IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 8, 17, 20, 23 & 28 OF 2002

JULIUS MUGAMBI ……………………….................................…….. 1ST APPELLANT

JAPHETH KARITHI ……………..........................……………….. 2ND APPELLANT

SAMWEL MWIRIGI ………………….........................……………. 3RD APPELLANT

MUCHEKE KAGURU ………………..….........................……….. 4TH APPELLANT

MORRIS MWITI ……………………..........................……….…... 5TH APPELLANT

AND

REPUBLIC ……………………….................…….…….…………. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Juma & Tuiyot, JJ.) dated 13th September, 2001

in

H.C.CR.A. NO. 86, 88, 90, 91 & 92 OF 1999)

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JUDGMENT OF THE COURT

JULIUS MUGAMBI, SAMWEL MWIRIGI, MUCHEKE KAGURU and ***MORRIS MWITI,*** the appellants, and ***JAPHETH KARITHI*** whose appeal has abated under ***rule 68(1)(a)*** of the Rules of this Court on account of his death, were convicted by

the Chief Magistrate, Meru, on *23rd March, 2001* on three counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code and on one count of robbery contrary to ***section 296(1)*** of the Penal Code and sentenced to death on all counts but the execution of the sentences in three counts being ordered to remain in abeyance. Their respective appeals which were consolidated were partially successful. The convictions of each appellant on two counts of robbery with violence were quashed and sentences set aside, but the convictions of each appellant on one count of robbery with violence under ***section 296(2)*** and on one count of robbery under ***section 296(1)*** were upheld. And so were the sentences of death. This is therefore a second appeal.

We would point out at the outset that the two courts below erred in law in not realizing that a conviction under ***section 296(1)*** of the Penal Code does not carry a death sentence.

The prosecution relied on the following facts. During the night of *28th* and *29th May, 1999*, a gang of robbers staged a series of robberies in Gachua Village of Giaki Location of Meru Central District. With the use of axes, pangas and stones, it broke into and stole from several houses. It forcibly took money, shoes, clothes and other articles from the occupants of those houses.

After the robbery, a report was made to the police who mounted a search. Acting on information, the police raided a house about 2 kilometres from the scene of the robbery.

In that house there were many people, presumably consuming liquor. On seeing the police officers they fled in all directions. However, some of the people were arrested. Inside the house the police recovered axes, pangas, shoes and some articles allegedly stolen from the houses of the complainants, ***Paul Karimi*** *(PW1)*, ***Joseph Mwiti*** *(PW3)* and ***Muriithi Matiri*** *(PW4).*

In convicting the appellants the trial magistrate held:-

"***It is well established that the court may presume that a man in possession of stolen goods soon after the theft is either a thief, or has received the goods knowing them to be stolen, unless he can account for his possession – R. V. HASSANI S/O MOHAMED (3) (1948), 15 EACA 121, 122. I have said accused denied possession and therefore there was no explanation for the possession. In the circumstances of this case, including the proximity as to time and distance, I find that the accused are the ones who jointly took part in the violent robbery perpetrated against each of PW1, PW2, PW3 and PW4 accused are consequently found guilty as charged in each of Counts 1 to 4 and are respectively convicted."***

In a short judgment the first appellate court concurred with the findings of the trial magistrate and agreed with him on the application of the doctrine of recent possession.

Mrs. Ntarangwi for the appellant has submitted before us that the first appellate court erred in holding that the stolen and recovered articles were positively identified by the complainants as their property. She further argued that there was no evidence to suggest that the articles were in the possession of the appellants. She averred that the doctrine of recent possession was wrongly applied.

Mr. Orinda, the Principal State Counsel, has readily conceded the appeal. He pointed out firstly, that the two courts below failed to notice that a charge under ***section 296 (1)*** of the Penal Codes does not carry a death sentence; secondly, that the stolen goods were in a house wherein there were many people and the evidence is silent as to who was in possession of those goods. With respect we agree with him.

The conviction of the appellants was solely dependent on the unaccounted for recent possession of the goods allegedly belonging to the complainants and which were said to have been stolen during the robbery. But, the evidence shows that those goods were recovered in a house in which there were many people and yet others who were standing in the vicinity. It was not certain who was in possession of them. They could as well have been in the possession of the persons who fled when they saw the police officers. Moreover, it was not disputed that the house did not belong to the appellants.

It is our view, that the charges against the appellants were not proved beyond all reasonable doubt and that their convictions are unsafe.

In the result we allow the appeal, quash the convictions and set aside the sentences of death. The appellants shall be entitled to their liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 12th day of May, 2006.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR