



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

**CRIMINAL APPEAL 139 OF 2008**

**BETWEEN**

**1. SAMSON NJERU KAREKO**

- 2. ANTONY NJAGI NJUE**  
**3. SOLOMON NJERU ISHMAEL**  
**4. ENOS NJERU EPHANTUS**  
**5. DANIEL GITONGA NGARE.....APPELLANTS**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Embu (Khamoni & Okwengu, JJ.)  
dated 19<sup>th</sup> May, 2004*

**in**

**H.C.Cr.A. Nos. 85, 86, 87, 88 & 89 of 2001)**

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**JUDGMENT OF THE COURT**

The five appellants were convicted by the Senior Principal Magistrate, Embu of robbery with violence contrary to **section 296(2)** of the Penal Code and were each sentenced to death. Their respective first appeals to the superior court were dismissed. The 2<sup>nd</sup> appellant escaped from custody during the pendency of the appeal and his appeal has already been marked as abated under **rule 70(7)** of the Court of Appeal Rules.

On the night of 14<sup>th</sup> July, 2000 at 2.00 a.m. robbers raided the home of **Evans Ileri Mweya** (*complainant*) and robbed him of money, two pangas, one packet of maize flour, two packets of wheat flour and one packet of rice.

On the following day, that is, 15<sup>th</sup> July, 2000 the robbers again raided the home of the complainant at 2.00 a.m. and robbed him of motor vehicle registration number KWT 346, colour television, gas cylinder, two pairs of gumboots, one thermos flask, two hot pots and one kettle, two electric iron boxes, one foot-pump Eveready torch, four pairs of shoes, five pangas, jack, wheel spanner, seven sufurias, four sufuria lids, one wall clock, two umbrellas, one spare wheel, assorted clothes and beddings. After the robbers left the complainant's son and neighbours reported the robbery to police on telephone. At about 3.00 a.m. **Pc. Eric Muli** (PW3), **Pc. Isaac Mogambi** (PW4) of Criminal Investigations Department, Embu and other police officers went to the scene of the robbery and at about 5.00 a.m. they recovered the motor vehicle which had been abandoned at Gatunduri.

At about 1.00 p.m. the police officers proceeded to Runyenjes on information and arrested **Antony Njagi Njue** (2<sup>nd</sup> appellant). The 2<sup>nd</sup> appellant upon arrest led police to a house where **Enos Njeru Ephantus** (4<sup>th</sup> appellant) was found sleeping. His house was searched and three foot-pumps were recovered. The complainant subsequently identified one of them as the one stolen from his house during the robbery. The 4<sup>th</sup> appellant in turn led police to the home of **Samson Njeru Kereko** (1<sup>st</sup> appellant) and **Daniel Gitonga Ngare** (5<sup>th</sup> appellant). The two were found sleeping in a coffee plantation. On interrogation,

the 1<sup>st</sup> and 5<sup>th</sup> appellants led police to the home of **Solomon Njeru Ishmael** (3<sup>rd</sup> appellant). The 3<sup>rd</sup> appellant was found standing at the gate. He was arrested after which he led police to his house. He removed a key and opened his house. The police recovered nineteen different types of goods including a television set, radio cassette, gas cylinder, seven sufurias, four sufuria covers, assorted clothes, beddings, and a spare wheel which were later identified by the complainant as some of the properties stolen during the robbery.

On 21<sup>st</sup> July, 2010 the 1<sup>st</sup> appellant made a confessionary statement before **Ag. IP. Walter Bwoma** (PW7) which he repudiated at the trial. The statement was however admitted as evidence after holding a trial-within-trial.

The 1<sup>st</sup> appellant denied at the trial that he was found sleeping in a coffee plantation and testified, among other things, that he was arrested by police on the way and led to where other people who had been arrested including the 4<sup>th</sup> appellant were and where there were some goods.

The 3<sup>rd</sup> appellant stated at the trial that he was travelling home from Nairobi when he was arrested on the way. The 4<sup>th</sup> appellant testified at the trial that he was arrested near his house and that police searched his home and took his radio, wedges, wall clock and two bicycle pumps. He denied that the complainant's goods were recovered from his house. Lastly, the 5<sup>th</sup> appellant stated at the trial that he was arrested at his place of work where he had been employed to sell liquor.

The trial Magistrate believed the evidence of **Pc. Muli** and **Pc. Mogambi** and convicted the appellants on the basis of their evidence and on the basis of confession made by the 1<sup>st</sup> appellant to Ag. IP. Walter Bwoma.

On appeal, the superior court rejected the confessionary statement but nevertheless affirmed the convictions on the basis that the appellants were found in recent possession of the stolen goods.

**Mr. Mwangi**, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> appellants, relied on two supplementary grounds of appeal. The first ground faults the superior court for relying upon a retracted confession while the 2<sup>nd</sup> ground faults the superior court for failing to re-evaluate the evidence. Mr. Mwangi submitted that nothing was recovered from the 1<sup>st</sup> appellant and that the 3<sup>rd</sup> appellant should have been convicted, if at all, of handling stolen property found in his possession.

On his part **Mr. Kingori**, learned counsel for 4<sup>th</sup> and 5<sup>th</sup> appellants, grounded his submissions on the five supplementary grounds of appeal which faults the superior court for three reasons; firstly, for relying on inconclusive and defective evidence of recovery of stolen goods; secondly, for relying on accomplice evidence; and, thirdly, for relying on retracted/repudiated confessions without adequate corroboration.

There was overwhelming evidence that the complainant was robbed by a gang of robbers of a motor vehicle and various household goods on the night of 15<sup>th</sup> and 16<sup>th</sup> July, 2000 and that he was hit and injured on the head in the course of the robbery.

There were concurrent findings of fact by the two courts below that the motor vehicle and various goods were recovered on the same day, which goods the complainant identified as his. There was evidence from Pc. Eric Muli and Pc. Isaac Mogambi that a foot pump, which complainant identified as his, was recovered from the house of the 4<sup>th</sup> appellant and that various goods were recovered from the house of 3<sup>rd</sup> appellant which the complainant identified as his. The 3<sup>rd</sup> and 4<sup>th</sup> appellants denied that the complainant's goods were recovered from their respective houses. However the trial Magistrate made a finding that the two police officers told the truth and believed their evidence. The superior court similarly believed the evidence of the two police officers. Thus there was a concurrent finding of fact by the two courts below that the 3<sup>rd</sup> appellant was in possession of the complainant's foot pump while the 4<sup>th</sup> appellant was found in possession of a huge quantity of the goods that the complainant was robbed of. There was evidence to support those concurrent findings of fact. There are no grounds warranting our interference with the concurrent findings of fact.

The superior court appreciated that the 1<sup>st</sup> and 5<sup>th</sup> appellants were not found in physical possession of any of the stolen goods but made a finding that they led police to the other appellants from whom stolen goods were recovered and from that fact concluded that the 1<sup>st</sup> and 5<sup>th</sup> appellants had knowledge of the possession of stolen goods by 3<sup>rd</sup> and 4<sup>th</sup> appellants and thus in law all of them were in joint possession of the stolen goods. Again there are no grounds for interfering with the concurrent finding of fact by the two courts below that the 1<sup>st</sup> and 5<sup>th</sup> appellants led police to the house of the 3<sup>rd</sup> appellant where most of the stolen goods were recovered. By **section 31** of the Evidence Act which was operative at the time of the trial and which was subsequently repealed in 2003:

*"... when a fact is deposed to as discovered in consequence of information received from a person accused of any offence so much of such information whether it amounts to a confession or not as relates distinctly to the fact thereby discovered may be proved."*

By the definition of *possession* in **section 4** of the Penal Code a person who is not in personal possession is nevertheless deemed to be in possession if he knowingly has anything in the actual possession or custody of any other person or if he has anything in any place (*whether or not occupied by him*) for his use or benefit or for use and benefit of any other person.

The superior court made a correct inference from the conduct of the 1<sup>st</sup> and 5<sup>th</sup> appellants that all the appellants were in joint possession of the stolen goods.

The appellants were in possession of the stolen goods within hours after the robbery and the two courts below correctly invoked the doctrine of recent possession.

Lastly, it is not correct as submitted that the superior court relied on the repudiated confession of the 1<sup>st</sup> appellant. On the contrary, the superior court found that the confessionary statement was improperly admitted as evidence and did not rely on it. However, we are of the respectful view that the superior court misdirected itself by finding that the confessionary statement was improperly admitted. The statement was repudiated and after holding a trial-within-trial the Magistrate admitted it in evidence. The reasons given for the finding of the superior court that the statement was wrongly admitted such as, failure by the trial Magistrate to give reasons for admitting the statement and failure to give the co-accused implicated in the statement an

opportunity to cross-examine the 1<sup>st</sup> appellant do not, with respect, go to the admissibility of the statement but rather to the weight to be given to the statement. The trial Magistrate indeed inquired into the admissibility or otherwise of the statement with circumspection and ultimately admitted it as evidence. That the trial Magistrate carefully considered the issue of admissibility of the statement is supported by the fact that the trial Magistrate rejected two other cautionary statements owing to procedural defects.

The repudiated statement was amply corroborated by the conduct of the 1<sup>st</sup> and 5<sup>th</sup> appellants of leading to the recovery of goods and by the evidence of recovery of goods.

By **section 32(1)** of the Evidence Act which has not been repealed, such confession implicating other co-appellants could be taken into consideration.

In the final analysis we are satisfied that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> and 5<sup>th</sup> appellants were convicted on sound evidence. Accordingly the appeals are dismissed.

***Dated and delivered at Nyeri this 25<sup>th</sup> day of June, 2010***

**P. K. TUNOI**

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

**E. M. GITHINJI**

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

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**