



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 9 & 10 of 2007**

**JAMES KARANI M'IKOMBO.....1<sup>st</sup> APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**  
**CRIMINAL APPEAL NO. 10 OF 2007**

*(Arising from Nyeri C.M.'s Criminal Case No. 720 of 2005)*

**GREVASIO KILEMI.....2<sup>nd</sup> APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

James Karani M'Ikombo and Grevasio Kilemi being the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively with three others were tried on a charge of robbery with violence contrary to section 296(2) of the Penal code. At the end of the trial the appellants' co-accused were acquitted whereas the appellants were convicted and each sentenced to suffer death. The duo each filed an appeal which appeals were subsequently consolidated when the same came up for hearing before us.

On appeal, James Karani M'Ikombo, 1<sup>st</sup> appellant put forward the following grounds in his petition of appeal.

1. *That the trial court erred in law and fact in relying on the identification evidence of P.W.1 the sole identifying witness without the need to observe that the same amounted to dock identification which is of no value.*
2. *That the trial court erred in law and fact in accepting and relying on the evidence of the arresting officer claim that the first accused of this case informed him about my involvement with the claim in question a thing which left a lot to be desired on the reason why the arresting officer also charged him with the offence committed instead of using him as a prosecution witness.*
3. *That the trial court erred in law and fact in failing to consider that the prosecution case was not proved beyond all reasonable doubts to warrant a conviction in that:*
  - a. *No evidence adduced to proved the true ownership of the exhibited items.*
  - b. *The complainant gave no special mark which could have enabled them to identify the exhibited items.*
  - c. *No reason given to the police by the complainant to enable them trace the same.*
4. *that the trial court erred in law and fact in basing my conviction on recovery of the exhibited items in question and thus activated the doctrine of recent possession without observing that the circumstances surrounding the recovery were wholly dubious in that:*
  - a. *No recovery form produced.*
  - b. *no search warrant produced to satisfy the same.*
  - c. *No. independent eye witness summoned before court.*
5. *that the trial court erred in law and fact in not re-evaluating the evidence on record and note that the*

complainant claimed to have been called to Nyeri police station and shown the stolen items some hours before my arrest.

6. That the trial court erred in law and fact in failing to give my defence due consideration and no reasons were given for so doing.

On his part Grevasio Kilemi, 2<sup>nd</sup> Appellant, put forward the following grounds in his petition:

1. That the trial court erred in law and fact in finding me guilty of robbery with violence c/s 296(2) p.c. where the circumstances were not conclusive as no one identified me in the raid nor arrested me with anything which could implicate me in the robbery.

2. That the trial court erred in law and fact in relying with a single evidence of P.W.5 which was not worthy reliance as I was arrested in my brother's house where I was a visitor who had just arrived the same day from Meru.

3. That the trial court erred in law and fact for confiscating my money (Kshs. 6,050/=) which had no complaint and I was not part of the charge presented in court or part of the items stolen from the robbery.

4. That the prosecution did not produce anything to support that the alleged house where they recovered exhibits belonged to me regardless telling the court that the house belonged to my brother who was arrested and charged hence he did not say the same belonged to us. Why should I carry my brother's cross?

5. That the trial court erred in law and fact in relying on circumstantial evidence of recovery while knowing that I was not booked with any exhibits after my arrest nor charged with any alternative charge of possession of any stolen money to warrant me be found guilty.

6. That the trial court erred in law and fact in rejecting my defence which was plausible to secure my acquittal since I produced a receipt which showed I had arrived from Meru the material time of my arrest at my brother's house. Section 169(1) cpc was violated by the trial magistrate.

Mr. Makura. Learned State Counsel opposed the appeals on the basis that the appellants were properly convicted on the basis of the doctrine of recent possession.

We wish to consider this appeal by re-examining the evidence that was presented before the trial court. There is no doubt that the home of Hellen Wanjiru Wachira (P.W.2) was broken into and a robbery committed therein on the nights of 4<sup>th</sup> and 5<sup>th</sup> February 2005. Festus Ngiri Kithure (P.W.1) told the trial court that he was woken up by barking dogs. He went outside their house to check on what was happening and that is when he saw four men who were armed with axes, pangas and torches standing outside the veranda of the house of his employer. P.W.1 said since electricity lights were on, he managed to identify the James Karani M'Ikombo (1<sup>st</sup> appellant) a person he had seen for about 4 to 5 months. P.W.1 said the 1<sup>st</sup> appellant ordered him to go back to the house and to lie under the bed. He said he then locked the bed room door from outside before throwing objects to blow out the security lights. The investigating officer, I.P. Ochillo (P.W.5) said that the 1<sup>st</sup> appellant's name was given to him by Bernard Kinyua Nchebae, the first accused who was acquitted. Upon getting the 1<sup>st</sup> appellant's name, P.W.5 visited his house whereupon he conducted a search and recovered a video deck, a radio cassette and one speaker. Apparently the 2<sup>nd</sup> appellant, is the 1<sup>st</sup> appellant's brother. He was also found present in the house of the 1<sup>st</sup> appellant when the police conducted a search. The 2<sup>nd</sup> appellant said he had come from Meru to visit his brother in Nyeri to seek medical attention at Outspan Hospital. The 1<sup>st</sup> appellant confirmed that his brother had visited him to request for money for medical treatment. The duo gave the explanation in their defences.

We have already set out the grounds of appeal put forward by each appellant. There is no doubt that the 2<sup>nd</sup> appellant was found in the house of his brother (1<sup>st</sup> appellant). His explanation is that he had visited his brother to seek for medical attention. His defence was dismissed by the trial magistrate as a make up story. We have reconsidered the 2<sup>nd</sup> appellant's defence and we think the same was unjustly dismissed. The evidence which tended to connect the 2<sup>nd</sup> appellant with the offence is the recovery of Kshs. 6500/- from the 2<sup>nd</sup> appellant's pockets. That amount was not stated in charge sheet neither was it produced in evidence. We think the 2<sup>nd</sup> appellant's defence was plausible and should have led to his acquittal. We give him that benefit of doubt. We allow the appeal by Grevasio Kilemi M'Ikombo. His conviction is quashed and the sentence set aside. He is hereby set free forthwith unless lawfully held.

According to the evidence of P.W.5 the house of the 1<sup>st</sup> appellant was searched. Under the 1<sup>st</sup> appellant's bed, the police recovered a radio cassette stereo, a video deck, speaker and a blender. The complainant and his witness positively identified the aforesaid items to be those stolen from their house. After a careful consideration of the evidence against the 1<sup>st</sup> appellant we are satisfied that the doctrine of recent possession should be applied to sustain the conviction against the

1<sup>st</sup> appellant, James Karani M'Ikombo. We find that the 1<sup>st</sup> appellant was properly convicted. We dismiss his appeal in its entirety.

Dated and delivered this 13<sup>th</sup> day of January 2010.

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

**M.S.A. MAKHANDIA**  
**JUDGE**

In open court in the presence of the Appellants and Mr. Makura learned State Counsel.

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

**M.S.A. MAKHANDIA**  
**JUDGE**