



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.481 OF 2010**

*(An Appeal arising out of the conviction and sentence of Hon. G.L. Nzioka - SPM delivered on 3<sup>rd</sup> September 2010 in Kibera CM. CR. Case No.3699 of 2009)*

**LAWRENCE MWANZIA TITUS.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Lawrence Mwanzia Titus stood trial together with Kariuki Munyoroku and Allan Ndungu Gichia as Accused Nos. 1, 2 and 3 respectively. They were jointly 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 the night of 29<sup>th</sup> and 30<sup>th</sup> July 2009 at Theta Farm in Thika District within the Central Province, the accused, jointly with others not before court while armed with dangerous weapons namely pangas, rungus and steel cutters robbed Wilberforce Obanga Kisanya of 73<sup>1/2</sup> bags of parchment coffee valued at Kshs.3,000,000/-, the property of Akiba Properties Limited and at the time of such robbery used personal violence on the said Wilberforce Obanga Kisanya. The 3<sup>rd</sup> Accused was in the alternative charged with the offence of **handling stolen property** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on 1<sup>st</sup> August 2009 at Mbuni Coffee Mills in Kiambu District within Central Province, the Appellant, otherwise than in the course of stealing dishonestly retained 45 bags of parchment coffee knowing or having reason to believe them to be stolen goods. The Appellant was also in the alternative 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 1<sup>st</sup> August 2009 at Afri-coffee Trading Company Limited in Industrial Area within Nairobi Province, the Appellant, otherwise than in the course of stealing dishonestly disposed off 16<sup>1/2</sup> bags of parchment coffee knowing or having reason to believe them to be stolen goods.

When they were arraigned before the trial court, the Accused pleaded not guilty to the charges. After full trial the Appellant was convicted of the main count of robbery with violence. He was sentenced to death. The trial court found that 2<sup>nd</sup> and 3<sup>rd</sup> Accused had no case to answer on the charge of robbery with violence and proceeded to acquit them under **Section 215** of the **Criminal Procedure Code**. The 3<sup>rd</sup> Accused was however convicted on the alternative count of handing stolen goods and was sentenced to pay a fine of Kshs.100,000/- and in default to serve one (1) year imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for convicting him yet the prosecution had not proved its case to the required standard of proof beyond any reasonable doubt. He faulted the trial magistrate for convicting him on the basis of the alleged recovery of stolen items which according to him, were not found in their possession. The Appellant took issue with the fact that crucial witnesses had not been called to testify. He was aggrieved that the trial court ignored his defence without giving reasons and thus violated **Section 169** of the **Criminal Procedure Code**. In the premises therefore, 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, parties proceeded by way of written submission. The Appellant filed his written submission in support of his appeal on 5<sup>th</sup> May 2016. The Respondent, the Republic also filed its written submission opposing the Appellant's appeal on 21<sup>st</sup> June 2016. In his submission filed in court, the Appellant challenged the dock identification evidence of PW4 as unreliable especially since no identification parade was held. He cited the decision in **Gabriel Njoroge –Vs- Republic [1982-1988] 1KAR 1134** to buttress his submission. He further submitted that the trial court erred in placing on him the burden of proving his *alibi* defence that he got the coffee from Mulera Farm and not Theta Country Farm. He submitted that the onus was on the prosecution to adduce evidence refuting the *alibi* defence. In this regard, the Appellant cited the case of **Lomjerat Leura Dira –versus- Republic [2008] eKLR** in support of his submission. He further submitted that evidence on the recovery of the stolen goods was not proved to the required standard of proof beyond any reasonable doubt. It was the Appellant's submission that having due regard to the principle of equality before the law and equal protection of the law, the trial court ought to have applied the same due consideration it made when sentencing the 3<sup>rd</sup> Accused in holding that the offences were of a commercial nature hence a sentence of a fine would have sufficed. Finally, the Appellant challenged the trial court's decision to proceed with the trial in the absence of his legal counsel thereby infringing upon his right to representation as envisaged under the **Constitution**. It was his view that the trial was thus rendered a mistrial.

The Respondent opposed the appeal. It submitted that the prosecution had established its case on the charge of **robbery with violence** to the required standard of proof beyond any reasonable doubt. It was the prosecution's case that coffee was stolen from Theta Country Farm on the day in question and that PW1 was injured during the incident. PW7, a watchman at the farm saw the lorry that carried the coffee following the robbery. PW4, The driver of the lorry identified the Appellant as the person who hired his lorry to transport the coffee from Theta Country Farm. The evidence of PW5 was that the Appellant hired his vehicle to transport the coffee to Industrial Area on 30<sup>th</sup> July 2009. PW6, a Manager at Afri-coffee Company situated in Industrial Area confirmed that the Appellant delivered coffee to the company on 30<sup>th</sup> July 2009 although the consignment was not received since the complainant did not have a dealership/ movement permit. He knew Appellant very well. It was the Respondent's further submission that the identity of the stolen coffee was established. Responding to the Appellant's claim of the trial court denying him the right to representation, the Respondent submitted that it was the 3<sup>rd</sup> Accused's counsel who walked out of court therefore, the Appellant was not affected by the counsel's absence during trial. As regards the sentence meted on the Appellant by the trial court, the Respondent was of the view that the sentence was legal.

The facts of the case leading to the charge against the Appellant as presented by the prosecution are as follows. On the night of 29<sup>th</sup> July 2009, 73½ bags of parchment coffee were stolen from Theta Farm within Thika District. The coffee had been stored in three separate stores at a factory within the farm. PW1 Mwanza Musau, PW7 Gladwell Muriuki Musongo and PW9 Wilberforce Lubanga Kisinya were the night guards at the farm at the material time and were armed with a security dog, a whistle and a phone. PW1 and PW9 were stationed at the factory's stores while PW7 was stationed at the water pump within the farm. PW1 testified that at about 9.30 p.m, he saw a gang of about twenty (20) people welding timber, knives and what he thought was a pistol. He testified that the dog barked and ran after them and he followed it. He threw a panga at one of the gang members and several of them came after him. They got hold of him and physically assaulted him. PW9 came to the rescue of his colleague but was also caught and overwhelmed by the gang members. They were taken to a coffee plantation where they tied up. They testified that they could not see what the thugs were doing but they could hear them breaking into the

stores. They testified that they remained there for about three (3) hours when they heard a vehicle approaching where they were and later heard it as it left. The evidence of PW7 was that he saw a big vehicle entering the farm at about 12.30 a.m using a pathway that was not meant for public vehicles. He became suspicious, went to make a report at the office so they could raise an alarm. He testified that the alarm was raised but it took a while for people to respond to the alarm. He testified that he saw the lorry as it left the farm and flashed his torch to obtain the registration details of the vehicle which he testified were KAR 314B.

People arrived at the scene after the vehicle had left. They rescued PW1 and PW9 and untied them. Amongst the people who responded to the alarm were the Farm Manager, PW2 George Wainaina Kamau and the Factory Manager, PW3 Philip Kariri. PW2 testified that he received a phone call from a farm worker, Aston Malema at about midnight informing him of the robbery. He then called his assistant, one James Kihiku who informed him that that the stores were broken into and the entire consignment of parchment coffee was stolen. He went to the scene and found the guards together with other farm workers. The guards narrated to him how the robbery occurred. He was informed that a motor vehicle Registration No. KAR 314B had been spotted inside the farm during the incident. PW2 then called PW 10, Winfred Wangari Gitau, a Director of Akiba Properties (K) Limited, which owns the Farm to inform her about the incident. The evidence of PW3 was that he arrived at the scene and went to the factory where he found that three stores had been broken into. He found the padlocks on the verandah and saw that the parchment coffee was missing. He testified that he recovered a yellow bag in one of the stores that he suspected could have been left behind by the thieves. He handed the bag to PW2. A report on the robbery was made to Juja Police Station by PW2 in the company of PW1 and PW9. They gave the police the particulars of the vehicle that had been reported to have been seen at the farm.

PW12 PC Nicholas Omondi Agalo was at the police station when the report was made. He testified that the case was handed to the DCIO, Thika to carry out the investigations. He testified that he visited the farm on 30<sup>th</sup> July 2009 together with the DCIO and PC Sougor and saw that three stores had been broken into. They recovered one padlock at the scene together with a yellow empty sack that was said not to belong to the company, coffee sticks and ropes which were said to have been used by the thugs to assault and tie up PW1 and PW9 and several sisal bags belonging to the company. They also saw that the parchment coffee was spilled in the stores. PW12 testified that they called Officers from the Scenes of Crime Unit of the police to take photos of the scene. He also met PW10, PW3 and other farm workers whom they interrogated. He was shown a parchment book recorded by PW3 which essentially records the daily coffee pickings. The record showed that as at 29<sup>th</sup> July 2009, there were 73 ½ bags of parchment coffee in the stores. They were further informed that a vehicle had been spotted at the farm during the robbery and were given the registration details of the vehicle.

PW12 testified that a search conducted at the Registrar of Motor vehicles revealed that the owner of the vehicle was based at Ol Kalau. He therefore proceeded to Ol Kalau on 31<sup>st</sup> July 2009 accompanied by PC Sougor and CI Gitari to trace the vehicle. They learnt that the vehicle was owned PW8 John Gachao Gachogu. They got information from a relative of PW8 that the vehicle plied the Eldoret -Nairobi route. The said relative called the driver of the vehicle and was informed that the vehicle was at the time en route to Nairobi from Eldoret. The police intercepted the vehicle, a lorry, at Makutano junction driven by PW4 Daniel Munyambu Mungai. When PW4 was interrogated, he confirmed that he had transported coffee the previous day.

PW8 testified that he received a phone call from someone called Mwangi on 29<sup>th</sup> July 2009 asking him where his lorry was as he wanted to give him work. He told him that the lorry was in Nairobi but that it would be back by 6.00 p.m. PW8 thereafter called his driver PW4 and told him that he had secured transportation business. He testified that a person called Brown whom he identified as the 2<sup>nd</sup> Accused called him around 5.30 p.m. He recognized the 2<sup>nd</sup> Accused as he had saved his number on his phone. PW8 testified that the 2<sup>nd</sup> Accused, Brown told him that he needed to transport goods from Thika to Kiambu but did not disclose the nature of the goods. They negotiated the transportation fees to Kshs.27,000/- and he paid a deposit of Kshs.10,000/-.

The evidence of PW4 was that he met the 2<sup>nd</sup> Accused in Githurai. The 2<sup>nd</sup> Accused was introduced to him by PW8 as Mr. Brown. He was told that the 2<sup>nd</sup> Accused needed to transport goods from Thika to Kiambu but the nature of the goods was not disclosed to him. PW4 testified that the 2<sup>nd</sup> Accused got into the lorry and they proceeded to Ruiru Town where the 2<sup>nd</sup> Accused met several people who were inside a small vehicle. He testified that two occupants of the vehicle entered his lorry while the 2<sup>nd</sup> Accused remained behind. He identified one of the men as the Appellant. PW4 testified that the 2<sup>nd</sup> Accused informed him that the two men were the owners of the goods. He drove the men to a junction at Gatundu. He testified that just as they had passed the junction, they were stopped by a person who flashed a torch at them and they stopped. The Appellant asked him to dim the vehicle's head lights and follow the man with a torch. He testified that he was directed into a coffee plantation. He parked the lorry outside a store. He saw about 10-20 people with sacks. He testified that it was dark at the time but there was light coming from a distant place. He figured that they had come to load coffee as they were in a coffee plantation. PW4 testified that the coffee was loaded onto the lorry and they left with the two men he had come with. They drove back to Ruiru and parked the vehicle outside Dagger Hotel. It was about 2.30-3.00 a.m. They entered the hotel and met the 2<sup>nd</sup> Accused. They remained there for a while. PW4 later went to sleep inside the lorry's cabin.

The following day at about 6.00 a.m, they proceeded towards Kiambu Town and arrived at Paradise Lost Garden, Mbuni Mills at about 7.00 a.m. PW4 testified that the place looked like a coffee estate. A watchman opened the gate and they were allowed inside. They met a man who PW4 identified as the 3<sup>rd</sup> Accused who led them to a place where the goods were offloaded and weighed then placed aside. When they finished, the 2<sup>nd</sup> Accused paid Kshs.12,000/- to PW4 for the work and they parted ways. He testified that they proceeded to Industrial Area where he picked another consignment that was to be transported to Eldoret. He testified that he was intercepted by police officers at Makutano Junction as he was on his way back to Nairobi from Eldoret and was taken to Makutano Police Station. He testified that the police searched the lorry and found samples of the coffee. They took him to Ruiru town and asked him to show them where the coffee had been obtained. PW4 testified that he could not trace the farm but he could recall where the coffee was offloaded and he took them there.

PW12 testified that PW4 led them to Paradise Lost Farm, Mbuni Coffee Mills. He testified that they entered the farm and PW4 directed them to where the coffee was offloaded. He testified that as they were headed there, they met the farm's Milling Manager, who was identified as the 3<sup>rd</sup> Accused who made inquiries on their presence at the farm. He testified that PW4 informed them that the 3<sup>rd</sup> Accused was the one who received the coffee when it was offloaded at the farm. The 3<sup>rd</sup> Accused however denied knowledge of any deliveries at the farm by PW4. PW12 testified that they checked the gate register and saw that PW4's lorry had entered the farm at 6.00a.m and left at 7.59a.m. The purpose for the visit was indicated as milling and the driver was shown as 'Gachogu'. It is at that point that the 3<sup>rd</sup> Accused admitted that the coffee was brought to the farm and was taken for milling by the Appellant. He showed them a record Serial No.075 dated 30<sup>th</sup> July 2009 that showed that the Appellant delivered 2122 kilogrammes of coffee at Mbuni Coffee Mills and was paid Kshs.10,600/-. They were also showed two dispatch records Serial No.1782 dated 30<sup>th</sup> April 2009 and Serial No.603 which showed that part of the coffee had been dispatched to Afri-Coffee Company under the instruction of the Appellant. The 2<sup>nd</sup> Accused told them that there were three bags remaining at the premises that belonged to the Appellant. He told them that the coffee was brought on 30<sup>th</sup> July 2009 and was milled on the same day.

PW10 was called to Mbuni Coffee Mills to identify the recovered coffee. She arrived there accompanied by PW2 and PW3. They brought with them a sample of the parchment coffee that was left at their farm. They were shown milled coffee but were able to identify some as theirs. They looked at the pest damages on the coffee bean and found that the effect of the pest investigation tallied with the coffee at their farm. They identified 45 bags of coffee of different grades weighed different as theirs. While they were still in the factory, PW3 found a tag on the floor that had his handwriting. He said that the tags had been placed on the stolen bags. He looked around and found three more tags. The tags bore the name of the father of the Director of the Theta farm- Gatiinguru. Fourteen more tags were found at the place where the milling

company burns its waste. While they were still at Mbuni Coffee Farm, the 2<sup>nd</sup> Accused received a phone call from the Appellant. They told the 2<sup>nd</sup> Accused to ask him to come to the farm. He arrived at the farm in a taxi accompanied by two other people and was arrested. The coffee identified as belonging to Theta Farm was also taken to Thika Police Station.

PW12 testified that the Appellant led them to Kariobangi South where they found motor vehicle Registration No.KAV 868Y, a pick-up that he had used to transport the coffee to Afri-Coffee Company. PW5 Isaac Kuria Chege, a driver operating a taxi pick-up at Kariobangi confirmed that the Appellant hired him to transport coffee from Mbuni Coffee Mills to Afri-Coffee Mills on 30<sup>th</sup> July 2009. He testified that the Appellant approached him and told him that he had coffee to be transported from Kiambu to Industrial Area and they agreed on the charges he was to be paid. He testified that the Appellant called him after an hour and directed him to Mbuni Coffee Mills. He proceeded to the farm. He testified that he gave particulars at the gate which were recorded in a register. He was there from about 10.30 a.m. - 12.00 noon. He called the Appellant and told him where he was with the goods. He testified that the security guard led him to where the Appellant was. PW5 testified that the coffee was inside the store. He was asked to wait as the coffee was not ready. He waited for about thirty minutes as the coffee was being packed in nylon sacks. He was given a delivery note. They loaded 16½ bags of coffee. They proceeded with the Appellant to Afri-Coffee Company in Industrial Area where they offloaded the coffee. He left after he was paid.

PW6 George Mbiyu Mburu, a Warehouse Manager at Afri-Coffee Company in Lunga Lunga, Industrial Area testified that the Appellant delivered coffee to the company he worked for on 30<sup>th</sup> July 2009. He testified that he knew the Appellant very well prior to the material date. He stated that the Appellant previously worked for KPCU. PW6 testified that he did not receive the Appellant's coffee as the Appellant did not have a movement/dealers permit to transport the coffee. He testified that the Appellant told him that he forgot to carry the permit. PW6 suggested that he would place the coffee aside to allow the Appellant to avail the permit. He testified that the Appellant left 16 ½ bags of coffee and did not return. PW6 called the Appellant the following day and told him to either bring the permit or come for the coffee but the Appellant did not respond. He testified that the Appellant switched off his phone.

PW11 Peter Waema at the material time worked at the Coffee Board of Kenya stationed at the Machakos Office. He testified that his duties include issuing coffee movement permits. He testified that he did not issue any movement permit to the Appellant between 27<sup>th</sup>- 29<sup>th</sup> July 2009. He produced the movement register (**PEXH. 15**).

On 3<sup>rd</sup> August 2009, the police went to Afri-Coffee Company to collect the coffee. After concluding the investigation, the Appellant, the accused were charged with the present offences.

When the accused were put on their defence, they denied committing the offences. The Appellant stated that on 29<sup>th</sup> July, 2009, he travelled to Thika town on motor vehicle Registration No.KAE 368Y and went to Murera Farm where he was to collect 2,200 Kilogrammes of coffee he had bought. He testified that the vehicle developed a mechanical problem on the way. He testified that he went to a nearby posho mill and asked the owner whether he could get another vehicle to transport the coffee. The Appellant testified that he gave the owner of the posho mill who he identified as the 2<sup>nd</sup> Accused Kshs.10,000/- to look for another vehicle and left his contacts with him. He testified that at about 7.00p.m he was sent a vehicle Registration No.KAR 314B. He went with the driver and collected the coffee to Murera Farm. He testified that they went back to Ruiru. He left the driver there. They agreed to meet the following day. They met the following day and went to Mbuni Coffee Mills and delivered the coffee at 7.30a.m. He testified that he paid the 2<sup>nd</sup> Accused Kshs.20,000/- being the balance for the hire of the vehicle. He testified that he later went to Afri-Coffee Company on 30<sup>th</sup> July 2009. He testified that he was called by the 3<sup>rd</sup> Accused on 1<sup>st</sup> August 2009 and was told that he was required at Mbuni Coffee Mills. He went there and was arrested by the police and his documents from Mulera Farm were torn.

The 2<sup>nd</sup> Accused in his defence stated that on 29<sup>th</sup> July 2012, he was at his posho mill in Roysambu

when the Appellant came and asked him whether he could get a motor vehicle to transport his goods from Thika to Kiambu. He testified that he called his friend Gachogu, who is in the transport business, and he met with the man and he agreed to transport the goods. The 2<sup>nd</sup> Accused testified that that the Appellant gave him Kshs.10,000/- and asked him to take his vehicle to Ruiru where he paid him a further Kshs.20,000/-. They met at Ruiru and the Appellant gave him the balance. He then returned to Roysambu. Later, he met with Gachogu's driver at Kiambu road and gave him Kshs.17,000/- and he remained with Kshs.3,000/- as his commission. On 3<sup>rd</sup> August 2009, he was arrested in connection with the present offences which he denied knowledge of.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court in light of the submission made before this court on appeal and determine whether or not the trial court was justified in convicting the Appellant. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot substitute a finding made by the trial court on the demeanour of witnesses with its own assessment unless there was justification to do so (See **Njoroge –Vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution adduced evidence to support the charge of **robbery with violence** contrary to **Section 296** of the **Penal Code** that the Appellant was convicted of.

In the present appeal, the prosecution relied on both direct and circumstantial evidence in its bid to establish the charge facing the Appellant. PW1, PW7 and PW9 were employed as night security guards at Theta Farm at Thika. They were assigned to guard three separate stores within the farm. Among other things that were stored in the three buildings, were bags of parchment coffee. They testified that on the night of 29<sup>th</sup> July 2009 at about 9.30 p.m., they were accosted by a gang of about twenty men who were armed with timber pieces, knives and what they thought was a pistol. They were overwhelmed before they were escorted into a coffee plantation and tied. They testified that while they were in the coffee plantation, they heard the stores being broken into by the robbers. They later heard a vehicle revving as it entered the compound. After the vehicle had gone, they were able to untie themselves and made a report to the managers of the farm. One security guard noted the registration number of the motor vehicle as Registration No. KAR 314B. This was the circumstantial evidence.

The direct evidence was that of PW4 Daniel Munyambu, the driver of motor vehicle Registration No. KAR 314B who testified that the Appellant hired him on the material night of 29<sup>th</sup> July 2009 to ferry some goods from Thika. The motor vehicle is owned by PW8 John Gachogu. PW8 testified that on 29<sup>th</sup> July 2009 he was contacted by the Appellant's co-accused in the trial court with a proposal that he had work for him. PW8 was told that the Appellant had work that involved transporting goods from Thika to Kiambu. A sum of Kshs.27,000/- was agreed as the hire charges. A deposit of Kshs.10,000/- was paid. PW8 informed PW4, his driver to undertake the work. PW4 testified that he met with the Appellant and his co-accused in the trial court on Thika Road. He went with the Appellant to a coffee plantation where he was told to dim the lights. He parked the vehicle outside a building where there were people ready to load bags of coffee onto the lorry. PW4 testified that the loading of the motor vehicle was done between 1.30 a.m. and 2.00 a.m. He was later directed by the Appellant to take the bags of coffee to Mbuni Coffee Mills which is next to Paradise Lost farm. After delivering the bags of coffee, he left the place and went to do other duties which he had been assigned.

Immediately the police were informed, they commenced investigations and were able to establish the ownership of motor vehicle Registration No. KAR 314B. They were able to contact PW8 who informed them of the whereabouts of the motor vehicle. The motor vehicle was impounded. PW4 was interrogated. It was PW4's evidence that connected the Appellant to the robbery. It was clear from the evidence of PW12 PC Nicholas Omondi that it was the Appellant who was the mastermind of the robbery of the coffee from the stores at Thika and its delivery to the coffee processing mills at Mbuni and later its delivery to Afri-Coffee Company Limited. PW6 George Mburu, a Manager at Afri-Coffee Company based at Lunga Lunga Road, Industrial Area Nairobi, testified that on 30<sup>th</sup> July 2009 at about midday, the Appellant, whom he knew as Mwanzia, delivered 16½ bags of coffee to their business premises. He requested the Appellant to provide him with a permit to transport coffee before he could receive it in his premises. The Appellant told him that he had forgotten the permit. He promised to bring it. He did not

bring it. He re-appeared on 3<sup>rd</sup> August 2009 with police officers. The 16?2 bags of coffee were positively identified as the ones that were robbed from the complainant's stores at Thika on the night of 29<sup>th</sup> July 2009. The bags of coffee were produced as evidence by the prosecution.

On re-evaluation of the evidence adduced by the prosecution witnesses, it was clear to this court that a direct connection was established between the theft of the coffee from the complainant's premises and the delivery of the same to the premises where PW6 was a manager. This direct connection is the Appellant. The Appellant was in the motor vehicle that was hired to ferry the coffee from Thika to PW6's warehouse at Industrial Area Nairobi. PW4 positively identified the Appellant as the person who directed him to the coffee farm at Thika. The issue of mistaken identity cannot therefore arise because PW4 was in the Appellant's company for more than twelve hours from the time he was hired to the time he delivered the coffee to Mbuni Coffee Mills. PW6 connected the Appellant to the theft of the coffee because he confirmed that it was the Appellant who delivered the bags of coffee to their business premises at Industrial Area Nairobi. In his defence, the Appellant denied that he delivered the bags of coffee that were stolen from Theta farm. It was his evidence that he had purchased the same from Murera farm.

From this court's analysis of the evidence, it was clear that the prosecution witnesses were able to establish, to the required standard of proof beyond any reasonable doubt, that the particular bags of coffee that were stolen from Theta farm were the ones that were found delivered at Afri-Coffee Company at Lunga Lunga Road, Industrial Area Nairobi. It was the Appellant who delivered this coffee. It was evident from the evidence adduced that the Appellant made effort to conceal the identity of the bags of coffee stolen from Theta farm by re-bagging and retagging them. However, this effort was not successful since the complainants were able to retrieve some of the tags which were removed from the bags and dumped at Mbuni Coffee Mills.

In the premises therefore, it was clear that the doctrine of recent possession applied in this case. In **Malingi –Vs- Republic [1989] KLR 225**, Bosire J (as he then was) held at P.227:

***“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn, that he either stole it or was a guilty receiver.”***

In the present appeal, it was clear that the Appellant was found in possession of the bags of coffee which were robbed from the complainant's premises at Theta farm in Thika. He was found in possession of the bags of coffee less than twelve hours after the same had been robbed from the complainant's premises. He did not give a reasonable explanation of how he came to be in possession of the said bags of coffee. The claim that he purchased the same from another farm was not supported by evidence. If the allegation was to be believed, *why did he take possession of the bags of coffee in the dead of the night?* In fact the evidence pointed to the fact that he was a mastermind of the robbery. He was the financier of the actors in the robbery. He was the beneficiary of the bags of coffee that were robbed from the complainant's farm. The direct and circumstantial evidence that was adduced by the prosecution witnesses irresistibly point to the Appellant as the mastermind of the robbery. The prosecution was able to establish, to the required standard of proof that the complainant's premises were broken into, and in the course of the robbery, the complainant's employees were threatened with violence which thereby enabled the gang of robbers to steal the bags of coffee from the complainant's stores.

The Appellant's appeal in the circumstances lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby confirmed. It is so ordered.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF AUGUST 2016**

**L. KIMARU**

**JUDGE**