REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

HIGH COURT CRIMINAL APPEAL CASE NUMBER 23 OF 2016

DAVID NDOLO ....1ST APPELLANT

PAUL KANAI.............2ND APPELLANT

-VERSUS-

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

(Being an Appeal against both the conviction and sentence in Criminal Case No. 695 of 2013 of the Senior Resident Magistrate's Court at Kajiado, delivered by M. O Okuche, on the 27th October 2016)

JUDGEMENT

Introduction

DAVID NDOLO AND PAUL KANAI hereinafter referred to as the Appellants were charged alongside two others with two counts of Robbery with violence contrary to Section 296(2) of the Penal Code Cap 63 and 2 alternative counts of Handling stolen goods contrary to Section 322(2) of the Penal Code Cap 63 in the Chief Magistrates Criminal Case No. 695 of 2013. The contents of the charges are as particularised below.

On Count 1, the particulars were that 1.David Ndolo 2. Paul Kanai 3. Matayo Lemomo 4. Emmanuel Moko on the 19th day of September 2013 at Chyulu Maasai reserve residence in Loitoktok District within Kajiado County jointly robbed Mr. Tom Hill of: Binoculars make Swaroviski S/no 6439ZA, Binocular make Minox S/no. 51000799, Camera make Nikon S/no D7000, Radio make Sony S/no. 258107, Nikon battery charger S/no 1010029941G, Download cable S/no. 091350117, White phone charger S/no.03150 and White Wifi Tp link S/no 11463400388 all valued at Ksh.440,000/= and immediately before the time of such robbery threatened to kill the said Tom Hill.

The particulars of the alternative charge of handling stolen goods contrary to section 322 (2) of the penal code were that on the 20th day of September 2013 at Chyulu Maasai reserve residence in Loitokitok District within Kajiado County jointly otherwise than in the cause of stealing dishonestly received or retained Binoculars make Swaroviski S/no 6439ZA, Binocular make Minox S/no. 51000799, Camera make Nikon S/no D7000, Radio make Sony S/no. 258107, Nikon battery charger S/no 1010029941G, Download cable S/no. 091350117, White phone charger S/no.03150 and White Wifi Tp link S/no 11463400388 knowing or having reasons to believe them to be stolen goods.

On the second count of robbery with violence, the particulars were that on the 19th day of September 2013 at Chyulu Maasai reserve residence in Loitokitok District within Kajiado County the accused persons jointly robbed Mr. Paul Kiteso of cash Kshs. 3000/=, one laptop make Lenovo black in colour S/no CBP4109260 and one mobile phone make Iphone all valued at Kshs. 110,000/= and immediately before the time of such robbery struck the said Paul Kiteso on the forehead with a metallic piece of pipe.

The particulars of the alternative charge of handling stolen goods contrary to section 322 (2) of the penal code were that on the 20th day of September 2013 at Chyulu Maasai reserve residence in Loitokitok District within Kajiado county the accused persons jointly otherwise than in the cause of stealing dishonestly received or retained one laptop make Lenovo black in colour S/no. CBP4109260 valued at Kshs. 85,000/= knowing or having reasons to believe it to be stolen goods.

Grounds of Appeal

Feeling hard done by both the Conviction and Sentence of the Learned Trial Magistrate, the Appellants sought to appeal. By a Further Amended Grounds for Appeal dated 27th September 2018, the Appellants formulated 11 grounds for appeal to wit:

a. THAT, the Learned Trial Magistrate erred in both law and fact in proceeding to convict in reliance of evidence purportedly of the doctrine of recent possession without considering that the same did not meet the mandatory requisite legal threshold/laid down

principles.

b. THAT, the Learned Trial Magistrate erred in both Law and Fact by being impressed by the Mode of Arrest and the alleged discovery of a black laptop make Lenovo and laptop charger without considering that, the search was conducted un-procedurally and that, the Appellants were not in found in actual possession of the said 2 items nor all the items enumerated in the charge sheets.

c. THAT, the Learned Trial Magistrate erred in both Law & Fact in proceeding to convict the Appellants yet neither of the complainants (PWI & PW2) actually established/proved ownership of either of the 2 items allegedly recovered in Motor Vehicle KBN 130 T or indeed any of the items enumerated in the Charge Sheets and/or tendered as exhibits by PW12 and further that PW2 never, as the complainant, identified any of the items enumerated in the charge sheet as stolen from him, those allegedly recovered in Motor Vehicle KBN 130 T nor those produced as exhibits by PW12.

d. THAT, the Learned Trial Magistrate erred in law and fact in proceeding to convict the appellants without considering that, the Appellants were extremely prejudiced after they were taken to the scene of the alleged robbery to the complainants, instead of being taken to the Police Station and later an Identification Parade procedurally conducted to ascertain whether the Appellants were among the robbers who allegedly attacked the Complainants.

e. THAT, the Learned Trial Magistrate erred in Law and Fact by failing to find that, the circumstances prevailing at the scene of robbery were not favourable for any positive identification.

f. THAT, the Learned Trial Magistrate erred in Fact & in Law in convicting the appellants on the basis of non-existent P3 Form that was only mentioned/quoted but never actually tendered in evidence let alone availed to them before trial and which in any event was allegedly purported to be produced by the Investigating Officer rather than a qualified medical officer from the where it was filled therefore totally depriving it of any probative value. The said untendered P3 form would also have in any event not been sufficient since it did not constitute actual primary evidence of the alleged injury.

g. THAT, the Learned Trial Magistrate erred in Law and Fact by failing to find that some of the essential/Critical Witnesses did not testify during the Trial and thereby relied on inadmissible hearsay testimony by the witnesses who actually testified to the prejudice of the Appellants.

h. THAT, the Learned Trial Magistrate erred in Law and Fact by proceeding to convict and sentence the appellants on the basis of clearly unreliable witness testimony latent(sic) with glaring contradictions as well as in stark contrast with the said witnesses' statements despite the shocking anomalies being highlighted in cross-examination.

i. THAT, the Learned Trial Magistrate erred in Law and Fact by failing to find that the prosecution clearly had not proved its case beyond any reasonable doubt as required by Law.

j. THAT, the Learned Trial Magistrate erred in Law and Fact by rejecting the Appellants Defence without giving any cogent reasons and yet it was more than plausible to displace the Prosecution Case.

k. THAT, the Learned Trial Magistrate erred in Law and in Fact in meting out a harsh and punitive death sentence that is unconstitutional without actually considering the compelling mitigation given by the appellants.

Analysis and Determination

Given that this is a first appeal, it is incumbent upon this court to re-evaluate the evidence presented at trial and draw its own independent conclusions. The court however remains cognizant of the fact that it does not have the benefit of hearing and seeing the witnesses as the trial court did. See **Okeno v Republic [1972] EA 32; Peters v Sunday Post [1958] EA** and **Pandya vs Republic [1957] ES 336** where the court held:

> **"It is an established principle of the law that a first appellate court has powers to consider the questions of law and facts. It also has the duty to subject the evidence on record as a whole to a fresh and exhaustive scrutiny and to make its own findings of facts, giving allowance to the fact that it had no opportunity to see and observe the witnesses as they testify."**

Similarly, in **Henry Karanja Muiri v Republic Criminal Appeal No. 384 Of 2010 [2013] eKLR** the court stated:

> **"This Court has expressed itself time without number on the duty it bears when dealing with a first appeal and the concomitant right and expectation of an appellant. In ANN WAMBUI MUTHONI Vs. R Criminal Appeal No. 91 of 2011, (unreported) for instance, we expressed ourselves as follows: "This being a first appeal, it is our bounden duty and the appellant is entitled to expect from us a fresh, thorough and exhaustive assessment, appraisal and analysis of all the evidence that was before the trial court so as to reach our own independent conclusion on the guilt or otherwise of the appellant. This is in actualization of the appellant's right under Article 50(2) (q) of the Constitution and is in consonance with Rule 29 (1) of the Court of Appeal Rules which donates to us power to reappraise the evidence and to draw our own inferences of fact."**

In establishing its case, the prosecution in the Trial Court relied on the evidence of twelve witnesses which I shall undertake to condense forthwith.

PW1 TOM HILL. It was the evidence of PW1 that on the night of 19th September 2013, he was woken up by the sound of his dog barking.

He heard voices and saw some men at his door. One of the men called him by his first name to open the door. The men tried to forcefully gain entry into his bedroom and he screamed. After a while the men went away but came back with PW2 who identified himself and asked him to open the door. He could see the PW2 was naked and there was a knife held to his neck by one of the men. PW1 stated that he could see the men because there were gaps between the walls of his wooded room and because there was bright moonlight and the men had flashlights. He refused to open the door and after a while the men went away but when they came back the hit the door with full force and it broke down. PW1 averred that he kept on shouting for help and soon everything went silent. Shortly, he heard people asking him whether he was fine and at this juncture he opened door. He saw PW2 naked, a rope was tied around his neck and his hands tied below his back. He was bleeding from the head and it was swollen. He went on to state that when he went back to the main house with PW2, he found his items had been stolen. These items are the ones particularized in the charge sheet in count 1 and 2.

PW1 further averred that he could identify the accused persons because the moonlight was light and the persons had spotlights. On cross examination, PW1 reiterated he was able to identify both accused 1 and accused 2 by moonlight and the spotlight and that he recognised accused 1as he had seen him before.

PW2 Mr Paul Kiseto was the second complainant. He testified that on the night of 19th September 2013 he was sitting in PW1's kitchen using his laptop and wifi when four people entered. Two of them had knives and two had spotlights. He further averred that the 2nd accused tied a rope around his neck and pointed a knife at his back. He threatened to kill him if he made any noise. PW2 averred that he was able to identify the accused persons by the light of the spotlight. Subsequently the accused persons took him to the guesthouse where he was asked to undress and lay on the bed. He was tied to the bed and threatened with death should he raise the alarm. After about 10 minutes he heard a dog barking and PW1 shout "who are you get out of here". The gang came back to him and threatened to kill him if he did not obey the instructions. They told him to go and ask PW1 to open the door. When PW1 refused he was taken back to the guestroom and tied to the bed again. He was hit on the head with a metal rod and a table which broke up. The accused persons left. Later, he heard the voices of several people talking outside whereupon he untied himself and went on to inform two security officers of the incident.

PW2 averred that his laptop iPhone and iPhone charger that were in the kitchen were stolen. He went on to testify that when accused one and two were arrested, they were found with a laptop, a computer charger and an iPhone charger. It was further averred that when accused 1 and 2 were brought to the scene, they lead them to recover a camera, binoculars and a Sony radio.

PW3 Antony Njenga was a taxi driver of motor vehicle KBN 130 T. His testimony was that on 20th September 2013 at around 8.00am driving on his way to Loitoktok from Emali, he picked up two passengers, accused 1 and 2. He further testified that a computer cable and knife fell from one of the passengers when they were stopped by the Police. He went on to state that a laptop was found under the seat of his car. **PW4 Joseph Ntoipo** was the chief of Endakara location. He testified to having caused the arrest of accused 1 and 2 by informing the Aps to intercept the vehicle KBN 130T. **PW5 Senjuke ole Tomboya** on his part testified to having taken part in the arrest of accused 3 and identified accused 1 and 2 as having been the people arrested by **PW4. PW6 Jonathan Sankau** , **PW7 Lekemamuyu Supeet, PW8 Joseph Koteke Mikuku** and **PW9 Naiyo Ole Geta** corroborated the evidence of **PW1** and **PW2** as regards the occurrence of the incident and the arrest of the accused persons.

PW10 Benson Kamande APC No. 2008108624 testified to having received a call on 20th September 2013 informing him that there was a vehicle leaving Loitoktok with suspected stolen goods. He testified to detaining the said vehicle and that accused 1 and accused 2 were in the vehicle and further that upon searching the vehicle a black Lenovo laptop and a laptop charger was recovered.

PW11 Simon Musau APC No. 200923961 testified that on 20th September 2013, he received information about persons who had committed a robbery in Chyulu and were trying to escape. He was further informed that they had boarded a probox vehicle headed for loitoktok. The probox was detained at Iseneti and when he reached there he saw a laptop and charging cable that had been recovered by PW10.

PW12 Corporal Caleb Kemboi No. 72715 was the investigating officer in the incident. He testified that on 20th September 2013, he was tasked with investigating the matter and he proceeded to meet up with the complainant who took him to his house. The house had visible signs of been broken into. He testified that the accused persons had been arrested on their way to loitoktok and that the rangers recovered some of the stolen items after interrogating the accused persons. He went on to produce the recovered items particularised in the charge sheet.

When the Prosecution had rested, the court found that the appellants had a case to answer and put them on their defence. The evidence of both the Appellants is that on the 19th of September 2013, they had gone to Machakos to look for market for cowpeas. They did not find one and spent the night there. The next day, they went up to Emali and boarded a probox which was detained at Iseneti. After the vehicle was searched, the Aps claimed that there were stolen items found and pinned their theft on the appellants. The appellants were thereafter arrested and charged in court.

At the close of the trial, the learned magistrate was persuaded that the prosecution had established that a robbery had been committed and the Appellants had been found in possession of the items belonging to the complainants specifically a phone charger belonging to PW1 and a laptop identified as belonging to PW2 merely hours after the incident had occurred. The appellants were found guilty as charged and sentenced to death pursuant to Section 215 of the Criminal Procedure Code.

The appellants impugned the decision of the trial court and in their memorandum of appeal and written submissions criticised the conviction and sentence on the grounds enumerated elsewhere in this judgment. Broadly, the Appellants took issue with the application of the doctrine of recent possession, they contended that the circumstances prevailing were not favourable for positive identification. They also complained the evidence was inconsistent and lacked the credibility to support the conviction.

On its part, the Respondent supported the conviction and sentence and urged that the prosecution proved all the elements of the offence of robbery with violence.

Having assiduously re-evaluated the evidence on the record and appreciating the respective submissions of both the Appellants and the State, I find that the issues for determination are whether the prosecution proved its case beyond reasonable doubt to warrant this court to confirm the lower court judgement on conviction and sentence of the Appellant; whether the Appellant were positively identified at the scene of the crime and finally whether the doctrine of recent possession was properly applied in convicting the Appellants. I intend to

The Court of Appeal Case in ***Ganzi & 2 Others v Republic [2005] 1KLR*** set out what constitutes the offence of robbery to be: *The offender is armed with any offensive weapon or instrument; the offender was in company with one or more other persons; or at or immediately before and or immediately after the robbery the offender wounds, beats, strikes or use other personal violence to any other person.* In the same court in the case of ***Ajode v Republic [2004] 2 KLR 81*** the court observed:

> **"It is clear that injury of the victim itself is not the only ingredient of the offence of robbery under Section 296 (2) and to reduce the charge to that of simple robbery under section 296 (1) because none of the witnesses was injured is not correct in law."**

Did the prosecution prove any one of the ingredients which constitutes the offence of robbery with violence? To answer this, I will first delve into whether the Appellants were positively identified at the scene before examining whether the trial court properly applied the doctrine of recent possession.

As to whether the appellants were identified as the assailants who attacked PW2 and threatened PW1, the incident took place at about at about 10pm in the night in circumstances that unless scrutinised might be found difficult for positive identification. **In Wamunga v Republic [1989] KLR 424** the Court of Appeal warned that:

> **"[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction."**

The trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see **Maitanyi v Republic [1986] KLR 198** and **R v Turnbull [1967] 3 ALL ER 549**). The Court of Appeal was resounding in **Kiarie v Republic [1984] KLR 739**, that reliance on such evidence of identification must be "absolutely watertight" to justify conviction.

Further, it is trite that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see **Anjononi & Others v Republic [1980] KLR 59**). But in **Wanjohi & 2 Others v Republic [1989] KLR 415**, the Court of Appeal held that, *"recognition is stronger than identification but an honest recognition may yet be mistaken."*

The facts as they relate to the identification and recognition of the appellants are that PW1 testified to having identified the appellants by the light of the moonlight and the spotlights that they carried. PW1 further testified to having recognised the first appellant as he had seen him before. Similarly, PW2 testified to having been able to identify the assailants by their spotlights and the bright moonlight. Had these only been the facts to be relied on, I would not have found it safe to convict as while there might have been moonlight, I cannot be sure of its intensity on the material night. In addition, if the assailants were pointing their spotlights at the complainants, the light would have been in their eyes hence it would be difficult to see. However, this evidence was corroborated by the evidence of the appellants' possession of the stolen items as I shall elaborate presently.

At this juncture, I am enjoined to explain why it is my finding that the trial magistrate properly applied the doctrine of recent possession. **Section 4 of the Penal Code** defines possession as follows:

> "(a) be in possession or have in possession includes not only having in your own personal possession, but also knowingly having anything the actual possession or custody of any other person, or having anything in place whether belonging to or occupied by oneself or not for the use or benefit of oneself or any other person."

In **Kelvin Nyongesa & 2 others v Republic Criminal Appeals No. 76, 68 & 69 of 2016 [2017] eKLR** it was stated that:

> **"19. The meaning of possession was elucidated in Kinyatti v R [1984] eKLR where the Court of Appeal held that in defining "being in possession", full control of the object or article in possession of the accused is not necessary nor is it a requirement of that definition. It further held that in order to prove possession, it is enough to prove either that the accused was in actual possession of the item or that he knew that the item was in the actual possession or custody of another person or that he had the item in any place (regardless of whether the place belongs or is occupied by him or not) for his use or benefit or another person. The Court further explained that knowledge that the item is in actual possession or in one's custody or of another person may be inferred from the circumstances or proved facts of the particular case."**

The law on recent possession was succinctly set out by the Court of Appeal in **Erick Otieno Arum v Republic Criminal Appeal 85 Of 2005 [2006] eKLR** where it authoritatively held:

> **"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; that 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."**

In **Malingi vs Republic, 1989 KLR 275 at page 227** Bosire, J, as he then was rendered himself thus:

> **"By application of the doctrine (to wit doctrine of recent possession) the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there're are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver. (emphasis is ours)."**

Let me now apply the foregoing precedents to the facts of the instant case. The evidence of the prosecution witnesses proved that the property was found with the appellants. In addition, it was established that the appellants had led the police to the scene where the stolen items were recovered. The stolen laptop and charger were positively identified as the property of the complainants. The evidence showed that the property was stolen from the complainants. Finally, it was shown that the properties were recently stolen from the complainants. The incident occurred on the night of 19th September 2013 and the appellants apprehended on the morning of 20th September 2013 in possession of the stolen items.

When tasked to explain their whereabouts at the time of the incident and afterwards, the appellants had both claimed in their evidence that on the 19th of September 2013, they had gone to Machakos to look for market for cowpeas. They did not find one and spent the night there. The next day, they went up to Emali and boarded a probox which was stopped at Iseneti. After the vehicle was searched, the Aps claimed that there were stolen items found and pinned their theft on the appellants. The appellants were thereafter arrested and charged in court.

In **Kelvin Nyongesa & 2 others v Republic [supra]** the court held that:

> "13. 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 relieve the prosecution from proving its case to the required standard. That explanation need only be a plausible (see ***Malingi v Republic [1988] KLR 225.*** *In* ***Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008,*** *the Court of Appeal observed that;*
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> **"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 Chapter 80, the accused has to discharge that burden."**

My measured view is that the prosecution presented sufficient evidence to prove the case beyond reasonable doubt. The evidence of the appellants being in possession of recently stolen property of the complainants squarely placed them at the scene of the robbery. The explanation given by the Appellants as to their possession of the stolen items was a complete denial of possessing the property, yet it had been showed that the appellants had led the police to the recovery of some of the stolen items. The explanation is therefore not plausible.

The prosecution proved the existence of all of the circumstances stipulated under Section 296(2) of the Penal Code. The law is very clear that proof of any one of the ingredients in the three circumstances constitutes the offence. In the instant case, the prosecution had not only placed the appellants at the scene but had also proven beyond reasonable doubt the existence of all the three scenarios contemplated by the offence of robbery with violence. The trial magistrate, in my view, applied the law correctly. In the premises therefore, the conviction of the trial court is affirmed.

Apropos the sentence, this court takes cognizance of the Supreme Court decision in ***Francis Karioko Muruatetu & another versus R. & others, Petition No.15 of 2015*** that rendered the mandatory death sentence unconstitutional. Further, in ***Willam Okungu Kittiny, Kisumu Criminal Appeal No. 56 of 2013*** the Court of Appeal applied the reasoning in the Muruatetu case to a case of robbery with violence. I can do no better than echo the position in **David Ochieng Akoko v Republic Criminal Appeal 185 of 2014 [2018] eKLR** where E. M. Githinji, Hannah Okwengu and J. Mohamed, JJA proffered as follows:

> **"We are alive to the fact that the Supreme Court decision in Francis Karioko Muruatetu & another versus R. & others, Petition No.15 of 2015, has ruled that the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is unconstitutional. As we stated in Willam Okungu Kittiny, Kisumu Criminal Appeal No. 56 of 2013, the reasoning of the Supreme Court in Muruatetu decision can be extended to cover the mandatory sentence provided under Section 296(2) of the Penal Code. We believe that had the trial magistrate had the benefit of this judgment, she would have exercised her discretion in sentencing, rather than being tied down to imposing the mandatory death penalty."**

It is against this backdrop that I shall now review the sentence. To do so, I will first consider the Appellants' mitigation at the trial court. Both parties in their mitigation were remorseful and sought forgiveness, the first accused went further to indicate he was the sole breadwinner. Regarding the extent of injuries sustained by the victims, only PW2 sustained any injury to the head but recovered. No death was caused. In addition, the stolen items were recovered. The Appellants have been incarcerated since the judgement delivered on 27th October 2016, a period of just over two years.

Bearing in mind all the foregoing, I find no reason to interfere with the conviction of the appellants. I am satisfied that the death sentence be substituted with the period of imprisonment already served. As a result, the appellants are hereby set free unless otherwise lawfully held.

Dated and Delivered at Kajiado this 6th Day of 26th February 2019.

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R. NYAKUNDI

JUDGE

Representation

Mr. Kamau for the Appellants

Mr. Meroka for the Director for Public Prosecutions

Appellants - present