REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO. 208 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.190 of 2014 by Hon. S.N. Mwangi – S.R.M.)

PETER MAINA NDERITU....APPELLANT

-VERSUS-

REPUBLIC...........................RESPONDENT

J U D G M E N T

This is an appeal against the judgment of ***S.N. Mwangi*** dated 22/11/2017. ***Peter Maina Nderitu,*** the appellant, was convicted for the offence of Robbery with Violence contrary to ***Section 296 (2) of the Penal Code.*** The particulars of the charge are that on 30/11/2013, at Nyahururu Township in Laikipia County, jointly with others not before the court, being armed with offensive weapons, namely knives; robbed ***Julius Ole Parsalaach*** a ceska pistol serial No. G8296, 15 rounds of 9mm ammunition; a wallet with Kshs.150/-, mobile phone make Nokia 210 Asha, certificate of appointment, Kenya Police ID Card, KCB ATM, Police Sacco ATM, all worth Kshs.150,000/- and immediately before the said robbery, threatened to use actual violence on the said ***Julius Ole Parsalaach.***

Upon conviction, the appellant was sentenced to suffer death. He is aggrieved by the whole judgment and filed this appeal citing 11 grounds of appeal. The grounds of appeal can be condensed into the following;

1. **That the conviction was based on a defective charge sheet;**

2. **That the applicant was not positively identified as one of the witnesses;**

3. **That the court erred in connecting him on the doctrine of recent possession.**

The applicant filed written submissions and urges the court to quash the conviction and set aside the sentence.

This being the first appeal, it behooves this court tore-examines all the evidence that was tendered before the trial court, analyze it and to arrive at its own conclusions. This court will however make due allowance for the fact that this court did not have an opportunity to hear and see the witnesses testify in order to weigh their demeanor. For this proposition I am guided by the decision in ***Kiulu vs Republic (1975) EA.***

The prosecution case was as follows;

PW1 Cpl Julius Ole Parsalaach, the complainant herein, a police officer attached at Nyahururu Police Station was on 21/11/2013 at 5.20am, coming from Arena Sports Club in Nyahururu Town on foot when he reached near DEB School. He received a call on his phone and he was suddenly attacked from behind by somebody grabbing his neck – strangled him and he could not scream. Two other people joined and started to assault him. He knocked one of them who came to his front and he was punched in the left eye, was made to fall, was punched all over the body and they stole from him his firearm which was loaded, a wallet with documents, national ID [….], certificate of appointment, ATM card, NHIF Card and cash 150/- and mobile phone. He identified the phone in court and the receipt. He said it took about 15 minutes to rob him as he struggled with the robbers and was able to identify the one who came to his front and hit him on the eye. After taking the firearm they fled on foot. He tried to chase them but they separated and took different directions. He shouted for help and ***Sgt. Marube, PC Kipchumba and PC Mwanzia*** responded. They went round town trying to trace the robbers but failed to get them. He was treated at Nyahururu Hospital.

On 25/12/2013, one suspect was gunned down at Salgaa while in possession of the pistol which had been stolen from PW1. PW1's phone was tracked till 22/01/2014 when it was found in Nyahururu Town. The one in possession of the phone claimed that a person who drank beer at his bar, left it as security for a debt. PW1 identified the appellant as the person who stole from him as he came face to face with him

and that it is the appellant punched him on the eye and was urging the other robbers to finish him.

PW1 said the appellant had big eyes and he saw him as he kicked him; PW1 said that the incident was near DEB School where there were security lights that enabled him see the appellant.

Jacob Maina Kingori (PW2) recalled that in early November 2013, while on his way to town, one Mama Kamau or Alice informed him that there was a phone on sale. She was in Chemi Chemi bar. He saw the phone, a Nokia and he bought it for 1,200/-; that the seller was present, and he identified him as the appellant. PW2 explained that the appellant informed him that he had drunk alcohol in the bar and had no money to pay for it and hence the need to sell the phone. PW2 gave the phone to his wife ***PW3 Jane Njoki***, to use till 22/12/2014 when she was called by CID Nyahururu and was informed that the phone had been stolen. He was not issued with a receipt but Alice was his witness.

Jane Njoki (PW3) wife to PW3 confirmed that in November 2013, PW2 called her to come and see a phone that was on sale and if she liked it. She saw the phone, examined it and they agreed to buy it at a price of Kshs.1,200/- because the seller had a bill to pay in Mama Kamau's bar. PW2 identified the appellant as the seller of the phone. PW3 used the phone till 21/01/2014 when she was called by a police officer who later informed her that the phone was stolen. She directed the police officer to her husband.

PW3 Alice Wangui Mwangi, owner of Chemi Chemi Bar recalled the events in November 2012 when Mwangi went to the bar, ordered for alcohol, drunk 8 bottles and when she billed him, he denied having money as he had forgotten it at home. When PW4 insisted on payment, Mwangi offered to leave his phone as security. PW3 did not accept the phone and went out to look for a buyer and Jack (PW2) came by and agreed to buy it for the wife; that Jack called his wife to come see the phone, she liked the phone and PW2 paid for Kshs.1,200/- for the phone and Mwangi paid for the bill; That after a month, police went to her bar with Jack (PW2) and asked if she knew the seller of the phone; she knew where the estranged wife of Mwangi lived and she took police, the said wife who had reunited with the appellant and they were staying at Maina village. The wife even led police where the appellant was staying in a hotel. PW3 identified the phone, black in colour. PW4 identified Mwangi (the appellant) as her regular customer.

PW5 Sgt. Mark Marube of Nyahururu Police Station was on duty on 29/04/2013 with ***PC Kipchumba and Mwaniki***, when at about 2.30am while on patrol PW1 stopped them as he screamed in the middle of the road saying that he had been robbed of his firearm; that PW1 had injuries to the head and was bleeding profusely. He showed them the scene of crime on a path opposite DC's office where they recovered a radio pocket and torch. They tried to trace the robbers to no avail. PW5 is the one who had issued the ceska pistol to PW1 No. 45028, pistol No. B/No. G8296 calibre 9mm and 15 rounds of ammunition. More officers were called to assist in tracing the robbers but no arrest was made. The Pistol was found after it was used in crime in Molo. He identified the entry in the Arms Movement Register, the ceska pistol and its magazine.

PW6 Agnes Irungu a registered clinical officer produced a P3 Form in respect of PW1 and she assigned the degree of injury as harm.

PW7 Cpl David Njuki of CID Nyandarua received a report of PW1 being robbed. He saw PW1 was injured on the face. According to PW7, the complainant support was that he did not see the robbers because it was dark. PW7 sent the phone's serial number to Safaricom and on 20/01/2014 he got a report that a new number was being used in the phone by one ***Jane Njoki*** who lived in Nyahururu (PW3). He traced the said ***Jane Njoki*** in Chemi Chemi area, compared the serial number on the phone with the receipt PW1 was issued with and confirmed the same to be PW1's phone. PW3 led them to her husband ***Jacob Maina (PW2)*** who was investigated and he confirmed that the seller of the phone failed to pay for the beer he had drunk and offered the phone as security. PW7 later arrested the appellant at his place of work at Nuclear Stage where he was led by PW2, PW3 and PW4 and that PW2 confirmed that the appellant was the seller of the phone. PW7 said the pistol was recovered on 25/01/2014 with 8 rounds of ammunition and the holder was killed in Molo area. He produced 5 rounds of ammunition because 3 had been tested by the ballistic expert. He produced all the exhibits including the ballistic expert report dated 30/01/2014.

When called upon to defend himself, the appellant gave unsworn evidence to the effect that he resides in Ukweli Estate and has no knowledge of the charges against him; that on 22/01/2014 he was at work in a butchery when 5 of them were arrested, 3 were released and he was later charged.

It is the appellant's submission that PW1 never identified the robbers; that PW1 never reported to PW5 who was first at the scene nor did he record in his statement that he was able to identify the robbers; that PW7 who also went to the scene the same night said that the complainant had told them it was too dark to see anybody.

As regards the court invoking the doctrine of recent possession, he submitted that the phone was not found with him; that the prosecution failed to produce the Safaricom data of the handset and hence the evidence was hearsay; that the court tended to shift the burden of proof to him when the trial court said that he had not volunteered any information to police about the phone; that the court chose to believe PW2, PW3 and PW4's evidence which was contradicting and no explanation why the defence was not believed.

In opposing the appeal ***Miss Rugut,*** learned Counsel for the State submitted that the appellant was properly identified by PW1 who described him as dark with big eyes and that there were lights at the DEB School.

As regards reliance on the doctrine of recent possession, counsel submitted that PW2, PW3 and PW4 all identified the appellant as the seller of the mobile phone.

As to identity of the phone, PW1 produced receipts which showed that the phone belonged to PW1. Counsel argued that the appellant did not explain where he got the phone and that the appeal lacks merit and be dismissed.

The appellant was charged with the offence of Robbery with Violence contrary to ***Section 296 (2) of the Penal Code.*** The ingredients necessary to be established by the prosecution beyond reasonable doubt were enunciated in the case of ***Oluoch vs Republic (1985) KLR 549,***

where it was held;

> **"Robbery with violence is committed in any of the following instances;**
>
> **a. The offender is armed with any dangerous and offensive weapon or instrument; or**
>
> **b. The offender is in company with one or more person or persons; or**
>
> **c. At or immediately before or immediately after the time of the robbery, the offender wounds, beats, striker or uses other personal violence to any person."**

The use of the word 'OR' in the definition means that any of the above ingredients is sufficient to prove an offence of robbery with violence.

In the instant case, PW1 was alone at the time of attack. He told the court that he was attacked by three people who descended on him, beating him and ultimately seriously injuring his eye. He was later examined by a doctor and found to have suffered harm. PW5, PW6 and PW7 who saw PW1 on the said night said PW1 improved. Only one of the three elements required to prove the offence, all the three elements were present.

<u>Whether the appellant was positively identified:</u>

The law is that a fact can be proved by the evidence of one person unless a particular law requires otherwise (***see Section 143 Evidence Act***). PW1 was alone at the time of the attack. It was at night about 5.20am. At first PW1 never disclosed how he was able to see the robbers because he was accosted from the back. However, he later added that he saw the appellant who went to the front and PW1 kicked him in the process as a result of which the appellant hit him on the eye, PW1 then described him as being dark with big eyes. He did not know him before. When cross – examined by the appellant, it transpired that PW1 had not given the robber's description in his statement. Infact PW7 who went to the scene the same night told the court that PW1 told him that it was too dark for him to see the attackers.

In the case of ***Terekali & Another vs Republic (1952) EA 259*** the East African Court of appeal stated as follows on the importance of the first report;

> **"Evidence of a first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statements may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others."**

PW5, PW6 and PW7 went round Nyahururu Town looking for the robbers. If PW1 had told them that he was able to identify the robbers, the three witnesses would have confirmed so. They did not. In addition to the above, PW5, PW6 and PW7 said that the incident was on a path near the DC's office in sharp contrast to PW1's evidence that it was at the entrance to DEB School where there were electric lights. The trial court considered the issue of identification and made reliance on the case of ***Karanja & Another vs Republic (2004) 2 KLR 140*** which referred to the well known case of ***Cleophas Otieno Wamunga vs Republic Court of Appeal No. 20 of 1989 (Kisumu)*** where the court observed that when the case depends wholly on identification of the accused by one witness in unfavourable conditions, the court has to warn itself of the need for caution before convicting on such evidence. In my view, the court correctly held that the identification of the appellant by PW1 was not without the possibility of error.

<u>Whether the appellant was in recent possession of the complainant's property:</u>

No doubt the complainant lost several items which included a ceska pistol which PW7 had issued to him the previous day. The trial court considered the principles that the court will consider to establish whether there was recent possession as expressed in ***Peter Ng'ang'a Kahiga vs Republic Criminal Appeal No. 272 of 2008.*** The said elements as reproduced in the above case are as follows;

> **"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 positively proved; In other words, there must be positive proof if;**
>
> **I. That the property was found with the suspect;**
>
> **II. That the property is positively the property of the complainant;**
>
> **III. That the property was stolen from the complainant;**
>
> **IV. That the property was recently stolen from the complainant.**

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

No doubt PW1 reported that his phone a Nokia Asha, ceska pistol, wallet and other identification were stolen from him. The robbery was committed on the evening of 30/11/2013. PW1 produced in evidence the receipt issued to him upon purchase of the phone Pexht No. 2. The IMEI number was quoted on the receipt as 358513050310211. It is the same number found on the phone that was found with PW3 through

Safaricom tracking system. I have no doubt that PW1 lost the phone that was recovered from PW3.

Though PW2 and PW3 were not sure of the date when the phone was bought, PW4 said it was sometime end of November. The robbery was on 30th November, 2013 early morning hence the sale could only have taken placed that day or soon thereafter. What is certain is that the phone was traced to PW3 on 21/01/2014 about six weeks after the robbery. What is apparent is that PW2, PW3 and PW4 took part in the sale transaction when the phone changed hands from the appellant to PW2 and PW3, either on the same day of the robbery or soon thereafter. I have no doubt that it is the appellant who sold the phone to PW2 and PW3 soon after the robbery. PW4 is the one who invited PW2 to buy the phone from her regular customer, the appellant. It is PW4 who helped trace the appellant whom she knew whey well.

The appellant's defence was a bare denial. He did not offer any reasonable explanation of how he came into possession of the said phone. The trial court correctly applied the case of ***Hassan vs Republic (2005) 2 KLR 11*** where the court held;

"Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for his possession, a presumption of fact arises that he is either the thief or a receiver."

Having considered the applicable law and the authorities which have dealt with the issue of recent possession, I am satisfied that the trial court arrived at the correct finding that the appellant was in recent possession of PW1's phone. It is irrespective of the fact that it was recovered 1 ½ months later. He sold it soon after the robbery. The conviction is well founded and I affirm it.

The appellant was sentenced to serve death. Although the appellant never complained about the sentence, in light of the decision of ***Francis Warioko Muruatetu & Another vs Republic (2017) eKLR SC*** which declared unconstitutional, the mandatory death sentence, I hereby set aside the death sentence. The appellant was treated as a first offender. He had been in custody for 4 years before sentence. The offence is serious. He attacked a police officer and in the process the ceska pistol was stolen which was used in commission of other crimes. A deterrent sentence must be meted. I hereby sentence the appellant to 25 years imprisonment. The appeal succeeds to that extent.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***30th*** day of ***April,*** 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Angeline Chinga – State Counsel

Eric – Court Assistant

Appellant – Peter Maina