REPUBLIC OF KENYA
COURT OF APPEAL AT NAKURU
Criminal Appeal 421 of 2001
BETWEEN

DANIEL OMAYA OLUTENDE …….APPELLANT
AND
REPUBLIC ……..RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Musinga, JJ.) dated 13th December, 2007
in

H.C.CR.A. NO. 509 OF 2003)
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JUDGMENT OF THE COURT

The issue of law which arises in this appeal is whether the doctrine of recent possession upon which the conviction of the appellant was based, was properly applied.

The appellant, together with one ***Ann Wangari Wangui***, were jointly charged before Nakuru Chief Magistrate, Mrs. G.A. Ndeda, with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. It was alleged that on the night of 16th March, 2003 at K in Nakuru District, Rift Valley Province, they jointly with others not before court while armed with dangerous or offensive weapons, namely a big stone, robbed ***J.K.S*** of his lantern lamp, one torch, one mobile telephone, ten arrows, one brief case, personal documents, personal file, penis module for condom use demonstration, one wall clock, inverter cord, beginners guide to tape recording book, one iron box, 50 ml co-trimoxazole paediatric suspension syrup, two kilograms of sugar, three pieces of imperial leather soap, one car radio cassette, all valued at Shs. 12,932/= and cash

Shs. 5,500/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said J.K.S. According to the record, the appellant admitted that offence when the plea was taken and he also admitted the facts read out to him in the language he understood. His co-accused however denied the offence. Somehow, the trial magistrate did not dispose of the guilty plea by the appellant but proceeded to set down the case for hearing. Five prosecution witnesses subsequently testified as well as the appellant and his co-accused. In the end they were both convicted and sentenced to death. On first appeal by both, the appeal of Ann Wangari Wangui was allowed by the superior court (Koome and Musinga JJ), who stated as follows:

> **"In view of the fact that there was no evidence to prove that the house where the items were found belonged to the 2nd appellant coupled with the fact that the complainant did not identify the 2nd appellant as one of the assailants, the conviction of the 2nd appellant would not be safe. The least the prosecution could have done would have been to charge her with handling stolen property. In the circumstances of this case and the evidence before the trial court, it is not safe to sustain the conviction of the 2nd appellant of the offence of robbery with violence. Since the 2nd appellant was not charged with the alternative charge of handling stolen property, we would allow the appeal in respect of the 2nd appellant, quash the conviction and set aside the sentence imposed upon the 2nd appellant. She is set at liberty forthwith unless otherwise lawfully held."**

In passing, we confess that we do not understand the reasoning of the superior court in that passage. It would seem to have been the view of that court that although there was no evidence to convict the accused on the main charge of robbery with violence and it was possible to convict her for handling stolen property, the court was incapacitated because there was no alternative charge upon which it could act. With respect that would be a misdirection in law. As this Court recently stated in the case of **Michael Bwana Orieng v Republic, Cr. App. No. 342/2008, (UR)**:

> **"The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charges once there is ample evidence to support the main charge. If the main charge is not proved, either because it is defective or because the evidence on record does not support any element of the offence, the evidence does not evaporate into thin air! It may be examined to see if it supports a minor and cognate offence and if it does prove such offence beyond reasonable doubt, a conviction will follow. Many a times only the main charge in**

> **offences such as Murder, Robbery or Rape, for example, will appear on record. But it cannot be argued that if the evidence establishes minor and cognate offences such as manslaughter, theft or indecent assault respectively, the court cannot convict for those offences on the ground that they were not charged. So too with defilement. Indecent assault is a minor and cognate offence and was for consideration if the main charge was unsustainable. Section 179 of the Criminal Procedure Code allows for such procedure."**

It was possible therefore to convict for the offence of handling if such was the offence proved beyond doubt in this case. As we have said, this is merely an observation for the benefit of the trial court and superior court since the appellant's co-accused was set at liberty and her acquittal is not challenged. The appellant's appeal was however dismissed, hence this second and final appeal.

The facts leading to the appellant's conviction were straightforward.

At about 4 a.m. on 16th March, 2003, J.K.S (PW1) (the complainant) was sleeping in his house on the same bed with his two sons aged 11 and 4 years respectively. Suddenly they were woken up by a loud bang which shattered the front door of the house and another bang which broke the bedroom door. Two people went into the bedroom and ordered them to cover themselves and remain motionless, which they did. The intruders ransacked the house and stole all the items listed in the charge sheet. The incident was confirmed by the complainant's son ***B.K.S*** (PW2) and his brother ***J.K.S*** (PW3) who lived nearby, and had heard two loud bangs without realising they were at the complainant's house. The complainant informed (PW3) in the morning and they both recorded the missing items and made a report at Kaptembwo Police Post. ***Pc. Stephen Mathenge*** (PW4) received the report and commenced investigations. He recovered the huge stone used to break into the house and some shoes abandoned by the robbers. On the same day, the complainant's brief case was found in a quarry partly burned. Six days later on 22nd March, 2003, Pc. Mathenge received another report of theft in Kaptembwo and he, together with ***Pc. Peter Mungai*** (PW5) went to investigate. They managed to arrest the appellant who was carrying some items. The appellant led them to his house where several items, subsequently identified by the complainant as his, were found. They included a mirror, iron box,

a pair of inverter cords and a file which originally had his name and notes but the name had been erased and written *"Daniel Omaya Olutende"*.

The appellant in his brief unsworn statement in defence said nothing about the items found in his possession and which the complainant had identified as his. Instead he dwelt on the day of his arrest on 23rd March, 2003 when he woke up at 5.30 a.m. and went to a place called "Junction". There, he met a group of people who beat him up and took him to Kaptembwo Police Post where he stayed for two days and on the 3rd day he was charged with the offence of robbery.

As stated earlier, the appellant was convicted on the basis of being found with property recently stolen and his failure to account for possession of such property. The superior court was fully conscious about this and delivered itself as follows:

> **"This appeal raises the single issue of whether the conviction based on the doctrine of recent possession is applicable in this case. The principles that govern the circumstances under which an accused person can be convicted on the basis of the doctrine of recent possession are well settled. We wish to refer to the case of Isaac Nganga Kahiga vs. Republic C.A Cr. Appeal No. 272 of 2005 (Nyeri) (unreported) where it was held that:**
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> > ***"It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that (sic) that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another. In order to prove possession, there must be acceptable evidence of search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."***
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> **The evidence before the trial court shows that the 1st appellant in the first instance admitted the offence. The trial court however subjected him to a trial after which he was found guilty on the grounds that he was found in possession of the stolen items. Those items were positively identified by the complainant. The 1st appellant did not offer any reasonable explanation as to how the items came to be in his possession. The evidence in this regard was based on the testimony of PW4 and PW5, arresting and investigating officers respectively. They arrested the 1st appellant**

following their investigations in another incident. The 1st appellant led the police to his house where they recovered the book which had been written "Daniel Omaya Olutende", the name of the 1st appellant. The book however had notes written by the complainant and he was able to identify the book. The complainant also identified the iron box and the mirror which were all recovered in the 1st appellant's house."

We are now told by the appellant that the superior court improperly applied the doctrine of recent possession and he urges us to allow the appeal on that ground. Learned counsel for him, Mr. Maragia Ogaro, submitted that the stolen items were not found in possession of the appellant but in a house occupied by a lady; that the evidence of the complainant's son, (PW2), who was aged 11 years old was improperly admitted to the prejudice of the appellant as it was not preceded by the *voire dire*; that essential witnesses were not called to corroborate the prosecution case; and that the plea of guilty recorded by the trial court was prejudicial to the appellant as it was equivocal. Mr. Ogaro called for the acquittal of the appellant or an order for retrial. On the other hand, learned State Counsel, Mr. Nyakundi, submitted that a period of six days within which the appellant was found with the stolen goods was recent as they did not change hands; that there was no explanation for possession of the stolen goods; that even without the evidence of PW2, the conviction of the appellant would still be sound; that there was no equivocation in the plea of guilty; and that the plea did not affect the judgment which was based on the evidence adduced at the trial. He called for dismissal of the appeal.

We have considered the matter on the one issue of law upon which this appeal rests. We find no basis for the complaints raised that the guilty plea recorded but ignored by the trial magistrate was prejudicial to the appellant who, on the contrary, had a full opportunity to defend himself. We similarly find no basis for the complaint that the evidence of PW2 was prejudicial. Even without it, the evidence of the complainant was believed by the two courts below and there can be no doubt, as factually found, that the items listed in the charge sheet were stolen in the circumstances explained by him and he identified some of them upon recovery in possession of the appellant. The evidence of the investigating officer Pc. Mungai (PW5) and the complainant was also believed, that they were led to the house of the appellant in K by the

appellant himself and they recovered the items identified by the complainant. Neither Pc. Mungai nor the complainant were cross-examined on their account of recovery of the stolen items. Such evidence was admissible before amendment by deletion of ***section 31*** of the **Evidence Act (Cap 80)** by **Act No. 5 of 2003** which came into effect in July 2003. We find no impropriety in reliance of the former provision. It is our view, in line with the authority relied on by the superior court, that there was positive proof of possession of the stolen property by the appellant; that the property was in the appellant's house and one of the stolen items bore his name; that the property was stolen from the complainant and was his; and that the period of six days was short enough to qualify as recent. Being of that frame of mind, we find no reason to interfere with the findings of the superior court and we disallow the appeal in its entirety. It is dismissed.

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

S.E.O. BOSIRE
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JUDGE OF APPEAL

P.N. WAKI
……..……..
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR