



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
APPELLATE SIDE  
H.C.CR. APPEAL NO. 13 OF 2004**

**JUMNNEMOHAMED HASSAN ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being appeals from Original Criminal Conviction and sentence in Criminal Case No. 1516 of 2003 of the Chief Magistrate's Court at Mombasa – L. N. Mbatia, SRM)**

**Coram:                      Before Hon. Justice Mwera, Hon. Justice Khaminwa  
   Ademba for the state  
   Appellant in person  
   Court clerk – Sango, Chege**

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

The appellant (accused 2) was charged with another under Section 296 (2) Penal Code in that on 30th November 2003 at 1.30am at Kigoto Village, Waa, Kwale jointly with others not before court armed with pangas, rungas, bows and arrows robbed Ali Juma Mafimbo of cash, computer screen, TV (black & white), radio cassette (Hitachi), two mobile phones, a suit case, two brief cases, clothes etc, valued at Kshs. 120,000/- and at that time or immediately after the robbery they used personal violence on the said Ali.

When the plea was first taken on 7th August 2003, one PC Yegon was the prosecutor but on 28th November 2003 a fresh plea was taken with a competent prosecutor IP Mutangili in attendance.

After the prosecution case the appellant with his mate gave unsworn statements in defence and the Learned Trial Magistrate retired to consider her judgment. When she delivered it, the co-accused got 2 years for handling stolen property under Section 322(1) Penal Code while the appellant was found guilty as charged and a death sentence was passed on him hence this appeal.

The grounds of appeal were that there was no direct evidence linking the appellant to the offence; that the Learned Trial Magistrate relied on evidence of a single witness (PW3) regarding recovery of a suit case and that the defence was not adequately considered.

At the hearing of the appeal the appellant submitted in writing and then finally after the Learned State Counsel had replied.

The first ground, as per the submissions, was how P.C Issah (PW3) came to know about the whereabouts of the complainant's goods and that the police informer should have been a suspect in the whole matter. And that that informer did not testify in the lower court. While it would be contrary to public policy for police informers to testify in criminal cases, the evidence of PW3, a C.I.D officer at Kwale is that on 24th July 2003 a suspect was handed to him by Administration police from Matuga following several recent robberies. This suspect led the police to the residence of Kassim the co-accused to the appellant and a Hitachi radio was recovered. Then they went to the home of the appellant and recovered a Kaunda suit and a pair of trousers etc. They took the suspect and the recovered goods to Diani Police Station. That the complainant (Ali) later identified the radio and clothes. Many other things, not concerned here, were recovered. In cross examination the said suspect was the one who turned out to be the informer.

And from the complainant the Learned Trial Magistrate heard that he was attacked in his house on the night of 29th April 2003, some 3 months, before the appellant was arrested. Ten raiders came into his sitting room and a panga was placed across his neck. The attackers had a flash light and they ransacked the whole house demanding money for 45 minutes. They stole cash, a suit case of clothes including a kaunda suit, two mobile phones, a radio cassette and many other household and personal goods. Some time later the complainant was called to Diani Police Station and he identified the radio cassette, a suit case, and one outfit, a kaunda suit, grey trousers, all which were identified and produced.

His wife Maurine (PW2) also testified about the robbery in the night, the many things that were stolen and the recovered ones. That they were called by Diani Police to identify the same and they did so. The Learned State Counsel said as much in his submission.

The Learned Trial Magistrate did not have doubt in her judgment that PW3 recovered the complainant's stolen goods from the appellant's house which the complainant later identified – the suit case, kaunda suit, the grey trousers. The lower court found that the appellant was one of the robbers and he was convicted and sentenced accordingly. We see no defect in the reliance on the evidence of PW3 when he recovered the stolen goods which were identified by the owner. The ground of single witness fails.

The appellant then contended that the principle of recent possession was not applicable 3months after the robbery. We do not agree. The goods were recovered after that period following the robbery. The learned trial magistrate, remarked on this recent possession in her judgment. She believed PW3 that he actually did recover the property. Neither in cross examination nor in his defence did the appellant explain how he came by the complainant's goods. In the circumstances the conclusion that the appellant was among the ten robbers was proper. This ground also fails.

The other ground was that the appellant's defence was not well considered by the Learned Trial Magistrate. The appellant gave an unsworn statement in defence largely saying that when he was arrested, from his house the police took his wife's and children's clothes. That they returned some of them. That he was surprised to be charged as he was. He spoke of police inquiry about a gun which he denied. He seemed to say that the bag produced in court was in the police motor vehicle before the appellant was arrested and placed there.

The learned trial magistrate did set out that statement in her judgment and she rejected it. She said that other properties belonging to the complainant were also recovered from the appellant's house besides the bag. She did not see it as a mere coincidence that the things having been stolen from Ali, were recovered from the appellant's house.

We similarly went over the lower court proceedings, the judgment and the submissions and were satisfied that the appellant's defence was given due consideration by the Learned Trial Magistrate.

In sum we see no merit in this appeal and it is dismissed in its entirety.

Judgment delivered on 2nd November 2004.

**J.W. MWERA**

**JUDGE**

**J. KHAMINWA**

**JUDGE**