IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 275 OF 2005

JOHN MWANGI WAHOME …..…..…… APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi

(Lesiit & Makhandia, JJ.) dated 6th May, 2004

in

H.C.CR.A. NO. 1154 OF 1993)

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JUDGMENT OF THE COURT

The appellant, **John Mwangi Wahome**, was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code before the Senior Resident Magistrate's Court at Nyeri. The particulars of the charge were that on the night of 12th/13th day of April, 1992 at Gitugi Primary School, Othaya Division, Nyeri District of the Central Province, jointly with others not before the court robbed **Benson Mwangi Munywa** of 48 balls of knitting wools, 18 pieces of table clothes, one tape measure, one stapler, all valued Kshs.1,000/= and at or immediately before or immediately after the time of such robbery killed the said **Benson Mwangi Munywa**.

The appellant was also charged with the alternative count of handling stolen property contrary to **Section 322 (2)** of the Penal Code.

Briefly, the facts that led to the above charge were as follows: On the morning of 13th April, 1992, **Benson Mwangi Munywa** (the deceased), who was a watchman at the Gitugi Primary School, was found dead at the school compound. On the previous night, the school premises, including the Headmaster's office, had been broken into, and 48 balls of knitting wools, 18 pieces of table clothes, one tape measure, one stapler, all valued at Kshs.1,000/= were stolen. After a week, the appellant, together with two other persons, were arrested with the items which were identified as having been stolen from the school. Following investigations by the police, all the three persons were charged with the offence of robbery with violence.

After a full trial, and relying substantially on the doctrine of recent possession, as well as on statements made under caution but which were subsequently retracted, the lower court found the three guilty of the offence charged, and sentenced them to death as provided for by the law.

They appealed to the superior court. The learned Judges of the superior court (Lesiit & Makhandia, JJ.) allowed the appeals of the other two persons, but dismissed the appeal of the appellant. In allowing the appeal of the other two persons, the superior court delivered itself, in part, as follows:

"In this case the only other evidence against the 2nd and 3rd appellants was that of recovery of exhibits from them. This evidence has been discredited due to the contradictions in the evidence of the two Police Officers Cpl. Simon and S/Sgt Munyambu. We do find that the evidence against the 2nd and 3rd appellant is insufficient to sustain the convictions. Consequently we allow their appeals, quash the convictions and set aside the sentences".

With respect to the appellant, the superior court stated as follows:

"In this case, the prosecution is relying on the two retracted statements exhibit 21 and exhibit 22, which the 1st appellant made to two police officers after his arrest. That however is not the only evidence that the prosecution is relying on. It relies on more. That the 1st appellant was found with two cut wounds, one in each hand six days after this offence. Mary Wangeci, whom we regard as an independent witness, said that the 1st appellant had the two wounds on 19th April and that it was the basis that he sought from her a place to spend that night in her house. She could not have been lying. There was blood on the broken door handle of the Headmaster's office, exhibit 10, the simi exhibit 11, rungu exhibit 10 and a polythene bag exhibit 12. All the exhibits were recovered inside the compound of the school the morning after this incident. We did consider the blood group of the blood stains found on these exhibits and are agreeable that it was not a coincidence that it matched that of the 1st appellant. This is especially so considering circumstances of the case and of the offence.

The 1st appellant also confessed to the crime and admitted being a principle (sic) offender in this offence. We did seek for and found corroboration between the confession and the rest of the evidence in the prosecution case. This included the fact that the 1st appellant did lead to the recovery of two crowbars, exhibit 8, which he mentioned as part of the weapons used in the robbery in his statement and the fact the watchman of the school was killed by being struck many times all over the body, which he stated in his statement and which was consistent with the cause of death in the post mortem form. The other evidence which renders the 1st appellant (sic) confession true is the description of how he and others broke into the school offices and stole various items and the fact that they shared the items out among themselves. That confirms the evidence of the Headmaster and teachers P.W.2 and 5 that the school was broken into and several items stolen. It also confirms the evidence that exhibits were recovered from different places.

Taking all these evidence into consideration, we do find that it is corroboration of material particular and that it does render credence to the retracted statements of the 1st appellant. The credence is sufficient to remove any doubt in our minds that the confessions were anything but the truth.

We do find that there was overwhelming evidence against the 1st appellant and that the conviction entered by the learned trial Magistrate against him is safe".

The appellant is now before us in this second and final appeal. He filed home made grounds of appeal which are based essentially on facts rather than law. However, his learned counsel, Ms. Veronica Kegode, filed supplementary grounds of appeal on 1st July, 2009. This being a second appeal, by dint of the provisions of **Section 361** of the *Criminal Procedure Code*, we are enjoined to consider only matters of law and not matters of fact. The only grounds that relate to law are the application of the doctrine of

recent possession, and whether the superior court failed to re-evaluate and analyze the entire evidence and to draw its own conclusions.

Ms. Kegode indeed addressed us on those two issues. She argued that the doctrine of recent possession was wrongly invoked in this case as the stolen items were actually found at the residence of **Mary Wangechi Kariuki**, PW4, who was initially charged with the same offence as the appellant, and later released, only to turn into a prosecution witness. Ms. Kegode, further argued that the superior court erred in relying on a confession statement which had been retracted, without any credible corroboration of the evidence against the appellant.

On the other hand, Mr. J. Kaigai, learned Principal State Counsel, argued that both the lower courts found as a fact that the stolen items were found in the possession of the appellant, and that notwithstanding the fact that the confession had been retracted, there was sufficient corroboration and other evidence against the appellant leading to the conclusion that he was guilty of the offence charged.

There were no eye-witnesses to this incident. According to the superior court, the evidence against the appellant was four-fold as follows:

"On that he was found in possession of recently stolen items that is yellow table clothes one which had the Gitugi Primary School Code No. 22125. They were exhibit 3 and were identified by Esther Wanjiru (P.W.2) a Home Science teacher as those prepared by students in her class. P.W.4, Mary Wangeci, identified them as items the 1st appellant was carrying when he went to her house to sleep on the night of 19th April 1992.

The other evidence against the 1st appellant was that a broken door handle to the Headmaster's office, identified as exhibit 3, a simi exhibit 11, a rungu exhibit 10 and a polythene bag exhibit 12, all recovered by Senior Sergeant Munyambu (P.W.11) in the school compound were found to have blood group 'A' which was similar to that of the 1st appellant. The Government Chemist Report to that effect was exhibit 20. In same report the deceased watchman's blood was found to be of Group 'B'.

The other evidence against the 1st appellant were his statements under caution made to IP. Nzioka (P.W.9) and IP. Kamau (P.W.10) and which were exhibits 21 and 22 respectively. In exhibit 21, the 1st appellant gave a full confession in which he implicated the co-accused and another and gave details of weapons used in the robbery, the killing of the watchman, the breaking into the Headmaster's and the Deputy Headmaster's offices and also details of injuries he suffered. The injuries were to both hands.

Fourth the 1st appellant was found to have had injuries to his hands by P.W.4 and on arrest by Police Officers".

With regard to the possession of the items allegedly stolen from the school, there is no dispute that these were found in the residence of PW4, where the appellant had allegedly sought over-night accommodation. The record does not indicate whether the police asked him about these items, or to explain why he was in possession of the same. However, in his sworn statement before the trial court, he denied having spent the night at the residence of PW4. He denied that he even knew PW4. Given that PW4 claimed that she knew the appellant as a *"neighbor"*, and given that PW4 was a married woman, whose husband was not at home on the night of the incident when she is alleged to have opened the door for a *"neighbor"* to sleep in her house, it was incumbent upon the superior court to re-evaluate and analyze this aspect of the testimony, and to come to its own conclusion. Neither the superior court nor the trial court considered this point. We doubt whether they would have come to the same conclusion if they had done so.

With regard to the other evidence against the appellant, we would note that the same was based on the confession statement made by the appellant. We are skeptical whether the said evidence met the test

established by the case of **Tuwamoi vs. Uganda** [1962] EA 328 with regard to retracted confessions:

"The present rule then applied in East Africa in regard to a retracted confession is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the court might do so if it is fully satisfied in the circumstances of the case that the confession is true".

We are of the view that it was unsafe to rely on the evidence of the matching blood-group as that could have been coincidental; or the hand injury to the appellant which he said he had sustained elsewhere at an earlier time; or the evidence of PW4 who was an accomplice turned prosecution witness.

In our view, both the lower courts ought to have considered whether the explanations provided by the appellant were reasonable, even if they did not believe the same to be true (see **Kipsaina vs. R** [1975] EALR 253).

For all these reasons, we are of the view that the conviction of the appellant was unsafe and we hereby quash the same, set aside the sentence imposed on the appellant and order that he be released from prison forthwith, unless otherwise lawfully held.

Dated and delivered at Nairobi this 23rd day of April, 2010.

D. K. S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR