REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 88 OF 2015

(Formerly Nakuru HC.CR.A. 28 and 29 of 2013)

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 3293 of 2011 of the Chief Magistrate's Court at Naivasha –E. Boke, PM)

SAMUEL NDUNGU WAIRIMU……1ST APPELLANT

SAMUEL MURUGI KARANJA……...2ND APPELLANT

-VERSUS-

REPUBLIC…….....RESPONDENT

J U D G M E N T

1. Criminal Appeals No. **HCCRA 28** and **29 of 2013** both filed in the High Court of Kenya at Nakuru were consolidated by this court on 2/6/2016, under High Court Criminal Appeal 29 of 2013 in the corresponding **Naivasha High Court Criminal Appeal No. 88 of 2015,** opened upon their transfer to Naivasha. Thus the Appellant **Samuel Ndungu Wairimu** in **Nakuru Criminal Appeal No. 29 of 2013** became the first Appellant while **Samuel Murugi Karanja** (Appellant in **Nakuru Criminal Appeal 28 of 2013**) became the 2nd Appellant.

2. The 1st and 2nd Appellants were the 1st and 2nd Accused, respectively, in **Naivasha Criminal Case No. 3293 of 2011** wherein they faced two counts of Robbery with violence contrary to Section 295 as read with 296 (2) of the Penal Code. They faced an alternative charge of Handling stolen property contrary to Section 322 of the Penal Code in respect of each main count.

3. The particulars of the charge in the first main court were as follows:

> **"On the night of the 5th and 6th day of November 2011 at Kanyugi village, Engineer location in Nyandarua County, jointly while armed with dangerous weapons namely knives they robbed off Francis Mwangi Kio items under listed to the attached sheet and immediately before the time of such robbery used actual violence to the said Francis Mwangi Kio." (sic)**

4. Regarding the second main count the charge particulars stated that:

> **"On the night of the 5th and 6th day of November 2011 at Kanyugi village, Engineer location in Nyandarua county, jointly while armed with dangerous weapons namely knives they robbed off Victoria Lucy Mwangi one Nokia 1680 valued at Kshs 3,800/= and cash 13,000/= and immediately after the time of such robbery used actual violence to the said Victoria Lucy**

Mwangi." (sic)

5. The particulars in respect of the alternative charges are also set out in the charge sheet. The Appellants denied the offences, but following a full trial they were found guilty on the two main counts. The 1st Appellant was sentenced to death, while the 2nd Appellant who was proved to have been a minor at the time of the offence, was ordered detained at the President's pleasure.

6. The Appellants, aggrieved by the outcome, filed their appeals. On the day set for the hearing of the appeals, the court admitted their amended grounds of appeal and the appeal proceeded to hearing. I propose to first summarise the respective cases as presented through the evidence of the prosecution and the defence at the trial.

7. The prosecution case was as follows. The complainant in the first main count, **Francis Mwangi Kio (PW2)** was a teacher at Mwiteithia Primary School and at the material time resided at Kanyugi village, which is under the jurisdiction of Kinangop Police Station. On 5/11/2011 at about 9.20pm he was in his house in the company of his wife **Victoria Lucy Mwangi** (**PW3**) when two hooded men burst in. They were armed with knives and menacingly approached the complainants. They demanded for money while ordering the complainants to lie down.

8. They claimed to have been paid Shs 40,000/= to "finish" the couple and therefore demanded a sum of Shs 100,000/= to spare their lives. The couple pleaded with them by offering them valuables in the home. The robbers took the complainant's mobile phones and ransacked the home. As **PW2** lay face down with his injured hands tied down, the robbers forced **PW3** to part with cash Shs 13,000/=. The robbers continued to look for valuables. Household goods which included a television set, computer, DVD player, woofers, speakers as well as assorted clothes were packed inside three suit cases and a bag. About 4.00am the robbers left the home with the goods. Immediately, **PW2** freed himself and rushed to Kinangop Police station where he made a report. **PC Odongo** (**PW1**) visited the home and commenced investigations.

9. Meanwhile, at about 5.00am a motor cycle taxi operator **John Gachango Nyokabi** (**PW5**) was at the Engineer stage dropping off a customer after 5.20am when he saw two men carrying several pieces of luggage. He saw them board a matatu vehicle KBK 537W. Thus when **PW2** approached him minutes later to inquire if he had spotted two young men carrying luggage, he confirmed and was able to lead **PW2** and **PW1** to the home of the vehicle conductor **Samuel Mwangi Maina** (**PW4**). **PW1** rang **PW4** instructing to drive the vehicle at the time headed for Limuru, to the nearest police station. The vehicle was driven to Lari Police Station, with **PW1** and **PW2** following closely behind, and arriving at 7.00am.

10. The vehicle was received by **PC Moraa** (**PW6**) who retrieved the packed bags from the two men identified as the first and second Appellant. On being opened the bags revealed the assorted goods later identified by **PW2** as property stolen from his home. Two phones which had been treated as prisoners' property were included therein. The 1st complainant also identified clothes which the 2nd Accused wore on top of his own clothing, namely, a blue jacket, blue/black jeans trouser, white T-shirt, stripped short and jumper (**Exhibit 5a – e**) as his stolen clothes. **PW2** also identified the 2nd Appellant as a former pupil in his school.

11. During a further search a sum of Shs 11,200/= was found hidden in the zipped collar of the jacket worn by the 1st Appellant. All the recovered items, together with ownership documents tendered by PW2 were produced in court as **exhibits 1 – 33** in the course of the trial.

12. In their defence, the Appellants opted to give unsworn statements. The 1st Appellant told the trial court that he had resided at Engineer town since 2008 and was engaged in selling second hand shoes. Early on the morning of 6/11/2011 he intended to travel to Gikomba, Nairobi to buy stocks. On his person was Shs 10,350 in cash and Shs 20,000/= on MPESA (phone). He boarded a matatu at Engineer town, but before Limuru town, the matatu was diverted to Lari Police Station. He was placed in custody prior to the arrival of **PW1**. **PW1** upon searching him found his Shs 10,200/=. He exclaimed then that

the Appellant was "one of them". Together with another passenger unknown to him he was taken to Kinangop police station. He denied the offences.

13. The 2nd Appellant stated in his unsworn statement that he lived at Kanyungi village, Engineer with his parents and was a student at Mwandandi Secondary School. He boarded a matatu early in the morning of 6/11/2011 at Engineer stage. His destination was Limuru where he intended to obtain school fees from his brother. He had no luggage. As the vehicle approached Limuru, the driver diverted into Lari Police Station where all the passengers were ordered to alight. He was placed in custody. Later **PW1** collected him. He denied the offences.

14. The 1st Appellant raised five amended grounds, the material ones being grounds 3, 4 and 5, to the effect that:

> **"3. That she (trial magistrate) erred in law and facts in putting reliance upon totally inconsistence and contradictory prosecution evidence.**
>
> **4. That she erred in law and facts in applying the doctrine of recent possession without finding that there was no inventory, nor the exhibit list signed by either the accused person or the arresting officer.**
>
> **5. That she erred in law and fact in not finding that my defence was plausible enough to over throw the fabricated prosecution case."**

15. On ground 3 the 1st Appellant cites what he refers to as inconsistencies on the date of the robbery report per **PW1** and other witnesses, and the name attributed to him (**Samuel Mwangi**) by **PW4**. He also challenges his purported identification at the scene of offence and failure by the complainants to give a description of the robbers in their first report to police.

16. Regarding grounds four and five he took issue with the evidence of **PW6,** in particular, her failure to prepare an inventory, and her reference to two suit cases containing electronic goods, while the complainant talked of four suitcases as having being stolen. In his view, the evidence of possession is fabricated, more so because nobody identified him at the robbery scene. He further asserted that he gave a good and truthful defence.

17. For his part the 2nd Appellant similarly relied on five grounds of appeal. In ground two he faulted the application of the doctrine of recent possession in this case, because in his view Section 118 of the Criminal Procedure Code and Sections 19 and 20 of the Police Act were breached. Ground 4 refers to material contradictions in the prosecution evidence while in ground 5 the 2nd Appellant complains that his defence was not considered.

18. His other grounds, also similarly raised by the 1st Appellant relate to the constitutionality of the sentence and observance of the provisions of Article 50 (2) (g) and (h) of the Constitution at the trial. I will be dealing with those at the end of my judgment.

19. On ground 2, the 2nd Appellant submitted that the evidence of **PW6** was inadequate to connect him with the stolen goods, and that no independent witness was called to give evidence on that score. He points to **PW6's** failure to prepare an inventory of the goods and the discrepancy between her evidence and the complainant's on the number of the suit cases involved. In respect of ground 4, the 2nd Appellant highlights instances of contradictions by witnesses **PW1**, **PW4**, **PW5** and **PW6** as to the registration mark of the matatu in which he was travelling. In his opinion, the evidence of possession is riddled with discrepancies and should be disregarded.

20. Pointing to the inability by the complainants to identify the robbers at the scene, the failure by them to give a description of the robbers in their first report, the 2nd Appellant dismisses their alleged

identification as worthless. Regarding the fifth ground the 2nd Appellant reiterated the defence he gave in the lower court.

21. Mr. Koima representing the Director of Public Prosecutions opposed the appeal. He reiterated the evidence adduced by the prosecution at the trial. He sought to rely on the decision of the Court of Appeal in **Morris Ochieng Juma & 3 Others -Vs- Republic [2012] eKLR** on the application of the doctrine of recent possession. He submitted that the Appellants were found in possession of the stolen goods within hours of the robbery but did not give a reasonable explanation for the possession.

22. The Court of Appeal for Eastern Africa set out the duty of the first appellate court in **Pandya -Vs- Republic [1957] EA 336** as follows:-

> ***"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."***

23. In this case there is no dispute that the two accused were both travelling in the same matatu from Engineer town, their home town, towards Nairobi on the morning of their arrest. At Limuru, the driver of the matatu diverted to Lari Police station. Officers at the station ordered all the passengers to disembark with their goods. The two accused were detained along with the suspected stolen goods. Soon, they were handed over to **PW1** who took them to Kinangop Police Station. They were eventually charged.

24. There seemed to be hardly any dispute concerning the occurrence of robbery at **PW2's** home on the night of 5th and 6th November 2011, and that several household goods were stolen during the said robbery. Further there seemed to be no dispute that some goods stolen from **PW2** and **PW3** were found in the matatu in which the two Appellants were travelling on the material morning. The real sticking point in this case was whether the two Appellants were in possession of the said stolen goods, and ultimately whether the doctrine of recent possession could be applied in the case in proof of the Appellants' respective guilt.

25. As the trial magistrate observed, identification evidence by **PW2** and **PW3** of the persons who robbed them was inconclusive. Although there were lights on, the two robbers wore masks or had hooded faces, which made identification difficult. Thus the whole prosecution case rested on the evidence of possession of stolen goods. This evidence was in a chain, commencing with the robbery itself, the sighting of the two young men with bags at Engineer stage to their presence on the matatu and eventual arrest at Lari Police Station and the recovery of the goods exhibited in court. In this regard the evidence of **PW1** to **PW6** must be viewed as a whole as it paints the entire transaction from start to finish.

26. The evidence, hardly challenged, by **PW2** and **PW3** was that the robbers having burst into their home at 9.30pm on 5/11/2011 left at about 4.00am on the next day 6/11/2011. They took with them family goods packed in suitcases, and money. Although **PW2** lay face down and was trussed with ropes in the course of the robbery, **PW3** was left free and interacted with the robbers as they made various demands and collected valuables amidst threats of violence.

27. She stated in part during her Evidence-in-Chief:

> **"The unmasked man asked for receipts for those electronics but I told him that I did not have**

it. He also ordered me to give him carton for television set but I got up to look for one and he accompanied me but we failed to set it. He looked for packing bags for himself…..got a big suit case from my daughter's bedroom and two (2) other suitcases from our bedroom. The big suitcase was packed with television set supported with goods."

She also indicated that a large green bag was taken by the robbers when they left "*around 4.00am heading to 5.00am*."

28. Immediately after the men left, **PW2** left home and reported the incident at Kinangop Police Station. **PW2** said that the *boda boda* man, **PW5** informed him that a vehicle had left the stage 20 minutes before his arrival at the stage. **PW5** placed the time of his sighting "*two men carrying bags on their backs and holding others with hands*" at 5.00am while he was at the Engineer stage. He witnessed them board and depart in matatu **KBK 537N** headed for Nairobi. He confirmed that **PW2** approached him only minutes later with his inquiry. **PW5** assisted the police and **PW2** trace the home and phone contact of **PW4**.

29. This latter witness stated that while at Engineer at 5.00am the two men he later handed over to **PW6**, approached him and inquired concerning payable fare to Limuru. The two had luggage and that he had proposed that it be stored in the boot, which proposal the passengers rejected. He said that the luggage was with the two passengers during the journey from Engineer towards Limuru. In all he said there were four (4) suit cases and bags. **PW4** said that upon receiving the call by police he confirmed the presence of the luggage in the matatu. In cross examination by the 1st Appellant he stated:

"He (Police Officer) talked of suit cases and bags in my motor vehicle there were no other passengers with suit cases and bags besides you (Appellants). The other passenger had gunny bags and baskets."

30. According to **PW6** when the vehicle drove into Lari police station, the two suspects had two suitcases containing electronic goods as well as phones and money. Admitting during cross-examination that she did not make an inventory, beyond recording the phones found on the Appellants' person in the occurrence book, **PW6** stated during cross-examination by the 2nd Appellant that:

"The driver told me where the suspects were seated in the motor vehicle who fitted the descriptions of the suspects he had been given on phone. I found you with luggages he was talking about……I did not take an inventory of the goods. Only kept phones as your property……..

You are the one who had both phones……..I did not specify who between you had what because you alighted and placed luggages together as you were getting more goods from the matatu so it was hard to know who was handling what."

31. The phones were marked **Exhibit 12(a)** and **12 (b)** and were identified to be part of property looted from **PW2** and **PW3**. Equally three suitcases (large, medium and small) and a large black bag (**Exhibit 29 a – c)** and **30**) were tendered by **PW1** as the packaging of the goods exhibited. The seeming contradiction between the evidence of **PW6** and **PW1** in connection with the number of bags is insignificant in my opinion and cannot be the basis of dismissing the testimony of **PW6**. In that regard, the only serious complaint raised by the Appellants concerns the failure by **PW6** to prepare an inventory.

32. As desirable as it might be to have an inventory prepared at recovery, the failure to prepare one cannot displace the physical evidence and existence of goods placed before the court as in this case. In the case of **Leonard Odhiambo Ouma and Another -Vs- Republic [2011] eKLR** the Court of Appeal discussed the effect of failure to prepare an inventory on recovery. The court observed that:

"Failure to compile an inventory as contended in ground 5, is in our view a procedural step which in the circumstances, did not prejudice the Appellants in any way and for this reason, the omission did not vitiate the trial. We find no substance in this ground as well."

33. Later, the High Court observed in **Stephen Kimani Robe and Others -Vs- Republic [2013] eKLR** that such failure:

> ***"The purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence."***

34. Further, in addition to the items packed in the bags, evidence by **PW1** and **2** points to the fact that the 2nd Appellant was at the time wearing clothes identified by **PW2** as his property. The trial magistrate believed, upon considering the evidence that the 2nd Appellant was found wearing some of **PW2's** clothes including a T-shirt, jacket, trouser on top of his own clothes [**Exhibit 5a – 5e**]. Also found on the 1st Appellant was the sum of Shs 11,200/- hidden in the jacket zipper. This was taken by police to be part of the Shs 13,000/= which **PW3** gave the robbers in a bid to save her husband from imminent death.

35. The possession by the 1st Appellant of this money was not disputed, nor the two **Nokia** phones recorded as the Appellants' property on arrest, but later proved to be part of the goods stolen from **PW2** and **PW3**. It matters not that **PW6** could not tell exactly who among the Appellants had the phones on him. The 1st Appellant indirectly admitted possession of a phone by stating that he had Shs 20,000/= in MPESA on arrest.

36. I am of the view, reviewing the prosecution evidence, that it was overwhelming and displaced the Appellant's defences in so far as the possession of the stolen goods was concerned. I can find no reason for total strangers such as **PW4, PW5** and **PW6** to falsely implicate two innocent persons with possession of stolen goods. The succession of events in this case was such that the Appellants' possession of the goods while at stage and in the matatu was unbroken until the time of their arrest at Lari Police Station.

37. And even as they alighted, each person (passenger) came out with their goods. If indeed the Appellants had nothing to do with the packaged goods while travelling in the matatu there can be no rational explanation for possessing on theirs persons – whichever one of them – both of the complainants' phones, as well as money and clothes identified to belong to **PW2** and **PW3**. This finding in particular gives much weight to evidence by **PW4** and **PW6** as regards the fact that apart from the Appellants nobody else had any suit case luggage on boarding the vehicle. These phones, money and clothes found on the Appellants' persons connected them strongly to the suitcases containing other property stolen from **PW2** and **PW3**.

38. The Appellants were seen carrying the goods in question by **PW4** and **PW5** about 5.00am, which is less than an hour since the robbers leaving **PW2's** home with the loot. It was indeed within minutes of the end of the robbery ordeal at **PW2's** home. The Appellants strenuously sought to distance themselves from the goods in question during the trial. The trial court correctly found that the fact of possession was proven and that the Appellants had not given any reasonable explanation for the possession. In my view the court property directed itself.

39. On application of the doctrine of recent possession of stolen goods, the Court of Appeal stated in ***Ogembo -Versus- Republic, [2003]1 EA,*** to the effect that:

> ***"For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen."***
>
> **Recently, this Court in *Moses Maiku Wepukhulu & PAUL NAMBUYE NABWERA -Versus- Republic CR.A NO. 278 OF 2005* (Koome, Mwera & Otieno-Odek, JJ.A.) quoted with the approval what constitutes the doctrine of recent possession in the case of *Malingi -Versus- Republic, [1989] KLR 225*:**

"By the application of the doctrine 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. That the item he has in his possession has been stolen; it has been stolen a short period prior to their 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 the circumstances of the case) recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items."

The doctrine is a rebuttable presumption of fact. Accordingly, 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 or was a guilty receiver.

As was aptly stated in the case of *Hassan -Versus- Republic, (2005) 2 KLR 151:*

"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."

40. And in **Morris Otieno Juma & 3 Others –Vs- Republic [2012] eKLR** the court stated:

"We have carefully considered the Appellants' respective appeals. There are concurrent findings of fact by the two courts below, that through the 4th Appellant the 1st, 2md and 3rd Appellants were arrested and with them were found several items which the complainant positively identified as part of the property which was stolen from her in the course of a robbery. The recovery was made within three days of the robbery complained of, and the lapse of time was recent enough to invoke the doctrine of possession of recently stolen property. It is a doctrine which operates on the basis of the rebuttable presumption of fact under Section 119 of the Evidence Act that the person in possession is either the thief or a guilty receiver. Being a rebuttable presumption, if a suspect offers a reasonable explanation as to how he came into possession of the property the presumption would be displaced.

Both courts below having rejected the respective Appellant's explanations, the presumption applies."

41. In my considered view, the trial court correctly applied the doctrine of recent possession in this case where goods belonging to **PW2** and **PW3** and proved stolen from their home on the night of 5th November and 6th November 2011 were found in the possession of the Appellants within hours of the end of the robbery. Even though the arrest occurred an hour or two later the possession was unbroken as the Appellants were seen carrying the goods to the stage, boarding and travelling in a matatu by witnesses (**PW4** and **PW5**) and were eventually arrested while in possession thereof by PW6. The Appellants made no claim to any of the goods, save Shs 11,200/= which in the circumstances of this case could not have belonged to the 1st Appellant, and was properly treated as part of the money violently taken from **PW3** in the course of the robbery.

42. The robbers who struck at **PW2's** home numbered two, at least and wielded knives. They injured **PW2** with a knife and also trussed him. They also mishandled **PW3** leading to her sustaining swollen legs. These injuries are well documented in the respective P3 forms. All in all the prosecution evidence was overwhelming and the Appellants defences were properly rejected by the trial court.

43. Finally, as the Appellants have submitted it is true that under Article 50 (2) (g) and (h) of the Constitution an Accused person is entitled to have an advocate assigned to him at state expense, "**If substantial injustice would otherwise result**." The right is not absolute but applies within circumscribed situations. Having perused the record herein, I note that the Appellants represented themselves robustly and successfully demanded the recall of witnesses and other material evidence. With regard to the 2nd Appellant whom it seems was about 17 going to 18 years of age at the time of the

offence, the Appellant only raised the question of his age upon conviction. His claims in February 2013 that he was 17 years old, were displaced through an age assessment which revealed his age as 19 years of age at the end of 2013. The 1st Appellant was an adult.

44. In my view, nothing turns on the question of non-provision of legal representation at state expense. Further the sentence meted out is legal and not unconstitutional as was claimed on this appeal. I can find no merit in the appeals and will dismiss both accordingly.

Delivered and signed at Naivasha, this 13th day of April, 2017.

In the presence of:-

Mr. Mutinda for the DPP

Appellant – 1st present

2nd present

C/C – Barasa

C. MEOLI

JUDGE