REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 90 OF 2017

(CONSOLIDATED WITH CRIMINAL APPEAL NO. 92 0F 2015)

BETWEEN

AGABITUS MILIMO INGAVI.......................................1st APPELLANT

DESMOND SHIVONJE..2ND APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal against convictions and sentences of death for the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code in a judgment delivered by Hon.E. Malesi, Senior Resident Magistrate, on 12th July 2017 in Kakamega Chief Magistrate's Court Criminal Case No. 3786 of 2016)

CORAM: HON. LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The two appellants were charged with the offence of ***Robbery with violence, contrary to Section 296(2) of the Penal Code.*** The particulars are that the appellants, jointly on the 5th day of October 2016, at Nyayo Tea Zone village, Shirere sub-location,in Bukhungu location within Kakamega County,while armed with pangas robbed Ronald Wafula Nambale of cash, two mobile phones make *Tecno* and *Infinix hot 3* and one laptop make *HP* all valued at Kshs. 89,000/- and at the time of such robbery threatened to use actual violence to the said Ronald Wafula Nambale. The Appellants were further charged in the alternative with the offence of ***handling stolen property contrary to section 322(2) of the Penal Code.***

2. At the conclusion of the trial, the learned trial magistrate found the appellants guilty of the main charge convicted both of them and sentenced them to death as by law prescribed.

The Appeal

3. Being dissatisfied with the entire trial court's judgment, the appellants filed their separate appeals which were consolidated by an order of this court made on 25.9.2018. The appellants' common grounds of appeal are **THAT*:***-

> ***i. The learned trial magistrate gravely erred in law and facts in convicting the appellant and invoking the doctrine of recent possession without observing that I was not found in actual possession of the alleged stolen items.***
>
> ***ii. The learned trial magistrate gravely erred in law and facts in finding the charge proved even in the absence of evidence to prove ownership.***
>
> ***iii. The learned trial magistrate seriously erred in law and facts in convicting the appellant in the absence of an inventory as provided for in law.***
>
> ***iv. The learned trial magistrate gravely erred in law and facts in finding credence in the prosecution’s evidence in light of***

suspicious, credible, weak, inconsistent and fabricated evidence.(sic)

v. The learned trial magistrate gravely erred in law and facts in placing reliance on doubtful evidence that lacked identification.

vi. The learned trial magistrate grossly erred and/or misdirected himself in law in conducting a trial that failed to meet the standards of article 50(2)(g)(h) and (j) of the Constitution.

vii. The learned trial magistrate grossly erred in law and facts in shifting the burden of proof on the appellant.

viii. The learned trial magistrate erred in law and facts when he ignored the appellants' defence.

4. This is a first appeal. That being the case this court is under a duty to subject the whole of the evidence to its own exhaustive analysis and to draw its own conclusions, only bearing in mind the fact that it neither saw nor heard the witnesses and to make an allowance for for that fact. In the now well known case of ***Okeno vs. Republic [1972] EA 32*** the Court of Appeal of Eastern Africa outlined the duty of a first appellate court in these words:-

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala Vs. R. (1957) EA. 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 conclusion; 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."

Issues For Determination

5. From the evidence, the law and the submissions, the following issues have arisen for determination: -

a) Whether the appellant's rights under Article 50(2) (g)(h) and (j) of the Constitution of Kenya were violated.

b) Whether the attackers were in the company of one or more persons.

c) Whether the attackers were armed with pangas.

d) Whether the attackers threatened the complainant/PW1 with use of actual violence.

e) Whether the appellants were positively and properly identified

f) Whether the learned trial magistrate correctly applied the doctrine of recent possession.

g) Whether the absence of an inventory was fatal to the respondent's case.

h) Whether the sentence imposed upon the appellants is tenable in the circumstances.

a) Whether the appellant's rights under Article 50(2) (g)(h) and (j) of the Constitution of Kenya were violated

6. It was the 1st appellant's submission that his rights to a fair trial were violated due to the fact that the respondent ambushed him with evidence having not been supplied with the said evidence in advance. The 1st appellant submitted that a new and amended charge sheet was introduced to the appellant just minutes before hearing the testimony of PW1 and that as a result he suffered irreversible prejudice and as such, the trial, conviction and sentence against him cannot be sustained and justified.

7. The 2nd appellant on his part complained that the trial **"failed to meet the standards of Article 50(2)(g)(h) and (j) of the Constitution."**

8. ***Article 50(2)(g) (h) and (j) of the Constitution*** provide that:-

50.Fair hearing

(1)………………………….

(2) Every accused person has the right to a fair trial, which includes the right—

(a)……………………..

…………………………….

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h)to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

…………………………

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

………………………………………………………………………..”

9. ***Article 25 (c) of the Constitution of Kenya*** provides that:-

25.Fundamental Rights and freedoms that may not be limited

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—…………………………

(c) the right to a fair trial;

…………………………….”

(see Supreme Court of Kenya cases: **Christopher Odhiambo Karan v David Ouma Ochieng & 2 others [2018] eKLR; Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others, Sc. Pet. 18 of 2014, [2014] eKLR)**

10. The Supreme Court of Kenya, in the case of ***Republic v Karisa Chengo & 2 others [2017] eKLR,*** held as follows:-

"The issue of fair trial and fundamental rights also touches on the interpretation of the Constitution, and related legislation. It also has a bearing on the rights of accused persons to have their appeals determined according to law. Article 20(3) (b) of the Constitution thus requires Courts "to adopt the interpretation that most favours the enforcement of a right or fundamental freedom"

……………………..

In that regard, the right to legal representation at State expense, where the interests of justice demand, did not commence with the promulgation of the Constitution of 2010. This is a global right that has been in place for sometime now. The International Covenant on Civil and Political Rights(ICCP) adopted on 16th December 1966, for instance, provides in Article 14(3)(d) that legal assistance should be assigned to a party in any case where the interests of justice so require, and without payment in the case of a party who lacks the means to pay for it. Needless to add that Kenya is a party to this Convention having acceded to it on 1 May 1972.

Before the promulgation of the Constitution, 2010, Kenya recognized that in the interest of justice, persons charged with the offence of murder required legal representation and provided counsel to such people through the pauper briefs scheme and by Gazette Notice of 2016, the retired Chief Justice sent out directions on pauper briefs under the current Constitution. In August 2010, Kenya enshrined in Article 50(2)(h) of its Constitution the right to legal representation at State expense, in both civil and criminal cases, to deserving Kenyans. In respect of criminal cases, Article 50(2)(h) thus declares that "Every accused person has the right to a fair trial, which includes the right … to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly…."

………………………..

It does not define what "substantial injustice" means. However, in David Macharia Njoroge v. Republic, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result…." While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa v. Republic; C.A No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.

In addition to the above, we do not agree with the Court of Appeal's holding in the instant case to the effect that the right guaranteed in Article 50 (2) (h) of the Constitution is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the Legal Aid Act. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50 (2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of

***the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.* We must however emphasize the fact that in accordance with the language of the Constitution, *this particular right is not open ended*. It only becomes available "if substantial injustice would otherwise result."**

It is noteworthy in the above context that the Legal Aid Act, 2016 which came into force on 10th May, 2016 in its preamble states that its focus is to "give effect to Articles 19(2), 48, 50(2) (g) and (h) of the Constitution to facilitate access to justice and social justice."

While we have taken note of the extensive and useful comments made by the Court of Appeal in Thomas Alugha Ndegwa v. Republic (supra) in the operationalization of this Statute, Section 3 of the Act specifically sets out the objectives of the legislation in the following terms:-

"The object of this Act is to establish a legal and institutional framework to promote access to justice by

(a) providing affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons in Kenya in accordance with the Constitution;

(b) …..

Further, Section 43 of the Act, 2016 states that:-

(1) A Court before which an unrepresented accused person is presented shall

(a) promptly inform the accused of his or her right to legal representation;

(b) If substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her;

…….

(6) Despite the provisions of this Section, lack of legal representation shall not be a bar to the continuation of proceedings against a person." [Emphasis is mine].

11. The Supreme Court went ahead to isolate the factors set out under section 36 of the Legal Aid Act that would inform a court's decision as to whether or not to rule in favour of any accused person about the need to allow or not allow legal representation in any particular case with emphasis being that legal aid will be provided if the interests of justice so demand.

12. The Supreme Court also placed reliance on **"The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003**" which similarly set out the applicable guidelines with respect to legal aid and legal assistance; the bottom line being that an accused person is entitled to legal assistance where the interests of justice so require and without payment for the same. In this regard, a court dealing with the issue is called upon to exercise its discretion to avail or not avail legal assistance based on the seriousness of the offence facing the accused and the severity of the sentence in case of a conviction.

13. It was thus not lost to the Supreme Court that the court may itself judge each situation based on the peculiar circumstances, in order to determine whether the ends of justice demand legal aid. What this means is that legal aid will not be available in all cases. The circumstances of each case must justify that availability. Legal aid may thus be availed where public justice demands the same.

14. In the case of ***Leonard Maina Mwangi v Director of Public Prosecutions & 2 others [2017] eKLR,*** **Lesiit J** cites the Supreme Court of India in the case of ***Zahira Habibullah Sheikh & another vs State of Gujarat & OthersAIR 2006 SC 1367*** where the said court stated:-

"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical or comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted…… Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and presence….The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

Also see Mativo J in the case of ***Joseph Ndungu Kagiri v Republic [2016] eKLR.***

15. From the above authorities and provisions of the law, it is clear that the right to legal representation goes to the root of a fair trial and may likely cause substantial injustice to an accused person if an accused is denied this right. The chances of unfairness and prejudice are even higher where one is charged with an offence that attracts the penalty of death or life imprisonment. In such cases, a trial court is duty bound to take extra caution while conducting such trial.

16. In the instant case, the record shows that the trial court only read out the charges to the appellants during plea taking. The record does not indicate that the trial court informed the appellants of their rights under ***section 43 (1) of the Legal Aid Act, 2016 and Article 50(2)(h) and (g) of the Constitution*** regarding the right to legal representation. However, it is clear that the 2nd appellant was aware of this right as the record indicates that he was represented by an advocate, one Mr. Khayumbi. The record furthers shows that on 2nd March 2017 the 1st appellant was not ready to proceed with the hearing as he told the trial court that he had not been supplied with witness statements. The trial court adjourned the hearing and ordered that he be supplied with those statements. On 8th March 2017, the respondent applied to amend the earlier charge sheet to include the element of violence. The 1st appellant objected to this application but the trial court admitted the amended charge sheet and ruled that the same be read to the appellants to which they pleaded not guilty. Counsel for the respondent then stated that he was ready to proceed with the case. Both appellants responded that they were ready.

17. I am of the considered view that the 1st appellant had been supplied with the witness statements and evidence intended to be relied upon by the respondent as was ordered by the trial court before, and this explains why he told the court that he was ready to proceed with the hearing. Similarly, the 2nd appellant's advocate did not raise any issue of witness statements so it is safe to conclude here that both appellants were supplied with witness statements before the trial commenced.

18. It is thus my finding and conclusion that the appellants were not prejudiced in any way as they were supplied with the witness statements and all other evidence the respondent intended to rely on during the trial and that their right under ***Article 50(2)(j)*** was not violated in any way as they had access to that evidence and had adequate time to prepare their defence. Furthermore, I find that the 2nd appellant was represented during the trial by an advocate who ensured fair trial and thus his right under ***Article 50(2)(g) and (h) of the Constitution*** cannot be said to have been violated. Accordingly, the appellants' appeal premised on this ground must fail.

b) Whether the attackers were in the company of one or more persons

19. One of the ingredients necessary to prove the offence of robbery with violence is that the offender must be in the company of one or more persons. (See the Court of Appeal in ***Oluoch –VS – Republic [1985] KLR*** and also **Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR.)**

20. The complainant, Ronald Wafula Nambale, testified as PW1 and stated that he was confronted by two people who robbed him at Lurambi area, a fact he reiterated during cross-examination. **Samwel Watitwa,** testified as PW2 and stated that he was informed by PW1 that two people had confronted, attacked and stolen from him. PW1 named the appellants. PC **Sarah Ndenga** testified as PW4 and stated that she was informed by PW1 that he was accosted by two men armed with pangas.

21. From the evidence, I am satisfied that the attack on PW1 was committed by two people

c) Whether the attackers were armed with pangas

22. Another ingredient necessary to satisfy the offence of robbery with violence is the fact that the offenders must have been armed with any dangerous and/or offensive weapon or instrument(*See the Court of Appeal in* ***Oluoch –VS – Republic (above)*** *and* ***Joseph Kaberia Kahinga & 11 others v Attorney General (above).***

23. PW1 testified that his attackers were armed with pangas when they accosted him. PW4 testified that she was informed by PW1 that he was accosted by people who were armed with pangas. While some instruments or weapons would be obvious without the need of defining them, there are others which are not as obvious. For instance, the definition of dangerous or offensive weapons includes at one extreme a stone or stick and the other extreme a firearm ***(Joseph Kaberia Kahinga & 11 others v Attorney General (supra)***. A panga is one such dangerous weapon that does not need defining and I find that the respondent was able to satisfy this ingredient that PW1's attackers were armed with dangerous and offensive weapons, namely pangas.

d) Whether the attackers threatened the complainant/PW1

24. Another ingredient necessary to prove the offence of robbery with violence is the fact that the offenders immediately before or immediately after the time of the robbery wound, beat, strike or threaten to use other personal violence (*See the Court of Appeal in* ***Oluoch – VS – Republic Case (supra);*** *and* ***Joseph Kaberia Kahinga & 11 others v Attorney General Case (above).***

25. PW1 testified that the 1st appellant placed a panga on his neck as the 2nd appellant searched his pockets and told him to remove everything he had, after which they fled with his backpack which contained two phones(*Techno P5* and *Infinix Hot 3*), *HP 14* laptop and a wallet which contained Kshs. 5,000/-, his national ID card and student ID card. PW4 corroborated PW1's testimony by stating that PW1 informed her that the 1st appellant placed a panga on his neck and then robbed him of the two phones, laptop and cash.

26. Based on the evidence above, I find that the respondent satisfied the ingredient of the offence of robbery with violence by proving that the attackers of PW1 threatened him with violence during the robbery, by placing a panga on his neck as they robbed him.

e) Whether the appellants were positively and properly identified

27. Identification is the most crucial ingredient in any criminal trial because the ultimate question in all criminal proceedings is whether the person(s) brought before the trial court actually committed the offence(s) with which they have been charged.

28. PW1 stated that he recognized the 1st appellant as the said 1st appellant was his neighbor and a boda boda rider who used to carry him as a pillion passenger sometimes. On cross-examination by the 1st appellant, PW1 stated that he knew the 1st appellant by name, face and knew

where he stayed and that it was the 1st appellant who robbed him. PW2 corroborated PW1's testimony by stating that he knew the 1st appellant as his neighbor and boda boda operator. PW1 further testified that he identified the 2nd appellant using a motor cycle headlamp as it approached towards them. On cross-examination by Mr. Khayumbi, counsel for the 2nd appellant, PW1 however, stated that he had never seen the 2nd appellant before the incident. PW1 stated that it was the 1st appellant's brother who linked the 2nd appellant to the robbery by telling him that it was the 2nd appellant who was the 1st appellant's accomplice. PW1 also stated that it was the 1st appellant's brother who led PW1, PW2 and **Corporal Leonard Barasa**, PW3 to the 2nd appellant.

29. The 1st appellant's brother did not testify during the trial to corroborate PW1's testimony.

30. The Court of Appeal, in the case of **Jali Kazungu Gona v Republic [2017] eKLR** held that:-

> ***"In Wamunga vs. Republic [1989] KLR 424 this Court while discussing the caution to be taken where the only evidence against an accused is of identification succinctly stated: -***
>
> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of mere identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."***
>
> ***(See Court of Appeal in Maitanyi vs. Republic [1986] KLR 198 and D.K Kemei J in Hassan Abdallah Mohammed v Republic [2017] eKLR,)***
>
> **…………………………………………**
>
> ***"To begin with BP was clear that she did not know the appellant prior to the incident hence, it was crucial for the veracity of her identification of the appellant to be tested through an identification parade, for the reason that identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu & another vs. Republic [2010] eKLR. Unfortunately, her identification of the appellant at the trial as submitted by the appellant amounted to dock identification. In that regard, we reiterate the findings in the decision of this Court in Ajode vs. Republic [2004] eKLR which expressed that:-***
>
> ***"It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade."***

31. Similarly, in the instant case, PW1 did not know the 2nd appellant prior to the incident. It was thus imperative that an identification parade be conducted to test the veracity of PW1's identification of the 2nd appellant. PW4 conceded that there was no identification parade conducted. There is no way PW1 could have identified the 2nd appellant using the fleeting light from the headlamp of a motorcycle, which PW4 stated was 50 meters away. The only person who apparently could link the 2nd appellant to the robbery was the 1st appellant's brother, who was not called to testify. I find that barring any other evidence, the visual identity of the 2nd appellant as one of the attackers in the incident is not cogent.

32. On the other hand, I find that the 1st appellant was properly and positively identified by recognition by PW1 and PW2. PW1 gave the 1st appellant's name with his first report to whoever he met and also to the police.

f) Whether the learned trial magistrate correctly applied the doctrine of recent possession

33. In his judgment, the learned trial magistrate held that the doctrine of recent possession as well as the evidence of PW1,PW3 and PW4 placed the 2nd appellant at the center of PW1's recovered *infinix* phone. PW1 stated that he was informed that some of his items were at the 2nd appellant's house and together with PW3, they proceeded to the 2nd appellant's house and recovered the infinix phone from the 2nd appellant's pocket trousers. This was on 9th October 2016, about three days after the incident. PW1 was able to identify the said infinix phone in court. PW1's testimony was corroborated by that of PW3 who stated that together with a colleague, they were led to the 2nd appellant's house and after a search, they recovered the infinix phone.

34. In the case of ***Simon Mareiro Mokaya v Republic [2015] eKLR,*** Nyamweya J held that:-

> ***"On the first issue, the doctrine of recent possession is stated in the case of Malingi vs Republic (1989) KLR 227 as follows:***
>
> ***"The doctrine is one of fact. It is a presumption of fact arising under section 119 of the Evidence Act, Cap 80 Laws of Kenya which provides:***
>
> ***"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."***

So as applies to the offence of theft or handling, recent possession raises a presumption of fact that the one in possession is either <u>the thief or guilty receiver</u> (<u>R – v – Hassan s/o Mohamed (1948) 25 EACA 121)</u>. The trial court has the duty to decide whether from the facts and circumstances of the particular case under consideration the accused person either <u>stole the item or was a guilty or innocent receiver</u>. By the application of the doctrine <u>the burden shifts from the prosecution to the accused to explain his possession of the item complained about.</u> He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that <u>the item he had in his possession had been stolen</u>; it had been <u>stolen a short period prior to the possession</u>; that <u>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</u>; that there are <u>no co-existing circumstances which point to any other person as having been in possession of the item</u>. The doctrine being a presumption of fact is a rebuttable presumption. That is why <u>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."</u>

35. Nyamweya J went further and referred to the case of ***Erick Odhiambo Okumu vs Republic (2015) eKLR (Mombasa Criminal Appeal No. 84 of 2012)*** in which the principles of circumstantial evidence were stated as follows:-

"It has long been accepted that the <u>guilt of an accused person</u> <u>does not have to be proved by direct evidence alone.</u> Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in <u>MUSILI TULO V. REPUBLIC</u> (supra):-

"<u>[C]ircumstantial evidence is as good as any evidence</u> if it is properly evaluated and, as is usually put, <u>it can prove a case with the accuracy of mathematics."</u>

But for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, <u>and to no other person,</u> as the perpetrator of the offence. In <u>ABANGA ALIAS ONYANGO V. REPUBLIC</u>, CR. APP. NO 32 OF 1990 this Court tabulated the conditions as follows:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be <u>cogently and firmly established</u>; (ii) those circumstances should be of a definite tendency <u>unerringly pointing towards guilt of the accused;</u> (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that <u>within all human probability</u> the crime was committed by the accused and none else."

(See also <u>SAWE V. REPUBLIC</u> [2003] KLR 364 and <u>GMI V. REPUBLIC</u>, CR. APP. NO. 308 OF 2011 (NYERI)).

Before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that <u>there are no other co-existing circumstances, which would weaken or destroy the inference of guilt.</u> (See <u>TEPER V. R.</u> [1952] All ER 480 and <u>MUSOKE V. R</u> [1958] EA 715). In <u>DHALAY SINGH V. REPUBLIC</u>, CR. APP. NO. 10 of 1997 this Court reiterated this principle as follows:-

> ***"For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal."***

36. In the present case, paragraph 15 of the learned trial magistrate's judgment shows that he correctly referenced and applied the principles of the doctrine of recent possession by holding that the infinix phone was recovered from the 2nd appellant and the said phone had been recently stolen from PW1. The 2nd appellant was unable to give a logical explanation as to how he came about to possess the said phone being that the burden of proof was on him.

37. To this end, I find that the learned trial magistrate correctly applied the doctrine of recent possession in finding that the 2nd appellant must have stolen the said phone from PW1 in the absence of any other logical explanation by the 2nd appellant or that he was a guilty receiver. It should also be further noted that the phone was recovered just three days after the robbery and the absence of an explanation by the 2nd appellant leads me, as it did the trial court, to draw an inference of his guilt in the robbery and forms a chain so complete that there is no escape from the conclusion that within all human probability the robbery was committed by the 2nd appellant together with the 1st appellant.

<u>g) Whether the absence of an inventory was fatal to the respondent's case</u>

38. It was the 2nd appellant's submission that his conviction in the absence of an inventory was an error by the learned trial magistrate. In his judgment, the learned trial magistrate cited the Court of Appeal case of ***Leonard Odhiambo Ouma & Another v Republic [2011] eKLR*** where the appellate court held that:-

"Failure to compile an inventory as contended in ground 5, is in our view <u>a procedural step</u> which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial."

39. This court is bound by the above holding of the appellate court and as such I find and hold that there was no error in the trial court's determination that the lack of an inventory of the recovered items was not fatal to the respondent's case.

40. It is thus my finding and conclusion that the appellants' rights under ***Article 50(2)(g) (h) and (j)*** were never violated in any way, the 1st appellant having been supplied with the witness statements and evidence the respondent intended to rely on for the hearing beforehand which enabled him prepare for his defence. The 2nd appellant was represented by an advocate during the trial and thus there is no way his right to representation under ***Article 50(2)(g) and (h)*** could have been violated.

41. It is also my finding that the respondent discharged the burden of proof to the required standard of beyond reasonable doubt for the offence of ***robbery with violence contrary to section 296(2) of the Penal Code.*** The prosecution proved that PW1 was robbed by the two appellants; the appellants were armed with dangerous weapons, namely, pangas and that they threatened to use force on PW1 before robbing him.

42. I further find and hold that PW1 was able to identify the 1st appellant by recognition, a fact that was corroborated by PW2. Circumstantial evidence based on the doctrine of recent possession was able to identify the 2nd appellant as the other attacker. All fingers pointed at him as the 1st appellant's accomplice in the absence of any other plausible explanation by the 2nd appellant. It should be noted that in the case of ***Leonard Odhiambo Ouma & Another v Republic [2011] eKLR(supra)*** the Court of Appeal upheld the decision of the trial court where the recovery of a motor vehicle two days after the robbery and without any explanation by the appellant as to how he came to possess the said motor vehicle was sufficient to identify the appellant in that case as the robber.

43. Therefore, I am satisfied that the learned trial court was right in convicting the appellants on the charge of ***robbery with violence contrary to section 296(2) of the Penal Code.*** I accordingly uphold the same.

h) **Whether the sentence imposed upon the appellants is tenable in the circumstances**

44. The issue of sentencing, especially when it comes to the mandatory minimum sentence of death was discussed by the Supreme Court of Kenya in the case of ***Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR*** in which the court held that the death penalty prescribed for capital offences though still lawful, was unconstitutional. The Court of Appeal has since followed the Supreme Court decision. In the case of ***William Okungu Kittiny v Republic [2018] eKLR,*** the Court of Appeal sitting in Kisumu declared that the ***Muruatetu decision*** broadly considered the constitutionality of the death sentence in general. The Supreme Court also urged courts to take into account the following factors before deciding on the appropriate sentence to mete out.

(a) age of the offender;

(b) the fact of being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

45. In the present case, the record indicates that the appellants had no previous records meaning that they were first offenders. In mitigation, the 1st appellant stated that he had a family which needed him. The 2nd appellant stated that he had four children and that his wife solely depended on him. I note that though PW1 was not physically injured during the robbery, he was traumatized. I also note that most of his stolen items were recovered. The bail assessment report filed in the lower court indicated that the 1st appellant was aged 27 years whereas the 2nd appellant was aged 40 years. The above notwithstanding, the conduct of the appellants was most unbecoming and is a threat to the security of ordinary persons such as PW1, going about their day to day lives. The community thus needs to be protected against the actions of such persons. In this regard, I would sentence the appellants to thirty (30) years in prison.

Conclusion

46. In light of all the above, I make the following orders:-

a. The appellants' appeal on conviction has no basis and is accordingly dismissed.

b. The appellant's appeal on sentence is allowed in part only by setting aside the sentence of death and substituting the same with imprisonment of thirty (30) years with effect from 2.8.2017.

c. Right of appeal within 14 days from the date of this judgment.

47. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 29th November, 2019

WILLIAM M. MUSYOKA

JUDGE

In the presence of:-

Appellant present in person

Ms. Omondi for respondent

Erick – Court assistant