



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 109 of 2008

PATRICK MUCHIRI

MWANGI.....APPELLANT

versus

REPUBLIC.....RES

PONDENT

*(From Original Conviction and Sentence in Criminal Case No.936 of 2007 of the Chief Magistrate's Court at Nyeri by J. K. NG'ENO – S.P.M. dated 9<sup>TH</sup> May, 2008)*

### J U D G M E N T

Patrick Muchiri Mwangi, the Appellant herein and five others were jointly tried on a charge of five counts:

In Count I, the particulars of the offence are that: *on the 13<sup>th</sup> day of November 2006 at Central Pub in Mukurweini in Nyeri District within Central Province jointly with others not before court while armed with dangerous weapons namely: pangas, runqus, axes and secateurs robbed Peter Mwangi Kamau of one Sony music system, seven speakers, one DSTV Decoder, one Sub-woofer, one TV "14" Inch Sony, one JVC DVD, one Panasonic VCR, two crates of assorted beers and an adaptor all valued at Kshs.156,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Mwangi Kamau.*

In Count II, the particulars of the offence are that: *on the 13<sup>th</sup> day of November 2006, at Central Pub in Mukurweini in Nyeri District within Central Province jointly with other not before Court while armed with dangerous weapons namely: runqus, axes and a pair of secateurs robbed Patrick Ngunjiri Nderitu of Kshs.350/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Patrick Njunjiri Nderitu.*

In Count III, the particulars of the offence are that: *on the 13<sup>th</sup> day of November 2006, at Central Pub in Mukurweini in Nyeri District within Central Province jointly with other not before Court while armed with dangerous weapons namely: runqus, axes and a pair of secateurs robbed Joseph Kibari Gitishe of Kshs.480/= and at or immediately before or immediately after the time of such robbery used*

**actual violence to the said Joseph Kibari Gitishe.**

In Count IV, the particulars of the offence are that: **On the 12<sup>th</sup> of November 2006, at Karatina in Nyeri District in Central Province, jointly with another not before Court conspired together to commit a felony namely: Robbery with Violence.**

In Count V, the particulars of the offence are that: **on the 15<sup>th</sup> day of December 2006, at Karindundu Estate in Nyeri District within Central Province not being in his place of abode had with him a spanner and three master keys all articles for use in the course of or in connection with burglary.**

At the end of the trial, the Appellant's Co-accuseds were acquitted. The Appellant was convicted in Counts I and III and sentenced to Suffer Death. Being aggrieved, the Appellant preferred this appeal.

On appeal, the appellant put forward the following grounds in his Petition:

**"1. the Trial Magistrate erred in law and in facts when convicting the appellant on allegation was in possession of T.V., Torch and nine bottles of beer and failed to consider nobody else was available from the place motor vehicle of the recovery by the Prosecution.**

**2. The Trial Magistrate erred in law and in facts when convicting the appellant and failed to consider evidence by P.W.3 and P.W.2 was or had serious and incurable contradictions as to how the appellant was allegedly found or possessed the alleged alibi.**

**3. The Trial Magistrate erred in law and in facts when convicting the appellant and failed to consider and note that recent possession was not proved on the appellant or that it was proved how the appellant was found in possession of the alleged exhibits.**

**4. The Trial Magistrate erred in law and in facts when convicting the appellant in reliance of the time appellant arrested proves or establish that appellant was part of the gang or robber who attacked and robbed complainant and failed to consider the explanations adduced by the appellant.**

**5. The Trial Magistrate erred in law and in facts when misconstrued the burden of prove by shifting it to the appellant who was not to prove his innocence.**

**6. The Trial Magistrate erred in law and in facts when convicting the appellant and failed to note that evidence by P.W.2, P.W.3 and P.W.4 of Acc. No.1 or part of their evidence of items found by the group who escaped but dropped them identified by the complainant.**

**7. The Trial Magistrate erred in law and in fact when rejecting the defence of the appellant either by Prosecution allegation or alleged confessionary statement by P.W.2 and P.W.3, appellant confessed of the robbery that was not supported materially in Court."**

When the appeal came up for hearing, Miss Maundu, Learned State Counsel opposed the same on the ground that the appellant was connected to the offences he was convicted for by the doctrine of recent possession. The Learned State Counsel pointed out that P.W.2 acting on a tip off flagged down a public service motor vehicle and in it were found stolen goods which were in possession of the appellant.

At this juncture, we wish to set out in brief, the case that was before the trial court. The Prosecution's case was supported by the evidence of ten (10) witnesses. We will restrict our re-evaluation of the evidence to the counts which were directed at the Appellant. It is the evidence of Peter Mwangi Kamau (P.W.1) that on 12<sup>th</sup> November 2006, he was on duty guarding Central Pub in Mukurweini when at around 3.30 A.M., the Pub was attacked by a gang. He claimed he was assaulted and in the process those attackers made away with a T.V. make National, T.V. make Sony, 2 DSTV, Decoders, Video Deck, torch and assortment of beers. Before the attack, P.W.1 said, he had been joined by Patrick Ngunjiri Nderitu (P.W.6) and Joseph Kibari Gitishe (P.W.7) to take a nab in the nearby bar at 11.00 p.m. P.W.1 was later

summoned by the police in the morning of 13<sup>th</sup> November, 2006 to identify some of the goods which had been taken away during the attack. P.W.1 said he found the goods placed beside the appellant on the roadside. P.C. Joshua Kiambati (P.W.2), a police officer attached to the Highway Patrol Unit told the trial court that on 13<sup>th</sup> November 2006, he stopped motor vehicle registration number KAR 103M and upon carrying out a search therein he found T.V. make Sony and a crate with nine (9) bottles of Pilsner beer. The driver of the aforesaid motor vehicle is said to have pointed out the owner of the recovered items to belong to the Appellant. The evidence of P.W.2 is corroborated by the evidence of Corporal Ahmed Alaso Adan (P.W.4). The Appellant, when placed on his defence, denied the offence and stated that he was arrested by the police when they discovered he had not fastened his seatbelt. He alleged that he was surprised when he was charged with the offence of **Robbery with Violence**. The Learned Trial Senior Principal Magistrate, considered the evidence presented before him and came to the conclusion that the Appellant was connected to the offence by the application of the doctrine of recent possession.

On appeal, the Appellant beseeched us to find that there was no credible evidence to show that he was in possession of the stolen items. We have on our part re-evaluated the entire evidence and we think the Appellant raised a legitimate point which the Learned Senior Principal Magistrate did not give serious consideration. There is no doubt in our minds that the T.V. make Sony and a crate of 9 bottles of beer were found in motor vehicle registration number KAR 103M. We are also satisfied that the Appellant was one of the passengers who boarded the aforesaid motor vehicle. It is the evidence of P.W.2 that the driver of the aforesaid motor vehicle was the one who pinpointed the Appellant as the owner of the T.V. make Sony and the crate of 9 bottles of beer. It is our considered view that upto this stage, the evidence appear to be watertight. The only serious dent which will spoil an otherwise straightforward case is the failure by the prosecution to summon the driver of motor vehicle registration number KAR 103M to testify to confirm that indeed the Appellant was the passenger who was in possession of the stolen items. We have entertained some doubts in our minds as to whether the Appellant or someone else was in possession of the stolen goods. For this reason, we are obliged to give the Appellant the benefit of doubt by allowing the appeal, which we hereby do. Consequently, the appeal is allowed. The conviction is quashed and the sentence is set aside. The Appellant should be set free forthwith unless lawfully held.

**Dated and delivered this 8<sup>th</sup> day of June 2012.**

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**J. K. SERGON**  
**JUDGE**

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**J. WAKIAGA**  
**JUDGE**