

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 32 of 2008

JACKSON SIKO ORONI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

JACKSON SIKO ORONI, the appellant was with another charged with three counts of capital robbery. In the alternative each was also charged with one count of being in possession of suspected stolen property contrary to **Section 323** of the **Penal Code** and handling stolen property contrary to **Section 323(2)** of the **Penal Code**. The other accused person was acquitted of all the charges but the appellant was convicted on the three counts of capital robbery and given the mandatory death sentence. He has appealed against both the conviction and sentence.

The three capital robbery charges were that on 11th June 2005 at Free Area Estate in Nakuru Town within Rift Valley Province the appellant and other accused person robbed John Mutua of a Gold Star TV, Afron video deck and other items all valued at Kshs.22,500/- and that at or immediately before or immediately after the time of such robbery they threatened to use personal violence on the said John Mutua. In counts two and three it was alleged that at the same date in the same estate they robbed Grace Nduta Ndungu and James Kariuki of various household items to the tune of Kshs.30,000/- and Kshs.8,650/- respectively. Grace Nduta the complainant in count two did not identify any of her robbers and none of her pieces of property was found with the appellant. James Kariuki the complainant in count three did not testify. There was therefore no evidence at all for the conviction of the appellant on those counts. We accordingly quash those convictions.

On count one the complainant, John Mutua, PW1, testified that the robbers broke into his house but they did not go into his bedroom where he was with his wife. They only took various household items from the seating room and went away. In the circumstances we find that the allegation that the robbers threatened to use violence on PW1 has therefore no basis. Consequently the robbery charge and/or conviction has also no basis.

As we have said, the robbers did not go into PW1's bedroom. He therefore did not see any of the robbers and did not therefore identify the appellant in this case as one of them. The appellant's conviction is based on his being found in possession of the Gold Star TV and the Afron Video Deck which PW1 positively identified as his. Although none of the people who arrested the appellant with the Gold Star TV testified, in his defence the appellant admitted that he was found with that TV and his explanation thereof was that he had carried it on his bike for a customer who was ahead of him on another bike. When those people stopped them the customer ran away and that he himself took the TV to the police station and later took the police to the customer's house. The police found PW1's Video Deck in appellant's house. The appellant never explained how he came to be in possession of the Video Deck. In the circumstances we reject even his explanation that he had carried the TV for a customer who disappeared. We are satisfied that the appellant was found in possession of PW1's Gold Star TV and Video Deck within a time span of about 24 hours and having failed to explain on how came to their possession on the doctrine of recent possession we agree with the trial magistrate that he stole them.

We, however, do not agree with the trial magistrate that the appellant robbed PW1 of those items. As we have stated PW1 remained with his wife in their bedroom when the items were stolen from the seating room. There is no evidence of any threats having been given. In the circumstances we find that the

robbery charge cannot hold. We therefore quash the appellant's conviction of the robbery charge and set aside the death sentence thereon and substitute therefor a conviction of burglary contrary to **Section 304(2)** and stealing contrary to **Section 279(b)** of the **Penal Code**. The appellant having been incarcerated since 12th June 2005 and that the appellant has family responsibilities we sentence him to six years imprisonment on each limb from the date of his conviction. The sentences shall run concurrently.

DATED and delivered this 26th day of November, 2009.

D. K. MARAGA

JUDGE.

W. OUKO

JUDGE.