REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CRIMINAL APPEAL 158, 159 & 160 OF 2009

BETWEEN

ANTHONY ODHIAMBO OLANDO ……..…… 1ST APPPELLANT

YONA OTIENO WAUNA ……...……. 2ND APPELLANT

GEORGE OCHIENG MESO …….……. 3RD APPELLANT

AND

REPUBLIC ……...…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ) dated 2nd June, 2008

In

H. C. Cr. A. Nos. 38, 39 & 40 of 2008)

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JUDGMENT OF THE COURT

The appellants, **Anthony Odhiambo Olando**, **Yona Otieno Wauna** and **George Ochieng Meso** were charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code before the Principal Magistrate's Court at Siaya. The particulars of charge under ***section 296 (2)*** of the Penal Code were that on the 17th day of July, 2007 along Kisumu/Busia at Ukaya stage, Maliera sub location in Siaya District within Nyanza Province, jointly with others not before court while armed with dangerous weapons namely pangas and rungus robbed Julius Omondi Atieno of cash Kshs.19,000/- , one employment card, one Equity Bank Card, one voters card, National Identity card, two shirts, one pair of long trouser, neck tie, spare wheel, car jack and handler and a wheel spanner all valued at Kshs.40,000/- and at or immediately before or immediately after the time of such robbery wounded the said Julius Omondi Atieno.

Briefly, the facts that led to the above charge were as follows: At about 9.00 p.m. on the night of 17th July, 2007 the complainant, Julius Omondi Atieno (PW1) (Atieno) was driving his motor vehicle registration No. KUR 564 along the Kisumu – Busia Road towards his home in Ukaya in Siaya District. After he passed a centre known as Dudi, he found the road ahead blocked with a log. He applied the brakes in an attempt to stop the motor vehicle, but was unable to do so, and ran over the log, bringing the motor vehicle to a screeching halt. Just then, two men emerged from the bush, and started attacking him. Two more men emerged from the other side of the road, and joined in the attack. As they continued to beat him, they demanded money. One of the robbers pulled out some money from Atieno's pocket, together with some documents. Atieno tricked them into believing that there was money in the boot of the car. As they proceeded to the boot, Atieno ran off into the bush, hid there for a while as he heard the robbers break into the boot. When it was safe to do so, he proceeded to the home of a friend, George Ouma Odongo (PW3) (Odongo) and together they dashed to the home of their Assistant Chief, Patrick Otieno Owuor (PW2) and reported the incident. The Assistant Chief mobilized the youths from the area, and proceeded to investigate the incident. They visited the scene and found the motor vehicle broken into, and items from the boot missing. Based on suspicion that they harboured about the possible involvement of certain people, they headed to the home of a woman who told them that their son had gone to spend the night at Yona's house (that is the 2nd appellant). They headed to the said house and found the 2nd appellant still awake, wearing boots that were wet. A search there led to the recovery of the sum of Kshs.5000/-, the complainant's identity and voters cards and his wallet. His empty suit case was also recovered. At that point, the 2nd appellant volunteered information that the 1st and 3rd appellants were his accomplices. The team then proceeded to the 1st appellant's house and recovered a jungle jacket, later identified by Atieno as the one worn by the 1st appellant during the incident. A search at the 3rd appellant's house led to the recovery of the car jack belonging to the complainant. The three appellants were then arrested and handed over to the police, together with the items recovered from them.

After a full trial, and relying primarily on the doctrine of recent possession, the trial court found the appellants guilty of the offence charged, and sentenced them to death, as provided for by the law.

Their appeal to the superior court was not successful, hence this second and final appeal. They filed home-made grounds of appeal which are almost identical in respect of the three appellants, and are based essentially on facts rather than law. However, their learned counsel, Mr. G. V. Odunga, filed a supplementary memorandum of appeal outlining the following three grounds:-

"1. The Learned 1st appellate Judges erred in law in not re-evaluating the evidence of the trial court as required by the law in order to reach their own conclusions.

2. The Learned 1st Appellate Judges erred in law in improperly evaluating the evidence that was adduced before the trial court and thus proceeded on wrong premises in upholding the appellant's (sic) conviction.

3. The Learned 1st Appellate Judges erred in upholding the conviction based on the doctrine of recent possession without satisfying themselves as to whether the conditions precedent for the invocation of the said doctrine had been satisfied."

This being a 2nd appeal, by dint of the provisions of ***section 361*** of the Criminal Procedure Code, we are enjoined to consider only matters of law and not matters of fact. The only grounds that relate to law are the doctrine of recent possession and the superior court's alleged failure to re-evaluate the evidence before it in order to arrive at its own conclusion. Indeed, the central basis upon which both the lower courts found the appellants guilty is the doctrine of recent possession . There were no eye witnesses to the alleged offences committed by the appellants herein.

In his submissions before us, Mr. Odunga argued that had the superior court re-evaluated the evidence before the trial court, it would have noticed contradictions in evidence, and cited two specific examples: one witness testified that the jungle jacket allegedly worn by the 1st appellant during the incident was found outside the 1st appellant's house, while another witness said it was found inside the house. Secondly, one witness testified that the stolen wheel handle was found at the 3rd appellant's house, while another asserted that it was found in the banana plantation, outside the 3rd appellant's house. Mr. Odunga submitted that given that these contradictions were material, the superior court ought to have found the convictions unsafe. He argued that the two courts below had failed to take into account the evidence of the appellants who had denied possession of the stolen items. Possession having been denied, in his view, the doctrine of recent possession could not be relied upon to convict the appellants. On the other hand, Ms. M.C. Oundo, learned Principal State Counsel, argued that both the lower courts found as a fact that the stolen items were indeed found either in the possession of the appellants or in their respective houses, and that they had not offered any explanation as to how they got possession of the same.

We concur with the submissions of the learned Principal State Counsel that the doctrine of recent possession was properly invoked. The 2nd appellant was found in actual possession of the complainant's identity and voters cards, wallet, suitcase and cash Shs.5000/-, none of which he could explain or claim as his own. The 3rd appellant was found in possession of the car jack belonging

to the complainant, while the 1st appellant was found in possession of two shirts, long trouser, pair of shoes, tie, wheel spanner and a jungle jacket which linked him to the scene of the crime. All these items were found in the actual or constructive possessions of the appellants barely a few hours after the robbery. They offered absolutely no explanation as to how they had come into possession of these items. The presumption is that they were either thieves or guilty receivers. The presumption is a rebuttable one, and the appellants had a duty to rebut that presumption which they failed to do. That is the evidential burden that was placed before them by virtue of the provisions of ***section 111*** of the Evidence Act, ***Cap 80*** of the Laws of Kenya. The burden is clearly not a heavy one. It was only to give a plausible explanation as to how the goods stolen that night found their way into their houses or in their physical or constructive possession. They never gave that explanation and the inevitable inference is that they were the thieves.

With regard to the contradiction in evidence in the trial court pointed out to us by the learned counsel for the appellants, we are of the view that these contradictions were not material, and we cannot say that the superior court's failure to note them resulted in any miscarriage of justice. Here, we have the concurrent findings of facts by the two courts below, and we see no reason to interfere with the same.

In the result and for the reasons we have given above we come to the conclusion that there is no merit in this appeal, and we dismiss the same.

Dated and delivered at Kisumu this 25th day of June, 2010.

M. KEIWUA

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.