REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 38 OF 2017

DUNCAN OUMA AWUOR.......................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 859 of 2016 of the

Chief Magistrate's Court at Malindi – Hon. Y.I. Khatambi, SRM)

JUDGEMENT

1. The Appellant, Duncan Ouma Owuor was charged before the Chief Magistrate's Court at Malindi in Criminal Case No. 859 of 2016 with several counts of robbery with violence contrary to Section 296(2) of the Penal Code. At the conclusion of the trial he was found guilty in respect of five of the counts and sentenced to suffer death. Aggrieved by the conviction and sentence, he has appealed to this court on the amended grounds of appeal filed on 10th July, 2018 as follows:

> **"1. The learned magistrate erred in law and fact by failing to consider that no identification parade was conducted and parade forms produced as exhibit.**
>
> **2. The learned magistrate erred in law and fact by failing to consider that the mandatory nature of the death sentence under Section 296(2) of the Penal Code is unconstitutional, null and void.**
>
> **3. The learned magistrate erred in law and fact by failing to consider ownership of the alleged exhibits was not proved by production of sale receipts (documentary evidence) by all complainants in breach of Section 116 of the Evidence Act.**
>
> **4. The learned magistrate erred in law and fact by failing to consider that both the conviction and sentence is founded on a defective charge whose particulars is at variance with the adduced evidence on record.**
>
> **5. The learned magistrate erred in law and fact by failing to consider that my defence was unrebutted – unchallenged by the prosecution evidence on record."**

2. The appeal was disposed off through written submissions. On his claim that the trial court erred in imposing a death sentence on him, the Appellant submitted at length and cited several authorities as to why the sentence of death is not mandatory. I will come back to this ground of appeal if the conviction against the Appellant is sustained.

3. Turning to the second ground of appeal, the Appellant submitted that the trial magistrate erred in convicting him considering that no identification parade was held. The prosecution's response to this ground of appeal is that there was no need to hold identification parades as none of the complainants stated that they identified the people who robbed them.

4. There is agreement between the Appellant and counsel for the Respondent that none of the complainants stated that they identified the people who robbed them. Counsel is therefore correct that there was no need to hold identification parades. Such parades could not have served any purpose as the witnesses could not have picked anybody from the parades. An identification parade can only be held where a witness says that he saw the robber and can be able to identify him if he meets him again.

5. The third ground of appeal and which I find is the main ground in this appeal is the Applicant's assertion that the trial court erred in

convicting him based on the doctrine of recent possession. On this ground counsel for the Respondent submitted that the trial magistrate correctly applied the doctrine of recent possession in convicting the Appellant.

6. A person found with an item recently stolen who fails to explain how he came into possession of the item is presumed to have stolen the item. This is what is called the doctrine of recent possession. In order for the doctrine to be successfully relied upon by the prosecution, certain conditions must be met. The Court of Appeal explained the ingredients of the doctrine of recent possession in the case of **Isaac Ng'ang'a Kahiga & another v Republic [2006] eKLR; Criminal Appeal No. 272 of 2005 (Nyeri)** 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, 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."***

7. Once the prosecution has proved all the ingredients, it becomes the duty of the accused person to explain how he came into possession of the property in question. If the explanation given by the accused person is reasonable, he should be acquitted.

8. In **Peter Kariuki Kibue v Republic [2001] eKLR**, the Court of Appeal stated that:

> **"Since he did not offer any explanation the rebuttable presumption in law raised, based on the provisions of section 119 of the Evidence Act, is that he was one of the people who robbed Damaris of the items together with her car and also robbed Irungu of his car. It is a presumption of fact which courts often refer to as the doctrine of possession of recently stolen property. As we stated earlier it is a doctrine which raises a rebuttable presumption of fact which may be displaced by an accused person giving a reasonable explanation as to how he came to be in possession of the same."**

9. What I have stated above is a snapshot of the law that will guide this court in determining this appeal.

10. This being a first appeal, this court, as was stated in **Isaac Ng'ang'a Kahiga** (supra) **"has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance of the same."**

11. The prosecution commenced its case before the trial court by calling PW1 Police Constable John Mayani. His testimony was that on 14th November, 2011 at around 9.00 p.m. he was in Kwachocha area in Malindi with a group of police officers led by the OCS, Malindi where they were dealing with a case of creating disturbance. It was then that they received a call from the police station informing them of a theft at Pine Court. They proceeded there and learned that eight robbers had entered the hotel and stolen television sets and mobile phones among other items. They were also shown a gadget which showed where the suspects were. They started tracking the robbers using the gadget. They followed the seashore up to Baobab area where they found the Appellant hiding. They recovered from him eleven mobile phones, a server, a pair of shoes, toothpaste, nail polish and a black cash box. The items were in a bag. The Appellant told them that he lost his way. He was arrested. Cross-examined, PW1 stated that they were guided by Safaricom personnel. He stated that he did not know Mohamed and that no panga was recovered.

12. PW2 Benson Thuita was having dinner at Pine Court Beach Restaurant on the material day when he heard a command telling people to sit down. On looking to see what was happening he was hit on the head. He was robbed of a wallet which had Kshs.8,000 and ATM cards. He was also robbed of his shoes, a wrist watch and a Nokia 650 phone. All his items were recovered. The thieves had pangas and sticks. He identified his mobile phone in court. It is noted that PW2 was the complainant in count 6 and the items he mentioned in his testimony are the items listed in the charge sheet.

13. PW3 Victor Baraka who is the complainant in count 5 told the court that he was at Pine Court when a group of men armed with pangas went and robbed them. He was robbed of a mobile phone and cash Kshs. 5,000. He later identified his phone at the police station. Like PW2, he told the court that he was not able to identify any of the thieves.

14. The complainant in count 4 Adam Jackson Ndoro testified as PW4. He told the court that on the material day he was at Pine Court with three other people when three men approached them and demanded money. One of the men who was armed with a panga hit him with the blunt side of the panga. They took his chain, shoes, Samsung phone, money, wallet and rings. When cross-examined PW4 stated that he identified one robber who was not the Appellant. He stated that his phone was recovered from a suspect and he identified it at the police station.

15. PW5 Mohamed Abdulahi the complainant in count 2 was at the hotel with his friend when men armed with pangas approached their table and demanded their property. They took his Iphone 6 mobile phone, casio watch, bag, shoes, sunglasses, hat and licence. His phone, shoes and bag were later recovered and he identified them in court. His testimony was that he did not identify any of the 7 or 8 robbers.

16. Christopher Malingi Thaura the complainant in count 3 testified as PW6. He stated that he was a driver at Pine Court Hotel. His testimony was that the robbers took a music mixer, a cash box and a Nokia phone for Mpesa transactions belonging to the hotel. They also took his Techno Y35 mobile phone. He stated that one of the robbers forced him to lie down but he later took off. The witness identified the stolen items in court and stated that he was in shock and could not identify any of the robbers.

17. PW8 Police Constable James Munyes Lokedong was the investigating officer. He was on patrol with his colleagues from the DCI on the material night when they received the report about the robbery. They proceeded to the scene and they were told that over five robbers

armed with pangas and a firearm had carried out a robbery at the hotel and stole phones and money among other items from the customers. Using a tracking device in one of the phones that had been stolen they tracked the Appellant to Baobab area where upon his arrest they recovered 13 mobile phones, a black cash box, a music mixer, a tube of toothpaste, a pair of shoes, nail polish and a bag from him. He produced the recovered items as exhibits in court. He stated that no weapon was recovered from the Appellant.

18. In his defence, the Appellant told the court that he assists fishermen in transporting their catch. On the material day he worked from 1.00 p.m. until 5.00 p.m. He later went back to work at the beach at about 11.00 p.m. After a short while he saw people with torches who appeared to be looking for something. One of them went to where he was sitted, scrolling his mobile phone, and started assaulting him. The man called the others and he was arrested and taken to the police station. He was locked up in the cells. The next night he was pulled out of the cells to the reception by three police officers and the investigating officer told him to sign on a paper. On asking what the paper was all about he was assaulted and he sustained injuries on the head. He then signed the paper. On 29th November, 2017 he was charged in court. The Appellant stressed that none of the prosecution witnesses identified him as one of the robbers.

19. Looking at the evidence that was placed before the trial court, it is clear that the prosecution established beyond reasonable doubt that patrons of Pine Court Hotel were attacked by men armed with pangas. The men who assaulted some of the patrons stole their personal belongings and items belonging to the hotel. The witnesses did not identify the robbers.

20. The evidence that connected the Appellant to the robbery was that of PW1 and PW8. These two witnesses told the court that they used a tracking device fitted in one of the stolen mobile phones to track the robbers. The tracking device led them to Baobab area where they found the Appellant hiding. He had some of the stolen items.

21. The trial magistrate considered the evidence that was adduced and found PW1 and PW8 to be truthful witnesses. She also found their evidence to be consistent. I have on my part looked at the evidence of PW1 and PW8 and I reach the same conclusion with the trial magistrate. PW1 told the court that the tracking device led them to where the Appellant was. The Appellant was about 4 kilometres from the scene of robbery. Indeed PW1 stated that they found the Appellant hiding. He was sitting near the stolen items. PW8 also told the court that they found the Appellant with the stolen items.

22. It is also noted that the Appellant signed an inventory of the stolen items. Although he claimed that the inventory was signed under duress, PW8 testified during cross-examination that they did not use any force on the Appellant. I have also perused the proceedings and note that the Appellant did not complain of any assault when he first appeared in court for plea on 28th November, 2016. The Appellant's claim that he sustained serious injuries cannot be believed.

23. There is sufficient evidence on record to show that all the items that were recovered from the Appellant had been stolen from the complainants who testified as witnesses in court. Hardly four hours had passed from the time of robbery before the Appellant was arrested with the stolen items. He never offered any explanation as to how he came into possession of the stolen items. Each complainant identified his items. Mobile phones were identified by their IMEI numbers and sim cards. It was therefore not necessary for the complainants to produce receipts to show that the items belonged to them. The trial magistrate was therefore correct in invoking the doctrine of recent possession of stolen items to convict the Appellant. She was also correct in convicting him for only those counts in which the complainants had testified.

24. There was the claim by the Appellant that the trial magistrate did not consider his defence. This is not correct. At page 9 of the judgement the Appellant's defence was considered. The magistrate stated that:

> **"The accused had a duty to explain how he came in possession of the stolen items. No reason was advanced instead the accused stated that an identification parade was not conducted. In a case such as this where none of the complainants saw the assailants' faces, it would be futile to conduct a parade. That notwithstanding, I am of the considered view that since the accused was found in possession of the stolen items, the recovery negates the need to conduct a parade."**

25. Earlier in the judgement the trial magistrate had found the evidence of PW1 and PW8 believable thereby dislodging the Appellant's implied testimony that he was not found with the stolen items

26. Looking at the evidence that was adduced in its entirety, I agree with the trial court that the Appellant was one of the robbers. His conviction is therefore safe.

27. Turning to the question of sentence, I note that the sentence of death imposed by the trial court was the only sentence available for robbery with violence at the time the Appellant was sentenced in November, 2017. The trial magistrate cannot therefore be faulted for imposing that sentence. However, the decision made by the Supreme Court in December, 2017 in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** now makes it necessary for this court to consider the mitigation of the Appellant and pass an appropriate sentence.

28. In his mitigation before the trial court the Appellant had told the court that his mother passed away in 1995 and his father had passed away in 2003. His grandmother who was 80 years old was unwell. He had a wife with two children. In considering the mitigation of the Appellant the court must also look at the seriousness of the offence. Although most of the stolen items were recovered, the Appellant was involved in several robberies at the same time. They wanted to gain enormously from their expedition. Some of the complainants received injuries, although minor. Robbery is not an offence to be taken lightly. Anybody who commits robbery should receive an appropriate sentence. The circumstances of the commission of the offences do not warrant the imposition of the death sentence. Taking into account the period in which the Appellant was in custody before conviction, I sentence him to fifteen years imprisonment on each of the counts for which he was convicted. The sentences will run concurrently with effect from 3rd November, 2017 being the date he was sentenced by the trial court.

Dated, signed and delivered at Malindi this 31st day of January, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT