REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 206 OF 2011

PHILIP SIMIYU MUKANGAI.....1ST APPELLANT

JAMES MASINDE WAFULA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in original Webuye PM'S

Court ***case number 356/2010 delivered on 22/10/2011 by Hon. E.C. Cherono, PM)***

J U D G M E N T

The appellants **Philip Simiyu Mukangai** (1st Appellant)and **James Masinde Wafula** (2nd appellant) were jointly charged in the Magistrates Court with offence of Robbery **with violence Contrary to Section 295 as Read with 296(1) of the Penal Code.** *Particulars of offence being: On the 5th March 2010 at Mwitoma area Misikhu location in Bungoma East District within Western Province jointly armed with dangerous or offensive weapons namely Knives robbed Japheth Kisaka Mutoro of a motor cycle Reg. No. KMCC 864T TVS STAR valued at Kshs.80,000/= the property of Fred Wasimela and at or immediately after the time of such robbery used actual violence to the said* ***JAPHETH KISAKA MUTORO.***

The evidence before the trial court briefly was that **PW1, Fred Wasimela** testified that he lives in Misikhu. He testified that Japheth Kisaka was his employee as rider of Motor cycle KMCC. No. 846J TVs Star. He recalled that on 5/3/2010 he received a call from Jonathan Mukoro that his rider had been robbed between Misikhu and Makhese. He was informed that two men who robbed them had been arrested and taken to Makhese AP Camp.

The next day he visited the AP camp and he was informed the suspects were at Webuye Police Station. He visited the police station and found the suspects. He produced a KRA Pin Certificate he was used to purchase the motor cycle as exhibit 4.

Pw2 Japheth Kisaka Mutoro testified that on 5.3.2010 at 7 p.m. he was at Misikhu when a client approached him to take him to Makhese. He was at a Petrol station and he could see him since there was light and he identified him in court as the 1st appellant. He testified that when they were between Misikhu and Makhese he stopped so that the client can alight but someone appeared and removed a knife. He testified the client he was carrying also removed a knife and stabbed him on the waist. He sensed danger and left them with the motor cycle and he took off. He hid in the bush and called his friend Jonathan Mukoro. He testified that he started doing a follow up to recover his motor bike when he was informed by Jonathan that the Motor Cycle had been recovered at Makhese and he went to the scene. He found that the suspects had been taken to Webuye Police Station. The following day he went to the hospital and he recalled that each of the accused had a knife. He produced jacket he was wearing as exhibit, the motor cycle and the knife they used to stab him were also produced in court.

PW 3 Jonathan Mukoro testified that he received a telephone call from complainant a fellow boda boda rider who informed him that he had been robbed of his motor cycle and that the robbers were riding the motor cycle towards Makhese. He mobilized other boda boda and they set up a road block. Shortly after they saw the motor cycle coming at high speed, they stopped the riders who refused to stop but were blocked by the makeshift roadblock and fell down. The two appellants who were on the motor cycle were apprehended and handed over to police.

PW 4 APC Stanley Limo was at the police station when he received the two appellants from members of public on allegations of robbery. He also received the subject motor cycle recovered from the appellants.

In his sworn evidence, 1st appellant Philip **Simiyu Mukangai** told the court he had visited Winrose, a fellow teacher on 5th March, 2010 and left her house at 8.00 p.m. after eating and consuming traditional brew. When he got to the main road he met four people who ordered him to stop and identify himself. He obliged. However, upon being asked to produce his identity card, he demanded to know who they were and one

of them slapped him. He reacted in self-defence and was hit on the head with a rungu. He lost consciousness and when he came to, he was lying on a hospital bed, handcuffed. He did not know the 2nd appellant and only met him in court.

The 2nd appellant James Masinde Wafula in his sworn testimony described himself as a businessman, dealing in Second hand clothes. He closed his business at Lugulu market on 5th march, 2020 and at about 7.00 p.m. he went to wait for motor vehicle to go to his residence at Matete. He failed to get transport and decided to book himself at a guest house. While on his way, he met four people who stopped, asked him to identify himself and where he was going. The people said they were community police and since he did not have his national Identify Card, they would take him to Makhese AP Camp. He as handed over to the Administration Police and placed in cells, where he found seven other people, three having injuries. He was eventually charged in court yet he had no knowledge about the alleged incident.

Upon this evidence, the trial magistrate found both appellant guilty, convicted them and sentenced them to sentence of death.

Aggrieved by the conviction and sentence the appellant appealed on the following identical grounds: -

> ***1) That the learned trial magistrate erred in both law and facts by not considering my sworn alibi defence and submission without proper reason.***
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> ***2) That the learned trial magistrate failed in law and facts when he relied upon the exhibit marked P-MFI-1 (Motorcycle) find, without putting into mind that no dusting was done, furthermore no recovery document was issued to the court as per where specifically the exhibit was found despite the fact that the PW 3 and PW 5 having openly disclosed to the court that the said exhibit was recovered from the members of the public. Regardless of such evidence before him the learned trial magistrate shifted the burden of proof on my shoulders convicting 1 the appellant.***
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> ***3) That my lordship the learned trial magistrate failed to consider that there was no identification parade which was conducted to clear doubts of identity by the complainant, but he only relied on dock identification by PW 2 WHIH WAS far-fetched, remotive and manipulative acts of police coaching to hamper as well as disorient the course of justice.***
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> ***4) That the conviction of death sentence imposed on me is unconstitutional as well as unjust given the circumstances and ingredient of the case foresaid.***

The appellants filed written submissions and highlighted the same. They submit that the charge sheet was defective the offence was alleged to have been committed on 5th March, 2020 while the OB No. is OB No. 06/03/201, the colour of the motor cycle was not indicated and that the registration No. indicated and one stolen are different.

The appellants further submit that the witnesses gave contradictory evidence in respect of the motorcycle and knife recovered. They further submit that they were not given a right to choose and be represented by an advocate that crucial witnessed were not called and that Section 211 was not complied with; that their alibi defence was not considered and that the death sentence imposed is unconstitutional.

M/s Nyakibia for state submitted that the complainant identified the 1st Appellant at the petrol station where there was sufficient security light. That there was use of violence and that both appellant were found in possession of the stolen motor cycle and finally that the sentence of death was commuted to life imprisonment.

The appellants were charged with the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code, Section 296 (2) provides: -

> ***"(2) 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."***

The ingredients of the offence of Robbery with Violence was clearly set out by the Court of Appeal in **Oluoch Vs Republic (1985) KLR** where it said: -

> ***"Robbery with violence is committed in any of the following circumstances: -***
>
> ***The offender is armed with any dangerous or offensive weapon or instrument***
>
> ***OR***
>
> ***a) The offender is in company of one or more persons***
>
> ***OR***

b) At or immediately before or immediately after the time of such robber the offender wounds, beats, strikes or uses other personal violence to any person."

The evidence of the complainant was that met the 1st Appellant at a petrol station who asked him to ferry the 1st appellant from Misikhu to

Makhese in his motor cycle. The complaint agreed. On the way at Mirinda the appellant indicated to him to stop to alight. He stopped and suddenly another person emerged who was armed with a knife. The Appellant also removed a knife and stabbed complainant on the wrist. The complaint left loose the motor cycle which 1st and 2nd appellant rode away towards Misikha. He testified that he sustained injures for which he was treated. The evidence supports that there were more than one person, they were armed with offensive weapons a knife and inflicted injuries on the complainant.

The use of OR in the definition of the ingredients of Robbery means that prove of any of the elements is sufficient to prove robbery with violence.

In this case all three elements of being with another person, armed with a dangerous or offensive weapon and wounding and inflicting actual violence were all present and proved.

The appellants in this appeal submits that they were not positively identified as there was no evidence of source of light and that the complainant did not give description to police and finally that no identification parade was conducted.

It is now settled that issues of identification must be treated with greatest care. In **Matianyi Vs Republic (1986) KLR 198** the Court of Appeal stated: -

> ***"It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its positon relative to the suspect are all important matters helping to test the evidence with the greatest care. It is not careful test if one of these matters are unknown because they were not inquired into. In days gone by there would have been a careful inquiry into these matters by the committing magistrate, state counsel and defence counsel. In the absence of these safeguards, it is now becomes the great burden of Senior Magistrate trying cases of capital Robbery to make inquires themselves."***

PW 2 the complainant testified that we met 1st Appellant at the Petrol Station. He testified that there was light at the petrol Station from the security lights. He engaged in a discussion with 1st Appellant where they negotiated the fare and agreed at Ksh.50. His evidence, therefore, was that from the security lights at the petrol Station and the period he engaged with 1st Appellant over where he was going and the fare, he was able to identify him properly.

In respect of 2nd appellant, the complainant testified that when he stopped he saw another person come from ahead of him. He was able to see him suing the motorcycle light. When he reached where the compliant was, 2nd Appellant stabbed him. He as able to see him. I find that there was sufficient light to identify the 2nd appellant.

The complainant testified that after being robbed, he made a mobile telephone calls to his friends who were at Makhese. He told Jonathan Mukoro a fellow boda boda rider and informed him that he had been robbed of motor cycle and the robbers had were riding it towards Makhese. PW 3 Jonathan Mukoro mobilized other boda boda riders and they went to the stage. He then testified.

> ***"We went to road. After a short while the motorbike came. We stopped heard of the said motorbike which was driven in a high speed. It hit one of the motorbikes we had used to block the road. After it hit that motor Bike it fell down. The motorbike had one driver who had one pillion passenger. There were two people on the said motorbike. We arrested the two. There were screams by members of the public. We took the two suspects to Makhese AP Camp where we handed over the two suspects. I can see one of them (identifies the 1st accused on the dock. I also saw a knife with the Administration Police. I do not know whom among them was having the same (referred P-MFI 6) this is the knife. I can see the motorbike which we recovered on the fateful date (referred P-MFI 1) this is the motor bike. It was being driven by Japheth Kisaka. He is one of my colleagues. He came after I called him. I told him that the people who had robbed him the motor bike had been arrested. Mr. Japheth Kisaka was having blood on his forehead."***

The evidence of the witness is that the appellants were apprehended aboard the complainant's motorcycle which had been robbed of him a free minutes earlier. They were then handed over to police. The prosecution, therefore, was also invoking the doctrine of recent possession. In **Isaac Nganga Kahiga alias Peter Nganga Kahiga Vs Republic – criminal appeal 272 (2005)** the Court of Appeal stated: -

> ***"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.***
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> ***i) That the property was found with the suspect.***
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> ***ii) That the property is positively the property of the complainant.***
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> ***iii) That the property was stolen from the complainant.***
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> ***iv) That the property was recently stolen from the complainant.***

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.

One the prosecution has established all the elements above then the trial court can apply the doctrine of recent possession. What is the doctrine of recent possession? In the Canadian Supreme Court in **Republic Versus Kowkyk (1988) 2 SCR 59 McIntyre J** explored the

history of this doctrine and said:

> ***"Before going further, it will be worthwhile to recognize what is involved in the so called doctrine of recent possession. It is difficult indeed to call it a doctrine for nothing is taught nor can it be properly said to refer to the presumption arising from unexplained possession stolen property since no necessary conclusion arises from it Leskin J (as he then was) (Hall, J concurring) in a concurring judgment in Republic Vs Graham supra said at page 215***
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> ***'The use of the term presumption which has been associated with the doctrine is too broad and the word which properly ought to be substituted is inference in brief where unexplained recent possession and that the goods were stolen are established by the crown in a prosecution for possessing stolen goods. It is proper to instruct the jury or if none it is proper for the trial judge to proceed on the footing that an inference of guilty knowledge upon which, failing other evidence to the contrary, a conviction can rest, may(but not must) be drawn against the accused."***
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> ***He went on to point out that two questions that of recency of possession and that of the contemporaneity of any explanation must be disposed of before the inference may be properly drawn. He made it clear that no adverse inference could be drawn against an accused from the fact of possession alone unless it is recent and that if a pretrial explanation of such possession were given by the accused and if it is possessed that degree of contemporaneity making evidence of it admissible for no adverse inference could be drawn on the basis of recent possession alone if the explanation were one which could reasonably be true.***

Implicit in Laskin J's words that: -

> ***"Recent possession alone will not justify an inference of guilt where a contraprenous explanation has been offered. It is the proposition that in the absence of such explanation recent possession alone is quite sufficient to raise a factual inference of theft."***

The Supreme Court then accepted the following summary of the doctrine: -

> ***"Upon proof of the un-explained possession of the recently stolen property, the trier of fact may, but not must-draw an inference of guilt of theft or offences incidental thereto. Where the circumstances of such that a question could arise as to whether the accused was a thief or merely in possession it will be for the trier of fact, upon a consideration of all the circumstances to decide which if either inference should be drawn all recent possession cases the inference of guilt is permissive and not mandatory and when an explanation is offered which might reasonably be true even though the trier of fact is not satisfied of its truth the doctrine will not apply."***

The doctrine requires that the prosecution must show that accused was found in possession of the stolen property, that the property belong to the complainant, that it had been recently stolen, from the complainant. Once these facts have been established the accused has to give an explanation which must be plausible as to how he came by the goods. If the accused fails to offer an explanation, then an inference that he is the thief can be made.

In this case, the complainant was robbed of his motor cycle that night, the appellants were arrested a short time later riding on the same motorcycle from the direction where the complainant had been robbed. In their defence they deny being found in possession of the motorcycle and explain they were arrested for other reasons. I find just as the trial magistrate that the appellants were found with the stolen motorcycle a short time after the robbery. Their explanation that they were arrested for other reasons is not true and was properly rejected by the trial magistrate.

The appellants in their submissions raised an issue of discrepancy in the Registration Number of the Motor Cycle stolen. They submitted that the registration of the motorcycle in the charge sheet was indicated as KMCC 864T TV Star. They submit that the evidence given by **PW 1 Fred Masimela** the owner was KMCC 864J. **PW 2 Japheth Kisaka Mutoro** the complainant testified that it was KMCC 864J. **PW 5 No. 232636 APC Stanley Limio** who received the appellants from the members of public together with the motor cycle testified that it was registration No. KMCC 864J which he produced as exhibit. The appellants contends that these were two different exhibits. The discrepancy the appellants are alluding to is the prefix "J" by the witnesses instead of "T" as per the charge sheet.

In **Njuki Versus Republic (2002) KLR 77** the court on discrepancies stated: -

> ***"In certain criminal cases particularly those that involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused, however where discrepancies in evidence do not affect an otherwise proved case against the accused the court is allowed to overlook those discrepancies and proceed to convict the accused."***

Upon consideration, I find the discrepancy alluded to by the accused is not material as the motorcycle that was recovered from them was recovered and produced in court as exhibit. The discrepancy was so minor that did not affect credibility of the prosecution evidence nor did not cause any material prejudice to the appellant.

I, therefore, find that the appellant's sentenced for the Offence of Robbery with Violence under Section 296(2) of the Penal Code was properly and appeal on conviction dismissed.

On sentence, I note appellants were convicted to suffer death. I hereby set aside the sentence of death imposed. I hereby sentence the 1st Appellant **Philip Simiyu Mukangai** to life imprisonment and 2nd Appellant **James Masinde Wafula** to life imprisonment. Right of appeal

within 14 days.

Dated, signed and delivered at Bungoma this 18th day of June, 2020.

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S N RIECHI

JUDGE