



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

CRIMINAL APPEAL 82 OF 2004

CHRISTOPHER RABUT OPAKA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Tanui & Gacheche, JJ) dated 17th July, 2002

In

H.C.Cr. A. No. 422 of 2002

JUDGMENT OF THE COURT

Mr. Orengo, learned counsel for the appellant Christopher Raput Opaka, drew our attention to this Court's decision in the case of ISAAC NG'ANG'A KAHIGA, alias PETER NG'ANG'A KAHIGA, Criminal Appeal No. 82 of 2004 (unreported) in which the Court laid down the principles of law applicable in cases in which the doctrine of recent possession is in issue. In that case, the Court stated as follows:-

“ It is trite 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 the 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 the other. In order to prove possession there must be acceptable evidence as to 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.”

This case aptly and succinctly states the legal position with regard to the doctrine of recent possession and Mr. Orengo was right in citing it to us; we did not understand Mr. Musau, the learned Senior Principal State Counsel for the Republic, to in any way contest that position.

Francis Ogola Okach (P.W 1) was attacked and robbed of his motor vehicle Reg. No. 29 CD 234K, Ksh.2,200/- and a wrist watch make Philips Pasio; the attack took place at about 11.30 a.m. in broad daylight.

The evidence which was accepted by the trial Magistrate and by the superior court to which the appellant lodged his first appeal was that at about 12.30 p.m. Police Constable Said Madhken (P.W 2) was in the home of one Charles Abong'o; Said had earlier on received a report from Charles Abong'o about the presence of another vehicle in Abong'o's home and that vehicle was being suspected to have been stolen. So Constable Said was laying an ambush in Abong'o's home. At about 12.30 p.m. Said saw the vehicle Reg. No. 29 CD 234K come and park near Abong'o's home. That was the vehicle of which Francis had been robbed at about 11.30 a.m. Said swore he saw three people come out of the vehicle, and while two went and hid themselves in some bush, one carrying a jerry-can came to the home of Abong'o. Said said he arrested that person and according to Said, the person he arrested was the appellant. He took the appellant to Asembo Bay Police Post and on searching the appellant, he found a watch in one of the appellant's pockets. That watch was subsequently identified by Francis who had been robbed of it and in the magistrate's court he showed the marks on his watch – he had written his initials somewhere on the watch. The Magistrate was satisfied the watch belonged to Francis, that it had been stolen from Francis about an hour earlier and that Constable Said had recovered it from the pocket of the appellant. The High Court (Tanui and Gacheche, JJ) confirmed these findings.

In his submissions before us, Mr. Orengo appeared to argue that the appellant was not the person whom Constable Said saw come out of the vehicle and walk to the home of Charles Abong'o, but that the appellant was an innocent trader in maize and merely happened to be there looking for maize to buy. This is really a question of fact and was not available to the appellant on a second appeal such as the one before us. On that point, the trial Magistrate held as follows:-

***“So here is a situation where the complainant was robbed of a motor-vehicle at around 11.30 a.m. At around 12.30 p.m. the same motor- vehicle is found around 40 km away. The person arrested is found with the jerrican he had taken from the robbed motor vehicle. He emerges from the robbed motor-vehicle. On being searched he is found with the complainant's wrist watch which is positively identified I do not think there is any doubt at all that this same man is the robber
.....***

The accused defence, therefore, that he had gone to buy maize from a seller is simply not true. There is no doubt that the accused is concocting contradicting (sic) this story simply to try and exonerate himself from an offence he clearly committed. His defence is a sham.”

It is clear from this extract that the Magistrate was fully satisfied that the appellant had participated in the robbery upon Francis at about 11:30 a.m., that at about 12:30 p.m. Police Constable Said saw the appellant and two others emerge from the vehicle which had been stolen from Francis and that when Constable Said arrested the appellant and searched him, the appellant was found in possession of the watch belonging to Francis. The High Court, for its part, found as follows:-

***“We are, however satisfied that the evidence of P.W.2 linked the appellant to the commission of this offence. P.W.2 said that while he was guarding the Nissan Sunny vehicle he noticed an arrival at the scene of another vehicle whose registration No. was 29 CD 234K. He also said he saw three people alight from that vehicle and that two of them went to a nearby bush while one carrying a 5 litre jerrican walked to where the witness was Immediately after the appellant was arrested a Philips Pasio watch was recovered from one of his pockets. Earlier on, a similar watch had been stolen from P.W.1, and was given to the person who was driving the motor-vehicle. This wrist watch was positively identified by P.W.1 as belonging to him and he proved his claim by opening the cover and showed the court an inscription “Okach) F.O.” in it.
.....***

We are satisfied that the appellant was found in possession of both the motor- vehicle and the wrist watch which had been violently robbed a few hours earlier on

These are concurrent findings of facts by the two courts below and as Mr. Musau submitted before us, there is really no reason for this Court to interfere on a second appeal. There was more than sufficient evidence upon which the two courts below were entitled to come to such conclusions. It does not matter

whether the search was at the police post or at the scene where the appellant was arrested. It cannot matter that the jerrican the appellant was arrested with was not produced in this case and that Charles Abong'o was not called to testify in the case. Those omissions did not take away anything from the case put forward by the prosecution. It would be unreasonable on the evidence on record to think that Constable Said did not see the motor-vehicle 29 CD 234K come to the scene and that Constable Said recovered the watch from a person other than the appellant. We are satisfied the appellant was convicted on sound evidence which proved beyond any reasonable doubt that

“On the 18th day of July, 2001 at about 11:30 a.m. along Seme/Asembo Bay road in Kombewa Division, within Kisumu District of the Nyanza Province jointly with others not before the court, while armed with dangerous weapons, namely a pistol, knives and pangas robbed Francis Ogola Okach of one motor vehicle Reg No. 29 CD 234K Toyota Land Cruiser white in colour valued at K.Shs.5,000,000/=, cash K.Shs.2,200/=, one wrist watch make Philips Pasio valued at K.Shs.1,500/=, all to the total value of K.Shs.5,004,900/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said Francis Ogola Okach.”

This appeal fails and we order that it be and is hereby dismissed.

Dated and delivered at Kisumu this 24th day of November, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.