Case Number:	Criminal Appeal 90 of 2000
Date Delivered:	20 Dec 2000
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Riaga Samuel Cornelius Omolo, Samuel Elikana Ondari Bosire, Emmanuel Okello O'Kubasu
Citation:	Nicodemus Owuor v Republic [2000] eKLR
Advocates:	Mr Kiage for the Appellant Mr Okumu for the State
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	H.C.C.R. 944 of 1995
Case Outcome:	Appeal Dismissed
History County:	Nairobi
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, BOSIRE & O'KUBASU, JJ.A.

CRIMINAL APPEAL NO. 90 OF 2000

BETWEEN

NICODEMUS OWUOR ....APPELLANT

AND

REPUBLIC ………...RESPONDENT

(Appeal from a conviction & sentence of the High Court of Kenya at Nairobi (Osiemo & Etyang JJ) dated 8th December, 1999

in

H.C.C.R. NO. 944 OF 1995)

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JUDGMENT OF THE COURT

This is a second appeal by ***Nicodemus Owuor Lala*** , the appellant, against his conviction and sentence on two counts of robbery with violence, contrary to section 296 (2) of the ***Penal Code*** . Being a second appeal, our jurisdiction is confined to issues of law. The only issue of law raised in the appeal is whether the appellant was correctly identified as having been one of the two people who are alleged to have violently robbed ***Colin Speight (PW1)*** and ***Steven Windels (PW2)*** both of them US nationals, on the night of 1st and 2nd February, 1995, at Kenyatta University.

The robberies occurred at about 7.30 p.m. Both the complainants and three others were inside a house which they referred to as Uganda Hall, when at about 7.30 p.m. they heard a knock on the door. One of them opened the door.Immediately two men armed with knives stormed into the house brandishing those knives. They ordered occupants to lie down under the pain of death if they failed to do so. The gangsters then rummaged the bags of their victims in search of money and other valuables. Eventually they escaped with several items including an address book bearing the names of PW1, US $140 in cash, KShs.800 in cash, travellers cheques, a pair of boots and a jacket among other items. However, before the gangsters escaped, they raped in turns the only woman who was in that house, also an American and who apparently shortly later left the country in disgust.

Only PW1 and PW2 of the five people who were then in that house later testified at the trial of the appellant with two others. In his evidence, PW1 stated that he was unable to identify either of their two attackers. PW2, however, testified that because electric lights in that house were on he was able to identify the appellant. He said that the appellant remained with him in the house for a reasonably long time in the course of which time he was able to observe him.He later picked the appellant in an identification parade in which the latter was the suspect.

The appellant was arrested on 26th February, 1995, by the police following a tip off from an informer. The police found him in his house at Githurai Kimbo asleep with some woman. A PC Khamis Matiko (PW3) who was among the police officers who effected the arrest, testified that he knew the appellant before as "Micky" and that at his house they recovered PW1's address book, tennis shoes, a green cap and West clock, all which PW1 later identified as his. The appellant, according to PW3, also led them to the house of one Toti, who was later jointly charged with the appellant but who was eventually acquitted. Other items were recovered therefrom. They included one brown pair of boots, a pair of sandals and a blue jacket, all which were identified as part of the things which were stolen from PW1 and PW2 during the robbery. Toti was in the house with some woman and a man whose name was given as Onyango. He too was jointly charged with the appellant but was acquitted along with Toti.

In his submissions before us, Mr Kiage for the appellant, urged the view that the conditions at the locus in quo did not favour a correct identification of the robbers. He stated that PW2 who said that he identified the appellant was lying down when, according to his testimony, he observed the robbers and could not, therefore, properly observe his attackers. In his view, the recovery of some of the stolen items from the appellant's house could not lend assurance to the identification because according to him, the recovery was not recent. The goods were recovered about 25 days after the robbery and in Mr Kiage's view, the lapse of time is too long for the application of the doctrine of recent possession. At best, he said, the appellant could only be properly convicted of the charge of handling stolen property contrary to section ***322 (2) of the Penal Code*** which was preferred against him as an alternative charge.

On the other hand, Mr Okumu for the State, submitted that the doctrine of recent possession applies and that its application lends assurance to PW2's visual identification of the appellant at the scene of the robbery and his subsequent identification of the appellant at a well conducted identification parade.

Authorities on visual identification of robbery suspects by a single identifying witness at night time are legion.Among them are: OWEN KIMOTHO KIARIE V R, Criminal Appeal No. 93 of 1983 (unreported) and CHARLES O. MAITANGI V REPUBLIC [1985] 2 KAR 75 . But these authorities concern cases where the suspect was not arrested with anything relevant to the robberies giving rise to his prosecution. The evidence of recovery does lend greater assurance to the identification than merely identification parade evidence. However, evidence of recovery does not lessen the duty on the court to test with the greatest care visual identification evidence of a single witness, more so if the conditions favouring a correct identification are difficult.

There are concurrent findings of fact by both courts below, that conditions favouring a correct identification of the appellant were good. PW2 graphically testified how he was able to identify the appellant during the robbery and this is what he said in pertinent part: "We were ordered to lie down in (sic) pain of death.

They went through our baggage which were in that bedroom. They picked an ything they wanted. They later brought PW1 to the place where we were. So too Professor. The 1st accused and the other man held a knife to C's neck and raped her in our presence, the 1st accused raped her first in our presence .... Throughout ther e was electric light on in the house."

As to why he did not identify the appellant's companion and why he was able to identify the appellant, the witness on being cross-examined said:

"I did not see the other person who was with you well.

When we were in the bedroom you were with us in the bedroom while the other man was with K. I looked

at you closely then in the bedroom. It is true I was lying down but I was still able to see you. I panicked a little. The two of you had knives. I was looking both at the knife and the person who held it."

On 3rd March, 1995, PW2 picked the appellant in an identification parade as one of the two people who had robbed both PW1 and himself. Both courts below found as fact that the parade was well conducted and we have no basis of faulting them on that score. Likewise both the courts found as fact that the appellant was found with some of the items which were stolen in the course of the said robbery and on that too, we have no basis of faulting them.

We earlier stated that the recovery of some of the stolen items was made about 25 days after they were stolen. Mr Kiage submitted that the lapse of time was too long for the application of the doctrine of possession of recently stolen property. He also added that the items which were recovered are common items which change hands quickly. With due respect to him, in the ordinary course of human affairs, it is quite improbable for several items belonging to one person being sold to one person. Besides the appellant was found with a note book which bore the names of PW1. Only him could explain how he came to the possession of the note book. The appellant, in his defence, said nothing about the items which were recovered at his house. Having been the owner of the house he was obliged to explain how the items came to be in the house. His case was not that he bought the items at the market place. Nor did he suggest that any other person brought them there without his knowledge. This, clearly, is a good case for the invocation of the doctrine of recent possession. The appellant's appeal lacks merit.

In the result, we dismiss the appellant's appeal against both conviction and sentence.

Dated and delivered at Nairobi this 20th day of December, 2000.

R. S. C. OMOLO

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

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