



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL APPEAL NO. 115 OF 1999**  
**(Appeal from Original Conviction and Sentence in Criminal Case  
No. 2839 of 1997 of the Principal Magistrate's Court at Nyahururu)**

**PETER KARIMI NYAMBURA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

The Appellant, Peter Karimi Nyambura, 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 night of the 25th and 26th of October 1996 at Gatero village in Laikipia District jointly with his co-accused who was acquitted robbed Benson Mwangi Gathiya of one radio cassette make Phillip, one wall clock and nine sheep and at or immediately before or immediately after the time of such robbery killed the said Benson Mwangi Gathiya. The Appellant pleaded not guilty to the charge, and after a full trial, he was convicted as charged. He was sentenced to death as mandatorily provided by the law. He was aggrieved by the said conviction and sentence and has appealed to this Court against the said conviction and sentence.

In his Petition of Appeal, the Appellant faulted the decision of the trial Magistrate in convicting him on insufficient evidence; on relying on circumstantial evidence when the said evidence could not connect him to the crime; by not considering the evidence that he had offered in his defence and finally by relying on the evidence of identification when the said evidence could not be relied on. At the hearing of this Appeal, Mr. Gumo, Learned Assistant Deputy Public Prosecutor for the State supported both the conviction and sentence and urged this Court to dismiss the Appeal filed by the Appellant. On his part, the Appellant urged this Court to allow his Appeal on the grounds stated on his Petition of Appeal. In his Submissions before Court the Appellant submitted that the evidence that was adduced before the trial Court by the Prosecution did not connect him with the offence. He submitted that he was arrested as a suspect in another offence only to be charged with the current offence which he was convicted.

The facts of this case briefly stated are that on the 26th of October 1998 at about 7.00 a.m. PW 5 Gachungu Migwi was informed that his neighbour called Mwangi Kibogoyo (*hereinafter referred to as the deceased*) had been killed. He went to his house. He found his neighbour dead. From the evidence at the scene it appeared that the deceased had been killed outside his house and dragged back to the room. PW 5 testified that the deceased had an injury on the back of the head which was bleeding. PW 5 caused the matter to be reported to the Police. PW 7 Boro Wakaba a neighbour of the deceased went to the house of the deceased on the material day and found that he had been killed. He testified that he saw the nine sheep of the deceased missing. The only animals that were left were a cow and its calf. PW 1 Samuel Ndiangui Kinyua testified that on the 26th of October 1998 at about 6.40 a.m. he was in his house, when two people came wanting to sell him sheep. PW 1 was a butcher. PW 1 knew one of the people. He was the Appellant's co-accused who was acquitted called Kingori.

PW 1 went with the two people to the house of Kingori. He saw the sheep. They were many. Each

sheep was being offered for sale for Kshs. 1,000/=. PW 1 was unable to purchase the same because he was suspicious that the prices for which the sheep were being offered for sale were too low. PW 2 Kimani Maina testified that on the 26th October 1996 at about 8.30 a.m. he was called by Kingori to be a witness in an agreement whereby he wanted to buy two sheep from the Appellant. He witnessed the agreement for the purchase of two sheep for the price of Kshs 3000/=. The agreement was drawn by PW 3 Robert Mwangi Gachuhi, the son of the said Kingori. He testified that the Appellant went away with the rest of the sheep. PW 2 became suspicious of the Appellant. His suspicion was aroused because he felt that the sheep were being sold for less value than they were worth. He suspected that the sheep could have been stolen. PW 2 testified that he told Kingori that they should report the matter to the village elder. The three of them decided to follow the route that the Appellant had followed. PW 3 had followed the Appellant on his bicycle. PW 2 testified that they found PW 3 at a junction with the sheep. The Appellant later ran into the forest. They decided to take the sheep to the Police Station and also report their suspicion. PW 3 testified that he reduced into writing the agreement for the sale of the two sheep between his father Kingori and the Appellant. He further testified that the Appellant left with seven of the sheep. After he had left the homestead of PW 3's father, PW 3 realised that the Appellant had left a wall clock near their said homestead. PW 3 decided to follow the Appellant on a bicycle. He found the Appellant. He told him that somebody was interested in the purchase of the sheep. It was agreed that the sheep be kept at a nearby house. While PW 3 was opening the gate to the said house, the Appellant threatened PW 3 with the panga and ran away. He disappeared into the forest. PW 3 accompanied PW 2 to the Police where a report was made. PW 4 Susan Wanjiku Mwangi, the daughter of the deceased was informed of her father's death on the 27th of October 1996. He went to his father's house and discovered his wall clock, a radio and a panga were missing. His father's sheep were also missing.

Later she was able to identify the seven sheep that were recovered. She was also able to identify the wall clock that was recovered as belonging to his father. PW 8 John Ndung'u Kimani assisted Kingori and PW 2 to trace the Appellant whom Kingori suspected to have sold him stolen sheep. They were unable to trace him. They reported the matter to the Police.

PW 8 did not see the Appellant and therefore could not offer any evidence as to his identity. PW 9 Zakary Ngunjiri Gichuhi testified that he was a neighbour of the deceased. He was the one who reported his death to the Police. PW 10 Police Constable Michael Wachira was the investigating officer in this case. It was his testimony that a report of the death of the deceased was made to Rumuruti Police Station on the 26th of October 1996. PW 10 and two of his colleagues went to the scene. They were able to establish that the deceased's body had been dragged from the main house to the kitchen. There was evidence of a struggle. PW 10 was also able to establish that the deceased was living alone and owned several sheep which were missing. It was further in testimony that he obtained information that the sheep had been recovered some few kilometres away from the deceased home at Gatero in an area known as Kwa Njiku. PW 10 was able to meet PW 1 who narrated to him the incident early that morning when an attempt to sell him sheep was made. PW 10 recovered the two sheep that had been left in the homestead of Kingori. He also recovered the wall clock. He further testified that after the statements were recorded from the witnesses, the Appellant was arrested in September 1997. He also testified that the cause of death of the deceased when post-mortem was done was indicated as head injury caused by a sharp object.

When the Appellant was put on his defence, he denied involvement in the robbery. He testified that he had been initially arrested by the Police as a suspect in the theft of a motor vehicle. The Appellant was therefore surprised when he was charged with robbery with violence from the deceased. The Appellant denied that he knew Kingori who was his co-accused in the Lower Court. Kingori in evidence in his defence before the trial Magistrate testified that he had previously known the Appellant as he had repaired his bicycle. He further testified that the Appellant approached him on the 25th October 1996 and told him that he had sheep to sell. Kingori agreed to purchase two sheep from the Appellant. The following day Kingori was woken up at 7.00 a.m. He found the Appellant outside his house with nine sheep. Kingori purchased two sheep from the Appellant for Kshs 3000/=. Kingori testified that he was later arrested and charged.

The High Court as the first Appellate Court in Criminal Cases is mandated to look at the evidence adduced before the trial Magistrate afresh, re-evaluate the same and reach its own independent

conclusion whether or not to uphold the Appellant's conviction. In reaching its determination, the High Court has to put in mind the fact that it did not have an opportunity of seeing the witnesses and therefore cannot be expected to give any finding as to the demeanour of the witnesses. The High Court is further required to consider the grounds of Appeal put forward by the Appellant in its Judgment (see **Njoroge – versus- Republic 1987 K.L.R. 19**). In the instant case, the issues for our determination is whether or not on the evidence on record, it can be concluded that it was indeed the Appellant who robbed and killed the deceased. It was the Prosecution's case that the Appellant having been found so soon after the robbery incident with the stolen sheep belonging to the deceased, the inference that was to be drawn was that it was the Appellant who robbed and killed the deceased. The prosecution did not adduce any direct evidence to link the Appellant to the robbery. There was no eye witness account. The evidence that the Prosecution relied on and which the Appellant was convicted by the trial Magistrate is the evidence of the sheep and the wall clock belonging to the deceased which were found to be in possession of the Appellant soon after the said robbery.

It was the evidence of PW 2, PW 3 and Kingori who was the Appellant's co-accused in the Lower Court that the Appellant was seen with the nine sheep belonging to the deceased early the following day after the robbery had taken place and were the deceased had been fatal injured. The evidence of PW 2, PW 3 and Kingori were cogent and consistent. There could not be any case of mistaken identity. The Appellant has been known by Kingori prior to the incident where he sold to him two sheep.

The Appellant used to take his bicycle to be repaired by Kingori. The sale of the sheep took place early in the morning about 8.30 a.m. It was broad daylight. The three witnesses were able to identify the Appellant. It was the evidence of PW 10 that the distance between the deceased house at Gatero Village and the house of Kingori at Kwa Njiku were not far apart. It was therefore possible for the sheep to have been stolen from the deceased and be driven to the residence of Kingori overnight. The said three witnesses further testified that the Appellant left a wall clock at the compound of Kingori.

This wall clock was later identified by PW 4 the daughter of the deceased as having belonged to the deceased. When the Appellant was asked by PW 3 to await a purchaser who would be interested in buying the seven sheep that had remained, the Appellant threatened him with a panga and ran away into the forest. In his defence, the Appellant did not offer any explanation to this action. The Appellant denied any involvement in the robbery. What is the law that relates to the circumstances that appertains to this case?

In **R. –versus- Loughlin 35 Cr App R 69** it was held by the then Lord Chief Justice of England that:

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

This is the well known doctrine of recent possession. This decision has been applied by the Courts in Kenya. The Court of Appeal has applied this doctrine in **Robinson Siko Ogembo – versus- Republic Criminal Appeal No. 124 of 2001 (C. A. Nakuru) (unreported)**. The said decision was quoted with approval by the Court of Appeal as recent as the 14th of May 2004 in **Samuel Munene Matu –versus- Republic Criminal Appeal No. 108 of 2003 (Nyeri) (unreported)**. The essential elements to sustain a conviction on the doctrine of recent possession is that the property must have been stolen from the owner. The said property must be identifiable as belonging to the owner. The accused person must be found in possession of the said property soon after the said property has left the possession of the owner. The time that is taken to amount to being found to be in possession of the said property soon after the theft or robbery depends on the circumstances of each case.

In the particular instance of this case the Appellant was found in possession of the sheep and the wall clock barely twelve hours after the deceased had been robbed and killed. The Appellant was found to be in possession by PW 2, PW 3 and Kingori who was his co-accused. The Appellant sold two of the

sheep to Kingori and was paid Kshs. 3000/=. The sheep and the wall clock were identified by PW 4 as belonging to the deceased.

From the facts of this case, it is clear that the doctrine of recent possession is applicable. This Court can infer and indeed we infer that in the absence of any explanation, the fact that the Appellant was found in possession of the sheep and the wall clock soon after the robbery and the fatal wounding of the deceased leads to no other conclusion other than the fact that it was the Appellant who robbed and killed the deceased. We find no substance in his defence. It was a mere blanket denial. We find no merit in his Appeal. We proceed to dismiss the same. The conviction and sentence of the trial Magistrate is hereby confirmed.

**DATED at NAKURU this 26th day of May 2004.**

**D. K. MUSINGA**

**AG. JUDGE**

**L. KIMARU**

**AG. JUDGE**