REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.134 OF 2012

GEOFFREY MULI KYALO……...…….APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

(Being an appeal from the judgment of the Hon. G. H. Oduori (Principal Magistrate)

In

LimuruPrincipal Magistrate's Criminal Case No.3988 of 2012

delivered on 07th March, 2012)

JUDGMENT

David Muli Kyalo the appellant herein was charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. He was also charged with breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code. Particulars of Count I were that on 13th December 2010 at Mirangi Primary School in Kiambu West District within Central Province, jointly with another robbed Jonathan Kimanzi Munyoki of mobile phone make Nokia 1200, one pair of safari boot shoes and a cap all valued at kshs.3,800/- and at or immediately before or immediately after the time of such robbery wounded the said Jonathan KimanziMunyoki.

Particulars of the second count were that on the same date and place he jointly with another broke into the office of Mirangi primary School and stole 83 text books and one gas cooker all valued at Kshs.80,000/-.

He was found guilty of both offences and was sentenced to death in Count I and three years imprisonment in Count II which was held in abeyance pending the sentence in Count I.

He was dissatisfied with both the conviction and sentence and lodged this appeal. In an amended memorandum of appeal dated 17th March, 2015 we crystalize the grounds of appeal as: **Firstly**, that the decision of the trial court did not comply with Section 169(1) of the Criminal Procedure Code, **secondly**, that the trial magistrate relied in inconsistence and unreliable evidence in convicting him, **thirdly**, that the prosecution failed to prove its case to the required standard, **fourthly,** that the trial magistrate disregarded his defence without giving any reasons, **fifthly**, that his constitutional right under Article 50(2)(j) of the Constitution was violated, and **sixthly**, that Section 200 of the Criminal Procedure Code was not complied with.

The appeal was canvassed before us on 17th March, 2015. The appellant relied on written submissions filed alongside the amended grounds of appeal whereas Learned State Counsel for the respondent made oral submissions all of which we shall consider hereafter.

This being the first appellate court, we have to re-evaluate and re-examine the evidence on record and arrive at our own independent findings. See the case of

Kiilu and Another –Vs- Republic (1995) 1 KLR 174.

Prosecution called a total of 7 witnesses. **PW1** who was the complainant testified that on the 12th September, 2010 between 2.00 and 3.00 a.m. while working at Mirangi Primary School as a watchman, he heard footsteps and when he went to check what was happening found four people. He tried to run away but they chased him. They caught up with him and frog matched him to the school office. They tied him with ropes and demanded that he remains silent and threatened to kill him after they finish their business. They also demanded for his phone and Kshs.100/-. They then broke into the school office where they stole a gas cylinder, some books and a pair of safari boot shoes. After they had left, he struggled and was able to untie the rope and he fled home while bleeding on his hands. He also had some cut wounds on the head. He asked the neighbours to call the chairman and headmaster of the school after which he went to hospital for treatment. On his way to hospital he made a report to police officers who were manning a road block at Kinale. On the following day he learnt that the robbers had been arrested and one of them shot. He proceeded to Lari police Station where he found the stolen items had been recovered except his mobile phone.

PW2, Herman Kimani the headmaster of Mirangi Primary School testified that he received a call from PW1 about the robbery on the night of 12th and 13th September, 2010. He in turn informed the chairman and a member of the schoolmanagement. He visited the school where he confirmed that the robbers had gained entry into the staffroom through a broken window. At Lari Police Station he identified the recovered items which he also identified in court.

PW3,Dominic Chui and the chairman of the school corroborated the evidence of PW2 and added that he visited the school where he confirmed the robbery and the theft. He thereafter learnt that the robbers had been arrested and one of them shot.

PW4, James Kabue a clinical officer at Tigoni Hospital examined PW1 and filled his P3 form on 15th September, 2010. He had earlier been treated at Kijabe hospital following an assault on the night of 13th September, 2010. He had sustained cut wounds on the head and knee. The wound on the head had been stitched. He also suffered tenderness on the shoulder. He assessed the degree of theinjuries as harm and produced the P3 form as an exhibit.

PW5, Corporal George Kisa of Kimende Police Post identified and produced in court the recovered items.

PW6, Police Constable Robert Mwema of Lari Police station testified that on 12th September, 2010 at about 6.00 pm he was manning a roadblock at Kinale with seven other police officers. Corporal Kisa who was with him received information about the robbery. A Nissan vehicle which they stopped was carrying PW1 who had been attacked and was going to Kijabe Hospital for treatment. At around 5.00 a.m. they were informed by passengers who were in a vehicle they had stopped that they had seen some people carrying items in sacks. The reportees drove them to where they had seen the people. At the scene another motor vehicle slowed and one of the three persons entered leaving two outside. Corporal Kisa ordered the two who were outside to surrender. One of them was the appellant. He started running away and that is when Corporal Kisa shot his leg to immobilize him. He then arrested him. The other suspect ran into the forest. The third suspect surrendered to them. The police then escorted the appellant and the other suspect to Kimende Police Post and thereafter to Lari Police Station alongside the exhibits they had recovered which were text books, a torch, a cap, safari boot shoes, pliers and a meko gas cylinder.

PW7, Corporal George Kisa corroborated the evidence of PW6 in its entirety.

The appellant gave a sworn statement of defence. He stated that he worked at Gikomba where he was employed to iron clothes. He stated that he was not on duty on the night of 12th September, 2012 and being a Sunday he went to church and returned home at 4.00 pm. Thereafter he proceeded to his father's farm at Gichiengo where he spent the night. He woke up at 4.30 am and proceeded to Gichiengo bus stage where he met some people who had a luggage. Ten minutes later, a Nissan drove to the stage and stopped. The people who had the luggage ran to board the vehicle. Those ahead of him spotted some police officers and started running away. As they ran, they hit him and he fell down across road facing the forest. That is when he felt he had been hit on his left leg. The police approached him and arrested him. He was escorted to the police station and later to Kiambu District Hospital. He further stated that he was charged for an offence he was not aware about.

We now proceed to consider the issues raised by the appellant in his Amended Memorandum of Appeal. We shall begin by considering whether the evidence adduced supported the charges. There is no doubt that indeed a robbery incident occurred at Mirangi primary School. This was sufficiently proved by the evidence of PW1 who was the watchman guarding the premises on the night of the attack. His evidence was that he was attacked by a gang of more than one person. PW2 the headmaster of the school together with PW3 visited the scene and confirmed the fact of the breaking into the school offices as well as the theft of the school items. PW4 who examined and filled the P3 form of PW1 confirmed that he had been injured. The account of the events as narrated by PW1 leaves no doubt that he was attacked on the fateful night leading to the injuries he suffered. In that respect, we hold that all the elements of the offence or robbery with violence were proved. We must now grapple with the question of whether the evidence on record sufficiently established the involvement of the appellant in the commission of the offence. According to the appellant the evidence of PW6 and PW7 who ought to have corroborated the evidence of PW1 did not link him to eitherthe breaking into the school premises or possession of the stolen goods. He urged the court to find that the evidence of the two witnesses (PW6 and 7) was inconsistent and could not be relied on.

It is factual that none of the witnesses saw the appellant break into the school offices or steal the items recovered. He was arrested based on the evidence of PW6 and PW7. On examination of their evidence it is our view that the same was circumstantial which we must treat with a lot of care. The prosecution relied on the recovery of the stolen goods to establish the culpability of the appellant. In order to rely on circumstantial evidence as a basis for a conviction, the evidence must irresistibly point to the guilty of the accused person and there should be no co-existing factors that can weaken or destroy the inference of guilt. See the case of **Republic –Vs- KipkeringKoske (1958) EA, 715** in which it was held that:-

> **"In order to justify a conviction based on circumstantial evidence, the evidence must irresistibly point to the guilt of the accused person and that there should be no co-existing factor that may weaken or destroy the inference of guilty."**

The circumstantial evidence relied upon was the recovery of the stolen goods. In this respect, learned State Counsel Mr. Mureithi urged us to find that the appellant was found with the stolen goods only a few hours after the robbery. And that we should invoke the doctrine of recent possession. He referred us to a Court of Appeal judgment in **Criminal Appeal No.122 of 2004 – Daniel InjehiaNjuguna& two others –Vs- Republic**, the Court of Appeal sitting in Nairobi. That court referred to the case of **Stephen NjengaMukiria& Another –Vs- Republic Criminal Appeal No.NAK175 of 2003** in which the court clarified that the doctrine of recent possession is applicable in cases of robbery with violence, manslaughter or murder, among other charges and that before relying on the doctrine of recent possession,

1. **Possession must be positively proved i.e. that the recently stolen property was found with the suspect;**
2. **The ownership of the property by the complainant must be proved;**
3. **There must be evidence that the property was recently stolen.**

Also cited therein was the case of **Isaac Khalinga –Vs- Republic Criminal Appeal No.272 of 2005** where it was observed that "**the word "*recent*" is relative and the proof as to time will depend on the easiness with which the stolen property can move from one person to another**." Further as stated in **Arum –Vs- Republic (2006)1 KLR, 233** for the doctrine of recent possession to be reliably applied as a basis for conviction,

> **"……..the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; 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 property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."**

The answer as to whether the recovered items met the standard of the doctrine of recent possession lies with the testimonies of PW6 and PW7. PW6 testified that he learnt of the robbery while manning Kinale roadblock in the company of PW7 and other police officers. The driver of the vehicle that took PW1 to hospital informed the police that they had spotted three people carrying goods in a sack. When the police were driven to the scene they saw three people. They found one of them boarding a vehicle that was at the stage. The other two were ordered to surrender. The appellant who had not boarded the vehicle took flight and PW6 chased him and shot at him to immobilize him and that is how he was arrested. The recovered items were taken to Lari Police Station. His further evidence was that ***"at Kimandewe found that the sack had text books, torch, cap, safari boots, pliers, meko gas".***

We observe that according to PW6 he was informed about three people carrying goods in a sack. But when he went to the scene he did not state that they found the three people with anything. His partial testimony was as follows:-

> **"They reported they had seen three people carrying things in a sack. "We asked them to drive us to the scene. As we reached we saw three people on the left side towards Naivasha……..."**

Interestingly, even after arresting the suspects he did not testify that he recovered any items from them and his testimony in that respect was that:-

> **"The other suspect ran away into the forest. The motor vehicle took us to Kimende Police Post. We took accused and the other one who had surrendered. We left the two at Kimende. They were taken to Lari Police plus the exhibits. Accused was taken to hospital and later admitted. At Kimende we found the sack had text books, torch, cap, safari boots, pliers, meko gas. Books were for Mirangi Primary school. Exhibits were produced in court. I had not met the accused before that day."**

Therefore, despite the fact that the appellant was at the point where the witnesses were said to have found three people, his (PW6) evidence was not conclusive that the stolen goods were recovered from the person of the appellant. He neither demonstrated that the appellant had anything to do with the said goods so as to fit in the conclusion that he may have stolen them.

On the other hand, PW7's evidence was that he was informed about three people who had some luggage and they were driven to the spot where they arrested the appellant and others. In this respect he testified as follows:-

> **"PW6 shot one as he tried to run away. One escaped to the forest. We took the two we arrested to Kimende plus the goods we recovered. Accused is the one who was shot. They had 83 text books, meko gas cylinder, cap, rope……"**

Further evidence of PW7 was that the appellant had house breaking tools.He did not indicate how and whether the tools were recovered from him. In court he produced 83 text books, a meko gas cylinder, pliers, a pair of shoes and a cap being the items that were allegedly recovered from the appellant.He only tried to link the appellant with the good on cross-examination which we think was a contradiction of his evidence in chief. His evidence, in our view, was so casual as to enable us arrive at a finding that in fact the appellant was in possession of the goods or the house-breaking tools.This evidence was also contradicted by PW6 who did not state that himself and PW7 recovered any of the items from the appellant. We find the evidence of the two witnesses as inconsistent and lending damage to the prosecution's case. Respectively, we find that the prosecution did not discharge its burden to the required standard and that the circumstantial evidence was too weak as to link the appellant to the offences.

The above observations aside, we have to consider whether the trial magistrate considered the defence of the appellant in her judgment. Having examined the said judgment, we are of the view that the appellant's defence was sufficiently considered save that the learned trial magistrate arrived at the wrong decision.

We now address ourselves to the issues of law raised by the appellant. He submitted that the learned magistrate who took over the conduct of the trial from another magistrate proceeded to pass the sentence without complying with Section 200 of the Criminal Procedure Code. The record of proceedings shows that the matter was heard by Hon. M. A. Murage (SPM) to its conclusion. She also wrote the judgment which was delivered by Hon. G. H. Oduor. Under Section 200(1) of the Criminal Procedure Code.**"Subject to Sub Section (3) where, a magistrate after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may**

a. **Deliver a judgment that has been written and signed but not delivered by his predecessor."**

We do accordingly find no fault in the fact that the judgment was delivered by a succeeding magistrate other than the trial court.

The appellant further submitted that the judgment of the learned trial magistrate did not comply with Section 169(1) of the Criminal Procedure Code. He submitted that the learned trial magistrate did not set out points for determination nor give reasons for her decision. The said Section 169(1) provides as follows:-

> **"Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."**

The section outlines the basic requirements of a judgment as follows:-

a. **It should be written by or under the direction of the presiding officer of the court in the language of the court.**
b. **It should contain the point or points for determination.**
c. **It should contain the decision thereon.**
d. **It should contain the reasons for the decision.**
e. **It should be dated and signed by the presiding officer in open court at the time of pronouncing it.**

Our analysis of the judgment is that it met the above requirements save that although the learned magistrate did not specifically outline the issues for determination she nevertheless in the judgment pointed out which points she was determining. This ground of appeal definitely fails.

It was also the submission of the appellant that his constitutional right was violated since he was denied

access to witness statements. Under Article 50(2)(j)

> **"Every accused person has the right to a fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence."**

The record of the proceedings show that after the appellant was arraigned in court he made the request for witness statement. The court directed that the accused should make the request during the hearing of the case. He renewed his request when the matter came up for hearing and the court in turn directed that the statements be furnished to him. On the next hearing date which was on 16th February, 2011, the appellant refused to proceed with the hearing and requested to be furnished with a copy of the P3 form. The court conceded to his request and directed that the P3 form be supplied to him. The next hearing date was 9thMarch, 2011 when the prosecution applied for adjournment on ground that the witnesses had not arrived.The appellant did not oppose the application but asked to be given a copy of the P3 form. In acceding to the application, the court ordered that the P3 form be furnished to him. The trial came up for hearing next on 30th March, 2011 and the witnesses took to the stand to testify. On this date the appellant did not raise a concern that he had neither been furnished with the P3 form nor the witness statement. We then conclude that as at this date he had all the documents which he had requested for because he did not make further requests for them. He also participated in the hearing to its conclusion. In the circumstances, we find and hold that the appellant's constitutional right to access to the prosecution's evidence prior to the hearing of the case was not infringed.

In the end, we find that the prosecution failed to prove that the appellant committed the offences. We allow the appeal. We quash the conviction and set aside the sentences and order that the appellant be and is hereby set free unless otherwise lawfully held.

DATED and **DELIVERED** at **NAIROBI** this 26thday of **MAY** 2015.

L. KIMARU **G. W. NGENYE- MACHARIA**

JUDGE **JUDGE**