



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CRIMINAL APPEAL NO. 75 OF 2008**

**BETWEEN**

**MOSES MWANGI KIHARA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nyeri ( Kasango &*

*Makhandia, JJ.) dated 7<sup>th</sup> May, 2008*

**in**

**H.C.CR.A NO. 178 OF 2005)**

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**JUDGMENT OF THE COURT**

1. **Moses Mwangi Kihara**, the appellant, Patrick Muchangi and James Mwangi Kamori were jointly charged with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, Chapter 63, Laws of Kenya while the appellant was also charged with an alternative count of handling stolen property contrary to **Section 322 (2)** of the **Penal Code**.
2. The particulars of the first count of robbery with violence were that on the night of 13<sup>th</sup> September, 2004 at Nyakagumo Village in Maragua District within the then Central Province the appellant and his co-accuseds jointly with others not before the court, while armed with offensive weapons namely pangas and runqus robbed Habel Karanja Jotham of cash Kshs. 2,500/=, mobile phone make Nokia 3210 valued at Kshs. 5,000/=, Sunny radio valued at Kshs 2,400/= all valued at Kshs. 10,350/= and at or immediately before or immediately after such robbery wounded the said Habel Karanja Jotham. The particulars of the second count were that on the above mentioned date and place the appellant and his co-accuseds jointly with others not before the court while armed

with the above mentioned offensive weapons robbed Jackson Mburu Muiruri of one T.V set make L.G 14" colour T.V S/No. 0035Y00327 valued at Kshs. 13,900/= cash Kshs. 4,150/= and two top blazers valued at Kshs. 1,200/= all valued at Kshs. 19,250/= and at or immediately before or immediately after such robbery threatened to use actual violence to the said Jackson Mburu Muiruri.

3. On the other hand, the particulars of the alternative count of handling stolen goods were that on 13<sup>th</sup> September, 2004 at Maragua Township in Maragua District within the then Central Province the appellant otherwise than in the course of stealing, dishonestly received or retained one T.V set make L.G S/No. 0035Y00327 valued at Kshs. 13,900/= knowing or having reasons to believe it to be a stolen good or unlawfully obtained.
4. The prosecution called a total of eight witnesses in support of its case against the appellant. It was the prosecution's case that on the night of 13<sup>th</sup> September, 2004 at around 1:20 a.m while PW4, Jackson Mburu Muiruri (Jackson), and PW5, Mary Wambui Mburu (Mary), were asleep they heard footsteps outside their house. Mary switched on the security light and she saw a group of armed people outside the house. The robbers smashed the security light, broke the door using a big stone and entered into the house. When Jackson opened the bedroom door he saw a panga over his head and torches pointed at his face. He was ordered to lie down and he gave the robbers Kshs. 150/= that was in his pocket. Mary was ordered to sit down and to give the robbers money. She gave the robbers Kshs. 4,000/=. It was both Jackson and Mary's evidence that the robbers also stole Jackson's Omax watch, two blouses belonging to Mary and a T.V set make L.G which had been purchased by their son, PW6 , Evans Njuguna Mburu (Evans). After the robbers left they called the police.
5. Thereafter, at around 2:00 a.m on the same night while PW2, Habel Karanja (Habel), was asleep he heard footsteps outside his bedroom. His wife switched on the security lights which were smashed by the robbers. Habel heard someone from outside demanding for money in Kiswahili. Habel and his wife began screaming for help but their neighbours did not respond. The robbers started banging the bedroom window until the grills thereon came off. Before switching off the bedroom light Habel saw that there were about ten armed robbers outside his house. His wife gave the robbers through the bedroom window Jackson's trouser which had Kshs. 2,500/= and mobile phone make Nokia 5210. The robbers demanded for more money and Jackson's wife gave then two shirts and a pair of trousers. Jackson testified that the robbers subsequently managed to get access into the house using his daughter's bedroom window and broke down his bedroom door. The robbers hit Jackson with a stone on his left eye injuring him. After a short while the robbers ran away when they heard neighbours approaching the house. None of the victims could identify the robbers.
6. On the same night PW7, PC Joseph Munyua (PC Joseph), was informed about the robberies and proceeded to the scene. Upon searching Jackson's compound, PC Joseph recovered two blouses which Mary identified as the ones which had been stolen by the robbers that night. On 14<sup>th</sup> September, 2004 at around 2:25 p.m while PW3, PC Patrick Kimani (PC Patrick), a dog handler, was at Maragua Junction he saw three men heading towards Trinity Primary School. One of the men was carrying a sack. Being suspicious of the said persons he ordered them to stop. Two of them ran away leaving the appellant who was carrying the sack. PC Patrick recovered a T.V set Make L.G from the sack. He arrested the appellant and took him to Maragua Police station. Jackson identified the recovered T.V set as the one that was stolen on the material day and Evans produced a receipt of purchase of the same. The appellant led to the arrest of his co-accuseds. They were charged and arraigned in court.
7. In his defence the appellant gave a sworn statement. He testified that on 13<sup>th</sup> September, 2004 he woke up and prepared himself to go for physiotherapy at Kenyatta National Hospital. It was his evidence that he had injured his hand when he was young and therefore required regular physiotherapy. When he was at the stage near the police station, a police officer arrested him after inquiring where he was going . He denied being in possession of the T.V set. The appellant's co-accuseds also gave sworn statements in their defence and denied committing the offences they were charged with.
8. The trial court convicted the appellant and his co-accuseds on the two counts of robbery with violence and sentenced them to death on each count. Aggrieved with the said decision the appellant and James Mwangi Kamori filed an appeal in the High Court. The High Court (Kasango

& Makhandia, JJ.) vide a judgment dated 7<sup>th</sup> May, 2008 quashed the conviction on the offence of robbery with violence and set aside the sentence meted out to the appellant and James and convicted the appellant on the alternative charge of handling stolen property. It is against that decision that the appellant has filed this second appeal based on the following grounds:-

***The learned Judges erred in law by failing to re-evaluate the evidence before arriving at a conclusion that the conviction by the trial court was safe.***

***The learned Judges erred in law by failing to consider the language used when the charge was read was not indicated in the record.***

***The learned Judges erred in law by failing to consider contradictions in the prosecution's evidence and by finding that the prosecution had discharged its burden of proof.***

***The learned Judges erred in law by failing to give due consideration to the appellant's defence.***

9. Mr. S. Mwaniki, learned counsel for the appellant, filed written submissions and made oral submissions in support of the appeal. He submitted that the evidence tendered in respect of identification of the T. V set allegedly found in the appellant's possession was full of contradictions. He argued that both PC Patrick, who allegedly recovered the T.V set and Jackson were not able to give the serial number of the T.V during their initial reports; Mary in her statement indicated the T.V's serial number as 0035000327 while the serial number indicated on the receipt which was produced as proof of ownership of the T.V set was 0035Y00327. Mr. Mwaniki argued that there was need of corroboration of PC Patrick's evidence that the appellant was in possession of the stolen T.V set. He stated that the failure by the appellant to explain how he came into possession of the T.V set did not necessarily mean he was guilty of the offence he was charged with; the prosecution had the onus of proving the ingredients of the charge beyond reasonable doubt. The prosecution failed to prove its case beyond reasonable doubt.
10. Mr. Mwaniki submitted that the trial court did not indicate the language used when the appellant was taking plea; therefore it is not possible to determine whether the language used was understood by the appellant. The failure to indicate the language used was contrary to **Section 77(2)(b)** of the former **Constitution**. According to him the High Court did not re-evaluate the evidence tendered in the trial court as required by the law. He urged us to allow the appeal.
11. Mr. J. Kaigai, Assistant Director of Public prosecution, in opposing the appeal, submitted that the appellant was arrested with the T.V set which was stolen from Jackson; PW8, Job Kiiru Nduati (Job), confirmed that he sold the T.V set to Jackson's son, Evans. Mr. Kaigai argued that under **Section 111** of the **Evidence Act**, Chapter 80, Laws of Kenya, the appellant was required to give an explanation of his possession of the stolen T.V set. He urged us to confirm the appellant's conviction for the offence of handling stolen property and to sentence him to 14 years imprisonment.
12. This being a 2<sup>nd</sup> 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)”***

13. **Section 77(2) (b)** of the former **Constitution** provided,

**“ 77(2) Every person who is charged with a criminal offence-**

**a).....**

**b) shall be informed as soon as reasonably practicable, in a language that he understands and in details, of the nature of the offence with which he is charged.”**

The appellant's contention that the language used during plea taking was never indicated and that the same was a violation of the aforementioned fundamental right was never raised in his first appeal. However, having perused the record we are satisfied that the charges against the appellant were explained to him in a language he understood and to which he pleaded not guilty. Therefore, this ground fails.

14. PC Patrick testified that on 14<sup>th</sup> September, 2004 while he was near Maragua junction he saw the appellant carrying a sack in the company of two men; he directed the appellant to stop and upon searching the sack he recovered a T.V set make L.G. It was the appellant's contention that there was need of further independent evidence to corroborate PC Patrick's evidence of recovery of the T.V set. **Section 143** of the **Evidence Act** provides:-

**“No particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact.”**

We disagree with this contention and find that PC Patrick's evidence on recovery of the T.V set on the appellant a day after the robbery was uncontroverted.

15. The next issue for our consideration is whether the T.V set recovered on the appellant was the one which was stolen from Jackson. It was the appellant's contention that the serial number of the T.V set recorded in the witness statements differed with the serial number in the receipt produced by Evans. We cannot help but note that from the record PC Patrick did not indicate the serial number of the T.V set recovered on the appellant; the serial number on Mary's statement was 0035000327 while the serial number indicated on the receipt produced by Evans was 0035Y00327. Did this discrepancies in the serial number hinder the positive identification of the T.V set? It was Jackson's uncontroverted evidence that the T.V set which was stolen on the material day had been purchased by Evans. Evans confirmed that he bought the T.V set and produced receipt confirming the same. The receipt bore serial number 0035Y00327 which matched the serial number on the recovered T.V set. We are of the considered view that the prosecution proved beyond reasonable doubt that the T.V set which was found in the possession of the appellant was the one produced at the trial court. We find that the discrepancy in Mary's statement as to the T.V's serial number 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 further find that there was positive identification of the T.V set found in the possession of the appellant as the one stolen from Jackson.

16. Having found that the appellant was found in recent possession of the stolen T.V set, the next issue for our determination is whether the High Court was correct in convicting the appellant on the alternative charge of handling stolen property. In **Andrea Obonyo -vs- Republic (1962) EA 542** it was held that,

**“When a person is charged with theft and in the alternative, with receiving and the sole**

***evidence connecting him with the offence is the recent possession of stolen property, then, if the only reasonable inference is that he must have either stolen the property or received it knowing it to be stolen, he should be convicted either of theft or of receiving according to which is more possible or likely in the circumstances.***

Further, this Court in ***Anthony Kariuki Kareri -vs-Republic- Criminal Appeal No. 110 of 2002*** expressed itself as follows:-

***“The presumption is that a person in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. That is a presumption of facts and not an implication of law which presumption is merely an application of the ordinary rule relating to circumstantial evidence.”***

Based on the evidence on record we concur with the High Court that the recovery of the T.V set on the appellant did not establish his guilt for the offence of robbery with violence. We are convinced that in this case there was need of corroborative evidence to warrant conviction of the appellant for the offence of robbery with violence. This is because based on the circumstances of the case it could be inferred that he was a handler of the stolen T.V set.

17. Therefore, did the prosecution establish the offence of handling stolen property against the appellant? ***Section 322(1)*** of the ***Penal Code*** provides:-

***“A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.”***

From the foregoing, it is quite clear that the prosecution had proved that the T.V set found in the possession of the appellant was the one stolen from Jackson. It was incumbent for the prosecution to also prove that at the time the appellant received the T.V set he knew or had a reason to believe that the same was stolen. In ***Ratilal -vs- Republic (1971) EA 575***, it was held that,

***“The necessary mens rea must exist at the time of the receipt of the stolen goods so that it must be established that the accused person knew at the time of the receipt that the goods were stolen or that he had reason so to believe.”***

PC Patrick gave uncontroverted evidence that when he ordered the appellant and the two men he was with to stop, the two men ran away and when he directed the appellant to open the sack he refused prompting him to open the same wherein he found the T.V set. We are of the considered view that based on the appellant's aforementioned conduct coupled with the fact that he was in possession of the T.V set a day after it was stolen clearly points to the inference that he knew or believed that the same was stolen. Further, the appellant did not tender any explanation as to how he came into possession of the stolen T.V set. In ***Odongo -vs- Republic- Criminal Appeal No. 82 of 1983***, this Court stated,

***“As receiving and retaining are not mutually exclusive, a charge of dishonestly receiving, like one of receiving stolen property, is not established if the explanation given by the accused is reasonable.”***

18. We find that the evidence on record did establish that the appellant was guilty of the offence of handling stolen property. We, therefore, see no reason to interfere with the appellant's conviction for the said offence. However, we note that despite the High Court substituting the appellant's conviction for robbery with violence with the conviction of handling stolen property did not sentence the appellant on the said offence. ***Section 322 (2)*** of the ***Penal Code*** provides:-

***“A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.”***

It is not in dispute that the appellant has since his conviction in the trial court served a term of nine years imprisonment. We therefore, sentence him to nine years to run from the date of his arrest.

19. The upshot of the foregoing is that we dismiss the appeal herein. The appellant having served his sentence we direct that he be set at liberty unless otherwise lawfully held.

***Dated and delivered at Nyeri this 10<sup>th</sup> day of December, 2013***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***J.OTIENO-ODEK***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**