REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 97 OF 2002

SAMUEL NDIRANGU MBUGUA…….....…….APPELLANT

VERSUS

REPUBLIC…….....…...…….RESPONDENT

(From original conviction and sentence in Criminal Case No. 1940 of 2001 of the Senior Principal Magistrate's Court at Naivasha – M. M. Muya [S.P.M.]

JUDGMENT OF THE COURT

The appellant, Samuel Ndirangu Mbugua was charged with two counts of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on the 27th of September 2001 at Naivasha Township, the appellant jointly with others not before court and while armed with dangerous weapons namely pangas, rungus and iron bars robbed Michael Kungu and Kassim Mwadzida of cash, mobile phone, car radio make Artech and a wrist watch as stated in the charge sheet and at or immediately before or immediately after the time of such robbery seriously injured the said Michael Kungu and Kassim Mwadzida. The appellant was alternatively charged with handling stolen goods contrary to **Section 322(2) of the Penal Code**. The particulars of the charge were that on the 28th of September 2001 at Naivasha Township the appellant, otherwise than in the course of stealing, dishonestly handled a car radio make Artech knowing or having reason to believe it to be stolen property. The appellant denied the charges and after a full trial he was found guilty of the main charge of robbery with violence and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted based on the prosecution evidence that was contradictory and insufficient to sustain a conviction on the charge. The appellant was further aggrieved that the trial magistrate had convicted him in the absence of any evidence being adduced by the prosecution to connect him with the robbery. He was further aggrieved that the trial magistrate had convicted him based on the evidence of an alleged recovery of the robbed item in his possession whereas evidence had been adduced which had established that the said item had been recovered in possession of another person. The appellant faulted the trial magistrate for convicting him without putting into consideration the evidence that he had offered in his defence which, in his opinion, exonerated him from the robbery.

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, Assistant Deputy Public Prosecutor made oral submissions urging this court to disallow the appeal and uphold the conviction of the appellant. He submitted that there was overwhelming evidence adduced by the prosecution which established that the

appellant was found with a car radio which had been robbed from the complainants a day before it was recovered from the possession of the appellant. He submitted that the doctrine of recent possession applied in the case of the appellant and in the absence of a satisfactorily explanation from him of how he came into possession of the said car radio, the presumption was that the appellant was the one who robbed the car radio from the complainants. We shall consider the submissions made in this appeal by the appellant and by the State after briefly setting out the facts of this case.

On the 27th of September 2001 at about 9.00 p.m., PW1 Michael Kungu, a taxi operator at Naivasha Town was hired by PW5 Kassim Mwadzida to take him to County Council Estate, Naivasha. PW1 took PW5 to the said estate and while at the gate of the house of PW5, they were attacked by robbers. PW1 was robbed of Kshs 400/= and his Motorola mobile phone. He was also robbed of his car radio make Artech. During the course of the robbery, PW1 was hit on the head with an iron bar and sustained injuries. PW5 was robbed of Kshs 100/= and was also twice hit on the head with an iron bar. PW1 and PW5 were not able to identify their assaillants but they recalled that the robbers numbered more than five. After the attack, PW1 and PW5 went to Naivasha Hospital where they were treated and discharged. They later made a report to PW3, Police Constable Patrick Opiny based at Naivasha Police Station and were issued with P3 forms which were filled by Meshak Odada, a Clinical Officer at Naivasha District Hospital and which were produced in evidence by PW4, George Kariuki on his behalf. The degrees of injuries sustained by PW1 and PW5 were assessed as harm.

On the 28th of September 2001 at about 1.00 a.m., PW6 Police Constable Laban Chepkok accompanied by two other police officers, went to Moi South Lake road where they had earlier received information that two suspects had been arrested by members of the public after the robbery of PW1 and PW5. The suspects had apparently been assaulted by the members of the public and had been seriously injured. PW6 was shown an Artech radio by the members of the public which was allegedly recovered in possession of the appellant by the members of the public. PW6 accompanied the appellant to his house and conducted a search but was unable to recover anything that could connect him to the robbery. The Artech radio which was allegedly recovered in possession of the appellant by the members of the public was positively identified by PW1 as the one which was robbed from him. The other suspect who was arrested by the members of the public with the appellant later died from the injuries that he had sustained when he was beaten by the members of the public. PW6 arrested the appellant and later charged him with the offence of robbery with violence for which he was convicted.

When he was put on his defence the appellant denied that he was involved in the robbery. He testified that he had been arrested by a group of people when he had gone to see a person who had been beaten by the members of the public. He was pounced on and stripped of his clothes. He testified that he was then handed over to the police who later charged him with the offence which he was not aware of.

This being a first appeal, this court is mandated to re-evaluate and to reconsider the evidence adduced by the witnesses so as to arrive at an independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put into mind that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as regard the demeanour of the witnesses (*See* **Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge of robbery with violence against the appellant to the required standard of proof beyond reasonable doubt. We have re-evaluated the evidence which was adduced by the prosecution witnesses and the defence which was offered by the appellant. We have further considered the submissions which were made before us by the appellant and by Mr. Gumo on behalf of the State.

The evidence that was relied on by the prosecution to secure the conviction of the appellant is that of the recovery of the car radio allegedly in possession of the appellant. The complainants were not able to identify the persons who robbed them. The prosecution adduced evidence to establish the doctrine of recent possession in its bid to secure the conviction of the appellant. Bosire J. (*as he was then*) gave the circumstances under which the doctrine of recent possession could be applied in the case of **Malingi –vs- Republic [1989]KLR 225** where at page 227 he held that:

"***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."***

For the doctrine of recent possession to apply, the prosecution must prove that the stolen item was found in the possession of the appellant. They must also establish that the said stolen item was found in possession of the appellant so soon after the item had been stolen from the complainant. The presumption that the appellant was involved in the robbery where the item was stolen would only apply if the appellant fails to give a satisfactorily explanation of how he came into possession of the said stolen item.

In this case, PW6 testified that he recovered the Artech car radio from the members of the public who allegedly recovered it in the possession of the appellant. PW6 further testified that the members of the public had apprehended the appellant and another person who later died from the injuries that he had sustained when he was beaten by the said members of the public. No said member of the public who allegedly saw the said car radio in possession of the appellant was called to testify in court. What we are left with is the evidence of PW6 which is insufficient to prove beyond reasonable doubt that the said Artech car radio was found in actual possession of the appellant. The submission made by the appellant that the said car radio was in possession of the suspect who died while undergoing treatment could not be dismissed offhand. Further, PW6 testified that when they re-arrested the appellant from the members of the public, they took him to his house where they conducted a search but were unable to recover anything that could connect him to the robbery of the complainants in this case.

Having therefore re-evaluated the evidence adduced and considered the submissions made, we are not satisfied that the doctrine of recent possession was properly applied in the case of the appellant. The prosecution did not establish beyond reasonable doubt that the Artech car radio belonging to PW1 was actually found in possession of the appellant. The submission made by the appellant that the said Artech car radio could have been in possession of the suspect who died raises reasonable doubt as to whether the said radio was actually found in possession of the appellant. This doubt will of necessity be resolved in favour of the appellant. We therefore find merit with the appeal of the appellant. We allow it.

We consequently quash his conviction and set aside the death sentence imposed on him by the trial magistrate. The appellant is acquitted of the charge of robbery with violence. He is ordered set at liberty and released from prison unless otherwise lawfully held. It is so ordered.

DATED at NAKURU this 10th day of May 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE