REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 135 & 124 of 2001

(From Original conviction (s) and Sentence (s) in Criminal Case No. 351 of 2001 of the Senior Principal Magistrate's Court at Machakos (J.R. Karanja SPM)

MORRIS MUTHIANI SAMMY .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL 124 OF 2001

MORRIS MUTHIANI SAMMY .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

J U D G M E N T

The appellant, Morris Muthiani Sammy, was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal code. He was, in the alternative, charged with the offence of handling stolen property contrary to Section 322 (2) of the Penal code. He was convicted of robbery with violence and sentenced to death as provided by the law. He appealed against both the conviction and the sentence.

The prosecution facts as we understand them are that on 3/2/2001, at 7.30 p.m, the complainant Emily Mutinda Mbuvi, was at her house at Kitumbai village, when she was invaded by a group of about three people armed with pangas. They demanded money before running away with her handbag which contained a lotion, her identity card, and some money. These items were recovered, except the amount of money.

Seven witnesses testified. The complainant, PW1, said that on 5/2/2000 at 7.00 p.m she was in her house at Katumani village when three people entered her house armed with pangas. When she screamed, she was ordered to shut up. The people demanded money as they led her to the bedroom where they picked her handbag and made their exit with it. In the handbag, the complainant had a tube of "Fair & Lovely" lotion, her identity card, and some money. One of the attackers snatched the complainant's baby and started running away with it but the complainant quickly followed him and was able to recover the

baby before the attackers escaped. She had noticed that all the three attackers had covered their faces with white balaclavas so that she was not able to see their faces. It is in evidence that the complainant raised alarm and neighbours immediately ran to her house where she explained what had happened.

One of the people who answered the alarm was Kyalo Mwangangi, PW2, who a few minutes before the complainant was heard to scream, had seen three men wearing balaclavas and caps near his house. Because the people looked strangers, he got suspicious of them and informed his neighbour, Stephen Mutisya, PW3, about the suspicious characters he had just seen. When the PW1 and PW2, were informed of what happened at the complainant's house when they answered the complainant's screams, they and other neighbours rushed to where PW2 had seen the strangers earlier but saw nobody. The neighbours spread out and within a few minutes they caught up with appellant about 300 metres away from complainant's house but others escaped. On searching him they found the complainant's identity card, her lotion tube and a white balaclava in his pocket. Nearby, on the ground the complainant's handbag earlier stolen was as well picked. The money supposed to be in the bag was not recovered. On being threatened the appellant is said to have given out two names, Matolo and Mboya, as the people who were in his company in the robbery and who had just escaped. They arrested him and took him back to the complainant's house where the complainant identified the handbag, the identity and the body lotion, as hers. She also identified the balaclava as similar to the ones she had seen the robbers wearing. As a result the appellant was handed over to a police officer from Kibwezi Police Station who went to where the members of public were about to lynch the appellant. PW3, PW4 and PW5 were some of the people who pursued the thieves and arrested the appellant as stated. The two other attackers who were said to have escaped and whose names were allegedly given out by the complainant were arrested later but they were acquitted by the lower court.

When the appellant was placed on his defence he denied the offence. He said that on the material day at 2.00 p.m, the motor vehicle in which he served as a conductor had broken down forcing him to go to Kibwezi town to purchase a spare part. It was as he arrived in town that he was confronted by a group of people and arrested, being alleged to have been one of the thieves who had just robbed a trader. Despite his denial that he was not a robber and even after explaining his mission, they had threatened to lynch him before he was handed over to the police. He stated the items said to belong to the complainant had been planted on him.

The honourable trial magistrate having considered the appellant's defence among those of the other co – accused, as well as considering the prosecution evidence, noted that the complainant admitted that she did not manage to identify any of the attackers. He however accepted the evidence that the appellant was arrested a few minutes after the robbery. He noted and accepted that the appellant was found in possession of the complainant's items which had been stolen only a few minutes before, while being in the complainant's handbag snatched away by the robbers. The trial magistrate noted also that a balaclava like the ones which the attackers were seen wearing earlier by the complainant and PW2, was recovered in the appellant's pocket. So the honourable trial magistrate concluded that due to being in possession of the items, the appellant must have been one of the three people who had attacked the complainant. The magistrate did not specifically state that he was applying the doctrine of "recent possession" to come to the conclusion he reached.

