REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R, MWONGO, J

HCCR APP NO 37 OF 2017

(Being and appeal from the Judgment of Hon. S.M. Githinji, CM in CM/NVS/CR: No. 456 of 2012)

DAVID NDUNGU NJOROGE..........APPELLANT

VERSUS

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

JUDGMENT

Background

1. The Appellant was convicted with robbery with violence contrary to **section 296(2)** of the **Penal Code**, and sentenced to life imprisonment.

2. Briefly, the facts were that on the night of 12th February, 2012 two men gained access to the complainant's home at Site Estate, Gilgil. One of them stood between the curtain and the door and switched off the external security lights. Using a torch, he shone the light into the eyes of PW2 and her brother. He then drew a sword which he placed on the neck of one of them and asked for money. He threatened the complainants, then he took a radio. The other man grabbed the television set and left with it. The first man also grabbed two phones and vanished into the night. PW 2 did not recognize any of the assailants.

3. When PW 1 got to the house, he found it had already been raided. He called a neighbor and together they went to Gilgil police station where they knew the report. The following day they went and recorded statements.

4. Two days later, on 14 February 2012, PW3 the OCS Google police station was on duty along Naivasha -Gilgil road. On reaching a place known as Sogea near Marura farm, he saw a man seated at the roadside with the package wrapped in sheets. As there was no home nearby it aroused his suspicion. He got the man to open the package and found a television set inside. As the man was unable to explain himself, TW three arrested him and took him to the police station with the television set.

5. Following investigations, the police were able to relate the television set to the report that had been filed on 12 February 2012. PW1 was called to the police station, and was easily able to identify the television set. It was also discovered that the man had given his name Joseph Maina but his true identity was in fact David Ndungu Njoroge, the Appellant.

6. Dissatisfied with his conviction, the appellant has brought an appeal to the high court on the following grounds;

> ***a.* That the learned trial magistrate erred in laws and fact by convicting the appellant but failed to note that, the offence of robbery with violence was never in evidence to the rehired standard.**
>
> ***b.* That the learned trial magistrate erred in laws and fact by wrongly applying the doctrine of recent possession.**
>
> ***c.* The appellant further prays for re-sentencing hearing since the sentence awarded had been declared unconstitutional.**
>
> **d. Lastly that the defence of the appellant was truthful**.

7. The appellant filed written submissions in the appeal. On his part, Mr. Koima for the Director of Public Prosecutions, made oral submissions. He urged that the prosecution had proved the offence of robbery with violence and the appellant's involvement in it by the fact he was found to be in possession of the TV set which had been stolen from the complainant's house not so long after the incidence.

8. The appellant then responded, claiming that he had been arrested for being drunk at a site in gilgil and that the person who had been booked to be in possession of the TV set was a person by the name of Joseph Maina. He claimed that he was framed as the booking officer was not called to testify.

Issues for determination

9. Having carefully listened to the parties and considered the material before me, the issues for determination by the court are as follows:

a. whether the offence with which the Appellant was charged of robbery with violence contrary to section 296(2) of the Penal Code was proved, and

b. whether the appellant was one of the assailants.

Robbery with violence

10. In the case of **Oluoch v Republic [1985] KLR** the Court of Appeal clearly spelt out the ingredients of the offence of robbery with violence, as follows:

> **"Robbery with violence is committed in any of the following circumstances:**
>
> **a. The offender is armed with any dangerous and offensive weapon or instrument; or**
>
> **b. The offender is in company with one or more person or persons; or**
>
> **c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ………"**
>
> **The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code."**

11. Are these ingredients present in the present case? Here, PW2 testified that during the incident she was present and was in the house with her brother Samuel Ndungu, when two persons accosted them. According to her, one of the perpetrators was armed with a sword which he raised over her brother threatening him, while asking for money; that when they saw there was no money they made away with a TV set, a radio and two mobile phones.

12. There is evidence of the presence of two men and the possession of a sword used to threaten PW2 and her brother for money. This evidence fulfills ingredients (a) and (b) above in the offence of Robbery with Violence under **section 296(2)** of the **Penal Code.** The fact that neither the complainant nor any other person sustained any injury in the course of the robbery does not water down the offence. The offence cannot therefore be reduced to simple robbery.

13. The question that now remains is the identity of the persons who were involved in the commission of the crime. As is clear from the eyewitness testimony, the assailants were not recognised or identified at the time of the robbery.

Doctrine of recent possession

14. Where positive identification of an assailant robbery at the time of the incident is not possible, the law through the doctrine of recent possession, requires that a nexus is made between the assailant and his possession of the allegedly stolen goods. In the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic Cr App. No. 272 of 2005(UR)** court discussed the elements of proof for in the application of the doctrine of recent possession. The court stated as follows:

> **"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.**
>
> **In other words, there must be positive proof:**
>
> **i). that the property was found with the suspect;**
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> **ii). that the property is positively the property of the complainant;**
>
> **iii). that the property was stolen from the complainant;**
>
> **iv). 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."**

15. Applying these principles in the present case, the question arises as to whether the stolen property was found with the suspect. Reverting to the testimony of PW3, the OCS of Gilgil police station, he said he was on duty on 14th February, 2012 at 6.30 am, when he saw a suspicious-looking person on the roadside with a package wrapped in a sheet. He confronted the man, asked him to open the package and noted that there was a television set wrapped inside. When asked to explain what he was doing at that time with a TV set wrapped in a sheet he was unable to give a plausible account. As a result PW3 arrested man and took him to the police station together with the package. He left him at the station, and went on to attend to the duty he was scheduled for. The man was booked in the occurrence book by a different officer. However, PW 3 identified the Appellant in the dock as the person he had arrested with the TV set.

16. What is absolutely critical in reaching the conclusion leading to the application of the doctrine of recent possession is the unambiguous and clear linkage between the identity of the person in possession of the stolen property and the stolen goods. The person arrested must be positively identified with the stolen goods. If the link between his identity and the possession is lost, there must be evidence to re-ascertain the link.

17. PW4 the Investigating Officer was not present when the PW3 made the arrest. But he found the Appellant at the police station having been booked in by another officer. He produced the television set, which had the initials PEKN at the back, as an exhibit. The initials were identified as being those of the complainant, Peter Ndungu. PW 4 also stated that the Appellant gave the wrong name, Joseph Maina, when he was booked in the Occurrence Book.

18. However, I note a critical break in the link between the property and the person recorded as arrested. The officer who made the booking was not called to give evidence. Nor was any evidence placed before the court as to how the Appellant's proper name was finally discovered to be David Ndungu Njoroge. There were no witnesses at the time of the arrest. The OCS, after he made the arrest, should have been careful to ensure that the Appellant was indeed recorded in the occurrence book.

19. The Learned Magistrate correctly understood the import of the accused's protestations about having been arrested for being drunk and disorderly. He summarized the issue as follows:

> **"In determining whether the offence against the accused is proved, by the prosecution beyond reasonable doubt, the most crucial issue for determination is whether the accused is one and the same person who was booked with the Television set, namely Joseph Maina."**

20. According to the Police Occurrence Book, Joseph Maina was booked for having the television set. There was no booking for David Ndungu for drunk and disorderly. In Cross examination, PW4 asserted that the Appellant gave the wrong name when he was at the . However, he admitted that his statement did not show that fact. In re-examination he said: ***"IP Guyo who knew him (accused) told us he gave the wrong name".*** Inspector Guyo was not called to testify.

21. The Appellant gave an unsworn statement in which he stated he was arrested for being drunk and disorderly and taken to Gilgil police station. He was then charged with a strange offence. He denied the charge, and maintained his denial even at mitigation.

22. Faced with this evidence, the learned Magistrate found as follows:

> **"PW 1 explained convincingly why the difference in names in the occurrence book and the accused. The accused had given the wrong name, Joseph Maina, and IP Nguyo is the one who disclosed his real identity. Given the evidence, the accused appears to have started fabricating his defence from the onset. He made sure the wrong name was booked in the occurrence book. The police had no cause to release the real culprit and fix the accused. I am certain he is the one who was arrested while in possession of the recovered television set by PW3"**

23. I have carefully read the evidence of PW1. Nowhere does he explain, leave alone "convincingly", the reason for the difference in names between the accused and the occurrence book. PW 1 only convincingly explained the fact of the TV set having his initials and a record of the serial number. The learned Magistrate erred in relying on the evidence of PW1 to explain the OB discrepancy which could only logically be explained by the police themselves. They did not give an explanation that is plausible. IP Nguyo should have been called to give evidence. The mode and moment of discovery that Joseph Maina was in fact David Ndungu, if at all, should have been given in evidence. This was not done.

24. There can be no doubt that the police were and are the best placed body to ensure the correctness of the identity of persons arrested, or at least to maintain a clear link between the arrest and the person arraigned as having been in possession of the stolen goods. There was a lapse on the part of the police, and it is not for the accused to prove his innocence, but for the prosecution to prove guilt beyond reasonable doubt.

25. In the absence of any clear and convincing evidence that Joseph Maina was indeed one and the same person as David Ndungu who was found with the stolen goods, I think it is unsafe to affirm the conviction, as that would be shaky ground. Further, the learned Magistrate's reliance on the evidence of PW1 to prove the mistake in the recording of the occurrence book was erroneous as I have shown.

26. Accordingly, I allow the appeal and quash the conviction and sentence meted. The Appellant shall be set at liberty forthwith, unless otherwise lawfully held.

27. Orders accordingly.

Dated and Delivered at Naivasha this 18th Day of October, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. David Njoroge the Appellant

2. Mr. Koima for the State

3. Court Clerk – Quinter Ogutu