IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 299 OF 2005

BETWEEN

WILLIAM IMBALI ……..……..…..……..…… APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Mutungi & Ochieng, JJ.) dated 14th April, 2005

in

H. C. CR. A. No. 833 of 2002)

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JUDGMENT OF THE COURT

The appellant, ***William Imbali***, was charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code before the Principal Magistrate's Court at Kibera. The particulars of the charge were that on the 13th day of January, 2002 at Kibagare Way in Spring Valley within Nairobi Province jointly with others not before Court being armed with dangerous or offensive weapons, namely iron bars and a pair of scissors robbed CHARLES OKANGO of one Television set make LG, one Computer machine make Sony, one drilling machine, one Video machine make LG and one VCD player all valued at Kshs.200,000/= and immediately before or immediately after the time of such robbery wounded the said CHARLES OKANGO.

Briefly, the facts that led to the above charge were as follows: At about 3.00 am on the morning of 13th January, 2002 the complainant, Charles Okango (PW 1) was asleep in his house when he heard a big bang on the door, and immediately thereafter he saw people in the house. They had iron bars, scissors and torches. They said they had been sent to kill him because he had sacked an employee who was since jobless. At this point the complainant pressed the panic button and the intruders hit him on the leg. He pressed the panic button a second time, and the intruders grabbed some household items mentioned in the charge sheet, and ran out. The complainant screamed for help, and other guards came over, helped him get medical treatment, and reported the matter to the police. In the morning, when the sun rose, he and the other guards followed the path the robbers had taken, and came across a deserted half-constructed house where they found the appellant sleeping. They also found his missing household items including a

computer monitor, bed sheet, and a television set. They called the police, and the appellant was arrested and charged with the offence stated earlier.

After a full trial, and relying primarily on the doctrine of recent possession, the trial court found the appellant guilty of the offence charged, and sentenced him to death, as provided for by the law.

His appeal to the superior court was not successful, hence this second and final appeal. He filed home-made grounds of appeal based essentially on facts rather than law.

This being a second appeal, by dint of the provisions of ***section 361*** of the Criminal Procedure Code, we are enjoined to consider only matters of law and not matters of fact. The only ground that relates to law is the doctrine of recent possession. Indeed, the central basis upon which both the lower courts found the appellant guilty is the doctrine of recent possession. There were no eye-witnesses to the alleged offence committed by the appellant, and the complainant himself was unable to identify the robbers.

In her submissions before us, Mrs. Nyamongo, learned counsel for the appellant, argued that had the superior court re-evaluated the evidence before the trial court, it would have noticed contradiction in evidence relating to the items allegedly found in the possession of the appellant, that the place where the items were recovered did not belong to the appellant, nor was it in his control, and that anyone could have placed those items within that deserted house. Accordingly, Mrs. Nyamongo submitted that the conviction was unsafe.

On the other hand, Mr. O'Mirera, learned Senior Principal State Counsel, argued that both the lower courts found as a fact that the stolen items were indeed found in the possession of the appellant, and that he had not offered any explanation as to how he got possession of the same.

We concur with the submissions of the learned Senior Principal State Counsel that the doctrine of recent possession was properly invoked. The appellant was found in actual possession of some of the items stated in the charge sheet, none of which he could explain or claim as his own. Some of these items were found in his possession barely a few hours after the robbery. He offered absolutely no explanation as to how he had come into possession of these items. The presumption is that he was the thief. The presumption is a rebuttable one, and the appellant had a duty to rebut that presumption which he failed to do. That is the evidential burden that was placed on him by virtue of the provisions of ***section 111*** of the Evidence Act, Cap 80 of the Laws of Kenya. The burden is clearly not a heavy one. It was only to give a plausible explanation as to how the goods stolen that night found their way into his physical possession. He never gave that explanation and the inevitable inference is that he was the thief.

With regard to the alleged contradictions in evidence in the trial court pointed out to us by the learned counsel for the appellant, we are of the view that these contradictions were not material, and we cannot say that the superior court's failure to note them resulted in any miscarriage of justice. Here, we have the concurrent findings of facts by the two courts below, that the appellant was found in possession of some of the stolen items and we see no reason to interfere with the same.

In the result, and for the reasons we have given above, we come to the conclusion that there is no merit in this appeal, and we dismiss the same.

Dated and delivered at Nairobi this 24th day of September, 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

ALNASHIR VISRAM

…….……..

JUDGE OF APPEAL

J. G. NYAMU

..…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR