**IN THE COURT OF APPEAL**
**AT NAIROBI**
**(CORAM: SHAH, BOSIRE & KEIWUA, JJ.A.)**
**CRIMINAL APPEAL NO. 21 OF 2001**

**BETWEEN**

**PETER KARIUKI KIBUE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from the judgment of the High Court of Kenya at**

**Nairobi (Justice Osiemo & Lady Justice Ondeyo) dated**

**15th July, 1998**

**in**

**H.C.CR.A. NO. 475 OF 1996)**

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**JUDGMENT OF THE COURT**

Following his conviction and sentence after trial on two counts of robbery with violence, contrary to section 296(2) of the Penal Code, Peter Kariuki Kibue appealed to the superior court against the conviction and sentence. Upon dismissal of his appeal by the superior court (Osiemo and Ondeyo, JJ), he brought this appeal. Being a second appeal only issues of law fall for determination. The only point of law raised by the present appeal is whether the appellant was correctly identified as having been among the several people who are alleged to have violently robbed Dr. Charles Irungu (Irungu) and Damaris Wanjiru Waweru (Damaris) and whether exhibits allegedly found on him were correctly identified.

The robberies complained of took place on 26th November, 1996, at about 10.30 p.m. at the gate into Damaris's residence at Uthiru, in Nairobi. Irungu and Damaris were driving separate motor vehicles following each other and had stopped outside the said gate for the gate to be opened for them when a gang of robbers pounced on them. Irungu was driving a white Nissan Sunny car, Reg. No. KAB 958X, while Damaris was driving motor vehicle Registration Number, KQF 366, a Peugeot 504 saloon. The former was trailing the latter. Both testified at the appellant's trial and said that they were able to identify the appellant at the time of the robbery with the aid of the vehicles headlights and the door lights inside the cars.

It is, however, in evidence that the attack on Damaris and Irungu was more or less simultaneous and at night time. It is doubtful whether as at that time the complainants could unmistakeably identify their attackers. Their evidence on identification is clearly weak and we do not attach much weight to it.

The robbers commandeered the two cars, and after going for some distance Irungu was thrown out of his car and was abandoned by the roadside. Damaris was also later abandoned after her car overturned and hit against a certain tree. She was bundled into the boot of that car by the robbers who then left her there and escaped together in Irungu's car. It was her evidence that before her car overturned, the appellant forcibly obtained Kshs.580/- from her in cash, a pair of jeans trousers, an Omax wrist watch, and a leather jacket. She testified that she was able to identify the appellant inside her car before it overturned, using the curtsey light, more so, because they were together for some time. The piece of evidence as relates to the identification is also weak and a conviction could not be founded on it alone without more.

The evidence both courts below relied upon to find the appellant guilty on both counts concerns possession by the appellant only a few hours after the robberies, of a black leather jacket and jeans trousers which Damaris said were taken from her at the time of the robberies. According to the evidence on record which both courts below accepted and acted upon, the appellant was arrested shortly after he and his accomplices had abandoned Damaris. He was one of seven men who came out of Irungu's car when it was stopped near Kabete Police Station as it was being driven towards the city centre. Irungu blocked its way using a car he had obtained from Damaris's residence. Irungu was in the company of Nancy Wanjiru Igamba (Nancy). All the men escaped except the appellant who was arrested before he could escape.

The appellant was wearing a black leather jacket, and had a jeans trouser round his neck. Damaris later identified both items as hers. This is what she said:

> "My car was towed to the Police Station; also found the other Dr. Irungu's car (sic). The police told me they had arrested one person. I went to see him and found the accused still wearing my jacket. I also saw my long trouser at Kikuyu Police Station ... I also see my jacket and trousers here in court."

The appellant did not challenge her on that evidence.

Nancy's evidence on the issue was as follows:

> "We then went to the Police Station where Mrs. Waweru identified her black leather jacket and long trousers. The accused in the dock is the one whom we arrested."

Irungu on his part testified, in pertinent part as follows:

> "I then saw my car coming from the opposite direction. I drove right in front of it and blocked its path. There were ... seven men inside. We came out shouting thieves! thieves! and asked help from the members of the public. The occupants of the car got out and started to run away. One door does not open and therefore accused tried to get out of the widow and he fell. He was wearing jeans at that time. Nancy fought the accused but he slipped but then I went after the accused ... At that juncture at that time (sic) accused wore black leather jacket ... Mrs. Waweru found us at the Police Station dressed differently from the way I had left her. Mrs Waweru's jeans are the jeans we found around the accused's neck... I see a black leather jacket which was stolen from Mrs Waweru and a pair of black jeans belonging to Mrs Waweru."

The appellant did not question both Nancy and Irungu on their respective testimony concerning his arrest and possession of the black leather jacket and jeans trousers. Our view of the matter is that the appellant was arrested as stated by Nancy and Irungu and that he had in his possession the two items. Both the trial magistrate and the superior court, on first appeal, were perfectly entitled to come to the conclusion they did that the appellant was arrested a few hours after the robberies complained of against

him, in possession of some of the items which were stolen in the course of the robberies. Besides he was seen escaping out of Irungu's car which, a few hours earlier, had been robbed from him. The possession was recent.

The appellant's defence was short, and in effect amounted to an alibi. He testified that he operates a radio repair business at Uthiru shopping centre, and that on the material date of the robberies he was at his shop throughout the day up to about 9 p.m. when he closed his shop. He did not, however, leave the shop until 9.45 p.m. and as he walked home he met a group of people who surrounded him, beat him up badly and alleged that he was the man they were looking for, presumably for some offence. He was later taken to Kikuyu Police Station where he was charged with the offences for which he now stands convicted. He did not make any mention of the clothes the prosecution said he was arrested with.

The superior court in dismissing the appellant's first appeal agreed with the trial court that the appellant's defence was unbelievable. Both the Courts below having rejected the appellant's defence it meant his possession of Damaris' leather jacket and jeans trousers remained unexplained. The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver.

Since he did not offer any explanation the rebuttable presumption in law raised, based on the provisions of ***section 119*** of the Evidence Act, is that he was one of the people who robbed Damaris of the items together with her car and also robbed Irungu of his car. It is a presumption of fact which courts often refer to as the doctrine of possession of recently stolen property. As we stated earlier it is a doctrine which raises a rebuttable presumption of fact which may be displaced by an accused person giving a reasonable explanation as to how he came to be in possession of the same.

Mr Mogikoyo for the appellant submitted before us that the concurrent findings of fact by both the courts below based on credibility of witnesses is not binding on us, and that despite the fact that this is a second appeal, we would be at liberty to make our own findings or draw our own conclusions from the evidence on record. He in effect urged us to reevaluate the evidence afresh, analyse it and draw our own inferences. In his view, if we do so, and particularly consider that a gentleman (Mr. Ndungu Gicheru) who lent Damaris some clothes after the appellant allegedly forcibly took away her jeans, trousers and jacket was not called to give evidence, we would come to the conclusion that the appellant was not arrested as stated by Nancy and Irungu, but as he walked to his home from his place of business.

With due respect to learned counsel, the jurisdiction of this Court is conferred by statute, and the Court exercises the powers expressly given to it by law. ***Section 361*** of the Criminal Procedure Code expressly enacts that in second appeals the jurisdiction of this Court is limited to matters of law. That being so, this Court lacks the jurisdiction to deal with issues of fact. Learned counsel did not state how we would overcome the statutory bar on the matter. Nor did he show any error in principle in the manner the superior court handled the evidence on which the doctrine of recent possession was based. In view of the foregoing we find no basis for interfering with the concurrent findings of fact on possession by the appellant of items which Damaris and Irungu identified in court as those of Damaris. Besides, failure to call a witness per se, more so when the evidence on record is sufficient, is not a proper basis for dealing with issues of fact on a second appeal.

Accordingly, there is no basis for interfering with the appellant's conviction on the two counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The sentence which was meted out to him is a lawful sentence. In the result his appeal lacks any merit and is dismissed in its entirety. Order accordingly.

**Dated and delivered at Nairobi this 31st day of July, 2001.**

**A.B. SHAH**
**.....**

**JUDGE OF APPEAL**

**S.E.O. BOSIRE**
**.....**

**JUDGE OF APPEAL**

**M. OLE KEIWUA**
**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**