



**REPUBLIC OF KENYA**

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

**Criminal Appeal 67 of 2008 & 69 of 2008 (Consolidated)**

**JOHN KAMAU GITHUKU ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the sentence of T.W. Murigi Senior Resident Magistrate  
in Senior Principal Magistrate's Criminal Case No. 1241 of 2005 at MURANGA)*

**CONSOLIDATED WITH**

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**CRIMINAL APPEAL NO. 69 OF 2008**

**ALEX WANGERI KARACHU ..... APPELLANT**

**VERSUS**

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*(Being an appeal from the sentence of T.W. Murigi Senior Resident Magistrate  
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**JUDGMENT**

The above two appeals were consolidated and on consolidation the appellant John Kamau Githuku in Criminal Appeal No. 67 of 2008 was made the first appellant. Alex Wangeri Karachu the appellant in Criminal Appeal No. 69 of 2008 was made the second appellant. The second appellant sought to withdraw his appeal and his prayer was granted. His appeal therefore was marked as withdrawn. The only appeal therefore being considered in this judgment is Criminal Appeal No. 67 of 2008. The appellant was charged with 8 counts of robbery with violence and one count in the alternative of handling stolen goods. The lower court after hearing the case in its judgment convicted the appellant for robbery with violence and for handling stolen goods. We have experienced difficulty in following the learned magistrate's said conviction bearing in mind that the appellant had 8 separate counts of robbery with

violence and one alternative count of handling stolen goods. The learned magistrate in her considered judgment stated, *“It is for the foregoing reasons that I find the first accused (1<sup>st</sup> appellant) guilty of the offence of robbery with violence contrary to section 296(2) of the penal code and handling stolen property contrary to section 322(2) of the penal code .....”* In sentencing the learned magistrate did not indicate the different counts that the appellant faced. She stated thus, *“The first accused (1<sup>st</sup> appellant) is sentenced to death on count III and on sentence on handling stolen goods is held in abeyance.”* On being convicted and sentenced the appellant filed this appeal against both conviction and sentence. This is the first appellate court. As such we are expected to submit the lower court’s evidence to fresh and exhaustive examination. We need to weigh conflicting evidence and to draw our own conclusion. In doing so we need to make allowances for the fact that the trial court had the advantage of hearing and seeing the witnesses. See *Okeno v Republic [1972] E.A. 32*. In examining afresh the lower court’s evidence we find in our view that it is best to start at the point of arrest of the appellant. PW 8 Corporal Dan Kagembo stated that on the 1<sup>st</sup> June 2005 the appellant John Kamau Githuku was said to have been involved in a series of robberies. This witness together with other police officers laid an ambush for the appellant. On entering the appellant’s house and carrying out a search they recovered therein 8 different makes of mobile phones, several watches, home made gun and assorted clothing. PW 8 said that it took them three trips in their vehicle to carry the recovered goods to the police station. The items were later identified by the complainants in counts No. II to VIII. In cross examination he stated that the mobile phones and watches were hidden in the ceiling of the appellant’s home. That the appellant signed the inventory of the recovered goods in the presence of his parents. Leonard Githinji was the complainant in count VIII. He stated that on 15<sup>th</sup> May 2005 at 4a.m. he was at his home with his family. He heard a knock at the door and thinking that it was his neighbour he opened the door. Instead however he found four armed men who were armed with axes, pangas, stones and rungun. They threatened to kill him and forced him back into the house. They demanded money and he gave them Kshs.600/-. They demanded for his mobile and he gave them his Motorola mobile phone T.190. On 19<sup>th</sup> February 2006 at CID Muranga offices he identified his mobile phone. He said that he identified it because the numbers on it were faded and because it had gum on it and the battery socket was dusty. He found his SIM card intact in the phone. He positively identified the phone as the one which had been stolen from him. He however stated that he did not identify any of the robbers. Benson Irungu Kibeu was the complainant in respect of count No. V. Robbers went to his home on 29<sup>th</sup> May 2005 at 12.30a.m. and stated that they were policemen who wanted to search his house for stolen goods. On opening the door for them he noted that they were armed with axes and sticks. They placed an axe on his forehead and took his mobile phone Nokia 3310. They also ransacked his house and took clothes. He did not identify any of the robbers. Later on at the CID office Muranga he identified the cover of his phone which was identifiable because his daughter had put “cutex” on it. He was able to demonstrate to the court that the cover was for his Nokia mobile phone. Nothing else was recovered. Faith Ngenia Wanjohi was on 15<sup>th</sup> October 2005 at her parents home when people began to break down windows and were banging doors. This was during the night. Her father opened the door and on so doing twenty men got into the house and ordered him to lie down. The men were armed with pangas, axes and rungun. They demanded money and this witness gave them Kshs.100/-. They demanded for her mobile phone and she gave them her Motorola mobile phone T. 192. They took her parents to their bed room and also robbed them. The witness however said that because of the torches that the robbers were using she was able to identify one of the robbers whom she identified at the dock as John Kamau Githuka the 1<sup>st</sup> appellant herein. She described him as, *“medium in height and medium in colour.”* Although this witness stated that she participated in an identification parade, that was not confirmed by the police officers who gave evidence in this case. Felix Wanjohi Mwendia was the complainant in respect of count No. I. Robbers struck his home on 15<sup>th</sup> May 2005 at 12.55a.m. They began breaking his windows until they opened the doors for them. Six men entered and they were armed with bars, rungun and axes. They dragged him to his bed room and demanded money from him. They also stole his mobile phone Nokia 3310, clothes, plates, his wife’s watch, his child’s mobile and bed sheets. He did not identify any of the robbers. Later at CID office Murang’a he identified his mobile. He noted that the mobile was his because it had a mark on it which he had put on it with a nail. His SIM card was also intact in the phone. Eunice Wanjiru Wanjohi was the complainant in count No. II. She was the wife of Felix Wanjohi Mwendia. She was present when their windows were being broken with axes. On her husband opening the door ten men armed with pangas and axes entered. They had torches and they began to ransack the house. They stole money, mobile phone,

wrist watch, bed sheets, pullovers and other household goods. During the robbery she did not identify any of the robbers. Later she was able to identify her wrist watch that had been recovered. She identified the watch because she had owned it for a long time. It was of Orientex make. Loise Njoki Kamau was the complainant in count No. VI. On 29<sup>th</sup> May 2005 at 12.00a.m. people who were at her door ordered her to open for them. They said that they were looking for stolen goods. When they entered they demanded money from her and took her mobile phone Nokia 3310. They also took her clothes and a torch. They were with sticks and knives. During the attack they had threatened to cut her neck. She however did not identify any of them. Later at CID office Muranga she identified her sweater which had been recovered. She identified it by a tear which had been repaired by a tailor. Ernest Gachingi Mwangi was the complainant in count No. VII. He said that he was shopkeeper. On 29<sup>th</sup> May 2005 at 11.30p.m. he was tricked to open his door by people who described themselves as Administration police. When they entered he noted that they were armed with pangas and axes. They stole from him in total Kshs.5000/-. Shop goods, five shirts, 6 trousers, pair of Safari boots, two skirt suits and a sweater. They hit him with a side of a panga. Later he identified his trousers and a grey shirt which had been recovered. One brown trouser he identified because it had a hole. The other one had an ink stain. On his shirt he pointed a broken spare button which proved that it was his shirt. He however did not identify the robbers. John Wainaina Gicharu was the complainant in respect of count IV. He was a teacher by profession. On 12<sup>th</sup> February 2005 at 1.00a.m. he was awoken by bright torch light. He opened the door and two men got into the house. They were armed with sticks. They robbed him of his great wall TV, battery, two suit cases one green and black, assorted clothes and a watch Seiko make, utensils, black shoes and a radio Panasonic model. Later at CID office Muranga he identified his green suit case. He was able to identify it because of its broken handle. He did not identify the robbers. Prosecution also presented the evidence of Eunice Wanjiru Gachiengo. She suffered a robbery at her house on 29<sup>th</sup> May 2005. Her evidence however did not support any of the counts that the appellants were facing. She also did not recognize any of the robbers. PW 9 Ag. Inspector Kinoti Githinji said that on 15<sup>th</sup>/16<sup>th</sup> May 2005 there was a spate of robberies in Iyego area in Kangema. Following a tip off, they arrested the appellant on 1<sup>st</sup> June 2005. During his arrest various goods were recovered from his home. People who had suffered the robberies were invited to identify their goods. The goods were displayed at Muranga police station. Felix Wanjohi identified his mobile Nokia 3310 amongst those goods. This witness later in evidence stated that that phone of Felix Wanjohi was recovered from another person other than the appellant. Amongst the goods displayed Eunice Wanjiru Wanjohi identified her wrist watch. Eunice Wanjiru Gachiengo identified her cardigan. Loise NJoki Kamau also identified her cardigan. Leonard Githinji identified his Motorola model mobile phone make Talkabout. Irungu identified the back side of his mobile phone cover. At the hearing of this appeal the appellant presented to us his written submissions. We have had an opportunity to consider those submissions. Learned state counsel Mr. Makura did not oppose the appellant's appeal. He submitted that the learned trial magistrate erred to have convicted the appellant on the main count and also on the alternative count. In respect of that submission we are in agreement with the learned state counsel. The learned trial magistrate ought to have opted to either convict on the main count of robbery or convict on the alternative count of handling stolen property. Learned state counsel further faulted the lower court's judgment for the learned magistrate's failure to warn herself on reliance on identifying evidence of Faith Ngenia Wanjohi. In response we say that the evidence of identification was not the only evidence which supported count No. III. The witness in respect of that count also identified her Motorola mobile phone T. 192. In respect of items of properties recovered at the appellant's home learned state counsel argued that the lower court was in error in relying on the doctrine of recent possession. This he submitted was because the goods were recovered sixteen days after the robbery. He relied on the case of *R vs Cash [1985] QB 801* where it was held that items such as mobile phones changed hands very fast and in that regard the court found that a 9 day period did not disclose recent possession. Counsel therefore argued that the 16 day period in this case made the doctrine to be inapplicable. The requisites that need to be met before the doctrine can be invoked were set out in the case of *Isaac Nanga Kahiga alias Peter Nganga Kahiga vs Republic, Criminal Appeal No. 272 of 2005* (unreported) in the following 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.....”*

Bearing those standards in mind PW 8 and 9 gave evidence of the recovery of various items in the house of the appellant which items were identified by the complainant in counts No. II to VIII. Those items were positively identified by their owners and in some cases the owners identified specific peculiarities on those items. The goods were the subject of recent robbery. The robberies took place between February and May 2005. Most of the items except the one on count No. IV were stolen between 15<sup>th</sup> and 29<sup>th</sup> May 2005. The arrest of the appellants which seemed to have followed the search at his home was on 1<sup>st</sup> June 2005. This fact was supported by the appellant in his defence when he confirmed his date of arrest. The items recovered varied from mobile phones to clothes and suit cases. In our view the period between 15<sup>th</sup> May and 1<sup>st</sup> June was not prolonged sufficiently to break the chain of events. Amongst the items recovered were three mobile phones, a wrist watch and clothing. In case of the recovered mobile phones we reject the learned state counsel’s submission that the period of recovery was prolonged to so make the doctrine of recent possession inapplicable. This is so when one considers that those items were recovered in the appellant’s ceiling. The item which was the subject of the robbery of 12<sup>th</sup> February 2005 and which was recovered was a green suit case. The suit case cannot be said to be an item which changes hands frequently. We are of the view that the prosecution proved the case against the appellant on count II to VIII on the required standards. Having made that finding there cannot be any finding on the alternative count. On that score we therefore convict the appellant on count II, IV, V, VI, VII and VIII. We also confirm his conviction on count III and confirm his sentence on that count to suffer death as law provides as per the judgment of the lower court. The sentence on count II, IV, V, VI, VII and VIII shall be held in abeyance. We quash the conviction of the appellant on the alternative count. As stated before criminal appeal No. 69 of 2008 where the appellant is Alex Wangeri Karachu is hereby marked as withdrawn. That is the judgment of this court.

*Dated and delivered at Nyeri this 11<sup>th</sup> day of May 2009.*

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE