



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Criminal Appeal 197 Of 2002**

**PETER MWANGI WAIRAGU ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT OF COURT**

The appellant, **Peter Mwangi Wairagu** was charged before the Senior Resident Magistrate's Court in Molo with the **offence of robbery with violence contrary to Section 296(2) of the Penal Code.**

The particulars of the offence are that on the 3<sup>rd</sup> day of November 2001 at Molo Township in Nakuru District of the Rift Valley Province jointly with others still at large, robbed **Kennedy Ochoe Onyango** of one jacket, one pullover, cash money Kshs.500/- and personal documents, all totaling Kshs.2,500/- and at or immediately before or immediately after the time of such robbery used personal violence to the said Kennedy Ochoe Onyango.

The appellant pleaded not guilty to the charge and after a full trial, the learned Senior Resident Magistrate R. Kirui convicted the appellant as charged and sentenced him to death.

The appellant being dissatisfied with both the conviction and sentence has appealed to his court. He has raised the following grounds of appeal.

§ **That the learned trial Magistrate erred in law and in fact by convicting him on uncorroborated, inconsistent and contradictory circumstantial evidence.**

§ **The appellant was not identified by any of the witnesses.**

§ **The learned Magistrate erred by admitting the cautionary statement.**

In addition to the above grounds the appellant, presented a supplementary amended "memorandum" of appeal and grounds of appeal during the hearing which grounds we admitted. The issues raised in the supplementary record are cutting across the above grounds and therefore will not repeat them.

The evidence adduced that lead to the conviction of the appellant can be summarized as thus;

On 3<sup>rd</sup> November 2001 at about 8.00 p.m. the complainant was walking home alone at Maishani, Molo when four (4) people attacked him at a dark place. A struggle ensued and the complainant fell in a ditch. The men pulled out his shirt, jacket, a pullover and other personal items all valued at Kshs.2,000/-. Some coins fell from his pockets and while the men were scrambling over the fallen coins, the complainant

managed to escape. He reported the matter to the police on the following day.

Two weeks later, at Mwananchi Bar, the complainant spotted Paul Ndungu Njuguna, (PW 2) wearing the same jacket which was stolen from him. PW 2 and Lucy Muthoni, PW 3 gave evidence of how the appellant sold the jacket to PW 2 on 3<sup>rd</sup> November 2001 at the same Mwananchi Bar at about 10.00 p.m. at a purchase consideration of Kshs.50/-. Since it was raining, PW 2 decided to wear the jacket and five days later he was arrested wearing the same jacket in the same bar. This was the same jacket which was allegedly stolen from the complainant.

Investigations were carried out by P.C Bernard Kiprotich, (PW4). It was established that the appellant is the one who had sold the jacket to PW 2 for Kshs.50/- on 3<sup>rd</sup> November 2001. In evaluating the evidence the learned Magistrate noted the following in his judgment.

*“The complainant positively identified the jacket as the one stolen from him during the robbery. The accused in his charge and cautionary statement admitted having the jacket but claimed it had been given to him by somebody else but never stated under what circumstances. He however, failed to explain how he got it in his testimony in court. He never even mentioned it but simply claimed to have been arrested over another offence, but later charged with robbery with violence.*

*In the absence of any explanation the only reason why he had the stolen jacket, just a short time after the robbery, is that he robbed or was involved in robbery of the complainant of it. I believe he was involved.*

*The complainant’s evidence is that the accused was with three others and that they struggled with him at the time of the robbery. That satisfied the requirements of **subsection (2) of Section 296 of the Penal Code.**”*

The trial Magistrate convicted the appellant by relying on the doctrine of recent possession.

On the part of the State, the learned Senior State Counsel supported the conviction and sentence as being safe and watertight based on the doctrine of recent possession; He submitted that there was inescapable conclusion that the appellant was part of the robbers who robbed the complainant of his jacket and other personal effects.

This being the first appellate court, it is the duty of this court to re-evaluate and reconsider the evidence as a whole and subject it to fresh and exhaustive re-examination (See **Okeno –Vs- Republic 1972 E.A – 32**).

The issue for determination by this court is whether the application of the doctrine of recent possession by the trial magistrate on the evidence that was adduced by the witnesses in this case, proved the guilt of the appellant to the required standard of proof beyond reasonable doubt.

In **Malingi –vs- Republic [1989]KLR 225** Bosire –J (as he was then) held at **page 227**

***“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly, that the item he has in his possession has been stolen: it has been stolen a short period prior to the possession: that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent: that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.”***

In this case, the complainant was robbed at night he did not identify the people who robbed him. However, five days later, he saw PW2 wearing a jacket which he positively identified to be the jacket which was robbed from him on the material night. The complainant made a report to the police. PW2

was arrested. When he was interrogated, he told the police that the appellant had sold the said jacket to him, on the 3<sup>rd</sup> of November, 2001 at New Mwananchi Bar for a sum of Ksh.50/=. PW2 knew the appellant prior to the material day when he was sold the said jacket. PW2's evidence was corroborated by the evidence of PW3 Lucy Mukami who testified that he saw the appellant who was well known to her selling the said jacket to PW2. She testified that the appellant had two jackets which she was selling. She recalled that the appellant sold the said jacket to PW2 at about 10.00 p.m., on the 3<sup>rd</sup> November, 2001. When the appellant was put on his defence, he did not give an explanation of how he came into possession of the said jacket so soon after the same was robbed from the complainant.

We have re-evaluated the evidence that was adduced before the trial magistrate and we are satisfied that the trial magistrate correctly applied the doctrine of recent possession to find the appellant guilty for the offence of the robbery of the complainant. The prosecution established that the appellant was in possession of the said jacket, which was positively identified by the complainant, two hours after the said jacket had been robbed from the complainant. The appellant sold the said jacket to the PW2 two hours after the said robbery. PW2's evidence as to the circumstances under which the said jacket was sold to him was corroborated by the evidence of PW3 who worked at the bar where PW2 was drinking beer when the said jacket was sold to him by the appellant. Both PW2 and PW3 knew the appellant very well prior to the said night when the appellant sold PW2 the jacket. The only inference that can be drawn as to the circumstances under which the appellant was found in possession of the said jacket two hours after the complainant was robbed is that it is the appellant who was among the gang of robbers who robbed the complainant of his jacket. The appellant offered no explanation that could satisfy this court that he came into possession of the said jacket under innocent and lawful circumstances.

We have considered the submissions that were made before us by both the appellant and by Mr. Koech on behalf of the State. We are satisfied that the prosecution proved its case on the charge of robbery against the appellant to the required standard of proof beyond reasonable doubt. We find no merit with the submissions made by the appellant that he was a second hand cloth trader who had sold the said jacket to PW2 under innocent circumstances. We find no merit in the defence that he offered before the trial magistrate. The said defence was mere denial.

We therefore dismiss the appeal against both conviction and sentence. The conviction and the sentence imposed by the trial magistrate on the appellant is hereby confirmed.

It is so ordered.

**Judgment read and signed on 23<sup>rd</sup> March 2006.**

**MARTHA KOOME**

**JUDGE**

**L. KIMARU**

**JUDGE**