



**IN THE COURT OF APPEAL OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL 296 OF 2009**

**ISMAEL WANYAMA MULONGO**

**TITUS SIKUKU OTANGA .....APPELLANTS**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Bungoma  
(Muchemi & Chitembwe, JJ.) dated 18<sup>th</sup> June, 2009**

**in**

**H.C.CR.A. NOS. 112 & 113 OF 2007)**

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**JUDGMENT OF THE COURT**

The first appellant and the second appellant were the first and second accused respectively at the trial. They were jointly charged with three others, who were acquitted with two counts of robbery with violence contrary to **Section 296 (2)** of the Penal Code. In the first count they were alleged to have robbed **Simon Musungu Mukanda** (Simon) at Nangeni market, Bungoma of cash Kshs.8,700/=, a bicycle and assorted shop goods all valued at Kshs.17,100/= on 14<sup>th</sup> May, 2006.

In the second count, they were alleged to have robbed **Robert Khaemba Buchunju** (Robert) of shop goods worth Shs.37,000/= at the same market and on the same day. The appellants pleaded not guilty to the two charges but after trial they were convicted as charged in the first count and sentenced to death but on the second count they were convicted of the lesser offence of shop breaking and stealing contrary to **Section 306** of the Penal Code and each sentenced to 4 years imprisonment. Their respective appeals to the superior court against conviction and sentence were dismissed save that the sentence of 4 years imprisonment for shop breaking and stealing was set aside, thereby precipitating this second and final appeal.

The prosecution case was briefly as follows. On the night of 14<sup>th</sup> May, 2006 the complainant in the first count and his wife **Leah Musungu** (Leah) were asleep in their shop. They were awakened at about 3 a.m. by robbers who ordered them to open the door. When the complainant failed to open the door, the robbers broke both the window and the door of his shop after which four robbers entered into the shop. One robber who had a gun stood at the window. He was identified by the complainant and his wife as the first appellant. The robbers forced the complainant to lie under a chair and placed a panga at his neck. The robbers then demanded Shs.50,000/= and threatened to kill

the complainant, if he did not produce the money. The complainant's wife gave them Shs.4,400/= but they demanded more. The complainant gave them Shs.700/= but they still demanded more while beating the complainant. One of the robbers took Leah to the shop counter and emptied all the money in coins into paper bags. The robbers left after also stealing the complainant's bicycle, shop goods including sugar, rice and cooking fat.

Apparently, the same gang of robbers proceeded to the shop of **Robert** in the same market, broke into the shop and stole various shop goods. The incident was reported to Robert by a watchman at the market **Francis Wanyonyi Walucho** (PW4) (Francis) at about 3.30 a.m. On going to the shop Robert found that various shop goods including a full crate of soda, uniform materials, bicycle spare parts, loaves of bread had been stolen. Francis also reported the incident to **Cleophas Wamalwa** (PW6) (Cleophas) a village elder at about 3 a.m. and the two proceeded to the scene.

Robert and the members of the public decided to look for the suspects. It had rained but there was moonlight. There were bicycle tyre marks and shoe prints. They followed the trail of shoe prints and tyre marks towards Siboti and at Siboti they were directed to the house of the first appellant. They knocked at the door of the house of the appellant. The first appellant said he was asleep but after the members of public explained that they were looking for the robbers, the first appellant said he did not know anything about it, and told them to check at the house of one Oponyo (2<sup>nd</sup> appellant herein) as the robbers may be there. The members of public however entered into the house of the 1<sup>st</sup> appellant and searched it. They found the first appellant lying on a mattress with wet and muddy shoes on. He was arrested. The incident was reported to **Chrisantus Asusa Wanyonyi** (Wanyonyi), the Assistant Chief of the area at about 7. a.m. The Assistant Chief went to the scene and after which he followed the members of the public to Siboti where he found the 1<sup>st</sup> appellant having already been arrested. Wanyonyi and the village elder led members of the public to the house of the 2<sup>nd</sup> appellant where they recovered one crate of soda, long trouser, hacksaw, police boots, hammer and other goods. Robert identified the crate as the one stolen from his shop.

The first appellant denied committing the offences charged and claimed that the Chief of Siboti Leonard Wabomba had a grudge against him as he had impregnated his daughter. Similarly, the second appellant claimed that he did not know anything about the offence and that he had a land dispute with the village elder Esambus Makhoha.

The trial magistrate believed the evidence that the trail of spiked shoes prints led to the house of the first appellant and concluded in essence that the first appellant was identified by the first complainant and Leah.

As regards the second appellant, the trial magistrate made a finding that he was found in possession of the stolen goods just a few hours after the offences were committed and convicted him on the basis of the doctrine of the recent possession.

The superior court reconsidered the evidence and reached the same conclusion as the trial magistrate.

The main ground in the first appellant's memorandum of appeal is ground number 5 which states that the superior court erred in law in affirming the decision of the trial magistrate despite the fact that there was no favourable condition for positive identification.

On his part, the second appellant complains in ground 2 of the memorandum of appeal that the superior court erred in both fact and law in applying the doctrine of recent possession.

Mr. Chirchir, learned State Counsel did not support the conviction of both appellants. As regards the conviction of the first appellant he submitted that the evidence of identification by Simon, the complainant and his wife Leah was doubtful as the conditions for identification were not favourable.

Simon was awakened at about 3 a.m. by robbers who ordered him to open the door of his shop. According to his evidence at the trial, the robbers broke the window and destroyed the door after which they entered into the shop, forced Simon to lie down under a chair and

placed a panga at his neck. He testified that he lifted his head and saw the first appellant, whom he did not know before standing at the window holding a gun. The robbers were using torch lights. Simon further testified at the trial that the first appellant was wearing police uniform and a hood on his head and that he did not identify any other robber. Leah also testified at the trial that she identified the first appellant and that the first appellant had covered his head leaving the face visible. No identification parades were conducted in respect of the first appellant.

The evidence of Simon and Leah, that they identified the first appellant was not reliable. The conditions prevailing were not conducive to positive identification. This was dock identification which was not given credence by the prevailing circumstances. Indeed, it is clear from the judgment of both the trial magistrate and the superior court that the conviction of the 1<sup>st</sup> appellant was not based on visual identification. Had the conviction been based on visual identification, we would have agreed with the learned State Counsel and found the conviction unsafe.

Nevertheless, the conviction of the 1<sup>st</sup> appellant was based on circumstantial evidence, namely that a trail of spiked shoe prints led from the shop of Simon to the house of the 1<sup>st</sup> appellant; that the 1<sup>st</sup> appellant was found in possession of spiked shoes, and lastly, that he implicated the 2<sup>nd</sup> appellant who was in turn found in possession of stolen goods. On this aspect of the prosecution case the trial magistrate stated in part:

**“Both PW1 and PW3 and even the Assistant chief of Nangeni, Mr. Chrisantus Wanyonyi (PW5), testified, that it had rained and what they saw from the scene were unique spike marks which led upto 1<sup>st</sup> accused’s house. That inside the house he was asleep still clad in the shoes that had the spikes. Is this just pure coincidence? It is also the evidence of witnesses that it is him who gave the names of 2<sup>nd</sup> accused whose house was also searched and some of the stolen goods and clothes that the robbers wore recovered”.**

The superior court did not evaluate the evidence relating to the tracing of the spiked shoe marks nor make a finding whether that evidence was credible or otherwise. Rather the superior court reasoned, thus:

**“As for the 1<sup>st</sup> appellant he directed the complainants to the house of the 2<sup>nd</sup> appellant. How did the 1<sup>st</sup> appellant know that there was stolen items at the 2<sup>nd</sup> appellants home if he had not participated in the robbery? We find that the 1<sup>st</sup> appellant was also involved in the robbery”.**

Similarly, the learned State Counsel did not submit on the evidence of tracing the trail of spiked shoe prints. He however submitted in respect of the evidence of recent possession of stolen goods that no police officer was involved in the recovery of the goods and that the evidence from civilian witnesses was suspect.

It is only three witnesses who gave evidence relating to the tracing of the shoe prints, namely, Simon, Robert and Assistant Chief Wanyonyi. According to the complainant, the shoe prints led to the house of the 1<sup>st</sup> appellant and that the 1<sup>st</sup> appellant was wearing the shoes. Robert gave a different version. According to him, when the members of public found foot prints leading to Siboti, they informed the village elder who took the members of the public to the Chief of the area and that they showed the Chief the foot prints; that the Chief decided that they check on “Mulongo” (1<sup>st</sup> appellant) in the neighbourhood; that the chief led them to 1<sup>st</sup> appellant’s house; that they knocked at the door; that the 1<sup>st</sup> appellant said he was asleep; that the Chief told him what had happened and 1<sup>st</sup> appellant said he did not know; that they could check if it may be the thugs were at Oponyo’s (2<sup>nd</sup> appellant) and that the Chief entered in the 1<sup>st</sup> appellant’s house after which he led the members of public to the house of the 2<sup>nd</sup> appellant. He identified a pair of shoes which he said was recovered from 1<sup>st</sup> appellant’s house. Wanyonyi on his part testified at the trial that upon getting the report of the robbery at 7 a.m. he went to Nangeni market and was informed that the complainants had gone to trace the robbers; that he could see unique shoe prints which he followed to Siboti and that upon arrival at Sibot he found that the team ahead had already arrested the 1<sup>st</sup> appellant and taken him to the chief’s camp.

In essence therefore, it is only Simon and Robert who gave direct evidence of the circumstances leading to the arrest of the 1<sup>st</sup> appellant. The evidence of the two witnesses is however materially inconsistent in that whereas Simon testified that the shoe prints led to the house of the 1<sup>st</sup> appellant, Robert testified that they led to Siboti and that it was Chief who led the members of the public to the house of the 1<sup>st</sup> appellant in the neighbourhood. Indeed, Robert answered in cross-examination by the appellant, thus:

**“It is the chief who named you”.**

The chief (probably Wamboke) who named the 1<sup>st</sup> appellant and led members of public to his house and recovered the spiked shoes was not called as a witness. Moreover, the village elder, Cleophas Wamalwa (PW6) who according to Robert was in the company of the members of the public and who took them to the Chief, did not say so. According to the village elder, he remained at Nangeni market as the members of the public followed the robbers towards Siboti.

Had the superior court re-appraised the evidence, it would have found that the circumstantial evidence against the 1<sup>st</sup> appellant was inconsistent, weak, inconclusive and unreliable. In our view, the learned State Counsel was correct in conceding the appeal against the first appellant.

The 2<sup>nd</sup> appellant was convicted solely on the basis of the recent possession of stolen goods. There was evidence from Robert that it is the 1<sup>st</sup> appellant who told the members of the public to check if the thieves were in the 2<sup>nd</sup> appellant's house. However, the trial magistrate apparently rejected that evidence saying:

**“Though 1<sup>st</sup> accused has not implicated him and he was not identified at the scene, the recovery soon after leaves question mark on him. I invoke the doctrine of recent possession and find that he participated in both the robbery and shop breaking”.**

The particulars of the charge of robbery in the first count stated, among other things, that the appellant robbed the complainant of “assorted shop goods” without specifying the shop goods stolen. Simon testified that the robbers stole shop goods including sugar, rice and cooking fat. Leah also testified that the robbers stole ½ sack of sugar, cooking fat and rice.

According to Robert, a jungle uniform, empty crate of sodas (*which he identified as his*), Royco sachets, lemon power and some tools were recovered from the 2<sup>nd</sup> appellant's house. The evidence of Wanyonyi shows that a carton that carried cooking fat and rice was recovered from 2<sup>nd</sup> appellant's house and that Royco sachets, lemon sachets were recovered from the house of 1<sup>st</sup> appellant.

Simon only referred to Royco sachets, sugar and fat as the goods which were recovered but stated that the fat and sugar exhibited in court were rotten. There was the evidence of Wanyonyi that nobody claimed the recovered things.

Again, the superior court did not analyze and reevaluate the evidence relating to the recovery of the stolen goods from the 2<sup>nd</sup> appellant's house. Had the superior court done so it could have found that, not only was there no concrete evidence of the quantity of the three types of goods recovered but also there was no positive identification of the goods by the complainants as some of the goods that he was robbed of. In our view, the evidence regarding the possession of the stolen goods was of poor quality and unreliable. The learned State Counsel, quite properly in our view, conceded the appeal of the 2<sup>nd</sup> appellant.

For the foregoing reasons, we allow the appeal of each appellant, quash the respective convictions and set aside the sentences. Each appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Eldoret this 16<sup>th</sup> day of April, 2010.**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR