REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 65 OF 2017

JAMES MWANGI KIMANGU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Nyeri Chief Magistrates Court Criminal Case No. 883 of 2013 (Hon. H. Adika, Senior Resident Magistrate) delivered on 4 October 2017)

JUDGMENT

On 8 April 2014, the appellant was charged with several offences ranging from robbery with violence to handling stolen property. The offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code cap. 63 constituted the first count. The particulars were that on the night of the 13th day of November 2013 at around 23:00 hours at Mutara farm within Nyeri County, jointly with others not before court, and while armed with dangerous weapons, namely, pangas, the appellant robbed Francis Murithi Munene of his fork-jembe, jembe, one axe, knapsack sprayer, one 12-volt battery, one packet of simlaw cabbage seeds, four ultravelis animal medicine and, one he goat all valued at Kshs. 44,000/= and that at the time of such robbery, he used actual violence to the said Francis Murithi Munene.

The second count was that of vandalism of electrical apparatus contrary to section 64(4)(b) of the Energy Act, 2006. The particulars here were that on the 13th day of November 2013 at around 23:00 hours at Mutara farm in Nyeri County jointly with others not before court the appellant wilfully and unlawfully vandalised one transformer serial number 00 91107 332 valued at Kshs. 1.5 million the property of Kenya power.

In the third count he was charged with the offence of sabotage contrary to section 343 (b)of the Penal Code. In this count the particulars were that on the 13th day of November 2013 at around 23:00 hours at Mutara farm, Nyeri County jointly with others not before court, the appellant wilfully and unlawfully destroyed one transformer serial number 0091107332 knowing that such an act will impair the supply of electricity to the community of Mutara farm area.

The fourth count was unauthorized disconnection of electrical apparatus from an electrical supply line contrary to section 64 (1)(d) of the Energy Act, 2006. Here it was alleged that on the 13th day of November 2013 at around 23:00 hours at Mutara farm, Nyeri County jointly with others not before court, the appellant wilfully and unlawfully disconnected one transformer serial number 0091107332 from an electrical line belonging to Kenya power without the consent of the said Kenya power.

In the fifth count, the appellant was charged with stealing stock contrary to section 278 of the penal code and the particulars were that on the 13th day of November 2013 at around 23 hours at Mutira farm, Nyeri

county, jointly with others not before court, he stole one goat valued at Kshs. 16,000/= the property of Francis Murithi Munene.

The final count was that of having or conveying suspected stolen property contrary to section 323 of the Penal Code particulars being that on the 13th day of November 2013 at Game rock area in Nyeri County having been detained by No. 216 955 corporal Stephen Mugambi, as a result of the powers conferred by section 26 of the Criminal Procedure Code, cap.75, the appellant had in his possession one motorcycle registration number KMCL 560 J make Sachs reasonably suspected to have been stolen or unlawfully obtained.

After the principal counts, two alternative counts were added but it is not clear from the charge sheet itself which of the six principal counts were these two counts alternative to. Both the alternative counts were of handling stolen property contrary to section 322(1) (2) of the Penal Code particulars being that on the 13th day of November 2013 at the Game rock area within Nyeri County otherwise in the cause of stealing, the appellant dishonestly retained fork jembe, jembe one 12-volt battery, one packet of simlaw cabbage seeds, four ultravelis animal medicine, meat of one slaughtered goat and three copper transformer taplings having reason to believe them to have been stolen or unlawfully obtained.

In the other alternative count, the particulars were that on the 13th day of November 2013 at Kirichu area within Nyeri County otherwise in the course of stealing dishonestly retained two jerricans of 20 litres of transformer oil that forms part of a transformer knowingly or having reason to believe them to have been stolen or unlawfully obtained.

The appellant pleaded not guilty but he was, nonetheless, convicted on all the counts.

Intriguingly, although the learned magistrate convicted the appellant on all the principal counts, he also convicted him on one of the two alternative counts of handling stolen property.

Even before delving into the grounds of the appellant's appeal I must hasten to state that I find the learned magistrate's action to have been a gross misapprehension of the law; this is so because, irrespective of the principal count which this secondary count was alternative to, it was not open to him to convict the appellant on both the principal count and the count alternative to it. The reason is simply that both the principal and the alternative count would ordinarily be founded on the same act or omission and an offence, as known in law, would constitute the impugned act or omission by the accused (see section 4 of the Penal Code on the definition of 'offence'). Convicting an accused on the principal and alternative count would effectively amount to punishing him twice for the same offence. Speaking of this question in **Seifu s/o Bakari versus Republic (1960) E.A. 338 at page 339** the Court of Appeal for East Africa held that:

> ***"Where charges against an accused are in the alternative, the proper course, upon conviction of the appellant on one count, is for the court to refrain from entering a verdict or finding on the other count."***

Be that as it may the petitioner raised four grounds of appeal in his petition filed in court on 11 October 2017; I understand these grounds to be as follows:

1. The learned magistrate erred both in law and in fact in convicting the appellant on the 2nd to 4th counts based on the doctrine of recent possession when there was no evidence to support such doctrine and, in particular when there was no evidence that the appellant was arrested with any of the alleged stolen items.
2. The learned magistrate erred in law and in fact in convicting the appellant for the offence of robbery with violence yet there was no evidence of identification.
3. The learned magistrate erred in law in not holding the charge sheet to have been defective.
4. The learned magistrate erred in law and in fact in relying on the evidence of the prosecution witnesses without considering the appellant's defence which was neither controverted nor displaced and in so doing he breached the provisions of section 212 of the Criminal Procedure

Code,

At the hearing of the appeal, Ms Mwai, the learned counsel for the appellant argued the appeal based on these grounds and urged that the appellant was likely to have been arrested elsewhere and brought to where the alleged exhibits were found and therefore the doctrine of recent possession was misapplied.

She also urged that no inventory of the recovered items was taken and it is not clear what the appellant was arrested with because the occurrence book of the police station in which the appellant was booked was not produced.

Again, while the samples taken for analysis were recovered on 13 November 2013, it was not until the 28 November 2013 that they were forwarded to the Government chemist for analysis. The delay in sending the items to the Government chemist and the chain of custody during that period of delay was not explained and thus raising a reasonable doubt whether any offensive substance was recovered from the appellant's house.

The learned counsel also argued that the appellant's defence was not shaken at all yet the learned magistrate did not take it into consideration.

As for the possession of the motorcycle, it had been confiscated earlier in the year but returned to the appellant as the owner by the same police officers who had impounded it.

Ms Ndungu, the learned counsel for the appellant opposed the appeal and urged the doctrine of recent possession was properly applied because the stolen property was positively identified and that it was found in the possession of the appellant. The property, according to the learned counsel, had recently been stolen.

Although the inventory of the items was not produced, the learned counsel for the state urged that the prosecution evidence was consistent that indeed the stolen items had been recovered. Again, the appellant did not deny that he was found in possession of the motor cycle registration number KMCL 560 J

At this juncture, it is important that I consider the evidence as it was presented before the trial and evaluate it afresh so as to come to the right factual conclusions; it is only then than I can apply the relevant law, which largely forms the basis of the charges against the appellant, to those facts.

The first prosecution witness was **Christopher Mwangi Kanyi(PW1);** he testified that he was a watchman at Mutira farm; the farm is near Kimathi University in Nyeri. Because the farm is quite expansive, he guarded it together with two other watchmen whom he named as Francis Mureithi and one Gathabu.

On 12 November 2013, at 11 P.M., lights at the farm went off abruptly. As they proceeded to the cattle shed to check on the animals, they saw two people climbing on a transformer. Fearing that they were either thieves or robbers Kanyi and his colleagues went and reported at Kimathi police post. They came back with the police but by then the intruders had left. They had removed the transformer from which they had siphoned fuel and stolen goats worth Kshs. 15,000/=. They had also broken into the watchmen's houses and stolen pangas, jembes and a slasher.

Francis Mureithi (PW2) testified that the robbers broke into his house at 11.00 P.M. They locked him inside a different house, as they removed a transformer and also slaughtered one of his employer's goats; they carried away its carcass.

Peter Gathangu Kanyange (PW3) testified that he too was a watchman at the farm; their employer was one Miano. It was his evidence that he and his colleagues immediately went to the police station to make a report when they saw a stranger on the transformer in the farm they had been employed to guard. The police at Kabiruini police post where they went to make the report took time to go to the scene; although the report was made at about 11 P.M. it was not until 4.00 A.M. that they went to the scene by which time

the thugs had left.

Charles Muchiri Maina (PW4) testified that he was a security officer at Kenya Power and Lighting Company. On 20th or 23rd day of a month that is not apparent from the record he was called at about 2.00 to 2.30 A.M. and informed that a transformer had been vandalised. He called a sergeant at his company who in turn informed the police officers on patrol. The officers recovered two motorcycles, allegedly used by the thugs. It was his evidence that nothing came out of the investigations and so the motorcycles were returned to their owners. The motorcycles were registered as KMEY 182 R and KMCL 560 J.

Police constable Stephen Odhiambo (PW5) testified that on 13 November 2013 at 4.30 A.M. he was at the crime branch office in Nyeri when administration police officers at Game rock informed him that a man, who turned out to be the appellant, had been arrested with transformer accessories, several spanners and a motorcycle registration number KMCC 560J. He proceeded to the scene, at Game rock and arrested the appellant. At the time of the arrest, the appellant is said to have been wearing a yellow jumper and a navy blue trouser. The clothes are said to have been smelling transformer oil. He booked the appellant with the offence of robbery.

Nyongesa Kisa (PW6) a security officer at Kenya power and lighting company got information on 13 November 2013 at about 8.00A.M, that there were parts resembling those belonging to the power company at Nyeri police station and he was required to go and identify them. He identified some of the items as belonging to Kenya power. Officers from the power company accompanied the appellant to his house at Kirichu where they are said to have conducted a search. The appellant opened his house from which the officers are alleged to have recovered two twenty-litre jerricans with oil that was suspected to be transformer oil. They also recovered a blue jacket smelling transformer oil. An inventory of the recovered items was recorded at the scene and that it was also signed by the appellant himself.

It is after the search at the accused's house that he got information that a transformer at Kabiruini, serial number 0091107332 had been vandalised.

The government analyst **Nelly Maureen Papa (PW7)** testified that on 28 November 2013 she received the following items from Sergeant Magasani Guyo:

1. Item A, a 'control sample' in 250 millilitre bottle

2. Item B1 and B2, two 250 bottles containing some liquid.

3. Item C, a yellow pullover.

4. Item D, a navy blue trouser

5. Item E, a black leather jacket

6. Item F, a blue jacket

It was his evidence that he was to ascertain if items B1 and B2 were transformer oil and whether the clothes had traces of transformer oil. Items A, B1 and B2 were analysed and established to be transformer oil and the clothes marked as items c, d, e and f were found to have traces of transformer oil.

Seergeant Magasan Guyo (PW7) a police officer attached to Kenya Power & Lighting Company testified that on 21 April 2013, at around 1.30 A.M., he received a call from Charles Maina (PW4) to the effect that a transformer at Kahawa Ridge, near Kimathi University was being vandalised. He went to the scene accompanied by two officers who were on duty. At the scene they found two motorcycles registration numbers KMCJ 182 R and KMCJ 560 J whose owners are said to have escaped. They also found a vandalised transformer whose serial number was 5193432. They collected the motorcycles and the transformer and took them to the police station. Later motorcycle registration number KMCL 560 J was given back to the appellant because he had reported that this was his motorcycle and that it had been

stolen.

On 13 November 2013 the Officer in Charge of Nyeri police station called him and told him that someone had been arrested with stolen items relating to a transformer. He proceeded to the station and was shown the items; they had been recovered at Gamerock the previous night. It was his evidence that two administration police officer who were on patrol spotted two people hiding in a thicket. They ran away but the officers arrested one of them. These officers were named as corporal Mugambi and police constable Ahmed Kaib. It was his evidence that the appellant was also arrested with motorcycle registration number KMCL 560 J. The officer later accompanied the appellant to his house at Kirichu area at Kiganjo. They conducted a search at the appellant's house from where they recovered two 20 litre jerricans containing what they suspected to be transformer oil. They also recovered two jackets that smelled petrol. The appellant himself was wearing a blue trouser and a yellow jumper at the material time. It was while at the police station, apparently after searching the appellant's house that they were told that a transformer had been stolen at Mutara farm. In the course of his investigations, he established that motorcycle registration number KMCL 560J did not belong to the appellant and therefore he formed the opinion that the motorcycle had been stolen. The investigation testified that he had initially charged the appellant with a different offence on 24 April 2013 but could not tell how the case ended.

Hamed Khaib Zantur (PW8) testified that he was a police officer stationed at Gamerock police post. On 13 November 2013 at about 4.25 A.M. he was on routine patrol with his colleague corporal Mugambi when he saw someone flash a spotlight. They asked the person to identify himself but he instead started running away. They managed to arrest him and took him back where they had first seen him; there they found a motorcycle registration number KMCL 560 J, mechanical tools and an animal carcass. They handed the case over to the duty officer.

In his sworn defence, the appellant testified that he lived at Kiricho in Nyeri county and that he was a 'boda' rider. He would ride motorcycle registration number KMCL 560 J for his business. On 13 November 2013 he was travelling on Kiganjo-Gamerock-Nyeri road when he encountered two administration police officers on patrol at Game rock. They arrested him without giving any reason for the arrest. They called a police officer from Nyeri. In response, the officer whom he identified as Stephen Odhiambo (PW5) came and took him to Nyeri police station.

He was booked for the offence of preparation to commit a felony yet he was eventually charged with and eventually convicted of totally different offences. He denied knowledge of Mutara farm. Neither was he involved in vandalism or transportation of vandalised goods. It was his evidence that he was simply charged because the investigation officer had a grudge against him. To prove his point, he produced a newspaper cutting of the Daily Nation of 11 March 2014 in which it was reported the investigator had been charged with the offence of soliciting and receiving bribe to free the appellant who was suspected of vandalising transformers. According to the newspaper report, the investigator was granted a bond of Kshs. 100,000/= and his case was set to be heard on 20 April 2014. The investigator had come to him soliciting for a bribe.

He agreed that he had been taken to his house but that nothing was found in it. The two jerricans which they alleged to have been removed from his house were actually removed from his father's house.

The appellant's neighbour **Joseph Nderitu Maina (DW2)** testified that on 13 November 2013, at about 11.A.M., the appellant arrived in a motor vehicle belonging to Kenya Power & Lighting Company together with four other people. The appellant was handcuffed. They took him to his home. They removed from the appellant's father's house two 20 litre jerricans, a leather jacket a mallet and a hammer. The jerricans were empty. They then left together. He knew the appellant as a 'boda' operator but that he did not have a motorcycle of his own.

Jackson Kimangu Muigua (DW3) testified that he was the appellant's father and that he worked in a quarry. His son was a boda operator. On 13 November 2013, he was at the quarry when Maina (DW2) called him at about 2.00 P.M. and told him that the appellant was at home handcuffed and that the people he came with had collected his two jerricans, a pullover, a mallet and a hammer from his house. When he

returned home at 4 P.M., he noted the items to be missing. He had three jerricans in the house but they left the one containing water. The appellant, according to his evidence, was employed by different people who owned motorcycles.

This is all there was as to the evidence with which the trial court was confronted and it is the evidence I am bounden to analyse afresh and come to my own conclusions independent of those reached by the trial court. Ordinarily, as the first appellate court, I would be cautious that that the trial court had the advantage, which I do not have, of seeing and hearing the witness. (See **Okeno versus Republic (1972) EA 32).** However, I note that the trial was conducted by several magistrates the last of whom heard the evidence of the appellant's two witnesses only. Since he did not hear or see all the prosecution witness and neither did he hear the appellant's evidence, he was largely in no better position than that which I find myself in.

The evidence in support of the first count of robbery with violence was, in my view, conclusive that indeed Francis Mureithi (PW2), the complainant in this count, was violently robbed on 12 November 2013 (although the particulars in the charge sheet state the date to be 13 November 2013). The offence of robbery is defined in section 295 of the Penal Code; however, section 296(2) prescribes the penalty where it is committed in certain particular circumstances; section 295

states;

> ***295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

And section 296(2) reads as follows: -

> ***296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

When the offence is committed in circumstances prescribed in section 296(2) it is usually referred to as aggravated robbery or robbery with violence. All that the prosecution has to prove in order to establish this degree of robbery is that the accused was armed with any weapon or instrument that may deemed to be dangerous or offensive; or, the accused was in the company of one or more persons; or that immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to his victim or any person.

According to Mureithi, two people broke into his house in the dead of the night; they hassled him from the house and apparently locked him in a different house. They killed his employer's goat and carried its carcass; apart from the carcass they also carried away some other items including a tractor battery, a jembe and cabbage seeds.

These facts go to show that the offence of robbery with violence was established as contemplated under section 296(2) of the Penal Code. What was not proved was whether the appellant was one of the two robbers who robbed the complainant.

Mureithi himself was categorical that he could not identify the appellant. It was the evidence of Zantur (PW8) that linked the appellant to the offence. It was his evidence that they spotted the appellant together with another in some bush in the wee hours of 13 November 2013. The appellant and his colleague ran away but Zantur together with his fellow police officer caught up with him. They brought him back to the place where he had ran away from and it is at that place they recovered a tractor battery, what he described as a carpet seat and 'farm medicine'.

The appellant denied having been in the bush as alleged by Zantur; and neither, according to his testimony, was he found in possession of any of the items alleged to have been found on him. He admitted having been arrested but that he was arrested at a roadblock and not in the bush.

In my assessment, the appellant's side of the story appeared more probable because he was in the so called 'boda boda' business and that being the case, there wouldn't be anything strange in him riding a motorcycle at any particular time. In any event no inventory was prepared listing any items he was allegedly found with. In view of the appellant's denial such an inventory would have been a useful piece of evidence to demonstrate that the stolen items were not only recovered but also that they were recovered in the appellant's possession.

Having testified that he handed the appellant over to constable Odhiambo together with the alleged stolen items, an inventory signed by at least Zantur himself and constable Odhiambo would have gone a long way in corroborating his evidence of the appellant's possession of the stolen items.

It is not lost that such an inventory was prepared and signed by the appellant, amongst other people, when police officers are alleged to have recovered certain items in the appellant's house. I agree with the learned counsel for the appellant that if an inventory was found necessary for items recovered in the appellant's own house, it was even more necessary for the items recovered in a bush which, of course, was not associated with the appellant in any way.

Despite several requests by the appellant, the Occurrence book in which the appellant was booked and which would ordinarily show the items the appellant was arrested with was not produced. In the absence of the inventory and the occurrence book there was no evidence that the appellant was arrested with any of the alleged items.

This being the case, I find the reasons given by the learned magistrate in holding the appellant culpable for the offence in the first count to be quite unsatisfactory, in the sense that he appears to have misdirected himself in fact and misapprehended the law. While holding that the appellant was guilty for the offence of robbery with violence, the learned magistrate held as follows:

> ***"The accused person was arrested at Kimrock area. This is not in doubt. The accused himself placed at the scene and said that the place was a road block. The accused however says he was not arrested with anything. PW5, 8 and 9 all stated that the accused was arrested with an array of items which they produced. The accused did not provide any evidence in support of his allegation that he had nothing except the motor bike nor did he rebut the evidence that these items were found on him including the motorbike."***

With due respect to the learned magistrate, the appellant could not be asked to prove his innocence; on the contrary, it was upon the state to prove that the accused was found in possession of the alleged items and not the appellant to prove that he did not have them. It is an age old principle of criminal law that the legal burden of proof in a criminal case is always on the prosecution and not on the accused.

If it will help, let me reiterate the words of Viscount L.C. in **Woolmington versus D.P.P (1935) A.C 462** where this question was discussed at great length; the learned judge stated as follows:

> ***"Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and also to any statutory exception."***

The learned judge continued:

> ***"No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained." (see pages 481, 482).***

If it was not established beyond reasonable doubt that the appellant was arrested with the stolen items, the doctrine of recent possession which the learned magistrate relied upon in convicting the appellant was not applicable. It certainly could not apply when the first condition for its application, which is prove of possession, was not established. In the case **Eric Otieno Arum Vs. Republic – (2006) 1 KLR 233** which the learned magistrate cited, the Court of Appeal set down the conditions which must be met before invoking the doctrine of recent possession. These conditions are, first, that the property was found with the accused; secondly, that the property was positively the property of the complainant; and, thirdly, the property was stolen from the complainant and finally, the property was recently stolen from the complaint. In the absence of proof of any of these conditions, the doctrine of recent possession wouldn't apply.

I am therefore satisfied that the first count was not proved to the required standard.

The second, third and fourth counts are interlinked and so was the evidence proffered in their support; it thus makes sense to deal with them together.

As the investigation officer, Sergeant Magasan Guyo's (PW7's) evidence on these counts was, no doubt, central to these counts as it was in respect of the rest of the counts. But I must say at the outset that, besides his other weakness which will become apparent in due course, I have found his evidence to be, somewhat, convoluted.

To begin with, the officer spoke of a transformer serialised as number 5193432 but which was vandalised in April 2013. The transformer in issue here was no. 0091107332, if the particulars provided in the fourth count was anything to go by. This particular transformer which is alleged to have been recovered was never exhibited in court; what was exhibited were two photographs one showing that part where the transformer's serial number had been superimposed and the other showing the transformer from a distant view; in neither of these photographs would one tell that the transformer was vandalised, and if it was vandalised, the extent of such vandalism. No explanation was given why the alleged vandalised transformer was not exhibited in court, at the very least, for the court to view it and satisfy itself that the transformer was vandalised as alleged.

No doubt, the trial court would have been prepared to take the evidence from an employee or an agent of the Kenya Power and Lighting Company knowledgeable in such equipment as transformers and what their vandalism would entail. More, importantly, such an officer would have given useful opinion that based on his expertise and assessment, the transformer was vandalised as understood under section 64(4) (b) of the Energy Act, 2006 which formed the basis of the third, fourth and fifth counts.

I am persuaded that in the absence of the exhibit of the alleged vandalised transformer and in the absence of any explicit evidence of whether it was vandalised; how and the extent to which it was vandalised, there was no factual basis upon which the trial court would reach the conclusion that the transformer was vandalised contrary to section 64(4)(b) of the Energy Act, 2006; or that, the appellant had destroyed the transformer and therefore culpable for sabotage under section 343 (b) of the Penal Code; or, that he was also culpable for unauthorised disconnection of electrical apparatus from an electrical supply line contrary to section 64(1)(d) of the Energy Act, 2006.

For the same reasons, the learned magistrate's finding that the appellant was found with the work-related items belonging to Kenya Power and Lighting Company would be faulted. I say so because the only people that testified on behalf of the power company were two security officers whose evidence cannot be said to have been conclusive of the nature of the items that the appellant was alleged to have been found in possession of or whether they were part of the transformer that was alleged to have been vandalised.

One of these security officers was Maina (PW4); his evidence was of little help because he did not testify as to whether he had any knowledge on the company's equipment such as transformers and in any event, the transformer to which he made reference in his testimony was serial number 5193432 and which is alleged to have been destroyed in "20th and 21st 2013". Neither the transformer nor the stated dates were material to the appellant's trial.

