



IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 181 of 2003

PETER MACHARIA NJUGUNA APPELLANT

AND

REPUBLICRESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Nakuru
(Muga Apondi, J.) dated 26.06.2003*

in

H.C.CR.A NO. 528 OF 2001)

JUDGMENT OF THE COURT

The appellant, PETER MACHARIA NJUGUNA, was charged with robbery with violence contrary to *section 296(2)* of the *Penal Code* with an alternative charge of handling stolen goods contrary to *section 322 (2)* of the *Penal Code*. After trial before the Senior Resident Magistrate at Naivasha, Mr. Muya, the appellant was convicted on the alternative charge and sentenced to four (4) years imprisonment with four (4) strokes of the cane. Being aggrieved by his conviction and sentence the appellant preferred an appeal to the High Court of Kenya at Nakuru (Muga Apondi, J.) but by its judgment dated and delivered on 24th June, 2003, the appeal was dismissed and the conviction on the main charge of robbery with violence contrary to *section 296 (2)* of the *Penal Code* being entered against the appellant. Consequently, the appellant was sentenced to death.

In this appeal, both Mr. Matiri for the appellant and Mr. Gumo, the Provincial State Counsel representing the Republic, are agreed that the conviction of the appellant is unsafe and the appeal ought to be allowed. We respectfully agree with them.

The complainant **John Kamau** (PW1) was attacked by robbers at his home at Maai Mahiu at about 2.30 a.m. They robbed him of a coat, a watch, a handbag and a jacket. He did not identify any of his assailants. However, about two weeks later at Longonot the appellant sold a watch to **Solomon Mwaura** (PW2) for Shs.200/= . On 20th July, 2002, PW2 was arrested with the said watch which PW1 identified as his and of which he had been robbed. After investigation PW1 led the police to the appellant. He was arrested and subsequently arraigned in court.

In his testimony before the trial court the appellant denied robbing PW1 of his property. The sum total

of the appellant's evidence is that he had purchased the watch from unknown person within the local trading centre.

The learned Judge in enhancing the conviction held:-

“A review of the evidence on record clearly shows that the appellant was found with the stolen watch about 11 days after the robbery. The said wrist watch was positively identified by the complainant. The learned trial magistrate correctly evaluated the above evidence and made a finding that the said wrist watch was stolen. However, the learned magistrate overlooked to make the conclusion that the doctrine of recent possession applied in the circumstances. In fact, the trial magistrate never made any findings as far as the main charge of robbery was concerned. That was definitely a misdirection. Being the first appellate court, I hereby find that the appellant was found with a stolen wrist watch within 11 days of the robbery and that the doctrine of recent possession applied.

From the above, it is apparent that the appellant must have participated in the commission of the main charge.”

On our independent analysis of the entire evidence we find that the two courts below did not make a finding whether or not the appellant was an innocent possessor of the watch. A watch is a common article within a trading centre and can change hands severally within a short time and under the particular circumstances of this case, we are satisfied that the evidence of recent possession was not strong enough and could not in any way support the conviction against the appellant. We so hold.

It has also been submitted before us that the entire appeal process and consequential judgment of the superior court was a nullity in law in the light of the provisions of **section 359 (1)** of the **Criminal Procedure Code**. As we are allowing the appeal on a different ground we see no point in deciding on this ground.

In the result this appeal is allowed. The conviction is quashed and the sentence of death is set aside. The appellant shall be entitled to his liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nakuru this 30th day of March, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR