REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 80 of 2008

JULIUS MUIRURI MUTUGI……..... APPELLANT

Versus

REPUBLIC…..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Principal Magistrate's Court at Murang'a in Criminal Case No.985 of 2007 by A. KIMANI NDUNGU – PM)

J U D G M E N T

The appellant was initially charged jointly with **Mary Njoki Muchoki** with one count of Robbery with Violence contrary to *section 296 (2)* of the Penal code. Particulars thereof were that on the 18th March, 2007 at Kiawambeu village in Murang'a District within Central Province, jointly with others not before court, while armed with dangerous weapons namely axes and pangas robbed **Paul Mwangi Ndungu** of one Toyota Car radio, kitchen knives, 4Kgs of hybrid maize seeds, 8Kgs of beans, 2 bed sheets, one blanket, one mattress, a spanner, 2 Motorola mobile phones, one 40KV battery, one jeans trouser, 1 battery clamps and 10 metric electric cable all valued at Ksh.30,495/= and at the time of such robbery threatened to use actual violence on the said **Paul Mwangi Ndung'u**. The two also faced an alternative count of handling stolen goods contrary to *section 322 (2)* Penal code. Facts being that on 2nd April, 2007 at Gichembe village in Murang'a District within Central Province, otherwise than in the course of stealing dishonestly received or retained one mattress, one bed sheet, one blanket, one pair or scissors, one pair of pliers and 2 files knowing or having reason to believe them to be stolen or unlawfully obtained.

The two returned a plea of not guilty and their trial was scheduled for 14th May, 2001. On that day however, the prosecution withdrew the charges against the appellant's co-accused and turned her into a prosecution witness. However the charge sheet was not amended to reflect the changed circumstances. We shall revert to this issue later in this judgment. The prosecution called a total of 7 witnesses. The totality of their evidence was as follows:-

PW1 was the appellant's girlfriend. On 1st April, 2007 she went to the appellant's house on a visit. The appellant was not around but his mother was, and gave her keys to the appellant's house. She waited for the appellant to come home but in vain. She then went to bed. At about 2.00 a.m. police officers came calling and ordered her to open the house and she complied. The police officers searched the house and removed items therefrom including a radio, TV, Blanket, bag, and mattress.

PW2 was employed by PW3 as a farmhand. On the night of 18th March, 2007, at about 1a.m whilst asleep in his employers house he heard a bang on the door and was ordered to open at the risk of being killed if he failed to do so. Suddenly a group of 5 people gained entry into the house through the kitchen door. He was unable to identify any of them. However he managed to slip away and ran to a neighbour's residence. He came back early in the morning the following day at about 5 a.m and found that the robbers had stolen a mattress, a battery, bed sheet, car radio, 2 files, pliers, battery chargers, 4 kg of maize and 10 kgs of beans belonging to his employer. He immediately informed his employer, PW3 in Nairobi and he came with the police officers. On 2nd April, there were screams in the village and the appellant was suspected. PW2 and others went to his home and laid an ambush. However the appellant escaped from his house. In the said house, PW2 identified beans, files, scissors, pliers, a phone cover, blanket and mattress as belonging to PW3. He was familiar with those items. PW3 too positively identified the said items when he was called upon for that purpose. He was the actual owner. Notably he identified the mattress from a cutting along the sides and the pliers. The mattress had been cut as it was bigger than the bed. The pair of pliers were ordinarily in his car for long so that he was familiar with them.

PW4 confirmed that the items displayed in court were recovered from the appellant's house. He is the local Assistant Chief. PW5 a local AP also confirmed recovery of the items from the house of the appellant.

PW6 heard of touts talking of a robbery suspect in the vicinity of Mukuyu bus stage. He got interested as there had been a spade of robberies in his Muchungucha village of Makuyu. He decided to follow the alleged suspect. On greeting him, the suspect took to his heels. The witness then boarded a vehicle headed for Nairobi. Coincidentally, the same suspect boarded the same motor vehicle at a further bus stage known as **Wanjii**. PW6 alerted the driver of the motor vehicle of the presence of the suspect. The driver in turn drove the motor vehicle to Maragua police station where the suspect who turned out to be the appellant was handed over to the police.

The appellant was put on his defence. He elected to give an unsworn statement of defence and called no witnesses. He said that he left home on 26th November, 2006 for Nairobi because of insecurity over Mungiki menace. He returned on 12th April, 2007 after Easter Holidays when he learned that the Assistant Chief and police officers had raised his house and found a woman there. They had then left with some items belonging to him and the woman they found there. The items taken as aforesaid were his scissors, mattress, bed sheet, radio cassette speaker and bag which was used to carry the said items missing. He decided to see the woman in question who turned out to be his co-accused. He took a short cut through Mukuyu and waited for a vehicle at Wanjii. He boarded the same and was instead taken to Maragua police station and the person who took him there reported that he was among those administering oaths. He was then taken to Murang'a police station. He was later charged alongside the woman. He had receipts for some of the items and not others in particular those that he bought in the market.

The learned magistrate having carefully considered and appraised the evidence tendered by both the prosecution and defence, found in favour of the prosecution, convicted the appellant and sentenced him to death as mandatorily required. The appellant was aggrieved by the conviction and sentence. He therefore lodged the instant appeal. He faulted the learned magistrate on the grounds that he wrongly invoked the doctrine of recent possession, failed to appreciate that his constitutional rights had been violated by long incarceration before he was arraigned in court, failed to resolve the contradictions in the prosecution case in his favour and finally, failed to consider sufficiently his defence.

When the appeal came up for hearing, the appellant tendered written submissions which we have carefully read and considered. **Ms Ngalyuka,** learned Senior State counsel opposed the

appeal and submitted that the robbery was committed on 18th March, 2007 and report thereof made to the police and the area chief the following day. Two weeks later assortment of times were recovered from the appellant's house which were positively identified by the owner PW3 and his farmhand PW2. Though the appellant claimed ownership of the items, the court considered that aspect of the matter and found the prosecution witnesses consistent and credible. The defence was therefore rightly dismissed. In the result the learned magistrate properly invoked the doctrine of recent to convict the appellant.

The determination of this appeal will turn on the procedural flaws committed by the learned magistrate during the trial. As already pointed out at the beginning of this judgment initially the appellant was charged alongside a co-accused. Subsequently, the charges against the co-accused were withdrawn. However the charge sheet was not amended by the prosecution or the learned magistrate to reflect the then obtaining position. What consequences flow from that over sight and omission?

The record as we have already stated shows that initially there were two accused persons when arraigned in court on 27th April, 2007 the appellant and one, **Mary Njoki Muchoki** who was later turned into prosecution witness number 3. Just before the trial commenced on 14th May, 2007 all the charges against **Mary Njoki Muchoki** were withdrawn and the appellant was left to stand the trial alone. However the initial charge sheet remained unchanged. It was not amended and or substituted. The facts in the charge sheet too remained changed. That being the case, the appellant, it would appear was convicted on a defective charge. The withdrawal of the charges against the appellant's co-accused, in our view completely and radically changed the characteristics of the initial charge. It behoved the prosecution therefore to prepare a fresh charge sheet and or amend the original charge sheet as the particulars in the earlier charge sheet referred to the two accused persons including the appellant. Indeed going through the record, we are left in no doubt at all that the learned magistrate proceeded with the case as though the case for the co-accused had not been withdrawn.

It cannot be said therefore that the failure to amend the charge sheet after the case against the appellant's co-accused was withdrawn did not occasion the appellant prejudice. It is for the foregoing reason that we are constrained to allow this appeal.

The upshot of the foregoing is that we allow the appeal, quash the conviction recorded against the appellant and set aside the sentence imposed on him. We order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 4th day of December, 2009.

J.K. SERGON

JUDGE

M.S.A. MAKHANDIA

JUDGE