REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 29 OF 2015

FORMERLY NAKURU CRIMINAL APPEAL NO. 135 OF 2014

(Being appeal from original Conviction and Sentence in the Chief Magistrate's Court at Narok Criminal Case No. 1619 of 2014)

WILSON KURIA KIMANI……....APPELLANT

-VERSUS-

REPUBLIC…….....RESPONDENT

J U D G M E N T

1. The Appellant was in the substituted charge sheet presented on 24/1/2014 charged with two counts of Robbery Contrary to Section 296 (2) of the Penal Code before the Chief Magistrate's Court at Narok. The alternative count was Handling stolen goods Contrary to Section 322 (2) of the Penal Code. The particulars are set out in the charge sheet.

2. At the close of the trial, he was convicted on the two counts of Robbery with violence Contrary to Section 296 (2) of the Penal Code and sentenced to death in respect of count 1 while sentence on count 2 was held in abeyance.

3. While the appeal was pending Section 359 of the Criminal Procedure Code was amended pursuant to the passage of the High Court Organisation and Administration Act. Thus this appeal was set down for hearing before one Judge. The court also allowed the Appellant's application to adduce further evidence at the hearing of the appeal, being an **OB No. 18 of 8th November 2013** from Narok Police Station.

4. The original grounds of appeal were sharpened and more or less repeated in the Amended Grounds of appeal filed subsequently albeit without the court's leave .

5. The Amended grounds of appeal are that

> **"1. THAT the pundit trial magistrate erred in law and fact when he relied on exhibit that were falsely planted against me to hold that I was found with the same drawing an assumption that I was at the scene of robbery.**
>
> **2. THAT the learned trial Magistrate erred in law and fact when he convicted me in the present case while relying on the evidence of purported visual identification which was not free from error or mistake.**
>
> **3. THAT the pundit trial magistrate erred both in law and fact when he convicted me in the**

present case relying on the evidence of the identification parade conducted in my respect yet failed to find that the same flawed as the chapter 46 of the force standing orders was not duly observed.

4. THAT the pundit trial magistrate erred both in law and fact when he rejected my plausible defence that was consistent with innocence." (sic)

6. In support of his appeal, the Appellant relied on the written submissions. Pursuant to the court's order **PC Ronald Chemosit** of DCI Narok tendered in court the original **OB No. 18 of 8th November 2013** and was also referred to **OB No. 16 of 4th November 2013**.

7. The Appellant's submissions on grounds 1 and 2 while not disputing the robbery at the home of the victims, take issue with their ability to identify the robbers. Relying on the **OB No. 8 of 18th November 2013** the Appellant challenges evidence by **PW1** (one of the robbery victims) that he was arrested on 10th November 2013 and that he was then in possession of a camera stolen from **PW1's** house as claimed by one police officer **PW3**. Whereas **PW1** and **PW2** testified that they learned of the recoveries on 10/11/2013. The Appellant's argument is that the discrepancies indicate that the stolen items were planted on him.

8. Concerning grounds 3 and 4 the Appellant submitted that the identification parade conducted subsequent to his arrest served no purpose as the victims of the crime having spotted him were the ones who alerted the police to arrest him. He pointed out that the purported identification by the victim **PW2** was unreliable as it was based on the clothing worn by the Appellant. The Appellant further submitted that the trial magistrate did not give due consideration to his evidence and particularly the circumstances of his arrest. He also highlighted the failure by police to procure data on phones allegedly recovered in his possession.

9. For his part, Mr. Koima on behalf of the DPP opposed the appeal. He reiterated the evidence by **PW1** concerning the circumstances of the robbery, therefore asserting that the victims had sufficient opportunity to observe the robbers, who spent almost 3 hours in the victims' home. He submitted that the Appellant was arrested after the victims spotted him on 8th November 2013. That when police arrested the Appellant, they recovered a camera identified by **PW1** and **PW2** as their stolen property.

10. Citing the court of appeal decision in **David Nzongo –Vs- Republic [2010] eKLR**, Mr. Koima argued that under the doctrine of recent possession, the Appellant ought to have explained his possession of the camera. He pointed out that the robbers numbered about five and one of them was armed with a firearm and that the complainants sustained injuries at the hands of the robbers. He therefore submitted that the charges against the Appellant were proved and that the appeal has no merit.

11. In **Okeno -Vs- Republic [1973] EA 32** the Court of Appeal outlined the duty of the first appellate court stating that:

"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. During the trial, the prosecution called nine witnesses. The prosecution case was as follows. On the evening of 2/11/2013, **Samuel Mogeni Motari (PW1)** and his wife **Martha Ogamba (PW2)** were in

their residence at Total Estate, Narok. At about 7.30pm **PW2** while performing routine house chores, opened the door to pick an item from outside the house. Two men rushed towards her. She screamed drawing **PW2** to her side. Presently, more men appeared and pushed the complainants to their house. One of them, identified as the Appellant was armed with a firearm. On pain of death, the couple was forced into their bedroom and made to give up various household goods including a television set and phones.

13. When the robbers, not finding any money threatened to harm them, **PW2** pleaded with them, promising that the couple would deliver money to the robbers in the next few days. After ransacking the home and assaulting the witnesses, the robbers left with the goods. Terrified, the couple did not raise an alarm. They sought treatment on the next day and also reported to police.

14. The robbers made good their threat on 3/11/2013 when they telephoned **PW1** demanding the promised money. They threatened to cause harm to the couple or set their home ablaze. This caused the couple, fearing for their safety, to move temporarily into a lodging. By chance, the couple spotted three of the gangsters including the Appellant within the town on the next day but they vanished and police who subsequently came to the scene could not trace them. That was on 7/11/2013.

15. However on the next day (8/11/2013) the Appellant was spotted by **PW2** who alerted **PW1** then with her. It would seem that members of the public took position to prevent the escape of the Appellant while police were notified. It was **PC Okoth (PW3)** and other officers who came to the scene and arrested the Appellant. They took him to the station and upon conducting a search recovered several items including a BenQ Digital Camera (**Exhibit 3**).

16. Also recovered were a leather wallet bearing the Appellant's Identity card and 3 phones make **TECNO**, **FORME** and **IPLUS** as well as a **NOKIA** phone and a **sim card No. 0772980291**. None of the phones were tendered as exhibits at the trial. Subsequently identification parade were conducted and the Appellant was charged.

17. In his unsworn defence the Appellant testified that he was a potato trader in Nairobi. That on (8/11/2013) while awaiting transport at a stage in Narok he was arrested by Narok, Police who demanded that he leads them to other accomplices. He was led to Majengo for that purpose and, assaulted by police sustaining injuries. Initially he was booked at Mulot Police Station and only taken to Narok Police Station on 10/11/2013 to find a parade mounted. On 11/11/2013 he was charged and subsequently forced to sign a false inventory concerning goods he knew nothing about. He denied the charges.

18. I have considered the evidence on record and the respective submissions in respect of the appeal. The robbery at the home of **PW1** and **PW2** on the night of 2nd November 2013 was not in dispute. Nor the loss of assorted household goods to the robbers. The disputed issue in this matter is the identification of the Appellant as one of the robbers who struck at the home and his possession of recently stolen goods.

19. The prosecution evidence was primarily based on the physical identification of the Appellant by the complainants, and the recovery of one of the items stolen from the complainants in his possession about six days since the robbery.

20. Concerning the identification parade conducted on 10/11/2013 by **IP Peter Muiruri (PW6),** I wholly agree with the Appellant that it served no useful purpose; both **PW1** and **PW2** had admitted seeing the Appellant previously and infact led to his arrest on 8/11/2013. Be that as it may **PW1** and **PW2** gave what appears to me a vivid account of the robbery incident. Their evidence regarding events during the incident is consistent. They stated that the robbers harassed them while demanding for valuables and money; and that they even ate food at the house.

21. With particular regard to the participation of the Appellant in the robbery, **PW1** stated that in his evidence-in-chief that there was gunman among the robbers. He said:

> **"They (robbers) beat me up demanding cash. I wsa pushed into the bedroom. My wife was**

also pushed into the room. They ransacked the house looking for cash. They found no cash. The gunman cocked the gun. He said that if I did not give them cash he would shoot me. He detained the magazine and showed me live rounds of ammunition saying that he was for real …… The gunman maintained constant guard on me saying he had been at Westgate Mall and had a good experience at hostile situation…… The house had lighting on. It was electricity lighting in all 4 bedrooms. The 5 men were joined by 3 others during the course of robbery. The man in the dock is the one who pointed a gun at me. He was being called "corporal" by his accomplices. He is the one who was arrested by police after I spotted him around cereals (Cereals Board Depot). He is wearing the very same clothes that he was wearing on the date of robbery."

22. Under cross-examination **PW1** stated inter alia that:

"You stayed in the house over 3 hours. You (Appellant) were the ring leader. You closely questioned me. You told me that you had planned to attack me on an earlier date but could not as I had many guests that date. You held the gun. I think that it was a G3 Rifle. A total of 8 men raided my house. There were other weapons…… Yes I am the one who alerted CID on two occasions that I had spotted you after the robbery…… One day at ODM Market. On day 2 you were at cereals."

23. PW2 also referred to a gunman and "ring-leader" called corporal stating:

"One of them called corporal warned that if we made any report to the police we would find corporal there and pay with death. The man who was being called corporal is the Accused in the dock. He was holding the firearm. He is the ringleader who ordered his accomplices around. I took particulars noted of this Accused because he was the most prominent of the 8 criminals …… Master of the other 7. He spoke with me closely. I negotiated with him not to beat me in the presence of my children. He granted this request and hid the children in one room…… On 8th November, we were with my husband on our way to cereals depot to buy fertilizer. When we spotted "corporal" standing by a kiosk. He had a bottle of mineral water……sweater on..... It is corporal whom I handed over this BenQ Camera"

24. During cross-examination **PW2** was to state that:

"I counted 8 male robbers. You were the gunman. You were being called corpora. You gave out verbal instructions and orders to your accomplices……. There was clear electricity lighting. I am the one who actually spotted you near cereals deport before alerting my husband…… You had no face mask…… boasted you would not be traced…… I am the one who handed over the camera to you."

This witness also denied the suggestion, made for the first time, that exhibits were planted on the Appellant, explaining that, the Appellant had not been arrested at the time she recorded her first statement to police on 4/11/2013.

25. Reviewing the identification evidence albeit in a summary manner, the trial magistrate stated in his judgment that:

"As can be exhibited by the evidence, there was overwhelming evidence against "corporal". These were 3 ways

1) **He was positively identified by PW1 in a police identification parade……**

2) **Similarly, he was positively identified by PW2 (Martha)**

In both cases 1 and 2 the witnesses had prolonged exposure to the robbers for over 3 hours in their house which had good electricity lighting." (sic)

26. Because the robbery, as usually is the case, happened unexpectedly, and at night, I think the trial magistrate should have considered the evidence of identification in a little more detail. Rather than in the broad strokes fashion he did. The Court of Appeal has in several cases pronounced itself concerning visual identification by night or in difficult circumstances, such as those pertaining in to the present case.

27. In the case of Jose **Joseph Muchangi Nyaga & Another -Vs- Republic (2013) eKLR** the court stated in this regard :-

> **"Evidence of visual identification should always be approached with great care and caution (See Waithaka Chege versus Republic (1979) (KLR 217). Greater care should be exercised where the conditions for favourable identification are poor. (Gikonyo Karume and Another Versus Republic (1980) KLR 23) ……before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of and the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him……"**

28. Caution is necessary in this case because there were 8 robbers in the night robbery and the witnesses were subjected to harassment and even assault in the course of the robbery.

29. But as the trial court noted, there was electric light in all the rooms. Both **PW1** and **PW2** were in one room described as a bedroom, lit by electricity. From the description of the role played by and conversation had with the Appellant, the witnesses had opportunity to view him sufficiently, even noting his clothes. Further, the second witness **(PW2)** stated that she personally handed over one of the items – the recovered camera – to the Appellant during the robbery. **PW1** said that the Appellant guarded him closely during the incident and that he and his wife 'negotiated' with the robbers, promising to give them money later, in order to escape threatened death.

30. Three hours is a long time, and I think in those circumstances, the witnesses had ample opportunity to observe the Appellant, in particular who stood out for his "commander" role. So much that **PW1** and **PW2** were able to identify the Appellant when they spotted him two days later within the town.

