**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPEAL NO 174 OF 2013**

**NATHAN OCHICHI LERAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal against the original conviction and sentence of T.A. Odera, PM in Criminal Case No. 773 of 2012**

**delivered on 13th May 2013 in the Principal Magistrate's Court at Mavoko)**

**JUDGMENT**

The Appellant was charged with the offence of robbery with violence contrary to Section 295 as read together with section 296(2) of the Penal Code. The particulars of the offence were that on the 24th day of October 2012 at Kitengela township within Kajiado County, being armed with dangerous weapon namely a bolted rungu robbed Daniel Ouma Odera of Kshs. 3000 and a mobile phone make Nokia C3 all valued at Kshs. 8,500/=, and at the time of such robbery used actual violence against the said Daniel Ouma Odera. The Appellant was arraigned in court on 25th October 2012 where he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to life imprisonment.

The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal by way of a Petition of Appeal filed in court on 10th June 2013. The Appellant also availed to the Court amended grounds of appeal dated 19th November 2015 and written submissions of the same date during the hearing of the appeal.

The grounds of appeal relied on by the Appellant are that the learned magistrate erred in law and facts to base the conviction on the doctrine of recent possession of exhibit 1 whose recovery evidence by PW1 and PW2 was unreliable; that the trial magistrate erred in relying on insufficient circumstantial evidence which was weakened by co-existing circumstances; the case was not proved beyond reasonable doubt and that his alibi defence was not given due consideration as was entitled by section 169 of the Criminal Procedure code.

The Appellant argued in his submissions that PW2 and PW3 did not establish the location of the robbery in order to conclude that it was the direction he had emanated from. He also stated that the evidence of PW2 and PW3 had contradictions in describing the scene or its surrounding and the light used in the observation. He further questioned the testimony of PW2 and the recovery of exhibit 1, in particular the existence of a woman who had called the mobile phone and why there were no investigations on the

mobile number of the said woman and why she was not summoned in court to testify. He further submitted that the Kshs. 3,000/= and the mobile phone were not recovered on him, and therefore that this fact should exonerate him.

Ms. Rita Rono, the learned Prosecution counsel filed submissions on 9th February 2016 wherein it was argued that the prosecution had proven the case beyond reasonable doubt. The counsel stated that PW1 knew the Appellant as a watchman at his friend's plot and he had seen the Appellant following him through the aid of lights that were lit on both sides of the road. It was further submitted that PW1 had seen the Appellant hit him with a rungu and he had lost Kshs. 3000 and a mobile phone that was recovered from the Appellant.

The Prosecution counsel noted that PW1 had produced a receipt which proved ownership of the phone, and that PW2 and PW3 had corroborated the testimony of PW1. The prosecution also relied on the doctrine of recent possession as the phone that belonged to PW1 was recovered from the Appellant and this was corroborated by PW2 and PW3. The decision by the Court of Appeal in **Martin Kirimi Mugambi vs David Mutuma alias Gatune (2013) e KLR** was cited in this respect.

On the Appellant's defence of alibi, it was submitted that the Appellant should have informed the prosecution at the earliest time possible and not during his defence so as to give the prosecution enough time to ensure that the alibi established reasonable doubt. Reliance was placed on the decision in **Basil vs Okaroni, BusiaCriminal Appeal 49** at Busia High Court.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that we never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called five witnesses. PW1 was Daniel Ouma Odera. It was his testimony that on 24.10.12 at 1.30 a.m he was on his way home when he decided to wait for a *boda boda* (motorcycle taxi) near a place called Miriam. He said that the Appellant who was known to him as a watchman at his friend's plot came and stood next to him. He also said that two policemen passed them and greeted them before moving away. He later decided to walk home as he was not getting a *boda boda* to ferry him.

PW1 stated that as he walked he then noticed the Appellant following him. Further, that as he reached the corner near his house he was hit by a rungu on the side on his head and he lost consciousness. When he came around he found that he had lost Kshs. 3000 and his phone make Nokia C 3. He also said that he had injuries on his elbow. He then started calling out to the watchman for help. It was his account that he sought assistance from a neighbour and went to report the matter at Kitengela Police station. The Appellant was arrested with the stolen phone which PW1 identified by production of a purchase receipt. PW1 also stated that the rungu was also recovered and the clothes he had been wearing at the material time produced as evidence in court.

PW 2 was Corporal Bernard Sila who recounted that on 24/10/12 at 1.45 a.m he was on patrol together with his colleague Peter Epocho. He stated that on reaching a place called Mirriams which was 400m from the station they heard screams. He stated that he had a man's voice calling for help. It was his testimony that they went to the direction of the voice and that was when they met a man walking fast, and identified him as the man they had seen earlier that night standing with PW1. PW2 testified that they asked the man to show them his place of work but he was unable to and they became suspicious because the man had a rungu.

PW2 then arrested the man and searched him, and found a red phone in his trousers left pocket. He stated that the phone rang and a woman answered and claimed the phone belonged to her husband. PW2 stated that they requested her to come to where they were, where she confirmed that the phone belonged to PW1. They then took the Appellant to the police station where they found PW1 who was bleeding from the head and had blood stationed clothes. He said that the victim recorded a statement.

PW3 was Corporal Peter Epocho, and he corroborated what PW2 had stated. He added that they had also recovered an Alcatel Phone and a lock nut together with the rungu from the Appellant. He stated that he did not recover the complainant's money from Appellant.

PW4 was Police Sergent Elias Oware who was the investigating officer in the case. He stated that on 24/10/12 at 2.50 am the PW1 went to the station and reported that he had been robbed by the Appellant who he had seen earlier before as he awaited a *boda boda*. He stated that PW1 said he had lost Kshs. 3000 and a Nokia C3 mobile phone. He also confirmed that PW2 and PW3 had arrested the Appellant with the stolen mobile phone and the rungu that was used in the attack. He confirmed receiving a receipt of purchase of the stolen mobile phone which was used in the identification.

PW4 further stated that the complainant had been treated and issued with a P3 form which was also produced in evidence. He also noted that the identity of the Appellant was established by PW1 as there was good lighting to identify him, and that he had met the watchman less than 20 minutes before the attack. PW4 produced as exhibits the Nokia C3 phone and Alcatel Phone recovered from the Appellant, the rungu and nuts found with the Appellant, the phone purchase receipt availed by the PWI and the clothes PW1 was wearing at the time he was attacked.

PW5, Geoffrey Gichobi Wagura, who works at Kitengela Health Centre as the clinical officer in-charge, on his part stated that PW1 had been referred to him from Kitengela police station where he had complained of assault. He said that he had blood stained clothes, his head had an injury and his left arm had bruises. He also said his neck was tender and also had bruises. PW5 produced a filled P3 form as an exhibit.

The trial court found that the Appellant had a case to answer and put him on his defence. The Appellant gave sworn evidence and did not call any witnesses. He testified that he was a watchman at Kitengela, and that on 24/10/12 at 1.45 and a police officer approached him at his place of work and called him. He said that the police officer asked him whether he had seen someone running and he said he had not. It was his account that he had an argument with the police officer, and that he was handcuffed and was taken to the police station. He denied committing the offence.

I have considered the arguments made by the Appellant and the Prosecution.

The grounds of appeal put and relied upon by the Appellant raise two issues for determination. The first is whether the doctrine of recent possession was applicable to the Appellant; and the second is whether there was sufficient evidence to convict the said Appellant for the offence of robbery with violence.

On the first issue the Appellant argued that the evidence of PW1,2 and 3 as to his being found with PW1's phone after the robbery was unreliable and the doctrine of recent possession was erroneously applied to him. The doctrine of recent possession is stated in the case of **Malingi vs Republic (1989) KLR 227** as follows:

> **"The doctrine is one of fact. It is a presumption of fact arising under section 119 of the Evidence Act, Cap 80 Laws of Kenya which provides:**
>
> **"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."**
>
> **So as applies to the offence of theft or handling, recent possession raises a presumption of fact that the one in possession is either the thief or guilty receiver (R – v – Hassan s/o Mohamed (1948) 25 EACA 121). The trial court has the duty to decide whether from the facts and circumstances of the particular case under consideration the accused person either stole the item or was a guilty or innocent receiver. 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 have proved certain basic**

**facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the 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 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 item. The doctrine being a presumption of fact is a rebuttable presumption. That is why 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 it or was a guilty receiver."**

The Appellant in the present appeal was found with a Nokia C-3 telephone by after being arrested and searched by PW2 and PW3 on the same day that PW1 was robbed of a similar telephone. PW1 and PW4 brought evidence of a purchase receipt with the serial number of the phone to show that the said telephone recovered from the Appellant belonged to PW1. The evidence of the woman who called and asked for PW1 on the said phone was therefore not necessary to prove that the telephone belonged to PW1. PW1 also gave evidence that before he was robbed he had met the Appellant who had followed him. It is thus my finding that the application of the doctrine of recent possession was correctly applied to the Appellant by the trial magistrate.

On the issue of whether there was sufficient evidence to convict the Appellants for the offence of robbery with violence, section 296 (2) of the Penal Code provides as follows:

**"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

The prosecution must be prove theft as **a central element of the offence of robbery with violence, as the offence is basically an aggravated form of theft. The** other elements of the offence of robbery with violence were elaborated by the Court of Appeal in ***Ganzi & 2 Others v Republic*** **[2005] 1 KLR and** in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** as follows:

1. **If the offender is armed with any dangerous or offensive weapon or instrument, or**

2. **If he is in the company with one or more other person or persons, or**

3. **If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.**

I am alive in this regard to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**.

In the present appeal, the Appellant was placed at the scene of the crime by PW1 who stated that the Appellant was following him, and he recognized him from the lights on both sides of the the road as a watchman who worked at a friend's plot. This was a few moments before PW1 was hit on the head with a rungu and lost consciousness. PW5 produced a P3 form dated 24th October 2013 in this regard that showed that PW1 suffered injuries on his head, left elbow and neck which he classified as harm.

In addition, PW1 was found near the scene of the crime on the same day by PW2 and PW3 who were policemen on patrol, and he was found with a rungu. Lastly, as found in the foregoing the Appellant was found with the phone that PW1 testified was stolen from him during the attack. The ingredients of theft, possession of an offensive weapon and the use of violence on PW1 during the robbery were therefore established, and I find that there was sufficient evidence that proved beyond reasonable doubt that the Appellant committed the offence of robbery with violence.

Lastly, as regards the legality of the sentence, section 296 (2) of the Penal Code is clear that the sentence of death that is provided for the offence of robbery with violence is a mandatory sentence.

I accordingly uphold the conviction of the Appellants for the charge of robbery with violence contrary to section 296(2) of the Penal Code, and the sentence of death for this conviction is found to be legal and is upheld.

It is so ordered.

**DATED AT MACHAKOS THIS 21st DAY OF MARCH 2016.**

**P. NYAMWEYA**

**JUDGE**