



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 281 OF 2003**

**FROM ORIGINAL CONVICTION AND SETNECE IN CRIMINAL CASE NO. NO. 14 OF 2002  
OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KIKUYU**

**SAMUEL KIMANI KAMAU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**SAMUEL KIMANI KAMAU** was charged with **ROBBERY WITH VIOLENCE** contrary to section 296(2) of the Penal Code.

The particulars in the charge are that on 26<sup>th</sup> April 2002, at Gikambura Village, Kiambu, the appellant, jointly with others not before court, while armed with dangerous weapons namely a pistol, robbed John Iraya Kamau of his motor vehicle, a Toyota corolla, Registration KAE 420P, a Panasonic Video camera, an Erickson telephone, and Kshs 2,000/= cash. The robbers are said to have used actual violence on their victim at or immediately before or immediately after the time of the robbery.

The appellant also faced a second count, which was for **HANDLING STOLEN GOODS**, contrary to section 322(2) of the Penal Code. The particulars of this offence were that the appellant was found in possession of one Panasonic Video Camera, which had been stolen from the complainant, on 26<sup>th</sup> April 2002, as particularized in count 1, above. The appellant is said to have been found in possession of the video camera on 12<sup>th</sup> May 2002.

After a full trial, at which the prosecution called six witnesses, and the appellant gave an unsworn statement in his defence, the learned trial Magistrate acquitted the appellant on count 1, but convicted him on count 2. The appellant was then sentenced to 5 years imprisonment, with 5 strokes of the cane.

In this appeal, the appellant challenged both his conviction and sentence. He put forward the contention that the trial court was wrong to have convicted him on purely circumstantial evidence. As far as the appellant was concerned, the evidence tendered by the prosecution, relating to the recovery of the video camera, was inconclusive. He also complained that the trial court failed to give due consideration to his defence. And, as regards sentence, the appellant contends that the same was harsh and excessive.

When canvassing the appeal, the appellant said that the video camera was not recovered in his house, but from his father's shamba. He says that he had had nothing at all to do with the video camera.

According to him, he only saw the video camera in the shamba on the morning of his arrest.

PW1, John Iraya testified that he was a video photographer. On 26<sup>th</sup> April 2002, he was driving from Naivasha, to his house at Gikambura. He got to his gate about 7.15p.m. Four men accosted him, when he was putting his car into the garage. One of the four men had a pistol. The robbers stole his car, cell phone, video camera, video stand, batteries and cash.

The vehicle was found abandoned, at Thogoto forest, but the other items were missing from it. Later, PW1 was called to the police Station and shown a video camera. He identified it as his. He also produced the supporting documents, which when compared to the particulars of the video camera, produced a perfect match. In effect, there was no doubt at all that the video camera belonged to PW1.

PW3, Anne Waithera, is a waitress at Swallo Bar, which is located at Dagoretti Mworoto. She recalls hearing the appellant and his brother talking about the fact that they had something to sell. The appellant and his brother were talking while having drinks at the bar where PW3, works i.e. Swallo Bar.

Later, when Police Officers came and made inquiries, PW3 led them to the house of the appellant's brother, who in turn told the police that it was the appellant who had the video camera.

PW4, Mbure Kimani is a brother to the appellant. He testified that the appellant and someone else had told him that they had a video camera to sell. It is then that he introduced them to PW3. The next day when PW3 went to PW4's house, in the company of Police Officers, PW4 took them to the appellant's house, which was some 20 kilometers away.

PW5, PC Fredrick Muturi said that he and his two colleagues received information that someone was selling a video camera at Dagoretti Market. They went there and met PW3, who directed them to PW4, who in turn directed them to the appellant. PW5 interrogated the appellant who then produced the video camera from the shamba, where it had been hidden.

The police then went through the statement which the complainant had recorded. They found his contracts, and then called him. The complainant went to the police Station, with receipts, and was able to establish that he was the owner of the video camera.

When the appellant was put on his defence, he said that the video camera was not recovered from his house. He alleged to have seen it for the first time at the police station. If nothing else, that testimony is divergent from what the appellant told this court. When canvassing his appeal, the appellant said that he had seen the video camera in the shamba. When asked whose shamba it was, he said it was his father's. He went on to explain that even though the shamba belonged to his father, the house nearest to it is his (appellant). His father's house was said to be situated further away.

Even though the appellant was not giving new evidence during the hearing of his appeal, he chose to give that version of events to the court. At that time I had not had the benefit of perusing the record of the proceedings before the lower court. I therefore had no idea that the submissions by the appellant were at variance with the evidence which he had given at his trial. But, now that I have noted the variance, I can only say that the learned trial Magistrate, cannot be faulted for convicting the appellant.

But even without the new information given by the appellant, I note that the evidence of PW1, PW3, PW4 and PW4 was consistent and corroborative. PW3 was told by the appellant that he had something to sell. The said thing was a video camera, as PW4 said. Interestingly, the appellant did not ask PW1 any questions at all.

When questioning PW5, the appellant emphasized that the video was not recovered from his house. However, he seemed to have forgotten one thing, that the video camera was recovered inside a brief case, which was in the shamba. That would explain why PW3 and PW4 did not see the video camera inside the police vehicle. It is only when the brief case was opened, at the police station that the two witnesses had the chance to see it.

Everything considered, and having re-evaluated the evidence on record, I find that there was absolutely no doubt that the appellant was in possession of the video camera. Also, given the manner in which he was striving to sell it off, I have no doubt that the appellant knew or had reason to believe that the goods were stolen. Why else would one want to hawk his own video camera, worth Kshs 100,000/=, through a bar waitress, at Dagoretti Mworoto?

I therefore uphold conviction. And as regards sentence, the law stipulates that a person convicted for Handling stolen goods is guilty of a felony, and is liable to imprisonment with hard labour, for a term of not less than seven or more than fourteen years. Having been sentenced to 5 years imprisonment, the appellant was actually given a sentence that was not lawful. Even though the respondent has not asked me to enhance the sentence, I cannot permit an unlawful sentence to stand. Accordingly, in the exercise of the authority vested on this court by virtue of the provisions of Section 354(3)(a)(ii) of the Criminal Procedure Code, I do uphold the finding of guilt, but alter the sentence, by increasing it to 7 years, so as to bring it in line with the provisions of section 322(2) of the Penal Code. Meanwhile, I do also order that the sentence of five strokes of the cane be vacated, as corporal punishment was repealed in Kenya. The said repeal was effected by Act No. 5 of 2003. Therefore, the appellant shall not be subjected to corporal punishment.

Those are the orders I make, i.e. that the appeal is dismissed; the conviction is upheld; the sentence of imprisonment is enhanced from 5 to 7 years; and the corporal punishment is vacated.

Dated at Nairobi this 17th day of January 2005

**FRED A. OCHIENG**

**JUDGE**

**Delivered in the presence of**

**For the State**

**Appellant in person present**

**Mr. Odero Court Clerk**