REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 227 Of 2012

DAVID OMASA WANYAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the

Chief Magistrate's Court at Kibera Cr. Case No. 3443 of 2010

delivered by Hon. A. Mwangi, PM on 13th August, 2012).

JUDGMENT.

Background.

Davide Omasa Wanyama, the Appellant herein was the first accused in the trial having been charged alongside three others in count I with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on 10th August, 2010 at Mbandu stores and hardware in Langata division within Nairobi Area, jointly with others not before the court being armed with dangerous weapons namely pistols robbed Joab Bosire of Kshs. 20,503/= of 30 tonnes of sand, 18 rolls of hoop iron, 26 packets of welding rods, assorted paints, 36 peggler taps, 10 digging forks, 3 digging jembes, 4 rolls of chicken wire, 20 hammers, 10 packets of metal drill bits, 5 pieces of cutting discs, 4 packets of window stays, 4 packets of window handles, 20 pieces of plastic beds, 9 union door locks, 53 tri circle padlocks, 5 spades, a mobile phone make Motorola L7, 2 title deeds and a lorry registration number KBE 811E Isuzu FVZ all valued at Kshs. 8,924,793/- and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Joash Bosire.

In Count II he was charged alongside three others with conspiracy to commit a felony contrary to **Section 393 of the Penal Code**. The particulars of the offence were that on 5th August, 2010 at Kibera Karanja Stage in Langata division within Nairobi area, jointly with others not before the court conspired together to commit a felony namely to rob Daniel Mulili of his lorry registration number KBE 811E Isuzu FVR and hardware goods.

In Count III he was charged alone with the offence of being in possession of forged bank notes or currency contrary to **Section 359 of the Penal Code**. The particulars of the offence were that on 10th August, 2010 at Kibera in Langata within Nairobi Area, without legal authority or excuse had in his possession 2 forged currency notes of Kshs. 1,000/- knowing them to be forged.

In Count IV he was again charged alone with the offence of being in possession of an imitation firearm contrary to **Section 34(1) of the Firearms Act, CAP 114, Laws of Kenya**. The particulars of this offence were that on 10th August, 2010 at Kibera in Langata Division within Nairobi Area was found in possession of imitation firearm.

The 3rd accused was acquitted under **Section 210 of the Criminal Procedure Code** whilst the 2nd and 4th accused persons were acquitted at the conclusion of the trial. The Appellant was acquitted in Counts II, III and IV. He was convicted in Count I and sentenced to death. He has lodged the instant appeal against the conviction and sentence. He relied on amended grounds of appeal filed contemporaneously with written submissions on 23rd October, 2017. They were that the charge sheet was defective, that the learned magistrate shifted the burden of proof upon him, that the prosecution evidence was contradictory, that his defence was not considered, that the doctrine of recent possession was not properly applied and that the learned trial magistrate failed to uphold his right to legal representation.

Submissions.

The Appellant relied on written submissions filed on 23rd October, 2017 and additional oral submissions made on 1st November, 2017.He submitted that the charge sheet was defective because the evidence adduced did not support the charge. This was with respect to the fact that he was charged with the offence of robbery with violence at which time he was armed with a pistol. He submitted that the evidence did not disclose that he was armed with a pistol. In that regard, his view was that the charge ought not to have been drafted under **Section 296(2) of the Penal Code**. Further that the prosecution ought to have seized the earliest opportunity to amend the charge sheet so as to align it with the evidence adduced.

The Appellant further submitted that the evidence adduced was contradictory and did not found a basis for his conviction. He cited the evidence of both PW3 and 9 whom the court heavily relied on in convicting him. According to the Appellant, each gave a different account of where he was arrested in relation to the position of the stolen motor vehicle. He submitted that according to PW3, he and another were found inside the motor vehicle whereas PW9 testified that only he was inside the motor vehicle whilst his colleague was found standing by the motor vehicle. His view was that this was a material contradiction rooting to the basis of the case which the court ought to have found had weakened the prosecution case.

He also faulted the learned trial magistrate's reliance on the doctrine of recent possession which he submitted was wrongly applied. According to the Appellant, the court ought to have had regard to the conflicting evidence of both PW3 and 9 and thereby find for him by upholding that he was not in possession of the stolen motor vehicle. Furthermore, no evidence was adduced linking him to the robbery itself.

The Appellant further faulted the learned trial magistrate's failure to uphold his alibi defence which if he had would have arrived at a different verdict. He in addition submitted that his right to legal representation was violated. He submitted that throughout the trial he was unrepresented by a legal counsel in contravention of **Article 50(2) (g)(h)**. Finally, he submitted that the death sentence imposed was harsh and excessive in the circumstances. He urged the court to quash the conviction and set aside the death sentence. Amongst the cases cite in support of the submission were **Yongo *v.* Republic[1983] eKLR, State of Uganda *v.* Wagara[1964] EA 366**,**Juma Ngodia *v.*Republic[1982-1988] KAR 454** and **Victor Mwendwa Mulinge *v.* Republic[2014] eKLR.**

Learned State Counsel, Ms. Sigei opposed the appeal. She submitted that the Appellant was convicted purely on the basis of the doctrine of recent possession. She submitted that this was proved by the evidence of PW3 and PW9 who found him in actual possession of the recently stolen vehicle. She denied that the charge was defective citing that in any case the Appellant had not raised the issue during the trial. She also denied that the trial court shifted the burden of proof upon the Appellant. She submitted that the Appellant's defence was considered and dismissed. With regard to legal representation she submitted that the Appellant had an advocate on record throughout the trial and as such his right to a fair trial was not violated. She concluded by stating that the sentence imposed was legal and accorded to **Section 296(2) of the Penal Code**. She urged the court to dismiss the appeal.

Evidence.

The prosecution's case was that the Appellant and others orchestrated a robbery at the complainant's store and got away with a number of items including a lorry. When the robbery was reported the lorry's number plates were circulated to police officers two of whom came across it being fueled. They approached the vehicle stealthily and arrested the Appellant who was in the vehicle. The complainant, **Daniel Musyoki Mulili** testified as **PW1**. He ran a hardware and transport business within Kibera. On the material date on 9th August, 2010 he was at his business premises until 5.00 p.m. When he checked out of his work, he left his three lorries parked at his business premises. Amongst his vehicles was a lorry Reg. KBE 811E. At about 3.00 a.m of the following morning, he was called by his watchman **PW7, Joash Bosire** informing him that there had been a robbery at his hardware. He was informed that the store was broken into and several items stolen. He proceeded to the scene where he found PW7 tied up with ropes on his hands. It was PW7 who informed him that at about 2.00 a.m., seven robbers had struck the premises, two being armed with pistols and one with a big gun. The G4S Security guards made a report to the police which included that PW1's motor vehicle KBE 811E had been stolen. Meanwhile, both PW3 and 9 who were administration police officers from Kibera DC's office were on patrol within Karanja Area when they spotted the motor vehicle at a nearby petrol station being fueled.

According to **PW3, APC Simon Kangoyo,** when they spotted the motor vehicle, they approached it and saw three men seated at the front cabin. One of the occupants was on the driver's seat and the other on the passenger's seat. When they saw them, the person on the passenger's seat jumped off the motor vehicle and started running away. His colleague PW9 gave chase but was unable to catch up with him. They therefore arrested the passenger on the driver's seat who is the Appellant herein. In corroborating the evidence of PW3, **PW9, APC Isaac Murugo** testified that the suspect who fled was by the side of the motor vehicle but the Appellant was on the driver's seat and was unable to flee as a result of which they apprehended him. Upon a search on the Appellant they recovered two currency notes of Kshs. 1,000/ which were counterfeit and a toy pistol stuck on his waist. He also had a black hood in his pocket.

PW4, Chief Inspector Jacob Oduor a document examiner at CID headquarters examined the two currency notes and confirmed they were counterfeit. **PW5, PC Charles Omwando Omuga** of CID Nairobi was a scene of crime officer who took photo graphs of the stolen motor vehicle as well as of the scene of the robbery. He produced the necessary photographs as exhibits. **PW6, Chief Inspector Alex Chirchir** was a firearm examiner at CID headquarters. He was tasked to ascertain whether the pistol recovered from the Appellant was a firearm within the meaning of the **Firearms Act, Cap 114, Laws of Kenya**. Upon examination, he concluded that the pistol was an imitation firearm as defined under the Act**.**

According to the prosecution the plan to orchestrate the robbery had been hatched way back in July, 2010. The Appellant had met **PW2, Michael Muyugari** whom he tried to entice into a conspiracy to participate in some work after which he would be paid Ksh. 100,000/. The two met a few more times but PW2 developed a cold feet and stopped picking calls from the Appellant. He later learned that the work was about being involved in the robbery after the Appellant was arrested. The testimony of PW2 gave rise to the offence of conspiracy to commit a felony.

PW10, PC James Njuki then of Hardy Police Station was the investigating officer. He summed the evidence of prosecution witnesses and

preferred the charges against the Appellant and his co-accused. He also produced necessary exhibits.

After the close of the prosecution case, the court ruled that the Appellant had a case to answer. He gave a sworn statement of defence in which he denied committing the offence. His defence was that on that on the fateful night when he was arrested, he was at the petrol station at about 5.40 a.m. to collect milk. He was together with about eight others when some police officers who were on patrol approached them and hand-cuffed all of them alleging that they were members of the outlawed Mungiki sect. Upon a search, police took his cash Kshs. 42,000 and ID card and a voters card. He was thereafter escorted to Hardy Police Station where he was put in custody for about four days. He stated that he was taken to court on 20th August, 2010 but took plea on 11th February, 2010. He called one witness **Alex Mutola Muinamo** who was **DW4.** His testimony was that a passerby at the petrol station within Karanja Area and he witnessed AP officers rounding up a group of men who were at the bus stop near District Officer's office. He stated that he also saw the police take away the Appellant's wallet. At about 1.00 p.m. he called the Appellant's wife and informed her what he had seen.

Determination

The Appellant was convicted solely on the basis that he was found in possession of a recently stolen vehicle, namely a motor vehicle registration number KBE 811E the property of PW1. The complainant, Daniel Musyoki Mulili, testified as PW1 and was able to prove the ownership of the motor vehicle. Apart from a tin of paint that was recovered inside the motor vehicle nothing else was recovered. On condensing the evidence of the prosecution the only portion that would link the Appellant to the actual robbery was that of PW2. PW2 testified that he had been roped in a conspiracy to participate in the robbery but pulled out. This gave rise to the framing of count II. Unfortunately the prosecution was unable to build a strong case in respect of that charge leading to the acquittal of the Appellant and his co-accused. This then drives me to reassess the evidence and to determine whether the circumstances of the arrest of the Appellant linked him to any other offence other than the one he was convicted for.

The arresting officers were both PW3 and 9. They were both administration police officers from Langata DC's office. They were on patrol on the night of the robbery within Kibera area. They sighted a lorry being fueled at a petrol station within Karanja area. PW3 testified that he saw two men inside in the front cabin. Their vision was aided by electric light emanating from the petrol station. When the persons in the lorry saw them the person on the driver's seat ran away and he gave chase leaving his colleague behind. He was unable to catch up with the person he was chasing. On returning to the petrol station he found that PW9 had arrested the other suspect who is the Appellant.

The evidence of PW9 on the other hand whilst corroborating that of PW3 was that one suspect was inside the lorry while the other stood beside it. When the suspects spotted them the one beside the lorry fled and they arrested the one inside the lorry, who is the Appellant.

No doubt that the evidence of PW3 and 9 was consistent with regard to how the Appellant was arrested. There is also no shadow of doubt that he was arrested inside the stolen lorry. His defence that he was nowhere near the scene of the arrest is a belated attempt to save his soul which unfortunately is ousted by the strong prosecution evidence. In my humble opinion, although no concrete evidence linked him to the robbery he was arrested in possession of a motor vehicle which he knew or had reason to believe it to be stolen. Therefore, even if the offence of robbery with violence could stand the evidence established the offence of handling stolen goods contrary to **Section 322(1)** as read with **322(2) of the Penal Code**. For avoidance of doubt, **Section 322(1)** provides as follows:

> ***A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding 14 years***

Handling stolen goods is itself defined under sub section (1) as follows:

> ***A person handles stolen goods if, otherwise than in the course of the stealing, knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.***

Suffice it to state, by the time the Appellant was found inside the vehicle he knew very well that the same did not belong to him and was therefore dishonestly detaining it either for his own or other persons benefit. In no uncertain terms the court must find him culpable for this offence.

The upshot of my finding is that the Appellant's defence could not bail him out to the extent that he was an innocent person. I find that the prosecution proved the offence of handling stolen goods under **Section 322(1) of the Penal Code** and I convict him accordingly. I therefore quash the conviction and set aside the death penalty.

I underscore the fact that the Appellant was throughout the trial except at defence hearing represented by an advocate. He gave his defence on 18th June, 2012 when the Legal Aid Bill was not operational. In that case he was not entitled to legal representation at State expense. His submission that his right to legal representation was violated is baseless.

Section 322(2) of the Penal Code provides for a penalty of a term not exceeding fourteen years. I note however that the Appellant has been in remand since he took plea on 20th August, 2010. To date he has been in remand for six years and 4 months in custody. The record shows that he was a first offender. The principle governing sentencing is that it is not prudent to impose the maximum sentence unless the law so provides. My view is that the period served in custody this far is sufficient deterrent sentence. I therefore order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED THIS 20TH DAY OF DECEMBER, 2017

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. *Miss Sigei for the Respondent.*