**REPUBLIC OF KENYA**

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

Criminal Appeal 49 of 2008

**EPHANTUS MWANGI MWAI…...…….......……….........…………...APPELLANT**

**VERSUS**

**REPUBLIC ……….....………………………………..........……..…RESPONDENT**

**(From original conviction and sentence in Cr. case No. 807 & 808 of 2006 at the Senior Principal Magistrate's Court at Kerugoya)**

## JUDGMENT

The appellant EPHANTUS MWANGI MWAI was charged with another accused with one count of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge are:-

**EPHANTUS MWANGI MWAI: On the 16th day of January 2006 at Kandende area in Kirinyaga District within Central province, jointly with others not before court and while armed with dangerous weapons namely pistols robbed TIMOTHY KARUMBA of a motor vehicle registration number KAQ 467f, A Toyota corolla station wagon white valued at KShs.330,000/= and at or immediately before or immediately after the time of such a robbery threatened to** use actual violence to the said TIMOTHY KARUMBA.

The appellant was charged with an alternative count of handling stolen goods contrary to Section 322(2) of the Penal Code. The particulars of the charge were:

**EPHANTUS MWANGI MWAI: On the 2nd day of June 2006 at Nanyuki town in Laikipia District of the Rift Valley Province, otherwise and on the course of stealing, dishonestly received or retained two window panes bearing registration numbers KAQ 467F knowing or having reason to believe them to be stolen goods.**

The appellant was convicted in the main count of robbery with violence and sentenced to death. The appellant was aggrieved by the conviction and sentence and therefore filed this appeal.

Mr. Morris Njagi advocate for the appellant filed an Amended Petition of Appeal with leave dated 17th July 2012. It has set down 9 ground of appeal as follows:-

0. **The learned trial Magistrate went wrong, misapprehended the evidence, misdirected himself on both facts and erred in convicting the appellant of the offence of the robbery contrary to section 296(2) of the Penal Code.**
1. **The Learned trial Magistrate misapprehended, and misdirected himself on the submissions of the appellants advocate.**
2. **The Learned Senior Resident Magistrate erred in law in failing to consider appellants defence statement against the prosecution evidence.**
3. **The Learned Resident Magistrate erred and misdirected himself in framing the issues for determination, lost sight of the charge sheet, and concluded in trying and judging the appellant on offences not before court.**
4. **The Learned Senior Resident Magistrate erred and misdirected himself on the meaning scope and application of circumstantial evidence and thereby erred in law in convicting the appellant when the burden of proof was not legally discharged.**
5. **The Learned Resident Magistrate erred and misdirected himself on the standard of proof in holding that the window pane found with the appellant belong to motor vehicle KAQ 467 F, when the said vehicle was not proved stolen.**
6. **The Learned Senior Resident Magistrate erred and misdirected himself on the scope and application of the doctrine of recent possession and therefore erred in law in holding it against the car window panes which were found five months after the alleged robbery.**
7. **The Learned Senior Resident Magistrate misdirected himself in law and facts in finding corroboration from totally inconsistent and contradictory evidence.**
8. **The Learned Senior Resident Magistrate went wrong and misdirected himself in advancing his own theory against the appellant unbacked by evidence that "the appellant has several number plates he was changing the motor vehicle from time to time".**

The chief facts of the case are that Timothy, PLW1 was employed by a person he did not name to drive his taxi operating from Kagumo town. It was his evidence that on $16^{th}$/$17^{th}$ June 2006 as he drove the taxi, registration No. KAQ 467F, with 2 people who had hired his services, he was car jacked by other people. It was at Kandende where the lady was to alight that persons emerged, entered the vehicle, punched him on the eyes and drove off with him. He was eventually drugged and he fell asleep. He woke up at home. His friend Charles, not a witness, told him he collected him at Kerugoya Town, took him to hospital then home.

It is the prosecution case that the motor vehicle KAQ 467F was sold to PW2 as KAR 478N o the $23^{rd}$ March 2006 PW2 said one NJOGU, one LUKA, one MWANGI and one 77 introduced him to the owner of the vehicle who sold it to him. His name was Stephen Kiiru Kamau. PW2 did not identify the said seller. One Stephen Kiiru Kamau who testified as PW3 testified that he was owner of motor vehicle KAR 478N and that he had never sold it to anyone. He also identified duplicate identity card EXB.5 saying names were his but the photograph on it was not.

PW4 Mr. BOSIRE BURA said the log book EXB.3 which PW2 was given as purchaser of motor vehicle was fake. PW5 was owner of motor vehicle KAQ 467F (original records show its KAQ not KAG. He said that the motor vehicle was stolen on $17^{th}$ January 2006. He said he had put distinct marks on them and when he saw a vehicle with different registration number, he was able to identify it as his stolen motor vehicle.

PW6 a garage owner and his mechanic PW8 all corroborated each other that in January 2006 a motor vehicle registration No. KAT 395Z was taken to them to change window panes which they did. They could not remember registration number on changed panes but they said they were scratched.

PW7 Cpl. Kemboi told Court that he reconstructed the engine no. on motor vehicle bearing registration No. KAR 478N. He said the number tallied with that for motor vehicle registration No. KAQ 467F.

PW9's evidence was that the $1^{st}$ accused asked him to look for a buyer for motor vehicle KAT 395Z. That one Matin Kariuki asked him to look for a buyer for motor vehicle KAR 478N and that he did get one.

PW11 the investigating officer of this case said he learnt that motor vehicle KAQ 467F was stolen on 17th January 2006 at gun point. He said that he recovered 2 window panes from the Appellant which were produced in court as EXB.10.

Pw10 Cpl. Kivuva recovered several vehicle number plates from 2nd accused in the case.

The appellant in his defence put forward an alibi as his defence for main count. He said he worked whole day at his shop then proceeded home at 8 p.m. In answer to Count 2, the appellant denied that any window panes were recovered from him. He denied involving himself in buying and selling motor vehicles.

We are the first appellate Court;

***"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for that fact that the trial court has had the advantage of hearing and seeing the witnesses."***

We have considered submissions by both Mr. Njagi for the appellant and Ms. Macharia for the stat. the appeal was opposed by the State.

The appellant was convicted by the learned trial magistrate on the basis of recovered window panes. The learned trial magistrate put it thus:

**"Accused 1 was connected due to the recovery of two window panes recovered from his house bearing registration numbers KAQ 467 F, being the window panes removed from KAQ 467 F. PW II Cpl Julius said the two window panes were recovered from accused one\'s house although accused denied. To corroborate that evidence PW 9 Francis Theuri said that at one time Mwangi accused 1 gave him a motor vehicle bearing registration No. KAT 395 Z which he wanted changed window panes with new ones... Then said the motor vehicle he was shown number plate number KAR 478 N was the same one he changed window panes."**

The learned trial Magistrate keenly relied on evidence of PW 9 Francis Theuri. We do not think that PW 9 was a reliable and credible witness. First of all he is the same person who led PW 2 to the person who sold the motor vehicle KAR 478 N to him. His nickname is "YY". All the witnesses connected with the stolen vehicles PW 6 and 8 all mentioned him in their evidence. It is clear PW 9 was dealing in stolen vehicles.

The other point is that it was PW 6 and 8 who changed window panes from motor vehicle KAT 395 Z and not PW 9 as learned trial Magistrate found.

Thirdly PW 9\'s evidence that the Appellant took to him motor vehicle KAT 395 Z to sell was denied by the Appellant. Due to lack of independent evidence, it was PW 9\'s word against that of the Appellant. That piece of evidence was controversial and was not proved.

Fourthly the motor vehicle KAT 395 Z\'s connection with the vehicle in issue in this case was not established. The vehicle sold to PW 2 was registration number KAR 478 N. The person who took the motor vehicle to PW 6 and 8 was PW 9. Nowhere was the Applicant connected with it. Fifthly the number plates KAT 395 Z among many others were recovered from the home of the 2nd accused at the lower court. Yet he was acquitted in this case for reasons which do not appear quite clear to us.

The only evidence against the appellant was the window panes recovered from his house. The learned trial Magistrate messed up the numbering of exhibits so that the panes were given exhibit number 10 as a log book for motor vehicle KAR 478 N. The window panes were not identified by PW 6 and 8 because

what the two said is that they did not register the registration mark on the old panes they removed from the vehicle for PW 9.

PW 5 is the only witness who tried to read the registration numbers on the panes as KAQ 467. He was the owner of the motor vehicle KAG 467 F stolen from PW 1. PW 5 said that when he saw the motor vehicle KAR 478 N at a garage, that is same motor vehicle PW 2 had bought and which he took to a garage for repairs. The repairs included change of engine. The garage where he took the vehicle is not disclosed neither is the owner disclosed. However PW 2 did say it was PW 9 who took him to that garage.

Getting back to this case PW II said he recovered the window panes in appellants house. Let us suppose he actually did, the issue to determine is since the recovery was made some time after the robbery, the court has to determine if the doctrine of recent possession applies.

In Arum v Republic (2000) 1KLR 233 the court of Appeal held;

"1. Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof;

(a) That the property was found with the suspect

(b) That the property was positively the property of the complainant.

(c) That the property was stolen from the complainant

(d) That the property was recently stolen from the complainant.

2. The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

3. In order to prove possession there must acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot suffice no matter from how many witnesses."

In this case PW II who said he recovered the window panes gave very casual evidence. He did not state the date of recovery. He did not state where the recovery was done. He did not state whether appellant was present or not. He claimed the recovery was from appellants house. However he did not say how he came to know that the place of recovery belonged to the appellant.

We find that the prosecution did not establish any of the ingredients needed to be proved to establish grounds upon which the doctrine of recent possession can apply.

In regard to the issue of time which should determine whether possession was recent or not, without evidence of date of recovery, time cannot be ascertainable.

We have come to the conclusion that the prosecution failed miserably to prove the charges against the appellant. We find that the learned trial magistrate conclusion that there was any evidence at all to establish the charge was made in error and misapprehension of the evidence adduced.

In the result we find merit in this appeal and do allow it. Accordingly we do quash the conviction and set aside the sentence. The appellant should be set at liberty forthwith unless otherwise lawfully held.

**DATED AT EMBU THIS 27TH DAY OF JULY 2012.**

**LESIIT J.** **H.I. ONG'UDI**

**J U D G E** **J U D G E**

**READ, SIGNED AND DELIVERED,**

**In the presence of:-**

**………………………………………for State**

**………………………………………Appellant**

**………………………...…………..Court Clerk**