IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 391 of 2006

BETWEEN

BENSON KAMAU MWANGI …… APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Musing & Kimaru, JJ.) dated 20th December, 2006

in

H.C.CR.A. NO. 22 OF 2004)
****

JUDGMENT OF THE COURT

The appellant was convicted by the Senior Resident Magistrate, Molo of the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code and sentenced to death. His appeal to the superior court against conviction and sentence was dismissed. By **Section 361 (1)** of the *Criminal Procedure Code* (CPC), a second appeal like the instant one should be confined to points of law only.

The particulars of the charge alleged that on 18th October, 2003 at Tayari Farm Molo, the appellant jointly with others and being armed with dangerous weapons, namely, home made toy gun, pangas and rungus robbed **Margaret Muthoni Mugo** (complainant) of Shs.400/=, one centrifuge machine, TV set, three blankets, ten sufurias, six hand bags, mobile phone, wall clock and three mattresses all valued at Shs.43,000/=.

The complainant testified at the trial, among other things, that she works at Molo Hospital and resides at Tayari farm; that on the material day at 9.30 p.m. she alighted from a vehicle at a junction to her home and started walking home in the company of a friend; that after walking for about 200 metres they met three men who were armed with pangas, rungus and a pistol; that the three men stopped them and threatened to cut them as they demanded money; that the three men robbed them of their bags; that the complainant's bag contained house keys and other documents; that thereafter the three men disappeared; that the complainant and her friend hid in the fence; that the three men returned after about one hour saying that they had been to their houses but did not find money; that thereafter, the three men demanded money, robbed complainant of her jacket, mobile phone, wrist watch, long trousers, shoes; that the complainant's companion was also robbed of her goods; that the robbers left; that complainant spent the night at her companion's house; that on the following morning she went to her house and found that it had been opened using the keys stolen from her; that the house had been ransacked and various household

goods stolen; that a centrifuge machine had also been stolen; that she reported to Molo police station; that later her three mattresses, wall clock, TV set, 2 blankets, a small bag and a centrifuge machine were recovered which she identified as hers, and, that, although the robbers had covered themselves she identified the appellant by voice.

The prosecution called three other witnesses, namely, **Mungai Njoroge** (PW2) (Mungai), a lab technologist; **Patrick Njuguna Ngige** (PW3) (Ngige) who was working at Molo District Hospital and **PC. Jasper Ratemo** (PW4). According to Mungai, the appellant went to his laboratory on 6th November, 2005 at 12 noon; that appellant pointed at a machine in that laboratory and asked what work it does; that he told him that it was a centrifuge machine used for cleaning blood, that appellant told him that he had such a machine which he had found hidden in the bush and was selling it; that he told the appellant had a friend who was interested in buying it, that the appellant later came to the laboratory and left the machine there on a Saturday as Mungai had not yet contacted the intended buyer; that the appellant asked for a deposit and Mungai gave him Shs.1000/= against a receipt; that when the appellant went back next Monday he found Mungai and Ngige, the prospective buyer, at the laboratory; that the appellant told Ngige that he was selling the machine at Shs.10,000/= and that as Ngige was inspecting the machine **PC. Jasper Ratemo** and other police officers arrived and arrested the appellant and took the machine. It transpired that when Ngige was informed that the appellant was selling the machine he informed the complainant who had told him of the theft of her machine and that the complainant had in turn reported to the police. Upon arrest, the appellant took police to his house where 3 mattresses, 2 blankets, 3 sufurias were recovered. The complainant identified the centrifuge machine, the mattresses, 2 blankets and sufurias as some of the properties which were stolen from her house. Police further recovered from the appellant a receipt issued by Kamau for the Shs.1,000/= deposit for the machine paid to the appellant.

At the trial, the appellant gave a defence of an alibi saying that he left for Nairobi on 17th October, 2003 and returned on 20th October, 2005.

The trial magistrate convicted the appellant on the basis of recent possession of stolen items and recognition of the appellant by voice. After the conviction the appellant said in mitigation, among other things:

> **"I admitted that the recovered things were recovered from me".**

The appellant appealed to the superior court against conviction and sentence. At the hearing of the appeal, the appellant contended that the prosecution did not charge him with the right offence, in that there should have been two separate charges – one for robbery relating to personal items that the complainant was robbed of on the way home and another charge of burglary and stealing for breaking into her house and stealing. However he contended that he was not found in possession of the items that the complainant was robbed of and exculpated himself from the offence of robbery. He stated that he was found in possession of the items stolen from the house and added:

> **"I admit that I was found with some items which were robbed from the house of the complainant but I found them in bush. I was arrested when in the process of selling a centrifuge machine.**
>
> **PW3 confirmed that I found those items in the forest. The court did not consider that those items were stolen in a burglary".**

The appellant replied to the submissions of the State Counsel in the superior court and said:

> **"I was with the items for 22 days ……. I admit that I was found with the stolen items".**

The superior court rejected the evidence of recognition of the appellant by voice and convicted the appellant solely on the basis of doctrine of recent possession – that the appellant was found in recent possession of the goods that the complainant was robbed of.

The several grounds of appeal contained in the supplementary memorandum of appeal can be condensed into five substantive

grounds, namely, the non-compliance with **Section 211** of the CPC; the reliance by the superior court on the admissions made by the appellant in the superior court; failure by the complainant to prove the recovered goods as hers, failure to prove the ingredients of the offence of robbery and veracity of prosecution witnesses.

Regarding the ground of non-compliance with **Section 211 (1)** CPC, the record of the trial court shows that after the prosecution closed its case, the trial magistrate ruled that the appellant had a case to answer and that he should be put on his defence. That finding was followed immediately by a sentence reading, thus:

"Accused. I shall give unsworn statement and call no witness".

The court thereafter recorded the unsworn statement of the appellant. **Section 211 (1)** of CPC requires the trial court after making a finding that an accused has a case to answer to explain the substance of the charge to the accused again, inform him of his he right to give evidence on oath and that if does so, he would be liable to cross-examination or to make a unsworn statement, and, lastly, to ask him whether he has any witness to call.

The record does not specifically show that the trial magistrate complied with **Section 211 (1)** of CPC. It is however implicit from the record that the trial magistrate complied with the section because the appellant answered that he would make unsworn statement and that he had no witnesses to call followed by a statement in the unsworn statement that he understood the charge he was facing. The appellant did not raise this ground in the superior court. Failure to specifically record that **Section 211 (1)** of CPC was complied with, is in the circumstances of this case, an irregularity in the proceedings which is cured by **Section 382** of CPC as it has not been shown that the irregularity has occasioned a failure of justice.

The question of the identification of the recovered goods is a matter of fact. The two courts below made a concurrent finding that the complainant had identified the recovered goods as hers. This being a second appeal the Court by virtue of **Section 361 (1) (a)** of CPC cannot entertain an appeal on a matter of fact.

There is nothing on the record of the proceedings of the trial court to show that the prosecution witnesses were not credible. Moreover, the two courts below believed the evidence of the witnesses. The credibility of witnesses is a matter of fact and it is trite law that this Court cannot entertain an appeal on a matter of fact.

It was submitted by Mr. Waitindi, learned counsel for the appellant that the ingredients of the offence of capital robbery were not proved as there was no evidence that the appellant saw the weapons. The offence of capital robbery under **Section 296 (2)** of the Penal Code is proved, if any of the three elements stipulated in that section are proved. In this case, the appellant testified that there were three robbers and that the robbers were armed with pangas, rungus and a pistol. She testified in her evidence in cross-examination that the robbers had torches and that she saw the weapons through the torch light. If the robbers were more than one or if the robbers were armed with dangerous or offensive weapons, the offence of capital robbery would be proved. The two courts below believed that the robbers were more than one and also that they were armed with pangas, rungus and a gun. Again, whether the robbers were more than one or whether they were armed with pangas, rungus and a pistol are matters of fact which were resolved by the two courts below and which we have no power to re-open.

Lastly, Mr. Watindi contended that the superior court erred in treating the appellants arguments at the hearing of the appeals as admissions. He contended further that the alleged admission was not evidence. It is clear from the record of the proceedings of the superior court that the appellant made a concious and unequivocal admission on more than one occasion at the hearing of the appeal that he was found in possession of the centrifuge machine and other goods stolen from the house of the complainant. By such admission the appellant was not thereby admitting the offence for he explained that he found those goods in the forest. There is nothing in law to stop an appellate court from

taking into account an admission of fact made whether or not it amounts to a confession by the appellant in the course of hearing of an appeal.

Moreover, there was ample evidence from Mungai, Ngige and **PC. Jasper Ratemo** that the appellant was indeed found in possession of the centrifuge machine. There, was further evidence from **PC. Jasper Ratemo** that some other items stolen from the house of the complainant were found in the house of the appellant. Those are matters of fact which this Court cannot re-open.

The explanation of the appellant that he found the recovered properties hidden in the bush was considered by the superior court and rejected.

On our reconsideration of the explanation, we find that the explanation which lacks any specific details is incredible in the circumstances of the case.

Lastly, we are satisfied that the doctrine of recent possession applied in this case and was properly invoked.

For those reasons, the appeal has no merit. It is accordingly dismissed.

Dated and delivered at Nairobi this 28th day of May, 2010.

E. O. O'KUBASU

……..……
JUDGE OF APPEAL

E. M. GITHINJI

……..……..……
JUDGE OF APPEAL

D. K. S. AGANYANYA

……...…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR