



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 233 OF 2007**

**WANJIHIA MWAI .....APPELLANT**

**Versus**

**REPUBLIC .....RESPONDENT**

***(Appeal arising from Chief Magistrate's***

***Court at Nyeri, in Cr. Case no.3446 of 2006)***

**JUDGMENT**

The appellant WANJIHIA MWAI alias FRANCIS NJIHIA MWAI alias SHARK MWAI KABURA was charged with robbery with violence contrary to section 296(2) of the Penal Code particulars of which were that on 9<sup>th</sup> day of June 2005 at Gituamba village Narumoru area within Nyeri District of Central Province jointly with others not before the court being armed with dangerous weapons namely pistol and pangas robbed FRANCIS GITHINJI HIUHU of a pistol S/No. 76H36955 make Browning with seven rounds of ammunition, a motor vehicle registration number KAN 190Q make Toyota Corolla, phone mobile Nokia, a wrist watch a pen make parker and cash Ksh. 3000/- all valued at Kshs. 568,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Francis Githinji Hiuhu.

The appellant denied the said charge and was put on trial where the prosecution case was that on 19<sup>th</sup> June 2005 the complainant was driving his motor vehicle towards his home and on the way he saw another motor vehicle parked by the way side with its bonnet wide opened. He assumed that the same had a mechanical problem. He proceeded to his home stopped his car and came out to open his gate when he was confronted by three masked men who ordered him to surrender and in compliance they robbed him of the items stated in the charge above. He reported the matter to the police and the motor vehicle was subsequently found abandoned and recovered in Karatina.

It was further the prosecution's case that on 14<sup>th</sup> July 2006 almost a year after the alleged robbery S/sgt Benson Mbugua accompanied by Apc Ndote and Apc Wambugu while on patrol at Gakera area met two men walking in a suspicious way followed them and arrested the appellant who was carrying a paper bag where they found a DVD Deck.

That the accused explained that the DVD Deck was his and decided to take them to his house in Majengo to produce the document of title on the same. As they were walking the appellant attempted to remove a pistol and the action was noticed by pc Ndote who hit the appellant and the pistol fell down.

The appellant was therefore taken to Nyeri Police Station and booked and the complainant was subsequently able to identify the said firearm and on that basis the accused was charged with the offence he now appeals against.

He has now filed an amended grounds of appeal wherein he raises therein grounds in which he takes issues with the trial courts reliance on circumstantial evidence, relying on the issue of recent possession and in failing to take into account his defence. He has also filed written submission which he has urged us to rely upon.

The State through the learned State Counsel opposes the appeal and states that the appellant was found in possession of firearm which had been stolen for P.W.1 and he agrees with the trial magistrate's finding that firearm is not a commodity which easily changes hands and therefore the trial magistrate was right in finding the appellant guilty as charged having considered his defence and properly dismissing the same.

The appellant in his ground one of the appeal takes issue with the trial magistrate reliance on the alleged possession of the pistol and states that the said pistol was not found in his possession but was left by someone else at the place where he was polishing his shoe which was the work station of D.W.1.

To our mind we have looked at the evidence before the trial court and wonders why then it was the appellant who was arrested and not D.W.1. We therefore find the evidence of P.W.2 and P.W.3 credible and agree with the trial magistrate finding on facts that the appellant was found in possession of the pistol that had been stolen from P.W.1 during the course of robbery.

We also concurred with the trial courts finding that a pistol is not a commodity that easily changes hands and the fact that the same was found in the possession of the appellant one year after the alleged commission of the offence would still bring the same within what constitutes recent possess as stated in the case of JACIAL SINGH v R 1953 EACA 253 quoted by the appellant in support of his ground there of his grounds of appeal in his submissions.

We have reviewed the evidence before the trial court looked at the defence of the appellant and are of the considered view that the prosecution was able to prove its case against the appellant as in law required and therefore hold that the appellant was safely convicted. We therefore find no merit in the appeal herein and therefore dismiss the same.

Dated and delivered at Nyeri this...2nd.... Day of December.....2011.

J.K. SERGON

JUDGE

J. WAKIAGA

JUDGE



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