REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 72 OF 2008

SIMON MUIRURI KAMAU ……..…….APPELLANT

Versus

REPUBLIC ……RESPONDENT

{*Appeal from Original Conviction and sentence in the Principal Magistrate's Court at Murang'a*

in Criminal Case No. 2074 of 2006 dated 10th April 2008 By T.W. MURIGI P.M}

JUDGMENT

The appellant **Simon Muiruri Kamau** alias **Samuel Njuguna Mwangi** was arraigned before the Principal Magistrate's Court, Murang'a to answer to a charge of robbery with violence contrary to section 296(2) of the Penal Code whose particulars were that

"***on the 20th day of February 2006 at Mukuyu township in Murang'a District within the Central Province jointly with others not before court and while armed with pangas and rungus robbed Peter Wanjii Mwai of one jacket valued a Kshs. 1800 and at or immediately before or immediately after he time of such robbery threatened to use actual violence to the said Peter Wanjii Mwai."***

The appellant in the alternative faced one count of handling stolen goods contrary to section 322(2) of the Penal Code whose particulars were that

"***on the 7th day of July 2006 at Mukuyu township in Murang'a District within Central Province otherwise then in the course of stealing dishonestly retained one jacket knowing or having reason to believe it to be stolen."***

He pleaded not guilty to both counts and he was tried. According to one **Peter Wanjii Mwai (P.W.1)** the complainant, he was a pastor with the P.C.M. & A church. On the 20th February 2006 at around 5.20 a.m. he was on his way to church for morning prayers. On reaching near the Christian fellowship foundation church he saw a group of men ahead of him and when he got near them some of them went towards the direction of mjini and one man remained behind. The man who remained behind pointed a torch towards him asked him in Kiswahili to identify himself and he thought that he was a police officer. He told him that he was going for his morning prayers. That man then called back the rest of the group and he was ordered to sit down. They started ransacking his pockets and in the process removed his

jacket demanding money. They were armed with pangas and iron rods. As he had no money on him the robbers eventually left with his jacket aforesaid . Much as he was not unable to identify any of the robbers during the incident, he nevertheless reported the robbery at Murang'a police station.

On 7th July, 2006 while coming from Maragua within Mukuyu he spotted a young man wearing his said. He decided to pursue the young man who entered a video den. He summoned his friend **Michael Kariuki (**P.W.2) and when he arrived, he informed him that he had spotted a man wearing his stolen jacket and had entered the video den. He described his jacket to P.W.2 with particular regard to the front pockets that he had been stitched with white and black thread and the inner lining which was torn. They decided to call out the young man from the video den so that they could examine the pocket. He though tried to resist but members of the public prevailed upon him to remove the jacket. Upon confirming that the jacket was indeed his, members of the public wanted to lynch the young man but he prevailed upon them from not doing so. Instead the advised him to hand him over together with the jacket to the police officers manning the roadblock nearby, one of whom was **Corporal Samuel Karagu** (P.W.3). The person with the alleged jacket was the appellant.

P.W.4 **No. 40856 p.c. John Wambua** was the investigating officer in this case. It was his evidence that on 20th February, 2006 at around 4.30 p.m. the complainant reported to him that while going to PCMA church at about 5.20 a.m. he had been attacked by robbers and robbed of his jacket brown in colour worth Kshs. 1,800/=. The complainant informed him that he could positively identify his jacket. That he had stitched the upper pocket with black and white thread. On 7th July, 2006 the appellant was arrested by members of the public after the complainant positively identified his jacket. He identified the jacket and the white and black thread and the stitched pocket. The appellant upon arrest was brought to the police station and was subsequently charged with the instant offence.

Put on his defence, the appellant elected to give a sworn statement of defence. He testified that he was from Mukuyu and sold pineapples for a living. That on 7th July, 2006 while going about his business he passed two people who suddenly held him and took away his jacket. That one of the men told him that the jacket was his. He told him that it was his having been given by his father. When they insisted he told them that they should go to the police manning a nearby roadblock and since there was a huge crowd the members of the public asked him to give back the jacket and he complied. That the police officers at the road block then escorted him to the police station and he was charged with the offence before court which he knew nothing about.

The learned magistrate having carefully considered and evaluated the evidence tendered by the prosecution as well as the defence, found favour with the prosecution case, convicted the appellant and sentenced him to the mandatory death sentence. Aggrieved by the conviction and sentence the appellant lodged the instant appeal citing improper application of the doctrine of recent possession, failure to call vital witnesses and failure to consider his defence as appropriate as grounds of appeal.

When the appeal came up for hearing, **Mr. Mukura** learned Senior State counsel conceded to the same on the grounds that the appellant was not identified at the scene of crime, that the jacket was recovered 2 months and 17 days later which cannot be said to be recent and that the circumstantial evidence did not irresistibly point at the appellant as a participant in the crime. The jacket may have gone through many hands before reaching the appellant. In the premises, the conviction of the appellant may not have been safe.

In response the appellant tendered written submissions which we have carefully read and considered.

Much as the appeal is conceded, it is still our duty as a first appellant court to re-evaluate the evidence, analyse it and come to our own conclusions but in doing so we must give allowance to the fact that we have neither seen nor heard the witnesses. **(Okeno v R (1972) E.A. 32).**

The conviction of the appellant turned on the application of the doctrine of recent possession for the complainant was categorical that he never identified any of the robbers, the appellant included, at the scene of the robbery. If a person is found in possession of recently stolen goods and does not account for

his possession, there is a rebuttable presumption that he is either the thief or a receiver. See **Andrea Obonyo V r (1962)E.A. 542.** In essence this is the doctrine of recent possession. In order to draw such inference of guilt from such circumstances however, the evidence must satisfy the well known standards stated in the case of **John Kubai & anor. V Republic criminal appeal number 303 of 2006 (UR)** some of which are that the stolen item was found in the possession of the suspect, that the stolen item belonged to the complainant, that it was stolen from the complainant, that it was recently stolen from the complainant and of course regard must be had to the nature of the item and if it is the kind of item that changes hands fast and freely,.

In our view none of these elements were proved in the circumstances of the case. Whereas the jacket was found on the appellant, the appellant claimed that it was his having been given to him by his father. It behoved the complainant to bring forth such evidence as would displace the appellant's claim to ownership of the jacket. No documentary evidence or otherwise was tendered by the complainant to counter the appellant's assertion. Indeed even his own description of the jacket was contradictory as regards its colour, as the colour of the thread with which he had stitched its front pockets and inner lining. The contradictions raise doubt as to whether the jacket really belonged to the complainant. Yes, there is no doubt that the complainant was robbed of his jacket . However we doubt whether the said jacket was the one recovered from the appellant on the material day. The robbery was said to have been committed on 20th February, 2006 yet the appellant was found in possession of the jacket on 7th July, 2006. This is a period in excess of 5 months though **Mr. Mukura,** thought that it was 2 months and 17 days. This period cannot by any stretch of imagination be said to be recent. In any case, with lots of mitumba jackets in town, it cannot be said that jackets are not the kind of items that change hands very fast.

As we stated earlier, being found in possession of stolen items raises a rebuttable presumption that the person found in possession therefore is either a thief or a receiver. The burden of proof thus shifts to the possessor to explain how he came by the item found in his possession. The explanation has to be reasonable. In this case the appellant right from the commencement of the case categorically stated that he had been given the jacket by his father. That evidence was never challenged, controverted nor rebutted. To our mind that explanation was reasonable and did displace therefore the application of the doctrine of recent possession.

We have no doubt at all that the conviction of the appellant by the application of the doctrine of recent possession cannot be said to have been safe. **Mr. Mukura** was therefore right to concede the appeal on that ground. The result is that we allow the appeal, quash the conviction and set aside the sentence of death imposed. The appellant shall forthwith be released unless lawfully held for other cause.

Dated and delivered at Nyeri this 7th day of May 2009.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE