REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 8 OF 2016

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 2056 of 2014of the Chief Magistrate's Court at Naivasha – P. Gesora, CM)

MOSES KAGUNYA NDERITU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. **Moses Kagunya Nderitu** was charged with Robbery with violence contrary to Section 296 (2) of the Penal Code. In that on the 5th day of November 2014 at Longonot along Maai Mahiu – Naivasha highway in Naivasha Sub-County within Nakuru County jointly with others not before court while armed with dangerous or offensive weapons to wit *rungus* and metal bars, he robbed **Daniel Kinyanjui** of one **Mitsubishi Fuso Lorry** registration number **KBY 302A** valued at Kshs 5,100,000/=, assorted hardware goods valued at Kshs 896,100/= and cash Kshs 2,000/= and during the time of such robbery, used actual violence to the said **Daniel Kinyanjui**. He denied the charge.

2. Following a full trial, the court found him guilty, convicted him and sentenced him to death. He has appealed to this court against the conviction. On the eve of the hearing of the appeal he filed amended grounds of appeal as follows:-

> **"1. THAT the trial magistrate erred in both facts and law by convicting the Appellant basing his conviction in reliance to PW3 evidence which was both doubtful and inconsistence.**
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> **2. THAT, the trial magistrate erred in both law and fact by convicting the Appellant in reliance to the doctrine of recent possession which the same was influent to base my conviction.**
>
> **3. THAT, the learned trial magistrate erred in matters of both facts and law by convicting the Appellant without considering that the mode of arrest was not in regard to the commission of the crime in question.**
>
> **4. THAT, the trial magistrate erred on matters of facts when he rejected my plausible defense without giving his points of determination contrary to Section 169 of the CPC."** (sic)

3. He also filed written submissions in support of the grounds. Stating that he did not dispute the robbery committed against the complainant and the loss of the **Mitsubishi Lorry KBY 302A** and assorted goods , the Appellant launched an attack on the evidence of **PW3**. He takes issue with the identification evidence led through **PW4**, erroneously identified in proceedings as **PW3**. Asserting, that **PW4** did not have ample opportunity to identify the person or persons who parked the stolen lorry on 6th November, 2014 at the yard he guarded and therefore could not describe them. He challenged the fact that the yard owner allowed the lorry on his yard.

4. In his view, there was no evidence that he was found in possession of the stolen lorry or its ignition keys hence the trial magistrate erred in applying the doctrine of recent possession to the facts of the case. Reiterating his defence at the trial, the Appellant stated that the same was unfairly dismissed by the trial court.

5. For his part, Mr. Mutinda for the DPP opposed the appeal. Relying on the decision of the Court of Appeal in **David Mutune Nzongo – Vs- Republic [2014] eKLR** he submitted that possession was proved against the Appellant and that **PW4's** evidence was adequate in identifying the Appellant positively. He was of the opinion that the prosecution evidence displaced the defence offered by the Appellant and submitted that the trial court correctly dismissed it.

6. In **Pandya -Vs- Republic [1957] EA 336** the Court of Appeal for Eastern Africa outlined the duty of the first appellate court. That duty remains the same, and must be the basis upon which this court considers the appeal. The court stated:-

"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

7. The prosecution case in the lower court was as follows. **Daniel Kinyanjui** (**PW1**) the complainant herein was a longtime employee of G. K. Hardware Limited operated by **Lucy Wangui Kamau** (**PW2**). He was the driver of the lorry **KBY 302A Mitsubishi FH** owned by **PW2**. He had travelled to Nairobi of 5th November 2014 to collect building materials including iron sheets and assorted metal bars. He left Nairobi at 5.00pm with the merchandise worth some Shs 896,000/= on board. He was alone. On reaching Longonot area, he was waved down by 2 men in green jackets and on slowing down, was attacked by four men who emerged from the shadows and wrested the vehicle from him and taking off.

8. He was left with two men who walked him away from the road to a spot where they trussed him and kept him under guard. They abandoned him at 4.00am on 6th November, 2014 close to the Longonot Park gate. Picking himself up **PW1** reported to officers at Murera Anti-Stock Theft Unit (ASTU) police camp. Police called **PW2**. **PW1** had sustained head injuries and was taken for treatment. The car tracking company was notified and commenced a search for the vehicle.

9. Meanwhile at 7.00am on the same date, the stolen lorry was driven to a yard located at Mwiki area and guarded by one **Lomunyak Melau** (**PW4**) by two men, including the Appellant who instructed it be washed saying the two were going for tea. At 1.00pm some people came knocking on **PW4'**s door and declared the lorry to be stolen property and later it was driven away.

10. At 8.00pm the Appellant returned and questioned PW**4** on the whereabouts of the lorry. When **PW4** told him his colleague had driven off with the lorry the Appellant started to flee but with the help of dogs, **PW4** caught up with the Appellant. He was escorted to Mwiki Police Station in a matatu. The lorry ignition keys were found dumped in the said matatu the following day. **PW2** identified her vehicle which had been stripped off its cargo by the time of recovery.

11. The Appellant in an unsworn defence statement denied possession of the lorry and stated that he was arrested within Mwiki on the evening of 6th November 2014 as he walked home from work.

12. The fact of the robbery at Longonot during which **PW1** lost the lorry and its cargo on the material date was not in dispute, as the trial court correctly observed. Also not disputed was the fact that the lorry was the property of **PW2**, at the time of robbery being driven by her employee **PW1**. It was further not disputed that the Appellant was arrested at Mwiki early on the night of 6th November, 2014.

13. The issue in dispute was whether the Appellant was involved in the robbery. In this connection the complainant **PW1** clearly stated that he did not identify the robbers. The prosecution relied on the evidence of possession of the stolen lorry as led by **PW4** to support its case against the Appellant. The star witness in this regard was **PW4**, the guard in the employ of **Peter Mwangi Chege** (**PW5**) erroneously referred to as **PW4** by the trial court.

14. The evidence by **PW4**, materially corroborated by **PW5** was that two men, the Appellant among them drove the lorry into the yard early on the morning of 6th November, 2014. That the Appellant asked **PW4** to wash the lorry as he and his counterpart went off for tea. **PW4** returned to his dwelling in the yard and did not wash the lorry , not having been paid. Police came to make inquiries later in the day. **PW4** testified that the Appellant later came back at 8.00pm to collect the vehicle and not finding it, attempted to flee the scene.

15. The Appellant has faulted the evidence of **PW4** asserting that he had no opportunity to identify him in their brief encounter that morning. Granted, it was early in the morning but **PW4** had a conversation with the early morning visitors in day light. They claimed that they were going for tea, instructing **PW4** to wash the lorry. The witness stated that later at 8.00pm, the Appellant came to the parking yard and enquired about the missing lorry before fleeing when told that his colleague had taken the lorry. **PW4** maintained this evidence in cross-examination and the Appellant never suggested to him or **PW5** that he was infact arrested from the road as he walked home.

16. Besides, it is hard to believe that **PW4** picked on the Appellant who was an innocent passerby in order to turn him into a scape goat. **PW4** told the court that when the Appellant returned, he let him into the yard explaining, obviously as a ruse, that his colleague had taken the lorry and would be returning. The witness having earlier seen the Appellant in day was in my opinion in a position to recognize him when he returned. And it seems that **PW5** was also keeping a look out after police visited the yard. He too witnessed the arrest of the Appellant following a chase. The Appellant's conduct – running away – is an indication of guilty knowledge.

17. **PW4's** evidence established that the Appellant was in possession of the stolen lorry merely hours since it was taken from **PW1**. The lorry belonged to **PW2**. The Appellant denied possession therefore not explaining how he had come into possession of the same.

18. In the case of **Francis Kariuki Thuku & 2 others -Vs- Republic [2010] eKLR,** quoted by the Court of Appeal in the **Nzongo** case, the court stated:-

"Concerning the application of the doctrine of recent possession to the facts in the case, we are of the view that the appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of R. V. Loughin 35 Cr. Appl. 269 by the Lord Chief Justice of England and this Court's own decision of Samuel

Munene Matu V. R. Criminal Appeal No. 108 of 2003 at Nyeri demonstrates that the doctrine was properly applied. The recovery of the items in the case before us was within 7 days whereas in the MATU case (supra) a period of 20 days was held to be recent. We accordingly uphold the superior court's view of the law on the point. In this regard we would re- echo the decision of this Court in the case of Hassan -vs- Republic [2005] 2 KLR 11 where as regards recently stolen goods it delivered itself thus:-

"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver." (Emphasis supplied)

19. In this case, the Appellant has not rebutted the presumption created by his proven possession of the lorry less than a day since it was robbed off **PW1**. The Appellant's defence was properly rejected by the lower court. The Appellant was properly convicted. His appeal lacks merit, must fail and is hereby dismissed.

Dated and signed at Kiambu, this 26th day of June, 2018.

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this 31st day of July , 2018.

R. MWONGO

JUDGE

In the presence of:-

For the DPP : Mr. Koima

Appellant : Moses Kagunya Nderitu – present

C/C – : Quinter