REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Criminal Appeal 136 of 2006

BETWEEN

FRANCIS KARIUKI THUKU …….. 1ST APPELLANT
PETER MWANGI KAGUTHI …….. 2ND APPELLANT
DANIEL WAWERU NJOROGE ……..…… 3RD APPELLANT

AND

REPUBLIC ……..…….…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Musinga, JJ.) dated 10th March, 2006

in

H.C.CR.A. NO. 276 OF 2002)
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JUDGMENT OF THE COURT

Before the Senior Resident Magistrate's Court at Molo, the three appellants namely, ***Peter Mwangi Kiguthi***, ***Francis Kariuki Thuku*** and ***Daniel Waweru Njoroge*** were charged with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code.

The particulars of the offence were that on *9th May, 2002*, at Moto Farm, Molo in Nakuru District, they jointly robbed ***Teresiah Wangu Ng'ang'a*** of 65 table clothes, one Sony radio cassette, 4 travelling bags, one shirt, 5 lady dresses, one wall clock, two trays, 4 wrist watches, one pressure lamp, 2 compact cassettes, and one torch all valued at ***Kshs.40,800/=*** and at or immediately before or immediately after such robbery, used actual violence to the said ***Teresiah Wangu Ng'ang'a***. The appellants were alternatively charged with the offence of handling stolen goods contrary to ***section 322 (2)*** of the Penal Code. After a full trial, the three appellants were convicted of robbery with violence and sentenced to death. Dissatisfied with the verdict, they filed an appeal in the superior court but the appeal was dismissed on *10th March, 2006*, hence this second and final appeal.

During the hearing of the appeal, the appellants were represented by Mr. Kipkenei, advocate, and the State was represented by a Senior State Counsel, Mr. Mugambi. The grounds relied on by the appellants are:-

> ***"1. That the learned judges erred in law (sic) while finding concurrent finding with the trial magistrate, the judges failed in not finding that the doctrine of recent possession did not apply in this case.***

2. ***That the superior court erred (sic) while admitting PW6 and PW8 evidence whereas there was no inventory of recovered exhibits. Therefore recovery forms were not tendered as evidence as required by law.***

3. ***That the presiding judge erred (sic) while finding that the appellant was known to the complainant PW1 prior to the day and date of robbery whereas no names were given to any person in authority as required by law.***

4. ***That the judges erred in law (sic) while accepting PW8 evidence, failing to note that no leading cautionary statement was tendered as evidence, no search inventory of the recovered items as evidence as required by law."***

In his submissions, Mr. Kipkenei identified three principal grounds, namely, that the appellants were not properly identified; that the 3rd appellant alleged that the stolen items were recovered from a house in his absence; and, finally, that as regards the second appellant, **PW3** testified that on *20th May, 2002*, the 2nd appellant had approached him to lend him some money to buy a pair of trousers and that as a result **PW3** gave him money on the security of a radio set which was thereafter identified by the complainant as her radio set but **PW6** the arresting officer claimed to have arrested him on *16th May, 2000* nearly four days earlier.

On the issue of identification, the appellant's counsel submitted that there was no positive identification of the appellants and that undue weight was given to the evidence of **PW1** who was shown the appellants by the police after the arrests and that failure to have held an identification parade was fatal to the identification of the appellants in the circumstances.

Concerning the recovery of the stolen items, counsel contended that the items were recovered after **7 days** and the items could not safely be said to have been recently stolen. He submitted that any recovery outside a one day period could not be said to be a recent recovery since such a recovery would not be within a reasonable period.

Counsel finally submitted that reliance on **PW3's** evidence that he lent money to the second appellant on the security of the radio set on *20th May, 2002* whereas the arresting officer informed the court that the 2nd appellant had been arrested by him four days earlier namely, on *16th May, 2002* meant that **PW3's** evidence was unreliable. In any event, Mr. Kipkenei submitted that the evidence of the possession of the alleged stolen items could at most only have led to a conviction on the alternative charge of handling stolen property as per the charge sheet.

Mr. Mugambi in supporting the conviction and sentence submitted that; all the three appellants were properly identified by the complainant **PW1**, and her worker **PW2** using the solar panel lighting; that in addition the recovery of stolen items from each of the appellants placed them at the scene of crime; that although the third appellant was not at his house at the time of recovery, he had upon being accosted by the police run away; that, the house where the recovery of the nine (9) table and seat covers was made was his and that the same items were immediately identified by the complainant as her goods. As regards 2nd appellant, he had borrowed money from **PW3** on the security of the stolen radio set, and, similarly, the first appellant had also borrowed from **PW4** ***Kshs.1,800/=*** and had pledged a stolen radio speaker which speaker was identified in court by **PW4** with the appellant as the giver.

Mr. Mugambi concluded his submissions by stating that the suggestion that items recovered within a period of seven days could not be said to have been recently stolen could not possibly be right in that it was a relatively short period for the items to have legitimately changed hands and in any event the appellants did not offer any reasonable explanation as to how they had acquired the possession of the stolen items.

We have carefully considered the grounds of appeal as set out above including the submissions of counsel and in this regard, we wish to point out that as the two courts below had made concurrent findings of fact on all the principal grounds relied on by the appellants' counsel, we cannot disturb such findings without any justifiable reason. It was not shown before us that either there was no evidence at all to support such findings or that the evidence which was there was unworthy of belief by a reasonable tribunal. The 1st appellant was also identified by **PW1** by recognition in that she described him as a former worker of her neighbour. In addition, the 2nd appellant was also known to **PW3**. In the circumstances, we find that there was no need of an identification parade.

While the issue of identification is always one of law, in the circumstances before us the findings by the two lower courts were reasonable on the evidence. One of the instances where the Court might intervene is where the lower courts have misdirected themselves on a finding of fact which is not the case here since the identification of the appellants was based on a very solid factual foundation and unless there is a misdirection, the Court would not interfere. Thus in the case of ***KIARIE V. REPUBLIC*** (1984) KLR 739 the Court held:-

> ***"The Court of Appeal on a second appeal may upset a finding of fact by the trial or the first appellate court where there is a misdirection but such a misdirection must be of such a nature and the circumstances of the case must be such that if it were a trial by jury, the jury would not have returned their verdict had there been no misdirection."***

Similarly on the issue of the sufficiency of the lighting, the courts found as a fact that the solar panel electricity was sufficient to identify the appellants in the circumstances. Concerning the application of the doctrine of recent possession to the facts in the case, we are of the view that the appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of ***R. V. LOUGHIN*** *35 Cr. Appl. 269* by the Lord Chief Justice of England and this Court's own decision of ***SAMUEL MUNENE MATU V. R.*** *Criminal Appeal No. 108 of 2003* at Nyeri demonstrates that the doctrine was properly applied. The recovery of the items in the case before us was within **7 days** whereas in the **MATU case** (supra) a period of **20 days** was held to be recent. We accordingly uphold the superior court's view of the law on the point. In this regard we would re echo the decision of this Court in the case of ***HASSAN V. REPUBLIC*** [2005] 2 KLR 11 where as regards recently stolen goods it delivered itself thus:-

> ***"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver."***

As regards the challenge touching on the discrepancy of the date of arrest and the pledge of the stolen item a scrutiny the evidence clearly reveals that the 2nd appellant pledged the stolen item on *20th May, 2002* but he was arrested on *6th June, 2002* and not *16th May, 2002*, as suggested by the appellant's counsel. In any event the discrepancy touching on dates was not material and would have been curable under ***section 382*** of the Criminal Procedure Code.

The upshot is that we find no merit in this appeal. It is accordingly dismissed. It is so ordered.

Dated and delivered at Nakuru this 28th day of May, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR