Case Number:	Criminal Appeal 114 of 2002
Date Delivered:	17 Jan 2003
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Effie Owuor, Richard Otieno Kwach, Moijo Matayia Ole Keiwua
Citation:	Simon Maina Wandue v Republic [2003] eKLR
Advocates:	-
Case Summary:	**Simon Maina Wandue *v* Republic** Court of Appeal, at Nairobi January 17, 2003 Kwach, Owuor & Keiwua JJ A Criminal Appeal No 114 of 2002 (Appeal from the judgment of the High Court of Kenya at Nairobi (Patel & Waweru, JJ) dated 30th October, 1998 in HCCR Appeal No 684 of 1997) ***Criminal law*** *- robbery with violence - appellant positively identified - whether conviction proper.* ***Criminal law*** *- robbery - recent possession of stolen goods – appellant arrested shortly after robbery - appellant found with items robbed from the complainant - appellant giving no explanation how he came in actual possession - whether inference that the appellant was one of the people who had robbed the complainant could be drawn.* The appellant was convicted by a Principal

Magistrate on a charge of robbery with violence contrary to s 296(2) of the Penal Code and sentenced to death. His appeal to the superior court against both conviction and sentence was dismissed.

The evidence was that the appellant had attacked the complainant, robbed him and shortly afterwards, he had been arrested and found with the items stolen from the complainant. The complainant also positively identified the appellant as one of the two people who had attacked him. At the time of arrest the appellant had not offered any explanation as to how he had come into actual possession of the stolen items.

The appellant appealed to the Court of Appeal against both conviction and sentence.

Held:

1. The two courts below had properly considered the circumstances under which the appellant was identified and came to a correct finding hence there was no reason for upsetting that finding.

2. The only inference that could be drawn from the very recent possession of complainant's stolen property by the appellant was that he was one of the two men that had just robbed the complainant.

3. The aforesaid inference plus the evidence of identification of the appellant as one of the two robbers, and the events that took place immediately after the complainant had been attacked leading to the appellant's arrest conclusively established the guilt of the appellant;

Appeal dismissed.

Cases

Lamamba, Charles v Republic Criminal Appeal No 8 of 1984

Statutes

1. Penal Code (cap 63) section 296 (2)

2. Criminal Procedure Code (cap 75) section 379

	(1) **Advocates** *Mr Mogikoyo* for Appellant
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal Dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kwach, Owuor & Keiwua JJ A)

CRIMINAL APPEAL NO 114 OF 2002

SIMON MAINA WANDUE …….. APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

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

(Patel & Waweru, JJ) dated 30th October, 1998 in

HCCR Appeal No 684 of 1997)

JUDGMENT

The appellant, Simon Maina Wandue, was convicted by the Principal Magistrate at Nairobi on a charge of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. His appeal to the superior court (Patel and Waweru, JJ) against both conviction and sentence was dismissed. He now comes before us on this second appeal which in terms of section 379(1) of the Criminal Procedure Code must only be limited to points of law.

The appellant was not represented in both the lower court and the superior court and therefore filed his own memorandum of appeal. Mr Mogikoyo who argued the appeal before us sought our leave, which we granted, and amended the memorandum of appeal by adding a new ground namely that, the identification of the appellant as the robber was not free from error. In addition to the aforesaid ground, the other ground canvassed was that the doctrine of recent possession could not apply as the appellant was not found in actual possession of the stolen property.

The facts of the case which will enable us to determine the points of law raised in this appeal are as follows: On the 19th day of August, 1996, at about 4.30 pm, one Anthony Ramogi (PW1), the complainant, was on his way home from work. He was as usual walking through a '*shamba*' near the CID Training School Lang'ata. He saw two men walking towards him. No sooner had they passed each other than he was hit on the head with a blunt object from behind and fell down. He immediately turned round only to find one of the men was holding an iron bar with which he continued to hit him, as he demanded to be given a leather jacket that Anthony was wearing. Anthony was not able to give him the jacket because of the blows that were being rained on him. Before the attack,

Anthony was carrying a bag that contained his scrabble board and cash, Ksh 300/=. When he fell down, he let go of the bag. The man whom he had met first and who he identified as the appellant, picked up the bag.

The other man is the one that was armed with an iron bar and is the one that was hitting him. When he began screaming for help, the two assailants left the scene. Although injured with a broken hand and

bleeding from an injury on the head, Anthony managed to stand up and decided to run back towards his place of work. Before going far, he met a good Samaritan who had been attracted to the scene by Anthony's screams. Together with this man they decided to go back and chase the assailants. When the assailants saw Anthony and the good samaritan coming they started running across the sports ground in the Training School. Luckily, they met two police officers to whom they reported and explained what had just happened.

One of the police officers they met was PC Boniface Wahisi (PW2).

According to Boniface, before he met Anthony and another person, he had met two people running one of whom had a bag and the other an iron bar. Anthony was bleeding profusely from a head injury and reported to him that he had just been robbed of his property by the two people that they were chasing. Boniface joined in the chase, went across the fence and the playground and found the two people hiding in a thicket . They flushed them out of the thicket. The man with the iron bar came out first and escaped. The other man whom he identified as the appellant, came out holding a bag and scrabble board and shelves which Anthony identified as his and which Boniface identified in court as the property that the appellant was in possession of at the time of the arrest. Anthony was eventually examined by Dr Ng'ang'a (PW3) who certified that he had been hit on the head with a blunt object and also had sustained a fracture of his left forearm. He classified the injuries as grievous harm.

The appellant's reply to this accusation in his defence was simply that he did not rob Anthony. He was on his way from Industrial Area where he had gone to look for a job when he met a crowd of people that implicated him in a robbery that he had nothing to do with.

There was no dispute as to the fact that Anthony was robbed and whoever robbed him grievously injured him in the process of robbing him.

Secondly, that the property that was taken from him namely the bag, scrabble board (save for the cash Ksh 300/=) were all recovered not far from the scene and positively identified by him.

Regarding the identity of the robbers, Mr Mogikoyo's submission was that although the robbery took place in broad daylight, the manner in which the victim was suddenly attacked could not have allowed him sufficient time to observe his assailants properly and identify them without error.

Both the two courts `—"ow were satisfied from the evidence before them and made a concurrent finding that the appellant was properly identified.

Anthony was attacked in broad daylight. The circumstances were such that he clearly saw his assailants and was able to notice and testify as to what each of them did during the robbery. He said the appellant was the first person to pass him. The other man was the one armed with the iron bar and is the one who was actually beating him, while the appellant picked up his bag containing his property as they left the scene. In crossexamination he told the court:

"I identified you by your .... features as you attacked me. You were very interested in the leather jacket I had. You had my bag and its contents".

The appellant was not only identified by Anthony, he was also identified by Boniface who met him running and supported Anthony's evidence that the appellant was the one that was carrying the bag as he ran from the scene of the robbery. He is the same man that was flushed out of the thicket immediately after the robbery.

We are satisfied that the two courts below properly considered the circumstances under which the appellant was identified and came to a correct finding. There is no reason why we should upset that finding.

Secondly, Mr Mogikoyo argued that in order for the doctrine of recent possession of stolen property to be invoked and a conviction founded, the prosecution must prove that the appellant had physical possession or control of the stolen items. We entirely agree with him. See *Charles Lamamba vs Republic* (Criminal Appeal No 8 of 1984) where this court held that:-

“The doctrine of possession of recently stolen property could not apply until possession by the appellant was satisfactorily proved.”

The evidence of Anthony and Boniface was accepted by the two courts below, in that it was the appellant that walked off with the bag containing the scrabble board and the money, immediately after the robbery. When Boniface saw the appellant running and being chased, he was clinging to the bag. Furthermore, when the appellant was flushed out from the thicket, he came out holding the bag which contained the scrabble board minus the cash, moments after the same property had been violently robbed from Anthony. Notwithstanding this overwhelming evidence, the appellant offered no explanation as to how he had come to be in actual possession of Anthony’s property that had just been taken from him moments earlier.

We fully agree with the learned judges’ finding that the only inference that could be drawn from the very recent possession of Anthony’s property by the appellant is that he was one of the two men that had just robbed

Anthony. The aforesaid inference plus the evidence of the identification of the appellant as one of the two robbers, and the events that took place immediately after Anthony had been attacked leading to the appellant’s arrest, in our view, conclusively established the guilt of the appellant.

We therefore find no merit in this appeal and hereby dismiss it in its entirety.

Dated and delivered at Nairobi this 17th day of January, 2003

R.O. KWACH

…….

JUDGE OF APPEAL

E. OWUOR

…….

JUDGE OF APPEAL

M.M.O. KEIWUA

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR