REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 63 of 2005

PETER WANJOHI MBOGO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPODNENT

(Appeal from original Conviction and Judgment in the Senior Resident Magistrate's Court at Karatina in Criminal Case No. 1012 of 2005 dated 25th February 2005 by Mr. J. N. Nyaga – Ag. P.M.)

J U D G M E N T

Peter Wanjohi Mbogo, hereinafter referred to as "the appellant" was tried and convicted by the Senior Resident Magistrate **J. N. Nyaga Esq**. of Karatina Senior Resident Magistrate's Court on three counts of Robbery with violence contrary to Section 296(2) of the Penal Code. The appellant also faced an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. Having convicted the appellant on the main count, the learned magistrate made no finding on the alternative count and correctly so in our view. Upon conviction, the appellant was sentenced to death. That conviction and sentence provoked this appeal.

In his Petition of appeal, the appellant faults his conviction by the learned magistrate on the following grounds.

"**1. That the learned magistrate erred in law and fact when he based the conviction and sentence on circumstantial evidence regarding the alleged stolen watch produced in evidence.**

2. That the learned trial magistrate erred both in law and fact in convicting the appellant in the instant case yet failed to observe that the evidence adduced was insufficient and could not sustain a conviction as erroneously held by the trial court.

3. That the learned trial magistrate erred in law and fact when he rejected the plausible defence without giving cogent reasons for its rejection thus violated the provision of section 169 (1) of the criminal procedure code....."

The brief facts of the case were that on the night of 13th and 14th May 2004 the complainants in respect of each count were sleeping in their respective homes at Kiangai village when they were attacked by a gang of robbers. The first complainant was robbed of cash, goods as well as a wrist watch. The other complainants were similarly robbed of their goods. None of the complainant recognised and or identified the robbers. Nonetheless they reported the series of robberies at Baricho police station. The complainants were then treated at Karatina District hospital and were each issued with P3 forms.

On 28th May 2004 **Corporal Kamonde** (PW5), **P.C. Patrick** (PW7) and **Corporal Njoroge** (PW8) received information that there were suspicious people living on a plot at Kiamwangi village. They raided the plot and found the appellant and one **James Irungu** in a room. They searched the room and came across various goods including three watches. The police officers took the goods and also arrested the appellant together with **James Irungu**. They took them to Karatina police station. The complainants were summoned. The first complainant (PW1) identified one of the watches as his. The appellant and **James Irungu** were then charged with the instant offences. However **James Irungu Maina** was acquitted of the charges under section 210 of the Criminal Procedure Code at stage of no case to answer.

In his defence, the appellant stated that on 23rd May 2004, he was sleeping in his room when police officers came and took away his goods including three watches. He was then taken to the police station and charged. He went on to state that in the year 2000 he had quarrelled with **P.C. Kariuki** (P.W.7) over a woman. That the said policeman had threatened to kill him. He went on to state on oath that the watch that was produced in court was not the one that was found in his house. His was a citizen watch with a strap for Seiko 5. It also had a crack on it.

At the hearing of the appeal, the appellant elected to tender written submissions in support of the appeal. We have carefully read and considered the written submissions.

Ms Ngalyuka, learned state counsel opposed the appeal. Counsel submitted that a watch stolen from PW1 was found in possession of the appellant by PW5 and PW7. The said watch was positively identified by PW1 and his wife (PW4). The appellant did not give any explanation as to how he came by the watch. The conviction of the appellant was thus inevitable.

As it is a first appeal, the appellant is entitled to expect from us that we shall subject the evidence on record to a fresh and exhaustive examination, weigh conflicting evidence, and ultimately make our own findings and draw our own conclusion.

In convicting the appellant, the learned magistrate invoked the doctrine of Recent possession. He stated that the only evidence to connect the appellant with the spade of robberies was that he was found with a watch that was positively identified by PW1 and which had been stolen from him during the robbery. The learned magistrate rendered himself thus "**..... The accused was found with the stolen watch two weeks later after the complainant was robbed of it. He was therefore in recent possession of stolen property. He was either the thief or he handled stolen property. The accused has not given an explanation of how he came into possession of the watch. He was therefore the thief....."**

In the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga, criminal case number 82 of 2004 (unreported),** the court of appeal laid down the principles of law applicable in cases in which the doctrine of recent possession is in issue. In that case the court stated as follows:-

"**..... 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 positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant, thirdly, that the property was stolen from the complainant and lastly, 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 the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view, any discredited evidence on the same cannot suffice no matter from how many witnesses....."**

How do these principles apply to the circumstances of this case? Right from the word go the appellant maintained that the properties recovered from him were his. When PW5 arrested the appellant and took possession of the goods recovered, the appellant signed the inventory of the goods. When the appellant cross-examined PW5 regarding the watch PW5 he said "**..... You said that the watch was yours....."**

However it is instructive that the inventory aforesaid was never tendered in Evidence. We are certain that the inventory had all the particulars of the items recovered from the appellant, for instance make, serial numbers, quantity, special marks etc of the said items. As to why the prosecution failed to tender the inventory in evidence is any body's guess. Considering the stance taken by the appellant that the watch tendered in evidence was not among those items recovered from him the inventory would have gone a long way in clearing the doubts raised. Failure to introduce the inventory in evidence left lingering doubts as to the ownership of watch(es) recovered from the appellant. Those doubts must be resolved in favour of the appellant.

PW1 identified the watch as belonging to him courtesy of a Seiko 5 strap. We doubt whether a strap perse can be a basis for determining that the watch belonged to PW1. There was nothing special about the strap. People change straps of their watches all the time. It matters not that the strap may belong to a different make of a watch. We think that the prosecution did not tender cogent evidence to connect PW1 with the watch. One would have expected that PW1 in an endeavour to show that the watch belonged to him produce a purchase receipt for the same showing the serial numbers of the watch and its make. We are of the view that had PW5 produced the inventory and PW1 produced the receipt of the alleged watch, the trial court could have been in a better position to determine its ownership. It would have perhaps been able to match the serial numbers on the receipt with the actual watch.

We also note that when PW1 reported the loss of his watch to the police he did not at all give any particulars and or description of the watch. Under cross-examination by the appellant, PW1 stated:

"**..... I did not give the marks of the watch to the police station when I reported.....**" Surely how could he have failed to tell the police that his watch was citizen with a Seiko 5 strap?

There is some variance also in the evidence with regard to when PW1is alleged to have identified the watch. PW1 stated that he identified the watch on 27th March 2004. The evidence of PW7 is to the effect that the complainant was summoned to the police station on 28th May 2004 and he identified the watch as his. We do not understand how the complainant could have identified the watch on 28th May 2004 as claimed by PW7. If so, is it possible therefore that the complainant was shown the watch prior to the alleged identification? Once again the inventory taken if it had been tendered in evidence would have cleared the issue.

On the whole we are not at all impressed by the evidence, tendered in support of the doctrine of recent possession. It would appear that PW5 and PW7 deliberately decided for reasons best known to themselves to withhold some vital evidence for instance the inventory of the goods recovered from the appellant's house. The appellant claims that the watch tendered in evidence was not among those recovered from the house. He may be right given the discredited evidence of the search and recovery. It may well be true that the case against the appellant was after all orchestrated by PW7 following a quarrel over a woman as claimed by the appellant.

That being the case we would, allow the appeal, quash the conviction and set aside the sentence of death imposed upon him. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 7th day of May 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE