REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

CRIMINAL APPEAL 331 OF 2003

ONESMUS MUNGAI KIRAGU..…..……...….…....APPELLANT

VERSUS

REPUBLIC……..…....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 339 of 2003

JAMES NJOROGE MACHARIA...……..….....APPELLANT

VERSUS

REPUBLIC……..….....RESPONDENT

J U D G M E N T

The Appellant's herein ONESMUS MUNGAI KIRAGU (1st Appellant) and JAMES NJOROGE MACHARIA (2nd Appellant) were convicted for one count of ROBBERY WITH VIOLENCE contrary to Section 296 (2) of the Penal Code. They were sentenced to suffer death as provided by law. It is against this conviction that both Appellants have lodged this appeal. Their appeals have been consolidated having arisen out of the same trial. The facts of the prosecution case was that the Complainant was robbed of his motor vehicle registration number KAN 228B, cash 1100/-, identity card and cell phone. This happened on the 11th January 2002 at around 7.30 p.m. as he sat in his car waiting for a friend. He was driven in his car from Gachiri-Muguga Estate to Red Hill, at gunpoint. One month later on 18th February 2002, the Complainant identified his vehicle's number plates mounted on a different vehicle. He could not identify those who robbed him. The Appellants were arrested by PW3 CPL. KENNEDY APINDI on 9th February 2002 at 6.00 p.m. inside a vehicle at Tiekunu area. The vehicle bore the number plate similar to those of the Complainant's vehicle. The Appellants were then charged with this offence together with another whom the trial court acquitted. The Appellants have raised similar grounds of appeal which we have summarized into three. The first issue raised challenges their conviction on the basis of recent possession of stolen items. The Appellants contended that the requirements of entering a conviction on the basis of recent possession were never met. The second issue raised was that the prosecution evidence was insufficient to sustain a conviction. Thirdly that their defences were not given due consideration.

The learned counsel for the State, MRS. KAGIRI did not tackle the issues raised by the Appellants in their petitions directly. The learned counsel contended that the conviction entered against the Appellants was safe and sustainable for two reasons. The first one being that both Appellants were found seated in a

vehicle whose number plates were similar to those the of Complainant's stolen vehicle. Two that each Appellant led to the recovery of a toy pistol and a home made gun respectively which weapons were similar to those used in the robbery. We must register our reaction to the manner in which the learned trial magistrate recorded the evidence adduced before him. We were appalled that the learned trial magistrate flagrantly disregarded the provisions of Section 63 of the Evidence Act and took down inadmissible evidence. Section 63(2) of the Evidence Act provides: -

"63(2) For the purposes of subsection (1), 'direct evidence' means –

(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;

(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;

(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds:

The trial magistrate also admitted the evidence of recovery of the toy pistol and home made gun that was made after confessions allegedly made by the Appellants to Police Officers in total contravention of Section 29 of the Evidence Act. Section 29 of the Evidence Act provides; - "29 No confession made to a police officer shall be proved against a person accused of any offence unless such police officer is-

(a) of or above the rank of, or a rank equivalent to, inspector; or

(b) an administrative officer holding first or second class magisterial powers and acting in the capacity of a police officer.

Under Section 29 of the Evidence Act, no confession made to a police officer can be admitted in evidence against an accused person unless the police officer was of the rank or above the rank of an inspector. In addition the confession may be admitted if the accused person was first cautioned before he made the confession.

In this case, PW2, Police Constable GITHUKE told the court that the two Appellants made several confessions to him. The first confession was that a motor vehicle bearing Reg. No. KAN 228B, in which they had been arrested earlier, had been stolen. The second confession was to the effect that they had a toy pistol and home made gun which they had used in the robbery and which they helped him recover. The third confession was that they had another accomplice and that they both identified the 3rd accused in the trial court as their accomplices. It will be noted from that PC GITHUKA was accompanied by other officers whom he named as PC KIPRONO, driver KARIUKI and WANGAI. The ranks of the last two were not given. Nonetheless PW2 being a Police Constable did not qualify to take a confession from the Appellants. PW2 could not therefore give evidence touching on the alleged confession. Besides, PW2 did not allege that he cautioned the Appellants of the consequences of making the confession to him including the fact that it could have been used against him in the evidence. Consequently the entire evidence of PW2 touching on the three confessions was inadmissible. PW3 CPL APINDI's evidence was a mixture of admissible and inadmissible evidence. The evidence was recorded in such a way that it is not clear to us what was meant by the witness. The mistake which occasions the evidence of PW3 indecipherable can only be blamed on the learned trial magistrate. PW3 said he received information concerning a suspicious vehicle. He said that he found the vehicle at some abandoned homestead. It had foreign number plates yet he said the number plates were KAN 228B which are very much Kenyan numbers and more importantly similar to the Complainant's stolen vehicle. PW3 said further that inside the vehicle they found a Madison Insurance sticker for vehicle KAE 469X. He circulated both vehicles and learnt, from some undisclosed source that the vehicles, which he does not specify, had been stolen. He then said he arrested both Appellants. In Court he identified some number plates whose numbers were not read out or recorded on the proceedings. We perused the judgment of the learned trial magistrate and

found that the trial courts findings compounded the contravention of the Evidence Act which we mentioned earlier. At J10 the following observation is made;

“There is also evidence that on the same night of arrest, PW2 interrogated the 1st and 2nd Accused and the two agreed to show the weapons they use in their trade. They returned to Tiekenu village and the 1st accused led them to a bush where they recovered a home made gun, the 2nd Accused led them to his home where they recovered a toy pistol.”

First of all there is no evidence to the effect that the two Appellants spoke of a trade they carried out together with. PW2 who recovered the toy pistol and the home made gun from the Appellants did not describe the place or the time that the two exhibits were recovered. The learned trial magistrate’s findings that they were found in a bush and a house respectively was a misdirection.

The learned trial magistrate made the following conclusion from the evidence before him; “I am of the belief that where the accused persons are found in possession of a recently stolen vehicle number plate mounted on another vehicle and with weapons similar to the ones used in the robbery and in the absence of any explanation then the accused persons must be the robbers.” We find no justification for this finding by the learned trial magistrate in his judgment. For one the trial magistrate did not consider in this judgment the issue of possession and in line with that, the issue of what amounts to recent possession. The number plate for which they were found in possession of, was identified by the Complainant as similar to his. The similarity he identified is not discussed by the trial magistrate either in the evidence of the Complainant or in the judgment. Number plates are made. The most the Complainant could say is that the numbers and letters on the number plate were similar to his but he could not say with certainty that they were the same as his. Since the number plate was the only nexus between the charge and the Appellants, that nexus is very weak to support a serious charge of ROBBERY WITH VIOLENCE for which the court convicted them. In addition the Appellants were found inside a vehicle bearing the said plates. Their position inside the vehicle was not discussed since its unknown, it could be that they were passengers inside the alleged vehicle. If they were passengers, how could they be said to own the vehicle. Since a vehicle has only one steering wheel we are unable to tell which among the Appellants may have been the one seated in the seat of the driver of that vehicle. The learned trial magistrate should also have addressed the issue of recent possession. For a number plate, we doubt that one month can be said to be recent possession of it.

We also doubt that a conviction for the main count of ROBBERY WITH VIOLENCE of the vehicle can be sustained on the basis of a number plate.

Having considered this appeal, we find that the manner in which the learned trial magistrate recorded the proceedings of the trial prejudiced the Appellants. The basis of the conviction was evidence irregularly taken. The conviction is therefore unsafe and cannot be allowed to stand. We shall allow the appeal quash the conviction and set aside the sentence. The Appellants should be set at liberty unless otherwise lawfully held.

Dated at Nairobi this 29th day of July 2005.

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE