REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.194 OF 2013

& CRIMINAL APPEAL NO.137 OF 2014

(An Appeal arising out of the conviction and sentence of Mrs. Wachira – PM delivered on 24th June 2013 in Kibera CM. CR. Case No.1932 of 2012)

JOHN GITONGA NDUNGU…….1ST APPELLANT

CHRISPINE ODHIAMBO MAGOHA……2ND APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellants, John Gitonga Ndungu and Chrispine Odhiambo Magoha were charged with two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the 1st Count was that on 11th April 2012 at Witeithie Township, Ruiru, Kiambu County, the Appellants, jointly with others not before the court, while armed with dangerous weapons namely; a pistol robbed John Mbugua Miringu of a Nissan Sunny motor vehicle Registration No. KAX 593Y, a mobile phone, identity card and Kshs.46,000/- cash and immediately before or immediately after the time of such robbery used actual violence to the said John Mbugua Miringu. In the 2nd Count, the particulars of the offence were that on the same day along Kenyatta Avenue in Nairobi, the Appellants, jointly with others not before court, while armed with dangerous weapons namely; pistols, robbed Joseph Kanda Limakur of a Toyota NZE motor vehicle Registration No. KBJ 453 P, a mobile phone and Kshs.500/- cash and immediately before the time of such robbery used actual violence to the said Joseph Kanda Limakur. When the Appellants were arraigned before the trial Magistrate's Court, they pleaded not guilty to the charge. After full trial, they were convicted as charged. They were sentence to death. The Appellants were aggrieved by their conviction and sentence. They have appealed to this court challenging their conviction and sentence.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted essentially on the evidence of identification that was made in circumstances that did not favour positive identification. The Appellants were aggrieved that the trial court failed to appreciate that the evidence adduced by prosecution witnesses in respect of identification was essentially dock identification and therefore unreliable to secure a conviction. The Appellants were aggrieved that they were convicted on the basis of unreliable, insufficient and fabricated evidence that did not establish their guilt to the required standard of proof beyond any reasonable doubt. The 1st Appellant took issue with the fact that he had been convicted on the basis of the evidence of identification yet none

of the victims of the robbery had identified him in an identification parade mounted by the police. The 1st Appellant reiterated that he had been framed by the police to cover up the fact that they had unlawfully shot him with a stray bullet. The Appellants took issue with the fact that the trial court did not take into consideration the fact that none of the robbed items were recovered in their possession to warrant their convictions. The Appellants faulted the trial magistrate for failing to take into consideration the totality of the evidence adduced which in their view totally exonerated them from the crimes. They were finally aggrieved that the evidence that they had adduced in their defence had not been taken into account before they were convicted. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their conviction and set aside the sentences that were imposed on them.

Prior to the hearing of the appeal, the appeals were consolidated and heard together as one. The 2nd Appellant presented to the court written submission in support of his appeal. He also made oral submission in support of his appeal. The 1st Appellant was represented by Ms. Betty Rashid. She submitted that the robbery incident that led to the charge occurred at night. The victim of the robbery told the trial court that he had identified the 1st Appellant during the robbery incident. She explained that the said victim did not give the description and the physical features of his assailant. She emphasized that the said victim did not confirm his identification of the 1st Appellant in a police identification parade. The trial court therefore relied essentially on dock identification to convict the 1st Appellant. She submitted that the evidence of identification relied on by the trial court to convict the 1st Appellant was such that it did not measure to the legal standards; the source of light was not stated, neither was the intensity of the said light set out in evidence. No description of the assailant was given by the victim of the robbery when he made the first report to the police.

As regards the circumstances of the 1st Appellant's arrest, she submitted that the 1st Appellant was a boda boda rider who had gone to a garage at Kayole. She explained that while the 1st Appellant was at the garage repairing his motor cycle, PW5, a police officer arrived at the scene. The 1st Appellant who was innocently at the garage was shot on his thigh. She submitted that the 1st Appellant having given a reasonable explanation regarding the circumstances that he was at the garage at the particular time, discounted the prosecution's case to the effect that he was found in possession of the motor vehicle that had been robbed from the complainant. She urged the court to find that the prosecution had failed to discharge the burden placed on it to establish that indeed the 1st Appellant was found in possession of the robbed motor vehicle.

As for the 2nd Appellant, he submitted that the circumstances in which the robbery took place were not conducive to positive identification. The robbery took place at night. In the hectic circumstances of the robbery, and the fact that the complainant had testified that during the robbery he was in a frightened state, it was not possible that he could be positive that he had identified him. He further submitted that since the complainant did not give the description of his assailants in the first report that he made to the police, the evidence of police identification parade which was later held had no basis and therefore should be disregarded. The thrust of the 2nd Appellant's submission was that there wasn't sufficient light or sufficient time that would have enabled the complainant to be positive that he had identified him. As regard the circumstance of his arrest, the 2nd Appellant explained that he had no connection with the recovery of the motor vehicle that had been stolen from the complainant. He explained that the circumstances under which the motor vehicle was recovered did not conclusively point to the fact that he was exclusively found in possession of the said motor vehicle. He urged the court to allow his appeal.

Ms. Nyauncho for the State opposed the appeals. She submitted that the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellants, in company of others, robbed the complainants after they had threatened them with a pistol. In both instances, the complainants were able to positively identify the Appellants as being in the gang that robbed them. In both cases the complainants were robbed of their motor vehicles and other personal belongings. The robbery took place for a considerable period of time that enabled the complainants to positively identify the Appellants as the persons who robbed them. Learned counsel submitted that if there was any doubt as regard the evidence of identification, in respect of the 2nd Appellant, the same was confirmed in an identification parade that

was held by the police a couple of days after the robbery incident. The Appellants were also found in possession of one of the stolen motor vehicle after the same had been traced using a tracking device. She submitted that the circumstance in which the Appellants were found in the vehicle led to no other conclusion than the fact that they were in actual possession of the same. She urged the court to apply the doctrine of recent possession to find the Appellants guilty of the charge. She was of the view that the grounds of appeal put forward by the Appellants raised no issues that would make this court overturn the decision of the trial court.

The facts of this case are as follows: PW3 John Mbugua Miringu is a pastor with Jesus Healing Centre at Weteithie in Thika. He testified that on 11th April 2012 at about 9.00 a.m. he was at the church. He had an appointment with one of the worshippers. As he was talking to the worshipper, he saw two men one with a brief case and another wearing a leather jacket enter the church. The two men sat at the rear of the church. He finished with the worshipper and escorted her out of the church. When he returned to the church, one of the men told him that he wished to be prayed for. He said he had challenges with his business and needed prayers. As he was conversing with one of the men, he whipped out a pistol and ordered PW3 to lie down. They tied his hands and legs. His mouth was gagged. They robbed him of wrist watch, his Ideos phone, his wallet and identity card. He was also robbed of Kshs.46,000/-. After being robbed, the robbers took off with his motor vehicle Nissan B15 Registration No. KAX 539Y. After freeing himself with the assistance of neighbours, he reported the incident at Juja Police Station. On 18th April 2012, he was informed that his motor vehicle had been recovered. He was also told that some suspects had been arrested. He was able to identify the 2nd Appellant as being one of the two men that robbed him.

On the same day at about 11.00 p.m., PW1 Joseph Kandar Limakur was at Hurlingham. PW1 was at the material time employed at a taxi driver by PW4 David Ndirangu Maina. PW1 had been assigned to drive motor vehicle Registration No. KBJ 453 P Toyota NZE. He testified that he was approached by a man in jeans shorts wearing a red T-shirt. He told him that his motor vehicle had mechanical problems and was at the Total Petrol Station. He needed to hire the vehicle to ferry him to where the motor vehicle was. They negotiated and agreed on the fare. The man entered the vehicle. They drove to the Total Petrol Station along Argwings Kodhek Road. PW1 saw a Nissan B15 Registration No. KAX 539Y that had broken down. Four men got out of the vehicle and entered his vehicle. They requested to be driven to Nairobi Town. At GPO roundabout, one of the men pointed a pistol at him. He took over control of the motor vehicle. PW1 was pushed to the rear of the motor vehicle. He was stepped on by the other men. His hands and legs were tied. His mouth was covered with a cellotape. He was driven towards Thika Road where he was abandoned in a rough road. He was able to untie himself before making a report at Ruaraka Police Post. PW1 testified that upon the arrest of the Appellants, he was positive that it was the Appellants who were among the gang that robbed him of the motor vehicle, Kshs.500/- and his Nokia 1200 mobile phone. PW1 testified that it was the 1st Appellant who hired him from Hurlingham Shopping Centre. He found the 2nd Appellant with three other men at Total Petrol Station.

PW4 testified that on the night of 12th April 2012, he received a call to the effect that his motor vehicle had been stolen. He had fitted the motor vehicle with a tracking device.He immediately called the company that had fitted the tracking device. The company is called Cyber Trace Limited. The company informed him that they had traced the vehicle at Ewaso Kedong. They travelled to Ewaso Kedong but were not able to trace the motor vehicle. He was later, on the same day, informed that the signal of the motor vehicle had been traced to Komarock Estate in Nairobi. The company sought the assistance of PW5 Sgt. Francis Omondi then based at CID Kayole Division. PW5 testified that at about 1.00 p.m. on the same day, he was accompanied by three other police officers to the site where it was alleged that a stolen motor vehicle had been traced hidden. He testified that when he reached the scene, he saw the motor vehicle Registration No. KBJ 453 P Toyota NZE parked with its bonnet open. He saw two men on the front at the bonnet while other men were seated inside the motor vehicle. He cocked his gun and ordered the men to lie down. The two men at the bonnet lay down but two others ran off. PW5 gave chase. He saw one man attempt to jump over a wall. He shot at him. The man fell to the ground. He had been shot on his leg. The man who was shot is the 1st Appellant. The 2nd Appellant was among the two men arrested while checking the engine of the motor vehicle.

PW7 IP Joseph Kipkulei then based at CID Kilimani Division was on 14th April 2012 requested by one of the investigating officers to conduct a police identification parade. He testified that the identifying witness was PW1. In the identification parade, PW1 was able to identify the 2nd Appellant. PW7 testified that he had conducted the identification parade in accordance with the **Police Standing Orders.** The case was investigated by PW8 PC Joseph Muriuki then based at CID Kilimani Division. He was assigned to investigate the case on 12th April 2012. After conducting the investigations, he established that a case had indeed been made to have the Appellants to be charged with the two counts of robbery with violence. He explained that the basis of forming the opinion was that the Appellants had been positively identified by complainants who were victims of the robbery. They were also found in possession of one of the stolen motor vehicles a few hours after the same had been robbed from PW1.

When the Appellants were put on their defence, they denied involvement in the robberies. The 1st Appellant testified that on the material day of 12th April 2012 he had gone to the garage to have his motor cycle serviced. While at the garage, he was shot on his thigh by the police. The police came to where he was and rushed him to hospital. The police explained that he had been accidentally shot when the police were giving chase to catch thieves. He told the court that he was charged with the current offences because the police wanted to cover up the fact that they had accidentally been shot. He reiterated that he was not a robber but was a victim of a stray bullet shot by the police. The 2nd Appellant also denied involvement in the robbery. He testified that on 12th April 2012 while he was at the stage at the junction of Umoja/Kangundo Road waiting for a matatu, he was arrested by the police, searched and then escorted to Kayole Police Station. He was booked in and was shocked when he was charged with the present offences. He denied being involved in the robbery. He testified that he was framed with the charge because the police insisted that he was a member of the infamous Mungiki gang. He reiterated that he had nothing to do with the robbery.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellants. In doing so, this court is required to be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding their respective demeanor (See **Njoroge –vs- Republic (1987) KLR 19**). The issue for determination by this court is whether the prosecution established the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** brought against the Appellants to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced for the trial court and the submission made by the parties to this appeal. It was clear from the judgment of the trial court that the Appellants were convicted on the basis of the evidence of identification and the application of the doctrine of recent possession. In respect of the evidence of identification, the Appellants submitted that the circumstance under which the robbery took place was such that it was not conducive for positive identification. That was especially so in respect of the identification by PW1. The Appellants challenged the identification by PW1 on the basis that the robbery incident, having taken place at night, the conditions was not conducive for positive identification. In particular, they submitted that PW1 did not explain the source of light that would have enabled him to be positive that he had identified the Appellants. On the other hand, the prosecution submitted that PW1 interacted with the Appellants at close proximity for some time and was therefore able to identify their facial features. In respect of the 2nd Appellant, if there was any doubt that indeed PW1 had identified him, that doubt was removed when PW1 pointed out to the Appellant in a police identification parade mounted by the police barely two days after the robbery incident.

Upon re-evaluating of the evidence adduced by PW1 in respect of the evidence of identification, this court is of the considered opinion that indeed PW1 was able to positively identify the Appellants as the persons who robbed him of the motor vehicle on the night of the robbery. This court arrived at this conclusion because PW1 explained that prior to the 1st Appellant hiring the motor vehicle he negotiated with him on the hire charges to be paid. PW1 and the 1st Appellant were in a well-lit place at Hurlingham. PW1 described the clothes that the 1st Appellant wore at the material time. The 1st Appellant sat in close

proximity with PW1 in the motor vehicle as they drove towards Total Petrol Station where they found the Nissan B15 motor vehicle which had earlier been robbed from PW3. In the motor vehicle was the 2nd Appellant. The 2nd Appellant with three others entered the motor vehicle as PW1 was instructed to drive the motor vehicle towards the City Centre. It was at the City Centre that the Appellants took control of the motor vehicle from PW1, subdued him and later dumped him at Ruaraka.

On his part, PW3 was robbed of his motor vehicle and cash at 9.00 a.m. It was in broad daylight. He testified that he was able to identify the 2nd Appellant as being among the gang of two persons that robbed him. He told the court that he clearly saw the 2nd Appellant because he was wearing a suit and had a briefcase. He spoke with PW3 at close proximity. He did not wear any disguises. It was conceded during the hearing of the appeal that PW3 was not called upon to identify the 2nd Appellant in an identification parade mounted by the police. PW3's identification of the 2nd Appellant was therefore dock identification. It is trite law that dock identification, generally, is worthless as form of identification unless other evidence is adduced to support the said identification. If the prosecution had only adduced PW3's testimony in a bid to secure the conviction of the 2nd Appellant, then the same would not have been sufficient to prove the charge brought against the 2nd Appellant to the required standard of proof beyond any reasonable doubt.

However, in the case of both Appellants, the prosecution adduced evidence which established to the required standard of proof beyond any reasonable doubt that they were found in possession of the motor vehicle that was robbed from PW1 a few hours after the robbery. In order to secure a conviction of the Appellants on the application of the doctrine of recent possession, the prosecution was required to establish certain facts. These facts were set out in the case of **Edward Otsudi –vs- Republic [2013] eKLR** at page 4 where the court held thus:

> ***"In the case of Erick Oherio Arum –Vs- Republic Criminal Appeal No.85 of 2005, the Court in respect of the doctrine of recent possession had this to say:-***
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> > ***"…In our view, before a Court of law can rely on the doctrine of recent possession as basis of conviction in a criminal case the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly, that: that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly, 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. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses……""***

In the present case, the prosecution adduced evidence which established that soon after the robbery of the motor vehicle Registration No. KBJ 453 P Toyota NZE from PW1, upon his abandonment by the robbers at Ruaraka, he was able to inform PW4 David Ndirangu Maina, the owner of the motor vehicle, who notified a car tracking company to trace the motor vehicle. The motor vehicle was traced at Komarock area at 1.00 p.m. on the same day of the robbery. PW5 testified that when he traced the motor vehicle, he found the Appellants with the motor vehicle. The 1st Appellant was seated in the motor vehicle while the 2nd Appellant was examining the engine of the motor vehicle with another person. The 1st Appellant was shot on his thigh by PW5 when he attempted to flee from the scene. It was clear to this court that the doctrine of recent possession applies in the case of the Appellants. The motor vehicle that was robbed from PW1 was found in the Appellants' possession a few hours after the robbery incident. This was after the robbed motor vehicle had been traced using a tracking device that had been installed in the motor vehicle. The Appellants were unable to give a reasonable explanation why they had the motor vehicle in their possession. The only presumption that can be drawn from the above sets of facts is that the Appellants were found in possession of the said motor vehicle because they had robbed the same from PW1.

In the premises therefore, this court finds no merit with the grounds of appeal put forward by the Appellants in support of their respective appeals. The evidence adduced by the prosecution witnesses, taken in totality, convinced this court to the required standard of proof beyond any reasonable doubt that indeed it was the Appellants that robbed the complainants in this case. The doctrine of recent possession also applies in the case of the motor vehicle that was robbed from PW3. PW1 testified that he found the Appellants in possession of the Nissan B15 Registration No.KAX 539Y. This was hardly twelve hours after the same had been robbed from PW3. Again, the Appellants did not give a reasonable explanation how they came to be in possession of the said motor vehicle a few hours after the same had been robbed from PW3. The only reasonable explanation is that it was the Appellants that robbed the said motor vehicle from PW3. This court has considered the evidence adduced by the Appellants in their defence. This court is of the view that the evidence adduced by the Appellants in their defence is devoid of truth, is self-serving and does not dent the strong evidence of the prosecution regarding identification and the recovery of the robbed motor vehicles that was adduced against them by the prosecution witnesses.

The upshot of the above reasons that the appeals lodged by the Appellants lacks merit and is hereby dismissed. Their conviction and sentences are upheld. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY JUNE 2016

L. KIMARU

JUDGE