REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Criminal Appeal 83 of 2006

MBELU KALOKI NZIOKA ……APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an from original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No.2938 of 2004 by S. A. Okato Senior Resident Magistrate on 4th July, 2006)

JUDGMENT

The Appellant, **Mbalu Kaloki Nzioka** and **Daniel Mbaluka Nzivo** were charged in the Chief Magistrate's Court, Machakos in the main count with robbery with violence contrary to section 296(2) of the Penal Code; particulars being that on the 24th May, 2004 at Mikuyu Village Mikuyu sub-location in Kathekakai location of Machakos District, within Eastern Province, jointly with others not before court while armed with dangerous weapons namely pangas, axes, bows and arrows, robbed **Paul Mwikya Mutisya** of two crates of beer, one brown jacket, two padlocks and keys, and cash KShs.3,200/= and at or immediately before or immediately after time of such robbery, used actual violence to the said **Paul Mwikya Mutisya**.

In the alternative count, **Daniel Mbaluka Nzivo** was charged with handling stolen goods contrary to section 322(2) of the Penal Code in that; on 7th June, 2004 at Vota area in Machakos District, otherwise than in the cause of stealing he dishonestly received or retained 19 empty bottles of beer, 11 empty bottles of sodas, 2 padlocks with keys and 4 empty bottles of Vienna beer valued at Kshs. 5,300/= the property of **Paul Mwikya Mutisya** having reasons to believe them to be stolen goods.

The Appellant and Co-accused both entered a plea of not guilty. However before the trial could commence the appellant's co-accused passed on and the case against him therefore abated. In a bid to prove its case against the appellant, the prosecution marshalled 3 witnesses. In brief, their case was that, **PW1**, **Paul Mwikya Mutisya-** "*the complainant*" on 23rd May, 2004 at about 9.30 p.m was inside his bar christened "*Soweto*" with two other customers taking stock at the counter when he was attacked by three robbers armed with pangas who threatened to slit his throat. In the process, they robbed him of cash Kshs. 3,200/=, two crates of beer, two padlocks with keys and then left at about 1.30 a.m. He and his two customers woke up from the floor where they had been ordered to lie and reported the matter to the police. On 11th June 2004 following a robbery in the same neighborhood, he teamed up with members of public and followed the foot marks from the shop that had been broken into upto the house of the appellant whom they found drunk. They searched his house and recovered 19 empty bottles of beer, 11

empty bottles of soda, 2 torches, 4 empty bottles of Vienna beer, two padlocks and their keys and bottle opener, which he identified as among the goods he had lost to the robbers on 24th May 2004. He added that the two torches bore the initials of his name – PMM for **Paul Mwikya Mutisya.** The two padlocks could not only open with the keys he had been robbed of but also with the spare keys he had kept at home, which he fetched and opened the padlocks at Machakos police station. They then escorted the appellant and co-accused to Machakos police station together with the recovered items.

PW.2 Philip Kimatu Mutisya, was among the bar patrons on that material night. He confirmed the story of the complainant. However during the robbery, he was also searched and KShs.1000/- and 3 jembes he had bought earlier on taken from him. He had been ordered to lie down and so the search was being done as he lay on the floor. He heard voices of 3 robbers and they were armed with a panga which they threatened them with. When the robbers left, they forced the door open and went home.

The report of the incident was received by **P.C. Timothy Agang** PW.3 of Machakos police station. After recording the statement of the complainant, he went with him back to the scene. He told him that 2 crates of beer, assorted bottles of soda, 2 padlocks, a bunch of keys, a jacket, 2 torches and cash KShs.3,200/- had been taken from him by the robbers. However, he could not recognize any of them. On 11th June, 2004, the witness received information that robbers had struck at the shop of one, **Mbaluka** in the same area and proceeded there. Later that day he received information that some people had been arrested in connection with that robbery by members of public and some items recovered. Among the items recovered were 2 padlocks. The complainant proved that they were his by opening them using a spare key. He re-arrested the appellant and co-accused, escorted them to Machakos Police Station and later charged them with the offences.

The learned magistrate having evaluated the evidence on record both for the prosecution and defence delivered himself thus in a judgment dated 4th July 2006:-

"I therefore find that some of the items recovered from the house of the accused and particularly exhibit 1, 2 and 6 were property of the complainant which he had lost to the robbers on the night of 23rd and 24th May, 2004. Although the accused's statement of defence is silent as to whether the said exhibits were recovered from his house or not I find that they were recovered from his house and were together with the empty bottles of beer he admitted to have been forced to carry to Machakos Police Station.

Having found as aforesaid it is trite law that a person found in possession of recently stolen goods is either the thief (robbers in this case) or a guilty handler save where he tenders a reasonable account as to how the stolen goods reached his possession. The accused did not attempt any explanation as to how the padlocks and their keys and the two torches and the rest of the other exhibits reached his house. Since the exhibits were recovered 18 days after the complainant's bar was broken into, I invoke the doctrine of recent possession and draw a rebuttable presumption that the accused was among the robbers who robbed the complainant of the items complained of and he is guilty and I so find too.

I have considered the evidence on record and find that the prosecution has proved its case against the accused beyond any reasonable doubt and accordingly, I convict the accused of robbery with violence contrary to section 296(2) of the Penal Code."

Upon convicting the appellant, the learned magistrate in accordance with the law sentenced him to death.

The appellant was aggrieved by the conviction and sentence aforesaid. Accordingly, he lodged this appeal complaining that the learned magistrate erred in law and fact in convicting him when he had not taken a plea on the charge upon which he was eventually convicted, the charge was in any event defective, the stolen property was not recovered from him or his house and finally, that his defence was not given due consideration.

When the appeal came up before us for plenary hearing, the appellant opted to canvass the same by way of written submissions. We have carefully read and considered them.

The State however conceded to the appeal. Through **Mr. Mukofu**, learned state counsel, the State opined that the conviction was unsafe. Though the appellant was convicted on account of recent possession, the items stolen were recovered 18 days later. Considering the period, the doctrine of recent possession was inapplicable.

Though the learned state counsel conceded the appeal, we are still under a duty as the first appellant court to review the whole case with a view to reaching our own decision on the evidence. This duty was cast upon us by such decisions as **Pandya vs. Republic (1957) E.A. 336, Okeno vs. Republic (1972) E.A. 32** and **Kariuki Karanja Vs. Republic [1986] KLR 190.** In all these cases, it was held that an appellant on a first appeal expects the appeal court to exhaustively examine the evidence afresh, remembering always though that the appellate court does not have the privilege of hearing and seeing witnesses who testified before the trial court. As we consider and evaluate the evidence afresh, we are also reminded not to ignore the judgment of the trial court, but should carefully weigh and consider it.

Having now carefully reconsidered and evaluated the evidence afresh we have the following to say: It is indeed true as the appellant has claimed in his written submissions that he was convicted and sentenced on a charge that he did not plead to. This is ofcourse contrary to the mandatory provisions of section207 of the Criminal Procedure Code.

The record both handwritten and typed is very clear that, on 6th July, 2004 when the appellant and co-accused appeared before **J. A. Karanja** (CM) no pleas were recorded. All that the court did on the material day was to fix a hearing date. From the record again it is apparent that the co-accused passed on while awaiting trial, though his plea had not been taken. Subsequently, the prosecution came up with the issue of consolidation of Criminal Case Nos. 3347/04 and Cr.4532/04 on 2nd December, 2004. On that day, the prosecutor informed the court that he wished to consolidate the two criminal cases and indeed, the consolidated charge sheet was before the court. But again no plea on the same was taken on that day.

After the death of the appellant's co-accused, it appears that there emerged another co-accused who was charged separately and who was the subject of the consolidation. For reasons which are not quite clear or apparent on the record, the prosecution at a later stage asked the trial court to proceed with the appellant's case alone. This is self-evident from the proceedings of 15th March, 2006. Again no plea had been taken. It is instructive that though the plea had not been recorded, there was already a consolidated charge sheet on the court file.

In the newly introduced charge sheet after the death of the appellant's co-accused, the appellant was now charged alongside one **Daniel Mbaluka Nzivo** who also was faced with alternative count of handling the alleged stolen items. Still no plea was entered before the hearing kicked off on 26th June, 2006. The upshot of all the foregoing is that the appellant defended himself on a charge which he did not plead to contrary to section 207 of the Criminal Procedure Code which rendered the entire trial a nullity. It is regrettable that such senior Judicial Officers who handled this case to its finality could not notice such fatal omission. It is this kind of casual approach to serious business that at times leads the judiciary to being held in odium by the citizen of this country.

On the doctrine of recent possession, we would agree that it was inapplicable in the circumstances but for a different reason. In his judgment on this aspect of the matter, the learned magistrate appreciated the issue as to whether the stolen items were recovered from the appellant's house. The prosecution evidence too was not emphatic as to whether the stolen items were indeed recovered from the appellant's or deceased's co-accused house. It is also instructive that the alternative charge of handling stolen goods was preferred against one, **Daniel Mbaluka Nzivo**, who is not the appellant. It would appear that indeed those items were recovered from this person according to the charge sheet. Now if the items which were positively identified by the complainant as belonging to him were recovered from this person who is not the appellant how then can the doctrine of recent possession be applicable?

Though the learned magistrate appreciated the issue, he merely glossed it over by simply saying;

"***although the accused's statement of defence is silent as to whether the said exhibits were recovered from his house or not I find that they were recovered from his house…"***

We do not think that there was any basis for such finding. The learned magistrate no doubt is aware of the cardinal principle in criminal law that if any doubt is raised in criminal proceedings, such doubt must always be resolved in favour of the accused. Had the learned magistrate applied that cardinal proposition of criminal law, there would have been nothing left upon which the doctrine of recent possession will have been anchored.

On these two grounds, we are satisfied that the conviction and sentence of the Appellant was not merited. Accordingly, we allow the appeal, quash the conviction and set aside the sentence of death imposed. The Appellant should be set at liberty at once unless otherwise lawfully held.

JUDGMENT DATED, **SIGNED** and **DELIVERED** at **MACHAKOS**, this **15TH** day of **JUNE**, 20**12**.

ASIKE-MAKHANDIA **GEORGE DULU**

JUDGE **JUDGE**