**ARUM V REPUBLIC**

**Division:** Court of Appeal of Kenya at Kisumu

**Date of ruling:** 16 June 2006

**Case Number:** 85/05

**Before:** Tunoi, O’kubasu and Onyango Otieno JJA

**Sourced by:** LawAfrica

**Summarised by:** E Ongoya

*[1] Appeal – Criminal appeal – Duties of an appellate court on first appeal – It must analyse facts and*

*make independent findings.*

*[2] Criminal law – Robbery with violence – Doctrine of recent possession – Constituent elements.*

**Editor’s Summary**

The appellant was charged before the Senior Resident Magistrate’s Court at Homa Bay with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the 15 October 2002, at Homa Bay Town Location in Homa Bay District within Nyanza

Province, jointly with others not before the court armed with dangerous weapons he robbed one Joseph

Ogonyo Oula one mobile phone, one motor vehicle ignition key and cash KShs 500 all valued at KShs 8

000. He was tried, convicted and sentenced to death. His first appeal to the High Court was dismissed.

The High Court relied on the facts that the mobile phone and car keys were found with the appellant and he had hidden them in his pants. He had been arrested only a few hours after the robbery.

It emerged that the complainant had not identified the appellant as one of the attackers. The police officer who searched the appellant to recover the car keys and mobile phone was not called as a witness.

The appellant preferred a second appeal to the Court of Appeal.

**Held** – A trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced as analysed. A court hearing the first appeal has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance for the same. *Okeno v Republic* [1972] EA 32 followed. Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, that is, there must be positive proof, first; that the property was found with the suspect, secondly that the property is positively identified as the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; the property was recently stolen from the complainant.

In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and any discredited evidence on the same cannot suffice no matter how many witnesses. In this case, the evidence of possession which would have been proved through evidence of arrest, search and recovery was absolutely contradictory.

Appeal allowed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

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*Okeno v Republic* [1972] EA 32 – **F**

*Shantilal M*