**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO. 154 OF 2014**

**JOHN WANJOHI KIGOTHO ..... APPELLANT**

**VERSUS**

**REPUBLIC ……..... RESPONDENT**

***(From the original conviction and sentence in criminal case***

***No.445 of 2012 of the Principal Magistrate's Court at Kangema***

***by Hon. J.O Magori – Principal Magistrate)***

**JUDGMENT**

The appellant, **JOHN WANJOHI KIGOTHO**, was convicted of an offence of robbery contrary to section 296 (2) of the Penal Code.

The particulars of the offence were that on 18th November 2012 in Kangema District within Murang'a County, jointly with others not before court, while armed with a pistol robbed **PETER MUCHIRI** of his Nokia phone, a motor cycle battery and three radios all valued at Kshs. 9800/=

He was sentenced to death

He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds in his amended petition of appeal which can be summarized as follows:

1. That the learned magistrate erred in law and in fact by failing to consider that the purported identification could have been mistaken.

2. That the learned magistrate erred in law and in fact by applying the doctrine of recent possession wrongly.

The state opposed the appeal through M/s. Lydia Wang'ombe, the learned counsel.

Briefly the facts of the prosecution case are as follows:

Peter Muchiri (PW2) was woken up by some people who knocked at his door. When he opened for them, they took him to his mother's house. They told him to wake her up which they did. When he returned to

his house he found some items missing. After the thugs had left, his mother raised an alarm. The appellant was arrested by members of public while attempting to flee.

In his defence the appellant contended that he was stopped by some two men who alleged he was a thief.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32.**

My perusal of the record establishes that **Peter Muchiri(PW2)** and **Daniel Mwangi (PW4)** were not in a position to identify the appellant except by what was variously referred to as an apron, a big jacket or overall. The trial magistrate did not place any weight on the alleged identification by the duo. Their mother **Rebecca Muthoni Njoguini (PW1)** also testified of a big jacket that the appellant was wearing. She is the only witness who was in a position to see the robbers well. They posed as police officers and when they entered her house there was a tin lamp. Since there was no attempt to disguise themselves, moments later she was in a position to identify him from his big jacket. She also said she used to see him at Gatunguru with a motor cycle.

Though the trial magistrate did not give much weight to the issue of identification, it is worth noting that the appellant was arrested at the complainant's gate and had not had any chance to change his clothes.

Even without invoking the doctrine of recent possession, the appellant was arrested at the scene of the crime with some of the items robbed from the complainant. The court of appeal on the doctrine recent possession in the case of ***MATU Vs. REPUBLIC [2004] 1 KLR 510*** *stated:-*

> ***The inevitable conclusion therefore, is that the appellant was in possession of the goods stolen from the complainant's kiosk and he could not offer any acceptable explanation of how he came by them. The two courts below came to the same conclusion and rightly so in our view, that the appellant was one of the robbers."***

In invoking the doctrine of recent possession, the learned trial magistrate did not err but was merely bolstering his argument in an already strong case against the appellant.

There is also circumstantial evidence that link the appellant to the offence. **Charles Kangeri Ngarega (PW3)** testified that he had employed the appellant to operate his motor cycle as a taxi. At about 8.30pm, when he arrived home he expected to find his motor cycle at home as was the habit but did not. When he called the appellant his phone was off. This is the motorcycle witnesses said failed to start as the appellant was attempting to flee. His accomplices however managed to escape arrest.

In the case of **REP V. KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135,** the Court held:-

**"In order to justify the inference of guilt, the inculputory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt**."

In the instant case, the circumstantial evidence adduced by PW3 can lead to no other inference other than that the appellant was part of the gang of robbers.

The upshot of the foregoing is that the appeal has no merits.The same is dismissed and the appellant to serve the sentence meted by the learned trial magistrate.

**DATED at MURANG'A this 19th day of August 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**