Case Number:	Criminal Appeal 184 of 2009
Date Delivered:	07 Dec 2011
Case Class:	Criminal
Court:	High Court at Kakamega
Case Action:	Judgment
Judge:	Luka Kiprotich Kimaru, Beatrice Thuranira Jaden
Citation:	CYRUS KAYAYI ONZERE v REPUBLIC [2011] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 184 OF 2009

(Appeal against conviction and sentence of the judgment of [MR. L. O. ONYINA, SRM] from the original Criminal Case No. 727 of 2008

in the Senior Resident Magistrate's Court Vihiga)

CYRUS KAYAYI ONZERE.....
.....APPELLANT

V E R S U S

REPUBLIC.....
.....RESPONDENT

J U D G M E N T

The appellant, Cyrus Kavayi Onzere, was charged with the offence of **robbery with violence** contrary to **Section 296(2**) of the **Penal Code**. The particulars of the offence were that on 14th May 2008 at 2.00 a.m. at Mudete village, North Maragoli, Vihiga District, the appellant, jointly with others not before

the court, while armed with pangas, robbed Gerald Musalia Akuyava of two mobile phones make Nokia, various electronic goods and personal clothing listed in the charge sheet and at or immediately before or immediately after the time of such robbery injured the said Gerald Musalia Akuyava. The appellant was alternatively charged with the offence of **handling stolen goods** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the appellant, otherwise than in the course of stealing, dishonestly retained a driving license belonging to Gerald Musalia Akuvaya, knowing or having reason to believe it to be stolen. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the appellant was found guilty on the main charge. He was sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the appellant raised several grounds of appeal challenging his conviction by the trial magistrate. The said grounds of appeal may be summarized as thus; the appellant was aggrieved that he had been convicted on the evidence of identification that cannot stand up to legal scrutiny. In particular, the appellant faulted the trial magistrate for relying on the evidence of identification which was made in difficult circumstances that were not conducive for positive identification. In this regard, the appellant took issue with the fact that the trial magistrate had not taken into account that there was no sufficient light which could have enabled the complainant to be positive that he had identified him. The appellant was aggrieved that the trial magistrate had convicted him on the basis of the evidence of recovery of recently stolen goods when it was not established by the prosecution that he was exclusively in control of the house where the stolen item was recovered. He faulted the trial magistrate for not taking into account the totality of the evidence adduced which in actual fact exonerated him from the crime. The appellant was finally aggrieved that the trial magistrate had not taken into consideration his alibi defence before reaching the erroneous decision to convict him. For the above reasons, the appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

At the hearing of the appeal, the appellant presented to the court written submissions urging the court to acquit him. The appellant further made oral arguments urging the court to allow his appeal. Mr. Orinda for the State opposed the appeal. He submitted that the prosecution had established its case against the appellant by applying the doctrine of recent possession to the required standard of proof beyond any reasonable doubt. He urged the court to dismiss the appeal as it did not have any merit.

Before giving reasons for our decision, we will set out the facts of this case, albeit briefly. On 14th May 2008, at about 2.00 a.m., PW1 Gerald Musalia (the complainant) was asleep in his house at Mudete village. At that time, he was woken upto from his sleep by people who were already inside his house. The people entered his bedroom and ordered him to bend down and keep quiet. According to the complainant, his assailants secured his co-operation by placing a panga on his neck. They also threatened to kill him. The complainant testified that as the robbers were ransacking his house, they were using torches. At one point, the flashlight of the torch was reflected on the screen of the television. The complainant testified that he was able to identify two of the robbers as the appellant (he identified him by name because he was his neighbour) and one Elvis Vijeri Azua. He further testified that he was able to identify the appellant by his voice when he ordered him around during the course of the robbery. The appellant was robbed of two mobile phones, make Nokia 3160 and 1110, VCD make

Royaltek, Leather shoes (boots), five trousers, four shirts, one T-shirt, a brief case, three caps, driving license, VICD tapes, car radio make Artech, a belt and a speaker. All the above properties were valued at KShs.46,000/=.

The complainant testified that the robbers gained access to his house by digging through the wall of the house. After the robbers had left his house, the complainant rang his mother PW2 Alice Kaveza Musalia and informed her of the robbery. Of significance, is that the complainant told PW2 that he had been robbed by the appellant (who he identified by name) and one Elvis. PW2 phoned the police based at Mudete police post. PW3 PC Francis Kamondo responded to the call. He visited the scene of crime on the same night. He was accompanied by Inspector Obala. PW3 testified that the complainant informed him that he (the complainant) had been robbed by a person known as Cyrus Kavai (the appellant). The complainant led the police to the house of the appellant's grandmother. According to PW3, the appellant lived with his grandmother. When the police knocked at the door, the appellant escaped from the house by running away through the back door. PW3 was not able to arrest the appellant because the appellant ran into a maize plantation. PW3 conducted a search in the house where the appellant was living. In the search, the driving license of the complainant was recovered. The driving license was produced in evidence by the prosecution. According to PW3, the appellant went underground after the incident. He however, resurfaced later. He was arrested and charged with the present offence. The complainant was examined by a clinical officer by the name Allan Govoga. He filled a P3 form which established that the complainant had sustained soft tissue injuries on the neck, back and chest. The P3 form was produced on behalf of the said clinical officer by PW4 Catherine Langat, another clinical officer based at Sabatia Health Centre.

When the appellant was put on his defence, he denied that he had committed the offence. He adduced alibi defence. He claimed he was in Kapsabet when the robbery took place. He explained the circumstances of his arrest in detail. He denied the thrust of the prosecution's case which was to the effect that the driving license was recovered in his constructive possession. He testified that he had no grudge with the complainant. The thrust of his defence was that he was a victim of mistaken identity.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at an independent determination whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any finding in regard to the demeanour of the witnesses (see **Njoroge vs Republic [1987] KLR 19**). In the present appeal, the issue for determination is whether the prosecution established its case against the appellant on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

We have carefully considered the submissions made in the appeal. We have also re-evaluated the evidence that was adduced before the trial magistrate. It was apparent that the appellant was convicted on the basis of the evidence of identification and that of recent possession. As regard the evidence of identification the complainant adduced evidence which was to the effect that he had recognized the

appellant and one Elvis during the course of the robbery. Although it was at night, and was dark, the complainant testified that he recognized the appellant from his reflection on the television screen when the appellant pointed the torch at the said screen. The complainant further testified that he was able to identify the appellant by his sound of voice. From the evidence adduced, it was clear that the complainant and the appellant were neighbours. No grudge existed between the complainant and the appellant. Having re-evaluated the evidence of identification adduced in this case, we have no doubt in our minds that the complainant identified the appellant during the course of the robbery. As required by the law, we have cautioned ourselves of the danger of convicting the appellant based solely on the evidence of identification. However, we are convinced of the credibility of the complainant's testimony. The complainant told the trial court that he was also able to identify the appellant by his voice. The Court of Appeal in **Libambula vs Republic [2003] KLR 683** held that evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In the present appeal, it was clear that the appellant was intimately known to the complainant prior to the robbery incident to an extent that the complainant was certain that it was the voice of the appellant which ordered him around during the course of the robbery. We are satisfied that the prosecution adduced sufficient evidence to establish the charge against the appellant on the evidence of identification.

If there was any doubt that the appellant committed the offence, then the doubt was removed when the complainant's driving licence was recovered from the appellant's grandmother's house about two (2) hours after the robbery. The prosecution established that the appellant was in the said house at the time the police sought to arrest him. According to PW3, the appellant escaped through the backdoor of the house. There is no other reasonable explanation for the recovery of the said driving license in the house where the appellant was found sleeping so soon after the robbery unless it was the appellant who robbed the same from the complainant. This is a classic case where the doctrine of recent possession is applicable. The alibi defence of the accused did not dent the otherwise strong prosecution case facing him. In any event, the testimony of the complainant and PW3 placed the appellant at the scene when the robbery took place. If indeed the appellant was a victim of mistaken identity as he appears to claim, then he would not have gone underground soon after the robbery incident.

The upshot of the above reasons is that the appeal fails. It is hereby dismissed as it lacks merit. The conviction of the appellant by the trial magistrate is upheld. The sentence is confirmed. The prosecution established its case against the appellant to the required standard of proof beyond any reasonable doubt on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.

It is so ordered.

Dated at Kakamega this 7th day of December 2011.

L. KIMARU

J U D G E

B. THURANIRA JADEN

J U D G E