



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

**Criminal Appeal 2 of 2004**

**DANIEL MULI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal against the judgment of the High Court of Kenya Mbogholi Msagah**

**& Mutitu JJ.) delivered on 15<sup>th</sup> August 2003 In H.C.C.R.A. NO. 612 OF 1995**

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**JUDGMENT OF THE COURT**

The appellant Daniel Muli, was convicted after a trial, of the main count of robbery with violence contrary to section 296(2) of the Penal Code, having been charged jointly with another person, whose appeal is not before us, of that count and separately on an alternative count each of handling stolen property contrary to section 322(2) of the Penal Code. The particulars of the main count read, in pertinent part, that:-

“On 8<sup>th</sup> day of June, 1994 at Kipkabus road, Ngara within Nairobi area, jointly with another not before the court, being armed with a pistol, robbed Rajal Sojpal Punja Shah of Kshs.80,000, Golden rings ... and at or immediately after the time of such robbery did use personal violence to the said Rajal Sojpal Punja Shah.”

An issue having been raised as to the propriety of the charge, we consider it proper to deal with it before proceeding further with consideration of the case against the appellant. Mr. Wamwayi, for the appellant, submitted before us that the charge as laid was defective as it names a person other than the victim of the robbery as complainant. He submitted that the first prosecution witness was not at the scene of the robbery when it happened and was therefore improperly named in the charge sheet as the complainant.

A post mortem report of the victim of the robbery was produced in evidence as exhibit 14. The deceased therein is named as Rajal Sojpal Punja Shah, and is described as a housewife. Clearly therefore, the person who was robbed and against whom violence was applied was not the first prosecution witness but his wife. She has been named in the charge sheet. The first prosecution witness is not Rajal, but Sojpal Punja Shah. The complaint has no basis.

The appellant's conviction was mainly based on the testimony of Sojpal Punja Shah (*Sojpal*), who testified that he had employed the appellant as his houseboy and that the appellant had worked for him for about two months before the date of the robbery, and that immediately after the robbery the appellant disappeared. There was also the evidence of police constable Charles Kitee (P.W.5) (*Kitee*), who testified that on 26<sup>th</sup> September, 1994, he was led to the home of the appellant in Kitui, from where he recovered an assortment of items which Sojpal identified as some of the items which were stolen from his house at the time of the alleged robbery.

The trial magistrate, Mrs. Mutoka, accepted the evidence of the two witnesses, and on the basis of the fact that the appellant allegedly disappeared from the home of Sojpal soon after the robbery, and the fact that several items were allegedly recovered from his house in Kitui, about four months after they were reported as having been stolen, she came to the conclusion that the appellant, alone or in company of other people not before the court, attacked the deceased, strangled her and made away with her property. She then convicted him, and sentenced him to the death penalty.

In his first appeal, the superior court affirmed that decision on the same grounds as the trial magistrate. In that appeal as also in this one, the appellant has raised two main grounds:

- (1) The identification of the appellant as Sojpal's employee was lacking in corroboration more so because the witness at no time gave any description of the appellant either to the police or any other person.**
- (2) The doctrine of recent possession was improperly invoked in absence of any corroborative evidence to the alleged recovery of the complainant's properties in the appellant's house.**

Mr. Wamwayi for the appellant was at pains to explain that the circumstances of this case were such that Sojpal's evidence could not be accepted without corroboration considering that he had neither documentary nor other proof to support his claim that he had employed the appellant. In his view the prosecution case was based on circumstantial evidence, which evidence has gaps particularly on how the police knew the appellant's home, and on evidence of recovery which, in his view is vague. Mr. Wamwayi further submitted that if indeed the appellant was employed by Sojpal, his son Mansuttal Sajpal Shah, (P.W.2)(*Mansuttal*) would have known him.

We have examined the evidence closely. Sojpal testified, and was cross-examined on his testimony but remained firm, that he personally employed the appellant. The appellant had worked for him for two months before the robbery incident. Is it possible that the witness would have failed to know the person he had employed and stayed with for two months? It will be preposterous to hold that he would have. The witness lived in his house with his deceased wife, and had two employees. He testified that on the material date of the robbery he left the deceased and the appellant at home and went to his grocery shop situated along Biashara Street. He did not testify on this, but it is quite clear from the evidence that his son lived at First Parklands Avenue away from him. He could not be expected to know the appellant well unless it was shown that he frequented his parent's home. In those circumstances we are of the view and so find that both courts below were perfectly entitled to come to the conclusion that Sojpal had indeed employed the appellant. The evidence supports such a conclusion.

No one witnessed the attack on the deceased. Mansuttal testified that he was telephoned at about 8.30 a.m. on the date of the robbery and was informed that there was a problem at his parents' home. A neighbour of his parents, Sushita M. Shah (P.W.6) is the one who telephoned him. It is instructive that the attack took place soon after Sojpal left home. The house was rummaged and several items were stolen. The deceased was lying on her bed facing up with a cloth tied round her neck and wrist. She was later rushed to hospital where she was pronounced dead soon after arrival. By about 9.30 a.m. the appellant was nowhere to be seen within the vicinity of Sojpal's residence.

The appellant's defence was that he was not an employee, and that the first time he stepped into the home of Sojpal, is when the police led him there. We have already held that the evidence on record leaves no doubt in our minds that he was an employee of Sojpal.

The appellant's conduct was suspect. Only him could explain what had happened that made him disappear from his place of work. **Section 111** of the Evidence Act Cap 80 Laws of Kenya places that burden on him. He did not explain and wanted the court to believe that he was not an employee of Sojpal. He was an employee and his disappearance is telling.

Kitee testified on the appellant's arrest. He testified that he looked for the appellant in Machakos District without success. He later learnt that the appellant hailed from Kitui. The Chief of Miambani Location assisted the witness in locating the appellant's home. It is clear from the evidence that the police officer was accompanied by a person he described as the appellant's "colleague". He is the one who pointed out the appellant to the witness. The witness conducted a search and, in his words:

**"... recovered one shirt .... One remote control, 1 electrical gadget, pouch, 1 compact cassette, 1 pocket watch, 1 bed sheet, 1 pink book, 1 table cloth plastic. We found them in his house and he was using the items."**

In cross-examination the witness stated:

**" I recovered these items from your home except the 2 white shirts. You led us to your grandmother's house to conduct a further search."**

All the items recovered were positively identified by Sojpal as his. He testified as follows on this aspect:

**"Recovered was my bed-sheet, 2 shirts, pocket watch, bed sheets, pink bedsheet, 1 hindu cassette tape, 1 plastic tablecloth. I identified them as mine. I had not given them to anyone."**

In those circumstances, the trial and first appellate courts were entitled to come to the conclusion that the several items Sojpal said he identified were recovered from the appellant. Considering their number and nature, the time they were recovered from the appellant was recent. The possession raised a rebuttable presumption of fact, under section 119 of the Evidence Act, that the appellant was either the thief or guilty receiver. The appellant did not offer any explanation. In the circumstances, we hold that the doctrine of recent possession of stolen property applies; and the appellant was properly held to be duty bound to explain his possession of those items. We do not agree with Mr. Wamwayi that there is any missing link in the chain of events. The recovery of the complainant's property from the appellant bridged any missing link that might have been there.

We do not also agree with Mr. Wamwayi, that the trial magistrate shifted the burden of proof to the appellant. As we stated earlier the law places a duty on an accused to explain certain facts. Likewise we do not agree with learned counsel that the circumstances of this case were such that the evidence of Kitee needed corroboration. As rightly pointed out by Mr. Kaigai, Senior State Counsel, **Section 143** of the Evidence Act is clear that there is no particular number of witnesses required to prove a fact. The finding on recovery depended on credibility of witnesses. There are concurrent findings on this by both the trial and first appellate courts and we find no proper basis for interfering.

In the result we find that the appellant was properly convicted of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. Accordingly we find no merit in his appeal and we hereby dismiss it. Order accordingly.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of July 2007.**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**W.S. DEVERELL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**