

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 234 of 2007

(Arising from Nanyuki S.P.M.'s Criminal Case No. 924 of 2006)

DENNIS KITHINJI MUTHEE.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

Dennis Kithinji Muthee, the appellant herein was tried on a charge of robbery contrary to S. 296(1) of the Penal code. He also faced an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. After undergoing a trial the appellant was convicted on the main count and sentenced to 7 years imprisonment. The appellant was dissatisfied hence this appeal.

The particulars in respect of the main charge is that on 10th October 2005, at Mutheithia village in Kirimara Location Timau Division in Meru Central District within Eastern Province robbed Nicholas Muriuki Marete of a bicycle, one coat, a pair of gloves and at or immediately before or immediately after the time of such robbery used actual violence to the said Nicholas Muriuki Muthee. The prosecution tendered the evidence of four witnesses in support of the charge while the appellant gave sworn testimony without summoning independent witnesses. In her judgment, Miss Ndungu, learned Senior Principal Magistrate convicted the appellant on the basis of the doctrine of recent possession. The learned magistrate stated the appellant was found in possession of a bicycle, a coat and gloves belonging to the complainant.

On appeal, the appellant has put forward eight grounds in his petition of appeal. Miss Ngalyuka, learned state counsel conceded the appeal on the grounds: First, that there was no concrete evidence as to how the property were recovered. Secondly, that the state is unable to explain the reasons for the delay to arraign the appellant in court within the period set by the constitution.

I have re-considered the evidence on record and it is clear that Julius Kaimenyi (P.W.4), did not explain how the bicycle, the coat and gloves were recovered. Those were the items which were used to connect the appellant with the offence he was convicted for. It would appear the doctrine of recent possession was not proved. Even if the aforesaid doctrine was established, it will not sustain a conviction because the items were recovered after a period of one year since they were stolen. The items are goods which can easily change hands hence it cannot hold water to state that the items had not changed hands. The learned Senior Principal Magistrate did not give the unique circumstances which made her hold that the items had not changed hands within that year. I am satisfied that Miss Ngalyuka rightly conceded the appeal on this ground.

The other ground which was raised by the appellant is to the effect that he was held in police custody beyond the period fixed by the constitution. The record shows that the appellant was arrested on 1st May 2006 and placed in police custody until 5th May 2006 when he was taken to court. It is conceded that the appellant was held in police custody for over 3 days yet the constitution allowed the police to hold him for 24 hours. Miss Ngalyuka admitted that she has been unable to secure an affidavit from the investigating officer to explain the reasons for the delay. The consequence of an unexplained violation of a constitutional right will lead to an acquittal. Again, I am convinced that Miss Ngalyuka has properly

conceded the appeal on this ground.

In the end this appeal is allowed with a consequential order that the conviction is quashed and the sentence set aside. The appellant is set free forthwith unless lawfully held.

Dated and delivered this 13th day of November 2009.

J.K. SERGON

JUDGE

In open court in the presence of Miss Ngalyuka for the State and the Appellant in person.

J.K. SERGON

JUDGE