REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 89 OF 2015

(FORMERLY NAKURU CRIMINAL APPEAL NO. 121 OF 2014)

(Being an appeal against conviction and sentence in Narok Criminal Case No. 136/2013 – Temba A. Sitati Ag SRM)

KAMULAK SHUMA……..……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

J U D G M E N T

1. The Appellant **Kamulak Shuma** was jointly charged with two others with the offence of Robbery with Violence contrary to section 296(2) of the Penal Code. In that on the 7th day of February 2013 at Morijo, Loita in Narok South District within Rift Valley Province, jointly with others, while armed with dangerous weapons namely rungus and knife, robbed Daniel Mwiti Buantai of motor cycle registration number KMCG 254S make Skygo and a wallet all valued at Kshs 90,000/= and at or immediately before or immediately after the time of such robbery killed the said **Daniel Mwiti Buantai.**

2. In the Alternative, he was charged with the offence of Handling stolen goods contrary to Section 322 (1)(2) of the Penal Code. In that on the 8th day of February 2013 at Olorte in Narok South District within the Rift Valley Province, otherwise than in the cause of stealing, dishonestly received or retained one motor cycle registration number KMCG make Skygo and a wallet knowing or having reasons to believe them to be stolen goods.

3. Following a full trial, the Appellant was found guilty and convicted while his co-accused were acquitted. The Appellant was accordingly sentenced to death. He had now appealed to this court against conviction. The appeal, on admission was certified for hearing before one Judge before being transferred to this court for hearing.

4. The Appellant's amended grounds of appeal were filed on the morning of the hearing of this appeal.

5. Grounds 1 & 2 faulted the trial court's reliance on the identification evidence by a prosecution witness **PW4** and the application of the doctrine of recent possession, respectively. In ground 3, the Appellant takes issue with what he refers to as insufficiency of the evidence due to the failure by the prosecution to call "vital" witnesses. The fourth ground raises an objection to the production of exhibits in alleged breach of Section 77 of the Evidence Act, while in the fifth ground, the Appellant complains that his defence was unfairly dismissed.

6. The Appellant's written submissions on grounds 1, 2 and 3 primarily targeted the identification evidence by **PW4** which he dismisses as mere dock identification; the circumstances of recovery of the deceased's motor cycle and wallet per **PW2;** and the prosecution alleged failure to summon critical witnesses such as the operator of the hotel from whence the Appellant was arrested and the persons who surrendered the registration plates in respect of the deceased's motor cycle.

7. He also submitted that the area chief who mentioned his name as a suspect did not testify and yet he was a key witness, who according to the Appellant, stage-managed the case brought against the Appellant.

8. Thus the Appellant argues that the prosecution evidence fell short of the prescribed standard and the court should have resolved the resultant doubt in his favor.

9. With regard to the production of the Government Analyst's report and death certificate by the Investigating Officer, the Appellant asserts that the same was erroneous and that the record does not indicate concurrence by him.

10. Through Mr Koima, the DPP opposed the appeal. He reiterated the prosecution evidence, highlighting in particular the arrest of the Appellant while in possession of the deceased's properties including the motorcycle, wallet and bank documents, and the presence of stains of blood on his clothes, that matched with the blood sample of the deceased. He urged the court to uphold the application of the doctrine of recent possession citing the Court of Appeal decision in **David Mutune Nzongo Vs Republic [2014] eKLR.**

11. The duty of the first appellate court was stated in **Okeno -Vs- Republic [1973]EA 32** as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424."**

12. The prosecution evidence adduced through 6 witnesses was as follows. The deceased **Daniel Mwiti Buantai** was a teacher at Enkutoto Primary School in Narok. He owned a motor cycle registration number KMCG 254S, make Skygo, black in colour. On 7th February 2013 at about 2.00pm, he drove the said motor cycle to the shop operated by **James Andilo Sadera (PW4)** at Narosura. He bought some provisions which he asked **PW4** to keep for him. He was to collect the items later after ferrying a passenger, identified as the Appellant, to the area called Morijo. He left with his companion.

13. The deceased did not return. His lifeless body which bore several head injuries was found by the roadside in Morijo location on the next morning. Beside it lay a helmet which had apparently been smashed into pieces. Police officers including **Cpl Paul Kiilu (PW 5)** and **Cpl Paul Sitienei (PW6)** were dispatched to the area from Narok police station. They commenced investigations by taking photographs of the scene and the body. Meanwhile, at 3.00pm, **AP Cpl Ambrose Rotich (PW2)** of Chemanangen Administration Police Camp in Narok South, received a tip that there was a man in his area who was riding on an unregistered motor cycle at the local centre.

14. PW2 proceeded to the centre where he was shown the suspect and apprehended him. He took him to the post where he searched him, recovering a brown wallet containing a bank slip in the name of the deceased and a plastic syringe. The said suspect was identified as the Appellant. Shortly, some members of public brought a set of number plates reading KMCG 254S and the motor cycle that was parked by the

side of the road at the centre. The recovered items were produced as exhibits 1-5.

15. The police officers **PW 5** and **PW 6** were duly notified, as they drove back to Narok police station with the deceased's body, cracked helmet (**Exhibit 7**) and a knife recovered at the scene of murder (**Exhibit 8).** They proceeded to Chemanangen. The officers took possession of **Exhibit 1-5** from **PW 2**. They also took the Appellant into their custody and headed back to Narok police station. Other suspects were arrested at Narosura (but were acquitted in the lower court).

16. The Investigating Officer **(PW 6)** upon arrival at Narok police station noted blood spots on the shirt (**Exhibit 9c)** and maasai shuka (**Exhibit 9B)** of the Appellant. These items, together with his lesso **(Exhibit 9A)** and recovered knife (**Exhibit 7)** were sent to the Government Analyst for comparison with blood samples taken from the body of the deceased, and from the Appellant.

17. The results showed that the Appellant's clothes **(Exhibit 9A and B)** contained stains of human blood which matched with that of the deceased. A lesso (**Exhibit 9B),** the knife **(Exhibit 7)** and the (deceased's) shirt (**Exhibit 9C)** bore human blood stains which matched with the blood sample of the Appellant. Also procured by the police during investigations were motor cycle documents produced as **Exhibit 13 A-F.** These showed that the motor cycle though not transferred into his name, had been purchased by the deceased in the previous year.

18. In his unsworn defence statement, the Appellant stated that he was a farmer at Olorte. On the day of his arrest he had taken out his cattle to drink water and then went to the market. He learned that the local chief was looking for him but did not hide. He was arrested at Chemanangen centre. Another person, a stranger to him, was also arrested. He denied possession of the wallet or knife at the time of arrest asserting that there was a communication problem between him and the police who arrested him.

19. I have considered all the submissions and the evidence on the record. There was no eye witness to the robbery and killing of the deceased person. The last witness to see the deceased alive on the afternoon of 7/2/13 was the shop keeper **PW4.** He saw the deceased accompanied by a man he identified in court as the Appellant. The deceased was riding his motor cycle as he left with the said Appellant. The said motor cycle was identified as the same one later recovered from the Appellant.

20. The identification of the Appellant by **PW4** in court amounted to dock identification and was of no value. The police had earlier confronted the witness with the Appellant at the DO's office on 9/2/13, rather than conduct an identification parade which was more appropriate, as **PW4** did not know the Appellant prior to the episode at his shop on 7/2/13.

21. Contrary to the assertions of the Appellant, the trial court did not base its decision on the identification evidence by **PW4.** The trial court correctly addressed its mind to two strands of evidence, all circumstantial; namely the possession by the Appellant of the deceased's motor cycle, wallet and bank document only hours since the robbery, and the forensic results in respect of several items and samples submitted for analysis by the Government Analyst.

22. In so doing, the court sought guidance in the principles pronounced earlier in **Republic –Vs- Kipkering Arap Koskei [1949] 16EACA 135** and **Simoni Musoke -Vs- Uganda (1958 E.A.)715**, as reiterated **in James Mwangi –Vs- Republic [1983) eKLR** to the effect that:-

> **"…..In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."**
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> **(And in Simoni Musoke -vs- Uganda (1958 E.A.)715)** that;
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> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial**

evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."

23. This was the correct approach where the prosecution relied on circumstantial evidence, in this case, evidence of recent possession **(see Odhiambo v Republic [2002])KLR 241** where the Court of Appeal stated *inter alia* that:

"Evidence of recent possession is circumstantial evidence which depending on the facts of each case may support any charge."

24. With regard to the possession by the Appellant of the victim's properties on 8/2/13. **PW 2** stated *inter alia*, in his evidence in chief:

"On 8th February, 2013 at about 3.00pm I was informed that there was a male suspect who was riding an unmarked motor cycle. The informant said the said rider had killed the owner. He (suspect) was headed to Morijo. I recorded the information in the Occurrence Book. I was directed to the suspect's location within Chemanangen centre. When I went to Chemanangen centre, I found many people at the market but was shown the suspect as he headed into a hotel to have a meal. He had parked a motor cycle by the hotel side on the road. I pounced on him… We took him to our… Administration Police camp… I searched his person recovering the following – 1 brown wallet. It had a bank slip bearing the names of Daniel Buantai… While I took down information about the suspect, members of public brought us a number plate KMCG 254S… I collected the motor cycle number plates. I then sent for the motor cycle and members of the public brought it to the station…"

25. During cross-examination, **PW 2** further stated:

"I recall that the motor cycle exhaust had burned you… You had a maasai shuka. You had a belt around your waist onto which you tied the wallet. You had just alighted from the motor cycle…"

26. This witness, on the face of it, moved with alacrity upon receiving information and arrived at the centre just as the Appellant was alighting and parking the motor cycle by the roadside. It seems that he decided to first place the suspect in the Administration Police post custody and search him before collecting the motor cycle. Evidently, **PW2** was alone and was reportedly assisted by the DO to arrest the suspect.

27. The Appellant takes issue with the above recovery evidence and particularly the failure by **PW2** to prepare an inventory in proof of the alleged recovery. I agree that the taking of an inventory is a requirement where goods/items are recovered by police from a suspect. However, there is no requirement that all witnesses to an incident, in this case the arrest, be called to give evidence **(see section 143 of the Evidence Act**). The failure to call those who surrendered the motor cycle number plates to **PW2** was explained by **PW6**: they were relatives of the Appellant who the police said could not be brought to court to testify.

28. The robbery had occurred in a different location from the recovery, and but for the information he received, **PW2** was unaware of the incident. It is quite unlikely that he picked on the Appellant out of the crowd at the market and implicated him with the possession of the items recovered. There is no evidence that he even knew the Appellant before the arrest. All he knew was that a male suspect who was riding on a motor cycle without registration plates was headed for Chemanangen from Morijo.

29. In dealing with the recovery evidence, the trial court in its judgment reviewed Section 57 of the National Police Service Act which empowers police to enter premises, stop vehicles, make arrests and conduct searches. Section 57(5) provides as follows:

"**A police officer who exercises the powers conferred under this Section shall:**

a. **Identify himself before hand;**
b. **Record the action;**
c. **Record the items taken;**
d. **Make a report regarding such exercise…."**

30. The trial court also found guidance in two decisions, namely **Stephen Kimani Robe and Others -Vs- Republic [2013] eKLR** and **Kimani Kimanjuri and another -Vs- Republic [2013] eKLR** on the purpose of the inventory and consequences of recovering officers failing to prepare such inventory. The High Court in the cited cases stated the purpose of the inventory as a documentation during investigation, of recovered items and that failure to prepare such inventory cannot diminish evidence of the physical existence of exhibits produced and identified in the trial.

31. A similar objection was raised before the Court of Appeal in the case of **Leonard Odhiambo Ouma and Another -Vs- Republic [2011] eKLR.** In that case, following a robbery, police acting on the information of an informant, searched the house and kiosk, respectively, of the Appellants. They recovered cash and other stolen items identified as the property of the complainant in the case. In the appeal, the argument was made that the conviction was erroneously upheld by the High Court, as provisions of Section 18 of the repealed Police Act, the equivalent of the present section 57 of the National Police Act were violated, due to the failure by police to prepare an inventory.

32. The Court of Appeal stated in its judgment 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. The Appellant herein was seen by **PW2** while parking and alighting from the stolen motor cycle, and upon being arrested and searched, found in possession of a wallet, a bank slip bearing the two names of the deceased person as well as a plastic syringe which were all produced after they were duly identified by **PW2**. The failure by **PW2** to prepare an inventory did not in my opinion prejudice the Appellants as the items were tendered in court upon due identification by **PW2**.

34. As stated in the case of **David Mutune Nzongo v Republic [2014] eKLR**, the mere fact that a witness (**PW2)** was alone when he made the recovery and that members of the public then present did not testify does not detract from such witness' evidence. The Trial Court properly accepted **PW2's** evidence observing that the recovery of the items occurred within 24 hours of the crime.

35. Relying on the decision of the Court of Appeal in **Arum v Republic Criminal Appeal KSM No. 85 of 2005**, the trial magistrate applied the doctrine of recent possession in this case. In supporting the trial court's decision, Mr. Koima highlighted the decisions considered by the Court of Appeal in **David Mutune Nzongo's** case.

36. In that case, the court cited an excerpt from its decision in **Francis Kariuki Thuku and 2 Others v Republic [2010]eKLR** stating that:

> **" Concerning the application of the doctrine of recent possession to the facts in the case, we are of the view that the Appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of R. V. Loughin 35 Criminal Appeal 269 by the Lord Chief Justice of England and this Court's own decision of Samuel Munene Matu V Republic Criminal Appeal No.108 of 2003 at Nyeri demonstrates that the doctrine was properly applied. The recovery of the items in the case before us was within 7 days whereas in the Matu case (supra) a period of 20 days was held to be recent. We accordingly uphold the superior court's view of the law on the point. In this regard we would re-echo the decision of this court in the case of Hassan vs Republic [2005] 2 KLR 11 where as regards recently stolen goods it**

delivered itself thus:-

"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." (Emphasis supplied)

37. The possession in this case by the Appellant of the deceased's motor cycle and a wallet containing his banking slip within 24 hours of the robbery justified the invocation of the doctrine of recent possession by the trial court. The Appellant's response was a denial which did not specifically refer to the motor cycle and therefore failure to give an explanation for the possession. Thus the rebuttable presumption of fact under **Section 119 of the Evidence Act** the he was the robber, was not in any way challenged.

38. Regarding the forensic evidence relied on by the prosecution, the shuka worn by the Appellant on arrest was found to have stains of human blood matching the blood sample of the deceased. A shirt described in **PW6's** evidence as belonging to the Appellant but in the exhibit memo as the shirt of the deceased bore blood stains that matched with the sample taken from the Appellant.

39. There was clearly a mix-up with regard to the latter items and therefore that part of the evidence could not properly be relied upon against the Appellant. With respect to the deceased's blood stains on the Appellant's shuka, and indeed the entire forensic report, the Appellant has argued that this evidence, and the Post Mortem form were tendered by **PW6** in violation of section 77 of the Evidence Act.

40. The Section states as follows:-

"**In criminal proceedings, any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence. The court may presume the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it. When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."**

41. From the trial record, the Appellant did not raise any objection to the production of the Government Analyst's Report and Post Mortem form at the trial. The prosecutor clearly explained that the makers were unavailable on the material date due to reasons given and therefore could not attend court in regard to the exhibits.

42. It is not clear to this court what further explanation the Appellant would have had the court make to the Appellant. Besides, with regard to the medical evidence as to the cause of death, the injuries on the deceased are fully captured in the photos taken and produced in court by **PW5**. There is evidence that samples of blood were taken from the Appellant from proceedings of 13/2/13 and the deceased (Post mortem).

43. In his present submissions, the Appellant purports to explain the presence of the deceased's blood on his 'shuka' by asserting that he travelled in the same vehicle that ferried the body of the deceased from the scene at Morijo. This suggestion had been made to **PW6** by the Appellant during cross-examination. Also suggested was that **PW6** smeared the Appellant's clothes with the blood of the deceased. Both suggestions were denied and were not repeated in the Appellant's defence statement.

44. It is my considered view that the Appellant was not prejudiced by the production of the Post Mortem form and the Government Analyst's report by **PW6**. In my considered view, the forensic evidence by way of conclusions in the latter report go a long way in corroborating the evidence of recent possession against the Appellant. But even if the forensic evidence were to be cast aside, the evidence of recent possession against the Appellant does in the circumstances of this case support the charge for which he

was convicted.

45. It is true, as the Appellant has complained, that the trial court was in error by admitting hearsay evidence by **PW6** that the Appellant was a habitual criminal or robber. However, the court did not base its findings on this evidence in arriving at its decision. Secondly, the recovery of the stolen goods from the Appellant was conducted by **PW2** and not **PW6** or the chief he claims planted or had exhibits planted on him. The report by the chief enabled the arrest of the Appellant by **PW2**, even before **PW6** was aware of the identity of the suspect.

46. There is no indication that **PW2**, **PW4** or **PW6** were acting under the directions of the said chief. Their testimonies stand independently and are together consistent in time and place and details. There is no trace of collusion among these witnesses. The trial court was entitled to believe their testimony which was also supported by independent forensic evidence and material exhibits.

47. In the result, I find no merit in the grounds raised on this appeal and will reject them accordingly. The appeal is dismissed.

Delivered and signed at Naivasha, this **23rd** day of **June**, **2016.**

In the presence of:-

For the DPP : Mr. Koima

Appellant : Present

Court Clerk : Barasa

C. MEOLI

JUDGE