REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 180 of 2007

JOHN KARIO NGARI .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

(Appeal from original Conviction and Sentence of the Chief Magistrate's Court at Nyeri in Criminal Case No. 5406 of 2003 dated 4th June 2007 by Mr. M. M. K. Serem – Ag. S.R.M.).

J U D G M E N T

The appellant herein, **John Kario Ngari** was charged with one count of robbery with violence contrary to Section 296(2) of the Penal Code. Particulars of the offence were that on 26th July 2003 at Ruringu market in Nyeri District of Central Province jointly with others not before the court while armed with offensive weapon namely a pistol robbed **Julius Gachunu Muthuni** of his motor vehicle registration number KAL 302X Toyota Corolla, one mobile phone make Motorola, cash Kshs.1,700/= and personal documents all valued at Kshs.460,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Julius Gachunu Muthuni**. The appellant pleaded not guilty to the charge and his trial ensued. During the trial the prosecution called a total of three (3) witnesses. The evidence adduced against the appellant in the trial court was that on 26th July 2003 at 8.30 p.m. the complainant herein **Julius Gichunu Muthuni** (PW1), a tax driver was on duty in his motor vehicle registration No. KAL 302X Toyota Corolla within Nyeri Town when two people a gentlemen and a lady approached him with a view to hiring his motor vehicle. The two were holding a bag. The lady had a veil on the head which only covered the head and not the face. The two wanted PW1 to drop them at Ruringu at a bar called Jacaranda. PW1 agreed to do so at a cost of Kshs.100/=. The two then entered the motor vehicle. The man sat at the back seat directly behind PW1. The lady sat in the front passenger seat. PW1 then drove the motor vehicle to Kenol Petrol station to refuel. Thereafter PW1 drove the motor vehicle towards Ruringu and on the way, the man at the back suddenly put a rope around his neck and pulled PW1 against the driver's seat. He thereafter pulled out a pistol and pointed it at PW1's right ear. The man then ordered PW1 to switch off the lights of the motor vehicle and he complied. The man told his accomplice, the lady in the front seat to remove a rope that was from the bag she was carrying and she did so. The rope that was on the neck of PW1 was then removed and the hands of PW1 thereafter tied together. He was then ordered to leave the driver's seat at gun point and jump to the back seat. PW1 obliged and immediately the man in the back seat jumped on to the driver's seat, started the motor vehicle and made a U-turn. As the motor vehicle turned another man came from the side of the road and entered the motor vehicle and sat on the driver's seat. The initial man then jumped to the back seat together with the lady. He proceeded to covered the face of the PW1 with a cloth and placed the pistol on PW1's right ear ready to shoot. The new man took over the motor vehicle and drove it for about 5 minutes. Upon reaching Ngangarithi area and having stolen from PW1 Kshs.1700/= and a mobile phone Motorola T 190

they threw him out of the motor vehicle. The motor vehicle was then reversed and it took off. The complainant was dazed. He went to a nearby house, was assisted with a mobile phone which he used to call his colleague and who in turn called the police. The complainant then later went to Nyeri police station and made a report. After 4 to 5 months, PW1 learnt that a motor vehicle shell had been recovered at Ruringu buried in a hole. He went to Nyeri Police station and looked at the recovered motor vehicle shell. The complainant was able to positively identify the shell of the motor vehicle at Nyeri police station as belonging to his motor vehicle.

