IN THE COURT OF APPEAL

AT NYERI

(CORAM: TUNOI, GITHINJI JJ A & RINGERA AG JA)

CRIMINAL APPEAL NO. 108 OF 2003

BETWEEN

SAMUEL MUNENE MATU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nyeri (Juma & Mitey, JJ) dated 1st March, 2002

in

HCCRA No 89 of 2001)

JUDGMENT

In or about the year 2000, the complainant Stephen Mwaniki (PW1) operated a mobile *kiosk* at Mukurweini Township wherein he sold clothes, shoes and other assorted shop goods. On 18th August, 2000, he closed the *kiosk* for the day at about 6 pm and went home. He left it in the care of the night watchman known as Francis Wanjau Mutero, now deceased, whom the complainant together with 17 other *kiosk* owners within the Township had commonly engaged.

On the following day, 19th August, 2002, P C Onyango Owadi (PW6) was at Mukurweini Police Station when he received information that a night watchman had been killed and his body was lying outside the *kiosk* the deceased was guarding. He rushed to the scene and carried out investigations. The deceased had been hit on back of the head and blood was oozing from the mouth, nose and ears. The *kiosk* had been swept clean. PW6 removed the body of the deceased to the mortuary and carried out investigations.

Samwel Kingori (PW4) was a taxi operator at Othaya Township. He testified that at about 6 pm on 20th August, 2000, James Mwangi Kariuki, the first accused in the trial court hired his taxi to move goods from Mukurweini to Othaya market. Along the way, Kariuki asked PW4 to park by the roadside where he was joined by the appellant who was carrying three sackfuls of goods which PW4 did not bother to check. Thereafter PW4 drove them up to Othaya market and left them there. On 4th October, 2000, Kariuki was arrested in Nyeri for offences related to burglary. On interrogation by the police Kariuki admitted that he, together with the appellant, had taken part in the robbery the subject of the appeal now before us. Kariuki volunteered to lead police to the house of the appellant where a search was conducted. Inside the house 2

bedsheets, 7 shirts, a pair of shoes, a ladies skirt and a hammer were recovered (Exhibit No 15). All these were taken to the Police Station where the complainant identified each one of them as some of his shop goods which had earlier been stolen from the kiosk.

The appellant and Kariuki were accordingly charged with others not before court of robbery with violence contrary to section 296 (2) of the Penal Code and after a protracted trial each of them was convicted as charged and sentenced to death. Their first appeals to the High Court of Kenya at Nyeri (Juma and Mitey, JJ) were dismissed on 1st March, 2002, and their convictions and sentences were upheld. Kariuki died before this appeal was heard.

Mr A J Kariuki for the appellant has fully addressed us on the original and supplementary grounds of appeal. He has referred us to various portions of the evidence from which he argued that the conviction is wrong. Most of these, in our view, were factual matters, for example, that PW4's testimony as regards ferrying the stolen goods from Mukurweini to Othaya was unworthy of belief since he did know of the contents of the bags, and also that there was no sufficient proof that the appellant was in possession of the stolen goods. Mr Kariuki further argued that the two courts below erred in law in totally ignoring the testimony of the appellant.

The question of importance in this appeal is whether the evidence led was such as to justify the conclusion that the appellant was among the gang of robbers who raided the complainant's *kiosk*, killed the watchman and stole the shop goods. It is of course trite that such evidence must reach the degree of certainty required to sustain conviction in a criminal trial. The first limb of evidence linking the appellant with the commission of the crime charged is that of PW4, the taxi operator. He testified that he identified the appellant as one of the two persons who had ferried goods in his taxi from Mukurweini to Othaya. It is worthy of note that the appellant said nothing about this in his defence. The second limb relates to the recovery of the stolen goods. These were recovered from the house of the appellant and were eventually identified by the complainant as his property. This was about three weeks after the robbery. The question for decision here is whether this possession was sufficient to sustain a conclusion that the appellant participated in the robbery on the night of 18th/19th August. How proximate in time in relation to the date of the robbery were the goods found in his possession? Before answering this question, it is necessary to state the principle of law germane to a consideration of this matter. In *R v Loughin* 35 Cr App R 69, the Lord Chief Justice of England said:-

"If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker."

That is the well-known doctrine of recent possession. In *Loughin's case*, drinks stolen from a pavilion in the dead of night were found about 2 hours afterwards in the appellant's possession and he gave no acceptable explanation of how he came by them. How does the principle enunciated in that case fit the facts of this case?

The robbery the subject of this appeal took place on the night of 18th and 19th August, 2000. The goods were found 20 days afterwards. We think that in the particular circumstances of this case the time lag between the date of the robbery and the discovery of the goods was not such that it would be unreasonable to hold that the appellant's possession thereof on that date was sufficient to found a conclusion that the appellant participated in the robbery. In our view, it can safely be said that the stolen goods were found in the appellant's possession shortly afterwards.

In his testimony before the trial court, the appellant did not give any explanation whatsoever as to how he came by the goods. He testified as follows:

"I stay at Othaya. I sell clothes. I do understand the charge against me. I recall on 6th October, 2000 I went to my business in the morning. I closed at 6.30 pm. I went to the bar and started taking beer and at midnight two people came to the bar one of them was a police officer Onyango Odero. They told me they wanted me. I asked them what for and they told me I will know it ahead. At the police station they started

beating me and the police officer reminded me of one Elizabeth Muthoni whom we were fighting over. The police officer told me he will charge me with a case I will not escape. I was later charged jointly with a person I did not know".

The inevitable conclusion, therefore, is that the appellant was in possession of the goods stolen from the complainant's kiosk and he could not offer any acceptable explanation of how he came by them. The two courts below came to the same conclusion, and rightly so in our view, that the appellant was one of the robbers.

On the consideration of the entire evidence tendered in the trial court, we think that the two courts below were perfectly entitled to find the appellant guilty as charged and they cannot be faulted. The appellant's conviction is sound and safe and it must stand.

Accordingly, we conclude that this appeal is unmeritorious and is dismissed. That is the order the Court.

Dated and Delivered at Nyeri this 14th day of May 2004.

P.K.TUNOI

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JUDGE OF APPEAL

E.M.GITHINJI

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JUDGE OF APPEAL

A.G.RINGERA

.....

AG.JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR