



**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 137 OF 2012**

**JULIUS MUTUA MUNYAO ..... APPELLANT**

**VERSUS**

**REPUBLIC**

*(Being an appeal from the conviction and sentence of Hon. M.W. Murage (CM) delivered on 27/9/2012 in Machakos Chief Magistrate's Court Criminal Case No. 1250 of 2010)*

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*(Before Hon. B. Thurairaja J and L.M. Mutende J)*

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

1. The Appellant, **Julius Mutua Munyao**, was charged with six counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code** in Count I - VI. The Appellant was however acquitted in Count I.
2. In Count II the particulars of the offence were that “on the 6<sup>th</sup> May 2010 at about 10.00 p.m. at **Yaitha village** along **Makueni–Machakos Road** in **Machakos District** within **Eastern Province** jointly with others not before court while armed with dangerous weapons namely pistols, metal bars and *rungus* robbed **Fredrick Njihia** of his laptop make **Dell vostro 1015**, mobile phone make **Nokia 1200**, bunch of keys labeled **P.C.E.A Guest House, Safaricom** modem, laptop adaptor, laptop mouse, 8 pieces of compact discs, laptop hand bag all valued at Kshs.60,000/= and cash Kshs.3,200 and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said **Fredrick Njihia**”.
3. In the alternative the Appellant was charged with the offence of handling stolen property contrary to **section 322 (2)** of the **Penal Code**.

The particulars of the offence were that “on the night of 6<sup>th</sup> and 7<sup>th</sup> May 2010 at **Mutulani Sub-Location** at **Kee Division** in **Makueni District** within **Eastern Province**, otherwise than in the course of stealing, dishonestly received or retained a bunch of keys labeled **P.C.E.A Guest House, Safaricom** modem, laptop make **Dell Vostro 1015**, laptop mouse, 8 pieces of compact disc knowing or having reason to believe them to be stolen property”.

4. In Count III, the particulars of the offence were that “on the 6<sup>th</sup> May 2010 at **Yaitha village** along **Makueni–Machakos Road** in **Machakos District** within **Eastern Province**, jointly with others not before court while armed with dangerous weapons namely pistols, metal bars and *rungus*, robbed **Teresia Mulandi** of two mobile phones make **Sonny Erickson K 750** and **G Tide Q** both valued at Kshs.14,000/= and at or immediately before or immediately after the time of such

- robbery threatened to use actual violence on the said **Teresia Mulandi**".
5. In the alternative the Appellant was charged with the offence of handing stolen property contrary to **section 322 (2)** of the **Penal Code**. The particulars were that "on the night of 6<sup>th</sup> and 7<sup>th</sup> May 2010 at **Mutulani Sub-location** in **Kee Division** of **Makueni District** within **Eastern Province**, otherwise than in the course of stealing, unlawfully and intentionally received or retained one mobile phone make **Sony Erickson K750** knowing or having reason to believe it to be stolen property".
  6. In Count IV the particulars of the offence were that "on the 6<sup>th</sup> May 2010 at **Yaitha village** along **Makueni–Machakos Road** in **Machakos District** within Eastern Province jointly with others not before court while armed with dangerous weapons namely pistols, metal bars and *rungus*, robbed **Elizabeth Mwende** cash Kshs.2,000/= and one **Nokia Phone** valued at Kshs.4,800/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said **Elizabeth Mwende**".
  7. In Count V the particulars of the offence were that "on the 6<sup>th</sup> day of May 2010 at **Yaitha village** along **Makueni – Machakos Road** in **Machakos District** within **Eastern Province** jointly with others not before court while armed with dangerous weapons namely pistols, metal bars and *rungus*, robbed **Jackson Makau** of cash Kshs.800/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said **Jackson Makau**".
  8. In Count VI the particulars of the offence in were that "on the 6<sup>th</sup> May 2010 at **Yaitha village** along **Makueni–Machakos Road** in **Makueni District** within **Eastern Province**, jointly with others not before court while armed with dangerous weapons namely pistols, metals bars and *rungus*, robbed **Milicent Manesa** of cash Kshs.15,000/= one mobile phone make **Nokia 1110** valued at Kshs.7,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said **Milicent Manesa**".
  9. The Appellant was charged with a seventh count for the offence of personating a public officer contrary to **section 105 (b)** of the **Penal Code**.

The particulars of the offence were that "on the 16<sup>th</sup> May 2010 at **Yaitha village** along **Makueni-Machakos Road** in **Machakos District** within **Eastern Province** jointly with others not before court presented himself to be a person employed in the public service namely a Police Officer assumed to arrest and search **Fredrick Njihia, Teresia Mulandi, Jackson Makau, Elizabeth Manesa** and **Gregory Mwendo**".

10. The case for the prosecution was that on the material day at about 10.30 p.m, the complainants who were employees of **African Brotherhood Church (ABC)** were on their way from **Kibwezi** where they had gone to do some work. While on their way back to **Machakos**, their motor vehicle broke down. They took a taxi in **Wote town**. When they reached **Yaitha area**, they found what looked like a police road block on the way. They were flagged down by five people who wore what looked like police uniform. The five people entered their motor vehicle and took control of the same. The motor vehicle was driven towards **Machakos** then turned back at **Kimutwa area** and driven back towards **ABC Kyawalia**. The vehicle was then stopped and the complainants told to come out and lie down. The complainants were robbed of the goods mentioned in the charge sheet. The assailants then drove off in the motor vehicle. The complainants thereafter called for help and reported the matter to the police.
11. Later on the same night three police officers who were patrolling **Mutulani/Kavandani** area at about 10.30 p.m. stopped some men who refused to stop and ran away. The police officers however managed to arrest one of them who is the Appellant herein. The Appellant was carrying a bag that contained a reflector, a rain coat and two torches. A phone and an identity card were also recovered from the Appellant. The Appellant was escorted to **Kilome Police Station**. The police officers returned to the scene the following day and recovered another bag that contained a laptop, a modem, a bunch of keys and an adapter. Those items were also taken to the police station. The complainant's were called to the police station and they identified the recovered properties as theirs. The Appellant was subsequently charged with the offences herein.
12. In his defence case, the Appellant gave sworn evidence. No witnesses were called. The Appellant stated that on the material day, he left his home at 8.00 a.m. and went to sell clothes at his stall at **Wote market**. That at 8.30 p.m. he was at the bus stage when three police officers

approached him and started interrogating him and arrested him on suspicions of having stolen a cow. They searched the Appellant and found him with an identity card and Kshs.500/=. The police officers then went to carry out their patrols with the Appellant in their company. The police officers then stopped a group of four people who ran away. The police officers gave chase and arrested two of them. The Appellant was later taken to the police station. The Appellant's house was searched but nothing was recovered. An identification parade was later conducted but the Appellant protested over the same and stated that the parade members had different physical attributes.

13. The trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubts. The Appellant was sentenced to death in Count II, III, IV, V and VI and one year imprisonment in Count VII. Aggrieved by the conviction and sentence, the Appellant appealed to this court on the following grounds:-

- **That the evidence on identification was insufficient.**
- **That the Appellant was not found in actual possession of the stolen goods.**
- **That the Appellant's defence was not considered.**

14. During the hearing of the appeal, the learned counsel for the Appellant reiterated the grounds of appeal. It was further submitted that the evidence on recovery was contradictory. That there was a break in the movement of the exhibits, that the burden of proof was shifted to the Appellant and that the alibi defence was elaborate.

15. The learned counsel for the State conceded to the appeal on the grounds that the provisions of **section 200 (3) of the Criminal Procedure Code** was not complied with when the case was taken over by the succeeding magistrate. This court was urged to order for a retrial on the grounds that there was sufficient evidence to sustain a conviction and the prosecution witnesses were still available.

16. This being a first appeal, we have an obligation to re-evaluate all the evidence given during the trial and come to our own independent conclusions. *See Okeno –vs- Republic (1972) EA 32.*

17. The complainants in Count II-VI, that is **Fredrick Njihia** (PW5), **Teresia Mulandi** (PW1), **Elizabeth Mwendu Mwongela** (PW3), **Jackson Makau Peter** (PW 2), and **Milicent Manesa** (PW4) gave evidence on how they were attacked by people who had posed as police officers and robbed them of their properties. Although their evidence leaves no doubt that they were robbed, the offence took place at night and the complainants were not able to identify their attackers.

18. In convicting the Appellant, the trial magistrate relied on the doctrine of recent possession. We will therefore scrutinize the evidence of the recovery of the goods in question. PW7 **Philip Gachanja**, PW8 **PC Collins Wambi Jumba** and PW9 **CPL. Wilfred Mumo Mboka** were the three police officers who were at the scene of arrest. According to the evidence of PW7 (**Gachanja**) he was ahead of the other two police officers. That the other two police officers stopped some young men who ran away but he managed to arrest the Appellant. That the Appellant had a bag which contained a reflector, a raincoat and two torches. That the Appellant was searched and found with a cell-phone. That they revisited the scene later and recovered another bag containing a laptop, modem, keys and an adapter.

19. On the other hand, PW8 (**Jumba**) identified the properties they found in the bag as two reflectors, 2 black jackets and a blue shirt. That after searching the Appellant, they recovered a cell-phone and an identification card that did not belong to him. The evidence of PW7 and PW8 differs on the items recovered. Clearly the list by PW8 is longer and contains items not mentioned by PW7 who effected the arrest. PW8 during cross-examination also mentioned that there were berets recovered and that he saw the Appellant throwing away a bag that they went to recover the following day.

20. The evidence of PW9 (**Mboka**) is that the bag they recovered at the scene that night contained several items. PW9 did not specifically identify the said items one by one in court. The court record merely reflects his evidence on identification as follows:- **“These are the items we found”**.

21. According to PW9, the following morning they went back to the scene of arrest and recovered another bag containing a lap top. This is a different version from the evidence of PW7 and PW8 which reflects that there was also a computer mouse, a charger, a modem, and a bunch of keys

recovered. Although the arresting officers made an inventory of the recovered goods, the three police officers who were at the scene gave contradictory and inconsistent evidence on exactly what was recovered. It is also noteworthy that the scene was not secured overnight and could have been interfered with.

22.PW6 **PC Moses Biwott** produced the following exhibits:-

- **Mobile phone – Exh. 1**
- **Brown wallet – Exh. 2**
- **Photograph (of motor vehicle) – Exh. 3**
- **Computer make Dell – Exh. 4**
- **Two reflector jackets – Exh. 5 a – c**
- **Black bag – Exh. 6**
- **Two rain coats – Exh. 7**
- **Brief case – Exh. 8**
- **Red torch – Exh. 9**
- **Black belt – Exh. 10**
- **Ten CDS – Exh. 11**
- **Adapter – Exh. 12**
- **Lap top mouse – Exh. 13**
- **Bunch of keya – Exh. 14**
- **Modem (Safaricom) – Exh. 15**
- **ABC accounts report – Exh. 16**
- **Blue Shirt – Exh. 17**
- **Inventory – Exh. 18**
- **Black belt – Exh. 19**
- **Maroon torch – Exh. 20**

This list of exhibits is longer than the items mentioned by the arresting officers.

23.On the identification of the recovered goods by the complainants, PW1 (**Mulandi**) who identified the cellphone (Exh.1) merely stated “**this is my phone**”. No special marks were pointed out to conclusively establish that it was his cellphone and not any other. PW2 (**Peter**) and PW3 (**Mwongela**) did not identify in court any of the properties that they were robbed of.

24.PW4 (**Manesa**) also did not identify in court any of the properties she was robbed of. PW5 (**Njihia**) however identified a lap top, modem and several CDS.

25.With the contradictory and inconsistency evidence on the recovery and the identification of the goods, it is not possible to say with certainty which goods were recovered from the Appellant and who the goods belonged to.

26.The Court of Appeal in **Arum –vs- Republic (2006) 1 KLR 233**, at **page 237** stated as follows with regard to the application of the doctrine of recent possession:-

**“In our view, before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must positive proof first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly; that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as of time, as has been stated over and over again, will depend of the easiness with which the stolen property can move from one person to the other.”**

We are not satisfied that this case meets the above criteria.

27.Although the learned state counsel was of the view that a retrial should be ordered for lack of compliance with section 200 (3) of the Criminal Procedure Code, we cannot order a retrial and give the prosecution a second bite of the cherry in view of the insufficiency of the prosecution evidence. We however, observe that the trial magistrate failed to inform the Appellant of his right

under **section 200 (3)** of the **Criminal Procedure Code** to have witnesses recalled.

28. The Appellant's defence is that he was arrested at 8.30 p.m. on the material day on suspicion of having stolen a cow. There is however no reason that emerges from the record why the police officers would plant any goods on the Appellant. However, a conviction is based on the strength of the prosecution case and not the weakness of the defence case.

29. With the foregoing, we conclude that the appeal has merits and we allow the same. The Appellant is at liberty unless otherwise lawfully held.

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**B. THURANIRA JADEN**

**L. MUTENDE**

**JUDGE**

**JUDGE**

**Dated and delivered at Machakos this 17<sup>th</sup> day of July 2014.**

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**B. THURANIRA JADEN**

**JUDGE**