REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Criminal Appeal 55 of 2007

(From original conviction and sentence in Criminal Case No. 3100 of 2005 of the Chief Magistrate's Court at Nakuru – G. C. Mutembei {Chief Magistrate})

JOSEPH NDUNGU WANGUI……..…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The appellant **Joseph Ndungu Wangui** was charged jointly with another with two counts of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. He also faced an alternative charge of **handling stolen goods** contrary to **section 322(2)** of the **Penal Code** *(count III)* as per charge sheet and a third charge *(count IV as per charge sheet)* of **being in possession of an imitation firearm** contrary to **section 34(1)(2)** of the **Firearms Act (Cap 114 Laws of Kenya).** The particulars of the first count under **section 296 (2)** were that on the 16th day of November, 2005 along Eldoret Eldama Ravine road at Sawich forest in Koibatek District within the Rift Valley Province, the appellant jointly with another not before court, while armed with dangerous weapons, namely pangas, rungus and toy gun, robbed Solomon Sang of cash Kshs 4,850/= a mobile phone make Nokia 3310, black pair of shoes, maroon jacket and grey trousers all valued at Kshs 6,200/= and at or immediately before or immediately after the time of such robbery threatened to shoot the said Solomon Sang.

The particulars of count II read as follows: On the 16th day of November, 2005 along Eldoret-Eldama Ravine road at Sawich forest in Koibatek within the Rift Valley Province, the appellant jointly with another not before court, while armed with pangas, rungu and a toy gun, robbed DANIEL KIPLANGAT of cash Kshs 450/=, a black jacket and brown shoes all valued at Kshs 650/= and at immediately before or immediately after the time of such robbery threatened to shot the said DANIEL KIPLANGAT.

The particulars of the **handling charge** were that on the 16th day of November 2005 at Sawich Forest in Koibatek District within Rift Valley Province jointly with another not before court, otherwise than in the course of stealing, the appellant dishonestly received or retained two pairs of shoes black and brown in colour, two jackets maroon and black in colour all valued at Kshs 1,850/= knowing or having reasons to be stolen goods, the property of Solomon Sang.

As regards the charge under **section 34(1)(2)** of the **Firearms Act** the charge sheet stated that on the

16th day of November, 2005 along Eldama Ravine Eldoret road at Sawich Forest in Koibatek District of the Rift Valley Province he was found armed with an imitated firearm, namely a toy pistol, with intent to commit a felony namely robbery with violence.

After a full trial before the Chief Magistrate Nakuru Hon. G. C. Mutembei the appellant was convicted on both counts of robbery with violence and sentenced to suffer death. He was also found guilty under count IV and sentenced to serve three years imprisonment. We shall be quick to note that the learned trial magistrate imposed two death sentences in addition to the three year imprisonment term without stating that the 2nd death sentence and the imprisonment term would be kept in abeyance in view of the death sentence passed in regard to count 1.

Aggrieved by both the conviction and sentence the appellant filed this appeal citing five grounds as follows;

1. That the learned trial magistrate erred in law and fact in convicting the appellant while basing reliance on inconsistent prosecution evidence.

2. That the learned trial magistrate erroneously relied on the evidence of alleged recovery of exhibits without proof of ownership by the complainants.

3. That the appellant's defence was disregarded without any valid reason and that the judgment of the trial court did not comply with the requirements of section 169(1) of the Criminal Procedure Code.

The State, represented by learned state counsel **Mr. Mugambi,** has conceded the appeal on the ground that the conviction was based merely on the doctrine of recent possession, yet the complainants *(PW1 and PW2)* testified that they did not identify their assailants. Neither did they identify the goods allegedly recovered as being theirs, nor did they give any description or identifying marks of the same to prove that the same were robbed of them by the appellant. **Mr. Mugambi** submitted further that the arrest of the appellant was not without fault. He was arrested after he had escaped, the police having lost sight of the persons who attacked and robbed the complainants. The exhibits produced in court, having not been found on the appellant but in the bushes, the conviction was, according to the State unsafe and ought to be quashed.

Including the two complainants, the State called five witnesses. Three of the said witnesses were Police officers who participated in the arrest and recoveries. **PW1 Solomon Sang** testified that he was an employee of Silgoit Flower Farm where he worked as a driver. On 16th November 2005 he was driving his employer's motor vehicle KAQ 581G headed for Nairobi. He was in the company of **PW2, Daniel Kiplagat** who also worked with the said Silgoit Flower Farm as a turn boy. At about 2.00 a.m. while at a place called Sawich, within Chemasusa Forest, their vehicle was flagged down by two people waving torches. PW1 stopped the vehicle. He and PW2 were ordered out. The thugs proceeded to search their pockets strip them of their clothes and shoes. He lost to the robbers Shs 4,850/=, a Nokia phone, trousers, a jacket and shoes while his colleague lost Shs 450/=, black shoes, trouser and a jacket. He said his trouser was grey, the jacket maroon and the shoes black. The thugs were armed with rifles. After the robbery the assailants removed logs that they had used to block the road and ordered PW1 and PW2 to continue with their journey to Nairobi. They proceeded to Ravine Police Station and reported the matter. On their way back, at 5.00 p.m. PW1 and PW2 passed by the police station where they were told that some of the stolen goods had been recovered. PW1 was shown his trouser, jacket and shoes which had been placed before court and marked for identification as MFI:1-3. A flowered jacket and a hat were also displayed in court, which PW1 believed to have been the ones worn by one of the people who accosted them. It was PW1's testimony that he was not able to identify the people who robbed him and his

colleague because the assailants never allowed them to look at the assailants and it was at night. PW2 gave a similar account of the incident confirming the items stolen from him as stated by PW1, but stating further that he too was not able to identify the robbers.

Sgt. Peter Limo of Eldama Ravine police station testified as PW3. He told the court that PW1 and PW2 reported to him at the station on the 16th November 2005 at around 3.00 a.m. while half-naked. They recounted the ordeal they had undergone under the hands of armed thugs. They were accompanied by another person who drove into the station in a Toyota and who was said to have been alerted by PW1 and PW2 of the possibility of an attack by the same thugs. PW3 testified further that, using the Toyota, he and his colleagues proceeded to the scene of the attack. They came to the place where logs had been placed on the road as a roadblock and stopped. Two people emerged from the rear, one wearing a hat and a jungle jacket resembling those worn by disciplined forces. He held what appeared to be a pistol while his colleague called a rifle. PW3 and his colleague decided to challenge the two assailants and aimed their weapons at them. On realizing this, the two assailants started running away into the forest. PW3 and PW4 pursued the assailants but the two disappeared into the forest. They called for reinforcement from the police station and stayed at the spot until morning. Members of the public joined them at 6.00 a.m. and the group proceeded to search the forest. After 30 minutes of searching a jungle hat and a toy pistol were recovered 5 metres apart around the same spot. A dog which was with one of the members of public started barking up a tree and the appellant who was in a smoke jacket was seen up the tree. He was ordered to come down under the threat of the tree being cut. The appellant was arrested. It was PW3's testimony that the appellant led the search team to a spot where two jackets *(MFI 1 and MFI 7)* were recovered. Upon being searched at the station the appellant was found wearing two trousers one of which was exhibited in court as MFI-2. Under cross-examination PW3 stated that a toy pistol and hat were found near the place that the appellant was found. He started however that the appellant was arrested after the recoveries had been made.

PW4 PC Leo Mulinge confirmed that he accompanied PW3 to the scene of the robbery and also in the search for the robbers. His evidence as to the recovery of the exhibits and the arrest of the appellant matched that of PW3. Under cross-examination by the appellant he too stated that the appellant was found up the tree while the toy pistol was recovered on the ground. **Elizabeth A. Kiiru** was the investigating officer in the case. She testified that on 16th November 2005 she was instructed by her superior D.C.I.O. Koibatek to take over this case from the O.C.S. Eldama Ravine. The accused was placed in her custody and a toy pistol, a maroon jacket, two pairs of shoes, jungle hat and a trouser were also handed to her. She later called the complainants PW1 and PW2 who came and identified the recovered items as theirs. PW5 then recorded their statement and later charged the appellant. She produced the marked items as exhibit 1-9.

The appellant in his unsworn defence testified that he was arrested at about 5.00 a.m. while on his way to work. He told the court that he was confronted by members of the public and police officers who asked him where he was going. After he told them he said that he was 'one of them and started beating him. It was then that police officers arrested him and took him to the police station.

We appreciate that the state has conceded this appeal. However being the first appellate court we are mandated to review and re-evaluate the evidence tendered at the trial in order to arrive at our own independent decision. Dismissing the appellant's defence as being untrue, the learned trial magistrate stated in his judgment that the appellant could have called his employee to corroborate his defence evidence. The learned trial magistrate also found that the prosecution would have no reason to implicate the appellant in this serious offence. He proceeded to find that there was overwhelming evidence to justify the conviction. With due respect to the learned magistrate we are of the view that he appears to have shifted the onus of proof to the appellant which is clearly contrary to law. As correctly stated by the learned State Counsel the circumstantial evidence of recent possession relied upon by the trial court is not sufficient in our view to justify the conviction. The complainants in the robbery charge did not identify their assailants. The police witnesses testified that the thugs took off into the forest and that the appellant was spotted much later on top of a tree. We cannot find a direct link between the appellant and the robbery committed against PW1 and PW2 who did not even attempt to describe the persons who robbed them. Although PW1 said that one of the assailants was wearing a flowered jacket and a hat while PW2

stated that he identified the jacket which one of the robbers had, this piece of evidence does not confirm that the smoke jacket said by PW3 to have been the one worn by the appellant, when he was arrested, was either of the two jackets mentioned by PW1 and PW2. We are unable therefore to find that the appellant was one of the assailants or was in any way connected with the robbery. That he was found on top of a tree near the spot where recoveries was made is not conclusive evidence that he was one of the robbers who attacked and robbed the complainants herein. He may have been at the wrong place at the wrong time. His conviction on the robbery charges is in no way safe and cannot stand. Similarly the evidence does not disclose any linkage at all between the appellant and the toy pistol produced before court. The finding by the learned trial magistrate that the appellant was found wearing a trouser belonging to the first complainant is not supported by any evidence. It was stated in evidence that the appellant was found wearing two trousers but none of the complainants laid any claim on either of those trousers.

In view of the above we find that the appeal herein succeeds and the same is allowed. The conviction is hereby quashed and the sentence set aside.

Accordingly the appellant is hereby set at liberty and shall be released from jail forthwith unless otherwise lawfully held.

Dated signed and delivered at Nakuru this 13th day of November, 2009

M. G. MUGO

JUDGE

W. OUKO

JUDGE