REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 111 OF 2018

SILAS MBOGO.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an appeal from the original conviction and sentence of the Senior Principal Magistrate's Court at Isiolo in Criminal Case No. 540 of 2011 delivered on 9th October 2012 by Hon. M Maundu, SPM)

JUDGMENT

1. Silas Mbogo, the Appellant was jointly charged with another, Adan Abdirahaman for two counts of the offence of 'Robbery with violence contrary to Section 296 (2) of the Penal Code.'

2. The particulars of offence for Count I were as follows: -

> 'On the 4th day of September 2011, at Isiolo township in Isiolo County within Eastern Province being armed with a dangerous/offensive weapons namely unknown firearms and iron bars robbed one Jelle Dahir of his mobile phone make Nokia 1203 valued at Ksh 2,000/= and cash Ksh 2,050/=.'

3. The particulars of offence for Count II were as follows: -

> 'On the 4th day of September 2011, at Isiolo township in Isiolo County within Eastern Province being armed with a dangerous/offensive weapons namely unknown firearms and iron bars robbed Abdi Kasai Ali of his mobile phone make Nokia 1110 valued at Ksh 2,500/= and cash Ksh 1,000/=.'

4. Both Accused pleaded not guilty to both counts but before the matter proceeded to full trial, the Prosecution made an application to withdraw the charges against the second Accused for lack of sufficient evidence against him. The application was allowed. Trial proceeded against the first Accused, the appellant herein, who was placed on his defence, after which the Court convicted him on both counts. He was thereafter sentenced to the death penalty for count I and count II was left in abeyance.

The Appeal

5. Being dissatisfied with both the conviction and the sentence meted by the trial Court, he has preferred the instant appeal. His grounds of appeal are as follows: -

> **i. That the learned trial magistrate erred in both matters of law and fact by failing to note that the light from the moon was not enough to identify the appellant at the scene of crime.**
>
> **ii. That the trial court erred in both matters of law and fact by failing to note that the property was not recently stolen from the complainant.**
>
> **iii. That the trial court erred in both matters of law and fact by failing to note that there was need of identification parade for identification of the Appellant.**
>
> **iv. That the learned trial magistrate erred in both matters of law and fact by failing to note that the prosecution case was marred with a lot of inconsistencies and discrepancies.**

v. That the learned trial magistrate erred in both matters of law and fact by failing to note that the Appellant was not found with the exhibit.

vi. That the learned trial magistrate erred in matters of law and fact by imposing harsh sentence which is unconstitutional.

Appellant's Submissions

6. The appeal was canvassed by way of written submissions. The Appellant in his submissions urges that the Prosecution's case was marred with inconsistencies. He urges that PW2, during cross-examination stated that the mobile phone was recovered from him and yet PW2 also said that his brother's wife was found with the mobile phone. He urges that although PW2 told the Court that the woman who was found with the mobile phone is not a witness in the case, the certified proceedings indicate that the woman who was found with the phone is a witness in the matter (PW4). He urges that PW5, the complainant contradicted himself by producing Ksh 1,000/= and a mobile phone and later stating that he was robbed Ksh 2,000/= and a mobile phone. He urges that the investigation officer testified that the complainant reported that they were attacked and robbed by two (2) men who they could not identify; and that PW1 said that someone overtook them, stood in front of them and cocked a gun and ordered them to stop; and that PW1 later told Court that two other men came from behind. He urges that as per the evidence of PW7, the clinical officer, a sharp object was used to inflict the injuries and yet PW1 said that the culprits used rungus and metal bars. He urges that these contradicting testimonies cannot secure a safe conviction and they prove that the main witnesses are not credible. He cites the cases of *John Barasa vs R, Kitale Criminal Appeal No. 22 of 2005* and *Dankerai Ramkisham Pandya vs R, E.A.C.A (1957) 336* for the proposition that contradictory and inconsistent evidence should not be relied upon.

7. He further urges that the lighting at the scene of crime was not conducive for proper identification and it is not clear whether the moon was bright during that month or it was covered by rain cloud. He urges that it is not in dispute that both complainants were attacked at around 10.00 p.m and that in the circumstances, it was necessary for the trial Court to test the evidence of identification with the greatest care as going by the degree of visibility at 10.00 p.m there could be a case of mistaken identity. He urges that the prosecution did not tender any evidence as to the intensity of the light from the moon and that there was thus no sufficient light at the scene to afford a positive identification. He urges that identification of a suspect in any criminal offence is always a pivotal question and whenever it arises the trial Court has to satisfy that the question has been disposed to such threshold as to leave no doubt that the suspect was positively identified. He cites the case of *Maitanyi vs R (1986) KLR 198* for the proposition that an inquiry as to the intensity of light is essential in testing the accuracy of evidence of identification. He further cites the case of *Cleophas Otieno Wamunga vs R, Kisumu Criminal Appeal No. 20 of 1989* and *Lesarau vs R (1988) KLR 783.*

8. He further urges that it has been held that if the police force standing orders in respect of conduct of identification parades are flouted, the value of evidence of identification depreciates considerably. He cites the case of *Nairobi Criminal Appeal No. 117 of 2005, David Mwita Wanja & Others vs R (2007) eKLR.* He urges that since there was no identification parade conducted to connect him with the offence, it cannot be concluded that he was positively identified and his conviction was thus not safe. He quotes the following finding by the Trial Court to support his submission: -

"This incident happened at night. The two (2) complainants claimed that they identified the Appellant herein at the time of the said robbery since there was moonlight. However, the investigation officer was categorical that the complainant reported that they did not identify any of the attackers. No identification parade was conducted. Therefore, the identification of the Appellant by the complainant here in Court is suspect and unreliable."

9. He urges that the trial magistrate, who had the benefit of seeing the complainant's demeanour during hearing came to the above conclusion and that the Court should thus not have convicted him.

10. He further urges that PW2's allegation that the Appellant sold the mobile phone to him was not proven. He urges that he was not the one who was found with the exhibit and that the doctrine of recent possession was not clearly established considering that the offence was committed between 4th September 2011 and the mobile phone was found on 16th September 2011 in PW4's possession. He cites *Criminal Case No. 272 of 2005 Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs R (2006) eKLR* and *Malingi vs R (1989) KLR 225* for the requirements for reliance on the doctrine of recent possession i.e firstly that the property was stolen from the complainant, secondly that that property was found in his (Appellant's) exclusive possession, thirdly that the property was positively identified as the complainant's property, finally, that the recovery of the stolen item was within the proximate time of the robbery. He urges that what constitutes proximate or recent depends on the nature of the stolen item and that in the present case, he was arrested one month after the robbery incident. He adds that he was not found with the mobile phone. He urges that there were other co-existing circumstances which pointed to another person having been in possession of the mobile phone prior to possession being passed to himself. He urges that the prosecution failed to establish all the elements of the doctrine of recent possession. He finally urges that his defence was not considered at all.

Respondent's Submissions

11. The Prosecution filed submissions dated 14th September 2021. They cite the provisions of Section 296 (2) of the Penal Code, the case of *Oluoch vs R (1985) KLR* and the case of *Joseph Njuguna Mwaura & 2 Others vs R (2013) eKLR* on the ingredients for the offence of robbery with violence which include: -

i. That the offender is armed with any dangerous and offensive weapon or instrument; or

ii. The offender is in company with one or more person or persons; or

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

12. On the first ingredient, they urge that PW1 testified that he was walking with Abdi Kassai near Taqwa Mosque when somebody overtook them, stood in front of them and cocked a gun which was an AK47 and instructed them to lie down. That two other men came from behind armed with rungus and metal bars. That PW1 was examined and a P3 form was produced which indicates that PW1 sustained a deep cut wound on the scalp and a cut on the back left side. That PW5, the second complainant also did corroborate this fact and he testified that himself and PW1 were from visiting a friend when 3 people appeared before them, one with a rifle. That PW5 witnessed the Appellant hit PW1 on the forehead and this he witnessed because there was moonlight during that night. They thus urge that the evidence of PW1 and PW5 proves that the assailants were armed with dangerous and offensive weapons which they used to rob both PW1 and PW5.

13. On the second ingredient, they urge that PW1 testified that he was attacked by the appellant in the company of two other persons and that this evidence was supported by that of PW5 who was in the company of PW1 when they were attacked. They urge that both testimonies confirm that there were three assailants i.e two people who were still at large and the Appellant who was arrested and tried.

14. On the third ingredient, they urge that PW1 testified that one of the men hit him on the head from behind with a metal bar and when he looked up, he identified the Appellant as one of the men. That at the time of the incident, he, PW1 was holding a mobile phone which the Appellant took, pushed him down, and removed Ksh 2,050/= from his back trouser pocket and as he was lying down, he was hit with a rungu on the left shoulder and that he was bleeding from the head and that they used a taxi to go to Isiolo Police Station to report the incident after which they went to Isiolo General Hospital where he was treated.

15. On identification of the Appellant, the prosecution cite the case of *R vs Turnbull & Others (1976) 3 ALL ER 549* for the factors to be considered with respect to recognition. They urge that PW1 testified that he indeed saw the Appellant and that there was moonlight. They further urge that PW2 who was the second Accused but was later discharged testified that he had purchased the phone from the Appellant for Ksh 1,050/=. That PW5 who was also in the company of PW1 testified that there was moonlight and that is what he used to properly identify the Appellant. They urge that PW3 was in his mother's shop when the Appellant came and told him that he wanted to sell his phone which he showed him and he, PW3 identified it as a Nokia Phone using a spot light. That PW2 came and bargained for the phone from Ksh 1,500/= to Ksh 1,050/=. That PW3 also testified that he had known the Appellant for about 2 years and that he sells firewood using a donkey cart.

16. With respect to the doctrine of recent possession, the prosecution cites Section 4 (a) of the Penal Code and the case of *Kinyati vs R (1984) eKLR* and they urge that in defining possession, full control of the object or article is not necessary nor is it a requirement of that definition. That in order to prove possession, it is enough to prove either that the Appellant was in actual possession of the item or that he knew that the item was in the actual possession or custody of another person or that he had the item in any place (regardless of whether the place belongs or is occupied by him or not) for his use or benefit or another person. The Court further explained that knowledge that the item is in actual possession or in one's custody or of any other person may be inferred from the circumstances or proved facts of the particular case. They cite the case of *Eric Otieno Arum vs R, Kisumu Criminal Appeal No. 85 of 2005 (2006) 1 KLR 233; (2006) eKLR* for the essential elements of the doctrine of recent possession. They urge that PW2 testified that it was the Appellant who sold him the phone for Ksh 1,050/=. That PW3 testified that the Appellant approached him on the 8th September 2011 to sell him the phone which the uncle bought on the same day. That he positively identified the Appellant as the person who had sold the phone to the uncle, four days after the Complainant was attacked and his phone stolen. That the phone was produced as Pexb1 and the Complainant identified it as his phone that had been stolen and provided a receipt dated 5th January 2010 indicating the purchase price for which he had bought the phone and it was marked as Pexb2. They urge that once the primary facts are established, the Appellant bears the evidential burden to provide a reasonable explanation for the possession. They cite the case of *R vs Elisha Okoth Saida (2017) eKLR* in which the other case of *Paul Mita Robi vs R,* Kisumu Criminal Appeal No. 200 of 2008 was referred

17. On the sentence, they urge that the same was not harsh but was appropriate taking into account the grievous nature in which the robbery happened. That PW1 stated how the Appellants were armed with rungus and metal bars. They cite the directions given by the Supreme Court on 6th July 2021 in the case of *Francis Kariokor Muruatetu & Another vs Petition No. 15 & 16 (Consolidated) of 2015.*

Determination

18. In a first appeal, the Court is enjoined to consider both issues of law and fact and make its own independent findings, bearing in mind that it is the trial Court that had the benefit of observing the demeanour of the witnesses. See ***Okeno v Republic (1972) EA 32.*** The Appellant's grounds of Appeal raise two main issues for determination as follows: -

i. Whether the Prosecution proved their case beyond reasonable doubt.

ii. Whether there is reason to disturb the sentence of the trial Court.

Whether the Prosecution proved their case beyond reasonable doubt.

19. The necessary ingredients for the offence of 'Robbery with violence contrary to Section 296 (2) of the Penal Code' are captured as follows: -

> **'If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before 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.'**

20. The existence of these factors can only be ascertained by looking at the evidence adduced during trial. The Appellants main contention is that he was not identified properly and that the stolen items were not in his possession.

Prosecution's Case

PW1

21. This Court has had a chance to examine the evidence led at the trial. PW1, the complainant in Count I stated that on 4th September 2011, at about 10.00 p.m, he was with Abdi Kassai walking on foot and when they reached Taqwa Mosque, somebody overtook them and stood in front of them. He testified that the person cocked a gun and ordered them to stop. That the person had an AK 47. That two other men came from behind, armed with rungus and metal bars and that one of them hit him with a metal on the head. That he looked back and saw him as there was moonlight. That the person took his mobile phone Nokia 1203 and Ksh 2,050/= from his back trouser. He testified that he had a receipt for the mobile phone.

22. He testified that while at the police station on 2nd October 2011 to get a P3 form, the police brought a suspect and as the suspect passed near him, he identified him and that the person is the Appellant who is standing in the dock. During cross-examination, he testified that the Appellant was wearing black clothes.

PW2

23. PW2, AAM testified that on 8th September 2011, at about 10.00 a.m, he was at his sister's shop with her sister's son, AA and Jamal and Hussein. He testified that while at the shop, 2 Turkana men came and told A that they had a mobile phone that they were selling at Ksh 1,500/= and that he bargained up to Ksh 1,050/= and bought it. He testified that after one week of using the phone, he lent it to his brother's wife to use and that on 2nd October 2011, while he was herding goats at Kambi Garba, 2 of his brother's children came and told him that their mother wanted to see him. That he continued herding and at about 1.00 p.m, the police officers came and arrested him. That he was intercepted carrying the said mobile phone. That he took the police to his sister's shop and on the following day, one of the 2 Turkana men who sold him the phone came to the shop and the police came and arrested him. He identified the person who sold him the phone as the Appellant on the dock.

24. During cross-examination, he confirmed that before the Appellant sold him the phone, he knew him personally and that he is a hand cat pusher. He confirmed that the mobile phone was recovered from him personally and not with his brother's wife. That his brother's wife was also arrested and that she was found with the phone.

PW3

25. PW3 was AA (minor). He was taken through a *voire dire* and found competent to testify. He testified that on 8th September 2011, he was at his mother's shop and at about 1.00 p.m, the Appellant came. He testified that he knew the Appellant. That the Appellant wanted to sell his phone and when his uncle, PW2 came, he bought it for Ksh 1,050/=. That 3 days later, he was in the shop when 2 police officers came with his uncle and asked if he knew the person who sold the mobile phone to his uncle. That on the same day at about 5.00 p.m, the Appellant came to their shop with another phone and told him that he had a camera phone which he was selling. That he asked him to wait and he telephoned a police officer who had given him his number and informed him that the Appellant was in the shop. That he kept the Appellant busy and that when it started raining the Appellant went to pick a jacket. That the police officers came and asked him to go and look for the Appellant and while on his way, he met with the Appellant and while there on the road, the police officers came and the Appellant took off but was arrested by a bystander police. He testified that he has known the Appellant for about 2 years and he sells firewood using a donkey.

PW4

26. PW4 was MA who testified that on 16th September 2011, although she was not very sure of the date, she was selling milk in Isiolo, she had her phone ringing and before she could pick her phone, police officers came and arrested her. She testified that she had stayed with that phone for only 10 days and that she was given the phone by A, a brother to her husband and that her phone was spoilt hence why A had given her the phone.

PW5

27. PW5 was Abdikasai Ali who testified that on 4th September 2011, him and Dahir were from Safi Estate heading to Taqwa area. That before they reached Taqwa Mosque, three people appeared in front of them and one had an AK47 rifle. That the one with a rifle pointed it to them and ordered them to lie down and before they could lie down the other two surrounded them. That the one with the rifle ordered them to produce money and phones and he Ksh 1,000/= and his Nokia Phone, worth Ksh 2,000/= and gave to one of the persons who were not armed. He testified that he identified one of the persons who did not have a gun and that is the person who hit Jelle who is the Appellant on the dock. He testified that there was moonlight and that the Appellant was very close to him and he identified him.

28. During cross-examination, he testified that there was moonlight and that the Appellant had not covered his face and that the Appellant was wearing black clothes.

PW6

29. PW6 was No. 89305 PC Collins Wasike who testified that he is based at Buru Buru Police Station but was based at Isiolo Police Station in September 2011. That on 5th September 2011, at about 9.00 a.m, he was in the office and he perused the O.B and saw a case minuted to him by the OCD. That two people were attacked and robbed of two mobile phones and money and that the CID Officers were tracking the stolen mobile phones. That on 4th October 2011, PC Kirui of Isiolo CID called him and told him that one of the stolen mobile phones was being used in Isiolo Town. That he accompanied PC Kirui to Isiolo Town and they interrogated the lady they found with the phone, who claimed to have been given the phone by AA. That the lady took them to the home of A and A admitted having given the phone to M and that they left M and took A to Isiolo Police Station. That A told them he had bought the phone from someone else at a shop. That A led them to the shop at Kambi Garba and that there were other people on the ground, one of who was A's brother who pointed the suspect to them.

That as they moved to arrest him, the suspect started running away but members of the public intervened and they arrested him. That the Appellant did not reveal how he acquired the mobile phone.

PW7

30. PW7 was Mohamed Duba, a clinical officer based at Isiolo District Hospital. He testified that on 6th October 2011, he filled a P3 form for one Jelle Dahir who alleged to have been assaulted by a person known to him. That Jelle had a deep cut wound on the scalp and a cut wound on the back left side and that the injuries were about 1 month old. That a sharp object was used to inflict the injuries and the degree of injury was harm.

Defence Hearing

31. The Appellant was placed on his defence. He stated that he stays at Shambai area in Isiolo and he does casual jobs like transporting goods with a handcart. That on Sunday 2nd October 2011 at about 12 noon, he left his home and went to Kambi Garba where the Turkana community lives. That his leg was aching and he went to buy pain killers at the Section of Kambi Garba which is occupied by Borana. That he went with PW3 AAbdulle to his shop where he was going to buy the pain killers and since it had started raining, he went to shield from the rain in the neighbouring buildings. That when the rains stopped, he returned to PW3's shop and he found him standing on the road side with other boys and as he was talking with PW3, a taxi came and stopped near where they were. That 3 people alighted and PW3 and other boys started shouting 'Ndiyo Huyo.' That by that time, there was bad blood between Borana and Turkana Community and he tried to run away but he fell down and he was arrested. He claimed that he did not know the reason why he was arrested.

32. During cross-examination, he testified that he cannot recall where he was on 4th September 2011 but that in the evening he was at home with his wife and children.

Analysis

Identification of the Appellant

33. The Complainant in Count I narrated how the incident of robbery with violence happened. He said that together with PW5, the Complainant in Count II, they were attacked while walking to Taqwa at 10.00 p.m in the night. He said that a man holding an AK 47 rushed in front of them and asked them to lie down. He further testified that two other men armed with rungus and metal bars came behind them and one of them, whom he identified as the Appellant took his phone and cash. He testified that the Appellant hit him with a metal bar. He testified that he could see as there was moonlight.

34. The Appellant urges that moon light is not enough light for one to positively identify a suspect. He urges that an identification parade ought to have been done. This Court has considered that the complainants were not able to identify the Appellants when a first report was made at the police. PW1 testified that it is when he had gone to the police station on 2nd October 2011 to get a P3 form and the police brought a suspect that he identified him as the Appellant.

35. This Court considers that in the circumstances of the case, where the robbery happened in the night at about 10.00 p.m, with the moon being the major source of lighting, conducting an identification parade would have been the best way to identify the Appellant. This Court has however observed that both PW1 and PW5, the two eye witnesses, confirmed that at the time of the robbery, they both saw the Appellant and that he was wearing black clothes and that his face was not covered.

36. The Court also observes that the identification of the Appellant was corroborated by PW2 and PW3 who testified that the Appellant had approached them at PW3's shop and sold to PW2 a phone make Nokia 1203. They both testified on how PW2 bargained from Ksh 1,500/= to Ksh 1,050/=. They both further testified to have known the Appellant very well prior to this incident and the Court considers that they could not have mistaken his identity.

37. This Court further observes that the evidence of PW2 was similar to that of PW3 with respect to how the stolen phone came into the possession of PW2. This Court considers that both PW2 and PW3 had their different encounters with the police on the day the Appellant was arrested. After PW2 explained to the police that the stolen phone had been sold to him by the Appellant, the police went to PW3's shop and PW3 confirmed to them that it is the Appellant who had sold the phone to PW2. It is on this same day that the police arrested the Appellant with the help of PW3 (who was familiar with the Appellant) and other bystanders. Between the time PW2 was arrested and the time the police came to PW3's shop, PW3 did not get a chance to converse with PW2. This rules out the possibility of any conspiracy between PW2 and PW3 to frame the Appellant. This Court finds that the similarity of PW2's and PW3's account as to how PW2 came to be in possession of the mobile phone is indicative of truth.

38. This Court further considers that the phone recovered from PW2 after he bought it from the Appellant is the same phone that was stolen from PW1 as proved by the receipt that PW1 produced. This Court does not take it to be a mere coincidence that the phone stolen and the phone the Appellant sold to PW2 is one and the same. This in fact is what links the Appellant to the offence the subject of the charges he faced.

39. The Appellant further urges that there was contradiction in that PW2 testified that he was the one who was caught with the mobile phone and yet he also testified that it is PW4 who was caught with the mobile phone. This Court has however perused the evidence and finds that the Prosecution gave a satisfactory explanation as to how the two, PW2 and PW4 both came to be arrested. The Court considers that the police first tracked the phone to PW4 who had been given the phone by PW2, her brother in law as her phone was spoilt. This evidence was not challenged at cross-examination. Indeed, PW4 was arrested and after she explained that she had only been given the phone to use by PW2, her brother in law, the police went for PW2, arrested him and released PW4. This Court considers that PW2 accepted that he had given the phone to PW4 to use, and there is, therefore, no inconsistency as posited by the Appellant.

Weapons Used

40. The Appellant urged that there was inconsistency in the Prosecution's evidence with respect to the nature of weapons used. He urged that while PW7 testified that a sharp object was used to inflict the injuries, PW1 testified that the Appellant and his accomplices were armed with rungus and metal bars. To this end, the Court considers that there was medical evidence to confirm that a sharp object was used to inflict the injuries on PW1. The medical evidence was not specific on the exact nature of weapon. The Court considers that metal bars and rungus can cause cut injuries and a metal bar may have sharp edges. PW1 testified that he was hit with a metal bar on the head and with a rungu on his left shoulder. His evidence was corroborated by that of PW5 who on cross-examination said the appellant was armed with a metal bar and a rungu and that he had beat PW1 to get him to lie down. Although PW5 testified that PW1 was hit with a rungu on the forehead and PW1 said he was hit with a metal bar on the head and with a rungu on his shoulder, this Court considers that the fact of the case of being armed with dangerous weapons to be materially corroborated with only discrepancy being which weapon was used which what part of PW1's body. It does not detract from the fact that in the course of robbing PW1 and PW5, while armed with dangerous weapon the appellant beat and wounded the complainant PW1. Indeed, medical evidence by the P3 of 6/10/2011 indicated injuries consistent with the evidence of PW1 and PW3 in that he had *"Deep cut wound Scalp medial Lt, six stitches and soft tissue injury back upper Lt."*

Possession

41. The Appellant has urged that the exhibit was not found with him. He urges that the doctrine of recent possession does not apply to this case because he was arrested one month after the robbery and that there are other circumstances that point to the fact that the mobile phone was in the hands of other persons before it was passed to him.

42. Possession is defined under Section 4 of the Penal Code as follows: -

> **"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 the actual possession or custody of any other person, or having anything in 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 two or more persons and any one 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 the custody and possession of each and all of them;**

See **Gachuru vs R** (2005) 1 KLR 689.

43. While it is true that the phone was not found with the Appellant as it was first PW4 and ultimately PW2 who were arrested with it, this Court considers that PW2 gave sufficient explanation as to how he came to be in possession of the phone. He testified that the same was sold to him by the Appellant, which fact was corroborated by PW3. This Court considers that an accused person does not have to be found in actual possession of the stolen item to be said to be in possession of the item. If the Prosecution establishes by way of evidence that the Appellant knowingly had the phone in the actual possession of another by sale thereof for the use or benefit of that or any other person, within the meaning of Section 4 of the Penal Code, possession is established.

44. The Appellant has further urged that the phone was not found in his ***recent*** possession, as he was arrested one month after the alleged robbery, and that the property was revered on 16th September 2011. This Court considers that from the evidence on record, the phone was stolen on 4th September 2011. From the records, it is not very clear when the phone was recovered after its successful tracking. According to PW4 who was first found with the phone, she was arrested on 16th September 2011, although she said that she was not very sure of the date. According to PW6, the arrest happened on 4th October 2011. Despite the uncertainty on the dates, this Court finds that the period of time between the date of the robbery, the recovery of the phone and the date of arrest was about one month i.e between September 2011 and October 2011. A period of upto four and half (4 ½) months has been held to be recent possession in case of livestock. See ***Njoroge v. R*** (1983) KLR 197.

45. In the case of ***Mathai vs Republic***, Criminal Appeal No. 731 of 1983 (1983) KLR 442, Todd J. upheld a conviction in a case of stealing, agreeing with the trial magistrate who had held as follows: -

> **"There is no direct evidence to show that EX 1 was stolen by accused 2 (the appellant) from those <u>stolen on December 21, 1982 but it was found to be in his possession on January 22, 1985 A MONTH LATER. Having directed my mind to the doctrine of recent possession, nature of the article and the time element I find accused 2 guilty on the main charge of store breaking and stealing contrary to section 306 (a) of the Penal Code and convict him accordingly."</u>**

46. To this Court's mind, therefore, a one-month period between the date of the robbery and the date of the Appellant's arrest is sufficiently proximate to qualify as 'recent' within the context of the doctrine of recent possession. Moreover, even considering the case of mobile phones which may be fast moving items, the fact that the appellant was identified as the seller defeats the objection as to proximacy of the recovery of the phone to the date of theft. Significantly, once the Court accepts the evidence of PW2 and PW3 as to the sale of the phone by the appellant, the date of possession becomes the 8/9/2011 when the appellant offered PW3 the phone for sale, eventually selling it to PW3's uncle, PW2 at the same time. This was only ***four (4) days*** after the night of the robbery on 4/9/2011.

Failure to produce a receipt

47. The Appellant has also urged that PW2 did not produce a receipt to show that the Appellant sold to him the phone. Bearing in mind the circumstances under which the phone was sold, this Court finds that it is not unreasonable that no receipt was produced. It was on record by the evidence of PW6 that the Appellant had told PW2 that he had family problems thus needed to sell the phone. Furthermore, it is the Appellant, the seller who would have been the author of any receipt. From the evidence adduced, it is clear that the Appellant was walking around with the single item looking for a buyer and it is possible that he may not even have had a receipt to issue. Since any such receipt to be issued would have originated from him, this Court does not accept that the failure by PW2 to produce a receipt confirms that no phone was sold to him.

Appellant's Defence

48. This Court has also analyzed the Appellant's defence and observes that the Appellant did not expressly deny having been with the phone. He also did not offer, as he is required by the presumption under the doctrine of recent possession, any explanation as to how he came to be in possession of the phone. He merely claims to have been implicated because he is Turkana and the Prosecution witnesses are Borana and that there was bad blood between Borana and Turkana communities at the time. This Court does not find this to be an adequate explanation. It would not be a coincidence that out of all the Turkana people in the region, the Prosecution witnesses would have singled out one being the Appellant. Furthermore, the evidence that the Appellant sold the phone to PW2 which is the very phone that was stolen clearly links the Appellant to the offence.

49. The implication of failure to offer a credible explanation after being found in possession of a stolen item was discussed in the case of ***R vs Hassani s/o Mohammed*** (1948) 15 EACA 121 which was cited with approval by Todd J in the aforementioned case of ***Mathai vs Republic***, Criminal Appeal No. 731 of 1983, (1983) KLR 422, 424, as follows: -

> **"On a finding that an accused was in possession of property recently stolen, in the absence of any explanation by him to account for his possession a presumption arises that he was either the thief or the receiver."**

50. This Court thus finds that the Prosecution proved their case against the Appellant beyond reasonable doubt.

Whether there is reason to disturb the sentence by the trial Court

51. On sentencing, this Court has considered the submissions made by parties. The Appellant was sentenced to the death penalty. The Appellant urges that the sentence meted out against him was harsh and unconstitutional. The Prosecution however urges that the trial Court exercised its discretion well in sentencing.

52. The leading authority on the question of interfering with sentence is that of ***Wanjema v Republic,*** Criminal Appeal No. 204 of 1970 (1971) EA 493, 494, where Trevelyan J held as follows:-

> **'An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.'**

53. The Supreme Court's finding in ***Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae***) [2017] eKLR, declared that the mandatory nature of the death penalty for the offence of murder c/s 203 as read with 204 is unconstitutional but retained the death sentence as a constitutional penalty.

> **"a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution."**

54. This court also notes the Directions of the Supreme Court in same case, ***Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)*** [2021] eKLR, explaining that the ratio of the decision applied to murder cases only and directing as follows:

> **"[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."**

These Directions are binding on this Court by virtue of Article 163(7) of the Constitution.

Conclusion

55. The complainant, PW1 was walking in the night on 4th September 2011 in the company of PW5, heading to Taqwa area. While on their way, they were attacked by an armed group of three persons, one of whom was identified as the Appellant. The weapons that the attackers were armed with included an AK 47 rifle, metal bars and rungus. PW1 testified to have been hit by the Appellant with a metal bar and this was confirmed by the medical evidence of PW7 who examined him.

56. PW1's mobile phone make Nokia 1203 and cash was stolen during the attack. In about a month's time after the phone was stolen, the police successfully tracked the phone and traced it to PW4, a sister in law to PW2. When PW4 was arrested, she explained that she had been given the phone by PW2 to use as her phone was spoilt and this in turn led to the arrest of PW2. PW2 thereafter gave a satisfactory explanation as to how he came to be in possession of the phone. He testified that the Appellant had sold the phone to him for Ksh 1,050/=, claiming that he had family problems. His evidence was corroborated by that of PW3 who witnessed the sale taking place.

57. The Appellant urges that there ought to have been an identification parade because at the time of the robbery, the only light used to identify him was moonlight which was not enough to positively identify him. However, on the strength of the other evidence linking the Appellant to the theft of the phone, this Court considers that the failure to conduct an identification parade would not occasion any injustice to the Appellant. The Court further finds that the Appellant failed to give any explain as to how he came to be in possession of the stolen phone. The Court considers that possession is not limited to actual possession but the fact of an Appellant having knowingly given possession by sale to another for her own or another's use or benefit is 'possession' within the meaning of Section 4 of the Penal Code. This Court rejects the Appellant's defence that he was framed because of bad blood between the Borana and Turkana communities. The Court finds that his defence was an afterthought and had no sound basis as the Appellant was not the only Borana person in the area at the time.

58. This Court, therefore, finds that all the elements of the offence of 'Robbery with violence contrary to Section 296 (2) of the Penal Code' were proved beyond reasonable doubt against the Appellant.

59. As regards the sentence of death, the Supreme court in the ***Muruatetu Directions*** of 6th July 2021, directed aggrieved persons to file a proper petition in that behalf and presented and fully argued for "a challenge on the constitutional validity of the mandatory death penalty in such cases … before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached."

60. For now, without such a determination, there is on the principle in ***Wanjema v. R*** (1971) EA 493, no demonstrable ground on error of principle or otherwise to justify interference with the sentence by the trial court, and the appeal from the sentence is dismissed.

ORDERS

61. Accordingly, the Court makes the following orders: -

i. The Appellant's appeal on conviction is declined and the finding of the lower Court on conviction is upheld.

ii. The Appellant's appeal on sentence is dismissed and the finding of the lower Court on sentence is upheld.

iii. For avoidance of doubt, the appellant is at liberty, as counselled by the Supreme Court in Muruatetu Directions *of 6th July 2021 to file a petition on* "a challenge on the constitutional validity of the mandatory death penalty for cases of 'Robbery with Violence contrary to Section 296 (2) of the Penal Code' before the High Court and [thereafter] escalated to the Court of Appeal, if necessary."

Orders accordingly.

DATED AND DELIVERED ON THIS 28TH DAY OF OCTOBER, 2021

EDWARD M. MURIITHI

JUDGE

Appearances

Silas Mbogo, the Appellant in person.