REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
CORAM: TUNOI, O'KUBASU & GITHINJI, JJ.A

CRIMINAL APPEAL 116 OF 2000

BETWEEN

JOHN KAMAU MWANGI Alias KAMARISA…….....……..…..…….APPELLANT

AND

REPUBLIC…….....……RESPONDENT

JUDGMENT OF THE COURT

The appellant ***JOHN KAMAU MWANGI*** alias ***KAMALISA*** and another were jointly charged before Senior Resident Magistrate's Court Muranga, with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The appellant was the first accused. They were alleged to have robbed ***BENARD MWANGI*** of motor vehicle registration No. KRJ 268, a television set, three radio cassettes, two solar panels, sewing machine head, Kshs.9,000 and various other goods on 14/1/97.

The appellant was charged with an alternative charge of handling stolen goods contrary to ***section 322(2)*** of the Penal Code. The trial magistrate, after trial, made a finding that the offence of robbery with violence was not proved and acquitted the appellant and his co-accused of the said charge. The learned trial magistrate, however, convicted the appellant on the alternative charge of handling stolen goods and sentenced him to 8 years imprisonment. The appellant appealed to the High Court against conviction and sentence. Before the commencement of the hearing of the appeal, the superior court cautioned the appellant to the effect that if the appeal against conviction failed the superior court might restore the original charge of robbery with violence and sentence him to death. The appellant nevertheless elected to proceed with the appeal. The superior court ultimately dismissed the appeal and inevitably set aside the conviction on the alternative charge of handling stolen goods and substituted a conviction for robbery with violence contrary to *section 296(2)* of the Penal Code and sentenced the appellant to death.

On the night of 14/1/97, at about 1 a.m. ***Benard Mwangi Wairimu (PW1)*** the complainant was asleep in his house. He was awakened by a loud bang on the door. The bedroom door was then broken open and six men armed with pangas and whips entered into the bedroom. They had torches. The house was lit with solar light. They beat the complainant and demanded money. They took shs.9,000 from the wall unit and household goods. They also disconnected the solar battery and dismantled the solar panels which they took. Thereafter the robbers demanded car keys. The complainant gave them the car keys after which they drove away in the complainant's motor vehicle registration No. KRJ 268. The robbery was reported at Maragwa Police Station in the morning of 14/1/97 at about 8.00 a.m. Later at about 8.20 a.m. police recovered the complainant's motor vehicle which had been abandoned along Kaharati Kamahuha road. On the same day at Maragwa town, police saw a suspect, Wangila, who was in the company of the appellant. The two ran away when they saw the police. They were chased and the appellant was arrested. Wangilah escaped. The appellant was searched. He had car keys in the jacket that he was wearing. He

was interrogated and led police to his home where various goods belonging to the complainant were recovered. The complainant also identified the car keys as his. The appellant was also wearing a hat, leather jacket and jean trousers which the complainant identified as his.

In his defence, the appellant stated that he was asleep in his house on the night of 14/1/97 and that on the following day the police went to his house at 8.30 a.m. and collected various goods from his house. He stated that the complainant who was his friend had taken the goods to the appellant's house on 10/1/97.

The learned trial magistrate found that the offence of robbery with violence was not proved against the appellant and his co-accused. She said in part in the judgment:-

> ***"The court has considered the evidence adduced by both sides and the court finds that there is no evidence of robbery against the accused persons because PW1 did not say he saw 1st accused during the robbery----------***
>
> ***The court therefore found no evidence of robbery against any of the accused persons and acquits 2nd accused of count 1 under section 215 of the Criminal Procedure Code.***
>
> ***In the alternative count the court has no doubt the 1st accused dishonestly handled the stolen items, which were for the complainant knowing they had been stolen. This is so because there is no dispute they were found in his house and they were not his. It is not true the complainant was his friend and he had taken them there as there was no reason to do that. In any case there is no doubt there was robbery at the home of PW1 and these were the stolen goods. The accused was even found wearing PW1's clothes and he tried to remove them, the jean jacket".***

The superior court in holding that the learned trial magistrate erred in not convicting the appellant on the main charge of robbery with violence contrary to section 296(2) of the penal code said in part:-

> ***"We now come to the finding by the learned magistrate that there was no evidence that the appellant was one of the robbers. The stolen goods were found in possession of the appellant shortly after the robbery. There were six robbers and in cross-examination the complainant stated that he saw the appellant and the appellant did not have one tooth. This may not have been adequate identification but the finding of the stolen goods in possession of the appellant at a short time after robbery corroborates, the complainant's statement that he saw the appellant at the robbery. In any event the doctrine of recent possession applies."***

There are five grounds of appeal which the appellant filed in person. The appellant essentially complains that the evidence of his identification by the complainant was not satisfactory and that the superior court failed to consider the explanation of how he came to be in possession of the complainant's goods. He asks for a retrial in the memorandum of appeal. Mr. Mahinda who appeared for the appellant in the appeal stated that the main contention in the appeal is that the superior court failed to consider the evidence of identification, scrutinize it or evaluate it and as a result reached the wrong finding. Mr. Mahinda further contended that the superior court misdirected itself on the doctrine of recent possession and submitted that the appellant explained how he came into possession of goods and that the possibility that the appellant could have been the receiver was not excluded.

Mr. Orinda, the learned Principal State Counsel, on his part supported the conviction and submitted that the conviction was not based on the identification of the appellant at the scene of robbery but on the possession of recently stolen goods and that the appellant's defence was properly rejected.

We would readily agree that there was no satisfactory evidence that the complainant identified the appellant during the robbery. The complainant did not say in his evidence that he identified the appellant as one of the six robbers who entered into his house. It is only when the appellant cross-examined him that he stated that he saw the appellant. Even then the complainant stated that he did not know the appellant before. The complainant did not show that the circumstances for identification of the appellant

were favourable; and moreover, the investigating officer did not conduct an identification parade. The belated dock identification of the appellant by the complainant is no doubt worthless.

There was concurrent finding of fact by the two courts below that the appellant was found in possession of complainant's goods stolen during the robbery. The two courts below rejected the appellant's explanation that complainant was his friend and that it was the complainant who took the goods to the appellant's house on 10/1/97 – about 4 days before the robbery.

There are no grounds for interfering with the concurrent findings of fact.

The trial court drew the inference from the fact of recent possession of the stolen goods by appellant that the appellant had dishonestly received the goods. The appellant was found in possession of complainant's goods stolen during the robbery on the morning following the robbery. His explanation of how he came in possession of the stolen goods was properly rejected. A presumption therefore arises that the appellant was either the thief (that is, he took part in the robbery) or a receiver – ***see ANDREA OBONYO V. R. [1962] E.A. 542 at page 549 para*** A. in which the predecessor of this Court said at page 549 para H-I:-

> ***"When a person is charged with theft and, in the alternative, with receiving and the sole evidence connecting him with the offence is the recent possession of stolen property, then, if the only reasonable inference is that he must have either stolen the property or received it knowing it to be stolen, he should be convicted either of the theft or of receiving according to which is more probable or likely in the circumstances. He is not entitled to be acquitted altogether merely because there may be some doubt as to which of the two offences he has committed. This position is justified because the decision is not between guilt or innocence, but between whether he is guilty of theft or receiving, it having been proved that he is guilty of one or the other"***

The trial magistrate did not consider whether a presumption that the appellant was one of the robbers could arise from the fact of recent possession of stolen goods by the appellant. This was in our view a misdirection or rather non-direction. The appellant was found in possession of a large quantity of the goods that complainant was robbed of including TV and solar panels on the morning following the robbery. He ran away when he saw the police. He was wearing some of the complainant's clothes stolen during the robbery. He had car keys of the complainant's motor vehicle stolen during the robbery.

Having regard to the nature of the goods stolen and the circumstances of their recovery the more reasonable inference was that the appellant was one of the robbers.

What has caused us much concern, however, is whether the superior court as the first appellate court had jurisdiction to substitute such an inference in the absence of an appeal by the Attorney – General the appellant having been acquitted of the charge of robbery by the trial magistrate. We do not have the benefit of the opinion of either the appellant's counsel or of the learned Principal State Counsel since that issue was not raised.

The powers of the High Court as first appellate court in criminal appeals are specified in ***section 354(3)*** of the Criminal Procedure Code (Code). More particularly, the powers of the High Court on an appeal from a conviction, an appeal against the sentence and an appeal against an acquittal are circumscribed thus:

> ***"354(3) The court may then if it considers that there is no sufficient grounds for interfering dismiss the appeal or may –***
>
> ***(a) In an appeal from a conviction –***
>
> ***(i) Reverse the finding and sentence and acquit or discharge the accused or order him to be tried by a court of competent jurisdiction; or (ii) Alter the finding maintaining, the sentence with or without altering the finding, reduce or increase the sentence; or***

(iii) With or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

(b) In an appeal against sentence increase or reduce or alter the nature of the sentence;

(c) In an appeal against an acquittal --------- hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court------"

The appellant in this case appealed to the superior court against the conviction and sentence for the offence of handling stolen property contrary to ***section 322(2)*** of the Penal Code. It is apparent from ***section 354(3)(a)*** and ***(b)*** that the superior court had no jurisdiction when dealing with the appeal against conviction for the offence of handling stolen property to alter the acquittal of the appellant for the offence of robbery with violence under ***Section 296(2)*** of the Penal Code to one of conviction and to pass a sentence of death for the said offence. Even when the High Court is exercising revisional jurisdiction under ***Section 364(1)*** of the Criminal Procedure Code, it has no jurisdiction to alter or reverse an order of acquittal ***(see section 364(1) (b))*** The Attorney General, however, can appeal to the High Court under section 348 A of the Penal Code against the acquittal of an accused person by a subordinate court and in such a case the High Court can under ***section 354(3)(c)*** of the Code reverse the acquittal. The Attorney General can also appeal against the acquittal of an accused person by the High Court in exercise of its original jurisdiction under the circumstances specified in ***Section 379(5)*** of the code and in such a case the Court of Appeal can give a declaratory judgment without reversing an acquittal. There was no appeal by the Attorney General to the High Court against the acquittal of the appellant for the offence of robbery with violence contrary to ***Section 296(2)*** of the Penal Code. Upon acquittal the appellant acquired his freedom which can only be taken away under the authority of the law. The law did not give the superior court jurisdiction to reverse the acquittal in the absence of an appeal.

It follows from the foregoing that the superior court erred in law in its substitution of the conviction for the offence of handling stolen property under ***Section 322(2)*** of the Penal Code with the conviction for the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code and in sentencing the appellant to death.

Accordingly, we allow the appeal to the extent that the conviction of the appellant for the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code is quashed and the sentence of death set aside. The conviction of the appellant for the offence of handling stolen property under ***Section 322(2)*** of the Penal Code and the sentence of 8 years imprisonment are restored. For avoidance of doubt the sentence will take effect from 27/2/98 when he was sentenced by the subordinate court.

DATED and DELIVERED at NYERI this 28th day of October, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR