of the High Court had found that there was lack of identification of the appellants but that there was evidence of recent possession. Mr. Otieno asked us to consider the conduct of the 1st appellant (Geoffrey Onyango Opiyo) who was found wearing the T-shirt that PW7 claimed to be his. It was pointed out that the 1st appellant said that the T-shirt was his and that his story should have been accepted.

As regards the second ground of appeal, Mr. Otieno submitted that it was the 1st appellant who took the police to the 2nd and 3rd appellants' place where there was a lady known as Janet Moraa Matoke who was the wife of the 2nd appellant. Mr. Otieno argued that this lady Janet ought to have been called as a prosecution witness since she was arrested and then released. He further submitted that the items were found in a house from where the police arrested everybody including Janet. Finally, Mr. Otieno was of the view that the appellants' conviction which was based on evidence of recent possession was not safe. He therefore asked us to allow the appeal and set the three appellants free.

On his part, Mr. Kiprop opposed the appeal submitting that the evidence of the lady Moraa was not necessary. Mr. Kiprop further submitted that the doctrine of recent possession was applicable as the items were recovered only five days after the series of the robberies, and that the explanations given by the appellants were properly rejected.

We have set out the background facts to this appeal and it is quite clear that this was a case in which there was a series of robberies committed in one village in one night in which the complainants were subjected to very rough treatment by the robbers, who made away with various items stolen from the complainants. From the concurrent findings of the two courts below, the appellants were convicted on the evidence of being found in recent possession of the items stolen during the series of robberies. It is to be observed that the recovered items were positively identified by the complainants and that all these items were recovered only five days after the series of robberies. The 1st appellant who was found in possession of a stolen T-shirt led the police to the 2nd and 3rd appellants who were found in possession of some of the items stolen during the commission of the crimes. These are concurrent findings of facts made by the two courts below which this Court cannot disturb unless those findings are shown to be based on no evidence – see **Njoroge v. Republic [1982] KLR 388 and Karingo v. Republic [1982] KLR 213**.

In **Anderea Obonyo & Others v. R [1962] E.A. 542 at p. 549**, the predecessor of this Court said:-

"When a person is charged with theft and, in the alternative, with receiving, and the sole evidence connecting him with the offences is the recent possession of the stolen property, then, if the only reasonable inference is that he must have either stolen the property or received it knowing it to be stolen, he should be convicted either of theft or of receiving according to which is more probable or likely in the circumstances."

In the present appeal, we are satisfied that the appellants were found in possession of some of the items recently stolen during the series of robberies in one village within Kodero-bara sub-location in Migori District. In the circumstances, the two courts below cannot be faulted for applying the doctrine of recent possession in convicting the appellants.

The first appellate court adopted the correct approach and quite properly corrected the errors the learned

trial Magistrate might have committed.

In view of the foregoing, we find no merit in this appeal and we order that the same be and is hereby dismissed in its entirety. Those shall be our orders.

Dated and delivered at KISUMU this 22nd day of March, 2012.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR