REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL 96 OF 2008

JOHN MUCHOKI GATUTHU ..... APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

(From the original conviction and sentence in Criminal Case No.47 of 2007 of the Senior Resident Magistrate's Court at Thika by Mrs. L.W. Gicheha – Senior Principal Magistrate)

JUDGMENT

The appellant, **JOHN MUCHOKI GATUHU**, was convicted on two counts of Robbery with violence **contrary to section 296 (2) of the Penal Code.** The learned trial magistrate then sentenced him to suffer death as by law prescribed.

In his appeal to the High Court, the appellant submitted that the prosecution did not prove the case against him to the standards required by law.

He noted that the only evidence that allegedly linked him to the offence was the items which the trial court held to have been recovered in his possession.

It was the contention of the appellant that there was no proof that the items were recovered from him.

Mr. Mulati, learned state counsel, did concede the appeal. His reason for so doing was that the evidence on record was not cogent.

We have re-evaluated the evidence on record and drawn our own conclusions therefrom.

PW 1 was the driver of a matatu. On the material day, he was driving from Maragua to Thika, at about 7.20p.m. The vehicle had between 8 and 10 passengers.

Before reaching Kaharati, one passenger said that he was to get off. However, then **PW 1** stopped the vehicle, the person seated next to him slapped him, after declaring that nobody was to alight.

PW 1 was then shoved to the seat behind that of the driver, and was forced to lie down on the floor of the vehicle.

The robbers who had masqueraded as passengers then removed **PW 1's** jacket and shoes. They also took KShs.8,000/- from him.

Thereafter, the robbers drove off for about 30 minutes, before abandoning the vehicle with **PW 1** and the genuine passengers.

When the police were contacted, they arrived at the place where the vehicle was abandoned. They then led the vehicle to Saba Saba Police Station.

Whilst **PW 1** was still at the police station, the appellant was brought there, under police escort. According to **PW 1**, the jacket and the shoes which he had lost to the robbers were delivered to the police station when the appellant was brought there.

However, **PW 1** said that he did not know where his property was recovered from.

PW 2 was a police officer. He was on patrol when he and his colleagues encountered 5 people. They ordered the said people to stop, but they ran off.

However, the appellant did not succeed in running away. **PW 2** arrested him.

As **PW 2** was interrogating the appellant, police officers from Saba Saba Police arrived. **PW 2** said, of the police officers;

"They said they were looking for people who had hijacked a vehicle in Nairobi-Thika road. They said they take accused and take him to Saba Saba Police Station for interrogation. After they reached they told us he was identified."

However, **PW 2** did not tell the court who it is that did identify the appellant.

We find it curious that someone did purport to identify the appellant when the victims expressly said that they did not identify him.

PW 3 is a police officer. He was in a patrol vehicle, when they heard about the car-jacking of a vehicle.

They found the appellant already under arrest at Saba Saba Police Station. By then, the jacket and the shoes belonging to **PW 1** were also already at the police station.

During cross-examination, **PW 3** admitted that the recovered items were not recovered by him. He told the court that the officer who recovered the items would testify later.

PW 4 was the conductor in the matatu at the time it was car-jacked. He managed to jump out of the vehicle just when the robbers were taking over from the driver **PW 1**).

He testified that he did not identify the persons who robbed **PW 1**.

PW 5 was one of the passengers in the vehicle. He said that the robbers switched off the cabin light. As a consequence, **PW 5** was not able to identify any of the robbers.

When the appellant was put to his defence, he said that he was only arrested because he had not run away from the police, when other people ran off. As far as he was concerned, he had no reason to run away.

From the evidence, the learned trial magistrate held as follows;

"The only link to the offence is the recovered jacket and shoes recovered from the person who was

handed over to the police on patrol by PW 2 after he arrested them from a group of people."

PW 2 did not say that he recovered the jacket and shoes from the appellant.

And **PW 3** said that he is not the officer who recovered the items. If anything, **PW 3** said that the officer who made the recovery would testify later. But the prosecution closed the case before that officer testified. Therefore, we never got to know who it is that allegedly recovered the items.

In the circumstances, we find that there was no foundation upon which the doctrine of recent possession could be applied.

Accordingly, the respondent was right to have conceded the appeal. We allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 26th day of June, 2012.

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FRED A. OCHIENG	**L.A. ACHODE**
JUDGE	**JUDGE**