REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL 23 OF 2016

JAMES MUNGAI KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgment and sentence of the **Hon. C. C. Oluoch**, **SPM**,

in Milimani Chief Magistrate's court, Criminal case No. 1298/2014, on 8.12.2015)

JUDGMENT

Before the lower court, the appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. the particulars of the charge were that on 8.9.2014 along Uhuru Highway in Nairobi within Nairobi County, jointly with another not before the court, he robbed GEOFFREY NDETO MUTUKU a motor cycle registration number KMDG 508M, Make Honda valued at Kshs.99,000/= and at the time of robbery used personal violence to the said GOEFFREY NDETO MUTUKU.

The appellant faced an alternative charge of handling stolen goods contrary to section 322(1)(2) of the Penal Code. that on 8.9.2014 at Thigio village in Kiambu within Kiambu County, otherwise than in the course of stealing, he dishonestly handled a motor cycle registration number KMDG 508M, make Honda, knowing or having reasons to believe it to be stolen goods.

The case of the appellant went through full trial. The appellant was eventually convicted on the main count of robbery with violence and sentenced to death on 8.12.2015.

The appellant first filed a memorandum of appeal against the said conviction and sentence on 26.1.2016. On 9.6.2021, he filed an amended grounds of appeal. The amended ground of appeal lists 5 grounds as follows: -

> **1. THAT the learned trial magistrate erred in law and fact by convicting the appellant while relying on the evidence of identification while failing to conduct an identification parade which was very necessary in this case.**
>
> **2. THAT the learned trial magistrate erred in law and fact by invoking the doctrine of recent possession while failing to adhere to the principles of the doctrine since the prosecution did not prove possession of the property by the appellant.**
>
> **3. THAT the learned trial magistrate erred in law and in fact by convicting the appellant while the prosecution case was poorly investigated.**
>
> **4. THAT the learned trial magistrate erred in law and fact by convicting the appellant while shifting the burden of proof on the appellant while the appellant's defence.**
>
> **5. THAT without prejudice to the above grounds on conviction, that the sentence of death was harsh and excessive.**

The appellant has urged this court to allow his appeal. The state respondent has on the other hand pleaded that this appeal lacks merit and should be dismissed.

This court sits on this matter as the 1st appellate court. The jurisdiction of the 1st appellate court is well settled in the case of **Okeno Versus Republic (1972)EA 32,** in which the Court of Appeal made the following pronouncements, amongst others;

i. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

ii. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, it must make it's own findings and draw its own conclusions.

iii. It should make allowance for the fact that the trial court has had the advantages of hearing and seeing the witnesses.

This appeal was canvassed by way of written submissions. Both the appellant and the Respondent duly complied and filed their set of submissions.

The appellant first submitted on the issue of identification. That the court below did not properly examine the evidence of the complainant on the identification of the appellant and even concluded that it was during broad daylight. That the court ought to have examined whether there were special reasons why complainant was able to identify the appellant, since he could have been mistaken even during daylight. He based his submission of the fact that the robbery took less than 5 minutes.

Further, the complainant maintained that it was the arresting officer who showed him to the complainant (page 23). That the investigating officer ought to have arranged for an identification parade so as to ensure no miscarriage of justice. He otherwise acknowledged that the court appreaciated this position and observed (page 55) that it was because the appellant had been exposed to the complainant before his transfer to parliament police station. He relied on ***Donald Atemia Sipendi Versus Republic (2019)eKLR,*** that the risk of wrongful conviction in mistaken identity is high and can result in miscarriage of justice.

The appellant buttressed his submissions on the importance of an identification parade, on the case of ***Samwel Kilonzo Musau Versus Republic(2014)eKLR***, that it is to give an opportunity to witness under controlled and fair conditions to pick out the people he is able to identify.

The appellant further submitted on the doctrine of recent possession that the court was wrong to rely on the same since the appellant was not found in possession of the motor cycle, but 2 people. That PW5 had stated that it was the appellant who gave the motor cycle to him, so, the appellant was not in possession of the same. That PW4 also stated that he was given the motor cycle by one Ng'ang'a, and that PW6 stated that the appellant was a mechanic in the area. He relied on the case of ***Eric Otieno Arum Versus Republic (2006)eKLR***, that:

"In our view, before a court of law can rely on the doctrine of recent possession, as a basis of conviction in a criminal case, possession must be positively proved."

And based on an American authority, ***In people versus Manini 79NYZd 561, 573(1992)***, he challenged the concept of constructive possession that in that case, it must be shown evidence of ability to use or dispose of the property.

Also the case of ***Malingi Versus Republic (1989)KLR225*** that'

"By application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. First, that the item in his possession has been stolen…. That there are no existing circumstances which point to any other person as having been in possession of the items."

On his own defence, the appellant submitted that the trial court was wrong in shifting the burden of proof and failing to consider his defence. That the court failed t consider his defence that he had a grudge with PW7 over a woman. That as a mechanic, the motor cycle had been brought to him for repairs by 2 men, and was not in his possession at the time of recovery.

Lastly, on sentence, the appellant relied on ***Benson Ochieng Versus Republic*** in which the applicant had been resentenced to 20 years imprisonment. He pleaded for an alternative lenient sentence.

The submission of the prosecution side were to the effect first, that the ingredients of the offence were proved as required (***Oluoch Versus Republic (1985) KLR***). Counsel also relied on the case of ***Patrick Opondo Opollo and Another Versus Republic Criminal Appeal No. 23/2014,*** that the circumstances were such that positive identification was possible. Also ***Francis Kariuki and others, Criminal Appeal No. 6/2001***.

That the offence occurred during broad daylight and the complainant was able to identify the appellant we as he had not covered his face. That there was further evidence of recent possession. That the theft was at 4:00pm and same was recovered 2 hours later. Counsel relied on ***Isaac Ng'ang'a Kahiga Versus Republic, Nyeri, Court of Appeal No. 272/2005***, that;

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be proved positively. In other words, there must be positive proof, first, that the property was found with the suspect, secondly that the property is positively the property of the complainant, thirdly, that the property was stolen from the complainant, and lastly, that the property was recently stolen from the complainant.."

He summed up that the defence of the appellant is a mere denial and an afterthought and that the appeal of the appellant ought to be dismissed since the sentence was also proper.

I have considered the 2 rival submissions. As outlined in the above cited case of ***Okeno Versus Republic***, it is imperative that this court looks

at the whole evidence as produced before the lower court.

PW1 was Pritesh Mahesh Pandit whose evidence was that on 8.9.2014, he had sent one of his employees Geoffrey Mutuku out on motor cycle registration number KMDG 508M, Honda, for deliveries. That at about 4:45pm, the said employee called and told him that his motor cycle had been stolen by some people who had passed as City Council traffic, before pushing him down and riding away in his motor cycle. The witness was able to track the motor cycle, headed towards Thika. He followed it till it was recovered at Thigio. He produced the documents of title of the motor cycle, and he motor cycle itself. That when recovered, it had no carrier, which was otherwise also separately recovered.

And PW2, Corporal Lilian Moraa, the investigating pofficer at CID, parliament, only formally produced the exhibits in court.

PW3, Geoffrey Ndetu Mutuku, recalled that on 8.9.2014 at around 4:00pm he was riding motor cycle in court from Westlands headed to Indutrial Area in heavy traffic. As he rode on the pavement along Uhuru Highway, he met 2 people who told him they were City Council Askaris and that he was riding on the pavement. One of the men took the key and the engine went off. One of the men pushed him down when he asked them to identify themselves. The men went away with the motor cycle. He reported the incident at parliament police station. That through tracking, the motor cycle was traced around Kiambu, at Thigio AP post.

This witness went to Thigio AP post, where he was shown the appellant as the man who had been arrested with the motor cycle. He identified him as the man who had snatched the keys. That when he saw the motor cycle, it had no carrier. The appellant led them to where the carried was. The witness went on that the arresting officer, corporal Langat told him that he had found some boys testing the motor cycle, and that they confirmed that they had been given it by the appellant. The carried was then found in possession of a man selling scrap metals, with only 1 invoice booklet. He confirmed that during the robbery, and as the appellant snatched the keys, he had not covered his face.

On cross examination, he stated that he had reported to the police that he would be able to identify the 2 men, and that it is the appellant who took them where the carrier was. And that the robbery took less than 5 minutes, and he saw the appellant clearly. The appellant and the other had pushed him into a trench besides the road before riding away with the motor cycle.

PW4, Geoffrey G. Kariuki, a scrap metal dealer at Nderi shopping centre recalled that on 8.9.2014 at about 4:00pm, the appellant, Mungai, went to him with a motor cycle. He knew him as he used to supply him with scrap metal. That the appellant asked him to keep a carried for him, while also telling him that he had borrowed the motor cycle so as to pick some scrap metal. Once gone, the appellant failed to come back for the carrier. He also never came back with the scrap metal, only to appear the following day with a police officer. The witness confirmed to the police that it was appellant who had left the carrier with him

On being asked questions, he answered that appellant would bring to him scrap metal, construction metal or motor vehicle metal.

And PW5, Samson Kimani Wambui, a motor cycle operator Ndeiyia Thigio base, gave evidence that on 8.9.2014 at about 5:00pm while at his base, he saw the appellant appear on a motor cycle, model Honda. This witness knew the appellant as one who repairs tyres at the stage. That the appellant gave the same to one Ng'ang'a who went round on it. He then gave the witness to also go round on it, on the way picking one Morris, to test ride the new bicycle. As the 2 rode a police officer Langat, stopped them. He led the 2 police officers to the appellant at the stage as the one who had given them the motor cycle. The appellant was then arrested.

In his presence, he heard the appellant state that he had bought the motor cycle and that he had left the carrier at Zambezi area.

This witness knew the appellant as a puncture repairer at the stage. He denied taking the motor cycle to the appellant.

APC Anthony Maina Kamau was PW6. His evidence was that on 8.9.2015 at around 6:00pm, while at Thigio AP Post, they received a call on a motor cycle stolen and tracked in the area. With other officers, they found the motor cycle with Kimani and Morris, who pointed at the appellant as the one who had given them the motor cycle. That on being interrogated, the appellant told them that the motor cycle had been involved in an accident in Nairobi and the rider had asked him to take it away from the accident. The motor cycle was identified by the owner the following day and the appellant transferred to parliament police station.

PW7, corporal Thomas Langat, testified that on 8.9.2014, while serving at Thigio AP post, he got information of a motor cycle being tracked, and being located at Thigio bus stop, KMPG 508M. in company of officer Maina, they proceeded to the stage and found the motor cycle, with 2 boys. That one of the boys, Kimani (PW5) pointed at the appellant as the one who had come with the motor cycle. He arrested the appellant despite his resistance. That appellant stated he had rescued it from an accident in Nairobi. That the carried was recovered at Zambezi.

This witness knew the appellant as a mechanic and boda boda rider. That it is the appellant who led them to the recovery of the carried. He denied that the appellant had been repairing the motor cycle.

PW8 Anthony Okello Omondi, on his part, testified that on 8.9.2014, while at Stoic Tracking Company, he received information of hijack of motor cycle KMDG 508M. He tracked the same and same was recovered by Thigio police post.

PW2 Corporal Lilian Moraa gave further evidence on 12.11.2015 and produced the exhibits relating to the motor cycle. She clarified that an identification parade could not be done since the witness had seen the appellant at the point of recovery.

The appellant gave a sworn evidence in his defence. His testimony was that he is a mechanic. That on 8.9.2014, at about 1:30pm, a customer brought to him a motor cycle to repair and he duly opened it up and worked on it till about 6:00pm. That 2 people came on a motor cycle and asked him to repair the same quickly. He took it for a road test before handing it over. Then the police came and he was taken to the

police post. That the following day he was transported to parliament police station and later charged in court. He denied the charges. On cross examination, he went on that whereas he knew his customer, John Kariuki, he could not call him as a witness. He denied knowing the 2 boys who came with the motor cycle. He otherwise knew PW5 Kimani, the one who brought the motor cycle. On further cross examination, he changed that he only saw him for the first time in court and denied giving him the motor cycle. He also denied ever seeing Geoffrey, the scrap metal dealer, nor ever stopping by his garage. He denied giving him the carrier. lastly, he stated that he has a grudge with Corporal Langat over a lady called Njeri.

I have considered the whole evidence on record by both the prosecution and appellant's sides. I have also considered the judgment of the Honourable Senior Principal Magistrate and the 2 respective submissions filed. from the foregoing, I can discern the following to be the issues for determination in this appeal:

i. Proof of the offence of robbery with violence.

ii. Identification of the appellant.

iii. Defence of the appellant.

iv. Whether prosecution proved the case beyond any reasonable doubt.

v. The issue of sentence.

It is important to first understand the law behind the offence of robbery with violence. Section 295 of the Penal Code defines the offence of robbery as;

"Any person who steals anything and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

The specific offence of robbery with violence is itself codified under section 296(2) of the Penal code as follows:-

"If the offender is armed with any dangerous or offensive weapon or instrument, or is company with one or more other person or persons, or if at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death!'

In the case relied on by the trial court of ***Oluoch Versus republic (1985)KLR 549***, the Court of Appeal gave directions on the ingredients of the offence of robbery with violence when it held;

"Under section 296(2) of the Penal Code, robbery with violence is committed in any of the following circumstances;

1. The offender is armed with any dangerous or offensive weapon or instrument.

2. The offender is in company with 1 or more person or persons, or,

3. At or immediately before or immediately after the time of the robbery, the offender wounds, beat strikes or uses other personal violence to any person"

As seen above, proof of any one or more of the 3 ingredients would be sufficient proof of the offence of robbery with violence. In our instant case, it was the undisputed evidence of PW3 on how he was attacked by the appellant and one other man, violently pushed into the trench and left behind as the 2 rode away in his motor cycle. That it was much later in the day that through tracking, the stolen motor cycle was recovered far away in Thigio in Kiambu county. With this evidence, this court is convinced that the prosecution dully proved the elements of robbery with violence. I so find.

On the 2nd issue of whether the appellant was positively identified as the perpetrator of the offence, I shall consider the same from the evidence on record. The evidence of PW3 was that he was riding along Uhuru Highway when he was stopped by the appellant and the other man, who both introduced themselves as Nairobi City Council officials, and who asked why he was riding on the pavement. That he asked the 2 to introduce themselves. That is when he was attacked. That the appellant is the one who faced him in the front. He had not covered his face. This attack was in broad daylight at about 4:00pm. Further, that on his first report at parliament police station, he declared that he would be able to identify the appellant if he saw him. It is worth noting that in the evidence of PW3, he was candid enough to state that he would not be able to identify the other man with the appellant since that other man had attacked him from back.

It is clear that the appellant was not subjected to any identification parade from PW3 to pick him out, if at all. The explanation given by the investigating officer, corporal Langat, was that this was because the appellant had been exposed to te witness at Thigio AP post. In the absence of such identification parade, the issue is therefore if the visual identification of the appellant by PW3 was accurate and positive.

In the case of ***Wamunga Versus Republic (1988)KLR, 426***, the Court of Appeal, giving directions on this issue held;

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is

enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it a basis off conviction."

In the case of ***Kiilu and Another Versus Republic (2005)IKLR 174***, the Court of Appeal, still on the same issue of identification held;

"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness, but this rule does not lessen the need for testing with a greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on a testimony of a single witness, can safely be accepted as free from the probability of error."

In considering the circumstances of how this robbery was executed, I am convinced that the circumstances favoured positive identification of the appellant by PW3. I duly align myself with the finding of the trial magistrate, who properly warned herself on possible dangers of conviction based on evidence of identification ***(Muiruri and 2 others Versus Republic (2002)eKLR, 274.***

And the accuracy of the identification by PW3 gets corroboration in the evidence of various other witnesses on the manner in which the appellant was arrested and the stolen motor cycle recovered. Amongst there were the following:-

i. The evidence of PW3, and PW7, that it was the appellant, who after the recovery of the motor cycle, led the investigating team to PW4, where he had taken and left the carrier of the stolen motor cycle.

ii. The evidence of PW4 that he knows the appellant well and that it was the appellant who had taken the carrier to his yard, only to appear the following day in company of police officers.

iii. The evidence of PW5 that while at Thigio motor cycle base, on the material date and time, he saw the appellant appear on a motor cycle, and that appellant gave him the same to test drive before the police appeared and arrested him and Morris.

iv. The evidence of PW6 an PW7, that upon being interrogated, the appellant gave an explanation that he had been given the motor cycle from an accident scene in Nairobi.

The trial magistrate applied the doctrine of recent possession as against the appellant. The case of ***Gideon Meitekin Koyiet Versus Republic (2013)eKLR*** was relied on what the doctrine of recent possession would entail, thus**;**

a. That the property was found in possession of the suspect.

b. That the property was positively identified by the complainant.

c. That the property was recently stolen from the complainant.

The court of Appeal in the case of ***Donald Mugo Kamunge Versus Republic (2015)eKLR,*** while stressing the need to prove the above 3 elements of the doctrine of recent possession, further directed that the said property must also be proved to be of the complainant. And that proof of time would depend on circumstances of each case, depending on the easiness with which the stolen property can move from one person to another.

The appellant has not challenged the above elements of the doctrine of recent possession except one. He has denied that he was found in possession of the stolen motor cycle and maintained that the same was recovered from PW5 and one Morris. From the evidence on record, the said motor cycle was recovered while in physical possession of the 2. However, the evidence of PW5 was clear that it is the appellant who had appeared with this motor cycle and given him to test drive the same. The appellant had the opportunity to cross examined this witness, but his cross examination did not in any way dent the evidence of this witness.

The robbery took place along Uhuru Highway at about 4:00pm and by around 6:00pm, he stolen motor cycle was recovered at Thigio, Kiambu County. The element of time as an element of the doctrine of recent possession was accordingly proved.

So, was the appellant in possession of the stolen motor cycle when it was recovered? To answer this, it is important to consider what possession mean. Under the definition section 4 of the Penal Code possession",

a. "Be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in actual possession or custody of any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

b. If there are 2 or more persons and any 1 or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in custody and possession of each and all of them"

There is no doubt in this matter that the appellant was not found in physical possession of the stolen motor cycle. However, he was positively identified as one of the robbers who rode away in the same. He drove it into Thigio market. He gave it out to PW5 to test drive. He took its carrier to PW4 where he led the investigators to the recovery. The appellant though not in physical possession of the same, was clearly in control over the same. In the circumstances, I am convinced that he was in constructive possession of the same I so find.

On the defence of the appellant, with respect, the same was a mere denial lacking in any substance. In the defence, the appellant offered no defence to the prosecution evidence of his identification at the scene of the robbery. He also offered no defence to the evidence of his possession of the stolen motor cycle as was given by PW4 and PW5. Neither did he offer any defence to the evidence of PW3 and PW7 on the recovery of the carrier of the stolen motor cycle. I sincerely do not find any merit in the defence of the appellant, which I dismiss.

I am in the circumstances, convinced that the prosecution managed to discharge its burden of proof and proved the case against the appellant beyond any reasonable doubt as required by the law.

On the issue of sentence, section 296(2) of the Penal Code, as seen above, prescribes for death sentence.

I have considered the sentencing proceedings of the court of 8.12.2015. The trial court duly accorded the appellant the opportunity to mitigate before proceedings to mete out the death sentence.

This court is cognizant of the legal position that sentence is a matter of discretion of the sentencing court. And that as an appellate court, this court would not interfere with the sentence of the lower court unless it is shown that the trial court overlooked some material factor, or took into account some wrong material or acted on wrong principles, (see ***Bernard Kimani Versus Republic (2002)eKLR, (A)***

In this case, I find the sentence meted out by the trial court legal and proper. I therefore have no reason whatsoever to interfere with the same.

In conclusion, I do not find any merit in this appeal. I dismiss the same wholly. Orders accordingly.

D. O. OGEMBO

JUDGE

29.9.2021.

Court:

Judgment read out in open court in the presence of the appellant, and Mr. Chebii for the state. Same interpreted to Kiswahili by court clerk.

D. O. OGEMBO

JUDGE

29.9.2021.