REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 64 of 2017.

PAUL MUSAU MAKAU.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara in Cr. Case No. 1779 of 2009 delivered by Hon. H. M. Nyaga on 23rd May 2017).

JUDGMENT.

Background.

1. The Appellant herein was in the first count charged with the offence of robbery with violence contrary to Section 296(2) of the Criminal Procedure Code. It was alleged that on 19th April, 2009 at Mowlem Barack Estate in Nairobi District within Nairobi Province while armed with a dangerous or offensive weapon, namely a pistol, jointly with others not before court robbed John Njagi Njeru of a motor vehicle registration number KBC 082Q(Nissan Sunny B15), a mobile phone make Nokia 1100, a pair of leather shoes and cash Kshs. 2950/- all valued at Kshs. 556,450/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said John Njagi Njeru.

2. The second count related to handling of stolen goods contrary to Section 322(2) of the Penal Code in that on 19th April, 2009 at Manyani Shopping Center in Taita District within Coast province, otherwise than in the course of stealing dishonestly received or retained a motor vehicle registration number KBC 082Q make Nissan Sunny B15 Grey in colour knowing or having reason to believe it to be stolen motor vehicle.

3. The Appellant was found guilty of what the trial court termed the principal count and sentenced to death. He was dissatisfied with both the conviction and sentence against which he proffered the present appeal. The grounds of appeal were annexed to his written submissions filed on 16th April, 2018.They were, in summary; that Section 200(3) of the Criminal Procedure Code was not complied with, that the circumstantial evidence could not found a conviction as it was uncorroborated, that the Appellant's mode of arrest was riddled with doubts, that the investigation was shoddy, that essential witnesses were not called, that the conviction was based on mere suspicion, that the prosecution's case was not proved beyond reasonable doubt and that the Appellant's defence was not considered.

Submissions.

4. In his submission, the Appellant took issue with non-compliance with Section 200(3) of the Criminal Procedure Code by the succeeding magistrate Hon. Nyaga. He submitted that this entirely vitiated the trial.

5. He then submitted that his conviction was based purely on circumstantial evidence which was not sufficient to found a conviction. He cited the inconsistency with the prosecution evidence of PW3, 4 and 5 on the recovery of stolen goods as well as the failure to positively identify him. Amongst the cases he cited to buttress the submission were **Sathya Narayan *v.* State[2013] 80 ACC 138 SC, Woolmington *v.* DPP[1935] AC 462,** and **Andrea Obonyo & others *v.* Republic[1962] EA 542.**

6. The Appellant also submitted that his alibi defence was not considered. His view was that having offered an alibi defence, the prosecution was under a duty to offer evidence in rebuttal. The failure to do so meant that the prosecution was not able to prove that he was at the scene of crime at the time the crime was committed. He relied, *inter alia*, on **Sekitoleko *v.*Uganda[1967] EA 531** and **Victor Mwendwa Mulinge *v.* Republic[2014] eKLR** and to buttress this submission. In addition, he cited the failure to call a mechanic who was allegedly at the scene when the Appellant was arrested. He submitted that although this mechanic was initially arrested he was never called to testify. He was of the view that his evidence would have shed light on whether he was the person who drove the car to the place it was recovered from. He relied

on **Bukenya & other *v.* Uganda[1972] EA 549** to buttress the submission that the failure to call a crucial witness weakened the prosecution case.

7. In his oral submission he acknowledged being arrested in possession of the stolen motor vehicle but submitted that the reason for this was because it was brought to him by someone who wanted him to find a mechanic. Further, that one of the persons who brought the vehicle to him was arrested alongside him and later released. He concluded by stating that the complainant testified that he had never seen him.

8. Ms. Akunja for the Respondent opposed appeal. She denied that Section 200(3) of the Criminal Procedure Code was not complied with. She stated that when the Appellant absconded the trial the matter had already been set for defence hearing after a ruling on a case to answer had been delivered. As such, he already had lost the right to recall any witnesses. She submitted that an identification parade was not necessary as the victim could not identify his assailant. Her case was that the Appellant was culpable by virtue of the doctrine of recent possession having been arrested in possession of the stolen motor vehicle. She submitted that good investigations led to the recovery of the vehicle and the Appellant's arrest. She urged the court to uphold both the conviction and sentence.

9. In reply, the Appellant denied that his identification documents were found in the stolen vehicle but on his clothes as confirmed by the investigating officer.

Evidence.

10. The prosecution's case was that the complainant, **PW1,** on 18th April, 2009 was along Moi Avenue in Nairobi when he was approached by two customers who wanted him to take them to a destination along Kangundo Road in his Taxi registration number KBC 082Q. As they approached the destination the passengers who were in possession of a gun took over the vehicle and after making him ingest tranquilizing agents left him by the road side and took off with the vehicle and his personal items. The vehicle was tracked and recovered at Manyani area in the Appellant's possession. PW1 lost his phone, cash and shoes. He came to later that morning and reported the matter at Kinyago Police Station. **PW2** was the employer of PW1. She was informed that PW1 was being detained at the Police Station after reporting the incident. She called the car tracking company which informed her that the vehicle was in Makueni but they could not disable it as it was moving at a very high speed. The vehicle was later disabled at around Manyani area. She later went to Voi Police Station where she was informed one person had been arrested.

11. **PW3** of DCIO Taita Taveta was informed by personnel from Stoic Fleet Watch on 19th April 2009 that they had stopped the vehicle by use of a tracking device. The vehicle was parked near Manyani Prison. They found the Appellant trying to find out what the problem was with the engine since it had stalled. They confronted him and searched him and recovered documents from him. The Appellant was accordingly arrested.

12. **PW4** accompanied PW2 to Voi CID office on 20th April, 2009 where she identified her vehicle. Together with his colleagues they rearrested the Appellant and escorted him to Buru Buru Police Station where he was charged accordingly. **PW5** testified that he was a car tracker who assisted in immobilization of the vehicle. He also visited the scene where the vehicle was found in the possession of the Appellant and a mechanic.

13. After the close of the prosecution case, the court ruled that a prime facie case had been established and accordingly put the Appellant to defence. He denied committing the offence. He stated that he was a petrol dealer at Mtito Adei. That on 20th April 2009 he was at his work place at Manyani when he saw a vehicle, Peugeot, approach. After serving them they asked him to join them so he could receive the payment. They drove towards Voi town where he was locked up at the police station before being transported to Jogoo Police Station and later to Buru Buru Police Station where charged. He stated that he knew nothing about the offence.

Determination.

14. I have considered the respective rival submissions and the evidence on record before arriving at the following issues for determination: Whether Section 200(3) of the Criminal Procedure Code was violated, whether the court erred when it dismissed the Appellant's alibi defence, whether crucial witnesses were not called and whether the offence was proved beyond reasonable a doubt.

15. I first point out that the charge sheet contained two counts. The judgment of the trial court on the other hand considered the second count as an alternative charge to count I. In my view, this was the correct decision as often, the offence of handling stolen goods is charged as an alternative to a main charge where a main charge exists. And so the charge as framed was an aberration from the norm. In that case, once a conviction in the main count is entered, no finding is made on the alternative charge. This is what the learned magistrate did, and therefore no prejudice was occasioned to the Appellant by the technical error in the drafting of the charge sheet. The error is curable under Section 382 of the Criminal Procedure Code.

16. On compliance with Section 200(3) of the Criminal Procedure Code, the Appellant was tried by Hon. T. Ngugi who heard the prosecution's case and made a ruling that the prosecution had established a *prima facie* case. However, before the defence hearing the Appellant escaped from jail. After he was apprehended the matter was placed before Hon. Nyaga who made the following direction on 21st February, 2017:

> ***"In the latter case, the accused had been placed on his defence. He escaped from lawful custody while awaiting his defence hearing. Having been placed on his defence section 200(3) C.P.C is no longer available to him. He shall therefore proceed to defend himself as authorized by law.***
>
> ***Why is section 200(3) C.P.C not available to the accused? I will attempt to give an answer to this question.***

In my view, once the entire prosecution case has been tendered and an accused is placed on his defence, then the recalling of prosecution witnesses would be an exercise in futility. The court cannot reverse the findings of the proceeding trial Magistrate to put an accused on his defence. To do so would be tantamount to sitting on appeal to his/her decision.

Though section 200(3) C.P.C refers to part of the evidence, it does not specify if it's just the prosecution case or also includes the defence case. In my view once an accused has been placed on his defence, the only witnesses he may recall are defence witnesses, if he so wishes. As I have already stated, the recalling of prosecution witnesses would be impracticable since this court cannot reverse the finding of the court made by the former trial magistrate.

The accused will proceed to be informed of his rights under Section 211 C.P.C."

17. Section 200(3) of the Criminal Procedure Code states:

"'Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

18. Clearly, the provision imparts a right to the accused, which the court is under a mandatory duty to inform him/her of, to demand for witnesses to be resummoned and reheard. The novel test that arises in this case is whether once the prosecution's case was closed the accused had a right to recall prosecution witnesses. In the considered view of this court, once a ruling under Section 211 of the Criminal Procedure Code has been made, the accused loses his right to elect to recall or resummons the prosecution witnesses. The rationale for this is because a ruling under Section 211 is substantive in nature and having been made by a previous magistrate is only amenable to an appeal. Had Hon. Nyaga found that the Appellant had a right to recall the prosecution witnesses, the same would have been tantamount to overturning a decision of a magistrate of concurrent jurisdiction and thereby conferring upon himself appellate jurisdiction which he did not possess. Therefore, Hon. Nyaga did not err in denying the Appellant's request to recall the prosecution witnesses and so Section 200(3) was not violated.

19. The Appellant did submit that his alibi defence was not considered. A relook at the proceedings attests that his defence revolved around matters that occurred on 20th April, 2009 which is a date of little significance to the matter at hand as the issues pertinent to this case occurred on 18th and 19th April, 2009. These related to the robbery and the Appellant's arrest. Further, the Appellant's defence was false as it sought to adduce evidence contrary to the fact that he was in custody on the date in question, which can be glimpsed from the charge sheet which sets out 19th April, 2009 as his date of arrest. It follows that his alibi defence was dislodged by the strong prosecution case.

20. The Appellant also took issue with the fact that the mechanic who was at the scene during his arrest was not called as a prosecution witness. I agree with the Appellant that the witness would have illuminated on his (Appellant) arrest and whether he was in possession of the stolen vehicle. I shall hereafter demonstrate that this evidence was adequately covered by other prosecution witnesses, in which case, the failure to call the mechanic did not at all vitiate the prosecution case.

21. On proof of the case, the Appellant was convicted based on circumstantial evidence. It was purely a case of being in possession of recently stolen goods. The Appellant contends that the trial magistrate erred when he relied on this evidence to found a conviction. An avalanche of case law abounds on applicability of circumstantial evidence. For instance, Brennan J. in **Chamberlain(No.2) *v.* The Queen[1984] HCA 7** stated that:

"Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. First, the primary facts from which the inference of guilt is to be drawn must be proved beyond reasonable doubt. No greater cogency can be attributed to an inference based upon particular facts that the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts which the [Court] finds. The drawing of the inference is not a matter of evidence: it is solely a function of the [Court's] critical judgment of men and affairs, their experience and their reason. An inference of guilt can safely be drawn if it is based upon primary facts which are found beyond reasonable doubt and if it is the only inference which is reasonably open upon the whole body of primary facts."

22. In our local jurisdiction, it was held in the case of **Republic v Kipkering Koske (19580 EA, 715** that;

"In order to justify a conviction based on circumstantial evidence, the evidence must irresistibly point to the guilt of the accused person and that there should be no co-existing factor that may weaken or destroy the inference of guilt."

23. In this case, the Appellant's possession of the stolen vehicle was the primary fact which would lead to an inference of his participation in the robbery. The evidence as adduced was that the car tracking company traced the car to around Voi and immobilized it. PW5 who was soon on the scene drove past the vehicle but fearing that the occupants were armed went to Voi Police Station where he reported the matter before proceeding back to the scene in the company of PW3, PC Murisa and PC Aden. When they arrived at the scene they found the Appellant and a mechanic. This fact of the Appellant being found with the stolen vehicle was not controverted.

24. Proof of recently stolen goods depends on the easiness of the stolen property to move from one person to another. See: **Isaac Nganga Kahiga alias Peter Kahiga *v.* Republic(Criminal Appeal No. 272 of 2005(UR)).** The test therefore is whether the vehicle could have changed hands in the period between the robbery and the arrest of the Appellant. The robbery occurred in the early hours of 19th April 2009, after 1.30 a.m. The vehicle was recovered on the same day around 5.00 p.m. In the intervening period, according to PW2 and PW5, the vehicle was being tracked and that it was traveling at such high speed that it took a while for immobilization to be safe. When immobilization occurred PW5 was soon at the scene and went to report the matter to the police. A car is not a fluid item that could change hands easily

within the period in question. More so taking into account the distance it had travelled from the point of robbery to the scene of recovery. I have no doubt in my mind therefore, that the Appellant had a hand in the theft of the vehicle. He cannot plead innocence.

25. The next test is whether ownership was proved. The vehicle was identified by PW1, 2 and PW4. Documents proving ownership were also produced. The court is satisfied that the prosecution did prove that the vehicle was owned by PW2.

26. From the foregoing, I arrive at the conclusion that the mechanic who was with the Appellant after the vehicle stalled was hired by the Appellant to figure out why the vehicle had stalled. His release by PW5 was in order The account of PW5 was clear as to the circumstances, location and events leading up to the Appellant's arrest and in so far as it was corroborated by the evidence of PW3, it sufficiently proved the arrest of the Appellant in possession of the stolen vehicle beyond a reasonable doubt.

27. On the inconsistencies regarding the recovery of the documents from the Appellant, the same is laid to rest by the presence of a Certificate of Search which clearly indicated that the search was undertaken on the Appellant's person and that the items seized were found in his trousers' pockets.

28. I add that all the elements necessary for the proof of the offence of robbery with violence were established. The robbers were armed with a pistol which they threatened PW1 with and they were more than one in number. A proof of any of the ingredients set out under Section 296(2) of the Penal Code meets the criteria for proof of the offence of robbery with violence.

29. On sentence, pursuant to the Supreme Court's decision in **Francis Karioki Muruatetu *v.*Republic[2017]eKLR,** mandatory death sentence was declared unconstitutional. And so in determining an appropriate sentence, the court must have regard to the circumstances of the case including the impact on the victim, the accused's mitigation and the period the accused has stayed in remand. Under Section 354 of the Criminal Procedure Code, this court has powers to vary the sentence accordingly. In the present case, the victim was a taxi driver and the assailants were "passengers''. He was drugged and after he became unconscious his vehicle was stolen. Considering that the vehicle was recovered and in good condition, I am of the opinion that death sentence is not warranted.

30. In sum, I uphold the conviction. I however set aside the death sentence and substitute it with an order that the Appellant shall serve fifteen (15) years imprisonment. This period shall be reduced by six years and 7 days being the period the Appellant was in remand prior to the conviction. This period is informed from the fact that the Appellant took plea on 27.11.2009. On 25.11.2010, he asked to be taken to KNH for dental treatment and an order was given accordingly. When the matter was mentioned on 1.2.2011 court was informed that he escaped from lawful custody when he was escorted to KNH. The actual date of the escape was not given and so the court will take it to be the date he was referred to hospital. There was a mention on 10.5.2013 when court was informed that he had been arrested in another case. By then the case had been withdrawn under Section 87(a) of the Criminal Procedure Code. He was brought to court on 14.5.2013 and was in remand until the case was concluded. The court has accordingly excluded the period he escaped.

DATED and DELIVERED this 29th day of May, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person present.*

2. *Miss Atina for the Respondent.*