REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 107 of 2006

NICHOLAS MUKILA NDETEI ……..…….……..…
APPELLANT

AND

REPUBLIC ……..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos (Onyancha & Lesiit, JJ.)

dated 5th April, 2006

in

H.C.CR.A. NO. 74 OF 2002)

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JUDGMENT OF THE COURT

On *3rd March, 1998*, the appellant herein, ***NICHOLAS MUKILA NDETEI*** was arraigned before the Senior Principal Magistrate's Court at Machakos where he was charged with four counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code. He was also charged with alternative counts of handling stolen property in relation to the first three counts of robbery. After a full trial before the learned Senior Resident Magistrate *(E.N. Maina, Esq.,)*, the appellant was convicted on the four main counts of robbery with violence and sentenced to suffer death in respect of each of the four counts.

Being dissatisfied with the convictions and the death sentence passed by the learned trial magistrate, the appellant filed an appeal to the High Court challenging both convictions and sentence of death. The superior court considered the appeal and dismissed it with slight correction as regards death sentence on all the four counts.

Still dissatisfied with the judgment of the superior court, the appellant now comes to this court by way of second and final appeal. That being so, only matters of law fall for consideration by virtue of ***section 361(1)*** of the *Criminal Procedure Code*.

The facts as accepted by the two courts below may be briefly stated.

The four complainants, ***Mului Ndivo, (PW1)***, ***Robino Joyce Biteyi, (PW3), Caroline M'Rithaa, (PW4)*** and ***Michael Musyoka Mutuse, (PW5)*** left Wote, the District Headquarters of Makueni District at about 5:00 p.m. on *3rd February, 1998* in a Pajero vehicle registration number KAC 749 being driven by ***Ndivo (PW1)***. At around 7:30 p.m. they had reached Kiboko Railways Station when the vehicle had a puncture and they all alighted so that they could change the wheel. After changing the wheel and as ***Mutuse (PW5)*** was taking the punctured wheel to the boot of the vehicle, a gang of about seven men emerged from the bush and attacked them. This gang of seven men was armed with pangas and iron bars. The gang ordered the complainants to lie down and produce whatever money they had. Ndivo was cut on the left hand between the first and second fingers and was also hit on the leg before being robbed of ***8.000/=*** which was in his trouser pocket, a wrist watch and shoes that he was wearing. He managed to sneak from the scene together with an Administration policeman whom they had given a lift. ***Robino (PW3)*** was beaten on the left side of the body with a blunt object; cut twice on the right inner head and right leg before she was robbed of her handbag which contained her Ugandan Passport No. A030302, two calculators, a purse with about 3,000/=, 100 US Dollars, an umbrella, three cheque books, two pens, a pair of spectacles and her address book, together with a Rado wrist watch. ***Caroline (PW4)*** was slapped on the left side of the face causing blinding of vision. She was also hit on the left hand and was robbed of ***Kshs.3,540/=***, a purse, ID Card, employment card, spectacles and a travelling bag which contained two dresses, a sweater, two wrist watches, an umbrella, shoes and a skin tight trouser. ***Mutuse (PW5)*** was hit on the right hand with an iron bar and also on the right eye. As a result, he fell down and lost consciousness for some minutes. In the course of all this, Mutuse lost a total of ***Kshs.16,000/=***, an ID card, a blazer, a Seiko watch and shoes. His brief case which he had left in the car was also stolen. In the brief case, there were two pairs of trousers and two shirts. Mutuse hid in the bush while PW3 and PW4 managed to hike a lift to Kiboko Police post where they found ***Ndivo (PW1)*** having reported the robbery incident. From Kiboko Police Post, the complainants reported at Kibwezi Police Station where they recorded statements after which they were issued with P3 Forms. **Ndivo** was treated at Makindu Hospital while **Robina**, **Caroline** and **Mutuse** were treated at Kibwezi Health Centre.

As a result of the foregoing, the police commenced their investigations and in the course of these investigations on *14th February, 1998*, ***Cpl. James Lethera (PW6)*** received information that those who were involved in the robbery incident were hiding at Ngaaka market. **Cpl. Lethera** and other police officers proceeded to Ngaaka market where they arrested the appellant as one of those who had been involved in the robbery of *3rd February, 1998*. The appellant was found wearing two pairs of trousers! One of the trousers was skin tight trousers of ***Robina (PW3)***! And the American Khaki trousers that the appellant was wearing was indentified by ***Mutuse (PW5)*** as one of the trousers that was in the brief case on the night of the incident. The appellant led the police to a bush where various items were recovered and these items were later identified by various complainants as some of the property stolen from them during the robbery.

The appellant's defence was that on *19th February, 1998*, he woke up and went to the shamba where he worked until 3:30 p.m. He then proceeded to Ngaaka market where he met policemen who asked him of his ID Card and then started beating him. The policemen then took him to his house and conducted a search which yielded nothing. He was taken to Kiboko Police Station on *20th February, 1998* from where he was transferred to Kibwezi Police Station where he stayed until *26th February, 1998* when he was taken to the O.C.S. *(Officer Commanding Station)* where he was forced to sign some papers. He stayed at Kibwezi until *3rd March, 1998* when he was charged in court.

The learned trial magistrate considered the foregoing and in his judgment delivered on *30th July, 1998*, stated:-

"***I have evaluated the evidence adduced carefully and I am satisfied beyond reasonable doubt that the accused person was one of the gangsters who on 3rd February, 1998 attacked the complainants and robbed them of their money and personal items as they changed a punctured tyre. It is my finding that although he was not identified during the attack he was found with items which had been stolen during the robbery about 2 weeks after the robbery. It is my finding that at the time of his arrest he was found wearing an American Khaki trouser which was positively identified by P.W.5. as his. I am***

satisfied that this trouser was in a brief case stolen from the motor vehicle on the material day. Inside that Khaki trouser he was also wearing a blue skin tight trouser which P.W.4. positively identified as hers and which I am also satisfied had been stolen during the robbery. I am further satisfied that it was him who led police officers to the place where the other personal items belonging to P.W.3. and P.W.4 were recovered. Both P.W.3. and P.W.4. positively identified those items among them a passport, diaries, notebooks, personal cheques and bank plates as theirs. I do not think it a coincidence that the accused was found in possession of 2 trousers stolen from 2 different people during the attack and also knowing where the rest of the stolen items were. The robbery occurred on 3rd February, 1998 and he was found in possession of the stolen clothes on 19th February, 1998. I find that the doctrine of recent possession applies to his case. The accused in his defence concedes that he was in fact arrested on 19th February, 1998. He did not however in his unsworn statement say how he came by the two trousers he was found wearing and which were stolen property. In fact he does not deny that he was wearing them or that he led the police officers to the place the other stolen items were recovered. The evidence of the prosecution witnesses is therefore not controverted and I find that the 4 counts of robbery with violence contrary to section 296(2) have been proved against him beyond reasonable doubt. I accordingly find him guilty and convict him."

The High Court *(Onyancha and Lesiit, JJ.)* as the first appellate court reconsidered and re-evaluated the evidence on record and in the course of its judgment delivered at Machakos on *5th April, 2006* stated inter alia:-

"***The robbery took place on 3rd February, 1998 and the technical possession of the items was established on 19th February, 1998, a period of 16 days. We find as did the trial magistrate, that the possession, considering the nature of the items, was recent within this principle. We also note that the appellant was found wearing two trousers belonging to P.W.4. and P.W.5 respectively. Possession of the two trousers alone in our view, would have been sufficient to link the appellant to the robbery in view of and in addition to the fact that he failed to give an innocent explanation as to how he came about the trousers which were recently stolen. The appellant did not even deny or challenge the evidence that he was arrested wearing both of trousers.***

We are conscious of the fact that it was not upon the appellant to prove his innocence and he need (sic) not have said anything in his defence if he chose to. However, the prosecution having put across this damning evidence against him, it was in his interest to explain all such damning evidence away on the balance of possibility. He failed to raise any such explanation, not only letting the prosecution evidence go uncontroverted, but letting its case stand proved beyond a reasonable doubt. In conclusion therefore, we find little merit in this appeal which we accordingly hereby dismiss."

It is from the foregoing that the appellant comes to this Court, as already stated elsewhere in this judgment, by way of second and final appeal. When the appeal came up for hearing on *14th July, 2009*, Mr.Evans Ondieki appeared for the appellant while Mrs. G. W. Murungi *(Senior Principal State Counsel)* appeared for the State. In his submissions Mr. Ondieki faulted the superior court in that it relied on the doctrine of recent possession and yet evidence of possession was not positively proved. Mr. Ondieki submitted that while there was constructive possession there must have been direct evidence. It was also Mr. Ondieki's submission that the charge sheet was defective as the evidence was at variance with the particulars of the charge. He urged us to allow the appeal.

On her part Mrs. Murungi supported the conviction of the appellant on the ground that the doctrine of recent possession was proved. She referred to the definition of possession in the penal code. It was further submitted that the appellant was unable to offer an explanation as to how he came to be in possession of the stolen items. For all these reasons, Mrs. Murungi asked us to dismiss this appeal.

We have endeavored to give the background of this appeal right from the trial court to the first appellate court. We have already set out in brief the facts as accepted by the two courts below. A second appellate court will not lightly interfere with concurrent findings of fact by a trial and first appellate court unless it is shown that they were based on no evidence – see ***Karingo v. Republic* [1982] KLR 213 and**

***Mwita v. R* [2004] 2 KLR 60**.

In our view, the main issue in this appeal is whether the two courts below could be faulted in the application of doctrine of recent possession. As already demonstrated elsewhere in this judgment, the complainants herein were attacked on the evening of *3rd February 1998* when they were robbed of various items. Then on *19th February, 1998* – about two weeks after, the appellant was found in possession of two pairs of trousers belonging to the two of the complainants. As if that was not enough, the appellant led the police to a bush where most of the stolen items were recovered. The appellant gave no explanation as to how he came to be in possession of these items which had been stolen from the complainants only two weeks before. Under ***section 4*** of the Penal Code possession is defined as follows:-

"***(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use of benefit of oneself or of any other person."***

In view of the foregoing, there can be no doubt that the appellant was in possession of the items stolen from the complainants during the robbery of *3rd February 1998*. As he gave no explanation as to how he came to be in possession of those items, the two courts below cannot be faulted for finding him guilty as charged.

The learned trial magistrate had sentenced the appellant to death on all the four counts. That was an error which was, however, corrected by the learned Judges of the superior court when they stated in their judgment as follows:-

"***We will conclude this judgment by referring to the sentence. The appellant was convicted of four robbery with violence counts for which he stood to receive death sentences in respect of each count. As stated often by the Court of Appeal and this court, where a person is convicted of more than one count, one of which carries a death sentence, he should be ordered to first undergo the death sentence with a suspension of the other sentences pending the execution of the death sentence. Where, as in this case, all counts attract death sentences, the proper order in our view would be to subject the prisoner to death in respect of the 1st count and to suspend others pending the execution of the 1st sentence. There is the question as to whether the other sentences should be pronounced before they are suspended. In our view such other sentences should be indeed pronounced and be then suspended pending execution of the first. The logic of this would be that if execution of the first sentence fails or is set aside, the next sentence would follow without referring the appellant to the court that sentenced him for fresh sentencing. Accordingly we order that the appellant serve the death sentence in respect to the first count while we suspend the other death sentences pending the execution of the first one. Orders accordingly."***

With that, we agree that this appeal lacks merit and we order that the same be and is hereby dismissed in its entirety.

Dated and delivered at NAIROBI this 25th day of September, 2009.

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR