



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

**CRIMINAL APPEAL 234 OF 2008**

**BETWEEN**

**BERNARD MAINA MWANIKI .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ) dated 2<sup>nd</sup> October 2008*

**H.C.CR.APP. NO. 214 OF 2005)**

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**JUDGMENT OF THE COURT**

The appellant was convicted by the Senior Resident Magistrate Nanyuki for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code and sentenced to death. He appealed to the superior court at Nyeri but the superior court dismissed the appeal in its entirety on 2<sup>nd</sup> October 2008. This is his second appeal.

The main grounds of appeal state in essence that the superior court erred in confirming conviction on the basis of doctrine of recent possession when the complainant had failed to prove that the cap and the wallet belonged to him and also in shifting the burden of proof.

The two courts below believed the evidence of William Wakinyua King'ori (PW1), the complainant, and Anthony Muchiri Kariithi (PW2) (Anthony), that the complainant was robbed of a wallet, cap; identity card and Ksh.6,000/= on the night of 26<sup>th</sup> February, 2006 by a gang of six robbers (whom he did not identify at the time of robbery) as he was leaving Impala Hotel, in Nanyuki Township.

The two courts below further believed the evidence of the complainant and Anthony that on 2<sup>nd</sup> March 2005 they found the appellant inside the Impala bar wearing a red cap with the trade mark **"NIKE"** which the complainant identified as his, arrested him and handed him over to P.C. Fredrick Gikundi (PC Gikundi) of Nanyuki Police Station (PW3) who was on patrol duties in Nanyuki Town. Lastly, the two courts below believed the evidence of the complainant, Anthony and, PC Gikundi that the appellant was subsequently searched and a wallet with a trade mark **REEBOK** was recovered from the appellant which complainant also identified as his.

At the trial the appellant gave sworn evidence in brief that he was in Isiolo on the date of the alleged robbery and that the cap and wallet found in his possession belonged to him.

The trial court dismissed both defences saying in part:-

***"He (appellant) did not call any witness to support his alibi and, I doubted his defence. Also he did not give any tenable or satisfactory account as to how he came into possession of the complainant's stolen hat and wallet just a few days from the time he was robbed..... He never even stated whether or not he bought the wallet and the cap."***

The superior court quite correctly made a finding that the trial magistrate had grossly misdirected herself regarding the burden of proof on the defence of alibi and in addition correctly restated the law, that a person who sets up a defence of alibi does not assume any responsibility of proving it. However, regarding the standard of proof of ownership of the cap and wallet, the superior court said in part:-

***"It is our view that it is the identification of stolen goods by concrete evidence which matters and not the public proclamation of ownership in court. PW1 was clearly able to identify the two items as belonging to him..."***

and further on;

***“Having been found in possession of items which another person laid a claim over, the appellant was required to prove by cogent evidence that indeed the items belonged to him. He could have been able to say if at all, when, where, and from whom he had bought the items. If he was issued with receipts upon purchase, he should have been able to tender them in evidence. As it is the appellant adduced no evidence at all to show that the said items indeed belonged to him, other than a bare statement that he bought them in Nanyuki.”***

The superior court relied on Gichina v. Republic (1970) EA 105;

Where, to quote the superior court

***“the court rejected the bare statement of a person found in possession of stolen goods that she had bought them from another person in the absence of documents evidencing the sale transaction.”***

In that case the person found in possession of stolen goods claimed without producing any material evidence that she had bought them from the appellant. There was no other evidence implicating the appellant, other than the bare statement of the person found in possession of stolen goods and the appellant was convicted on that bare statement.

The real finding of the Court in that judgment is that, before it was safe to rely on the evidence of a person found in possession of stolen goods implicating the accused as a seller, there must be independent evidence such as purchase receipts or an independent witness present at the time of sale to show that the possession was free from taint, and, that a bare statement implicating the accused as the seller is insufficient evidence. In that case the court was dealing with the burden of proof by the prosecution and not the burden of proof by an accused and to that extent *Gichina’s* case, is distinguishable from this case. With the greatest respect to the superior court, it shifted the heavy burden of proof beyond reasonable doubt imposed on the prosecution to the appellant where the law did not impose any burden on the appellant.

The superior court appreciated that the prosecution case was dependent on circumstantial evidence - specifically the doctrine of recent possession of a cap and wallet belonging to the complainant. However, the doctrine could be invoked but the prosecution had to first prove beyond all reasonable doubt that both the cap and the wallet belonged to the complainant. It is clear from the evidence of the complainant that the cap and wallet did not have distinctive marks personal to the complainant and that the complainant identified them merely by their colour and trade mark **“NIKE”** and **“REEBOK”** respectively. Indeed superior court agreed with the appellant’s submission that the items were of common usage which were generally available everywhere and which could change hand very first. The appellant gave sworn evidence at the trial and claimed that the cap and the wallet belonged to him.

In his evidence in cross-examination the appellant stated that he was a hawker selling bed sheets, wallets, caps and other goods which he normally buys at *“Kariuki’s”* in Nanyuki town. In the absence of any distinctive identification marks on the cap and the wallet their identification in essence boiled down to the complainant’s word on oath against the appellant’s word on oath. None of them produced any receipts to prove ownership. The trial magistrate merely believed that the cap and the wallet belonged to the complainant and did not inquire into the appellant’s claim that the goods belonged to him. It is clear that the finding that the goods belonged to the complainant by both courts was not expressly based on the finding of the credibility of the evidence of the complainant. The superior court in our view grossly misdirected itself by requiring the appellant to prove *“by cogent evidence”* that the cap and the wallet belonged to him just like the trial court misdirected itself in respect of the defence of alibi. On the contrary, the burden of proof was on the prosecution to prove beyond reasonable doubt that the two items belonged to the complainant. It was sufficient if the appellant raised reasonable doubt that the two items did not belong to the complainant. The prosecution evidence that the two items had no distinctive marks itself raised doubts about the complainant’s claim. The appellant’s claim of ownership of the goods on oath created more doubts.

In the final analysis, we are satisfied that the doctrine of recent possession did not apply in this case and the conviction based on it had no foundation.

In the result, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be released forthwith unless otherwise lawfully held.

***Dated and delivered at Nyeri this 21<sup>st</sup> day of May, 2010.***

**P.K. TUNOI**

.....  
**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**