REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

[CORAM: KOOME AND AZANGALALA, JJ]

HC.CRA. NO. 34 OF 2008

BETWEEN

GEOFREY KAMAU MAINA .....APPELLANT

AND

REPUBLIC.....RESPONDENT

[An Appeal from the Judgment of the Chief Magistrate's Court at Kitale (L.M. Nafula (SRM))

dated 30/6/2008 in CMC.CRC. No. 2975 of 2007]

JUDGMENT

Geoffrey Kamau Maina, the appellant, was charged in the Chief Magistrate's Court at Kitale with robbery with violence contrary to section 296 (2) of the Penal Code. It was alleged that on the 2nd of October, 2007, at Trans-Nzoia District within Rift Valley Province, the appellant with others not before the Court, while armed with pangas and rungus, robbed **David Wamalwa Mulongo** of his black Jacket and cash all valued at **Kshs 14,000/=** and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **David Wamalwa Mulongo** (hereinafter **"the complainant"**).

After hearing a total of four (4) witnesses, the learned trial Magistrate **L.M. Nafula (SRM)** found that the appellant had a case to answer. He made an unsworn statement denying the commission of the offence

and alleging that he had, on the material night, been arrested while on an innocent mission.

On the basis of the evidence adduced, the learned trial Magistrate found the appellant guilty as charged and sentenced him to death. He has appealed to this court against his conviction and sentence.

In his grounds of appeal, the appellant, in the main, raises the issues of unsatisfactory identification, inadequacy of evidence, failure to call essential witnesses and failure to adequately consider the appellant's defence statement.

When the appeal came up before us for hearing, the appellant appeared in person and opted to rely upon pre-written submissions which elaborated his grounds of appeal. On the other hand, **Mr. Onderi** appeared for the Republic and said that he would concede the appeal on the main ground that the basis of the appellant's conviction was the finding upon him of a jacket which was held to belong to the complainant yet the jacket was an ordinary jacket, which could be owned by anybody.

As the first appellate court, it is our duty to re-examine, re-evaluate and analyze the evidence upon which the appellant was convicted and come to our own independent conclusion bearing in mind that we did not see and hear the witnesses testify and must give allowance for that (see **Okeno –vrs Republic [1972] EA 32**). The prosecution case was that on the material night, the complainant was preparing to close his shop situated on Moi Farm in Trans-Nzoia District when he heard a bang on the door which gave way. Five armed thugs entered the shop and ordered him to sit down. He complied and felt something like a pistol near his ear. He was ordered to give them money and he told them to help themselves from his cash box where they took Kshs 13,000/=. The thugs demanded more money and he lied to them that it was at his house. They then set off for the house but, as they approached the house, they heard noises of people talking and the thugs developed cold feet and ordered, return to the shop. The complainant decided to escape into a nearby maize plantation as he screamed with the thugs in hot pursuit. He outran them but lost his jacket to the thugs. Members of the public were attracted by the screams and joined the screaming. Shortly afterwards, some members of the public went to him with a person they had arrested. He identified his jacket which the person had and so did some of the members of the public including **William Maina (P.W.2)** and **Enock Milimo (P.W.3).** Moi's Bridge Police Station Officers were informed and **CPL Lenah Kangogo (P.W.4)** with others from the station immediately visited the *Locus in quo*. They arrested the person and recovered the said jacket which P.W.4 produced at the trial. It was the appellant who was the person arrested by members of the public and re-arrested by P.W.4. **William Maina (P.W.2),** supported the complainant's evidence. He testified that he immediately suspected the appellant on the main grounds that he was a stranger in the area and was wearing a jacket which he had seen the complainant wearing that morning.

Enock William (P.W.3), in his testimony stated that he too was attracted by the complainant's screams and went to the road where they saw the appellant running. He (the appellant) asked him for directions and when he was given, he proceeded along the same road only to return shortly thereafter. P.W.3 was then joined by P.W.2, who interrogated the appellant and they then took him to the where the complainant was. The complainant then identified his jacket.

From the above evidence, the only issue for determination is whether the finding of the jacket on the appellant would inevitably lead to a conclusion that the appellant was one of the thugs who attacked the complainant.
The Learned trial Magistrate said the following regarding that finding:-

"Going to the case itself, I find that even though the complainant herein did not identify the people who attacked him on that fateful night, circumstances are that the accused herein was involved in the said robbery, he was found moments after the alleged offence wearing a jacket that had been snatched from the complainant as he struggled to flee, he has not offered any explanation as to how

he came to possess that jacket to persuade this court into reaching a conclusion that he was not at the scene of the alleged offence. To this end, I find that the doctrine of recent possession comes to play."

It is significant that the learned trial Magistrate seems to have determined, that the jacket in question had been proved to belong to the complainant even before she analyzed the claims made by both the complainant and the appellant. We say so, because, it was after that finding that the learned trial Magistrate continued as follows:-

"The accused in denying the charge has claimed that the jacket produced and exhibited in evidence is his, same having been snatched from him at the time of his arrest. While appreciating that jackets of this kind are manufactured on large scale, the jacket in question is peculiar, the complainant identified it as his and in so doing, gave distinct features on the jacket, the jacket was further identified by P.W. 2 who had also borrowed and worn it on previous occasions, thereby corroborating P.W.1's identification, that identification persuades me into believing that the jacket belonged to the complainant and not the accused as alleged".

In his evidence, the complainant merely stated, in respect of identification of the jacket as follows:-

"I bought the jacket from the market, there are many other such jackets but I was able to identify this jacket from the hole on the zip and from the faded part on the back."

We ask ourselves if what the complainant stated made the jacket peculiar as found by the learned trial Magistrate? We do not think so. As the complainant himself acknowledged, there were **"many such jackets"** available on the market. The existence of a hole on the zip and the fact that the jacket had faded at the back did not, in our view, make it peculiar. It could have the same features irrespective of its owner.

We also do not agree with the learned trial Magistrate that P.W.2 fully supported the identification of the jacket given by the complainant. P.W. 2's evidence of identification of the jacket was suspect. He alleged at the trial that he had seen the same jacket with the complainant. He also alleged that he had previously borrowed it from him. It is however significant that he did not specify the parts of the jacket which were faded. He merely stated that it was faded in some parts. He also was not specific with respect to where the hole on the jacket was. In cross-examination, he merely stated that the jacket had holes in it as opposed to the complainant's evidence that the hole was on the zip. Asked about a tear in the jacket, he replied that the same had been caused by members of the public as they pulled the jacket from the appellant, which suggests that when he first saw the jacket on the appellant, it had no tear. So, how could he identify it with a tear? His testimony was also in sharp conflict with the testimony of the complainant himself who stated in cross-examination that the tear was caused by the appellant pulling the jacket from him as he escaped.

It is also significant that P.W.3 did not support P.W.2 on that aspect of his evidence. P.W.3's evidence was that it was only the complainant that night who noted the jacket as his when P.W.2 and himself with members of the public led the appellant to the complainant.

We do not therefore think that the jacket found on the appellant was positively identified as belonging to the complainant. In our view, the doctrine of recent possession was not properly applied and Mr. Onderi, learned State Counsel was right in conceding this appeal.

We are not therefore satisfied that the appellant was properly convicted. According, we quash his conviction, set aside the sentence of death and order that he be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KITALE THIS 4TH DAY OF MARCH 2011.

M. KOOME

JUDGE

F. AZANGALALA

JUDGE

Read in the presence of:-

M. KOOME

JUDGE