REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 470 OF 2010

REPUBLIC…….RESPONDENT

VERSUS

PAUL KARACHA NDUNGU……..…….....APPELLANT

[Being an appeal from the original conviction and sentence by Hon. L.M. Njora P.M. dated 25th May, 2010 at Kikuyu PMCCR Case No. 18 of 2008.]

JUDGEMENT

The appellant, **Paul Ndungu Karacha** was the 4th accused in criminal case No. 18 of 2008 at Kikuyu Law Courts. His co-accused were Stephen Wafula Kitongo, 1st accused, Harrison Karongo Chege, 2nd accused, and James Muthuiri Gachuku, 3rd accused. They were all charged with robbery with violence contrary to S.292(2) of the Penal Code. The particulars of count were that on the 4th day of October, 2008 at Kibiku village in Kiambu District within Central Province jointly with others not before the court while armed with offensive weapons namely pangas robbed one, **David Njenga Mutuguti** of one mobile phone Nokia 6060 valued at Ksh.6,500.00 and cash, Ksh.1,800.00 all valued at Kshs.8,300.00 and at or immediately before or immediately after the time of such robbery used actual violence to the said **David Njenga Mutuguti.**

The 1st accused faced an alternative charge of handling stolen goods contrary to S.332(2) of the Penal Code in that on the 19th day of October, 2008 at Gikunyi trading centre in Kiambu District within Central Province he dishonestly retained one mobile phone Nokia 6060 knowing or having reason to believe it to be stolen goods.

The appellant was also charged with preparation to commit a felony contrary to S.308(2) of the Penal Code in that the appellant on the night of 24th/25th October, 2008 at Kingeero area in Kiambu District in Central Province not being in a place of abode had with him an article for use in the course of or in connection with robbery, namely a homemade gun and a torch.

The appellant faced a third count of being in possession of imitation of a firearm contrary to S.34(1) of the Fire Arm Act, 144, Laws of Kenya. On count III, the accused was charged with being in possession of an imitation of a firearm contrary to S.34(1) of the Firearm Act, Chapter 144, Laws of Kenya. The particulars of this Count was that on the night on 24th October, 2008 at Kingeero area in Kiambu District in Central Province with intent to commit felony namely robbery was found in possession of an object resembling a firearm.

At trial, the prosecution called nine (9) witnesses whereas the appellant gave a sworn statement in

defence. It adduced evidence that the complainant was accosted and robbed of his mobile phone, money and other goods. He was in the process injured and admitted to Aga Khan Hospital. He would not recognize any of the three assailants. Later his mobile phone was recovered from a man who was never arrested and treated as a suspect and neither was he called as a witness. From his statement on information to the police, the appellant was arrested. At the close of the prosecution case, the trial court on evaluation of the evidence and submissions by counsels of Accused I and Accused II in person found Accused I, II and III having no case to answer and acquitted them under S.210 of civil Procedure Code. The appellant was found with a case to answer and put on his defence. Ultimately, it emerged and was found that the appellant was the first and initial handler of the stolen mobile phone. He was convicted and sentenced to death.

The appellant has now appealed the conviction and sentence on the following grounds;

1. *That the trial magistrate erred in both law and facts when she convicted me in this case with no positive identification since the complainant did not identify the assailants.*

2. *That the learned trial magistrate erred in both law and facts when she convicted me in this case while relying on exhibits of mobile phone which was not recovered on my possession and even there was no any supportive document that was produced before the court to prove for same.*

3. *That the learned magistrate erred in both law and facts when she convicted me with the counts of preparation of which there was no tangible evidence to support the same and also there was no recovery form to support the charge.*

4. *That the learned trial magistrate breached the natural rules of justice when she convicted me while rejecting my sworn defence with no reasons thus violation the law provision under section 169 (1) of the c.p.c.*

5. *That my lordship I can't recall the whole evidence that was adduced during the trial now beg leave to this honourable court of justice to furnish me with trial proceedings so that they may assist me to add more grounds during the hearing of this appeal since I pry to be present during the hearing date.*

As a first appellate court, we are under duty to reconsider and evaluate the evidence afresh with a view to reaching our own conclusions in the matter. This duty has been stated and restated in many decisions both by the high court and Court of Appeal See **Pandya vs- R[1958] EA 336** and **Okeno –vs- Republic [1972] EA 32.** See also **Mwangi –vs- Republic [2004] 2 KLR 28** where the court held that "an appellant on a fist appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence."

The appellant in his written submissions raises the issue of breach of his constitutional rights by an infringement of Article 72(3) of the Constitution of Kenya, 2010 in that he was kept in police custody for fifteen (15) days before being arraigned and charged in court. He also raises the issue of misapplication of the doctrine of recent possession in that the phone the main subject of the prosecution case was not directly linked to him or his possession in evidence. We find this not to be substantial grounds in support of the appeal in that the issue of breach of constitutional rights is in law a matter for the trial court and should have been raised at that end. The issue of linkage of evidence of cellphone was well articulated by the prosecution witnesses and not rebutted by the defence. We therefore disagree with this submission.

Having considered the record and the respective submissions of the parties, and bearing in mind our duty as a first appellate court, we consider that this appeal must turn on the issue whether or not the doctrine of recent possession was correctly applied by the trial court. Secondly, the court must address itself on the issues of identification and sufficiency of evidence as raised by the appellant. It is evident that the appellant was the original handler of the stolen mobile phone. This was the evidence of PW8, PC Wycliffe Makari, the Investigating Officer at the trial court. He testified that while the 1st, 2nd and 3rd Accused were in the police cells, the 3rd Accused informed him that the person who had sold the stolen

phone to him had been arrested and was in the cells. He showed him and pointed at the appellant. This testimony derived from 3rd Accused's version of events of the phone therefore linked the appellant to possession and handling of the stolen phone. This is not shaken in cross-examination. The doctrine of recent possession was therefore proven and the appellant cannot suitably rely on this ground of appeal.

The issue of inadequacy of identification and sufficiency of evidence as raised by the appellant are not tenable. The appellant argues and submits that he was not identified by the complainant and therefore the fallacy of holding him accountable on the charges. He also faults his conviction on the grounds of preparation to commit a robbery when there was no tangible evidence to support the same. The evidence of PW4 negates this notion. He testified that the appellant was arrested at a road block along Kiambu/Kikuyu/Wangige road at 2045 hours. He had in his possession an object that looked like a firearm and a torch. This was confirmed by the evidence of PW5, Police Constable Nelson Simato of Muguga Police Post

(formerly Kingeero Police Post.) The appellant would not explain his possessions or intentions and was therefore charged with this offence. This *in toto* disabuses the appellant's theory on lack or insufficiency of evidence.

The appellant in his written submissions posits that the possession of a firearm is contradicted by the evidence of the case. He submits that the benefit of doubt on this issue of possession of firearm should go to him.

The appellant denies that he was indeed in possession of the stolen phone and disputes the relevance and application of the doctrine of recent possession in that it was twenty days after the robbery. He also cites anomalies in identification on grounds that he was identified by an outsider while in police custody. He could have pointed at any other person.

The appellant further grounds his appeal on the fact that at page 16 of the proceedings and judgement, the prosecution applied to bring new charges against the accused persons but the accused were denied a chance to recall earlier witnesses and were not even informed of their right to do the same thus prejudicing the rights of the accused persons.

At the trial, counsel for the republic sought to rely on the doctrine of recent possession. The appellant was arrested with a torch and home-made gun. He was also said to have sold the stolen mobile phone to the 3rd Accused. This linkage of the stolen phone to the appellant is adequate evidence in support of recent possession. In any event, the 3rd Accused had *ab initio* informed the investigating officer that he had bought the phone from a person who he could not immediately trace. He was only able to identify him when he saw at the police cells having been arrested. The complainant was injured and spent several days in hospital, initially in a comma. Counsel for the Respondent therefore submitted that robbery with violence is established and prayed that the appeal be dismissed.

The evidence of the appellant in a sworn statement cannot be said to have been rejected. It was merely not probative of any defence. This is therefore not a critical ground of appeal.

The appellant Paul Ndung'u Karanja Wangige – Muthumu testified that he was a shoe shiner at Kingeero Stage. On the material day he was at work whereby a lady came and he wiped her shoes. After a while another lady appeared and said that she had an affair with him and a fight ensued. People came and took them to Kingeero Post and then Kikuyu Police Station and later they were taken to court and charged. He took plea on Court 1 and then he was taken to Court 2 for hearing. The arresting officer never testified in court and there was no recovery book. The jacket they had said was with him was not brought either.

On cross-examination by the prosecutor the appellant testified that he had not known those officers earlier and that he only saw them on that day. He said he was at his work place which is near the road block when they fought and only the two of them were arrested. He did not have a phone and did not know his co-accused. He only met them in court and had fought over a girl called Carol whom they had been friends for about 2 months. He did not know what she did though she used to go to Nairobi. The

appellant testified that he did not have a torch or gun and that he was given back his handkerchief in court. He did not rob Njenga nor steal his phone and did not have any guns with him.

We buy the case for the state. All evidence and interrogations point out at the culpability of the appellant. This was through the evidence of PW8 who testified that in the course of investigations the 3rd Accused had identified the appellant as the person who had sold the phone to him. The 3rd Accused was able to identify the appellant in the police cells after he had been arrested in possession of a home-made gun. He informed PW8 that he had bought the phone from the appellant therefore linking the appellant to the phone the subject matter of the robbery with violence.

It would also be fair to elaborate that the doctrine of recent possession comes in to apply to the appellant through the evidence of PW8. He testified to the extent that the 3rd Accused linked the appellant to a sale to himself of the phone involved in the robbery. This means that although the appellant was not found in immediate possession of the phone in issue, he was the initial handler of the said phone and therefore the element of recent possession by the appellant.

All evidence in the circumstances led to a conviction of the accused and to us, nothing has changed. The issues of identification, recent possession and inadequacy of evidence in support of the conviction and sentence are a foregone conclusion bearing in mind our analysis of the issues raised in appeal and the evidence. We are therefore inclined to dismiss this appeal and uphold the conviction and sentence as made.

Dated, delivered and signed the 17th day of June, 2014.

R. LAGAT-KORIR **D.K.NJAGI MARETE**

JUDGE **JUDGE**

In the presence of:

……: Court Clerk

……: Appellant

……: For the Appellant

……: For the State/respondent

Appearances

1. Appellant in person
2. Mr. Aluata for the Republic