



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. 243 & 246 OF 2003**

**JOHN MBELE MULWA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**CONSOLIDATED WITH**  
**CRIMINAL APPEAL NO. 246 OF 2003**

**NICHOLAS MUINDI KITAVI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The two appellants John Mbele Mulwa and Nicholas Kitavi, were jointly charged with one count of robbery with violence contrary to Section 296 (1) of the Penal Code. They were in the alternative each separately charged with the offences of handling stolen property contrary to section 322 (2) of the Penal Code. They were each convicted of the alternative charge of handling stolen property and sentenced to 10 years imprisonment with hard labour. They each appeal against the conviction and sentence.

The prosecution evidence was that the complainant, P.W.1 Martin Wambua, was sleeping in his house at Kamba village in the night of 23.11.2002. At about 2.00 a.m. his house door was hit and forcefully

broken inwards. He saw a person enter using a match box light which he lighted to see the intruder. He testified that he recognised the 1<sup>st</sup> appellant, John Mbele Mulwa. He had known him before for 10 years and so he just recognised him. 1<sup>st</sup> appellant was in company of two other men whom the complainant had not seen before and whom he did not identify then. One of the other two robbers tried to strangle him. The intruders then covered the complainant with a blanket and he could not see the attackers as they collected and took away properties from the house. When the attackers left, the complainant screamed for help. He meanwhile noted that they had escaped with several properties including 3 long trousers, a radio cassette and a shirt. The next morning the 3 long trousers, a t-shirt and one shirt, were recovered in the home compound of the complainant. Later the radio cassette and motor vehicle battery were recovered. The complainant identified these items at the police station. The attackers did not injure him.

P.W.2, Peter Muthoka was asleep on 23.11.2002 when he heard his son P.W.1, knock at his door. P.W.1 complained that he had been robbed by a group of people one of whom was John Mbele Mulwa. P.W.2 looked for the suspect John Mbele Mulwa the next day but did not see him. On 25.11.2002 he reported the incident to the police at Kangundo Police Station. Then on 29.11.2002 he saw the 1<sup>st</sup> appellant and with the help of two people Kongo Mulwa and Mutuku Wambua, P.W.2 arrested the 1<sup>st</sup> appellant whom they escorted to appellant's father's home. It was P.W.2's further evidence that the 1<sup>st</sup> appellant admitted that he knew where the battery was and that he would lead them there. He then led them to the home of the 2<sup>nd</sup> appellant Nicholas Muindi Kitavi where the latter was found. In the meantime P.W.2 had requested the help of the Assistant chief of the area who accompanied them to the 2<sup>nd</sup> appellant's home. P.W.2 further testified that on being confronted over the robbery, the 2<sup>nd</sup> appellant admitted there and then, that he had taken the radio cassette to Nairobi. The two appellants were then escorted to Kangundo Police Station where they were detained and later charged. That the next day the father of the 2<sup>nd</sup> appellant delivered the radio cassette to P.W.2 who in turn took it to the police.

P.W.3, Alex Mwikya Musembi was the Assistant Chief of Muisuni Sub Location. He testified that on 29.11.2002 P.W.2 reported to him in company of 1<sup>st</sup> appellant, under arrest. He reported that 1<sup>st</sup> appellant and 2<sup>nd</sup> appellant had robbed the complainant and that the 1<sup>st</sup> appellant had said that he knew that the battery was at home of the 2<sup>nd</sup> appellant. The Assistant chief led them to the home of the 2<sup>nd</sup> appellant who admitted that he had the radio but had sent to Nairobi. The Assistant chief then took the two appellants to Kangundo Police Station.

When P.W.4 the father of the 2<sup>nd</sup> appellant, got information from the Chief that his son had been arrested for theft of a battery which it was alleged he had bought, he confronted his son, called Muasya who as a result ran away. He broke into his son's house and therein recovered a battery, which he escorted to the Chief.

In the meantime P.W.5, James Musyoki Munywoki, got information that a stolen battery was making rounds in his sub location. He summoned P.W.4 whom he ordered to check at his home to establish whether his son was hiding a battery. P.W.4 went and recovered the battery in his son's house and brought it to the Assistant Chief. The battery was later identified by the owner before it was delivered to the police.

P.W.8, Pc. Anthony Mbithi was on duty at Kangundo Police Station on 26.11.2002 when Assistant Chief, P.W.3 escorted the two appellants to the station. The complainant who was present explained to him how three men broke into his house on 23.11.2002 and robbed him of various items.

P.W.6, Pc. Wilson Mutai, is the investigating officer in this case. When he received this robbery report he started investigating. 1<sup>st</sup> appellant was taken out of the police cell and he led P.W.6 to a shop in Kwa Kamba market where he claimed he had sold the battery. The owner of the shop is said to have given the name of the person who bought the battery. At the home of the alleged purchaser of the battery, the mother of the alleged purchaser opened the house of the alleged purchaser but found no battery. The battery in court, P.W.8 claimed, was taken to the Police Station by the 2<sup>nd</sup> appellant's father. And the radio cassette in court was also taken to the police by the 1<sup>st</sup> appellant's father.

On being put on his defence the 1<sup>st</sup> appellant who gave an unsworn statement, stated that Muthuka, P.W.2 went to him on 24.11.2002 and claimed that he knew where the stolen property was. He was, as a result, arrested and taken to the police with some property whose origin he did not know.

The 2<sup>nd</sup> appellant who also gave unsworn statement stated that he was arrested on 22.1.2002 by Assistant Chief who went to 2<sup>nd</sup> appellant's home. That the Assistant Chief claimed that the 2<sup>nd</sup> appellant had stolen property i.e. a radio and battery. He was arrested and taken to the Police Station where he denied the theft or possession of the alleged stolen property. He denied knowledge of the exhibits in court i.e. the radio and battery.

In handling the evidence before him, the honourable trial Magistrate concluded, and rightly so, that there was little positive identification of the 1<sup>st</sup> appellant by the complainant. He noted that the offence of robbery was committed at night in the dark. I have re-evaluated the evidence. I am also of the view that the match-light claimed by the complainant to have helped him identify the 1<sup>st</sup> appellant was inadequate and unreliable. The identification claimed by the complainant of 1<sup>st</sup> appellant in my finding is accordingly unsustainable. There being no other evidence linking the two appellants to the robbery, all that remains is to consider whether there was recent possession in relation to the battery or the radio cassette.

I have examined the evidence relating to possession of the battery and the radio cassette. The main testimony came from P.W.2, Peter Muthuka who arrested the 1<sup>st</sup> appellant and took him to the home of the 2<sup>nd</sup> appellant in the presence of P.W.5, the assistant chief. The evidence of these two purports to establish that the 1<sup>st</sup> appellant confessed that he knew where the radio cassette and battery were. That the 2<sup>nd</sup> appellant said that the radio cassette was in Nairobi and that it was brought to P.W.2 the next day before P.W.2 took it to the police. He claimed that the radio cassette was brought to him by the father of the 2<sup>nd</sup> accused. It is clear from the evidence of P.W.2 and P.W.3 that they did not recover either item on 29.11.2002.

However, P.W.4 Kaloki Lua is the person who recovered the battery from the house of his son called Muasya who ran away when P.W.4, his father, began inquiring of the battery after getting a letter from the Assistant Chief James Musyoki. P.W.4's evidence suggests that the battery had been sold to the 1<sup>st</sup> appellant, probably by Musya who had ran away. On the other hand P.W.4's evidence can mean that the battery was sold to his son Musya who ran away when inquiry started. It is not clear whether it was the two appellants or either of them who sold it to Musya, in which case the appellants or one of them would carry responsibility.

On the issue of the radio cassette, who brought it from Nairobi, or where it was and why was he not called as a witness to inform the court as to how he obtained it and from whom and with what explanation? One Peter Musembi is mentioned but he was not called as a witness while his evidence would be crucial. On the other hand P.W.2 was the father of the complainant. His evidence would not be taken as independent. And yet it would appear he was the one who carried out much of the investigation in this case. He arrested 1<sup>st</sup> appellant and took him to the home of 2<sup>nd</sup> appellant where he arrested the 2<sup>nd</sup> appellant. It is his evidence which suggests where the stolen items were said to be found. He is the one who is said to have received the radio from Nairobi and took it to the police despite the fact that the two Assistant Chiefs had already been involved in the case from the start.

I have carefully considered the totality of the evidence and do not feel comfortable to conclude that the radio cassette and the battery were found in the possession of the two appellants to require them to give an innocent explanation as to how they came to their possession. In my understanding, before the burden to explain possession momentarily shifts to the accused, possession must not be in doubt, as in this case. The benefit of the doubt should therefore go to the appellants.

For the above reasons, the appeals of the appellants has merit. The appeal is hereby allowed. The convictions of handling stolen property is hereby quashed and the sentence of 10 years set aside. Each

appellant is hereby set at liberty forthwith unless otherwise lawfully held in prison. It is so ordered.

**Dated and delivered at Machakos this 23<sup>rd</sup> day of February 2006.**

**D. A. ONYACHA**

**JUDGE**