



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 251 of 2000

[From original conviction and sentence in Criminal Case No. 124 of
2001 of the Senior Resident Magistrate's Court at Molo – R. Kirui
(SRM)]

RICHARD KARANJA MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant, Richard Karanja Maina, 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 16th of December, 2000 at Turi Farmers, Nakuru District, the appellant in the company of others, while armed with *pangas*, *rungus* and iron bars robbed John Rugene Njeri of one TV set and one Sanyo Radio Cassette valued at Ksh.9,800/= and immediately before or immediately after the time of such robbery threatened to use actual violence to the said John Rugene Njeri. The appellant pleaded **not guilty** to the charge. After a full trial, the appellant was convicted as charged and sentenced to death as 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 five grounds in support of his appeal. The appellant was aggrieved that he had been convicted on the charge yet the prosecution had not proved its case against him to the required standard of proof beyond reasonable doubt. The appellant faulted the trial magistrate for convicting him on the evidence of recent possession whilst in actual fact, the stolen item had not been recovered in his possession to justify the application of the said doctrine of recent possession. The appellant was aggrieved that he had been convicted in the absence of evidence being adduced by the arresting officer. Finally, the appellant faulted the decision of the trial magistrate in convicting him after failing to consider the evidence that appellant had adduced in his defence.

At the hearing of the appeal, the appellant, with the leave of the court, presented to the court written submissions in support of his appeal. He urged the court to allow his appeal and set aside the conviction.

Mr. Gumo, the Assistant Deputy Public Prosecutor urged the court to disallow the appeal. He submitted that sufficient evidence had been adduced by the prosecution to establish the charge of robbery with violence. He submitted that the Radio Cassette which had been robbed from the complainant had been recovered from the possession of the appellant so soon after the robbery. Mr. Gumo argued that the trial magistrate had properly applied the doctrine of recent possession to convict the appellant.

We have carefully considered the written submission presented to us by the appellant and oral submission made by Mr. Gumo. Before we give our decision on this appeal, it is imperative that we set out the brief facts of this case.

The appellant was charged with two others before the trial magistrate's court. However, one of the accused in the Lower Court escaped from lawful custody but was killed by a mob at Kiambu before he could be re-arrested and tried. PW1, John Rukinya Njeri, testified that on the 16th December, 2000 while he was sleeping in his house at Turi Farm at about 3.00 a.m, robbers broke into his house and frog marched him to the house of his employer at Michinda school. The robbers broke into the house of PW1'S employer and stole from there a TV set and a radio cassette among other items. PW1 was manhandled and beaten up by the robbers. He testified that the robbers were about four in number. The robbers fled when the neighbours raised alarm. PW1 did not identify the robbers. PW1 was later called to the police station where he was able to identify the radio cassette which had been recovered by the police as belonging to his employer.

PW2, Grace Wanjiku Kamau testified that PW1 was her employee. She received information on the following day of the robbery, that her house at Elburgon had been broken into. She was not at her house at the time the robbery took place. She went back to her house and realised that her TV set and her Sanyo Radio Cassette had been stolen. A report was made to the police. After about a month, he was called to Elburgon Police Station. She was able to identify her Sanyo Radio Cassette which had been recovered by the Police. PW2 did not know the appellant. The Radio Cassette was photographed and released to PW2. The photograph produced as Prosecution's Exhibit number 1.

PW3, Police Constable Mathew Rono testified that on the 16th of January, 2001, he, accompanied by Police Constable Mungao conducted a search of several houses at Kasarani area, Elburgon and recovered several electronic goods which were suspected to be stolen. One of the items, the Sanyo Radio Cassette, belonging to PW2 was recovered in the house of the two accused persons (*one of whom is now the appellant*). PW3 had the radio cassette photographed and then released to PW2. The photograph was produced in evidence as Prosecution's Exhibit number 1. When PW3 was cross-examined by the appellant he testified that he did not know the appellant. He conceded that he had been informed by an aunt to the appellant that the appellant resided in one of the houses where the stolen Sanyo Radio Cassette was recovered. PW3, testified that he broke into the said house which was said to belong to the appellant and recovered the stolen radio cassette. He admitted that the appellant was not present when the recovery was made.

When the appellant was put on his defence, other than narrating the circumstances of his arrest, he did not say anything in connection with the evidence adduced by the prosecution. He denied that he was involved in the robbery which he was charged and convicted by the Lower Court.

This is a first appeal. As the first appellate court in Criminal cases, this court is required to re-consider, and re-examine and re-evaluate the evidence adduced before the trial court and reach its own independent determination whether or not to uphold the conviction of an appellant. As was held by the Court of Appeal in **Gabriel Njoroge vs Republic [I987] KLR I9 at Page 22;-**

“...it is the duty of the first appellate court to remember that the parties to the court are entitled as well on the questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect (See Pandya vs Republic [I957] E.A 336, Ruwala vs Republic [I957] E.A 570.”

Having carefully evaluated the evidence adduced before the trial court, we are of the opinion that the issue for determination by this court is whether the prosecution adduced sufficient evidence to have enabled the trial magistrate apply the doctrine of recent possession and therefore convict the appellant on the charge of robbery with violence. The evidence that the prosecution adduced to secure the conviction of the appellant by the trial court is that of the recovery of the Sanyo Radio Cassette by PW3 from the house which was alleged to belong to the appellant. According to PW1, he was robbed by a gang of four robbers. They robbed him of a Television set and a radio cassette belonging to his employer PW2. PW1 was not able to identify the robbers. He was robbed at about 3.00 a.m when it was dark. He was robbed on the 16th of December, 2000.

PW3 testified that he recovered the Sanyo Radio cassette and other electronic goods from the house of the accused persons (*one of whom was the appellant*). PW3 did not specifically state from which of the two houses, the said radio cassette was recovered. PW2 was called to the Police station and was able to identify the recovered Sanyo Radio cassette. The appellant denied that the said radio cassette was found in his possession. He denied involvement in the robbery. PW3 testified that at the time the recovery of the Sanyo Radio Cassette was made, the appellant was not present. In fact PW3 and his fellow Police officer broke into the house that was alleged to belong to the appellant and retrieved the said Sanyo Radio Cassette which was later identified by PW2.

Now, is this evidence sufficient to enable this court apply the doctrine of recent possession to convict the appellant for the offence of robbery with violence? Having re-evaluated the evidence adduced in this case, we do not think so. The court of Appeal in **Maina & 3 others vs Republic [1986] KLR 301** quoted with approval the definition by the Lord Chief Justice of England stated in **Republic vs Loughlin 35 Cr. App. R 69** of what constitutes the doctrine of recent possession.

He said;-

“If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainty evidence which the jury can infer that he is the house breaker or shop breaker.”

For the doctrine of recent possession to be applied to prove the offence connected with the theft of the item from the owner, the following ingredients must be established; That the item in question was stolen from the owner; that the said item was recovered in possession of the accused (*or appellant as the case may be*); that the said stolen item was found in possession of the accused so soon after the theft or robbery; and that the accused did not offer a reasonable explanation as to how he came to be in possession of the said stolen item.

In the present, the prosecution established that the Sanyo Radio Cassette was stolen from the premises of the complainant. One month later, the said Sanyo Radio cassette was recovered from a house at Kasarani area of Elburgon township. PW3 did not tell where the said Sanyo Radio Cassette was recovered as between the houses of the two accused persons before the lower court. We are not certain if the house which the said radio cassette was recovered was in fact the house of the appellant. The prosecution did not establish that the said house where the radio cassette was recovered was in exclusive and sole control of the appellant. The appellant was not in the said house when the said radio cassette was recovered by PW3. In our opinion the prosecution did not sufficiently establish the connection between the appellant and the house from which the Radio Cassette was recovered for the doctrine of recent possession to apply.

In the circumstances, therefore, since there was no other evidence that the prosecution relied in its bid to seek the conviction of the appellant, we hold that the prosecution did not establish the charge of robbery with violence against the appellant beyond any reasonable doubt. His appeal is therefore allowed. His conviction is quashed and the sentence imposed set aside. The appellant is ordered set at liberty unless otherwise lawfully held.

DATED at NAKURU this 27th day of July, 2005

D. MUSINGA

JUDGE

L. KIMARU

JUDGE.