REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 192 of 2003

[From Original Conviction and Sentence in Criminal Case No. 191 of 2003 of the Chief Magistrate's Court at Nakuru –J. S. KABURU -S.P.M

JOHN KIMANI NDIRANGU ……...…..… APPELLANT

VERSUS

REPUBLIC ……..……..……...…….RESPONDENT

JUDGMENT OF THE COURT

The appellant, John Kimani Ndirangu *(with two others who were acquitted*) were 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 7th day of January 2003 at Kabazi Trading Centre in Nakuru District within Rift Valley Province, jointly robbed **Joseph Wambugu Ndirangu** of one jacket, one shirt, a pair of shoes, five empty gunny bags, lettuce 5gms, two tins of cauliflower 20gms each, fertilizer one kilogram and cash Kshs.3,000/- all valued at Kshs.8,495 and at or immediately before or immediately after the time of such robbery beat the said Joseph Wambugu Ndirangu.

The appellant also faced the alternative charge of **handling stolen goods** contrary to **Section 322 (2) of the Penal Code**.

The particulars are that on the 22nd day of January 2003 at Jumatatu Farm Kabazi in Nakuru District within Rift Valley Province, otherwise than in the course of stealing, dishonestly received or retained one jacket and one tin of cauliflower 20 grams all valued at Kshs.1,040/- knowing or having reason to believe them to be stolen goods.

The appellant pleaded not guilty to the charges and after a full trial, the appellant's co-accused were acquitted of the charges but the appellant was convicted of the offence of robbery with violence and was sentenced to suffer the mandatory death sentence. Being aggrieved of the conviction and sentence he has filed the present appeal.

In his petition of appeal, the appellant has raised several grounds of appeal. The appellant has challenged the conviction that was based on insufficient and contradictory evidence of the prosecution. He faulted the trial magistrate for relying on the evidence that failed to connect the appellant with the offence.

During the hearing of this appeal, the appellant sought to and was granted leave to rely on further grounds of appeal in his supplementary grounds of appeal and his written submissions. The issues raised in the further grounds of appeal cut across the above grounds except on the issue of the charge sheet which the appellant contends is defective and the fact that the trial magistrate rejected his defence without giving reasons.

On the part of the state, **Mr. Koech,** the learned State Counsel conceded to this appeal on the grounds that the complainant did not identify the appellant and thus the conviction was unsafe.

This being the first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced by the witnesses before the trial magistrate and reach our own independent determination of whether to uphold the conviction of the appellant. In reaching such determination, this court should always bear in mind that it neither saw or heard the witnesses and give due regard to that aspect.

(*See* the case of **Njoroge –Vs- Republic [1987] KLR 19)**

It is therefore necessary to set out the brief summary of the evidence that led to the conviction and sentence of the appellant.

Joseph Wamugu Ndirangu (PW 1) and the complainant in this matter said that on 7th January 2003 at 7 p.m. while walking to his home from Kabazi town in the company of his friend **James Githiri Ngethe (PW 2),** he was attacked by people. He estimated the number of people to be about five. It was dark and they beat him and stole from him cornflower, lettuce, fertilizer one bag, five empty sacks, a long coat, shoes and shirt. The complainant said and it is important to highlight this aspect verbatim

"*They took a coat but I got it hanged on a tree in the morning*."

The complainant said that he temporarily lost consciousness but he was able to walk home and on the third day he went to hospital and reported the matter to the police where he recorded a statement. At the time of the incident, he said he did not identify the accused, he said he heard later that the accused went to beat another person who identified them. He said his long coat and cornflower were recovered which he identified. He was not present when they were recovered. He said he had seen the accused persons at a bar on the same night of the attack.

James Githiri Ngethe, PW 2, who was also attacked alongside the complainant on the said night, told the court how on the material date at about 7 p.m. to 11 p.m. he and the complainant were walking home from Kabazi when they were attacked. He managed to run away and the following day he learnt that **PW 1** was injured and robbed. They went back to the scene and saw the complainant's coat. On 9th January, they reported the matter to the police and after two weeks they were told that the people who attacked them had been arrested, he went to the police station but he said he could not identify the attackers. He said they were drinking from 6 p.m. to 10 p.m. and he was not able to identify the attackers.

Patrick Tanui, PW 3, was the arresting officer. He told the court that on 21st January 2003, while on duty at Kilengelo Police Station, members of the public brought in the accused persons whom they said they had arrested on the roadside. Upon interrogation the accused persons confessed that they had a jacket and a tin of cauliflower. He then arrested the accused persons and produced the jacket and the tin of cauliflower which he produced in court as exhibits.

The other evidence, which is worthwhile to consider, was by **Joseph Mwangi Waithaka,** PW 4 and the Councilor of Kabazi Ward. He is one of the members of public who escorted the accused to the police station after a member of public by the name Samson Muiruri told him they had arrested two boys who wanted to rob him *(note this was another incident).* **PW 4** told the court that the two suspects mentioned the name of the appellant and when they went to arrest him they recovered some seedlings and jacket which the appellant said they stole from another person. *(Note also the other person's name was not mentioned*).

Inspector of police **Joab Odero,** PW 6 gave evidence of how he took the cautionary statement under inquiry, which was admitted in evidence.

Indeed it is on the basis of the said statement that the appellant was convicted of the offence of robbery with violence.

When put on his defence, the appellant gave unsworn statement and denied having committed the offence and that he was forced to sign a written statement after he was beaten.

There are serious contradictions that are notable in the prosecution's evidence, firstly, the complainant's evidence was that they were attacked at 7.00 p.m, and he was not drunk while the evidence of **PW 2** was that they were drinking from 6.00 p.m. to 10 p.m. and they were attacked between 10.00 p.m. and 11 p.m.

Secondly, the evidence of **PW 1** and **PW 2,** the key witnesses, was that they recovered the complainant's jacket the next morning. This leaves doubt as to which jacket was later recovered by the members of public with the appellant two weeks later. The appellant did not lead any evidence regarding the second jacket.

Further and more importantly, the complainant did not identify the appellant during the attack, was not present to identify the appellant when he was arrested or even to identify the items that were allegedly robbed. Even when the complainant reported the matter to the police, there is no evidence that he gave a description of the robbers to anyone, in any event the complainant and **PW 2** did not identify the attackers.

In the circumstances, the circumstantial evidence of how the jacket and seedlings were found in possession of the appellant is unsatisfactory and we agree with the learned State Counsel that the evidence before the trial court was unsafe to sustain a conviction.

When dealing with a conviction based on the evidence of possession of stolen items, the Court of Appeal recently held in the case of **Isaac Nganga Kahia Vs Republic C.A Cr. Appeal No. 272 of 2005 (Nyeri)** *unreported*

"It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complaint; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another. In order to prove possession, there must be acceptable evidence of search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how may witnesses."

Similarly on the evidence of confession, the circumstances under which the appellant was arrested by members of public and considering that in his defence he explained that he was beaten and signed a written document, it would be unsafe to sustain a conviction on this sole evidence. The law on the weight to be given to a repudiated confession is now settled. (*See* **Tumwamoi Vs Uganda [1967] EA 84** page 91.

Having carefully re-evaluated the evidence adduced by the prosecution and also considered the defence offered by the appellant, it is our finding that the prosecution failed to establish a charge of robbery with violence against the appellant to the required standard. We are in agreement that the state rightly conceded to this appeal.

In the premises, we allow the appeal, quash the conviction and the sentence imposed on the appellant.

The appellant is set at liberty and ordered released from prison unless otherwise lawfully held.

Dated at Nakuru this 24th day of November 2006.

MARTHA KOOME

JUDGE

D. K. MUSINGA

JUDGE