Case Number:	Criminal Appeal 82 & 85 of 2008
Date Delivered:	16 Nov 2008
Case Class:	Criminal
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Mary Muhanji Kasango, Mathew John Anyara Emukule
Citation:	JAMES MURITHI KANYORE & ANOTHER V REPUBLIC [2008] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	P. Ngare - SRM
County:	Meru
Docket Number:	-
History Docket Number:	1381 of 2007
Case Outcome:	-
History County:	Meru
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL 82 OF 2008

JAMES MURITHI KANYORE …………………….. APPELLANT

CRIMINAL APPEAL NO. 85 OF 2008

DAVID MUNENE MARANGU …………………….. APPELLANT

VERSUS

REPUBLIC ……………………………………….. RESPONDENT

(An appeal against the judgment of P. Ngare SRM Chuka in Criminal Case No. 1381 of 2007 delivered on 24th December 2008)

JUDGMENT

The appellant was charged before the lower court with the offence of robbery with violence contrary to section 296 (2) of the Penal Code in the first count. In the 2nd count, he was charged with the offence of handling stolen goods contrary to section 322 (2) of the Penal Code. After trial before the lower court, he was convicted on the first count and was sentenced to suffer death. We are the first appellate court. This court is duty bound to re-evaluate the evidence of the lower court and in this regard the case of **Okeno Vrs. Republic** 1972 EA 32 is relevant. It was stated in that case as follows:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."

In the lower court, PWI stated that on 17th November 2007 at 9pm he was on his way home and passed by Moi Girls estate. At that point, he met with four young men who accosted him, held him by the neck and pulled him to the ground. They robbed him of his driving licence, mobile phone and Kshs. 850/=. He was able to see them because there was electricity light from a nearby home. When he

reported the matter to the Police the following day, he was assigned two police officers to carry out the investigations. At the scene of the robbery, they were given directions to the home of the men who carried out the robbery by members of public who said that they witnessed the robbery. They went to that home and found 4 men. PWI was able to recognize two of them. The police officers asked the men to produce their mobile phones. One of them informed them that there was another phone in another home. A neighbour came to them and told them that the appellant had given her the phone to try and operate it. The phone was a Nokia and had the welcoming words, *"CALLYPOSO REGIME."* PWI was able to operate the phone. He was not cross examined by the appellants. PWII stated that on the material date at 9pm he had gone to visit a friend. He slept at his friend's home and at midnight 3 boys two of whom are the appellants who entered the home with a mobile. The appellants told him that they had stolen the mobile phone. He noted that the mobile phone was a Nokia and on that night he gave it to a neighbour called Sabina to test whether it was working. In the morning of the following day, police came to the home together with PWI and the first appellant told them that the phone was with Sabina. This witness was also not cross examined by the appellants. Sabina was PWIII and she recalled that on 18th November 2007 the first appellant gave her the mobile phone for her to test it. The police later appeared and she voluntarily gave the phone to the police. She said that the second appellant was in possession of the sim card belonging to PWI. She witnessed the phone being switched on by PWI using that sim card. The appellants did not cross examine her. PWIV was the police officer who on 18th November 2007 at 10am acted on the complaint by PWI. This witness questioned members of the public who were able to pinpoint where the robbers were. When they went to that home they found the 1st and 2nd appellant in the house. They were identified by PWI. In the process they were able to recover PWI's mobile phone from PWIII and PWIII confirmed that the phone had been given to her for testing. This witness also confirmed that the sim card belonging to PWI was with the 2nd appellant. PWI managed to activate the phone which had the welcome message of *"CALLYPOSO REGIME".* This witness was not cross examined by the appellant's either. The appellants at the close of the prosecution's case were found to have a case to answer. The first appellant in his defence stated:-

"My names are David Munene Marangu. I hail from Jomba's estate Chuka. I am a loader within Chuka town. I have nothing to state further."

The 2nd appellant also in his defence gave his name and stated:-

"I recall on the day in question and I met with one Waraa. He took me to a place where we attacked PWI."

After that evidence was tendered, the lower court convicted the appellants. The evidence adduced by the prosecution clearly shows that both the appellants had possession of PWI's mobile phone. The first appellant was the one who handed over the phone to PWIII. The second appellant had in his possession PWI's sim card. The appellants ought to have given an explanation of their possession of that phone which was the subject of a violent robbery. The appellants were in possession of a recently stolen mobile phone. The doctrine of recent possession was discussed by the Court of Appeal in the case of **Anthony Kariuki Kareri Vrs. Republic** Criminal Appeal No. 110 of 2002 where the Court of Appeal had the following to say:-

"The doctrine of recent possession is comprehensively dealt with in the case of ANDREA OBONYO VRS. REPUBLIC [1962] EA 542 relied on by the appellant's counsel. The presumption is that a person in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. That is a presumption of fact and not an implication of law which presumption is merely an application of the ordinary rule relating to circumstantial evidence. In that case

***(Andrea Obonyo Vrs. Republic** [1962] EA 542) the court said   at page 349 paragraph 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 theft or of receiving according to which is more possible or likely in the circumstances. He is not entitled to be acquitted altogether merely because there may be doubt as to which of the two offences he has committed. "

Under the doctrine of possession of recently stolen goods, the appellants are constructively either thieves or receivers of stolen goods. The possession of the mobile phone by the appellants just the following day after the violent robbery in effect put both the appellants at the scene of the robbery. The phone was positively identified by PWI. The appellants did not offer any contradictory evidence to that of the prosecution evidence. They even did not cross examine any of the prosecution witnesses. As can be seen from above, the 2nd appellant admitted the offence in his defence. Having failed to give their defence when they were given the opportunity to do so, the appellant cannot at this late stage be heard to say that they failed to cross examine and to give their defence because of threat by the police. To us, the defence being raised at the hearing of this appeal is an afterthought. The appellants could have complained to the court if indeed there were such threats. We reject their attempt to belatedly raise such allegations. In the end we find that the prosecution did prove its case beyond reasonable doubt. The appellants in their written submissions which we have considered raised an issue that the trial court did not indicate the language they used when giving their defence. That issue does not in any way advance their appeal because the Constitution and the Criminal Procedure Code lay an obligation on the court to ensure that an accused person understands the proceedings. The language used when the prosecution witnesses gave evidence is clearly shown. There was no obligation for the court to show the language used by the appellants in their defence. In the end, the appellants' appeal hereby dismissed.

Dated and delivered at Meru this 16th day of November 2008.

MARY KASANGO

JUDGE

M.J.A. EMUKULE

JUDGE

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