We have considered the manner the honourable magistrate treated the evidence of possession. We are satisfied that after he reached the conclusion that the appellant was found with several items stolen from the complainants only a few minutes earlier he had to apply, inter alia the known doctrine of "recent possession". This requires the possessor, here the appellant, to exonerate himself by explaining as to how he came into the possession of the goods. The purpose of the doctrine, we hold, is to give the possessor a fair chance to explain that the "possession" was innocently acquired. For example in this case the appellant may explain that the stolen items were given to him a few minutes before by a friend and that he, the possessor, had no knowledge or could not have known or suspected that they were stolen. Such explanation to be acceptable by court must be reasonable and possibly true. If he failed to give such innocent explanation, the court would be led to the reasonable conclusion that the possessor was one of the thieves who attacked the complainant and robbed her of her aforesaid handbag and the goods. In this case, the appellant, despite being found in possession of the complainant's identity card, the body lotion,

and probably the handbag, which conclusion we accept as proper, he decided to say he was arrested in town as he went to purchase a motor vehicle spare part. His explanation was, in our opinion, rightly rejected by the trial magistrate. This left the trial magistrate with no other explanation for the "recent possession" of the stolen items except the one that he was one of the three thieves who attacked and escaped with the complainant's handbag. The fact that the appellant was also found in possession of a balaclava which had been earlier seen by PW2 and the complainant, being worn by the attackers and the strangers, strengthened more the conclusion that the appellant was one of the attackers.

In conclusion therefore, we are independently satisfied that there was more than sufficient evidence on the record to convict the appellant of the robbery with violence charge contrary to section 296 (2) of the Penal Code and that the honourable trial magistrate's conviction of the appellant was proper. We are aware that one of the complaints in this appeal was that the investigating officer was not called to testify. We believe that an investigating officer in any case being investigated, should indeed testify in such cases, especially in serious cases such as this. His evidence is usually to the effect that he received the report of the occurrence of the case. He would inform the court on how and when he co-ordinated the collection of the evidence from the various witnesses and finally on how and why he decided to charge the suspect with the offence before the court. His testimony during the trial cannot therefore be taken lightly, as it sometimes establishes orderliness in the evidence of the case. But sometimes in some cases, the evidence of the investigating officer may not go to the root of the case especially where evidence on record which the court relies on to convict, is somehow co-ordinated and does not necessarily need the part played by the officer. In this case, the PW7 No. 218303, Inspector Charles Jamanda, PW7 appears to have played some part of the investigations. He went to the place where the appellant had been arrested and found him being assaulted by members of the public. He rescued the appellant, collected the exhibits recovered from him, took him to Kibwezi Police Station, and later charged him with this offence jointly with others who were later to be acquitted. Clearly therefore, what this case is missing is the evidence of the officer who recorded the evidence from the witnesses who finally testified. It is our view and conclusion however, that while the testimony of the investigating officer would have been appropriate, lack of it does not negate the proof in this case. We strongly recommend that the testimony of investigating officers should always be included in and is in most of the cases, imperative. This case may be one of the few exceptions as we find that the case is complete without the investigating officer's testimony.

Another issue raised by the appellant through his counsel Mr Mulwa, was that the trial magistrate shifted the burden of proof to the accused by making a comment to the effect that the appellant's defence was unsustainable. We have considered the honourable trial magistrate's comment. We find nothing inappropriate about it. We understand the comment to mean that the appellant was, in the circumstances of being found with recently stolen properties, under some voluntary obligation to give an explanation explaining away the "possession". As the appellant gave an alibi and said nothing about the "possession", the trial magistrate found his alibi defence far short of what the law required him to explain. That is how and why he termed it "unsustainable". He could have used any other description like "unbelievable" or "incredible" or even "unacceptable". We understand him to mean that the appellant's defence was not useful or helpful to him and did not satisfy the obligation, however light, that appellant was expected, under the law to satisfy. We rule out any shift of the burden of proof from the prosecution where it always lies, to the appellant, as alleged by Mr Mulwa.

We finally note as well that Mr Mulwa, was unhappy by the trial magistrate's other comment that the appellant had at one stage been heard to call the two co-accused persons "comrades – in – arms". Mr Mulwa, believed that the use of the words meant that the court became prejudiced against the appellant and that that may have led the court to convict. We have considered this argument also but find little evidence on the record to support prejudice. The decision of the case depended, in our view, on "recent possession" and the appellant's explanation that the items were planted on him was not believed by the trial magistrate. We also have come to the same conclusions and fully agree with him after re-evaluating the evidence. Failure to give an innocent explanation of the recently stolen goods is what in our view, convicted the appellant and not any prejudice on the part of the trial court.

For the above reasons, we find that this appeal has no merit and we dismiss it. We order accordingly.

Dated and delivered at Machakos this 20th day of December, 2005.

D.A. ONYANCHA

JUDGE

J. LESIIT

JUDGE