



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**Criminal Appeal 157 of 2001**

**STEPHEN MAINA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Appeal from original Judgment and Conviction in Senior Resident Magistrate's Court***

***at Nanyuki in Criminal Case No. 1905 of 1999 dated 14th November 2000 by Mr. S. M. Kibunja – S.R.M. – Nanyuki)***

**J U D G M E N T**

Stephen Maina hereinafter referred to as the Appellant was tried jointly with three others for the offence of Robbery with violence contrary to section 296 (2) of the Penal Code, and a second charge of attempted Robbery with violence contrary to section 297 (2) as read with section 389 of the Penal Code and an alternative charge of Handling stolen goods contrary to section 322 (2) of the Penal Code. The appellant and his Co- Accused were all acquitted of the second charges of Attempted Robbery with violence but convicted on the reduced charge of simple Robbery contrary to section 296 (1) of the Penal Code in respect of the first charge. The appellant was sentenced to serve 5 years imprisonment and to suffer 5 strokes of the cane. Being aggrieved he has appealed against both his conviction and sentence.

It is evident from the following extract of the judgment of the lower court that the conviction of the appellant and his colleague was based on the following:

*“..... all accused were telling lies when they claim they did know the other. The fact that the 1st Accused knew where the T.V. was after hours (sic) after its theft and the fact that the 2nd Accused to 4th Accused were in the house the T.V. was found clearly leads to only one conclusion that the four Accused participated in its robbing the same from P.W.1 as stated in the particular of count 1.”*

It is apparent from the evidence which was adduced that the complainant could not identify any of the persons who robbed him. However it so happened that on the same night of the robbery one of the appellants Co-Accused was arrested by A.P.C. Peter Maingi (P.W.1). The appellants Co-Accused was found in possession of a bag, a knitted monkey face and a hammer. He was taken to Nanyuki Police Station where he was interrogated by P.C. Matata (P.W.4) and he not only admitted having participated in the robberies but also led the officers to the scene of the robbery and to a house where the appellant and 2 of his colleagues were found and a T.V. recovered. The appellant and his colleagues were arrested and subsequently charged. The recovered T.V. is the one referred to by the trial magistrate in his judgment. It is evident that the alleged confession which led to the recovery of the T.V. set was not properly obtained as there is no evidence that the appellant's Co-Accused was cautioned. Moreover P.W.4 being a police

constable did not have any authority to obtain a confession from a suspect. The evidence of the confession made by the appellant's Co-Accused was therefore inadmissible in evidence as the same was improperly obtained.

Secondly the evidence relating to the identification of the T.V. set was not watertight. The complainant contradicted himself in court first stating that the T.V. was Gold Star make and when he realized the T.V. produced in court was not of that make, he claimed only the owner of the T.V. could talk about it as he was not conversant with it. Jane Nyambura Ndungu (P.W.3) who was the actual owner of the T.V. did not identify any special mark on the T.V. set though she claimed it was hers. In the circumstances there was a doubt as to whether the T.V. produced in court was the same one of which the complainant was robbed.

Thirdly no effort was made by the police to establish the ownership of the house in which the T.V. was recovered. Moreover a T.V. is an ordinary household item and the mere fact that some people are found in a house where a stolen T.V. is recovered does not necessarily lead to the conclusion that these persons know the origin of the T.V. or have reason to believe the same to be stolen. The doctrine of recent possession could not properly apply herein as the appellant was not proved to be in possession or joint possession of the T.V. We find that there was a doubt the benefit of which ought to have gone to the appellant.

Accordingly we do allow this appeal quash the conviction and set aside the sentence imposed on the appellant.

The appellant shall be set free unless otherwise lawfully held.

*Dated this 16th day of November 2005*

**J. M. KHAMONI**

**JUDGE**

**H. M. OKWENGU**

**JUDGE**