REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 54 OF 2019

EVANS KAMAU MELAU...…….…….…… APPELLANT

VERSUS

REPUBLIC……...……..…RESPONDENT

(Appeal from original conviction and sentence in the Principal Magistrate's Court at Loitokitok (Hon. Okuche, P.M) dated 24th day of July 2019 in Criminal Case No. 8 of 2019.)

JUDGMENT

1. The appellant was charged with Robbery with Violence contrary to section 296 (2) of the Penal Code. Particulars were that on the 16th September2018 at Kajiado South within Kajiado County, jointly with others not before court, being armed with dangerous weapons, namely; a pistol and a sword, robbed Stephen Muchiri Mugambi of one mobile phone make Samsung Galaxy J5 Prime, valued at Kshs. 17,500 and cash Kshs. 10,000, and, at or immediately before or immediately after the time of such robbery, threatened to use violence to the said Stephen Muchiri Mugambi.

2. The appellant pleaded not guilty to the charge and after a trial in which the prosecution called 6 witnesses, and the appellant's defence, he was convicted and sentenced to thirty years' imprisonment. He was aggrieved with both conviction and sentence and lodged this appeal raising the following grounds, namely:

> ***1. The trial court erred both in law and fact by convicting the appellant when the prosecution had not proved their case against him beyond reasonable doubt.***
>
> ***2. The trial court erred both in law and fact by convicting the appellant on account of suspicion.***
>
> ***3. The trial court erred both in law and fact by conducting a trial wherein the appellant had not been supplied with statements of the prosecution witnesses in advance as provided under Article 50(2) (j) of the Constitution of Kenya.***
>
> ***4. The trial court erred both in law and fact by convicting the appellant in the absence of evidence linking him to the commission of the offence charged.***
>
> ***5. The trial court erred in law and fact by convicting the appellant yet the complainant's testimony and that of his witnesses did not place the appellant at the scene of the alleged crime. No evidence of positive identification of the appellant was tendered.***
>
> ***6. The trial court erred both in law and fact by convicting the appellant on account of fabricated, incredible and false testimony of PW2, a foreigner who testified in respect of a crime that was allegedly committed in a foreign jurisdiction.***

3. During the hearing of the appeal, the appellant relied on his written submissions dated 25th November 2019 and urged the court to allow the appeal, quash the conviction and set aside the sentence.

4. In the written submissions, the appellant argued grounds 1, 2, 4 5 and 6 together. He submitted that the case against him was not proved beyond reasonable doubt and that the prosecution failed to discharge its burden as required. It was the appellant's further submission that the complainant testified that he was robbed by a gang of three who had a gun; that one week after the incident he was called to the police station at Illasit and informed that his phone had been recovered in Tanzania and that the complainant admitted in cross-examination that he did not identify any of the attackers at the time of the robbery.

5. The appellant further submitted that according to PW2, he went to her shop on the Tanzania side (Tarakea market), took a soda and asked her to assist him charge his phone. Later the appellant went back for the phone at 8.30pm, but PW2 declined to open for him because it was late. Three people entered her shop beat her up and demanded money at gun point. She tried to flee but found other robbers at the gate. They

hit her and shot in the air forcing her customers to run away.

6. According to the appellant, the witness stated that he had a phone; one person had a pistol, while the other had a panga and a rungu; she witness went to hospital and when she came back to her shop, she found his (appellant's) phone in her shop which PW1 claimed to be his. PW2 identified the him in a parade.

7. It is the appellant's case that PW3, the complainant's son, had gone to open the gate for PW1 when he was confronted by three men, two armed with a pistol and knife. They took away his father's phone and money but that he did not identify the attackers. PW4, the appellant argued, merely testified on how he apprehended the appellant at Illasit, while PW5 only conducted an identification parade.

8. It was submitted that PW6 stated how he got information that a phone suspected to be that of PW1 had been recovered in Tarakea, Tanzania and taken to the police station. PW1 went to Tarakea police station in Tanzania and identified the phone to be his. PW6 later went for the phone which he produced in court as an exhibit.

9. Based on that evidence the appellant submitted that the evidence of PW1 and PW3 did not place him at the scene. He argued that PW3 admitted that he was not able to identify any of the attackers; that the prosecution did not prove the charge against him; that factors favouring positive identification were absent and that the trial court erred in convicting him.

10. According to the appellant, the trial court put premium weight on the evidence of PW2 in convicting him. He submitted that the evidence of PW2 was suspect and her narrative did not add up and for that reason, she was not a credible witness.

11. The appellant further discredited the evidence of PW6, that no inventory was produced. He argued that suspicion however strong cannot be the basis of conviction. He relied on **Sawe v Republic** CRA No. 2 of 2002.

12. He also argued that the person charged was **Evans Kamau Wambui** arrested on 5th January 2018 while the judgment was against **Evans Kamau Melau** who was arrested on 5th January 2019. This, he argued, was a fundamental defect which rendered the entire trial a mistrial.

13. The appellant took issue with the identification parade conducted by PW5. He argued that no answer was given in the identification parade form and therefore contended that PW2 did not identify him in the parade. He also argued that his fundamental rights under Article 50 (2) (j) of the Constitution were violated. According to the appellant, although an order was made that he be supplied with witness statements, the court record is silent on whether or not this was done. He relied on ***Dr. Christopher Ndarathi Murungaru v the Attorney General & Another,*** Civil Application No. 43 of 2006 and **Crowcher V Crowcher** [1972] 1 WLR 425.

14. The respondent filed written submissions dated 17th July 2020. He submitted that the prosecution proved the case that the assailants were in a group; were armed with dangerous weapons and robbed PW1 of his property by use of force. He relied on ***Oluoch v Republic*** [1988] KLR on what constitutes the offence of robbery with violence.

15. On identification, the respondent submitted that this was a matter of recognition; that PW2 was able to recognize the appellant as the person who handed the stolen phone to her for charging. He submitted that recognition was more assuring than identification. He relied on ***Anjononi & others v Republic*** [1980] KLR.

16. He also submitted that although the trial court did not state that conviction was based on the doctrine of recent possession, the evidence pointed as the basis for that conviction. He relied on ***Peter Nganga Kahiga v Republic*** Criminal Appeal No. 272 of 2005. The respondent argued that PW1 was robbed on 16th September 2018 and the phone was found on the following day 17th September 2018. This satisfied the circumstantial evidence for purposes of conviction. He urged the court to dismiss the appeal.

17. I have considered this appeal, submissions by parties and the authorities relied on. I have also perused the record of the trial court and considered the impugned judgment. This being a first appeal, it is the duty of this court, as the first appellate court, to re-evaluate, re-analyze and reconsider the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that. (See ***Okeno V Republic*** [1973] EA 32)

18. In ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

19. Further in ***victor Owich Mbogo v Republic,*** criminal appeal No. 152 of 2015 [2020] eKLR, the same court stated:

> ***"It is the duty of the first appellate court to reevaluate the evidence afresh and reach its own conclusion bearing in mind that unlike the trial court, the appellate court did not have the benefit of hearing or seeing the witnesses testify***."

20. **PW1 Stephen Muchiri** testified that on 16th September2018, he left church at 8pm and went home. When he reached his gate, he hooted and his son (PW3) opened the gate for him. He entered the compound but immediately heard PW3 raise an alarm. He stopped to check what was happening and was confronted by three people who ordered him to get out of the vehicle, one pointing a pistol at him. They ordered him

to give them all the money he had. One of the attackers got into the vehicle and ransacked it but there was no money in the vehicle. He gave them the Ksh. 10,000/= he had. They also took his phone and left.

21. He reported the matter to the police and after one week, he was called to the police station where he was informed that his phone had been traced in Tanzania. He went to Tarakea police station in Tanzania accompanied with a police officer and identified his phone. He was told to go home while police carried out investigations. In cross-examination, he told the court that he never identified any of the attackers.

22. **PW2 Evetha William Saki,** a Tanzania business lady, testified that on 17th September 2018 at 2pm, the appellant who was known to her since childhood went to her shop and drunk a soda. He requested her to assist him charge his phone and promised to pay for the soda when he came back for the phone.

23. The appellant went back to her shop at 8.30pm and informed her that he had come for his phone and asked her to open the shop and give him his phone. The witness declined to open since it was late. The appellant and two other men got into the shop, assaulted her and demanded money while pointing a pistol at her. She fell down. The attackers went to the counter to look for money. She took advantage and tried to run away but found other people at the gate. They hit her and she fell down. They shot in the air to scare people and as a result her customers run away. The appellant had a phone; another member of the gang had a pistol while a third had a panga and a rungu.

24. The police rushed to the scene responding to the gunshots. She went to hospital and when she came back, she noticed that the appellant had not taken his phone. She took the phone, black Samsung to Tarakea police station on the Tanzania side. She later recorded her statement with the police and identified the appellant at an identification parade. She also identified the phone in court.

25. **PW3 G.G,** a twelve-year-old minor, testified after a voire dire examination, that on 16th September 2018 at 9pm, he went to open the gate for his father, PW1. Immediately he opened the gate, three men, one armed with a pistol and another a knife, entered the compound. One of the attackers held him and led him to where his father had been made to lie down. They threatened to kill his father and took his phone and money and left. The witness said he did not identify any of the robbers. He identified the black phone in court

26. **PW4 No. 14801, PC Andrew Mutuku,** a police officer attached to Illasit Police Station, testified that on 5th January 2019 at 7am, he was called by his superior and informed him that a suspect of robbery with violence was in the area. They boarded a police vehicle and proceeded to Pilipili area next to Illasit. They arrested the appellant and escorted him to the police station after informing him of his offence.

27. **PW5 No. 23383, IP John Aridi,** the Deputy OCS of Loitokitok Police Station, testified that on 11th January 2019 he was called by the OCPD and instructed to go to Illasit CID office and conducted an identification parade. He went to the station and met Sgt. Julius Langat, the investigating officer in the case. He took the identification form; the investigating officer showed him the appellant; checked the appellant's physical features and later looked for persons of similar physical features for purposes of the parade.

28. He got 8 men of similar physical features; kept the witness at a distance about 80m away; constituted the parade and informed the appellant the purpose of the parade. He asked him whether he had an advocate or friend he wanted to be present and whether he agreed to participate in the parade. He also informed him of his right to have an advocate, relative or friend to witness the parade. The appellant responded that he did not need an advocate or friend to be present.

29. The witness then asked the appellant to choose his position. He chose to stand between the second and third members of the parade. PW2 identified the appellant by touching him. The appellant did not have any objections to the process. He was satisfied with the conduct of the parade. He prepared the form which he produced as an exhibit.

30. **PW6 No. 64273 Sgt. Julius Langat** of DCI Kajiado South testified that on 18th September 2018 he was called by the DCIO and asked to investigate a case of robbery with violence. He recorded PW1's statement who told him how the robbery incident occurred. One week later, he received information that a phone had been taken to Tarakea Police Station in Tanzania by another robbery victim that took place on 17th September 2018 on the Tanzania side. He called PW1 to the office and informed him about the phone. Tanzania police officers were also looking for the suspect over the robbery that had been committed in Tanzania.

31. The witness asked PW1 to go and check whether the phone was his which did. PW1 also gave PW6 the box for the phone which had the **IMEI No. 352085099907680.** PW6 went for the phone in Tanzania, checked the IMEI number which corresponded with that on the box. On 5th January 2019, the appellant was arrested and was positively identified at an identification parade conducted on 11th January 2019. He produced the phone and its box as exhibits.

32. After close of the prosecution case, the appellant was put on his defence and elected to give a sworn testimony. He told the court that he worked as a casual labourer and resided at Pilipili village; that on 5th January 2019, he was on the way to fetch sand for a customer when he was arrested by four police officers and taken to Illasit Police Station and later charged with the offence.

33. After considering the above evidence, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced him. The trial court stated at page 20:

> ***"The accused person was arrested on 5/1/2019 and subjected to an identification parade on 11/1/2019. The witness in this parade was PW2. She positively identified the accused by touching him. It should be noteworthy that it's the evidence of PW2 that the accused person had robbed her on 17/9/2018…"***

34. The trial court was satisfied that the prosecution had proved the ingredients of the offence namely; that PW1 was indeed robbed by three men who were armed and that the phone belonged to him and he positively identified it and had its box with the IMEI number.

35. The appellant argued that the prosecution did not prove its case against him beyond reasonable doubt; that both PW1 and PW3 did not identify any of the robbers and that the trial court was wrong to believe the evidence of PW2 that he was one of her attackers. It was further argued that the identification parade was not properly conducted and that PW5 who conducted the parade did not state in the identification parade form that he had been identified.

36. I have on my part considered the evidence re-evaluated and re-analyzed it in this regard. The issues that arise for determination are whether the prosecution proved its case as required by law and whether he was identified in the parade.

37. PW1 was attacked by three armed men. The men used or threatened to use violence against him and PW3. That meets the requirements of section 296(2) of the Penal Code which requires that the offender be armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or 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.

38. The fact that the attackers were armed with dangerous weapon, namely; a pistol, knife and club, (rungu), is not in dispute. They robbed PW1 of money and a Samsung phone. The two witnesses identified the phone in court. In this regard, the fact that PW1 was attacked by three armed men who threatened to use violence against him and PW3 meets the ingredients of the offence under Section 296(2) of the Penal Code.

39. The critical question that remained to be decided was whether the appellant was one of the attackers. Both PW1 and PW3, who saw the three armed men, were clear in their evidence that they did not identify any of them.

40. That left the issue of identification or recognition of the appellant as one of the attackers to PW2. According to PW2, the appellant was known to her and was a neighbour. He went to her shop on the Tanzania side on 17th September 2018 and asked for a soda. He later requested PW2 to assist him charge his phone. He promised to pay for the soda when he came back to collect the phone.

41. It was PW2's evidence that the appellant came back at about 8.30pm and asked her to open the shop and give him his phone. She declined to open for him because it was late. The appellant and other robbers entered the shop; assaulted her. They were armed with a pistol, rungus and a knife. The appellant was one of them. She ran away reported the matter to the police on the Tanzanian side and handed over the phone appellant had left to police.

42. The information about the phone reached police officers on the Kenyan side. PW1 went and identified the phone as his. The IMEI number of the phone and that on the box PW1 had matched. The appellant was later arrested and identified by PW2 at an identification parade. PW2 was clear that the appellant went to her shop and left the phone in her shop to charge. He was known to her and she even knew that he worked a turn boy and was selling sand. The appellant confirmed this when he testified that he was arrested while he went to fetch sand for customers.

43. According to PW2, she had known the appellant since childhood and are neighbours. The appellant did not deny this fact in his defence. She also said that the appellant was the one who left the phone in her shop and that he had taken a soda from her which he was to pay for when he went for the phone. The appellant did not deny this too. PW2's evidence was that of recognition based on long association and not identification. They were neighbours and the appellant was thus well known to PW2.

44. The appellant has faulted the trial court for placing premium on the evidence of PW2 as the basis for his conviction. I must point out that the evidence of PW2 was on the fact that it was the appellant who left the phone in her shop that was later identified to be that of PW1 and nothing more. I am satisfied that PW2 knew the appellant and that the appellant was the one who left the subject phone in her shop given that he appellant did not challenge this evidence or give explanation how the phone came into his possession. He also did not suggest that PW2 had reason to frame him as the person who had PW1's phone. The appellant did not even suggest in his defence that he did not know PW3.

45. The appellant also argued that the identification parade was not properly conducted. I have also perused the identification form produced as PEX2 and more so paragraph E, headed results of the Parade. It clearly shows in column 3 that the appellant was identified by touching. The appellant's contention that the form did not state how he was identified is not correct. The appellant also signed the form that he was satisfied with the way the parade was conducted. I am satisfied that the appellant was properly identified as one of the persons who attacked PW1.

46. In ***Anjononi & others v Republic*** [1980] KLR, the court of Appeal held that recognition is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. in this case, PW2 and the appellant were known to each other. grew up together and were neighbours. This was more assuring than identification by a stranger who was seeing the attacker for the first time.

47. The appellant was found in possession of recently stolen property. He did not give a plausible explanation how the stolen phone came into his possession if he was not one of the attackers. The doctrine of recent possession applied to this case even if the trial court did not state that it was applying this doctrine.

48. In Peter ***Nganga Kahiga v Republic*** (supra), the Court of Appeal stated 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. There must be prove of the property having been found with the suspect; the property is positively identified as that the complainant; the property must have been stolen from the complainant and the property must have been recently stolen from the complainant.

49. There is no doubt that all these parameters were proved in the case of the appellant. The phone was robbed from PW1 on 16th September 2018. It was found on 17th 2018 and was positively identified as that of PW1. The phone was found with the appellant who took it to PW2 for charging. The conditions to be met before one can be convicted on the basis of the doctrine of recent possession were satisfied in respect

to the appellant.

50. The appellant also argued that the person charged was **Evans Kamau Wambui** who was arrested on 5th January 2018 while the person convicted was **Evans Kamau Melau** was arrested on 5th January 2019. I have perused the charge sheet as well as the judgment delivered on 23rd July 2019. The charge sheet has the accused as Evans Kamau Maleu. However, particulars of the offence refer to Evans Kamau Wambui. The respondent did not submit on this aspect at all.

51. I have considered this argument and the evidence. I have also noted that when plea was taken, the appellant was called out and did not say he was not the one. He went through trial and even defended himself. In his defence, he did not contend that he was not the person charged. That being the case, I do not think the Wambui instead of Maleu was so grave as to render the trial a mistrial. It must have been a typing error that did not cause a miscarriage of justice.

52. Regarding sentence, the appellant was sentences to thirty years imprisonment. The offence the appellant was charged with attracts a death penalty which however the trial court did not impose. Sentence is at the discretion of the trial court and an appellate court should not readily interfere with exercise of the trial court's exercise unless the trial court took into account irrelevant matters or failed to take into account relevant factors leading to a miscarriage of justice.

53. In that respect and on my evaluation of the evidence, I find no merit in the appellant's appeal on conviction. The sentence of thirty years is a legal sentence.

54. I must however point out one aspect regarding the sentence. According to the record, the appellant was arrested on 5th January 2019 and was in custody until he was sentenced on 24th July 2019. Section 333(2) of the Criminal Procedure Act, the court whiling imposing sentence, should take into account the period an accused spent in custody or remand awaiting trial.

55. In ***Ahmad Aboifathi Mohammed & another v Republic*** (Criminal Appeal No. 135 of 2016 [2018] eKLR, the Court of Appeal stated thus:

> ***"By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person."***

The trial court did not take this period into account when sentencing the appellant as it should have.

56. Having considered the appeal, submissions and the evidence on record, I find no merit in this appeal. The appeal on conviction and sentence is dismissed. The appellant shall however serve the sentence of thirty (30) years from 5th January 2019.

57. Orders accordingly.

Dated, Signed and Delivered at Kajiado this 18th September 2020.

E. C. MWITA

JUDGE