IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 14 OF 2006

MORRIS MUTHIANI SAMMY .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Machakos

(Onyancha & Lessit, JJ.) dated 20th December 2005

in

H.C.Cr. Appeal No. 135 of 2001)

****

JUDGMENT OF THE COURT

Morris Muthiani Sammy, the appellant herein, was charged jointly with David Matolo Nyamai, Samson Mboya Munyambu, and others not before the court, of robbery with violence, contrary to section 296(2) of the Penal Code. An alternative count of handling stolen property, contrary to section 322(2) of the Penal Code was preferred against the appellant only. He was convicted by the trial Magistrate on the main count of robbery with violence contrary to section 296(2) of the Penal Code, and sentenced to death. His two co-accused persons were acquitted.

The evidence adduced against the appellant in the Magistrate's court was that on 5th February 2001, at about 7.00 p.m., Emily Mutinda Mbuvi (PW1) was at home at Katumani village when she heard some noise, and almost immediately, a group of three people armed with pangas entered into her house. She screamed and they ordered her to shut up. They demanded money. She took them to her bedroom where they took her handbag and ran away. One of them took her four months old baby and ran off with it. She followed him and he dropped the baby outside her house near her small shamba. The neighbours who heard her scream arrived at the scene and chased her attackers. They apprehended one of them, who is now the appellant. The appellant gave the names of his two companions as Matolo and Mboya. The appellant was found with one tube of "Fair and Lovely", ointment which was inside the bag, together with other items such as PW1's Identity card. Her bag was also recovered. It was dropped on the way by the thugs. It contained her Identity card but no money was recovered. Other items like balaclava and a hat were also found. The appellant was wearing them. PW1 could not see the faces of the thugs as they were wearing white balaclava.

Kyalo Mwangangi, (PW2) was in his homestead on 3rd February 2001, at about 7.30 p.m. He heard

the dog bark and saw people wearing balaclavas and holding pangas. He ran back to call neighbours who ran after the fleeing thugs. They later returned with the appellant whom they apprehended. He was found with cream and balaclava. Whilst being questioned, he gave the names of his accomplices as Matolo and Mboya, the original second and third accused persons respectively.

Stephen Mutisya (PW3) was in his house in Kibwezi on the 3rd February 2001, at 7.30 p.m. when he was informed by Kyalo PW2, of the thugs who were in PW1's compound. He joined the villagers who pursued the thugs and apprehended the appellant, who gave the names of his two companions as Matolo and Mboya. They were later arrested.

The appellant was found with a tube of cream and balaclava. The complainant's handbag was found having been dropped on the way.

On 3rd February 2001 at about 7.30 p.m. IP. Charles Jamanda (PW7) received a report that a robbery had occurred in Kibwezi town that night and a suspect had been arrested, and property recovered. He proceeded to the scene and found the appellant being beaten by members of the public. He rescued him and took him to Kibwezi Police Station where he was later charged along with two others. The recovered items were produced in court as exhibits.

Pc. Abdalla Bawada (PW5) and Pc. Benedict Ngwile (PW6) arrested the original 2nd and 3rd accused persons on 4th February 2001. They were jointly charged with the appellant, but later acquitted by the trial Magistrate.

The appellant denied the offence before the Trial Magistrate and said that he was a conductor in a matatu and was arrested in Kibwezi town at 7.00 p.m. whilst trying to buy motor vehicle spares as the matatu had broken down. He claimed that some items were planted on him at the time of arrest on allegations that he had robbed a woman.

In convicting the appellant, the trial Magistrate said,

"The first accused apprehension almost immediately after the offence is a significant fact since it strongly implicates him and more so due to possession of the cream and the balaclava ... By virtue of that possession a few minutes after the offence was committed the prosecution has proved that the first accused was involved in the offence and was in essence positively identified as one of the offenders. His defence is therefore unsustainable".

The appellant's first appeal was dismissed on 20th December 2005 by the High Court (Onyancha and Lesiit, JJ).

The High Court found that the appellant,

"**despite being found in possession of the complainant's identity card, the body lotion and probably the handbag, which conclusion we accept was proper, decided to say he was arrested in town as he went to purchase a motor vehicle spare part. His explanation was, in our opinion, rightly rejected by the trial magistrate. This left the trial magistrate with no other explanation for the "*recent possession*", of the stolen items except the one that he was one of the three thieves who attacked and escaped with the complainant's handbag".**

The appellant being dissatisfied with the above finding so he preferred this second appeal, where his two main grounds on points of law include being tried, convicted and sentenced on a defective charge and being convicted on the doctrine of recent possession of goods, and circumstantial evidence which did not meet the required standards.

Mr. Ondieki, Learned Counsel for the appellant submitted that the charge sheet on which the appellant was tried and convicted in the Magistrate's court was defective. He took us through the evidence of

several witnesses whose testimony was that the incident occurred on **"3rd February 2001"** yet the complainant gave the date of the incident as "**5th February 2001"** in her evidence. The charge sheet on the other hand reads, "**3rd February 2001**".

Mr. Ondieki submitted that the prosecution's failure to amend the charge sheet to reflect particulars, was fatal to their case as the evidence adduced contained errors. That further, there was no eyewitness to this offence, as the neighbours did not witness the robbery. In the circumstances, there was real danger of mistaken identity.

On the evidence of recent possession of goods, he submitted that the complainant's handbag was found on the road and not on the body of the appellant. To this effect therefore, he submitted that the Learned Judges of the Superior Court misdirected themselves when they said,

"... In this case, the appellant despite being found in possession of the complainant's identity card, the body lotion and probably the handbag, which conclusion we accept as proper, decided to say he was arrested in town ..."

Mr. Ondieki submitted finally that the circumstantial evidence was not to the required standard, and he urged the court to quash the conviction and acquit the appellant.

Mrs. Murugi, Senior Principal State Counsel for the Respondent conceded that the particulars of the charge were at variance with the evidence, as the complainant testified that the offence took place on the 5th February, 2001, yet the evidence of all the witnesses was that the robbery took place on 3rd February, 2001. She submitted that the superior court failed to analyse the confusion in the record to that effect. She submitted further that though the appellant was arrested in the vicinity soon after the offence was committed, the prosecution witnesses did not follow the appellant directly from the complainant's home, and the fact that some of the items were not found on his possession casts doubt on the doctrine of recent possession of goods by the appellant, and the doubt should be resolved in his favour.

We have considered the evidence on which the appellant was convicted by the trial Magistrate. That evidence was accepted by the superior court which proceeded to dismiss the appellant's appeal, as already stated. There was variance between the evidence of the complainant and the other witnesses as to when the offence was committed, whether the 3rd or 5th February, 2001.

Although there was variance between the charge and the evidence with respect to the time at which the alleged offence was committed, that variance by virtue of **section 214(2)** of the Criminal Procedure Code, is not material. This Court's decision in **JAMES OTENGO & OTHERS v. REPUBLIC Criminal Appeal No. 184 of 2002** (unreported) is distinguishable from this case in that in **JAMES OTENGO'S** case, the appeal was allowed solely on failure by the first appellate court to re-evaluate the evidence and make its own decision as per **OKENO V. REPUBLIC** [**1972] E.A**. page 32.

On the doctrine of recent possession of goods, this Court held in **ISAAC NANGA KAHIGA alias PETER NGANGA KAHIGA v. REPUBLIC Criminal Appeal No. 272 of 2005** (unreported)

"**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, and secondly that, the property is positively the property of the complainant, thirdly 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 properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses."**

In the case before us, none of the prosecution witnesses testified to having searched and recovered the

tube of “Fair and Lovely”, ointment, the balaclava, or the handbag from the appellant. In fact the evidence on record was that the handbag was recovered from the road. This aspect of the evidence was not considered by either the trial Magistrate or the first appellate court. The first appellate court misdirected itself by finding that the appellant was found in possession of the “**complainant’s identity card, the body lotion and probably the handbag ...”,** when there was no evidence to support such a finding.

On our own evaluation of the evidence on record we find that it would be unsafe to uphold the appellant’s conviction. We therefore allow the appeal, quash the conviction and set aside the death sentence which was imposed on the appellant. We direct that the appellant be released forthwith unless otherwise lawfully held. Order accordingly.

Dated and Delivered at Nairobi this 14th day of March 2008

E. O. O’KUBASU

.....

JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR