



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 332 OF 2006**

**JOHN KAMAU GATHONI..... APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(Appeal from a Judgment of the High Court of Kenya at Nairobi (O.K. Mutungi & F.A. Ochieng, JJ.) dated 19<sup>th</sup> May, 2005*

**in**

**HC.CR.A NO.434 OF 2002)**

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**JUDGMENT OF THE COURT**

*John Kamau Gathoni* hereinafter referred to as the “appellant” was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** before the Chief Magistrate’s Court in Thika.

He also faced a charge of rape contrary to **Section 140** of the **Penal Code**. The latter charge was quashed on appeal before the High Court and does not therefore concern us at this stage.

On the charge of robbery, the particulars were that:-

**“On the 24<sup>th</sup> day of December 2000 at Gitambaa Village in Thika District of the Central Province, jointly with others not before court robbed N.W.G of a T.V set make Sony, 3 Radios, 3 Wall Clocks, Iron box, a box containing blankets and bed sheets and assorted family clothes 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 N.W.G.”**

He denied the charge and the matter proceeded to hearing with the prosecution calling a total of four witnesses. On his part, the appellant testified on oath but called no witnesses. He was found guilty on both counts, convicted and sentenced to death on the charge of robbery with violence and to five years imprisonment on the rape charge. He appealed to the High Court against those convictions and sentences. His appeal on the 1<sup>st</sup> count was dismissed but as stated earlier on in this judgment, the second count was quashed.

In brief, the evidence adduced before the trial court was that **PW1 – N.W.G** was in her parents’ house with her two year old daughter on the night of 24<sup>th</sup> December 2000. Her parents had gone to church. She

told the Court that she went outside to feed their dogs at about 9.00 pm. She was immediately accosted by three people one of who hit her on her head with a torch. They took away her torch and then forced her back into the house. They asked her for a video machine but she said she did not know where it was. They then broke into her parents' bedroom and they started looking for it to no avail. They ordered her to lie on her bed as they rummaged through the other rooms. They threatened to rape her for failing to show them where the video machine was and according to her they actually did so. She told the Court that she passed out as the second person started to rape her. When she came to, she found they had already left the house. She then telephoned her father **P.G (PW2)** who rushed to Ruiru Police Station and reported the incident. He was accompanied to his house by some police officers.

On arrival to the house, he found things strewn all over the place. He noticed that some clothings, T.V set and other items had been stolen. He first took PW1 to Ruiru Health Centre for treatment. From the Health Centre, they passed through Ruiru Police Station.

Meanwhile, **P.C. Bernard Juma (PW3)** and other Officers from Ruiru Police Station were on mobile patrol duties when they saw a person carrying a large box on his head and became suspicious. They ordered him to stop but he defied them and dropped the box and started running away. They gave chase, caught him and took him back to where the box was. On checking the contents, they found a colour T.V make Sony, two long trousers, two cameras and some other items. They questioned the person but he could not give an acceptable account of himself and where he had gotten the said items from. They therefore arrested him and took him to the Police Station. That person was the appellant herein.

When PW1 and her father PW2 went to the Police Station from the Health Centre, they found the appellant having been arrested.

According to PW1 and PW2, the appellant was wearing PW2's jacket which had been stolen from their house a few hours earlier. PW2 identified the same as his to the satisfaction of the Police Officers and later to the trial Magistrate. PW2 also checked the other items which were in the box and identified the same as his. He did the same before the trial court.

The appellant was subsequently charged with the said offences for which he was convicted.

Being aggrieved by the convictions and sentences, he filed the appeal before the High Court. The same was heard by Mutungi J. (as he then was) and Ochieng J. After re-analysing and re-evaluating the evidence adduced before the trial Court, they found the conviction on the first count sound and dismissed the appeal in respect of that count and affirmed the death sentence.

In their considered judgment, the learned Judges of the High Court found, like the trial court had, that the appellant had been properly identified and that the evidence of the recovery of the stolen items from the appellant only a few hours after the incident offered corroboration to the evidence on identification. They found the appeal devoid of merit and dismissed the same.

Once again, the appellant was dissatisfied with the decision of that court and thus filed this Appeal.

He was represented by learned counsel *Mr. Ondieki* who adopted the appellant's homemade grounds of appeal filed in court on 24<sup>th</sup> May 2005. He classified them into four clusters namely that the doctrine of recent possession was not properly applied; that the evidence before the trial court was fraught with contradictions and inconsistencies; that there was no proper identification of the appellant; and finally that the appellants defence which was tendered on oath was not considered by both lower courts.

He also submitted that there was no mention of a stolen box in the charge sheet and that therefore rendered the charge defective. We nonetheless find this submission misleading as the particulars in the charge Sheet clearly state that there was "a box containing blankets and bed sheets."

Moreover, even if there was no mention of the box, that omission would not render the charge defective

because the charge as it stood satisfied all the essential ingredients required in a charge of robbery with violence.

Learned counsel also submitted that the evidence of robbery of the alleged items was not credible and that there were material contradictions as far as the jackets were concerned. He posed, “was the appellant found wearing the jacket? Was he wearing two jackets? or were the jackets inside the box when they were identified by the witnesses at the police station?”

He further submitted that the trial court had not warned itself on the dangers of convicting on the evidence of a single witness; that there were contradictions as far as the time was concerned. He referred us to two decisions of this Court and urged us to allow the appeal.

In response to these submissions, *Mr. Monda* learned Principal State Counsel submitted that the jacket was properly identified by PW2 and that the appellant was actually wearing it. He submitted that both lower courts had considered the issue of the jacket and made concurrent findings on it with the High Court finding that the only issue for determination as far as the jacket was concerned was its ownership and that the appellant had not claimed it. He submitted further that the appellant was properly identified. On the issue of the application of the doctrine of recent possession, *Mr. Monda* submitted that the stolen items had been recovered from the appellant four to five hours after the incident and in the absence of any explanation from the appellant, the presumption is that he was the thief. He further submitted that the appellant’s defence was analysed and given due consideration by the Superior Court.

He submitted that the authorities *Mr. Ondieki* had relied on i.e *Morris Muthiani Sammy ~Vs~ Republic (Criminal Appeal No. 14 of 2006)*; and *Karanja & Another ~Vs~ Republic [2004] 2KLR 142* were distinguishable from the present case. He pointed out that in the case of *Morris Muthiani*, the stolen items were recovered beside the road while in this case the appellant was actually wearing the stolen jacket.

On the second authority, he maintained that the evidence of identification by the complainant is not what was relied on but rather the doctrine of recent possession.

He therefore urged us to find this appeal unmerited and dismiss the same in its entirety.

On our part, we have carefully considered the evidence adduced before the trial court as hereinbefore analysed. We have also considered the grounds of appeal raised by the appellant and the rival submissions of both counsel and the law.

This being a second appeal, only issues of law fall for our determination.

On the issue of identification of the appellant, the High Court differed with the trial court and found the identification of the appellant by PW1 was not fool proof. The High Court pronounced itself on that aspect thus:-

***“In the circumstances, although the duration of fifteen minutes is considerable, we are unaware of some of the other prevailing factors and cannot therefore state, with certainty, that PW1 did positively identify the appellant, at the scene of crime.”***

We agree with the High Court on this finding. The circumstances prevailing at the scene, where there was only one torch as the source of light and whose intensity was not described, were not conducive to a proper visual identification of the appellant. We do note however, like the High Court did that other than the evidence of visual identification, there was another strong evidence against the appellant. This was the evidence of recent possession of the properties stolen from the complainant’s home only a few hours after robbery.

Learned counsel for the appellant pointed out a few discrepancies in the evidence pertaining to the colour of the complainant’s jacket which the appellant was said to have been found wearing. The learned trial magistrate found that indeed the appellant was found wearing PW2’s jacket at the police station and that

the appellant did not offer any explanation on the same.

The High Court upheld that finding and stated as a fact that the appellant was indeed found wearing PW2's jacket at the police station. There is no dispute or doubt raised to the effect that PW2 did not identify the said jacket sufficiently. Both lower courts made concurrent findings on this issue and we have no reason to differ with them. *Mr. Ondieki*, learned counsel for the appellant highlighted a few contradictions in the record as to the colour of the jacket; whether there were two jackets or one; whether one jacket was in the box or not.

We must agree with learned Principal State Counsel when he states that the two courts properly scrutinized the jacket and found that the appellant was found wearing it and further that PW2 identified it positively and also that the appellant laid no claim to the said jacket. The High Court made the following finding on that issue:-

***“As far as this Court is concerned there is no issue arising out of the colour of the jacket which the appellant wore at the time he was at the Police Station. The only significant issue pertains to the ownership of the jacket. At no time did the appellant claim ownership of the jacket or deny having worn it.”***

We agree with this finding of the High Court and find that the discrepancies which were pointed out by *Mr. Ondieki*, learned counsel for the appellant, did not vitiate those concurrent findings.

The issue that logically flows from this analysis and finding is whether the doctrine of recent possession was properly applied in this case.

Citing the celebrated case of *Republic ~Vs~ Loughlin 35 Criminal Appeals R 69* in *David Langat Kipkoeh & Others ~Vs~ Republic (Criminal Appeal No. 169 of 2004 CA Nairobi)*, this Court differently constituted stated that the doctrine of recent possession is simply one of circumstantial evidence. It pronounced itself thus:-

***“if it is proved that the premises had been broken into and that certain property had been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the house breaker or shop breaker.”***

A Court of Appeal case on this doctrine *Peter Kariuki Kibe ~Vs~ Republic (Criminal Appeal No. 21 of 2001 at Nairobi)* (unreported) was on all fours with this case. The appellant in that case was found in possession of the complainant's jacket and trousers shortly after a robbery and failed give a satisfactory explanation as to how he came by them. The court stated:-

***“The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as a thief or guiltily received. Since he did not offer any explanation, the rebuttable presumption in law raised, based on the provisions of Section 119 of the Evidence Act, is that he was one of the people who robbed Damaris of the items together with her car..... It is a presumption of fact which courts often refer to as the doctrine of possession of recently stolen property.”***

The appellant herein was found wearing PW2's jacket only a few hours after the robbery. He offered no explanation whatsoever as to how he came to be in possession of the same.

It is our considered view that the recent possession of the stolen jacket and other items placed him squarely at the scene of the robbery. We find no fault in the concurrent findings of both courts below on this aspect.

As to the discrepancies in the time, we find that these were immaterial and are curable under *Section 382* of the *Criminal Procedure Code*. We say so because all the described transactions, i.e the robbery, the report to police station, and the complainant's visit to the hospital occurred the same night

and it would not be plausible to expect the parties to have been checking their watches to confirm exactly what time each incident took place.

We also find that both courts below analysed and considered the appellant's defence with the High Court making the following finding:-

***“In effect the evidence by the prosecution witnesses sounds credible, as contrasted to that of the appellant as the timings which he talked about simply do not add up. In the circumstance, we fully appreciate the rejection of the appellant's defence by the learned trial Magistrate.”***

We find no basis for interfering with this finding by the High Court.

We are satisfied that both courts below properly evaluated the evidence before them in its entirety as they were enjoined to do by the law.

In the result, we find the appeal before us lacking in merit. We dismiss the same and affirm the decision of the High Court on both conviction and sentence.

***Dated and Delivered at Nairobi this 28<sup>th</sup> day of September, 2012.***

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARANJA**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**