The other security officer was Nyongesa (PW6). His evidence as far as these items are concerned was that:

> ***"I was informed that there was a suspect who had been arrested with items resembling electricity spare parts… among the items were spanners that were in a small white sack. We also had transformer tapping switches and boulders…I saw that there were items from Kenya power."***

It is obvious that what was regarded as 'electricity spare parts' or spanners would not necessarily be associated with a transformer, whether intact or vandalised. Again, although he spoke of transformer 'tapping switches' and 'boulders', which I suppose are specialised equipment, there was no evidence that these items were peculiar in any respect to the extent that only the power company owned or could own them. At any rate, his evidence did not link these items to the alleged vandalised transformer.

It is worth noting that none of the security officers testified as having ever seen the vandalised transformer and this would lend credence to the presumption that no transformer may have been vandalised by the appellant and, in any event, the appellant was not found in possession of the vandalised transformer or any of its accessories.

Police constable **Hamed Zantur (PW8), the** one and only officer of the two officers alleged to have arrested the appellant never mentioned anything to do with a transformer nor its accessories as among the items that the appellant was found in possession of. His evidence on the items the appellant was found with was as follows:

> ***"…on 13/11/2013 4.25 a.m. I was with my colleague cpl. Mugambi on routine patrol within Kemrock area. I saw someone lighting and switching off the spotlight. We challenge that person as to who he is. (sic). It was from a commotion area. Upon challenge they started running we fired to the air but they continued running. On (sic) the process we managed to arrest one of them. We took him to the scene of commotion. We found a motor cycle KMCL 560 mechanical tool and a carcass of animal exhibit 6a & 6b, tractor battery exhibit 7, carpet seat exhibit 7 and farm medicine exhibit 3. We then raised the duty officer. He came and we handed over the scene to him. The duty officer was from Nyeri (PW4)."***

So, all that the appellant was found with, if the evidence of Zantur was anything to go by, was an animal carcass, a motor cycle, a carpet and a 'farm medicine' whatever that meant.

The duty officer whom constable Zantur and his colleague are alleged to have handed the appellant over to was constable Odhiambo (PW5). In his evidence, this officer gave an assortment of about 17 items that the appellant is alleged to have been found with. To this extent, his evidence, at the very least contradicted that of constable Zantur.

Irrespective of who may have been right, it is worth noting no inventory of any sort was prepared either by the officers who arrested the appellant or constable Odhiambo to whom the appellant and the alleged stolen items were handed. As earlier, noted, the occurrence book in which the appellant and the alleged stolen items are alleged to have been booked was never produced.

Taking all these evidence into consideration, a reasonable doubt ought to have been entertained, that either the appellant was not arrested in the alleged circumstances or that when he was arrested by the two officers he was not in possession of the items he is alleged to have been found with. Either way, he ought to have benefited from that doubt.

For the same foregoing reasons, the fifth and sixth counts would not hold. If I have to say anything more on the sixth count, there was uncontroverted evidence from the appellant himself and his two witnesses that the appellant being a 'boda boda' operator would ride different motor cycles for different people. He need not have had his own motor cycle in those circumstances and it is against this background that he was riding motorcycle registration number KMCL 560 J. there was no basis for the suspicion that the

motor cycle may have been stolen property. This certainly could not have been the case particularly when it was the evidence of Muchiri (PW4) and the investigation officer himself (PW7) that this particular motorcycle had once been impounded but returned to the appellant or its owner.

I also found the evidence that certain items had been recovered in the appellant's house and which linked him to the offences which he faced to be doubtful. The appellant and his two witnesses were all consistent in the evidence that the items alleged to have been recovered from his house were removed from his father's house and that neither of the two jerricans contained any offensive substance. It is important to note none of the two jerricans was taken for chemical analysis. Certainly no explanation was given as to why and in what circumstances the alleged contents of those two jerricans were transferred to different containers, described by the government analyst as bottles. Lack of any explanation of the chain of custody of these items and the delay it took to present them for chemical forensic analysis ought to have created reasonable doubt whether they were found in the appellant's house. In any event, the appellant's evidence that these items were found in his father's house and his father's own testimony that those items belonged to him was never displaced.

In fact, had the learned magistrate considered the appellant's defence, even perfunctorily, he would probably have come to the conclusion that there was more doubt that the appellant committed any of the offences spread out in the six counts.

The reason I say this is because the appellant produced evidence that the sergeant Guyo (PW7), the investigations officer, may have been holding a grudge against him because of what had transpired between the earlier in the year. The evidence was in the form of a newspaper cutting that highlighted Guyo's impropriety in the course of his duties as a police officer; a result he was charged with a criminal offence.

As earlier noted, the newspaper cutting was of the Daily Nation of 11 March 2014; it read as follows:

> ***Officer denies seeking bribe to free suspect***
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> ***A police officer was yesterday released on a Kshs. 100,000 bond by a Nyeri Court, after he denied soliciting and receiving bribes to free a man suspected of vandalising transformers. Sergeant Magasan Guyo denied asking for Kshs 100,000/= from James Maina as an inducement to clear him in an investigation on alleged transformer thefts in Nyeri in February 18. The case will be heard on April 22.***

This evidence was not controverted and if anything, records at the Criminal Registry would show that the case that the newspaper was referring to was Nyeri Chief Magistrate Court Anticorruption Case No. 1 of 2014 in which the Sergeant Magasan and his colleague, one Michael Uddy were charged with counts of corruptly soliciting for a benefit contrary to section 39 (3) (a) as read with section 48 (1) of the Anti-corruption and Economic Crimes Act, No. 3 of 2003 and corruptly agreeing to receive a benefit contrary to section 39 (3) (a) as read with section 48 (1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.

Sergeant Magasan took plea to the charges on 10 March 2014 and his trial was concluded on 31 March 2019 when he was acquitted.

It is clear that as at the time he investigated the appellant's case, sergeant Magasan was himself facing a trial in which the appellant featured prominently in the prosecution case against him. It follows that the appellant's defence that the investigation officer held a grudge against him was not far-fetched. If anything one would wonder, and legitimately so, why the investigation officer would have been investigating the complaint against the appellant when section 62 (1) of the Anti-Corruption and Economic Crimes Act prohibited from undertaking his duties as a public officer while the case against him was pending; that section reads as follows:

> ***62. Suspension, if charged with corruption or economic crime***

(1) A public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge.

Besides the appellant's complaint of the underlying grudge between him and the investigation officer the provisions of this section of the law would bring into question the legality of the purported investigations of against the complaint against the appellant and his subsequent prosecution. The appellant was entitled to believe, and properly so, that his prosecution was motivated by malice and, in any event, was for a purpose other than the pursuit of criminal justice.

While denying the allegations against him, the appellant, in his sworn testimony testified that he was booked for the offence of preparation to commit a felony. In order to prove this point, he kept asking for the Occurrence Book in which he was booked at the police station for the entire period during the trial; the occurrence book was never produced. When the appellant cross-examined the investigation officer on this occurrence book, he testified that he did not book the appellant but that the occurrence book in respect of the offence for which the appellant was booked was at the police station.

The record shows that the appellant took up this with my learned sister Lady Justice Matheka when the appeal was mentioned before her on diverse dates. On each of these occasions which, from my count, are no less than ten, this Court has kept issuing the order for the production of the occurrence book. At one point, the Officer in Charge of Nyeri Police station was summoned to produce it but he never did; the last that was heard of him was that he could not trace the book.

The only reason why the police may have suppressed this piece of evidence is that if it had been produced, its contents would have been adverse to the prosecution case. And had the learned magistrate looked at the omission to produce it from this angle, he would certainly have reached the conclusion that what the appellant stated in his defence was probably true and he ought to have benefited from the doubt thereby created.

In the ultimate, I hold that the appellant's appeal is merited and it is hereby allowed. His conviction on all the counts is quashed and the appurtenant sentences set aside. He is therefore set at liberty unless he is lawfully held.

Signed, dated and delivered this 9 October 2020

Ngaah Jairus

JUDGE