



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI**

CORAM: TUNOI, AGANYANYA & NYAMU, J.J.A.

CRIMINAL APPEAL NO. 229 OF 2008

BETWEEN

JOHN KAMAU GITHUKU

GEOFFREY MAINA MWANGI APPELLANTS

AND

REPUBLIC RESPONDENT

**(An appeal from a judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ)
dated 3rd October, 2008**

in

HCCRA Nos. 92 & 93 OF 2006)

JUDGMENT OF THE COURT

The appellants, **JOHN KAMAU GITHUKU** and **GEOFFREY MAINA MWANGI** were in the trial court charged with robbery without violence contrary to **Section 296 (2) of the Penal Code** in the first and second counts for perpetrating two separate robberies on the night of 15th and 16th May, 2005 at Githongo Village, Muranga District. The first appellant **John Kamau Githuku** was also charged with the alternative count of handling stolen goods contrary to **Section 322 (2) of the Penal Code**.

The prosecution case was that the two appellants jointly with others not before the court while armed with dangerous weapons and an imitation gun robbed **Edward Kairu Kinya** (PW 11) of Kshs.1,200, a torch, a video deck make National S/No. T.8EK 43984 all valued at Kshs.16,700 and immediately before or after the time of such robbery used actual violence to the said complainant. As regards the second count it was claimed that they robbed **Priscilla Wanjiru Kairu** one mobile phone make Nokia 1100 bearing Safaricom line 0720-943448, a pair of shoes and a wristwatch all valued at Ksh.17,300. The alternative charge against the second appellant was that in the course of stealing he dishonestly handled one video deck make National S/No. T.8Fk3987 valued at Kshs.15000 the property of **Edward Kairu Kinya** (PW 2).

After a full hearing in the trial court, the two appellants were convicted on the two counts of robbery with violence principally on the ground that the Nokia mobile phone and video deck were recovered from both appellants and were identified by PW 1 and PW 2 as their respective

properties. Aggrieved by the verdict, the appellants appealed to the superior court against conviction and sentence but in a judgment dated 3rd October, 2008 the superior court dismissed their appeal and what is now before us is the second and final appeal by the two appellants. The appellants have with the assistance of their counsel C.M. Kingori relied on the following grounds: -

- “1. *The learned trial magistrate and the first appellate court erred in law in convicting the appellants on the basis of the doctrine of recent possession whereas the same was not established.*
2. *The learned trial magistrate and the first appellate court erred in law and fact in failing to resolve the apparent inconsistencies in the evidence and proceeding therefrom to convict the appellants.*
3. *The learned trial judge erred in law and fact in failing to exhaustively evaluate the available evidence.”*

The State was represented by Mr Kaigai, learned Senior Principal State Counsel.

The highlights of Mr Kingori’s submissions were that both courts below erred in relying on the doctrine of recent possession although there was no evidence that the items had been stolen as that the items were in the appellants’ possession and that the complainants owned the items. He reinforced his submissions by drawing the Court’s attention to the fact that the serial number of the video deck as per PW 6’s evidence was T.86443984 whereas in the charge sheet it was 18 FK43984 and further the video deck was recovered in his absence when he was still in the cells on 5th June, 2005. On the same ground counsel submitted that there was no evidence of ownership of the video deck and no particulars of the item were given to the police by the complainants. The same position prevailed as regards the ownership of the Nokia 1100; that there was no witness from Safaricom to describe how the alleged stolen Nokia was traced and therefore there was no evidence that the Nokia produced in court was the alleged stolen Nokia phone.

Concerning the challenge that the appellants’ application to recall PW 3 for cross-examination was not actualized by the court, counsel submitted that this prejudiced the appellants right to a fair trial. Mr Kingori further contended that the language used in the proceedings was never recorded and that the charges the appellants faced were not explained to them resulting in further breach of the right to a fair trial in that, in the circumstances, the appellants failed to conduct cross examination of the prosecution witnesses. Counsel contended that this was as a result of failure to understand the nature of the charges and for this reason they were impaired in their ability to raise appropriate defences to charges they did not understand.

On his part Mr Kaigai in supporting the conviction and sentence submitted that the two courts below had made concurrent findings on the issues raised by the appellants counsel; that failure to call any Safaricom witness was not fatal as the witnesses in tracing the phone relied on information from Safaricom; that as regards the recording of the language used the appellants did not demonstrate any prejudice, because after the plea was taken the trial court did record a plea of not guilty and there was no complaint on the conduct of the actual trial and in addition, the appellant did take part in the proceedings.

Taking the grounds raised seriatim, the first ground is that of application of the doctrine of recent possession of the items. Here we note that the two courts had made concurrent findings of fact and for this reason we would have no reason to intervene. Thus the trial court did specifically state that they believed PW 1 and PW 2 who testified that they owned the video deck and the Nokia mobile phone respectively. For this reason we think the application of the doctrine of recent possession was in the circumstances properly based on proven facts. Concerning the discrepancy of the serial number of the video deck it seems to us that it was a typographical error or a defect curable under **section 382 of the Criminal Procedure Code**. Concerning the related issue that the video deck was recovered in the appellants’ absence, we think that the contention has no substance in that according to the record the Occurrence Book indicated that although the appellant was in the cells on 4th June, 2005, he was properly booked out on 5th June, 2005, when he was taken to his home where the video deck was recovered. Turning to ownership we think that since the missing item from the video deck was recovered

in the complainant's farm and in the trail of the appellants, it provided the missing link in the ownership of the video deck and the two courts did believe the witnesses.

The same reasoning applies to the ownership of the Nokia phone since the person who was the immediate receiver of it was able to provide the investigators with the pin number of the phone and the investigators were in turn able to trace the users of the phone who in turn testified that it had been passed on to them by the second appellant. In the circumstances we are of the view that it was unnecessary to call a witness from Safaricom to testify since Safaricom had already given the initial help of describing the area where the user of the phone was operating from. What was left was for the police investigators to fill in the gaps which we think they did in an admirable manner.

As regards the alleged failure by the trial court to accord the first appellant the right of recall of PW 3, the investigating officer, we note that the purpose of the recall was to question him on whether the first appellant was taken from the cells in order to assist the police in tracing his house. On this we think that the evidence of the Occurrence Book that he was booked from the cells on 5th June, 2005, did not require further amplification and in view of the fact that the trial court did believe the witness, no prejudice was in our view suffered by the appellant to the extent of affecting his right to a fair trial.

Finally as regards the effect of the failure on the part of the trial court to record the language used when the plea was being taken, again we agree with Mr Kaigai that since he did take part in the proceedings after the plea were taken there is no proof of the appellants having suffered any prejudice. Similarly we think that failure *per se* to record the fact that the charges were explained to the appellants is not fatal to the trial in that the subsequent recording of the plea of not guilty by the appellants meant that they understood the charges they faced. On the same point and with respect to the appellants counsel, this challenge had no basis in law in that the record shows that both appellants did cross examine the witnesses. This was an indication that they did understand the nature of the charges they faced.

All in all this appeal has no merit and it is accordingly dismissed.

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

P. K. TUNOI

JUDGE OF APPEAL

D. K. S. AGANYANYA

JUDGE OF APPEAL

J. G. NYAMU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR