**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL APPEAL NO. 31 OF 2015**

**MARTIN GITONGA ……..…… APPELLANT**

***Versus***

**REPUBLIC ……..…… RESPONDENT**

***(Being an appeal from the original conviction and sentence in***

***Nanyuki Chief Magistrate's Court Criminal Case No. 192 of 2011***

***by Hon. J. N. Nyaga Chief Magistrate on***

***24th April 2015).***

**JUDGMENT**

1.The appellant **MARTIN GITONGA (Gitonga)** was charged before theChief Magistrate's Court at Nanyuki with the **offence of robbery with violence contrary to Section 296(2) of the Penal Code.** After trial he was convicted and he was sentenced to death. He was aggrieved by his conviction and sentence and has preferred this appeal. The duty of this court as the first appellant court was stated in the case **KENYA PORTS AUTHORITY VS KUSTON (KENYA) LIMITED (2009) 2EA 212** as follows:-

> **"On a first appeal from the High court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."**

2.The prosecution submitted evidence of the complainant **Peter KinuthiaWachira (Wachira)** and in so doing relied on the doctrine of recent possession. Wachira stated that on the 30th January 2011 at about 9.00 p.m. he was attacked on his way home having come from Panama club in Timau. As he walked home he noted that there were four people. Two of those people were ahead of him whilst two were behind him. As he proceeded he saw a man who was ahead of him running away. The people that were ahead of him ran after that man. Wachira feared that these people were thieves. He began to walk backwards as he did so those two people that were behind him began to beat him andhe fell down. They began to search his pockets and as they did so the other two persons appeared. Those people removed his jacket, trouser and took away a paper bag which contained a trouser. He was hit on the head and he became unconscious. He was left there only in his t-shirt and shorts since everything else had been stolen. A workmate of Wachira called David Kathurima rescued Wachira when he found him lying down

unconscious by taking him into his house. Kathurima reported the incident at Timau Police Station. Wachira continued being unconscious in the house of Kathurima until the next morning when he himself was able to go to Timau Police Station to report the robbery.

3.Wachira stated that during the robbery he heard the voice of Gitonga as being one of those who robbed him. He also stated that whilst he entered the Panama club he saw Gitonga standing near the door. He noted that Gitonga was in the company of other people. There were about 6 people in total outside the Panama Club. As he left the Panama club he left Gitonga in the place he had seen him standing.

4.Gitonga was working at the same place with Wachira. Wachira stated that on 4th February 2011 at about 8.00 a.m. he noted Gitonga was wearing the trousers which he had been carrying in the paper bag on the fateful day. Wachira suspected the trousers was his. He again saw Gitonga in the changing room and it is at that place he was able to confirm that the trousers Gitonga was wearing were the trousers he lost during the robbery.Wachira reported the matter to the security officer. Wachira and the security officer waited for Gitonga at the gate at the end of the day. Gitonga was questioned by the security officer and on being requested to remove the subject trouser it was found that he was wearing another trouser inside. He was taken to Timau police station together with the subject trouser.

5.Wachira in evidence stated that he had purchased the trouser on the day of the robberyand taken it to a tailor because the waist was too big and the length was too long for him. It is that trouser he was carrying on the day of the robbery. After the arrest of Gitonga both Wachira and the security officer went to the tailor and were able to get a piece of the cloth the tailor had cut from the trouser. That cloth was taken to the police station.

6.**PW 2** was **Henry Kimathi**. He said that he was a tailor by trade. On 30th January 2011 at 8.30 p.m. whilst at his place of work Wachira took to him a trouser for repair. They were acquainted with each other. He reduced the waist of the trouser and the lengthof the legs. He worked on the trousers for 30 minutes and returned it to Wachira. On the following day Wachira went to his premises and informed him that the trouser had been stolen. He confirmed that he gave the security officer a piece of the cloth that he had cut from the trouser. On being shown the piece of cloth that was before the court he confirmed that it was the one he had cut from the trouser and which he had added to the security officer. He described the trousers as being black codroy.

7.**Simon Mugo (Simon)PW3** was the security supervisor at Tima Flower Farm Limited. On the 4thFebruary 2011 he was called by another security officer who informed him that he had arrested one of the workers on the allegation that he had stolen a trouser belonging to a colleague. He proceeded to the gate where the person had been arrested where he found the person wearing the subject trousers. The two security officers together with the personnel manager, were present when Gitonga was asked to remove the subject trouser. This witness was able to confirm that the trousers had been altered by a tailor as stated by Wachira. He was also able to confirm Gitonga was wearing another trouser on top of the subject trouser. This witness was with Wachira when PW 2 handed over the piece of cloth that had been cut from his trouser.

8.**PW 4 Sgt Mugabe Nyawacha** was the investigating officer. He too was able to confirm that the subject trouser which were brought to the police station was subject to alteration. He rearrested the accused for the offence he faced.

9.Gitonga was put to his defence. His defence was one of alibi. On the subject day of the robbery he said that he was at home in the company of his motherEsther Muthoni and his brother Anthony Kinyua. He said that they watched television up to 1 pm and then went to sleep. He confirmed that he slept in a separate house from his mother. He denied the offence of robbery with violence. For the first time in his defence Gitonga stated that the trousers that were produced before court were not the trousers that were taken from him. He said that the trouser which was taken from him was his own trouser.

10.Gitonga's mother Esther Muthoni gave evidence and stated that on 30th January 2011 she prepared supper. The accused was at home. She however stated that she went to bed at 9.00 p.m. and left the

accused watching television. On being cross examined she stated that she did not know where the accused went to after 9.00 p.m.

11.Learned counsel Mr.Abwuor appeared for Gitonga. He submitted in respect of the Grounds of Appeal filed on behalf of Gitonga. He submitted that the fact that Kathurima did not testify in the case created doubt of the offence that Gitonga faces.

12.Learned counsel for Gitonga faulted the conviction of Gitonga on the basis that the robbery occurred on the night and therefore submitted that the source of light should have been indicated in order to confirm whether Gitonga was properly identified.

13. In his further submissions learned counsel was of the view that the evidence of Wachira could not be relied upon because he must have been in a state of stupor because of alcohol consumption. Learned counsel was of the view that Wachira because of his state of mind might have forgotten where he had put the items he alleged were stolen from him. He was also of the view that having not produced a receipt from the tailor there was no clear evidence that the tailor altered the trousers as alleged.

14.In view of the offence that Gitonga faced his counsels submitted that it was necessary for the prosecution to produce evidence to show that Wachira was injured. It was submitted that without that evidence the offence of robbery with violence had not been proved.

15.The Principal Prosecuting Counsel Mr.Tanui submitted that the ingredients of robbery with violence as required by section 296(2) of the Penal Code were proved by the prosecution. He further submitted that it was not fatal not to call Kathurima as a witness because the totality of the evidence which was adduced by the prosecution proved the charge. In respect of the identification of Gitonga learned counsel submitted that the prosecution's case was not based on identity but rather that it relied on doctrine of recent possession.

**COURT'S ANALYSIS AND DETERMINATION**

16.The learned trial magistrate in his well-considered judgment having summarised the evidence had this to say:-

> **"From the evidence adduced before the court I have no doubt that the pair of long trousers P EX 1 belongs to the complainant and that it was stolen from him on the evening of 30/1/2011. I have no doubt it is the same trouser that was removed from the person of the accused on 4/2/2011. Mugo PW 3 was there when the trouser was removed from the person of the accused. He told the court that the complainant told them that the trouser had been slimmed by a tailor on the waist and on the leg flaps and that when they removed the trouser from the accused they confirmed that it was indeed slimmed as stated by the complainant. Mugo showed the tailor's works on the trouser. The trouser was taken to Cpl Mugabe PW 4 who was showed the said works. The tailor PW 2 identified the trouser by his works that he did on the trouser and the piece of cloth that he had cut off from the trouser. The piece of cloth was also identified by the complainant and Mugo PW 3. I then have no doubt that the pair of trousers is the same one that was removed from the accused on 4/2/2011. There is no truth in his defence that it is not the one. When the defence cross-examined the complainant and Mugo (PW 3) there was no allegation made that the trouser P EX 1 was not the one that was removed from the person of the accused. No question was put to Cpl Mugabe that the trouser is not the one that was removed from the person of the accused. In the circumstances I have no doubt that the accused's defence is an afterthought. He was found wearing the complainant's trouser that had been stolen from him on the 30/1/2011. His alibi that he was not at the scene of the robbery can only be lies."**

I wholly agree with the summary of the learned trial magistrate in his considered judgment as above and in the final conclusion.

17. The learned counsel for Gitonga submitted there were discrepancies in the prosecution's case. In my view there were no discrepancies that can in any way have weakened the prosecution's case. Even if there were I am well guided by the case of **JOSPHAT WAGURA MACHARIA V REPUBLIC (2013)eKLR**as follows:-

> **"This court has also held that such a discrepancy is curable under section 382 of the Criminal Procedure Code, Chapter 75, Laws of Kenya. In JOSEPH MAINA MWANGI vsREPUBLIC – CRIMINAL APPEAL NO. 73 OF 1993 this court held:-**
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> **'In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences."**

However as stated before there were no major discrepancies in the prosecution's case.

18.The learned counsel for Gitonga erred in my view in submitting that the robbery with violence charge had not been proved because Wachira had not brought evidence of injury before court. The ingredients of robbery with violence were the subject of discussion in the case of **DANIEL MUTHOMI M'ARIMI (2013) eKLR**as follows:-

> **"in the present case, the appellant is faced with a charge of robbery with violence contrary to section 296(2) of the Penal Code. A charge under this section has three essential ingredients that must be proved by the prosecution. In JohanaNdungu v Republic, Criminal appeal No. 116 of 1995, the ingredients for the charge of robbery with violence were stated to be:**
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> **(i) if the offender is armed with any dangerous or**
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> **offensive weapon or instrument or;**
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> **(ii)if he is in company with one or more other person or**
>
> **persons or**
>
> **(iii) if, at or immediately before or immediately after the**
>
> **time of robbery, he wounds, beats, strikes or uses**
>
> **any other violence to any person."**

19. As can be seen from the above case there three circumstances in which a robbery with violence case can be proved. The ingredients of proving injury is only one of those. In the case of Wachira he was able to testify that there were four people that robbed him. In that regard Wachira was able to prove that the perpetrators were more than one person. It is important to note that Wachira was able to place Gitonga near the scene on the night in question. Much more than that on the day prior to the recovery of the trousers from GitongaGitonga himself informed Wachira that on the night he was robbed he had tried to assist him. The issue of Gitonga saying he tried to assist Wachiraas he was robbed was not subjected to cross examination. In my view Wachira by his evidence was able to show that one of the ingredients of robbery with violence was proved. The submissions of the appellant that the offence of robbery with violence was not proved is rejected.

20. As stated before the prosecution's case relied on the doctrine of recent possession. In the case of **ISAAC NG'ANG'A KAHIGA alias PETER NG'ANG'A KAHIGA VS REPUBLIC NYR CA CRIMINAL APPEAL NO. 272 OF 2005.** That doctrine was discussed as follows:-

> **"It is trite that before a court of law can rely on the doctrine of recent possession as a basis**

**for conviction in a criminal case, the possession must be positively proves. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property wasstolen from the complainant and lastly, that theproperty 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."**

21.There was indeed positive proof that the trouser was stolen and that the trousers belonged to Wachira. This was proved by the evidence of Wachira and his tailor. It was further proved by the security officer who confirmed that Gitonga was wearing the trousers. The trouser was recovered from Gitonga within 4 days after it was stolen. There it can be seen clearly that the doctrine was sufficiently proved by prosecution.

22.The evidence against Gitonga is indeed circumstantial. That evidence adduced against Gitonga was incompatible with innocence that he claims in his defence. In the case of **Margaret WamuyuWairiokovs Republic, Criminal Appeal No. 35 of 2005** it was stated that circumstantial evidence is very often the best evidence. However we observe that in the case of **R vs. KipkeringArapKoske and another, (1949)16 EACA 135** on circumstantial evidence it was stated:-

**"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation with upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the fact to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."**

Bearing the above case in mind Wachira sufficiently proved that he was robbed of his property amongst which was the subject trouser. The said trousers were proved by Wachira and the tailor to belong to Wachira. The subject trouser was confirmed by Wachira and PW 3 to have been in possession of Gitonga. All the above shows that the inculpatory facts were incompatible with the innocence of Gitonga."

23.As rightly summarised by the learned trial magistrate the defence offered by Gitonga did not in any way shake the prosecution's case. Gitonga alleged to have been in the company of his mother up to 1p.m. His mother however when she testified stated that she left the accused watching television at 9 p.m. and she could not say where he went to after that time.

24. It is in view of the above that I find there is no merit in the appeal before me. For that reason **the appeal is hereby dismissed. The conviction is upheld and the sentence is hereby confirmed**.

**DATED AND DELIVERED THIS 28TH DAY OF JULY 2016.**

**MARY KASANGO**

**JUDGE**

**CORAM**:

Before Justice Mary Kasango

Court Assistant – Njue

Appellant: Martin Gitonga ….....

For the State: ….....

COURT

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**