31. Evidence by the Appellant that he was on his own personal mission on the day of arrest was challenged by the recovery of the digital camera on the day he was arrested. This evidence, if credible provides useful corroboration of the identification evidence by **PW1** and **PW2.**

32. In this regard, it seems that after **PW1** and **PW2** spotted the Appellant, notified the police and **PW3** proceeded to the scene with other officers. It was day time. **PW3** testified that on arrest, the Appellant was taken to the station where a search conducted on him revealed the stolen digital camera. The search was conducted in the presence of **PC Chemosit (PW4)** at the station.

33. Both witnesses relied on the inventory admittedly signed by the Appellant in connection with the recovery **(Exhibit 4)** to authenticate the recovery. The same is dated 8/11/2013 which date puts to doubt the Appellant's statement that the same was made after his first court appearance on 11/11/2013. Although the Appellant was to return to court 7 days later on 18/11/2013 and on other occasions, he did not raise this matter to the court.

34. The proceedings of 13/1/2014 show that the Appellant knew the name of the investigating officer as he complained to the court about his reluctance to supply him with witness statements. The witness, when he testified on 27/2/2014, asserted, like, **PW3**, that the Appellant voluntarily signed the inventory herein.

35. The appellant while insinuating that the recovered camera was 'planted' on him did not specifically state to **PW3** and **PW4** in cross-examination that he was forced to sign the inventory. If the Appellant is believed, there are only two possibilities; namely that **PW3** and **PW4** obtained the camera **Exhibit 3** from another source or the Complainants and planted it on the Appellant, or that the Appellant was infact found in possession thereof. Much has been made by the Appellant concerning the fact that **PW1** and **PW2**

were only shown the exhibit on 10/11/2013 when they attended the identification parade. Nothing turns on that point as the Appellant had subsequent to his arrest been moved to Mulot Police Station where the parade was held on 10/11/2013. The witnesses demonstrated to the trial court photographs previously taken on the camera, by way of identification.

36. In my own view, I find it unlikely that **PW1** and **PW2** conspired with police to 'plant' the camera on the Appellant. Their evidence concerning the robbery incident and the spotting of the Appellant in town appears believable. They had no reason out of the multitude of people in Narok town to frame an innocent man whom they did not have dealings with previously. Similarly **PW3** did not know the Appellant until he was fingered by the Complainants.

37. The Occurrence Book entry of 8/11/2013 tendered in court may not have reflected the recovered camera – the full entry – was not availed. However, the inventory prepared in this case, suffices in my view. The evidence on the recovery therefore is credible and the court properly relied on it. The exhibit had been stolen from the home of **PW1** and **PW2** only six days before. The Appellant made every effort to distance himself from the exhibit. The facts of this case are similar to those in the case of **David Nzongo –Vs- Republic [2010] eKLR** which was cited by Mr. Koima.

38. In that case the court discussed the application of the doctrine of recent possession as follows:

> ***"The burden of proof in respect of the doctrine of recent possession; whether doctrine of recent possession properly invoked by the two courts below.***
>
> **There is a rebuttable presumption of fact under Section 119 of the Evidence Act, Cap 80, Laws Kenya that the appellant was either the robber or a guilty receiver, unless he offers a reasonable explanation as to his possession of suspected stolen items."**
>
> **In the case of *Francis Kariuki Thuku & 2 others –Vs- Republic [2010] eKLR* this Court held 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 Cr. Appl. 269 by the Lord Chief Justice of England and this Court's own decision of Samuel Munene Matu V. R. 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)**

39. The trial court in this case correctly applied the doctrine of recent possession. The Appellant having been found in possession of the **camera (Exhibit 3)** a rebuttable presumption under Section 119 of the Evidence Act had been raised. No explanation was given by the Appellant in this case. And beyond the evidence of possession he was also reliably identified by the victims of the robbery as the robber. The evidence in this case was therefore overwhelming and displaced the Appellant's denial.

40. In my view therefore there is no merit in the Appellant's grounds of appeal and the appeal must fail. Accordingly, the appeal is dismissed.

Delivered and signed at Naivasha, this **16th** day of **December, 2016.**

In the presence of:-

For the DPP : Mr. Koima

For the Appellant : N/A

C/C : Barasa

Appellant : Present

C. MEOLI

JUDGE