IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 118 OF 2005

BETWEEN

ISAAC NJOGU GICHIRI …….....……APPELLANT

AND

REPUBLIC ……..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ochieng & Makhandia, JJ.) dated 15th June, 2004

in

H.C.Cr. A. 647 & 628 of 2000)

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JUDGMENT OF THE COURT

The appellant, ***Isaac Njogu Gichiri*** was the 5th accused in the Senior Principal Magistrate's Court at Naivasha. He was charged with 4 others who were acquitted, with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The facts of the charge were that on 8th day of October, 1998 at around 8.00 a.m. at Nyakairu Farm Naivasha in Nakuru District of the Rift Valley Province jointly with others not before the court and being armed with a firearm robbed ***Maurice Onyango Mbwire*** of one lister engine, one generator, DPM 500 disintergrator, total gas cylinder, gas cooker, two AC- Dcinventor and household items all valued ***Kshs.405,400/=*** and immediately before or immediately after the time of such robbery wounded Maurice Onyango Mbwire. Nyakairu Farm was owned by ***Samwel Njoroge Karanja*** (PW1) who lived and carried on business at Nairobi. He employed several workers on the farm one of whom was Maurice Onyango Mbwire (PW2). On 8th October, 1998 a group of people attacked Mbwire (PW2) at his house on the farm at 8.00 p.m. and beat him up. They ordered him to lie down and then tied him up together with his co-worker ***Patrick Muriuki*** who was not called to testify. They ransacked his house and that of PW1 and stole the items stated in the charge sheet. After the robbers left, he managed to untie himself and when he checked he found that his Sonic radio, Roho wallclock and Kshs.1,600/= were missing. He also checked the house of his employer and found the door thereon broken. Though he did not enter the house, he went round it and found the generator and its engine had been stolen. He went to sleep and on the following day he reported the matter to Naivasha Police Station which commenced investigations in the robbery incident. The investigations led to the arrest of the appellant. PW2 did not identify any of the robbers, neither was any other witness called as a witness to assist in this.

After the robbery incident was reported to Naivasha Police Station ***Pc. Edward Ndemo*** (PW4) of Criminal Investigations Department was assigned to investigate the matter. As he did so the appellant was mentioned by ***Samwel Mwangi Ndirangu*** (PW3) as the person who had sold to him a machine which turned out to be the lister generator stolen from the compound of PW1. The appellant's co-accused ***Alicadioci Mwangi*** who was the first accused in the trial court gave the appellant's name as one of the robbers during the robbery which was committed at the farm of PW1 on 8th October, 1998. It is this accused who led PW4 to the engineering workshop owned by PW3 where he said the appellant had sold the generator. When PW4 visited PW3's workshop the latter admitted having bought the generator from the appellant but that he had taken it to his rural home at Kabate village. Indeed PW4 went to Kabate village and recovered the generator which was later identified by PW1 as the one stolen from his house on 8th October, 1998. The appellant was arrested in December, 1998 and later charged in court as herein before stated.

When the appellant was put to his defence, he denied the offence in an unsworn statement and said he did not know why he had been arrested and charged together with people he did not know. He blamed PW4 for his woes alleging that he had quarreled once with PW4 and even reported him to his Officer Commanding Station, thus imputing a grudge between him and PW4 as the cause of his arrest. The Senior Principal Magistrate (*M. M. Muya)* who heard the case wrote his judgment which he delivered on 7th April, 2000 in which he concluded:

"I find that the facts show that the 1st and 5th accused were involved in the robbery. The prosecution has proved that PW2 was robbed by thugs who were armed with a firearm and other dangerous weapon (sic) who used violence on him and wounded him.

I find that the charge of robbery contrary to section 296(2) P.C. is proved beyond any reasonable doubts *(sic)* ***against the 1st and 5th accused. I therefore find them guilty as charged and I convict them under section 215 CPC."***

Following that conviction the trial court proceeded to sentence the appellant and his co-accused to death, the mandatory sentence allowed by law for this offence.

The appellant and the co-accused were dissatisfied with the conviction and they appealed to the superior court. In its judgment delivered on 15th June, 2004 the superior court (*Fred A. Ochieng* and *M.S.A. Makhandia, JJ)* rendered themselves thus:

"The robbery occurred on 8th October, 1998. However hardly a month later, in November, 1998 the appellant approached PW3 and purports to sell to him the generator which had been stolen during the robbery. In the circumstances the appellant is deemed to be in recent possession of the stolen item. The trial Magistrate was therefore right in drawing the inference that the appellant came into possession of the engine by robbing PW2. The trial Magistrate was also right in rejecting the defence of the Appellant in the circumstances. The appellant's conviction in the light of the circumstantial evidence and the doctrine of recent possession was safe and cannot be faulted consequently we dismiss his appeal and confirm the sentence.

In the upshot we allow the appeal of the 1st appellant quash the conviction and set aside the sentence. However, as for the 2nd appellant, his appeal is dismissed and sentence imposed confirmed."

The appellant still dissatisfied with this decision has appealed to this Court through a supplementary memorandum of appeal filed in this Court by *Messrs Kinyori N. M. & Company Advocates.* It has 9 grounds of appeal as stated hereunder:

1. ***The appellate court erred in law in upholding the judgment and conviction by the trial Magistrate despite the fact that the case was not proved beyond reasonable doubt.***

2. ***The appellate court erred in law in confirming the conviction and sentence without itself***

critically analyzing and evaluating the doctrine of recent possession relied upon by the trial magistrate in relation to the circumstances of the case.

3. The appellate court erred in law in confirming the conviction and sentence by failing to take into account that the accused was identified on the dock and there was no identification carried out before the trial.

4. The appellate court erred in law in confirming the conviction and sentence by failing to take into account that section 211 of the Criminal Procedure Code was not fully complied with by the trial magistrate.

5. The appellate court erred in law in confirming the conviction and sentence by failing to take into account that the trial magistrate relied on hearsay evidence and statements which were not produced in court.

6. The appellate court erred in law in confirming the conviction and sentence relying on circumstantial evidence.

7. That the appellate court erred in law in confirming the conviction and sentence by failing to give due consideration to the appellant's defence.

8. That the appellate court erred in law in confirming the conviction and judgment relying on unsigned delivery note.

9. The appellate court erred in law in confirming the conviction and judgment relying on uncorroborated evidence."

The appeal was heard by this Court on 8th February, 2010 wherein ***Mrs. Kinyori N. M.*** appeared for the appellant while ***Mr. J. Kaigai***, Senior Principal State Counsel appeared for the Republic. In her submissions Mrs. Kinyori stated that the doctrine of recent possession was not applicable in this case as the generator was not recovered in possession of the appellant. She stated that the evidence of PW3 was not reliable since he did not give details to connect the appellant with the name Zakaria which he knew the appellant to be and whom he did not know before. Mrs. Kinyori questioned the identification of the appellant which she found to be dock identification. She also stated that the circumstantial evidence implicating the appellant did not irresistibly point at the appellant as one of the robbers who committed the robbery at the home of PW1 on the night of 8th October, 1998.

Mr. Kaigai, learned Senior Principal State Counsel supported the appellant's conviction and took the view that the evidence of PW3 which implicated the appellant was cogent and it met the legal standards required. He submitted further that the appellant did not explain how he came to be in possession of the generator and that the concurrent findings of the two courts below cannot be disturbed by this Court.

This is a second appeal and as such only matters of law fall for this Court's determination – see ***section 361(1)*** of the Criminal Procedure Code, also ***Mwita v R. [2004] 2 KLR 60.*** The evidence of PW4 gave an outline of facts leading to the arrest of the appellant in connection with the robbery at the house of PW1 on the night of 8th October, 1998. According to him there had been a spate of robberies within Naivasha town and its environs and on information PW4 received he interviewed a number of suspects, some of whom were the appellant's co-accused in the trial court who implicated the appellant and directed him to the engineering premises of PW3 where they alleged the appellant had sold the stolen generator. It is PW3 who then gave details of how the generator had been sold to him by the appellant under the name of Zakaria. According to PW3, the appellant told him his father left him the machine for maize milling but that he had converted it to an electrical generator. PW3 said in cross-examination that it was the appellant who sold him the generator.

Mrs. Kanyori, learned counsel for the appellant complained of failure by the superior court to analyze and re-evaluate the doctrine of recent possession relied upon by the trial Magistrate in relation to

the circumstances of the case. It is true the generator stolen from the home of PW1 was not found with the appellant at the time of his arrest. The trial Magistrate said this in his judgment about the appellant:

"As against the 5th accused, PW4 and 5 told the court that he was implicated by other suspects and they managed to arrest him. PW3 Samwel Mwangi Ndirangu testified that sometimes in November, 1998 while at his workshop here in Naivasha town when 5th accused in this case me (sic) him. The 5th accused told him he had a machine which was converted into an electrical generator and he wanted to sell it. 5th accused asked him whether he was interested to buy the generator.

PW3 agreed to buy and the 5th accused took the leister engine to him. The 5th accused sold the engine at Kshs.40,000/= to PW3. The 5th accused left the engine with PW3. Later Police went for the engine. PW3 identified the engine which was marked by this court as exhibit 2 after it was viewed by this court and identified by the respondent. The engine exhibit 2 is the one which was stolen from the home of the complainant, on the night of the robbery. The 5th accused had the engine and purported to sell it as his property. I find that the 5th accused had the engine soon after it was stolen. The reasonable conclusion is to be drawn is that the 5th accused came into possession of the engine by robbing PW2 in this case. *I find that I had no reason to doubt PW3. He struck me as a credible witness. I found it safe to believe him and to rely on him.* ***The PW4 testified that he had information that 5th accused was involved in the robbery. This information was corroborated by the evidence of PW3. I find that the defence of the 5th accused is not true,"*** emphasis supplied***.***

On this aspect the superior court stated as follows:

"The Appellant submitted that he was convicted on insufficient evidence as none of the items listed in the charge sheet were recovered from him … As we have already stated these complaints are without merit as the evidence against the Appellant was simply overwhelming. Apart from pw3's testimony, there was the testimony of PW4 which was corroborative."

Then the superior court quoted the case of ***Peter Kimaru Maina v Republic***, Nyeri ***Criminal Appeal No. 111 of 2003*** where this Court held as follows:

"Where there is evidence that the accused person is found in actual possession or has, shortly after a robbery sold one of the items stolen during the robbery, he is deemed to be in recent possession of the stolen property. … Evidence of recent possession of a stolen item alone is sufficient to find a conviction for the offence of robbery with violence."

The robbery in this case was committed on 8th October, 1998 and within a month PW3 was approached by the appellant to sell him a generator, one of the items stolen during that robbery. The evidence of PW3 was accepted and believed by the trial and the superior courts. These are concurrent findings of the two courts and with which this Court cannot differ, see ***M'Riungu v Republic [1983] KLR 455,*** also ***Mwita v Republic [2004] 2 KLR 32.*** And in view of the finding of trial and superior courts on the issue of recent possession, grounds1, 2, 3, 5, 8 and 9 fall by the wayside. With respect to compliance with ***section 211*** of the Criminal Procedure Code, we do not expect the trial courts to put down word for word that section provides and we are satisfied the words:-

"Section 211 CPC complied with"

are sufficient to indicate the appellant was explained his rights in defence.

With regard to failure by the superior court to give due consideration to the appellant's defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus:

"I find that the defence of the 5th accused is not true."

We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated:

"***The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances."***

We agree with this confirmation.

As to the issue of circumstantial evidence, we are of the firm view that in the circumstances of this case, the evidence of PW3, PW4 and PW5 led to irresistible inference that the appellant was part of the gang which invaded the home of PW1 where PW2 was in-charge and stole the generator and other household goods after wounding the said PW2 – see ***James Mwangi v Republic [1983] KLR 327.***

The upshot of our finding is that this appeal has no merit and it should and is hereby dismissed.

Delivered and dated at Nairobi this 5th day of March, 2010.

D. K. S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

..……..

JUDGE OF APPEAL

J. G. NYAMU

..……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR