REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO. 217 OF 2013

CHRISTOPHER MWANGI KIHIU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the original conviction and sentence of Hon. S. Mbungi–SPM dated 16th May, 2012 at the

Senior Principal Magistrate's Court at Kigumo in Criminal Case No. 988 of 2010)

JUDGEMENT

1. This is an appeal against conviction and sentence vide the judgement of the Senior Principal Magistrate at Kigumo dated 16th May 2012 where Christopher Mwangi Kihiu (the appellant) was found guilty and convicted for the offence of **Robbery with violence** contrary to **Section 296(2)** of the **Penal Code** and sentenced to death.

2. The particulars of that charge were that the appellant together with others not before the court while armed with dangerous weapons namely a pistol and metal bars robbed one Simon Njoroge Mwangi of a motor cycle registration number KMCJ 584K Jincheng Chassis No. VMA 6f00399 valued at Ksh. 80,000.

3. Aggrieved by conviction and sentence, the appellant lodged this appeal and premised it on five grounds in his amended memorandum of appeal namely;

> **1. That the learned trial magistrate erred in law and fact when he convicted and sentenced me to death in the instant case yet failed to find that the provisions of Section 150 CPC were not complied with.**
>
> **2. That the learned trial magistrate erred both in law and fact when he conducted an irregular trial breaching Section 77 of the Evidence Act Cap. 80 Laws of Kenya.**
>
> **3. That the pundit trial magistrate erred in law and fact when he relied on fully contradictory statements to base and sustain the conviction and sentence.**
>
> **4. That the learned trial magistrate erred in both law and fact when he applied the doctrine of recent possession yet failed to find that the same was not affirmatively proved.**
>
> **5. That the pundit trial magistrate erred in law and fact when he dismissed my defence on weak reasons.**

4. The appeal was canvassed by way of submissions. The appellant filed elaborate written submissions on the 31.8.2020. Mr. Waweru for the ODPP gave an oral submissions in response at the hearing of the appeal on 7.9.2020.

5. The duty of this court being a first appellate court was laid out succinctly in the case of **Okeno –vs- Republic (1972) EA 32** , where the court stated;

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilala M. Ruwala v. Republic [1957] E.A 570). 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 finding and conclusions. It must make its own findings and draw its own 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 (see Peters –vs- Sunday Post (1958) E.A 424."

6. I am alive to this duty and therefore the appropriate spring board in addressing this appeal is a summary of the evidence before the trial court.

7. It is the evidence of PW 1 and PW 2 testified that they were accosted by a group of five persons who were armed with pangas and a pistol when they dropped a passenger at Gatundu. They used PW 1's motorcycle which PW 1 normally used as a motorcycle taxi. The gang robbed them of the motorcycle. A report was made to the police. The appellant was later found with the motorcycle. At the time of the robbery, PW 2 was injured by the attackers.

8. PW 3 testified that he received a call informing him of a stolen motorcycle and which was being ridden towards Karega Maragua. The registration number was KMCJ 584K. He and others went to the road. They stopped a motorcycle and interrogated the driver (sic). They confirmed it was the stolen motorcycle. The rider was arrested. The rider was the appellant herein.

9. PW 4 largely rehashed the evidence of PW 1 and PW 2. He produced a log book proving ownership by PW 1 and photographs of the motorcycle as exhibits.

10. In his defence, the appellant stated that he was from his place of work when he met two police officers one of whom was pushing a motor bike. They planted the motor bike on him saying he was with those who had stolen the same.

11. I have had due regard to the evidence on record. It is clear that the evidence points at the appellant having been arrested with the motorcycle soon after the theft and therefore his conviction was based on the doctrine of recent possession.

12. The doctrine of recent possession entitles the court to draw an inference of guilt of where the accused is found in possession of recently stolen property in unexplained circumstances.

13. The Court of Appeal in ***Eric Otieno Arum v R [2006]eKLR*** summarized the essential elements of the doctrine of recent possession as follows;

> ***"In our view, before a Court of Law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof; first, that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. 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."***

14. The court proceeded to state;

> ***"Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relief the prosecution from proving its case to the required standard. That explanation need only be a plausible one (see Malingi v R [1988] KLR 225."***

15. In ***Paul Mwita Robi v R CR. Appeal No. 200 of 2008***, the Court of Appeal observed;

> ***"Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of Section 111 of the Evidence Act Cap 80, the accused has to discharge that burden."***

16. In our instant case, the appellant was found in possession of recently stolen property shortly after the robbery was reported to the police. It has been shown that the property was positively the property of the complainant and it was recently stolen. The burden shifted to the appellant to explain how he came to be in possession and legitimize the possession. His attempt at doing this in his unsworn defence was a meek and vain attempt to escape culpability. He suggests two officers planted the motorcycle on him. He gives no explanation whatsoever what motive the police officers would have had to frame him. He does not cite a past known grudge. He does not identify the police officers. His explanation is no plausible and fails to discharge the burden that had shifted to him.

17. There is credible evidence that the circumstances under which the motorcycle was stolen satisfied the ingredients of a robbery under **S 296(2)** of the **Penal Code**. The attackers were more than one. They were armed with pangas and a pistol. They injured PW 2.

18. In the premises, this court is satisfied that the conviction of the appellant was based on credible and cogent evidence and was thus safe.

19. As regards the sentence, I note the trial magistrate shackled himself with the mandatory death sentence under the relevant provision. He did not exercise discretion in sentencing. Following the decision of the Supreme Court in ***Francis Karioko Muruatetu & Another***, I find there exists sufficient ground to interfere with the sentence being well aware of the principles that govern this Court's powers to interfere with the sentence of a trial court.

20. With the result that, I find the appeal on conviction lacking merit and is dismissed. On sentence, I find the appeal successful and I set aside the death sentence imposed and substitute thereof a sentence of **25 years imprisonment to run from the date of conviction by the trial court being 16th May 2012.**

Dated, Signed and **delivered** at **Murang'a** this 11th day of **November, 2020**.

A.K NDUNG'U

JUDGE