IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 322 OF 2011

BETWEEN

JOSPHAT WAGURA MACHARIA..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Sergon, J.)

dated 13th May, 2010

in

H. C. Cr. A NO. 122 OF 2006)

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JUDGMENT OF THE COURT

1. ***Josphat Wagura Macharia***, the appellant, was charged with several offences: one count on robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***, Chapter 63, Laws of Kenya; an alternative count of handling stolen goods contrary to ***Section 322 (2)*** of the ***Penal Code;*** one count of preparation to commit a felony contrary to ***Section 308 (1)*** of the ***Penal Code*** and one count of being in possession of ammunition, contrary to ***Section 4(2)*** of the ***Firearms Act***, Chapter 114, Laws of Kenya in the Chief Magistrate's Court at Nyeri.
2. The particulars of the offence of robbery with violence were that on 27th September, 2004, at Tegu Bridge in Karatina, Nyeri District within the then Central Province, the appellant jointly with another not before court, while armed with dangerous and offensive weapons namely pistols, robbed Anthony Muthee Gathiru of his motor vehicle registration No. KAJ 822 C Toyota Corolla, Saloon, grey in colour and a mobile phone make Siemens C-35 all valued at Kshs 261,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said Anthony Muthee Gathiru.
3. The particulars of the alternative count of handling stolen goods were that on 3rd December, 2004 at Kayole Estate within Nairobi, otherwise than in the course of stealing, the appellant dishonestly retained motor vehicle registration No. KAJ 822 C Toyota Corolla Salon grey in colour, knowing

or having reasons to believe it to be stolen or unlawfully obtained.

4. The particulars of the count of preparation to commit a felony were that on 3rd December, 2004, at Kayole Estate within Nairobi, the appellant was found having one round of ammunition of 9 mm caliber, a Kenya Securicor bullet proof jacket No. 530 and three alphabetical letters K, L & O with a background resembling that used on motor vehicles registration number plates with an intent to commit a felony namely robbery.
5. On the offence of being in possession of ammunition, the particulars were that on 3rd December, 2004 at Kayole Estate within Nairobi, the appellant was found in possession of one round of ammunition of 9 mm caliber without a valid firearm certificate in force at that time.
6. The appellant pleaded not guilty to all counts. The matter proceeded to trial and the prosecution called a total of eight witnesses in support of its case against the appellant. It was the prosecution's case that PW2, Anthony Muthee Kabiro (Anthony), had been employed by PW5, Samuel Githinji Wakahiu (Samuel), to operate Samuel's vehicle registration Number KAJ 822C, make Toyota Corolla as a taxi within Karatina. The said vehicle was grey in colour. On 27th September, 2004, at around 11.00 pm while at the taxi terminus at the Celebration Hotel, Anthony was hired by two young men whom he estimated to be between the ages of 30-33 years to take them to Tumu Tumu Hospital. Upon agreeing that he would charge them Kshs 300/=, one of the young men gave Anthony Kshs 1,000/-. Anthony informed them he had no change and would therefore pass by the Petrol Station to get change. The two young men entered the vehicle and according to Anthony, the appellant sat in the front passenger seat while his companion sat at the back. They drove to Total Service Station where Anthony bought fuel of Kshs 100/= and gave the appellant's companion his change of Kshs 700/=
7. When they had driven for about 2 KM, the appellant requested Anthony to stop the car at a place known as *Nallen* so that he could look for something. Anthony testified that the appellant got out of the car and started touching his pockets as if he was looking for something. The appellant's companion who was inside the car asked the appellant if he had forgotten the hospital card. Thereafter, the appellant's companion requested the appellant to come back into the vehicle. The appellant entered the front passenger seat and removed a pistol from the pocket of his jacket. He brandished the gun at Anthony and ordered him to get out of the driver's seat and go to the back seat. Anthony complied with the orders and went to the back seat where he sat with the appellant's companion. Anthony testified that the appellant's companion was also armed with a pistol. The appellant sat on the driver's seat and drove the vehicle towards Tumu Tumu Hospital. They stopped and fueled the car and the appellant's accomplice paid Kshs 1400/- for the fuel. According to Anthony, they drove up to Marua and upon reaching the junction they drove through Kiganjo-Nanyuki road. When they arrived at Nyeri-Nanyuki Road, the robbers saw policemen who were ahead and decided to use King'ong'o-Nyeri road. They drove into a forest in Mweiga area where Anthony was ordered to get out of the car and walk without turning back.
8. After walking for a while, Anthony decided to turn back and he heard the vehicle being driven towards the direction they came from. By that time, it was around 1.00 am at night. He walked for about 2km and came out of the forest. While walking, Anthony met a good Samaritan who gave him his mobile phone to call Samuel. He informed Samuel about the incident. Thereafter, Samuel went to the Karatina Police Station and reported the incident to both the police and Flying Squad officers. Meanwhile, Anthony was able to get assistance from another good samaritan who drove him up to Kiganjo. (where he found the Flying Squad). Anthony testified that the robbers took his mobile phone make Siemens C-35 and Kshs 1,000/- from him.
9. PW 4, PC Harris Ibere (PC Harris), recorded Anthony's statement on 27th September, 2004 concerning the robbery. He commenced investigations and also circulated the registration number and the description of Samuel's vehicle to all police stations in Kenya.
10. PW 8, CPL Kennedy Lusweti Kusumba (Cpl Kennedy) testified that on 3rd December, 2004 at around 4.30 am, he was on patrol at Kayole in the company of PW 7, PC John Musyoka (PC John) and PC Thiongo. While on the road which connects Soweto and Kayole Hospital, they noticed motor vehicle registration No. KAP 983K make Toyota Corolla white in colour. Being suspicious of the vehicle, Cpl Kennedy testified that they flashed the lights of the police patrol car to the said vehicle KAP 983K signaling it to stop. According to him when the driver of the vehicle noticed they were policemen, he sped off and they pursued him. A few metres next to Kayole Hospital, the vehicle stopped and the occupant tried to escape. Cpl Kennedy testified that they surrounded

the vehicle and arrested the appellant. Upon searching the vehicle, they recovered at the gear lever, an ammunition 9 mm caliber covered with tissue paper and under the vehicle's carpet, they found alphabetical letters K, L & O which were made of reflective materials which resemble those used on motor vehicle registration number plates. They also discovered, upon opening the bonnet, a bullet proof jacket belonging to Securicor Company. Cpl Kennedy testified that they handed the appellant, the vehicle and recovered items to the Criminal Investigation Department of Buru Buru Police Station.

11. Thereafter, PC Harris was informed by CID Buru Buru that a vehicle bearing Registration Number KAP 983K had been intercepted at Kayole Hospital. The appellant, the said vehicle and the recovered items were subsequently taken to Karatina Police Station. PW 3, IP Joseph Mugo (IP Joseph), conducted an identification parade on 21st December, 2004 at Karatina Police Station. He testified that he explained to the appellant the purpose of the parade and the appellant agreed to participate. Anthony identified the appellant from the identification parade as one of the robbers. Anthony in his testimony maintained that the robbery took place for a long time and therefore he was able to get a strong impression of the appellant's physical attributes.
12. On 27th December, 2004 PC Harris requested PW 6, IP Sergeant Kimboi (IP Kimboi) to conduct a restoration on vehicle Registration Number KAP 983K. IP Kimboi testified that upon applying the restoration chemical on the chassis and engine of the said car, he confirmed that chassis and engine numbers had not been tampered with and were intact. Samuel identified the vehicle that was in the appellant's possession as his despite its registration number and colour having been changed. He produced the Logbook bearing his name which bore the same chassis and engine number as the vehicle that was found in possession of the appellant.
13. On 24th December, 2004 PW 1, Lawrence Ndemwa (Lawrence), a firearm examiner based at CID headquarters in Nairobi examined the ammunition recovered in the vehicle the appellant was driving. He testified that the ammunition of caliber 9.19 mm was suitable for use. The appellant was subsequently and arraigned in court and charged.
14. The appellant in his defence gave an unsworn statement. He testified that on 27th September, 2004, he went to his home at Nanyuki with his workers to construct a house. He testified that the construction went on up to 4th October, 2004. The appellant stated that he remained in Nanyuki up to 15th October, 2004 when he went back to Nairobi. He maintained that on 3rd December, 2004 at about 4:00 pm, one Mwangi brought vehicle registration number KAP 983K to his garage for repair; in the evening, the said Mwangi requested him to take the vehicle to Buffalo Bar. However, despite taking the vehicle to Buffalo Bar, the said Mwangi did not turn up. The appellant stated that he waited for the said Mwangi until 9.00 pm when he decided to take the vehicle to his house at Kayole. The appellant testified that on his way home, as he approached Othaya Bar, he overtook a vehicle which he did not know was a police vehicle. As soon as he parked the vehicle in front of his house, policemen surrounded him and interrogated him. He testified that the policemen handcuffed him and took away the car keys.
15. According to the appellant the policemen entered his house and searched it while he waited outside for about 30 minutes. He maintained that he informed the policemen who had inquired about the vehicle that it belonged to Mwangi. The appellant called the said Mwangi on his mobile phone and Mwangi talked with one of the policemen; Mwangi and the said policemen agreed that Mwangi would go and pick up the car at the police station. The appellant testified that the police showed him something that was in a polythene bag, ammunition and jacket. He maintained that he had not seen those things in the vehicle. He stated that he was taken to the Police Station where he was further interrogated by CID Buru Buru about the vehicle. The appellant stated that he informed the policemen that he was only carrying out repairs on the vehicle. He was later transferred to Karatina Police Station. While at the Crime Office of Karatina Police Station, he heard a police officer asking Anthony if he was the person and Anthony replied that he was not the one. He testified that thereafter an identification parade was conducted and Anthony identified him as one of the robbers. He stated that he expressed that he was not satisfied with the way he was identified to IP Joseph. He denied committing any of the offences he was charged with.
16. DW 3, Patrick Mwangi Karure (Patrick) testified that he knew the appellant as a mechanic. He stated that on 2nd December, 2004, he was with the appellant in his garage at Kabiruini, Nairobi when someone who was not known to him brought motor vehicle registration KAP 983 K for

repair.

17. The trial Court being convinced that the prosecution had proved its case convicted the appellant of the offences of robbery with violence, preparation to commit a felony and being in possession of ammunition without a valid firearm certificate. The trial Magistrate sentenced the appellant to death on the offence of robbery with violence and directed that the sentences in respect of the other offences be held in abeyance. Aggrieved with the trial court's decision, the appellant appealed to the High Court. The High Court (Sergon, Wakiaga, JJ.) in the judgment dated 16th December, 2011 dismissed the appellant's appeal and confirmed the conviction and sentence issued by the trial court. It is against the said decision of the High Court that the appellant has filed this second appeal based on 12 grounds which can be aptly be summarized as follows:-

- ***The learned Judges of Superior court erred in finding that the identification evidence adduced by the prosecution was from error.***

- ***The learned Judges of the Superior Court erred by failing to carefully test the evidence of a single identifying witness.***

- ***The learned Judges of the Superior Court erred in law by failing to take into account that the appellant had raised a defence of alibi and that the trial court had rejected the said defence without cogent reasons.***

- ***The learned Judges of the Superior Court erred in law by not making any finding on the counts of preparation to commit a felony and being in possession of ammunition without a valid firearm certificate.***

- ***The learned Judges of the Superior Court erred by failing to find that the appellant's constitutional rights to a fair hearing had been violated.***

18. Mr. Wahome Gikonyo, learned counsel for the appellant, on the issue of identification submitted that PW 2, Anthony, did not give evidence in the trial court of how he identified the appellant during the robbery. He argued that the circumstances surrounding the robbery were difficult such that Anthony could not have been able to have a proper and a strong impression of the features of his attackers. Mr. Gikonyo stated that according to Anthony's testimony, he had driven his assailants for a distance of 2km when they forced him to the back seat of the car using a pistol. He emphasized that the circumstances were that Anthony feared for his life and therefore, there was a real likelihood that the evidence on identification was not free from error. Mr. Gikonyo submitted that both lower courts did not subject the evidence of Anthony, being a single identifying witness to the required test. In support of the said submission, he relied on this Court's decision in ***Maitanyi -vs- Republic (1986) KLR 198.***
19. Mr. Gikonyo submitted that the identification parade was not properly conducted as Anthony had numerous unnecessary contact with the police before the identification parade was conducted; no reasons were given for the said visits by Anthony before the identification parade was conducted; there were certain inconsistencies in the prosecution's case. He stated that PW 4, PC Harris, testified that Anthony reported the robbery incident on 27th September, 2004 in the afternoon, while Anthony maintained that after the robbers attacked him on 27th September, 2004 at around 11.00 am they drove around with the car until about 1.00-2.00 am in the morning. He further argued that the extract of the Occurrence Book which was produced indicated that the report was made on 27th September, 2004 at 3.40 pm.
20. Mr. Gikonyo further argued that there was no basis for the two lower courts to reject the appellant's defence of *alibi*. The *alibi* evidence was not dislodged. He also argued that the appellant's constitutional rights to a fair hearing had been violated because he had been arrested on 3rd December, 2004 and was only arraigned in court on 28th December, 2004. He submitted that both lower courts did not make any findings on the alternative count of handling stolen goods. He finally urged us to allow the appeal.
21. Mr. E. W. Makunja, Senior Prosecuting Counsel, in opposing the appeal supported both the

conviction and sentence against the appellant. He submitted that the robbery took place during the day and there was sufficient room and time for the appellant to have identified his attackers. He maintained that the identification parade was properly carried out, the identification evidence was free from error and the appellant's identification was further corroborated by the fact that he was found in recent possession of the vehicle that had been stolen; the appellant's defence of *alibi* had been dislodged by the prosecution's evidence. In conclusion, he stated that it could not have been a coincidence that Anthony testified he was robbed by assailants who were armed with pistols and the appellant was found in possession of the stolen vehicle and ammunition.

22. This being a 2nd appeal, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***Chemangong -vs- R [1984] KLR 611***. In ***Kaingo -vs- R*** **(1982) KLR 213 at p. 219** this Court said:-

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"***

23. It is clear from the record that the appellant was arrested on 3rd December, 2004 and arraigned before the Chief Magistrate's Court on 28th December, 2004. The appellant contends by virtue of the delay of being arraigned in Court as required by ***Section 72 (3)*** of the former Constitution required that an accused who is arrested for a capital offence be arraigned in court within 14 days of his arrest, failure of which the prosecution assumes the burden to explain that the delay was reasonable. ***See Paul Mwangi -vs- Republic Criminal Appeal No. 35 of 2006.*** In this instant case the issue of delay in arraigning the appellant in Court was raised in the High Court wherein the learned Judges (Sergon, Wakiaga, JJ.) expressed themselves as follows:-

> ***"On the issue raised on ground one of his submission to the effect that he was arrested on 3rd December, 2004 we take the view that the appellant was never prejudiced in any way as alleged that he was denied the right to a speedy, fair trial and due protection of the Law. We take note that he was arrested in Nairobi for an offence which was committed in Nanyuki and the days taken by the prosecution to bring him to court were reasonable....."***

24. The question on our minds is whether the delay in arraigning the appellant in court prejudiced the appellant's right to fair trial and whether the same warrants his acquittal. In ***Julius Kamau Mbugua -vs- Republic – Criminal Appeal No. 60 of 2008***, this Court expressed itself as follows:-

> ***"In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However; the trial court can take cognizance of such pre-charge violation of personal liberty. If the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial related prejudice as a result of death of an important witness or has lost memory. In such cases, the trial court could give the appropriate protection like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though Constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages."***

Bearing in mind the foregoing, we are of the considered view that no prejudice was occasioned to

the appellant in respect of a fair trial on account of the delay.

25. It was the appellant's contention that there were inconsistencies in the prosecution's case at the trial court. Mr. Gikonyo pointed out that PW 2, Anthony testified that he was robbed on 27th September, 2004 at around 11.00 am and that they drove around with robbers until at about 1.00 am in the morning when he was abandoned in a forest in Mweiga. On the other hand, PW 4, PC Harris, testified that Anthony reported the incident at Karatina Police Station on 27th September, 2004 in the afternoon. We have noted that PC Harris confirmed that Occurrence Book clearly indicated that the report was made by Anthony on 27th September, 2004 at 3.40 pm. It is therefore, clear on the record that there is a discrepancy on the date and time when Anthony reported the incident to the police. This Court has on several occasions held that discrepancy as to the date of arrest and/or offence is not considered material in a case if it does not cause prejudice to the accused or if it is inconsequential to the conviction and/or sentence. This Court has also held that such a discrepancy is curable under ***Section 382*** of the ***Criminal Procedure Code***, Chapter 75, Laws of Kenya. In ***Joseph Maina Mwangi -vs- Republic – Criminal Appeal No. 73 of 1993*** this Court held:-

> ***"In any trial, there are bound to be discrepancies. An appellate Court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code vis whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences"***

We are of the considered view that the discrepancy on the date and time when the incident was reported is curable under ***Section 382*** of ***Criminal Procedure Code*** and the said discrepancy did not in any way prejudice the appellant.

26. There were concurrent findings of fact by both lower courts on the issue of identification. Both courts found that the circumstances during the robbery were such that PW 2, Anthony was able to properly identify the appellant as one of the attackers. Anthony testified that he observed his attackers for sometime from the time they hired his services up to the time they abandoned him in the forest. He testified that the appellant sat on the front passenger seat before the appellant ordered him to move to the back seat. Anthony maintained that while he was seated at the back of the car, he continued observing the appellant and noticed he had traces of grey hair. Anthony also testified that he had properly observed the appellant's physical attributes during the robbery. This was clearly identification by a single witness. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In ***Abdulla Bin Wendo & Another -vs- Reg (1953) 20 EACA 166,*** it was held that,

> ***"Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known the conditions favouring a correct identification were difficult."***

See also ***Roria -vs- Republic (1967) EA 583*** and ***Ogeto -vs- Republic (2004) 2 KLR 14.*** In this instant case, it was Anthony's evidence on cross-examination that he did not know the robbers prior to the incident; the appellant brandished the pistol at him and ordered Anthony to continue driving. Anthony testified he continued driving without looking back. He stated that during the robbery incident, he feared for his life. We are of the view that based on the foregoing that the circumstances that were prevailing during the robbery were difficult.

27. Having established as above, it is imperative to test whether the evidence on identification was positive and free from error as held by the two lower courts. In ***Maitanyi -vs- Republic, (1986) KLR 198***, this Court at page 201 held:

> ***"There is a second line of inquiry which ought to be made and that is whether the***

complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained."

28. During cross-examination, Anthony maintained that he had received a good impression of the physical attributes of the robbers. He testified that the appellant wore a black trouser and a cream shirt and that his accomplice had a jacket. Anthony also maintained that he had noticed that the appellant had traces of grey hair. We cannot help but note that Anthony did not give the said descriptions of the appellant in his initial report to the police. In fact, it was PC Harris's evidence that Anthony had said if he ever met the robbers he would be able to identify them. We therefore find that Anthony did not give the descriptions of his attackers in his initial report because he had not received a strong impression of his attackers.
29. The purpose of an identification parade is to test the ability of a witness to identify an accused person. This test can only be properly carried out if the witness had prior to the identification parade made a report that he could identify the accused and given a description of the accused. In ***Njoroge -vs- Republic (1987) KLR 19***, this Court at page 23 held,

"Dr. Macharia was a single identifying witness, whose evidence had to be tested with the greatest care..... That cannot be done unless the identifying witness had made a report as to whether he could identify the accused and given a description. His ability to identify the accused is then to be tested on an identification parade."

Having expressed ourselves as above, we find that Anthony's ability to identify his attackers was not properly tested in the identification parade that was held. This is because Anthony never indicated in his initial report that he could identify his attackers and never gave their descriptions. Based on the identification evidence adduced at the trial court we find that the identification was not free from error and could not have formed the basis of the appellant's conviction.

30. It was the prosecution's uncontroverted evidence that on 3rd December, 2004, the appellant was found in possession of motor vehicle registration number KAP 983K, Toyota Corolla which was Grey in colour; that after carrying out the restoration of the engine and chassis numbers in the said vehicle, PW 6 IP Kimboi found that the chassis No. was AE915069286 while engine No. was 5A3194986; the said engine and chassis numbers were identical to those of the stolen vehicle registration number KAJ 822C Toyota Corolla which was white in colour; PW 5, Samuel produced a Log book which proved that the vehicle which was found in possession of the appellant belonged to him and that the said registration number and colour had been altered. Both lower courts invoked the doctrine of recent possession to convict the appellant of the offence of robbery with violence. The question that falls for our consideration is whether based on the evidence adduced the two lower courts properly invoked the doctrine of recent possession.
31. In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic - Criminal Appeal No. 272 of 2005***, this Court held,

"….It is trite that 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 be positive proof, first: that the property was found with the suspect, secondly that the 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 to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

In the instant case, it is not in dispute that firstly, the appellant was found in possession of the stolen vehicle . Secondly, the stolen vehicle belonged to PW 5, Samuel. Thirdly, the vehicle in

question was stolen from PW 2, Anthony who was Samuel's employee. Fourthly, we find that the appellant was found in recent possession of the stolen vehicle. This is because the vehicle was stolen on 27th September, 2004 and was found in the appellant's possession on 3rd December, 2004, three months thereafter.

32. We further find that the explanation given by the appellant for his possession of the vehicle was not reasonable. He stated that one Mwangi left the car in his garage to be repaired. We concur with the trial court that the appellant did not adduce any evidence to prove that he was a jua kali mechanic and that was how he came into possession of the vehicle. In the case of ***Francis Kariuki Thuku & 2 others -vs- Republic [2010] eKLR*** this Court held that:-

> ***"Concerning the application of the doctrine of recent possession to the facts in the case, we are of the view that the appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of R. -vs- Loughin 35 Cr. Appl. 269 by the Lord Chief Justice of England and this Court's own decision of Samuel Munene Matu -vs- R. Criminal Appeal No. 108 of 2003 at Nyeri demonstrates that the doctrine was properly applied. The recovery of the items in the case before us was within 7 days whereas in the MATU case (supra) a period of 20 days was held to be recent. We accordingly uphold the superior court's view of the law on the point. In this regard we would re-echo the decision of this Court in the case of Hassan -vs- Republic [2005] 2 KLR 11 where as regards recently stolen goods it delivered itself thus:-"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver."***

In ***R -vs-Loughin 35 Cr App R 69***, the Lord Chief Justice of England said:-

> ***"If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop breaker."***

Therefore, we find that the two lower courts correctly invoked the doctrine of recent possession in this case.

33. The appellant contended that both lower courts did not take into consideration his evidence of alibi. The appellant testified that at the material time when the vehicle was stolen, he was at his home in Nanyuki with his workers constructing a house. In ***Kiarie -vs- Republic, (1984) KLR 739*** at page 745, this Court expressed itself as follows:-

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in Law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court doubt that is not unreasonable."***

See also ***Said -vs- Republic, (1963) EA 6.***We have perused the record and note contrary to the submissions made by Mr. Gikonyo on behalf of the appellant the trial court did consider the defence of alibi as herein below:-

> ***"On the same vein the accused told this court that at the time of the alleged offence, he was at Nanyuki constructing a house. It was his testimony that at no time did he leave the house until 15th October, 2004. At the close of the defence case, none of the workers were called to support the claim that the accused weighed with that of the prosecution. The only logical inference is that when this robbery took place on 27th September, 2004, the accused was one of them."***

We agree with the trial court that the defence of *alibi* by the appellant did not raise a reasonable doubt as to the guilt of the appellant and further the alibi defence was dislodged by the evidence adduced by the prosecution on recent possession.

34. Lastly, Mr. Gikonyo submitted that both lower courts erred by not making findings on the alternative count of robbery with violence. In this instant case, once the trial court convicted the appellant on the principal counts, it was not open for him to convict the appellant on an alternative count. See this Courts decision in ***David Kiragu Thuo & 5 Others -vs- Republic*** **– *Criminal Appeal No. 51/2007***.
35. The upshot of the foregoing is that we find no basis for interfering with appellant's conviction and sentence. Accordingly, the appeal herein is dismissed.

Dated and delivered at Nyeri this 13th day of November, 2013.

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

….....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR