REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 39 OF 2016

JIMMY MASILA KITEMA……………………………………………….. APPELLANT

VERSUS

REPUBLIC……………………………………………………………RESPONDENT

(From original conviction and sentence in Criminal Case Number 562 of 2014 in the Senior Resident (sic)**Magistrate's Court at Taveta delivered by Hon R.M. Ondieki (PM) on 9th March 2015)**

JUDGMENT

INTRODUCTION

1. The Appellant herein, Jimmy Masila Kitema, was tried and convicted by Hon R.M. Ondieki, Principal Magistrate for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was sentenced to death as prescribed by the law. He had also been charged an with alternative charge of handling stolen property contrary to Section 322(1)(2) of the Penal Code.

2. The particulars of the main charge were that :-

> **"On the 15th day of November 2014 at about 2030 hrs at Mwanyaza area in Kedong Village within the Taita Taveta County, jointly with others not before the court, robbedJohn Omondi of Motorbike Reg No. KMDC 618J Make Skygo blue in colour valued at Kshs 65,000/=, One Samsung Mobile worth Kshs 7,000/= and a wallet containing Kshs 800/= and immediately before and immediately after the time of such robbery wounded the said John Omondi."**

ALTERNATIVE CHARGE

> **"On the 16th day of November 2014 at about 2030 hrs at Mwanyaza area in Kedong Village within the Taita Taveta County, otherwise than in the course of stealing, dishonestly received or retained One Motor Cycle Reg No. KMDC 618J Make Skygo blue in colour valued at Kshs 65,000/= knowing or having reason to believe to be stolen good**(sic)**."**

3. Being dissatisfied with the said judgment, on 17th June 2016, the Appellant filed a Memorandum of Grounds Appeal at the High Court of Kenya, Mombasa. The grounds of appeal were that:-

> **1. THAT the learned trial magistrate erred in lawand fact by convicting him on relying** (sic)**on the evidence of recent possession alleged M/Cycle without considering that there was no prove to have been recovered in his possession** (sic).

2. THAT the learned trial magistrate erred in law and fact by convicting him without seeing that none of the witnesses pointed a finger of guilty at him as one of the robbers who robbed the complainant herein.

3. THAT the learned trial magistrate erred in law and fact in by convicting him on failing to see that the source of his arrest was not established to have any links to this matter in question for the members of the public who arrest him never testified to clear any doubt of his arrest (sic)**.**

4. THAT the learned trial magistrate erred in law and fact in failing to note that the prosecution had failed to prove its case beyond any reasonable doubt.

5. THAT the learned trial magistrate erred in law and fact in failing to consider his defense.

4. His Appeal was subsequently transferred to the High Court of Kenya Voi on 26th July 2016 by Ongeri J. On 5th September 2016, he filed Amended Grounds of Appeal and Written Submissions. He retained all his Grounds of Appeal as Amended Grounds of Appeal Nos (2), (3), (4) and (5) save for Ground of Appeal No (2) hereinabove which was replaced by the following Ground of Appeal No (1):-

1. THAT the learned trial magistrate erred in law and fact by finding his conviction and sentence without considering that the same was un safe for he was not awarded a fair trial as required by the law thus contravening to ARTICLE 50(j) of the constitution (sic).

5. The State filed its Written Submissions dated 27th September 2016 on even date. In response to the said Written Submissions, the Appellant filed Additional Submissions on 25th October 2016.

6. When the matter came up on 3rd November 2016, both the Appellant and counsel for the State asked the court to rely on their respective Written Submissions in their entirety as they did not wish to highlight the same. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

8. In establishing whether or not the Appellant's guilt was proven in the charge of robbery with violence, this court identified the following pertinent issuesfor its determination:-

a. Whether or not the Appellant was accorded a fair trial;

b. Whether or not the Appellant was positively identified;

c. Whether or not the Prosecution proved its case beyond reasonable doubt; and

d. Whether or not the Learned Trial Magistrate considered the Appellant's defence of alibi.

9. The court therefore dealt with the said issues under distinct and separate heads shown hereunder.

I. RIGHT TO FAIR TRIAL

10. Amended Ground of Appeal No (1) was dealt with under this head.

11. The Appellant submitted that during trial, he was entitled to a fair hearing as envisaged in Article 50 (2)(c) and (j) of the Constitution of Kenya, 2010. The said Article provides as follows:-

> **Every accused person has a right to a fair trial, which includes the right-**
>
> **(c) to have adequate time and facilities to prepare a defence;**
>
> **(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;**

12. He stated that he applied to be furnished with copies of witness statements on 17th November 2014 and on 22nd December 2014 before the trial commenced but the same were never furnished to him as a result of which the whole trial proceeded without him ever having been supplied with the same. It was his submission that this failure to supply him with the said statements caused him prejudice. He referred this court to the case of **Cr Appeal No 26 of 2014 Fredrick Okoth Okumu** in this regard and urged it to allow his Appeal.

13. The State contended that when the matter progressed for hearing for the first time on 9th January 2015, the Appellant never sought an adjournment so that he could be supplied with the said witness statements. It added that the responsibility of the Prosecution in furnishing him with the said documents was limited to making the said witness statements available to him but did not entail it incurring costs to make copies of the said witness statements and furnishing them to him.

14. It is good practise for a trial court to seek to know from all parties in any proceedings if they are all ready to proceed with the hearing of a case at any given time. However, a trial will not be deemed to have been a nullity or a mistrial merely because a trial court has not established this fact. Indeed, once such a trial court has made an order for furnishing of witness statements or other evidentiary material to an applying party, the responsibility to inform it that no such evidence has been supplied lies with that party. That responsibility does not lie with the other party of the trial court.

15. It therefore follows that once the Learned Trial Magistrate herein made an ordered directing that the Appellant be furnished with the said Written Statements, it was his responsibility of the Appellant to follow up and obtain the same from the Prosecution and to alertthe said Learned Trial Magistrate that he had not received the said witness statements before the trial commenced on 9th January 2015.

16. The Appellant could not have remained silent during the entire trial and later contend that his right to fair trial had been violated at this appellate stage because he had the opportunity of accessing evidentiary material that the Prosecution intended to rely upon before and during the trial.

17. The only inference that could be drawn and, which the Learned Trial Magistrate correctly drew when the Appellant proceeded without the said Witness Statements and failed to alert him that he had still not been supplied with the said witness statements was that the Appellant was ready to proceed with the hearing. The Appellant had acquiesced *status quo* prevailing at the particular time. His failure to object amounted to a waiver to object.

18. This court was therefore satisfied that the Learned Trial Magistrate acted correctly by presuming that the Appellant had been supplied with the witness statements and thus proceeding with the hearing.

19. Had the Appellant informed the Learned Trial Court that he had not been furnished with the witness statements and the said Learned Trial Magistrate proceeded with the hearing of the case, then that would have amounted to an infringement of his right to fair trial as protected by Article 50 of the Constitution of Kenya. In such an instance, this court would not have hesitated to nullify the proceedings therein.

20. In the premises foregoing, Amended Ground of Appeal No (1) was not merited and the same is hereby dismissed.

II. PROOF OF THE PROSECUTION CASE

21. The question of the Appellant's identification and the doctrine of recent possession contained in Amended Grounds of Appeal Nos (2), (3) and (4) were so closely intertwined and were therefore dealt with under the following heads.

A. IDENTIFICATION OF THE APPELLANT

22. The Appellant's submission was mainly centred on his identification by the Complainant, John Omondi (hereinafter referred to as "PW 1"), which he contended was never proven. PW 1testified that on 15th November 2014 at about 8.00 pm, he was riding Motor Cycle Registration Number KMDC 618J Skygo blue in colour (hereinafter referred to as "the 1st subject Motor Cycle"), which he said belonged to his brother, on his way to Kedong when he was blocked by Motor Cycle Registration Number KMCC 715P (hereinafter referred to as "the 2nd subject Motor Cycle) in which his three (3) attackers were travelling on.

23. He argued that the Learned Trial Magistrate erred when he concluded that PW 1 had identified him yet No 86058 PC Erickson Kiptoo (hereinafter referred to as "PW 2") had testified that he was arrested two (2)- three (3) kilometres from where PW 1 was alleged to have been attacked. He contended that this materially contradicted PW 1's evidence who had told the Trial Court that he was arrested about five (5) minutes after the alleged incident or two hundred (200) metres from the place of the said alleged incident.

24. He questioned why he was not booked with the 1st subject Motor Cycle at the time he was arrested if at all the same was really found in his possession. He was thus emphatic that the doctrine of recent possession that the Learned Trial Magistrate was irrelevant as it was a mere allegation with no evidentiary value.

25. He argued that the person PW 1 referred to as "Nzomo," who PW 1 had stated was the person who identified the 2nd subject Motor Cycle as having belonged to him (the Appellant) and the neighbours who PW 1 said came to his rescue were not called as witnesses during the trial.

26. It was his further submission that the contradiction in the main and alternative charges as regards the time he was allegedly found in possession of the 1st subject Motor Cycle was so material that it proved that the said charges had been fabricated. He argued that he could not have been in the police cells on 16th November 2014 at 8.30 am as had been stated by PW 2 and still be found in possession of the 1st subject Motor Cycle on the same date at 2100 hours as had been indicated in the Alternative Charge.

27. In arguing that the State had not demonstrated that the doctrine of recent possession was applicable in the circumstances of his case, he referred this court to the case of **Arum vs Republic 2006 EA** in which the Court of Appeal rendered itself as follows:-

> **"Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively identified, that is, there must be positive proof first, that the property was found with the suspect, secondly, that the property is positively identified as the property of the complainant, thirdly, that the property was stolen from the complainant, and fourthly, the property was recently stolen from the complainant."**

28. On its part, the State contended that the doctrine of recent possession was applicable in the circumstances of the case herein as the Appellant was found in possession of the 1st subject Motor Cycle. It further averred that there was nothing in the proceedings that seemed to suggest that the Appellant was not booked at the Taveta Police Station with the 1st subject Motor Cycle.

29. It was its submission that although the Prosecution did not call other witnesses to testify in the Trial Court, PW 1's evidence was sufficient as PW 1 as a single witness can prove a fact. It placed reliance on Section 143 of the Evidence Act Cap 80 (Laws of Kenya) that provides that **"no particular number of witnesses shall in the absence of any provision to the contrary be required to proof any fact."**

30. The State correctly stated that no particular number of witnesses is required to prove a fact and that a single witness can do so. Where there is a single witness, however, greater care must be taken to establish that such witness identified his attacker more so if there are no favourable conditions prevailing at the material time.

31. This was ably captured in the case of **Maitanyi vs Republic [1986] KLR 198 at 200** where it was held as follows:-

> **"…Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification especially when it is known that the conditions of favouring a correct identification were difficult. In such a circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."**

It was evident from the proceedings before this court that the Appellant's conviction was based on the sole evidence of PW 1. It was therefore necessary to place his evidence under a microscopic lens to establish if his identification of the Appellant herein was free from error.

3It was clear from the proceedings that the Prosecution did not lead any evidence to demonstrate that the lighting conditionsat the material time were conducive for PW 1 to have identified the Appellant herein. Although the said issue of lighting was not raised by either the Appellant or the State, it was evident that the conditions prevailing at the time PW 1 were not favourable for PW 1 to have positively identified the Appellant as the incident was said to have occurred at night.

34. Indeed, PW 1 testified that the incident occurred at 8.00pm and he did not recognise his attackers. Up until this point, his evidence was very unsafe to sustain a conviction against the Appellant herein. It required corroboration through either direct or circumstantial evidence as the said "Nzomo" or neighbours were not called as witnesses in the Trial Court.

35. He further told the Trial Court that his attackers made off with the 1st subject Motor Cycle, abandoned the 2nd subject Motor Cycle and fled towards Ziwani. The neighbours identified the owner of the said 2nd subject Motor Cycle as having been the Appellant herein who was arrested about five (5) minutes after PW 1 was attacked. It was his testimony that he went to the scene where the Appellant was arrested and found him with the 1st subject Motor Cycle, which he had been robbed of a few minutes earlier, a fact that was confirmed by PW 2.

36. Several facts emerged from PW 1's evidence. Firstly, on reaching where the Appellant was arrested, he recognised him as a person who used to work for his brother. Secondly, he identified the 1st subject Motor Cycle which was found with the Appellant herein at the time of his arrest.

37. Having analysed the said evidence, it was clear to this court that PW 1's identification of the Appellant's was free of error. Indeed, his recognition of the Appellant who was known to him was more persuasive than if he was identifying a stranger.

38. It was therefore not necessary for the said "Nzomo" or neighbours who arrested the Appellant to have been called as witnesses to corroborate PW 1's evidence as the recovery of the 1st subject Motor Cycle where the Appellant was arrested put him squarely at the scene of the incident.

39. In that respect, Amended Ground of Appeal No (3) had no merit and the same is hereby dismissed.

B. OF RECENT POSSESSION

40. The Appellant contended that he could not have been in the police cells on 16th November 2014 as had been stated by PW 2 and still have possession of the 1st subject Motor Cycle at 2100 hours on the same date as had been indicated in the Alternative Charge. If indeed the Appellant was confirming that he was in the police cells at 8.30 am by the morning of 16th November 2014, then the only conclusion this court could make was that he was arrested before the time that was indicated in the Alternative Charge.

41. As the Appellant was not convicted on the said Alternative Charge, the inconsistency of this piece of evidence was immaterial and was not indicative of a fabrication of the charges against him as he had argued. In addition, the discrepancy in the distance where the Appellant was arrested with the 1st subject Motor Cycle was inconsequential and immaterial because as can be seen hereinabove, PW 1 identified him and recovered the 1st subject Motor Cycle with him within five (5) minutes, which Motor Cycle still had its Number Plates.

42. Bearing in mind the holding in the case of **Arum vs Republic** (Supra), it was abundantly clear that the doctrine of recent possession was applicable in this case. This is because that the Appellant was arrested within such a short duration after the robbery and he was found with the said 1st subject Motor Cycle, which PW 1 positively identified as the Motor Cycle that he had been unlawfully dispossessed at the material time of the incident.

43. Once the Prosecution led evidence to prove that the doctrine of recent possession was applicable in the case herein, the burden of proof shifted to the Appellant to provide an alibi removing himself from the scene where the said 1st subject Motor Cycle was recovered.

44. Bosire J (as he then was) came to a similar conclusion in the case of **Malingi vs Republic (1989) KLR 225** when he stated as follows:-

> **"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have**(sic) **proved certain fact."**

45. Notably, the shifting of burden of proof to a person and in this case, to the Appellant, is envisaged in Section 109 of the Evidence Act that provides as follows:-

> **"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

46. The Learned Trial Magistrate addressed his mind to this inference and relied on the case of **R vs Loughin 35 Cr Appeal R 69** in which the Lord Chief Justice of England rendered himself as follows:-

> **"If it is proved that premises have been broken into and that certain property has been stolen from the premises and very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is housebreaker or shop breaker."**

47. The Appellant denied that he was the one who was found in possession of the said 1st subject Motor Cycle. It therefore behoved upon him to give a plausible explanation as to how he came to be in possession of the 1st subject Motor Cycle or provide an alibi that he was not at the said scene at all on the material date and time. As he failed to give a satisfactory explanation to exonerate himself from PW 1's assertions, it could only be inferred that he was part of PW 1's attackers on that fateful night.

48. For the foregoing reason, this court thus wholly concurred with the finding of the Learned Trial Magistrate that in the absence of any acceptable explanation of how the Appellant came to be in possession of the 1st subject Motor Cycle, the only inference that could be made was that he was one of the robbers who attacked PW 1 and the State was correct in submitting that the said Learned Trial Magistrate had come to the correct conclusion.

49. In this respect, Amended Ground of Appeal No (2) was not merited and the same is also hereby dismissed.

C. PROOF OF INGREDIENTS OF ROBBERY WITH VIOLENCE CHARGE

50. It was the Appellant's argument that if PW 1 had really been injured as he had contended, then he did not advance any logical reason to explain why the P3 Form was completed eighteen (18) hours after the alleged attack. He also questioned if PW 1 really sustained the injuries because he had changed his clothes as had been indicated in the said P3 Form.

51. On its part, the State submitted that the said P3 Form proved that PW 1 did in fact sustain the injuries and that the indication that the age of the said injuries which was given to have been approximately eighteen (18) hours, was proof that he actually sustained the said injuries on 15th November 2014.

52. It submitted that the fact that PW 1 sustained injuries during the robbery was proof that the Appellant was guilty having committed the offence of robbery with violence. It referred this court to Section 296(2) of the Penal Code that provides as follows:-

> **"If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

53. In a charge of robbery with violence, the prosecution does not need to prove that all the ingredients in Section 296(2) of the Penal Act exist simultaneously. All that it is required to show is that **any one** (emphasis court) of the following ingredient obtained at a particular point in time:-

a. b. the offender is armed with any dangerous or offensive weapon or instrument; or

the offender is with one or more person or person; or

c. immediately before or immediately after the time of robbery, the offender wounds, beats, strikes or uses any other personal violence on any other person.

55. He confirmed that PW 1 sustained deep cut wounds on the front side of his head, friction, burns on the right side of the face, deep cut wound on the lower lip and tenderness around the neck, which he said had been caused by a weapon that was both blunt and sharp. The approximate age of the injuries at eighteen (18) months.

56. Having considered the evidence that was adduced before the Trial Court by both PW 1 and PW 3, this court was indeed satisfied that not one, but all the ingredients of the charge of robbery with violence were present at the material time. The State was able to show that the Prosecution adduced evidence to demonstrate **THAT**:-

a. PW 1 was attacked by more than one (1) person. PW 1 testified that there were about six (6) people who attacked him.

b. PW 1's attackers were armed with an offensive weapon to wit the panga.

c. The attackers robbed PW 1 of the 1st subject motor Cycle.

d. During the robbery, these attackers wounded PW 1. One of them hit him with a panga while another strangled him.

57. The Appellant's argument that PW 1 had changed his clothes by the time the P3 Form was filled was to say the least, irrelevant. It was a red-herring intended to hood wink this court. It would not have been reasonably expected that a person who had been attacked the previous night would have failed to change his clothes at the time of having a P3 Form completed just so that he could prove that he had been injured.

58. Expecting a person who has been injured in whatever manner to wear the same clothes he had at the time when a P3 Form is filled is not only unrealistic but also onerous on such injured person. Indeed, P3 Forms can be filled at any time after an injury.

59. It must be pointed out that indication of the injuries in the P3 Form is not in itself proof that injuries were actually sustainedas it can also be fabricated. It must be corroborated. In this case, the proof of the contents of the P3 Form that was tendered in evidence in the case herein was corroborated by PW 1 who testified how he was attacked and the visible injuries that he sustained.

60. The evidence that was placed before this court was thus sufficient to satisfy it that the State had been able to demonstrate that the Prosecution did in fact prove its case beyond reasonable doubt.

61. Accordingly, Amended Ground of Appeal No (4) is hereby dismissed as the same was not merited.

III. APPELLANT'S DEFENCE OF ALIBI

62. The Appellant gave unsworn statement and did not also call any witnesses. This was a right that he had under the law. He also had a right to adduce sworn evidence that would have given the Prosecution an opportunity to test the veracity of the same.

63. It was abundantly clear to this court that the Appellant did not adduce any evidence to remove himself from the scene of PW 1's attack and robbery of the 1st subject Motor Cycle and subsequent recovery of the said Motor Cycle. He did not even attempt to give an alibi on the material date and time. He merely addressed his mind to 14th and 17th November 2014.

64. The Learned Trial Magistrate dismissed his defence as totally wanting. He observed that unsworn evidence that had no probative value. At most, it could only be persuasive rather than evidentiary.

65. This was a position that was set out in the case of **May vs Republic (1981)KLR** that was also relied upon by the Learned Trial Magistrate where the Court therein stated as follows:-

> **"An unsworn statement…potential value is persuasive rather than evidential…"**

66. This court found the Appellant's evidence to have been worthless as it did nothing to assist his case and that the Learned Trial Magistrate had arrived at the correct conclusion.

67. In the circumstances foregoing, this court also found and held that Ground No (5) of the Appellant's Grounds of Appeal to have been without merit and the same is hereby dismissed.

CONCLUSION

68. Accordingly, having considered the Appellant's Amended Grounds of Appeal, his Written Submissions, the State's Written Submissions and the case law they each relied upon, this court came to the firm conclusion that the Prosecution had proved its case beyond reasonable doubt.

69. It was thus not persuaded to find or hold that the conviction against the Appellant herein ought to be set aside or that the sentence that was meted upon him by the Learned Trial Magistrate ought to be quashed and substituted with any other sentence for the reason that the same was lawful, proper and

fitting in the circumstances of the case herein.

70. Indeed, the said Learned Trial Magistrate acted correctly when he convicted and sentenced the Appellant to death as it is the only sentence that he could mete upon him under the provisions of Section 296(2) of the Penal Code.

DISPOSITION

71. For the foregoing reasons, this court hereby affirms the conviction and sentence that was imposed upon the Appellant herein as it was safe to do so.

72. The upshot of this court's Judgment was that the Appellant's Appeal that was lodged on 17th May 2016 is hereby dismissed as the same was not merited.

73. It is so ordered.

DATED and **DELIVERED** at **VOI** this **13th** day of **December** 2016

J. KAMAU

JUDGE

In the presence of:-

Jimmy Masila Kitenda……...……….. Appellant

Miss Anyumba…………………………for State

Josephat Mavu– Court Clerk