REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

(CORAM: O'KUBASU, WAKI & NYAMU, JJ.A.)

CRIMINAL APPEAL NO. 72 OF 2008

BETWEEN

FRANCIS MAINGI MWAURA …….…… 1ST APPELLANT
PETER KABERU MUGO ……. 2ND APPELLANT
PETER KAMAU KANYI ……..…….. 3RD APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated the 7th day of May, 2008
in

H.C.CR. APP. NOS. 67, 68 & 69 OF 2005)
****

JUDGMENT OF THE COURT

The appellants, ***FRANCIS MAINGI MWAURA***, ***KABERU MUGO*** and ***PETER KAMAU KANYI*** were together with ***R N M*** , ***BENSON MUGO MUTHONI*** and ***JAMES KARIUKI MWANGI*** jointly charged on three counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code. They denied the charges before the Principal Magistrate's Court at Murang'a in Criminal Case No. 704 of 2004, and their trial commenced on *26th July, 2004*.

After the full trial before the learned Principal Magistrate (G.K. Mwaura, Esq.,), the three appellants were found guilty on all the three counts and each of them sentenced to death on each count as prescribed by law. The learned Principal Magistrate also found **R N M** guilty as charged but due to his age (*as he was said to be between 15-17 years following age assessment by Dr. J. Kerena*), the learned trial magistrate committed him to serve 3 years at Shimo la Tewa Borstal Institution. The said R N M did not appeal to the High Court and hence that is why the said M is not before us.

At the close of the prosecution case, the learned trial magistrate found **James Kariuki Mwangi** (*6th Accused*) had no case to answer and proceeded to acquit him under ***section 210*** of the Criminal Procedure Code. As regards **Benson Mugo Muthoni** (*5th accused*), the learned trial magistrate entertained some doubts with regard to the prosecution case against him (**Muthoni**) and proceeded to acquit him.

The facts as accepted by the two courts below were that on the night of *30th March, 2004*, at Kenya Railways, Murang'a Station, there were a spate of robberies in which **Harrison Mathu** (PW1) was violently robbed of ***Kshs.1,020/=*** and a jacket, **Joseph Gakangi Kanyenje** (PW6) was robbed of ***Kshs1,500/=***, a torch, a wrist watch, 3 hens and a cockerel and finally, **Bernard Mwangi** (PW2) was robbed of ***Ksh.2,000/=***. The two complainants (PW1 & PW2) were violently assaulted in the course of the robbery. PW1 sustained a fracture of the petela which was displaced according to the evidence of **John Maina Kanjira**, (PW7) the clinical officer who completed the P3 Form. The same clinical officer testified on behalf of his fellow colleague Julius Njuguna Chege and produced the P3 form in respect of PW2 who it was noted, sustained a cut above the right eye and a fracture on the left leg.

Soon after the robberies, a report was made to the Kenya Railways Police Post. **Charles Maina Kibuchi** (*PW8*), a neighbor of the complainants, **Pc Justin Muriithi** (*PW11*) and **Pc Charles Mutisya** (*PW12*) went to the victims' houses and noted footprints of the thugs as it had heavily rained. They followed the footprints towards Makuyu Market and then to a compound with several house units. The footprints then led them to two doors. At the first door, the police officers (*PW11* and *PW12*) knocked at the door and a man opened. The police encountered a woman and a child. There were further footprints which led to another door. The police knocked at the door but the occupants refused to open. The police forced open the door and therein four people were found. The three appellants herein were among the four found in that house. On searching the house, the police recovered wet clothes amongst them a green jacket, panga and muddy shoes. The police also recovered a cockerel. There was a woman called Grace who claimed that the cockerel had been brought by the five men who were in the room. Both five men and the said Grace were arrested and taken to the police station. The green jacket was subsequently positively identified by *PW1* as belonging to him and that it had been stolen during the robbery. Similarly, the cockerel was positively identified by its owner, **Kanyenje** (PW6). The panga was positively identified by its owner **Chege** (PW4). Apparently, Chege had marked the panga with initials *"HM"*.

When put to their defence, each appellant gave a defence which amounted to an alibi as each of the appellants said that he was not at the robbery scene and that he was not arrested in the manner described by the police officers.

In the course of his judgment delivered on *3rd March, 2005,* the learned trial magistrate stated inter alia:-

"the prosecution case that the accused were the robbers is based on that the robbers foot prints lead to where the accused persons were followed and that they were met with some of the stolen items very shortly, in fact almost immediately after the robbery."

The appellants having been convicted and sentenced as already stated elsewhere in this judgment decided to appeal to the High Court. In the course of their judgment, the learned Judges of the superior court (*Kasango & Makhandia, JJ.*) said:-

"The conviction of the appellants was predicated upon the doctrine of recent possession. This was so because the complainants who testified in support of the charges all stated that they were unable to identify any of the robbers during the robbery. The reason being that the robbers had bright torches which they turned on the victims' eyes and blinded them thereby. Accordingly the evidence tending to link the appellant is premised on the fact that they found in possession of recently stolen items to wit, a green jacket belonging to PW1, a panga belonging to PW4 and a cockerel belonging to PW6. This was so soon infact immediately after the robberies had been committed."

The learned judges of the superior court re-evaluated the evidence and in concluding their judgment which was delivered on *7th May, 2008* said:-

"The appellants having been found in possession of the items were duty bound to explain how they had come by them. They did not leading to the irresistible conclusion that either they were the thieves or received the goods knowing them to be stolen. In our case the items have been recovered so soon after the robberies, a rebuttable presumption arises that indeed they were members of the gang. The presumption was not rebutted. In invoking the doctrine of recent possession to find a conviction

against each appellant, the learned Magistrate was therefore right and cannot be faulted.

Having re-evaluated the evidence and considered the issues raised in this appeal and the submissions of the learned state counsel as well as the appellants, we are satisfied that the appellants were convicted on credible evidence. We see no reason to disturb the findings of the learned Magistrate.

Consequently, the three appeals are hereby dismissed in their entirety.

However as the appellants cannot be hanged three times over we do hereby set aside the sentences of death imposed by the learned Magistrate on counts two and three. The sentence of death on count one, however, remains. Those shall be the orders of the court in this appeal."

It is the foregoing that has given rise to this appeal which came up for hearing on *17th May, 2011*. Mr. J. Macharia appeared for the appellant, while Mr. J. Kaigai (Senior State Counsel), appeared for the State.

In his submissions, Mr. Macharia faulted the learned Judges of the High Court in that they did not re-evaluate the evidence as they were duty bound to do. Mr. Macharia went on to argue that the police should have called the lady known as Grace as a witness since she had been arrested together with the appellants. It was Mr. Macharia's contention that had the lady been called to testify, she would have resolved the issue of the ownership of the premises in which the appellants were arrested. On the issue of the recovered items, Mr. Macharia submitted that these items were not positively identified and that it was not resolved as from where the cockerel was recovered. Finally, Mr. Macharia submitted that there was contradiction as regards who were in the room where the appellants were allegedly found.

In response to the foregoing, Mr. Kaigai supported both the conviction and sentence as, in his view, the facts were straightforward since the appellants were found in possession of recently stolen items. Mr. Kaigai pointed out that the appellants were found in possession of the items only an hour after the robbery. He pointed out that the appellants did not give proper explanation as defined by ***section 11*** of the Evidence Act. Mr. Kaigai reminded us that there are concurrent findings by the two courts below.

We have set out the background facts to this appeal and the submissions of Mr. Macharia and Mr. Kaigai. This is a case in which the facts as accepted by the two courts below are that the there was a spate of robberies within Kenya Railways Murang'a Station quarters in which various innocent residents were robbed of various properties. The incident was reported to the police and as a result the police followed footprints which took them to a place where the appellants were arrested in possession of some of the items stolen during the robbery.

Mr. Macharia was of the view that the learned Judges of the superior court did not re-evaluate the evidence. We have considered this submission but on our part, we are satisfied that the first appellate court did, indeed, re-evaluate the evidence. For instance, the learned Judges dealt with the evidence of each witness and then considered the defence of each appellant before reaching the conclusions that there was both circumstantial evidence and possession of recently stolen property.

Mr. Macharia then submitted that the items recovered were not positively identified. We note from the record that various witnesses testified how they were robbed and how each of them was able to identify the recovered property.

These witnesses appeared before the trial magistrate who saw them give evidence and assess their credibility. The learned trial magistrate was satisfied with the testimony of the witnesses who identified various items. The Judges of the superior court were equally satisfied with the evidence of these witnesses. We, on our part, have considered the entire record and the evidence as relates to the arrest of the appellants, what was found in their possession, and how the items were identified by the robbery victims.

It is our view that in his submissions, Mr. Macharia dwelt on issues of fact rather than law e.g. doctrine of recent possession. But all in all we find that this was a straightforward case in which robbery victims who

were not able to identify their assailants were able to identify some of the stolen property. The recovery of the stolen property was within one hour of the robbery. The appellants were found in possession of the stolen property. In ***ANDREA OBONYO & OTHERS VS. R. [1962] E.A. 542 at p. 549*** the predecessor of this Court said:-

"All criminal charges must, of course, be proved beyond reasonable doubt. As was pointed out in Kantilal Jivraj vs. R. (2), the presumption which arises from the possession of property recently stolen is merely an application of the ordinary rule relating to circumstantial evidence. Where the evidence is circumstantial, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

When a person is charged with theft and, in the alternative, with receiving, and the sole evidence connecting him with the offences is the recent possession of the 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 probable or likely in the circumstances. He is not entitled to be acquitted altogether merely because there may be some doubt as to which of the two offences he has committed. That position is justified because the decision is not between guilt or innocence, but between whether he is guilty of theft or receiving, it having been proved that he is guilty of one or the other."

The foregoing was appreciated and applied by the two courts below to the facts of this case.

Finally, we wish to reiterate what this Court said in ***GICHURU V. R. [2005] 1 KLR 685*** at ***p. 694*** thus:-

"As this is a second appeal, only points of law may be raised since this Court will not disturb concurrent findings of facts made by the two courts below unless those findings are shown to be based on no evidence – see Njoroge vs. Republic [1982] KLR 388; Karingo v. Republic [1982] KLR 213."

In view of the foregoing, we find no merit in this appeal and we order that the same be and is hereby dismissed in its entirety.

Dated and delivered at Nyeri this 7th day of July, 2011.

E.O. O'KUBASU

……..
JUDGE OF APPEAL

P.N. WAKI

……
JUDGE OF APPEAL

J. G. NYAMU

……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR