IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 388 of 2006

BETWEEN

PETER LOTIMU ESINYON.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Musinga JJ) dated 24th November, 2006
in

H.C.CR.A. NO 573, 574 & 575 of 2003
****

JUDGMENT OF THE COURT

This is a second appeal by **PETER LOTIMU ESINYON**, the appellant, from the judgment of Koome and Musinga JJ of the High Court of Kenya at Nakuru by which they on 24th November 2006 dismissed the appellant's appeal and upheld the conviction and the sentence of death imposed upon him by the Senior Principal Magistrate, Nakuru, for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code.

The appellant and two others whose convictions were quashed and their sentences set aside on second appeal were arraigned on a charge that alleged that on 13th November 2001 at Kilemba Farm, Bahati, in Nakuru District being armed with dangerous weapons, namely, pangas and rungus, they robbed Stephen Mugi (PW1), the complainant, of assorted household goods named in the charge sheet, a bicycle, a television set and cash money and at or immediately before or immediately after the time of such robbery threatened to use actual violence against him.

The prosecution presented the following evidence before the trial court. At about 2.00 a.m. on 13th November 2001, PW1 was asleep in his house with his family when a gang of robbers broke the door and stormed in. The gang which had torches and was armed with pangas and rungus demanded money from PW1 while threatening to harm him and the members of his family. PW1 gave the robbers shs. 17,000/- which he had kept under the mattress which they took and then tied PW1 and his wife around the mouth with pieces of cloth. The robbers then proceeded to empty the house of household goods, and other properties. After they left PW1 called for help from his neighbours and a group of about 50 people assembled and decided to track the robbers. As it had rained, it was easy for the group to follow the footsteps which were markedly visible on the ground. These led to the house of the appellant which was about 3½ kilometers away. When the house was searched PW1 saw two body lotion bottles and a lesso which he claimed were his. However, there were no specific identifying marks on them. It is significant to note that the appellant in his defence claimed that the body lotions and the lesso belonged to his wife.

Upon apprehension the appellant was interrogated by the members of the public and he led them to a place behind his house within the labour camp where he claimed he lived and a TV and a bicycle were recovered. However, the appellant claimed that he knew nothing of the recovered property as the *locus quo* of recovery was in a maize plantation which did not belong to him. Further, he stated before the trial court that he was assaulted and almost lynched by the mob which had arrested him.

On the same day Chief Inspector Ekasipa (PW5) of Bahati Police Station took a charge and cautionary statement from the appellant which the prosecution contended that it amounted to a confession. But at the trial, the appellant repudiated it and a trial within a trial was held. However, though it was admitted by the trial court, PW5 did not avail herself for cross-examination after the statement had been admitted. We would agree with Mr. Ogaro, learned counsel for the appellant, that failure to accord the appellant the right to cross-examine PW5, who recorded the said statement occasioned the appellant miscarriage of justice. In the circumstances the said charge and caution statement ought to be excluded altogether and should not form the basis for convicting the appellant. We hold further that the two courts below erred by accepting the said statement.

The trial court also convicted the appellant on the basis of the doctrine of recent possession in that he was found with PW1's household goods alleged to have been found in his possession. In our view, we

think that the trial court had misapplied the doctrine of recent possession since PW1 did not positively identify the bottles of body lotions and the lesso as belonging to his wife. They had no special marks and were goods commonly used or possessed by many women and are found in many homes.

The recovery of the Tv and the bicycle in the maize plantation, in our view, did not establish a nexus with the appellant. Moreover, the maize plantation did not belong to him, and again, it was accessible to many members of the public.

We have on our part re-examined the entire evidence upon which the conviction of the appellant was based and, with respect to the two courts below, we find that it was unsatisfactory and not well-founded. Consequently, the conviction is unsafe and cannot be sustained.

In the result, this appeal is allowed. The conviction of the appellant is quashed and the sentence of death is set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

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

P.K. TUNOI
.....
JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR