



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAKURU**

**CORAM: GITHINJI, J.A. & ONYANGO OTIENO & DEVERELL, AG. JJ.A.**  
**CRIMINAL APPEAL NO. 110 OF 2002**

**BETWEEN**

**ANTONY KARIUKI KARERI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

(Appeal from the judgment of the High Court of Kenya at Nakuru (Rimita

& Ondeyo JJ) dated 28th September, 2001

in

H.C.CR.A. NO. 75 OF 1999)

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**JUDGMENT OF THE COURT**

The appellant and three others were jointly charged in the Chief Magistrate's Court, Nakuru with the offence of robbery with violence contrary to **section 296 (2) of the Penal Code**. The particulars of the charge alleged that on the night of 26th December, 1998, at Sparks Wines and Spirits Bar, at Shabaab, Nakuru, the appellant and three others while armed with dangerous weapons namely, pistols, robbed **Violet Akungu Awiti** of a radio cassette JVC make, serial number 166C7230 valued at Shs.18,000/-, a bottle of Vodka, a bottle of Captain Morgan, a bottle of Cinzano all valued at Shs.12,299 and cash Shs.5,369/-. The appellant was separately charged in count two with the offence of handling stolen property contrary to **Section 322 (2) of the Penal Code**. The particulars of the alternative charge stated that on 5th January, 1999 at Njoro within Nakuru otherwise than in the course of stealing the appellant dishonestly retained one radio cassette serial number 166C7230 make JVC knowing or having reason to believe it to be stolen or unlawfully obtained.

The appellant was convicted on the main offence of robbery and sentenced to death being the only sentence authorised by the law. His three co-accused were quite properly acquitted for lack of evidence. The appellant appealed to the superior court on several grounds, the main ground being that the learned trial magistrate misdirected herself in law in erroneously applying the doctrine of recent possession.

His first appeal to the superior court was dismissed. He now appeals to this Court on five grounds. The main ground being ground No 2 which states:

*“The superior court erred in law in importing into and applying the doctrine of recent possession in the case when evidence adduced before the trial court did not establish the same. Moreover, the doctrine of recent possession held by the trial court to sustain the conviction was not established and in failure to deal with the issue the court erred in law.”*

The Sparks Wines & Spirits Bar which was raided belonged to **Kennedy Ogango** a teacher at Egerton University. On 26th December, 1998 at 8.30 pm, Violet Akungu Awiti (apparently the complainant) was inside the bar serving customers while Juma Tavita, a watchman was outside the bar. According to Juma Tavita, a white saloon car stopped outside the bar and three people alighted. Two people went into the bar while one stood at the door. After a short while Juma heard bottles breaking inside the bar. He went into the bar and the person at the door pushed him inside and told him to lie down whereupon one person pointed a pistol at him and threatened to kill him.

Meanwhile according to the evidence of Violet, two people entered into the bar and ordered for two sodas and cigarettes and as she went to fetch them the two people ordered the people in the bar to lie down. When she turned, she saw one of them holding a pistol. One of them jumped into the counter and took Shs.5,000/- from the cash box, drinks worth Shs.9,000/- and a radio cassette. Both Violet and Juma did not identify any of the robbers although electric lights were on. The owner of the bar was away. He went to the bar on 31st December, 1998 and confirmed the theft. He learnt that a report had already been made to the police.

On 5th January, 1999, Cpl Joseph Wambua interrogated the appellant and the coaccused about the robbery at Sparks Bar. They had been arrested in connection with a different offence. The appellant then agreed to take Cpl Wambua to his house in Njoro to point out the radio cassette. They went there but they did not find the radio cassette in the house of the appellant. According to the evidence of Cpl Wambua in cross-examination by the appellant, he (appellant) took them to his sister's house where the radio cassette was recovered. That radio cassette was identified by Kennedy Ogango the owner of the bar. According to him, he bought that radio cassette in America in 1992 for US\$250 and the model was not available in Kenya. He gave the police the operating manual for the radio cassette.

The appellant gave sworn evidence at the trial. He testified that he stays in Free Area but had gone to Ndundori where he was arrested on 28th December, 1998. He further testified that on 5th January, 1999, a police corporal took him from the cells and told him to take him where he (appellant) stays but there was no recovery.

The conviction of the appellant was solely based on the fact that he led police to a house in Njoro on 5th January, 1999 where the radio cassette stolen from Sparks Bar on 26th December, 1998 was recovered. This is how the learned trial magistrate dealt with the doctrine of recent possession:

*“As for the 3rd accused person Antony Kareri Kariuki, he led the police to his house and eventually to his sisters house where the radio cassette was recovered. ... The court has no doubt that he is the one who led the police to where they eventually recovered the radio cassette. No evidence was*

*adduced to show previous grudges that would have made the police to frame him. The cassette recovered and its manual exhibit number 2 bore the same serial numbers. The court has no doubt therefore that this was the same radio cassette stolen from the complainant's premises. The robbery occurred on the 26th December, 1998 and the radio cassette was recovered on the 5th of January, 1999. In the opinion of the court the doctrine of recent possessions applies here. This doctrine stipulates that if a person is found with a stolen item a short while after the commission of an offence he is either the robber or the handler. The court believes that it was not a coincidence that the 3rd accused is arrested, he is asked about a certain robbery and he actually leads the police to wherever of the stolen items i.e. the radio cassette is recovered. The court has no doubt that the 3rd accused knew about this robbery and he knew that the radio cassette was one of the stolen items. The evidence violating the possibility of him being a handler."*

Mr Ondari, the learned counsel who appeared for the State in the superior court did not support the conviction. Mr Gumo the learned counsel who appeared before us however, supported the conviction. The superior court nevertheless upheld the conviction saying in part:

*"According to him (that is accused), no recovery was made in his presence. We strongly believe that the accused denies the recovery from his sister because the radio was in his constructive possession. He had no explanation to offer on how he came by the radio. His denial corroborates the prosecution case that he is the person who had the radio and it did not matter that he was in constructive possession. We, like the learned trial magistrate find that the appellant had the radio which had been stolen in a robbery at Sparks bar. The recovery was done about 10 days later after the robbery. But all the available circumstantial evidence shows that the appellant took part in the robbery as alleged."*

Mr Kisilah who appeared for the appellant before us made strong submissions particularly on the doctrine of recent possession. He submitted amongst other things that the court did not explain why the doctrine of recent possession applied, that there was no evidence of control of the radio cassette to support the doctrine of constructive possession, that mere knowledge of the existence of the radio cassette does not make the appellant a robber, that the 10 days between the robbery and recovery was not so close as to presume the appellant as a robber and that the prosecution did not exclude the appellant as being a recipient.

The doctrine of recent possession is comprehensively dealt with in the case of ***ANDREA OBONYO V R [1962] EA 542*** relied on by the appellant's counsel. The presumption is that a person in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. That is a presumption of fact and not an implication of law which presumption is merely an application of the ordinary rule relating to circumstantial evidence.

In that case the court said at page 349 para H, I:

*“When a person is charged with theft and, in the alternative, with receiving and the sole evidence connecting him with the offence is the recent possession of stolen property, then, if the only reasonable inference is that he must have either stolen the property or received it knowing it to be stolen, he should be convicted either of theft or of receiving according to which is more possible or likely in the circumstances. He is not entitled to be acquitted altogether merely because there may be doubt as to which of the two offences he has committed.”*

The two courts below were satisfied that the prosecution had proved that robbery took place in the course of which money, hot drinks and a radio cassette were stolen. The two courts below also believed the evidence and made a finding that the appellant led police to Njoro to recover the radio cassette and that indeed a radio cassette was recovered which was positively identified by the owner of the bar as the one which was stolen during the robbery.

These are concurrent findings of fact and this Court, as second appellate court, cannot interfere with those findings unless they were based on misdirections (including lack of evidence to support them) of such a nature that it is reasonably possible that without them the appellant could not have been convicted – see **KARINGO V R [1982] KLR 213**.

It has not been shown that there are any grounds for interfering with the concurrent findings of fact on those aspects of the prosecution case.

The main question raised in this appeal is whether the doctrine of recent possession applied to the facts of this case. The fact that the appellant was not in physical or personal possession of stolen radio cassette does not exclude the application of the doctrine for the first definition of recent possession, **Section 4 (a) of the Penal Code** is wide enough to include constructive possession. In that section the words **“be in possession of”** or **“have in possession”** are defined as:

*“Includes not only having in one’s own personal possession but also knowingly having anything in 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 or of benefit of oneself or any other person. ”*

The appellant did not explain the constructive possession. Although he admitted that he took Cpl Wambua to where he resides and to have seen the radio cassette at the police station he denied that radio cassette was recovered when he led police to Njoro. That denial of what the two courts below found to be the truth is evidence that appellant was in possession of the radio cassette as the superior court correctly decided – see **IDI S/O WAZIRI V R [1961] EA 146**.

The recovery of that radio cassette was proximate in time to the date of the robbery and in all the circumstances of the case we are satisfied that the two courts below correctly concluded that the appellant was a robber rather than a handler.

We find no merit in this appeal and accordingly dismiss it.

Dated and delivered at Nakuru this 24th day of September, 2004.

E. M. GITHINJ

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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AG. JUDGE OF APPEAL

W. S. DEVERELL

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AG. JUDGE OF APPEAL

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

**DEPUTY REGISTRAR**