REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 74 OF 2004

(From original conviction and sentence in Criminal Case No. 265 of 2003 of the Senior Resident Magistrate's court at SOTIK – J. M. NDUNA, SRM)

WESLEY KIPNGETICH KOECH……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

JUDGMENT OF THE COURT

The appellant was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge were that on the 2nd day of February 2003 at Kimolot Village in Bureti District of Rift Valley Province, with others not before court, while armed with dangerous weapons namely; home made pistol, simis and rungus, the appellants robbed Richard A. Bett, of one television make Phillips, one radio make Panasonic, a video tape and a torch all valued at Kshs.20,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Richard A. Bett. The appellant also faced another count of being in possession of an imitation of a firearm contrary to **Section 4(1)** of the **Firearms Act**.

The appellant denied the two counts. After a full trial, the appellant was convicted of the two counts and in the first one he was sentenced to death as by law provided and in the second one he was sentenced to five years imprisonment and the sentences were to run concurrently.

The appellant was dissatisfied with the said conviction and sentence and preferred an appeal to this court. He raised several grounds of appeal which may be summarized as hereunder:-

1. That the entire trial was a nullity in law as the prosecution was conducted by an unqualified prosecutor.

2. That there was no sufficient evidence that he had committed the two offences which he had been charged with.

3. That the learned trial misdirected himself in his analysis of the prosecution evidence and thereby

reached a wrong conclusion.

The prosecution case briefly stated was as follows:- **PW1, Richard Bett,** (the complainant) was in his house on 2nd February 2003, at about 8.00 p.m. He was with his wife and a child. Three people who were unknown to him forcefully gained entry into his house. They were armed with what seemed to him a pistol (although it later turned to be a home made gun), swords and rungus. The appellant pointed the pistol at his wife and threatened to kill her. The appellant's accomplices tied the complainant with a rope. The appellant and his accomplices then ransacked the house and stole the items as listed in the charge sheet. PW1 said that the appellant hit him thrice on the head with the home made gun and dragged him out of the house and left him there then fled away with his accomplices. PW1 managed to free himself after about five minutes. The incident took just a few minutes. PW1 screamed for help and some neighbours came to his aid and took him to a hospital.

After a short while, the complainant found two neighbours with a television set and a radio cassette which he identified as being part of the things that he had been robbed of. The two neighbours alleged that the said items had been dropped by two people who disappeared into the bush before they could be apprehended. PW1 with assistance of his neighbours combed their neighbourhood and they found a stranger standing by the road side. The stranger was interrogated but he failed to give a satisfactory account of himself and also failed to explain what he was doing in that place at the material time. PW1 identified that person as being one of the people who had robbed him. The appellant was escorted to an administration police camp and when searched, he was found in possession of a video tape that belonged to the complainant. The accused was also found in possession of a torch which the complainant identified as his.

In his cross examination by the appellant, the complainant said that there was a lantern lamp in the house when the robbers struck and therefore he was able to see the appellant clearly. He also said that he saw the gun that the appellant pointed at his wife. The appellant was flashing a torch which illuminated the complainant's house. The complainant further testified that the appellant was found in possession of a polythene bag which contained a toy pistol.

Charles Kirui, PW2, corroborated the evidence of PW1 in all material aspects. He said that he heard screams from the home of PW1 and when he rushed there he was told what had happened and he joined PW1 and others in combing their neighbourhood to look for the robbers. He further testified that he identified the two neighbours who were in possession of the television set and the radio cassette which had been dropped by the robbers as they fled. He further testified as to how they found the appellant standing somewhere along the road and when they asked him what he was doing there, he said he was waiting for a Tea Truck so that he could get a lift home. They found that explanation to be unsatisfactory because it was on a Sunday when Tea Trucks were not operating and also Tea Trucks were not using that road. When the suspect was taken to an administration police camp, he was found to be in possession of a green bag which contained a toy gun. A video tape and a torch were also recovered from the appellant.

Joseph Kimutai, PW3, corroborated the evidence of PW1 and PW2. **David Kiprono Koech, PW4**, an Administration Police Officer, testified that when the appellant was taken to their camp, he searched him and recovered a video tape, a toy gun, a rope and a torch.

John Misoi, PW5, was a police officer and he produced a ballistic expert report which confirmed that the gun which was recovered from the appellant was home made and was not capable of being fired. It was an imitation of a firearm as defined under the Firearms Act.

In his sworn statement of defence, the appellant testified that on 2nd February 2003, he was engaged in his usual business of getting logs to supply to a local Tea Factory. At about 6.00 p.m., he boarded a vehicle and alighted at Kapset market to await another vehicle to take him to his home. At about 8.30 p.m., he was confronted by some people who asked him to identify himself. He was thereafter taken to a chief's camp where he was shown a home made gun and the other items which were said to have been stolen from the house of PW1 and they were alleged to belong to him. He denied having been found in possession of those items.

The learned trial magistrate held that the appellant had been arrested shortly after the robbery and was found in possession of some of the items that PW1 had been robbed of, a video tape and a torch. He was also in possession of a home made gun. He also held that the appellant had been properly identified by PW1. On the basis of the aforesaid evidence, the trial court proceeded to convict the appellant accordingly.

Turning to the appellant's grounds of appeal, the appellant submitted that the prosecution case was conducted by an unqualified prosecutor, one Sergeant Muniko. The entire trial was therefore a nullity, he submitted. We examined the record of appeal and confirmed that from 19th February 2003, when the hearing started upto 8th September 2003, the prosecutor was recorded as being Sergeant Muniko. However, from 22nd September 2003, upto 2nd March 2004, when the hearing was concluded, the prosecutor's name is simply indicated as ***"Muniko for state"***. The rank of the prosecutor was not stated. **Section 85(2)** of the **Criminal Procedure Code** states as follows:-

"The Attorney General, by writing under his hand, may appoint any advocate of the high court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of police, to be a public prosecutor for the purposes of any case".

The Court of Appeal in ***ELIREMA AND ANOTHER VS REPUBLIC [2003] KLR 537,*** considered the issue of a prosecution case which was conducted by unqualified prosecutor. It held that such a trial was a nullity in law. In a subsequent decision ***BENARD LOLIMO EKIMAT V REPUBLIC, Criminal Appeal No. 151 of 2004 at Eldoret (unreported)*** the same court held that the rank of a prosecutor must be indicated in the proceedings so that it can be ascertained that the provisions of **Section 85(2)** of the **Criminal Procedure Code** had been complied with. In this matter, it can safely be assumed that from the beginning of the trial upto the conclusion of the same, the prosecutor was Sergeant Muniko. If that was so, it was contrary to the mandatory provisions of **Section 85(2)** of the **Criminal Procedure Code.** Even if the prosecutor was elevated to the rank of an Inspector after 8th September 2003, that was not stated in the proceedings and that renders the trial a nullity. We therefore uphold the first ground of appeal.

Turning to the other grounds of appeal, the complainant purported to have identified the appellant on the material night because there was a lantern lamp that was lit when the robbers entered his house. He did not state how bright that lantern lamp was. He further stated that he was able to see the appellant when he flashed a torch. However, the complainant was in a state of shock, particularly after seeing his wife being threatened with death, a gun having been pointed at her. It was also the complainant's evidence that the robbery took a few minutes. It was therefore doubtful whether he was able to see the appellant properly and be able to identify him thereafter. The complainant was the only identifying witness. In ***ABDULLA BIN WENDO VS R (1953) 20EACA 166***, the Court of Appeal stated as follows:-

"Subject to certain exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the

evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

We are of the view that the circumstances that prevailed at the material time were not favourable for positive identification of the appellant by PW1. However, we are satisfied that on the doctrine of recent possession, there was sufficient evidence to warrant a conviction of the appellant. The appellant was apprehended a few minutes after the robbery. He was found in possession of a video tape and a torch which were positively identified as belonging to the complainant. He did not give any explanation as to how he had come by those items except a flat denial that he was not found in possession of anything. The evidence of all the prosecution witnesses regarding recovery of the video tape and the torch clearly pointed at the appellant and nobody else. The appellant had also been found in possession of a home made gun. In ***MALINGI VS REPUBLIC [1989] KLR 225 at page 227***, Bosire J. (as he then was), considering the doctrine of recent possession, stated as follows:-

"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are not co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."

Having carefully re-evaluated the evidence adduced by the prosecution witnesses regarding recovery of the video tape and the torch and having considered the defence tendered by appellant, we are satisfied that he was found in possession of those items so soon after the robbery and the doctrine of recent possession was properly applied.

Regarding possession of a firearm, there was sufficient evidence that the appellant was found in possession of a home made gun which was incapable of firing any ammunition. PW1, PW2, PW3 and PW4 testified as to how that home made gun was found in the appellant's possession. PW5 tendered a ballistic expert's report regarding the home made gun. **Section 34(2)** of the **Firearms Act** states as follows:-

"A firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or other missile, be deemed to be a dangerous weapon or instrument for the purposes of the Penal Code."

Subsection 3 thereof states that ***"In this section, 'imitation firearm' means anything which has the appearance of being a firearm, whether it is capable of discharging any shot, bullet or other missile or not".***

We are therefore satisfied that the appellant was properly convicted on the evidence of the application of the doctrine of recent possession.

Miss Opati, learned state counsel, urged the court to find that the appellant had been properly

convicted on the doctrine of recent possession and as we have already stated, we agree with her. However, she further submitted that the court was properly constituted and there was nothing wrong with the conduct of the prosecution case. We do not agree with her in that regard. We believe that she did not take into consideration the position taken by the Court of Appeal in ***ELIREMA AND ANOTHER VS REPUBLIC (supra)*** regarding unqualified prosecutors. She urged the court to uphold the conviction and sentence. She did not pray for a re-trial. We have already stated that the entire trial was a nullity and that being the case, the conviction of the appellant and the sentence that was passed against him by the trial court cannot stand. We therefore quash the conviction and set aside the sentence. This court can on its own motion order a re-trial of the appellant but in the circumstances of the case we do not think that it would be appropriate and in the interest of justice to so order. The appellant has been in custody since February 2003 and another trial may take several years before it is concluded. We are also not certain whether the witnesses who had testified and the exhibits that had been produced would be easily available. In all the circumstances of the case, we think that a re-trial would be prejudicial to the appellant. Consequently, we allow the appeal and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE

Judgment delivered in open court in the presence of the appellant and Miss Optati for the state.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE