



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 7 of 2006

MOSES WAGURA KAGUNYA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the judgment of R.N. Muriuki,

Senior Resident Magistrate in Senior Resident Magistrate Magistrate's

Criminal Case No. 1594 of 2005 at Nanyuki)

JUDGMENT

The Appellant was convicted of a charge of robbery contrary to Section 296(1) of the Penal Code. He was sentenced to seven years imprisonment on that conviction. He has preferred an appeal against conviction and sentence. This is the first appeal. In deciding this appeal I am guided by the principles enunciated by the Court of Appeal Case of *Gabriel Njoroge vs Republic (1982 – 88) 1 KAR 1134 at page 1136* where it was stated:

*“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see *Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570*).”*

The prosecution's case was that a robbery took place on 9th July 2005 at 1a.m. at Timber Yard. PW 1 was a watchman at that yard. He was held by three men bound with rope and had his mouth covered. He did not identify any of the robbers. Later when he was released the following morning he discovered various items had been stolen from the

workshop. These included jerricans containing diesels, mattresses, two tables and a grinding machine. The owner of that business was PW 2 and he confirmed the theft. He said that there was report that diesel was being sold at Asian Quarters in Nanyuki. The matter was reported to the police. PW 3 described himself as a charcoal dealer. He said that on 8th July 2005 the Appellant told him that he was looking for a house. He took him to the plot where he himself resided. On the night of 9th July 2005 he was alerted by dogs that were barking outside. When he went outside he found the Appellant with other men and on opening a house and they proceeded to put items in that house. Those items were mattresses which he identified before court and two coffee tables. Later on in the company of other men the Appellant came ferrying jerricans of diesel. The Appellant explained to him that these items were from PW 2. On 11th July 2005 this witness assisted the Appellant to take those jerricans to the Asian quarters. PW 4 was a Police Officer who on getting information that diesel was being sold at the Asian quarters posed as a prospective buyer when the Appellant offered him the diesel for sale. The Appellant was arrested and they also recovered from

him mattresses and two coffee tables. The Appellant also assisted them to recover the grinding machine. In his defence the Appellant denied the charge. He implicated PW 3 by saying that he had commissioned him to sell the items and had promised to pay him a commission. The Appellant in submission in his appeal argued that the charge was fatal for having not reflected the name of the owner of the items. The charge reflected the name of the watchman. The argument that the charge fails for that failure has no merit because the theft was against the named watchman. The Appellant also argued that the lower court failed to consider his defence. To the contrary I find that the lower court analyzed his defence but rejected it. I have considered the other grounds of the Appellant's appeal. The prosecution in the lower court relied on the doctrine of recent possession of stolen goods. A case in point is **Ogembo vs Republic [2003] 1 EA**. The court held;-

“For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved (Lamambia v Republic [1984] LLR 1789 (CAK) followed) and that the appellant knew the property was stolen.”

The Court of Appeal in that judgment made reference to the case of **Bakari s/o Abdulla [1949] 16 EACA 84**;-

“that cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a case point no other reasonable conclusion, the presumption can extend to any other charge however penal”.

The doctrine was well satisfied in this case. The Appellant was found in possession of items of property which were identified by PW 2 as his properties that were the subject of a robbery. PW 3 also gave clear evidence of the Appellant's approach seeking for a house and how he on the night of the robbery brought into that house the items that were later identified by PW 2. These items were the subject of the robbery. This clearly shows that the Appellant participated in the robbery. I find the prosecution well

proved the case against the Appellant. I am in agreement with learned magistrate's finding that;-

“All the evidence points towards the accused as the person who was involved in the theft. He was seeing with the items by PW 3. Most of the stolen items were recovered from him just a day after the robbery from the complainant's store. I had no reason to doubt that the accused though not identified by PW 1 was one of the people who committed the robbery. The accused did also not give any reasonable to satisfactory account as to how he came into possession of the complainant's stolen property just a day

after the theft. I am satisfied that the prosecution has proved beyond reasonable doubt that the accused with others not before court robbed one Shapi Ole Lenkulai and at the said robbery threatened to use actual violence on the said Shapi”.

I find I am in agreement with that finding and accordingly the Appellant’s appeal is hereby dismissed.

Dated and delivered at Nyeri this 24th day of June 2008.

MARY KASANGO

JUDGE