



**IN THE COURT OF APPEAL OF KENYA**

**AT NAKURU**

**Criminal Appeal 216 of 2006**

**BETWEEN**

- 1. JACKSON EKAL**
- 2. JOHN EMOSIL NACHABOLI**
- 3. JOSEPH EMOSIL EKIRU**
- 4. PETERSON LONGILAI ..... APPELLANTS**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from the judgment of the High Court of Kenya at Nakuru (Musinga, J.) dated 8<sup>th</sup> May, 2006**

**in**

**H.C.CR.A. NOS. 222 – 226 OF 2004)**

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**JUDGMENT OF THE COURT**

The four appellants were convicted by Principal Magistrate, Nakuru of three counts of robbery contrary to **Section 296 (1)** of the Penal Code and each sentenced to eight years imprisonment on each count but the sentences were ordered to run concurrently. Their respective appeals to the superior court were dismissed thereby triggering the present appeal.

The facts giving rise to the charges were simple and straight forward.

The complainant in each of the three counts was Bisharu Osama Godana (PW1) (watchman). He had been employed as a watchman by three shopkeepers, namely, Peter Maiba Munyua (PW2) (Munyua); Peter Kamau (PW3) (Kamau) and John Mburu (PW4) (Mburu) to guard their respective shops at Pwani Trading Centre, Naishi, Nakuru District. On the night of 20<sup>th</sup>/21<sup>st</sup> December, 2003 a gang of robbers armed with pangas and rungus raided Pwani Trading Centre at about 1.15 a.m. They approached the watchman and told him to go away. They threatened to kill him if he did not go away. The watchman ran away but kept blowing the whistle. He did not identify any robbers. The robbers started breaking the shops. Meanwhile, Mburu heard screams from his house. He opened the window and saw torch lights at Pwani Trading

Centre. He went out of his house and went to the shamba from where he saw several people at the trading centre flashing torch lights but he did not identify any of them. He could hear the robbers breaking his shop from where he was hiding. The robbers left at about 2.30 a.m. towards Njoro. Mburu called neighbours and all went to Naishi police station where they reported to IP. Samuel Kimathi, the O.C.S. (PW6), the (O.C.S.). The watchman, Munyua, Mburu, the O.C.S. and others followed the robbers towards Njoro using Munyua's motor vehicle. At about 6 a.m. they found four people walking beside the road at stage at Njoro junction. Two of the four people were walking along one side of the road while the other two were walking along the other side each carrying a yellow paper bag. The police ordered them to stop. Three of the four people stopped and placed the paper bag down while the fourth dropped the paper bag and ran away. Police fired twice in the air. The members of public who gathered chased the fourth person and arrested him about 200 metres from where they had been stopped. The three shopkeepers visited the shops and confirmed that their respective shops had been broken into and an assortment of shop goods stolen from the respective shops. The goods contained in the paper bags were identified as some of the stolen goods. The three people who stopped were Robert Ekagai Ekal (Accused 2 at the trial (who is not one of the appellants), Jackson Ekal (Accused 3 at the trial and the 1<sup>st</sup> appellant herein); John Emosil Nachoboli (Accused 4 – the 2<sup>nd</sup> appellant herein). The person who ran away but was arrested is Peterson Logilai (Accused 6 – and the 4<sup>th</sup> appellant). Joseph Emosil Ekiru (Accused 1 – to 3<sup>rd</sup> appellant herein) was arrested later. The OCS testified that upon arrest the 2<sup>nd</sup> and 3<sup>rd</sup> appellants led police to the bush where a knife, piece of wood, rungu, Somali sword, a sword and several sacks of stolen shop goods were recovered hidden in the grass. The recovered goods were sorted out at the police station.

The 1<sup>st</sup> count in the charge sheet indicated that cash Shs.17,000/= and shop goods all valued Shs.74,615/= were stolen from the shop belonging to Munyua. At the trial, Munyua identified about 40 different kinds of goods as the ones stolen from his shop (Ex. 5 – 41). The second count in the charge sheet indicated that shop goods worth Shs.19,979/= were stolen from the shop of Kamau who identified nineteen different types of goods at the trial as the items stolen from his shop (Ex. 42 – 60).

Lastly, the 3<sup>rd</sup> count indicated that shop goods worth Shs.11,408/= were stolen from the shop of Mburu who identified five different types of shop goods at the trial as the ones stolen from his shop (Ex. 61 – 65).

The 1<sup>st</sup> appellant (Jackson Ekal) stated at the trial that he knew nothing about the offence and that he was arrested on 21<sup>st</sup> December, 2003 when he went to town (Njoro) at 9 a.m. by a police officer in plain clothes who asked him whether he had seen anybody pass.

The 2<sup>nd</sup> appellant (John Emosil Nachoboli) stated at the trial that he stays in Njoro and that he was arrested on the material day at the junction at 7.30 a.m. when he was going to a farm where people were working.

The 3<sup>rd</sup> appellant (Joseph Emosil Ekiru) on his part stated at the trial that he was arrested on 24<sup>th</sup> December, 2003 when he was on his way to a farm to look for work and that he knew nothing about the offence.

The 4<sup>th</sup> appellant (Peterson Longilai) stated at the trial that he lives in Njoro and that he left Njoro for Laikipia on 19<sup>th</sup> December, 2003 and when he returned on the following day he was informed that his house had been searched by police and a photograph, among other things, taken away. He added that on 21<sup>st</sup> December, 2003 he went to the police station on his own

but was released only to be arrested later in the day.

The trial magistrate convicted the 1<sup>st</sup>, 2<sup>nd</sup>, and the 4<sup>th</sup> appellants on the basis of doctrine of recent possession in that they were arrested in possession of stolen goods on the morning of 21<sup>st</sup> December, 2003 a few hours after the robbery, while walking along the road at Njoro junction stage. The 2<sup>nd</sup> appellant was also convicted on the evidence that after arrest he and 3<sup>rd</sup> appellant led police to the bush where some stolen goods were recovered.

The 3<sup>rd</sup> appellant was convicted on the basis of the doctrine of recent possession of stolen goods in that upon arrest he led police to the bush where a huge quantity of the stolen goods were recovered.

At the hearing of the appeal in the superior court, the 3<sup>rd</sup> appellant abandoned the appeal just as he has done in this appeal. The superior court (Musinga J) dismissed the appeals of the rest saying in part:

**“PW1 said that he could not identify any of the appellants as they had covered their faces. When he accompanied PW2 and PW4 to Naishi police station a few hours after the robbery together with PW6 they arrested appellants as they carried some of the stolen goods. In the absence of any reasonable explanation as to how they had come about the items, the trial magistrate was right in convicting them on the doctrine of recent possession”.**

We have already observed that the 3<sup>rd</sup> appellant has abandoned his appeal against conviction. He stated so unambiguously both in the memorandum of appeal and in his submissions before us. He however, pleads that we reduce the sentence. The sentence is legal. The severity of sentence is a matter of fact and we have no power to interfere with the sentence in a second appeal which is confined to points of law only. (See **Section (1) (a) Criminal Procedure Code**).

The appeals of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants challenge the findings of fact that they were arrested on the morning of 21<sup>st</sup> December, 2003 at Njoro junction each carrying a paper bag containing stolen goods. The 4<sup>th</sup> appellant stated in particular that he was not arrested after a chase and that the prosecution witnesses did not identify the specific goods recovered from him.

At the hearing of the appeal, the 2<sup>nd</sup> appellant was equivocal whether he is also appealing against the conviction for he said that he cannot insist on challenging the conviction but asked for reduction of sentence. We treat his appeal as against both conviction and sentence.

The circumstances under which the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants were arrested and whether or not each was carrying a paper bag containing stolen goods are factual matters. The two courts below made concurrent findings of fact that the appellants were indeed found walking together along a road each carrying a paper bag which was later found to contain some of the stolen goods. There were also concurrent findings of fact that the 4<sup>th</sup> appellant dropped the paper bag and escaped but was apprehended after a chase by the members of public a short distance from where they were seen. As was held in **M’Riunga vs. Republic** [1983] KLR 455 where a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law and should not interfere with the decision unless it is apparent that on the evidence no reasonable tribunal could have reached that conclusion – in other words, that the decision is bad in law.

In the circumstances of this case, it has not been shown that the concurrent findings of fact were not supported by

evidence.

It is true that the goods found in the paper bags that each appellant was carrying were mixed up and that the police did not ear mark the goods found in possession of each appellant. Indeed, all the goods were put in one paper bag and produced as one exhibit. Nonetheless, the shopkeepers identified the goods as some of the goods stolen from the shops. The appellants were walking together each carrying a paper bag containing goods stolen in the same trading centre by a gang of robbers. In law, they were deemed to be in joint possession of the stolen goods (see definition **(b)** of “*be in possession*” in **Section 4** of the *Penal Code*).

For the foregoing reasons, we are satisfied that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellant including the 3<sup>rd</sup> appellant were properly convicted. In the result, we dismiss the appeal of each appellant.

**Dated and delivered at Nakuru this 28<sup>th</sup> day of May, 2010.**

**R. S. C. OMOLO**

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

**E. M. GITHINJI**

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

**J. G. NYAMU**

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

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

DEPUTY REGISTRAR