



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 11 OF 2012**  
MOSES NGARI KIMAMA..... APPELLANT  
  
VERSUS  
  
REPUBLIC .....RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 1919 of 2010 of the Chief Magistrate's Court at Mombasa – **Hon. Ole Tanchu - SRM**)

**JUDGMENT**

The Appellant was Convicted and Sentenced to suffer death for the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code.

The particulars are that on the 17th day of April, 2010 at Gichanga Estate - Mombasa County, jointly, with others not before the Court and while armed with offensive weapons namely knives and a rope robbed **TITUS MURIU MURIGI** of a motor vehicle registration number KBK 887 H Toyota Premio valued at Ksh. 1 million and a mobile phone make motorolla Ksh. 950/= and driving license and at or immediately before or immediately after the time of such robbery used actual violence to the said **TITUS MURIU MURIGI**.

This appeal is conceded on the grounds that the identification parade that was conducted as against the Appellant was not carried out with scrupulous fairness as required in that the investigating officer was present and participated in the identification parade in the calling of Witnesses.

Secondly, that the investigating officer had received a photograph of the Appellant at the time of the recovery of the vehicle and that that photograph could have been used in the identification of the Appellant.

On the issue of possession it is conceded that whereas the appellant was found in possession of the vehicle that was stolen. He was found in the company of a lady and two children and an explanation had been given of how he came to be in possession of the vehicle.

That no further investigation were done by police to confirm the allegations made by the Accused.

Further that police did not call the lady who was found with the Accused as a Witness.

Counsel for the appellant Mr. Magolo contends that the police investigations were flawed. The photograph of the Appellant which was taken by the investigating officer was not produced as an exhibit. The photograph had been recovered before the identification parade was conducted and that there was likelihood that it was used for the purposes of identification before or during the parade.

It is also the contention by Counsel for the appellant that an entire file containing statements taken before the arrest of the Accused was done away with and a fresh one was compiled. This was explained away by stating that there was a new investigating officer but this did not necessarily mean that a fresh file had to be compiled. The Court is being asked to draw an adverse inference.

As the first appellate Court we are cognizant of the fact that we are bound by law to examine afresh and re-evaluate the evidence on record and to come to our own conclusion.

We do concur with learned State Counsel for the State Mr. Jami and Counsel for the defence Mr. Magolo that the conviction of the Appellant revolved around the issue of identification and that of possession.

On identification section 6(iv) (b) of force standing orders Cap 46 on identification parades provides that,

**“the police officer in charge of the case, although he be present, will not conduct the parade”.**

In the present case, the investigating officer although not conducting the parade as such, did participate in the parade by calling the Witnesses for the parade.

The same investigating officer during cross-examination by learned Counsel Mr. Magolo for the defence did admit at page 20 line 5 of the record of proceedings that a photograph of the suspect had been handed over to him,

**“We were also handed over a photograph of the suspect. We came to Mombasa with it. I have not produced the photograph of the suspect”.**

The question that exercises our minds is what was the reason of carrying the Accused photograph from Nairobi to Mombasa after he had already been arrested and before an identification parade could be conducted? What could have precluded the witness being shown the appellants photograph before identifying him at the parade?

We are of the considered view that the possession of a photograph (by the investigating officer) belonging to the Appellant did render the identification parade suspect and unreliable more so when it was him who was calling the Witnesses.

On the issue of possession. The robbery took place on the 17th day of April, 2010 at Gichanga Estate in Mombasa County. The recovery of the stolen vehicle was on the 15th day of June, 2010 at Githurai Nairobi County.

We note that there was no attempt to conceal the registration number of the vehicle. When the appellant was arrested he was in the company of a lady and two children. At the time of the arrest he did not make an attempt of escaping and had explained the officers that the vehicle had been given to him by a third party whose telephone number he gave to police and had it switched off after some time. It is also conceded that he did take police to Likoni Mombasa but the person was not found.

Is the doctrine of recent possession applicable? The Court of Appeal in the case of Matu – Vs- Republic (2004)/KLR held,

**“Under the doctrine of recent possession, where it is proved that premises have been broken into and that certain property has been stolen therefrom and that very shortly afterwards, a person is found in possession of that property, that is certainly evidence from which it can be inferred that the person is the house breaker or shop breaker”.**

We find in the present case that the recovery of the stolen motor vehicle was after a span of close to two months. That duration cannot be termed as very shortly afterwards. Secondly that the recovery was in Nairobi whereas the theft was in Mombasa.

Thirdly, that there was no attempt to conceal or hide the stolen vehicle and an explanation was given of how the appellant came into possession.

We do find that the doctrine of recent possession was not applicable in this case. The state concedes to this appeal which we find has merit.

We hereby allow the appeal and quash the Conviction and set aside the death Sentence.

The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed in open Court this **19th** day of **February, 2014**.

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**M. ODERO**

**JUDGE**

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**M. MUYA**

**JUDGE**

**In the presence of:-**

Learned State Counsel Miss Mwaura

Learned Counsel for defence absent

Court clerk Mussundi