REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 1(C) OF 2015

THOMAS MAINGI MULU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal from the judgement of the Magistrate's Court

at Kajiado (Hon. Okuche – Principal Magistrate

dated 21/1/2015 in Criminal Case No. 576 of 2013)

JUDGEMENT

THOMAS MAINGI MULU hereinafter referred as the appellant was charged before the Magistrate's Court at Kajiado on 5/8/13 with the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

Particulars of the offence:

The appellant on the 2nd day of August 2013 at 4.00 pm at Kimama within Loitokitok District in Kajiado County, with others not before court, while armed with Ceska Pistol, robbed Geoffrey Mpoke Parsanka of a lorry Reg. No. KBQ 894J, mobile phones and cash 4430, the property of Robert Dominic Rasaku all valued at Ksh.4.8 million.

The appellant at the trial pleaded not guilty to the charge and particulars thereof. The prosecution lined up nine (9) witnesses in support of their case. The appellant testified on his part and gave a sworn testimony.

After hearing the case the learned trial magistrate believed the case for the prosecution and found the appellant guilty. The appellant was convicted and sentenced to death as charged.

He has appealed against conviction and sentence imposed by the trial court. The grounds in the petition of appeal were as follows:

1. **The learned trial magistrate erred in both law and fact by convicting the appellant on a charge of robbery with violence contrary to Section 296 (2) of the Penal Code which charge was fatally defective since the particulars of the alleged offence do not state essential ingredients of the same.**

2. **The learned trial magistrate erred in both law and fact by failing to appreciate that there was a contradiction as to the time of the commission of the alleged offence.**

3. **The learned trial magistrate erred in both law and fact by failing to find that the prosecution did not prove to the required standard, that the prevailing conditions at the time were not conducive for identification of the appellant since the source of light, its intensity and location relative to the appellant were not disclosed as is by the law required.**

4. **The learned trial magistrate erred in law and fact by relying on evidence which was contradictory.**

5. **The learned trial magistrate erred in both law and fact by failing to find that PW6 did not conduct any investigations and that even if he did, the same were shoddy.**

6. **The learned trial magistrate erred in both law and fact by failing to accord the defence and its submissions the considerations it deserved.**

7. **The learned trial magistrate erred in law and fact by convicting and sentencing the appellant against the weight of evidence.**

8. **The learned trial magistrate erred in law and fact by meting out a sentence to the appellant which was manifestly harsh.**

For these reasons the appellant prayed for the conviction and sentence to be quashed.

At the hearing the appellant was represented by Mr. Kimeu and the respondent's case was led by Senior Prosecution Counsel Mr. Akula.

Submissions by appellant's counsel:

Mr. Kimeu for the appellant submitted and impugned the charge which the appellant faced in the lower court as being defective in substance. He argued that the appellant was charged under Section 296 (2) of the Penal Code which is a penalty section instead of Section 295 which creates the offence of robbery. This according to Mr. Kimeu made the charge totally defective in absence of any amendment.

Mr. Kimeu further contended that the particulars of the alleged offence as set out in the charge sheet were at variance with the evidence adduced. He particularly invited the court to scrutinize the testimonies of PW1 and PW2 regarding their evidence on the names and identity of the complainant.

Mr. Kimeu further submitted that the description of the alleged motor vehicle stolen on the material day was at variance with the testimonies and evidence of PW7 and PW8. According to Mr. Kimeu, the said witnesses gave conflicting evidence as to the vehicle registration number KBQ 849J and not KBQ 894J.

Mr. Kimeu further submitted that there were marked contradictions and inconsistencies by the prosecution witnesses which the trial court should have resolved in favour of the appellant. According to Mr. Kimeu, of significance was the issue of the robbers being armed with a pistol and yet none of the witnesses was explicitly clear on the number of pistols and whether they saw it being pointed at PW1.

Mr. Kimeu further delved into alleged inconsistencies on description of the number of maize bags and the nature of the materials used to tie PW1 and PW2 during the time of the robbery.

In addition Mr. Kimeu challenged the evidence of ownership of the subject motor vehicle as not proven by primary evidence being the original log book. He further faults the prosecution for not producing the actual motor vehicle in court as an exhibit. In his view the issue of ownership of the subject motor vehicle was unresolved by the prosecution against the appellant.

Mr. Kimeu faulted the prosecution evidence by PW4, the medical doctor who examined PW1 and PW2 regarding nature of injuries sustained and subsequently produced the P3 form which the trial court relied on as evidence against the appellant. The gist of the problem as per Mr. Kimeu's submissions was the age of injuries as opined by PW4 and the time the alleged offence took place.

Mr. Kimeu further contended that the appellant was not positively identified as the perpetrator of the crime in absence of an identification parade conducted by the investigating officer.

Mr. Kimeu further faulted the prosecution case and the trial court's findings for not relying on the alibi defence by the appellant. In Mr. Kimeu's argument, the defence of alibi put forward by the appellant was not disapproved by the prosecution and herefore, that alone could have been the reason to resolve it in favour of the appellant.

On case law, Mr. Kimeu for the appellant relied on the following authorities to buttress the arguments above as advanced in this appeal. The case of **TIMOTHY KATANA KAZUNGU v REPUBLIC HCCRA NO. 44 OF 2015 at MACHAKOS** for the proposition on the defective charge sheet which is not curable under Section 382 of the Criminal Procedure Code.

The case of **GODFREY OCHIENG SONGA v REPUBLIC (KISUMU CR. APPEAL NO. 199 OF 2006** for the proposition that the burden of proving an alibi does not shift to the appellant.

The case of **DAVID NGUGI MWANIKI v REPUBLIC CR. APPEAL NO. 68 OF 2001** for the principles that a charge is considered bad for being duplex occasioning embarrassment and prejudice on the part of appellant.

In a nutshell it was Mr. Kimeu's contention that the judgement by the trial court be set aside on both conviction and sentence.

The respondent's on appeal:

Mr. Akula the Senior Prosecution Counsel submitted and vehemently opposed the appeal on both conviction and sentence against the appellant. He emphasized that the prosecution proved their case at the trial beyond reasonable doubt by leading evidence to establish each of the ingredients under Section 296 (2) of the Penal Code.

Mr. Akula counsel for the respondent submitted that the charge upon which appellant was indicted was not defective as alleged by counsel Mr. Kimeu. He further submitted by inviting the court to discern the provisions of Section 295 vice versa Section 296(2) of the Penal Code.

The differences according to Mr. Akula are that Section 295 defines the offences of robbery generally whilst Section 296 (2) sets out the ingredients of aggravated robbery and penalty upon conviction.

Mr. Akula argues that the offence of robbery creates two distinct offences: one under Section 296 (1) being simple robbery with a penalty of life imprisonment, and on the other hand what is described as capital robbery under Section 296(2) which has a mandatory sentence of death upon conviction.

In support of the argument that the charge sheet and particulars thereof as enacted against the appellant were neither defective not duplex, he relied on the following authorities:

1. **JOSEPH NJUGUNA MWAURA & 2 OTHERS V REPUBLIC [2013] EKLR** upholding the decisions.

2. **SIMON MATEVU MUMALU V REPUBLIC [2007] EKLR 302 OF 2005**.

3. **JOSEPH ONYANGO OWUOR & CLIFF OCHIENG ODUOR V REPUBLIC [2010] EKLR 353 OF 2008.**

The authorities cited by counsel for the respondent was to affirm that the charge of robbery with violence should be crafted under Section 296 (2) which provides the ingredients constituting the offence and the penalty of a death sentence.

Mr. Akula on behalf of the respondent further reviewed the evidence at the trial court and weighed it against the ingredients of the offence under Section 296 (2) of the Penal Code. It was his contention that the prosecution evidence was watertight as to how the offence was committed and the appellant positively placed at the scene.

He further submitted and supported the judgement of the lower court as having rightfully convicted and sentenced the appellant on the evidence adduced by the prosecution. That the prima facie evidence by the prosecution was not rebutted by the defence of alibi presented by the appellant.

Mr. Akula contended that the robbery in question took place on 2nd August 2013. The appellant was found in possession of the lorry about four hours after the robbery. The evidence on arrest and being in possession of the lorry which was the subject matter of the robbery not only placed appellant at the scene but also established the appellant as the one who executed the plan to commit the offence. According to Mr. Akula's submissions the issue of conducting an identification parade was therefore not necessary. The cause of the appeal that Mr. Akula hinged on was the doctrine of recent possession.

For that proposition of law he relied on the decisions in:

1. **ELIZABETH GITIRI GACHANJA & 7 OTHERS V REPUBLIC [2011] EKLR CR. APPEAL NO. 51 OF 2004**.

2. **NKADSHO V REPUBLIC [2002] EKLR** on circumstantial evidence.

3. **NGANGA KAHIGA ALIAS PETR NGANGA KAHIGA V REPUBLIC CR. APPEAL 272 OF 2005**

4. **DAVID MUGO KIMUNGE V REPUBLIC [2015] EKLR**.

(These two latter cases for the proposition that the prosecution at the trial established the elements of the doctrine of recent possession against the appellant).

Learned prosecution counsel further submitted that the appellant was positively identified through testimony adduced by PW1 and PW2. In their testimony appellant at the time of committing the offence wore a jungle cap and blue shirt. He further contended that during the arrest as deduced from PW7 testimony a jungle cap was recovered from the front cabin of the vehicle.

He placed reliance on the case of **MUTANYI v REPUBLIC [1986] KLR 198** and **WANJOHI & OTHERS v REPUBLIC [1989] KLR 415** on the rule on identification by recognition. The test to be applied by the court to rely on that piece of evidence was that a positive identification had taken place and there was no error or mistake by the witness.

In support of the respondent's case, learned counsel contended that in the case below, no such error or mistake was present to challenge the testimony of PW1 and PW2 as alleged by the appellant.

Learned counsel for the respondent also submitted regarding appointment of an advocate in the lower court proceedings pursuant to the provisions of Article 5092) (h) of the Constitution.

Under Article 50 (2) (h) the right to legal representation by having an advocate assigned to an accused person by the state is provided for if substantial injustice would otherwise result. The accused is to be informed of this right promptly.

Learned counsel further submitted that appellant never applied for an advocate to be assigned. He further

submitted that there is no evidence that the right was violated and that any substantial injustice resulted as a consequence.

He placed reliance on the holding in the cases of **DAVID MACHARIA NJOROGE V REPUBLIC [2011] EKLR** and **MOSES GITONGA V REPUBLIC CA NO. 69 OF 2013**. The first case for the proposition on application of Article 50(2) (h) to persons accused of capital offences and right to legal representation at the state expense.

Secondly, for the latter case, where the court of appeal recognizes the right to a fair trial under Article 50 with one of the key obligations by parliament being to enact legislation to actualize access to legal representation. It was in learned counsel's contention for the respondent, that the appellant was not prejudiced and/nor substantial injustice occasioned for lack of legal representation.

On behalf of the respondent learned counsel submitted that the alibi defence did not dislodge the testimony by the eight (8) prosecution witnesses. That the case appellant faced at the trial court was proved beyond reasonable doubt.

This being the first appellate court the duty bestowed upon it has been well set out in the celebrated case of **PANDYA V REPUBLIC [1957] EA 336**. The court held thus:

> **"It is an established principle of the law that a first appellate court has powers to consider the questions of law and facts. It also has the duty to subject the evidence on record as a whole to a fresh and exhaustive scrutiny and to make its own findings of facts, giving allowance to the fact that it had no opportunity to see and observe the witnesses as they testify."**

In applying the above principles it is my singular duty to re-evaluate the evidence on record; the judgement by the learned trial magistrate, submissions by Mr. Kimeu for the appellant and Mr. Akula learned prosecution counsel for the respondent together with the authorities cited in this appeal. It is only then that I can draw my own conclusions as to the merit and demerits of the appeal.

This is a criminal case. The onus is on the prosecution to establish the guilt of the appellant beyond reasonable doubt. The re-evaluation of the evidence is to establish that the prosecution discharged that onus for the appeal to be dismissed and trial court judgment be affirmed. This burden on the prosecution does not shift to the appellant at any stage of the proceedings. (See **WOOLMINGTON V DPP [1935] A.C 462 CR. APPEAL R. 72**).

Section 107 of the Evidence Act stipulates that:

> **"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

The burden of proof in criminal proceedings is directly upon the prosecution to prove existence of the facts they assert on commission of a crime by an accused person. In the instant case the appellant counsel relied on the eight (8) grounds of appeal to demonstrate his dissatisfaction with the judgement of the trial court.

In the arguments by Mr. Kimeu for the appellant and response from the learned prosecution counsel, I find that the same can be christened in one broad issue for determination in this appeal:

Did the prosecution prove the guilt of the appellant as required by law beyond reasonable doubt? This key ground of appeal occasioned Mr. Kimeu to break it down into sub-headings for purposes of impugning the verdict of the trial court.

The prosecution case at the trial was based on the evidence of 9 (nine) witnesses. Their evidence had to prove the following ingredients of the offence beyond reasonable doubt in order for a verdict of guilty to be reached and a finding on conviction against the appellant.

The three tests of circumstances giving rise to the offence of robbery under Section 296(2) of the Penal Code are crafted as:

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

2. **If he is in 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.**

The evidence at the trial must show an existence of set of facts that the appellant was armed with a dangerous or offensive weapon at the time of the robbery, or the appellant was in company with one or more other person or persons, or the appellant immediately before or immediately after the time of the robbery wounded, or struck or used violence against the complainants.

In this appeal PW1 Geoffrey Mpoke and PW2 Michael Mbondo testified as the driver and turn-boy of subject motor vehicle KBQ 894J. Their evidence was to the effect that on 2/8/2013 they were to go to Kimana at about 4.30pm and collect herds of cattle for transportation to Kiboko; Kilungu.

It was further their testimony that on arrival at the scene they met four other people where one posed as the owner of the herds of cattle to be transported to Kiboko. PW1 and PW2 further testified that they did not load the herds of cattle but instead one of the four people they met pointed a pistol at them.

That the men ordered PW1 and PW2 to alight from the vehicle, that they tied PW1 and PW2 using wires and ropes. That they were then driven into the game park where they were abandoned as the two men drove motor vehicle registration KBQ 894J away. The four men left the scene. PW1 and PW2 got a chance to free themselves later and found their way out of the scene.

In the course of the robbery PW1 and PW2 adduced evidence that they sustained injuries inflicted by the assailants. They were seen at Loitokitok Hospital by Dr. Mutiso PW4 who filled the P3 forms and presented them in evidence as exhibit 1 & 4 in support of the prosecution case. Each of the complainants PW1 and PW2 sustained injuries to the face, thorax and abdomen while PW2 had injuries to the face and chest. Later in the day PW1 and PW2 reported the incident to the owner of the subject motor vehicle PW3.

PW3 in his evidence states that he telephoned a police officer PW8 that his motor vehicle had been stolen. According to the report he had hired his motor vehicle to a customer in Kimana to transport livestock. PW3 testified that he activated his tracking device and located the vehicle along Taita – Taveta Road. In conjunction with PW8 a signal was sent to police officers at Chala area to be vigilant and stop the vehicle on the basis of information given by PW3.

PW6 and PW7 Administration Police Officers on a roadblock along Rombo – Taveta Road spotted a vehicle being driven at 8.00 pm fitting the description from PW3 and PW8. It was their evidence that they arrested the vehicle which had two occupants. However, in the course of effecting arrest one person managed to escape leaving the accused who was indicted of the offence. In their testimony PW6 and PW7 identified the accused as the one intercepted and arrested with motor vehicle reg. No. KBQ 894J.

Arguing the first grounds, Mr. Kimeu for the applicant referred to the charge sheet and submitted that the information is fatally defective. The basis, according to Mr. Kimeu, was that appellant should have been charged under Section 295 of the Penal Code and not Section 296 (2) of the same code which creates the penalty for the offence. He cited the case of **TIMOTHY KATANA KAZUNGU v REPUBLIC CR. APPEAL No. 44 of 2011** at Machakos.

Learned counsel Mr. Akula for the respondent contended that the charge sheet referred to is not fatally defective. He placed reliance on the Court of Appeal case of **JOSEPH NJUGUNA (Supra)**. See also **SIMON MUTURI v REPUBLIC (Supra), JOSEPH ONYANGO OWUOR v REPUBLIC (Supra).**

The Court of Appeal set the record straight regarding the confusion of the application of Section 295 and Section 296 (2) of the Penal Code.

The gist of the provisions of Section 295 defines the offence of robbery under Section 295. The essential elements of robbery are stipulated as use of or threat to use actual violence against any person or property before or immediately after the robbery to factor in any manner the act of stealing.

These ingredients under Section 295 are pre-supposed in the offence of capital robbery prescribed under Section 296 (2) of the Penal Code. The prosecution's evidence against an accused ought to prove existence of facts under any of the three circumstances envisaged in Section 296 (2). The case of **TIMOTHY KAZUNGU (Supra)** referred to by the appellant's counsel is distinguishable by the Court of Appeal case of **JOSEPH NJUGUNA MWAURA (Supra) and JOHANA NDUNGU v REPUBLIC CR. APPEAL No. 116 of 1995** at Mombasa.

In both of these cases the Court of Appeal set out the correct position in law in respect of Section 295, 296 (1) and 296 (2) of the Penal Code. The offence of robbery once it's established that the offender was armed was a member of and in a group with more than one other person or at the time of robbery, immediately before or immediately after, that there was use of or threat to use actual violence against the victim; then Section 296 (2) comes into effect. In the instant case the accused is alleged to have been armed with a ceska pistol with others not before court and robbed the complainant Geoffrey Parsanka of a vehicle registration KBQ 894J and mobile phones.

These set of circumstances sit squarely under the provisions of Section 296(2) of the Penal Code. If the court convicts under this section a mandatory penalty of a death sentence is prescribed.

In the High Court case of **THOMAS v REPUBLIC** referred to by the appellant's counsel the misdirection was that the appellant in that case was indicted under Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The offence of defilement is created under Section 8 (1) and Section 8 (2) of the Act. There is variance as to the facts pertaining in that case and the instant case of appeal before me.

I disagree with appellant's counsel that the charge is fatally defective to warrant this court to interfere and set it aside. I find no ambiguity or prejudice occasioned upon the appellant in respect to the charge of robbery faced at the trial court.

Learned counsel for the appellant further submitted that the prosecution evidence more that of specifically PW1, PW2, PW3 and PW8 was faulty, and with inconsistencies and contradictions. He urged this court to find the inconsistencies fundamental to warrant a reversal of the trial court's judgement.

The respondent's counsel in reiterating the evidence of the nine (9) witnesses contended that there were no contradictions in their evidence. The evidence the appellant counsel has flagged relates to names and identity of the complainant (PW1). The charge sheet shows PW1's names as Geoffrey Mpoke Parsanka but (PW1) states otherwise.

Further the description of the motor vehicle registration is established by PW7 describing it as KBQ 894J. The other incident of inconsistencies according to the appellant counsel is in respect of testimony of PW1 and PW2 on number of pistols seen at the scene. From the evidence PW1 is stated to have alluded to two guns while PW2 saw only one pistol.

I have read and perused the evidence as presented at the trial court. I see no material inconsistencies alluded to PW1's and PW2's testimony. There is evidence on record that the robbers consisted of four men. The complainants were ordered out of the vehicle. There is no evidence that each focused on the four men at the same time.

The charge sheet particularizes the subject motor vehicle stolen as KBQ 894J. This is supported by the copy of records and certified copy of log book (exhibit 7). The statement can only be said to be contradictory if it is directly opposite of what was earlier stated or spoken by a witness.

In my considered view the discrepancies, if any, that the appellant's counsel is alluding to are minor and not material enough to affect the judgement of the lower court.

For this proposition the Supreme Court of Nigeria in the case of **ABOGEDE v STATE [1996] 5 NWLR pg 270, part 448** stated interalia thus:

> **"It is not every discrepancy between what one witness says at one time and what he says at another time that is sufficient to destroy the credibility of the witness all together. However, where the discrepancy is at least enough to call for a mention by the judge, it should appear on record that he averted his mind to it and the reason for believing the witness inspite of the discrepancy should also be stated. That will enable the appellate court to determine if the learned trial judge overlooked the discrepancy or whether he averted his mind to it and consider it but find the witness credible nevertheless."**

Closer home our own Court of Appeal faced the same issue in the case of **ERICK ONYANGO ONDENG v REPUBLIC CR. Appeal No. 5 of 2013 at Nairobi eKLR**. The court cited with approval the case of **TWEHAN Gane ALFRED v UGANDA CR. Appeal No. 139 of 2001 (UGCA)**. The court held thus on contradictions in evidence:

> **"With regard to contradictions in the prosecution's case the laws as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."**

What these decisions bring out is a guideline on how courts should approach the issue of inconsistencies and contradictions. The general thread being that unless the contradictions cited are of such a magnitude to occasion a miscarriage of justice, no decision is to be overturned.

In the instant appeal I have perused the record in its entirety and the impugned evidence by the appellant. The motor vehicle, the subject matter of the robbery was properly described as KBQ 894J. PW3 the owner of the motor vehicle produced as proof of ownership a copy of a log book and evidence from the Financial Equity Bank where the original is deposited as security. Crime officer PW9 took photographs of the motor vehicle at the scene and produced them in evidence as exhibit 2. The motor vehicle was released to the owner PW3. The appellant at the trial never challenged admission of documentary evidence to prove ownership. There was no application to have the motor vehicle physically availed in the course of the trial.

The prosecution's failure to produce the alluded motor vehicle did not prejudice the appellant in anyway. The evidence by the prosecution witnesses was not challenged by the appellant at the trial during cross-examination. That left the evidence by the prosecution credible and reliable to be applied by a court to reach a determination.

The motor vehicle was on hire at Kimana Centre, Loitokitok Sub-district on 2/8/2013. PW1 was the driver on the material day together with PW2's a turn-boy. They were robbed of the motor vehicle at gun point at about 4 – 6 o'clock at Amboseli Park. The owner PW3 was informed and in turn involved the police, PW8. The owner PW3 who had a tracking device located his motor vehicle being driven along Rombo – Taita – Taveta Road. PW6 and PW7 Administration Police officers intercepted the motor vehicle and arrested the appellant.

The court relied adequately on the doctrine of recent possession against the appellant. The appellant was found with the PW3's motor vehicle which had been indisputably violently robbed from PW1 and PW2 at gun point a few hours earlier. There was recovery of a green jungle cap at the front cabin of the vehicle. PW1 and PW3 gave a description in their evidence that appellant was wearing the cap during the robbery.

It was justifiable for the learned trial magistrate to safely draw the inference that the appellant was among

the robbers on 2/8/2013. In answering this question the applicable law on possession to show the claim and elements is critical. Section 4 of the Penal Code defines possession as follows:

> **"(a) be in possession or have in possession includes not only having in your own personal possession, but also knowingly having anything the actual possession or custody of any other person, or having anything in place whether belonging to or occupied by oneself or not for the use or benefit of oneself or any other person."**

In **Jowett's Dictionary of English Law pg 1367** possession is defined as follows:

> **"Possession; the visible possibility of exercising physical control over a thing, coupled with the intention of doing so, either against all the world, or against all the world except certain persons. There are therefore three requisites of possession. First, there must be actual or potential physical control. Secondly, physical control is not possession, unless accompanied by intention; hence if a thing is put into the hand of sleeping person, he has not possession of it. Thirdly, the possibility and intention must be visible or evidence by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed."**

The Court of Appeal dealt with the doctrine of recent possession of goods in the case of **ISAAC WANGA KAHIGA alias PETER KALUGA v REPUBLIC CR. Appeal No. 272 of 2005**. It held thus:

> **"It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words there must be proof. First, that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly 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 properties can move from one person to another. In order to prove possession, there must be acceptable search of the suspect and recovery of the alleged stolen property, and in overview any discredited evidence on the same cannot suffice no matter, how many witnesses."**

Applying the above legal principles to the instant case I am of the considered view that the complainant's motor vehicle was stolen at gun point at Amboseli Sub-County. The alleged robbery took place between 4 – 6 o'clock on the evening of 2/8/2013. The motor vehicle was traced with a tracking device as it was being driven along Rombo - Taita Taveta Road.

That was about two hours after the robbery. There was no time lag between occurrence of the offence and recovery of the motor vehicle. The description of the motor vehicle and documentary evidence on ownership produced as exhibits stands uncontroverted. The particulars of the motor vehicle in the charge sheet and supporting documents demonstrate that there is no dispute on ownership.

The appellant was arrested being in actual possession of the motor vehicle far away from the custody of the owner. He had taken physical control together with another not before court. The intention as can be inferred was to deprive the complainant permanently of his property. It was not normal for appellant to drive complaint's motor vehicle without consent or authority having acquired it through the commission of an offence. The applicable facts to be drawn herein; he was taking for his own benefit or for another person.

The burden of proof shifted to the appellant to adduce evidence on how he came to be in possession of the motor vehicle. There was no such explanation. What the appellant put forward was an alibi defence. He denied that PW6 and PW7 arrested him at Challa while in possession of a motor vehicle, the property of the complainant. The alibi defence was to cast doubt in the prosecution case that appellant was at the scene of the crime.

The Court of Appeal addressed this issue in the case of **VICTOR MWENDWA MULINGE v REPUBLIC [2014] eKLR**. The court stated as follows:

> **"It is trite law that the burden of proving the falsity, if at all of an accused's defence of alibi lies on the prosecution. See** Karanja v Republic [1983] KLR 501**. This court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."**

The learned trial magistrate addressed himself on the defence by the appellant as:

> **"The defence does not raise any doubt into the prosecution case and I will dismiss it."**

From the prosecution case and on evaluation I find several pieces of cogent evidence to confirm that appellant was nowhere else but at the scene of the robbery. That thread of evidence flows from the testimony of PW1, PW2, PW3, PW5, PW6 and PW7. That evidence by the prosecution put up a watertight case against the appellant which was not rebutted in answer to the charge.

It is trite law that a criminal case must be proved beyond reasonable doubt. ***Lord Denning*** had the opportunity once again to elucidate the proposition of the law as to the making of the phrase proof beyond doubt in the case of **MILLER v MINISTER OF PENSIONS [1947] 2 ALLER pg 372** as follows:

> **"Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law will fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave duly a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt but nothing short of that will suffice."**

I am of the conceded view that the prosecution presented sufficient evidence to prove the case beyond reasonable doubt. The appellant hinged onto such discrepancies which on evaluation are found to be too minor to warrant this court to interfere with the judgement.

The evidence of recognition of the appellant being in possession of recently stolen property of the complainant squarely placed him at the scene of the robbery. The prosecution proved the existence of all of the circumstances stipulated under Section 296(2) of the Penal Code.

The law is very clear that proof of any one of the ingredients in the three circumstances constitutes the offence. In the instant case all the three scenarios were established beyond reasonable doubt by the prosecution.

As regards Article 50 (2) (h) - a right to a fair trial, that the appellant was not assigned an advocate by the state, this court has scrutinized the entire record and proceedings before the trial court. It cannot be said that appellant did not have a fair trial because he was not represented by an advocate. The prosecution served the appellant with information and witness statements regarding the offence. The appellant had the opportunity to cross-examine and challenge the evidence by the witnesses.

At the close of the prosecution's case the appellant was placed on his defence. He answered to the charge by giving unsworn testimony. Thereafter the record reveals that he prepared final written submissions on the issues which emerged at the hearing.

DECISION

The conclusion I draw is that in accordance with the basic test of substantive justice, there was no failure or miscarriage of justice that occurred. On the totality of the whole evidence carefully considered and on

the above reasons this appeal lacks merits on both conviction and sentence. I hereby dismiss it and affirm the judgement of the lower court dated 21/1/2015.

Dated, delivered in open court at Kajiado on 14th day of October, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Akula for Director of Public Prosecutions

Mr. Kimeu for the appellant present

Appellant present

Mr. Mateli Court Assistant

COURT: The typed and certified proceedings be supplied forthwith.

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R. NYAKUNDI

JUDGE