PW1 later came to learn that it was the appellant who had been found with the shell of the motor vehicle. PW1 was not however able to identify the two people who hired the motor vehicle on the material day. Even the subsequent man who entered the motor vehicle from the side road was not identified. PW1 conceded in cross-examination that he saw the appellant for the first time in court. PW3 was **Sgt James Mwangi** who was then attached to CID Nyeri police. He testified that on 26th July 2003 at 9.00 p.m. he was on duty when PW1 came in and made a report of robbery. He booked the report and commenced investigations. On 10th November 2003, he received a report that a man wanted by CID Nakuru in connection with car jackings lived in Ruringu area of Nyeri. He got the information from an informer who told him that the man lived in his sister's house. On the night of 10th November 2003 the informer led PW3 to Ruringu estate near Caltex petrol station where the said suspect was said to reside with his sister and another brother. PW3 proceeded to the said house and demanded that it be opened having identified himself as a police officer. The house was opened and the appellant was arrested. The appellant told PW3 that he had been left in the house by his sister called Elizabeth who lives in Nairobi. PW3 had information that a motor vehicle had been buried underground in what looked like a cultivated area. The appellant was taken to Nyeri police station. The scene was dug up the following day and a shell of a motor vehicle recovered. The motor vehicle shell was then taken to Nyeri police station where both PW1 and PW2 the driver and owner of the subject motor vehicle positively identified the same.

PW3 did an official search of the plot **L.R. Aguthi/ Gatitu/2908** whereat the appellant had been arrested and it turned out that it was indeed registered in the name of sister of the appellant namely, **Elizabeth Wanjiru Ngare**. It is in this plot that the motor vehicle shell was recovered. It was then that he preferred the instant charges against the appellant.

In his sworn defence, the appellant told the court that on the day that the offence was committed he was in Nakuru with his family where he works as a clothes vendor. He was however arrested on 10th November 2003 with a brother of his at small joint bar and butchery at 7.00 p.m. in Nyeri town by **P.C. Thomas Muriuki** and **P.C. Wachira**. On 25th November 2003, the appellant was taken to Nakuru and his house searched and later brought back to Nyeri police station. He was then charged in court on 5th December 2003. The appellant in essence denied being involved in the crime or at the sister's house where the alleged motor vehicle shell was recovered.

In convicting the appellant, the trial magistrate said: "**....... I am fully convinced beyond all reasonable doubts that the accused person was arrested on 10th November 2003 and the offence committed on 26th July 2003. The accused arrested exactly 3 months and 14 days after the commission of the offence and was in possession of the shell of the stolen motor vehicle....... The recovery of the shell of the stolen motor vehicle and the arrest of the accused person came so soon after the commission of the offence and the only inference I can drew (sic) is that the accused person was part of the gang of robbers that were on the material day invaded (sic) and the complainant of his motor vehicle, the sister of the accused person one Elizabeth Wanjiru Ngare can best be an accomplice. Having considered the defence of the accused person, I shall rightly reject the same and hold that the inculpatory facts in this case are incompatible with the innocence of the accused person ....**"

The appellant being dissatisfied with the above findings, preferred the instant appeal through **Messrs Kagondu & Mukunya Advocates**. He put forth six grounds of appeal revolving around the application of the doctrine of recent possession, circumstantial evidence and finally that the reasoning of the trial magistrate was not supported by the evidence adduced at the hearing.

When the appeal came up for hearing before us, **Mr. Mukunya**, learned counsel for he appellant submitted that the doctrine of recent possession was wrongly invoked by the learned magistrate so as to find a conviction. That the house and plot in which the shell of the motor vehicle was recovered did not belong to the appellant, that the shell of the motor vehicle was recovered in the absence of the appellant as he was already in police custody and that the shell was not properly identified in terms of the colour. Finally, counsel submitted that the trial magistrate wrongly disallowed the appellant's Alibi defence. The evidence was circumstantial. However there was no nexus between the recovered shell of the motor vehicle and the appellant. He therefore urged us to quash the conviction and set free the appellant.

Ms Ngalyuka, learned state counsel, opposed the appeal. She submitted that possession need not be physical. Even knowledge of presence of a stolen item at a place is sufficient possession. That the appellant had knowledge that the shell of a motor vehicle was buried at his sister's house. He was bound to explain and he did not. Accordingly the learned magistrate was right in convicting the appellant on the doctrine of recent possession. There was no doubt as to the colour of the stolen motor vehicle. It was grey. In any event the colour was not the only identifying mark of the motor vehicle. There were other modifications to the motor vehicle that were shown to court by the complainant. Finally, she submitted that the contradictions if any in the prosecution case were minor and not fatal to the prosecution case. She urged us therefore to dismiss the appeal.

As this is a first appeal, the appellant is entitled to expect that we shall re-evaluate the evidence on record afresh and arrive at our own conclusions in the matter but giving allowance for the fact that the superior court had the advantage of seeing and hearing the witnesses –See **Okeno v/s Republic (1972) E.A. 32**. We must now therefore examine the evidence relating to the appellant and how the trial court treated such evidence.

To our mind however, this appeal may succeed or fail on the basis of the application of the doctrine of recent possession in the circumstances of this case. The law is now settled and we need not belabour it, that a person found in possession of recently stolen item is presumed in the absence of any reasonable explanation, to be either the thief or the handler of the stolen item. However before this doctrine can be invoked as a basis for conviction, certain prerequisites have to be met, and or satisfied. Those conditions were set out by the court of appeal in the case of **Isaac Nanga Kahiga alias Peter Nganga Kahiga v/s Republic, Criminal Appeal No. 272 of 2005** (unreported), in these terms:

"**......... It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be proved. In other words, there must be positive proof first, that the property was found with the suspect, and secondly that, the property is positively identified the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses ....**"

In the case before us, none of the prosecution witnesses testified to having searched and recovered the shell of the motor vehicle from the appellant. In other words, none of the prosecution witnesses talked of having interrogated the appellant upon arrest who subsequently led them to where the shell of the motor vehicle had been buried. If anything and there is overwhelming evidence that the alleged recovery of the shell of the motor vehicle was in the absence of the appellant. It cannot therefore be said that the appellant was found in possession of the shell of the stolen motor vehicle directly or constructively. The learned state counsel submitted that possession need not be direct and or physical. Even knowledge of presence of a stolen item at a place is sufficient possession. That much we agree. However in the circumstances of this case was there evidence of the appellant's apparent knowledge of the presence of the shell of the stolen motor vehicle buried somewhere in his sister's plot? We discern none. Further there is overwhelming evidence that the house and plot in which the shell was found buried does not belong to the appellant. Rather it belongs to the appellant's sister. There is also no evidence that the appellant had exclusive access to and possession of the house as well as the plot. Indeed at the time of his

arrest, he was in the company of his brother, who too was arrested but subsequently released for reasons which are not clear from the record. Further there is undisputed evidence that the appellant ordinarily resided with his family in Nakuru. In those circumstances, can it really be said that the appellant was in exclusive possession of the house and plot in which the shell was allegedly found buried? We do not think so. Other people may well have had access to he same. Perhaps the best person to have offered an explanation regarding the presence of the shell, if at all, should have been the appellant's sister and the registered proprietor of the plot. The police had the details of her whereabouts but never bothered to look her up as a witness and or even as a suspect. As correctly pointed out by the learned magistrate, she could as well have been an accomplice. In our view therefore there is no positive proof of the appellant's exclusive possession of the suit premises from which the shell was recovered nor was he in exclusive possession of the recovered shell of the motor vehicle. It was not found with the suspect.

Was the shell positively identified as belonging to the complainant? We do not think so either. When PW1, PW2 and PW3 testified they gave grey as the colour of the recovered shell of the motor vehicle. However, the logbook of the alleged stolen motor vehicle tendered in evidence indicated, the colour of the motor vehicle as green. PW1 & PW2 also indicated to the court modifications made to the stolen motor vehicle. However they did not eliminate the possibility of similar vehicle having similar modifications. In other words those modifications were not unique to this particular motor vehicle. That shell could as well as have belonged to another motor vehicle.

The shell was recovered almost 3 months after the alleged robbery. Three months time cannot b said to be recent as claimed by the leaned magistrate.

On our own evaluation of the evidence on record we find that this was not a fit or proper case for the application of the doctrine of recent possession. Accordingly we find ourselves unable to uphold the appellant's conviction. It was unsafe. We therefore allow the appeal, quash the conviction and set aside the death sentence that was imposed on the appellant. We direct that the appellant be released forthwith unless otherwise lawfully held. Orders accordingly.

Dated and delivered at Nyeri this 30th day of January 2009

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE