REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 177 Of 2000

DAVID LANGAT KIPKOECH……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT OF THE COURT

The appellant, David Langat Kipkoech was charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on the night of the 16th and the 17th of October 1999 at Mathangauta Trading Centre Nakuru District, the appellant jointly with others not before court robbed John Kariuki Macharia of one weighing scale, one pressure lamp, one radio cassette make trident, several clothing items and goods of trade all valued at Kshs 34,150/= and at or immediately before or immediately after the time of such robbery wounded the Cecilia Wanjiru Kariuki. The appellant pleaded not guilty to the charge and after a full trial he was convicted as charged. He was sentenced to death as is mandatorily provided by the law. Being aggrieved by his conviction and sentence the appellant appealed to this court.

In his petition of appeal the appellant has raised several grounds faulting the trial magistrate for convicting him. He was aggrieved that the trial magistrate had found that the stolen items were in his possession yet evidence had been adduced that the same were found in possession of other people. He was further aggrieved that the trial magistrate had erred in convicting him whereas it was another person altogether who had been identified at the scene of the robbery by the complainants. He was aggrieved that the trial magistrate had relied on the evidence of identification whereas no identification parade was held to confirm his alleged identification by the complainant. He was finally aggrieved that his defence had not been considered before the trial magistrate reached the said decision convicting him. At the hearing of the appeal, the appellant with the leave of the court, presented to this court written submissions in support of his appeal. Mr Gumo, learned Counsel for the State submitted that there was overwhelming evidence which had been adduced by the prosecution to sustain the conviction against the appellant. He urged this court to dismiss the appeal.

Before we consider the said arguments made on this appeal, it is imperative that we set out the facts of this case, albeit briefly. On the 17th of October 1999 about 3.00 a.m. as PW3, John Kariuki Macharia was asleep in his house with his wife Cecilia Wanjiru Kariuki (PW5), robbers broke into their house and ordered them to give them money. According to PW3, the robbers were three in number. The two witnesses testified that the robbers pointed torches at them while demanding to be given money. PW5 gave the robbers Kshs 15,000/= after she had been beaten by the said robbers. The robbers also stole a radio, a weighing machine, a pressure lamp, PW3's clothes and goods of trade that were in their shop. Both PW3 and PW5 testified

that they were able to identify one robber who was however not charged with the appellant in this case. PW5 testified that she was injured on the head when she was hit with a panga. PW3 made the report to the police about the robbery incident.

PW1 Elijah Muyai, a neighbour to the appellant testified that at some unspecified date in November 1999 the appellant visited his home and borrowed a sum of Kshs 1,000/= from him. The appellant gave PW1 a weighing scale as a lien for the said sum borrowed. On the 7th of January 2000, the police went to his house and took away the weighing scale. The weighing scale was positively identified by PW3 as the one which was robbed from his house on the night of the 17th of October 1999. PW2 Elijah Koech, a neighbour to the appellant, similarly testified that the appellant went to his house and asked him to give him maize in exchange of which he gave him a pressure lamp. On the 13th of January 2000 he received information that the pressure lamp was required by the police. He took the pressure lamp to the chief who took it to the police. The pressure lamp was identified by PW3 as having been robbed from him on the night of the 17th of October 1999. PW4 PC Joseph Chirchir, acting on information went to the house of PW1 and recovered the weighing scale which had been stolen from PW3. PW7 Inspector Dalmas Ongeri investigated the case and after the conclusion of the investigations charged the appellant with others who were however acquitted by the trial magistrate, with the offence of robbery with violence.

When the appellant was put on his defence he denied that he had been involved in the robbery. He testified that he had been charged with the offence while he was in prison, having earlier been arrested for a different offence. He denied that he had been involved in the robbery.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced by the witnesses before the trial magistrate so as to reach its own independent determination whether or not to uphold the conviction of the appellant by the trial magistrate. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified (**Njoroge –vs- Republic [1987]KLR 19**). In this appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to prove the charge against the appellant to the required standard of proof beyond reasonable doubt. We have re-evaluated the evidence adduced before the trial magistrate and also considered the written submissions made by the appellant and the oral submissions made on behalf of the State.

The prosecution basically relied on one piece of evidence to sustain the conviction of the appellant. That evidence is that of the alleged recovery of the two stolen items in the possession of the appellant which items had been stolen from PW3's house on the night of the 17th of October 1999. According to the evidence adduced by the prosecution witnesses i.e. PW1 and PW2, during the months of November 1999, the appellant approached them and borrowed money and maize respectively from them. In exchange, the appellant gave them a weighing scale and a pressure lamp respectively. These two items were later recovered by the police from their possession in the month of January 2000. The two witnesses testified that it is the appellant, their neighbour, who had given them the said two items in exchange for the maize and the money. The appellant denied that he had given the two items to the said witnesses.

Having evaluated the evidence, the issue for determination by this court is whether the prosecution adduced sufficient evidence to enable the doctrine of recent possession to be applied in this case. There is no doubt that the two items i.e. the weighing scale and the pressure lamp were stolen from the house of PW3 on the night of the 17th of October 1999. PW3 positively identified these items. Nobody else claimed them. Indeed the said items were released to PW3 in the course of the trial. PW3 and PW5 identified another person to be the one who robbed them on the night in question. For some inexplicable reason the said person who was identified by PW3 and PW5 was not charged. They did not identify the appellant. The only evidence therefore that connects the appellant to the said robbery is that of the recovered

items. PW1 and PW2 were given these items by the appellant more than one month after the robbery incident. The two items were retrieved from them by the police in January 2000 which was three months after the robbery incident.

Under what circumstances does the doctrine of recent possession apply? In **Malingi –vs- Republic [1989]KLR 225 at page 227** Bosire J. in explaining the circumstances under which the said doctrine would apply stated as follows:

"***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 the present case it is clear that the time which the said items were recovered cannot be described as being recent. Over a month had passed since the said items were stolen from PW3. The doctrine of recent possession cannot therefore be applied in the case of the appellant. The period between the robbery and the recovery of the robbed items cannot be described as recent. However we have no doubt that the appellant dishonestly obtained the said goods or knew that the said goods had been dishonestly obtained. The appellant did not give an explanation which could have exonerated him from the charge that he dishonestly handled the said goods.

We therefore find that the prosecution did not prove its case against the appellant on the charge of robbery with violence contrary **to Section 296(2) of the Penal Code**. Having re-evaluated the evidence and considered the submissions made we find that the offence disclosed by the facts of this case is that of handling stolen goods contrary to **Section 322(2) of the Penal Code**. We accordingly substitute the charge of robbery with violence contrary to **Section 296(2) of the Penal Code** with that of handling stolen goods contrary to **Section 322(2)** and accordingly convict the appellant for the same. The appeal is therefore allowed to extent that the sentence of death imposed as mandatorily required by **Section 296(2) of the Penal Code** is set aside and substituted by a sentence of this court for the charge which the appellant has now been convicted of handling stolen property.

We have considered the fact that the appellant has been in remand or has been serving the sentence imposed since the year 2000. We are of the view that the appellant has been sufficiently punished. We therefore commute the appellant's sentence to the period that he has been in prison. He is set at liberty and ordered released from prison unless otherwise lawfully held.

DATED at NAKURU this 1st day of March 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE