REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 200 OF 2007

Lesiit J.

JOHN THURANIRA M'ARITHO…………..APPELLANT

VERSUS

REPUBLIC ……………………..…….. RESPONDENT

(Appeal from original conviction and sentence in criminal case no. 3887 of 2004 pm's Court at Maua J.N. Nyaga (P.M.)

JUDGMENT

1. The Appellant John Thuranira M'Aritho was charged with another with three counts of robbery with violence contrary to section 296(2) of the Penal Code and one count in the alternative of Handling Stolen Property contrary to section 322(2) of the Penal Code. He was found guilty and convicted of the three main counts of robbery with violence. The appellant was sentenced to be detained at the President's pleasure on 14th November 2007 for reason the doctor assessed his age at between 18 and 22 years.
2. The appellant has appealed against both the conviction and sentence. He has raised 3 grounds in his amended grounds of appeal namely

I. **THAT the learned trial magistrate erred in both law and fact in relying on inconclusive and unsatisfactory circumstantial evidence from the prosecution.**

II. **THAT the learned trial magistrate further erred in law in failing to make a finding on my alibi defence which was fatal to the prosecution case, and shifted the burden of prove from the prosecution.**

III. **THAT the sentence imposed was harsh and excessive as it was against the actual weight of the evidence adduced**.

3. The appeal was not opposed by learned state counsel, Mr. Moses Mungai.
4. The facts of the prosecution case were that on the 19th August, 2004 at 7 pm, the complainant PW1, 2 and 5 were travelling in a matatu when some passengers turned robbers and hijacked the vehicle before stripping the passengers of their clothes and belongings and abandoning them on the road. One and a half months later the appellant was seen by PW1 wearing a sweater which PW1 claimed had been stolen from him during the incident. PW1 arrested the appellant and took him to Maua Police Station where the Appellant was charged. PW2 the matatu conductor, PW3 the driver and PW5 another passenger all testified in court. PW2 and 5 identified the appellant as

one of the robbers just as PW1 did. PW3 said he could not identify him.

5. The Appellant in his defence said he bought the pullover in a shop in Meru town and even produced a receipt. He said he showed the police the receipt who trashed it. He said he bought the pullover for 1250 on 26th June, 2004. He complained that after police took it from him as an exhibit, the pullover was altered and the pockets replaced with torn pieces of cloth.
6. I have carefully considered this appeal and have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses. I have given due allowance for this short coming and have drawn my own conclusions. I am guided by the Court of Appeal case of **Okeno v. Republic 1972 EA 32** Where the duties of a first appellate court were given as follows:

> **"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

7. The learned trial magistrate disbelieved the evidence of identification of the appellant as one of those who robbed the complainant of their properties. He however, found that PW1 had satisfactorily proved that the pullover, Exh.1 was hiS property and that it had been stolen from him during the robbery. He found that the Appellant had possession of a recently stolen property and convicted him of the main charges of robbery with violence. The learned trial magistrate delivered himself as follows.

> **That only leaves the evidence of John Kio PW1 that he found the accused wearing his stolen pullover. He said that he identified the pullover by a place that it was burnt by a pressing box on the back. Also that the front there was a place where it had been banged by a vehicle that left a mark on it. The pockets had developed holes and he had taken it to a tailor who repaired the pockets by adding other pieces of clothes on the pockets. He showed thes identification marks to the court. The accused said that when they took the pullover to the police station it did not have pockets that had been repaired."**

8. The learned trial magistrate considered Appellants defence concerning the ownership of the sweater and stated as follows:-

> **If the accused had actually bought the sweater, why did not he take Cpl Njeru to the shop where he had bought the sweater instead of taking him to Obadiah Mutethia whom he claimed to have given him the sweater. The accused's defence can only be a fabrication. The sweater does not belong to him. I do not believe that he has been in its possession since June, 2004. By then it is the complainant PW1 who was having it. The sweater is the property of John Kio PW1. I find that John Kio PW1 was robbed of the sweater on the 19th August 2004"**

9. Regarding the application of the doctrine of recent possession the court of appeal in **Charles Okelo Olala v. Republic CA NO. 328 OF 2008** it was stated thus;

> ***"Police investigations ended in the arrest of the appellant who had no explanation for being***

in possession of the recently stolen vehicle.

"In Ogembo vs. Republic [2003] 1 EA 222 at page 225 this Court said:-

"Dealing with a similar point, the Court of Appeal for Eastern Africa (as it was then) said as follows in the case of R. vs. Bakari s/o Abdulla [1949] 16 EACA 84.

That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a case point no other reasonable conclusion, the presumption can extend to any other charge however penal. This principle was quoted with approval in the case of Obonyo vs. Republic [1962] EA 592. In this case the court stated as follows:-

"If all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal."

"In this we are satisfied the circumstances of the case did not point to any other reasonable conclusion other than the conclusion that the appellant was one of the six robbers that terrorized the two families in Bureti District and that he was arrested with some of the stolen property a day after the robbery in Kisii which is not far from Bureti considering the fact that the robbers had easy transport namely the stolen vehicle."

10. In order to apply the doctrine of recent possession against an accused persons the prosecution must prove the following facts:

i. That the property belongs to the complainant.
ii. That it was stolen
iii. That it was found in the possession of the accused so soon after it was stolen.

11. In the instant case the complainant identified the sweater or pullover on the basis of a burnt portion on the back and a mark on the front. It was also described as an old pullover which had holes on the pockets which had been repaired by a fundi or tailor. The learned trial magistrate was very impressed by the identification of the pullover of the complainant. He was so impressed that he dismissed the Appellant's defence and a receipt for the purchase of a similar item from a shop in Meru Town.
12. With due respect to the learned trial magistrate, it was very important that the basis of the complainants' identification of the pullover as his must have been plausible, cogent and devoid of possibility of error or mistake. I do not think that the identification in this case passed these tests. A **"hole"** on the back and a "**mark**" on the front and "**torn**" pockets are not identification marks which can be beyond reproach. May be if the tailor who allegedly repaired it testified to confirm the same, the identification could have received some credibility.
13. I feel uneasy that on the basis of this identification alone the Appellant was convicted to death without more.
14. The other issue is whether one and a half months could be regarded as recently stolen property. Whether an item can be considered recently stolen depends on the item itself. A month may be recent possession of a vehicle but not a clothing. This is because the faster an item can change hands shortens the period which if a person is found with it can be regarded recently stolen. I believe that items like clothing can quickly change hands. One and a half months was in my view not recent possession of a stolen pullover.
15. On last issue, since the basis of identification of the pullover as complainant's property was not free from error or mistake, it follows that the item was not proved to have been stolen from the complainant at the time in question.
16. Having considered this appeal I find that the conviction was based on shaky evidence and was wholly unsafe. In the result I find merit in the Appellant's appeal, allow the same by quashing the conviction and setting aside the sentence. The Appellant should be set free unless he is otherwise

lawfully held.

DATED SIGNED AND DELIVERED THIS 4TH DAY OF JULY, 2013

J. LESIIT

JUDGE.