REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 313 OF 2006

ELIJAH SEKA OCHITO……..…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From the original conviction and sentence in Nakuru C.M.CR.C.NO.1356/2000 by

The Hon. Mr. R. K. Kirui, Ag. Resident Magistrate)

JUDGMENT

The Appellant herein Elijah Seko Ochito was charged, together with two other persons, with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He faced an alternative charge of handling stolen property contrary to section 322(2) of the Penal Code and further charges of rape contrary to Section 140 of the Penal Code and, in the alternative, indecent assault contrary to section 144(1) of the Penal Code. After a full trial wherein the prosecution called 10 witnesses, the appellant's co-accused were acquitted of all charges while he alone was convicted on the charge of robbery with violence and sentenced to suffer death. He was acquitted of the rape and indecent assault charges.

The appellant's appeal is against both the conviction and sentence and is based on the grounds that he was not properly identified as to be connected with the alleged robbery. He contends that he was convicted purely on the basis of dock identification and in the absence of clear proof of the charge. He complains also that the evidence upon which the learned trial magistrate relied when convicting him was contradictory in material aspects and that certain essential witnesses were not called to testify. The appellant states also that the doctrine of recent possession was wrongly applied in the absence of conclusive evidence as to the recovery of the stolen goods and the arrest of the appellant, thus making the conviction unsafe.

According to the appellant, the learned trial magistrate also erred in law and in fact by failing to find that the appellant's constitutional rights under Section 72(3) had been violated and in shifting the burden of proof to the appellant.

The particulars of the robbery charge were that on the night of 7th and 8th December, 1999 at Club 95 within Showground in Nakuru district, jointly with others not before court, the appellant and his co-accused while armed with dangerous weapons, namely, pangas, swords, axes and rungus robbed one Christopher Chirchir Lambaino of 47 audio cassettes, disco deck machine, 5 large speakers, a Panasonic T.V. , 2 radios cassettes, assorted brands of beer and cigarettes, 2 large bags and Kshs.390,000/= in cash, all valued at K.Shs. 400,000/=. They are said to have used actual violence against the said Christopher

Chirchir Lambaino in the course of the robbery. The particulars in the alternative charge under section 322(2) were that, on 6th January, 2000 at Mwariki Estate in Nakuru, otherwise than in the course of stealing, the appellant retained one Panasonic radio cassette, two microphones, one large speaker, 47 radio compacts all valued at K.Shs. 21,700/= knowing or having reasons to believe them to have been stolen or unlawfully obtained.

The appellant, who represented himself at the appeal, filed written submissions which he relied entirely. He invited the State to reply to those submissions and elected not to say anything in response to the submissions by the State Counsel, Mr. Mugambi. The State concedes the appeal on the grounds that the conviction was arrived at purely on the basis of recent possession yet the appellant was hospitalised and not at his home when the alleged recovery was made. Further that there was no evidence tendered as to whether the house where the recovery was made actually belonged to the appellant or whether he had any control and/or responsibility over said house and the goods or whether he was responsible for their being stored there. Mr. Mugambi submitted further that the prosecution did not give evidence as to who led the police to the said house.

As is required of us, we have studied the proceedings and judgment of the lower court evaluated and analysed the evidence adduced at the trial. It is clear to us that the appellant was convicted on the basis of possession of stolen properties only as appearing at page 3 of the judgment where the trial magistrate records that:

"The 1st accused. It was stated he was at the scene. The speakers, microphone, radio cassette and 47 audio compacts were recovered in his house. Against him therefore there is evidence of recovery……. The witnesses purported to have identified him. Faith (P.W.5) for instance said they had a long conversation. Had this been the only evidence i.e. the evidence of identification the same would not have formed a basis for a conviction as the witnesses were not very explicit as to the circumstances surrounding the identification. This however, coupled with the evidence of recovery only leads to an inference – one of guilty."

The appellant was arrested by P.W.2 P.C. Benson Chirchir. In his evidence in chief, he testified that, on 6th January, 2000 he, together with other officers at the Divisional Police Headquarters Nakuru, received a report that a suspect had stolen goods in his house. They went to the house where they found the appellant and recovered several electronic items. Under cross-examination, however, he changed his story and said that the house where the goods were recovered did not belong to the appellant but to one Rhonda, and that he and his colleagues found the appellant's wife there. He also said that he never found any of the exhibits in the accused persons' possession.

In his sworn defence, the appellant denied having robbed the complainant. He testified that he was arrested after he had found P.W.2 talking to his wife and questioned his action and motive. He claimed he was slapped, handcuffed and taken to his house, where a search was conducted but no recovery made. That he came to learn of the robbery incident while remanded at the Central Police station and knew nothing of the same. That he did not know his co-accused either. According to the appellant the charge was based purely on a grudge that P.W.2 bore towards him and which had to do with P.W.2's interest in the appellant's wife.

Apart from P.W.2 no-one else testified on the recovery of the stolen items. Clearly his evidence negates any finding that the recovery of the stolen goods was in the appellant's house or that he had anything to do with them as to connect him to the robbery. We find therefore that the trial magistrate's finding that the appellant was found in possession of items that were stolen was not supported by the evidence adduced before court and the learned trial magistrate erred in so finding. That being the case, we accept the learned Stated Counsel's submission that the conviction cannot be sustained and the appeal must succeed on that ground even without belabouring ourselves with the rest of the grounds of appeal.

Accordingly the appellant's conviction is hereby quashed and the death sentence passed against him set aside. We order that he be set free forthwith and released from jail unless he be otherwise lawfully held.

DATED, SIGNED and DELIVERED at Nakuru this 12th day of February, 2009.

M. KOOME **M. G. MUGO**

JUDGE **JUDGE**