REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCRA NO. 77 OF 2012.

(LESIIT AND MAKAU,JJ)

FRANCIS EDONG…….APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

((Being an appeal from the conviction and sentence of M. Maundu, SPM delivered on 11.10.2012 at Isiolo Law Courts)

J U D G M E N T

1. The appellant was jointly with one another charged at SPM Isiolo with robbery with violence contrary to Section 296(2) of the Penal code. He also faced alternative count of handling stolen goods contrary to Section 322(1) of the Penal Code. After trial the appellant was convicted of the main count of robbery with violence and sentenced to suffer death as prescribed by law.

2. The appellant was aggrieved by conviction and sentence and therefore preferred this appeal. The appellant's petition of appeal sets 7 grounds of appeal but when the appeal came up for hearing the appellant relied on amended grounds of appeal which raised 5 grounds of appeal as follows:-
    i. ***That, the learned trial magistrate erred in both law and facts in failing to observe that my fundamental rights were tampered with as stipulated in Article 49 of the Constitution of Kenya.***
    ii. ***That the learned trial Magistrate erred in both law and facts in failing to note that the charge sheet was defective.***
    iii. ***That the learned trial magistrate erred in both law and facts in failing to observe that the identification and recognition of I the appellant under the circumstances that prevailed at the scene was not from possibility of error.***
    iv. ***That the learned trial magistrate erred relying upon exhibits which presentation was wrong and full of short of the required standard of proof.***
    v. ***That the learned trial magistrate erred in both law and facts in failing to make a finding that the prosecution failed to summon vital witnesses mentioned during the trial for just decision to be reached.***

3. The prosecution at the trial called five(5) witnesses. The brief facts of the prosecution case were that on 4/7/2011 at about 7.30 p.m the complainant(PW1) was being driven back to Isiolo by his driver Muga(PW2) when at Kona Mbaya in Ngaremara he saw a person who was standing on the side of the road stopping them. The driver slowed down but before the Tuktuk stopped the person

started throwing stones at the driver; who jumped out of the tuktuk while in motion and it veered off the road and overturned. The complainant(PW1) also jumped out and saw another man on right side of the road. The first person he had seen got hold of him as the second man ransacked his pockets. That both of the men were armed with clubs. The complainant gave them his coat which contained Kshs.4,500/- and a Nokia mobile phone. The attackers took the coat and left. The complainant claimed there was moonlight and he was able to identify the two attackers. That ten minutes after the attack another motorcycle came and the complainant was escorted to Goth Conservancy, where they organized to search for the driver.

4. The driver was found at junction of Kenya Army School of Artillery along Isiolo-Marsabit road and all returned to Goth Conservancy where the complainant spent the night. On the following day two game rangers and 3 elders accompanied PW1 and PW2 to the scene and found footprints of the two attackers which they traced upto Alamach and purportedly found one of the attackers at a place where sand was being harvested. The person they found was the appellant and upon search a mobile phone was recovered from him which the complainant identified as his own mobile phone. The appellant was asked where his accomplice was and led the team to another sand harvesting site where the accomplice was traced and arrested and upon search nothing was traced from him. The appellant led the team to a manyatta where a coat was recovered and complainant's simcard which had been broken but still functional. The complainant identified the phone by a mark which he claimed he had put under the battery being "Paul Ichoru". The phone was produced as P.exhibit 1, simcard as exhibit P.exh.2. The appellant and his accomplice were escorted to Isiolo Police Station and subsequently charged with the present charges.

5. The appellant in his sworn defence denied having committed the offence stating that on 5.7.2011 he was travelling at the back of a lorry which was carrying sand when the lorry was stopped by police officers who were accompanied by members of public and he was ordered to disembark from the lorry and join the team which was following footprints of some animals which had been stolen, however on the way they met the second accused who was arrested. The appellant was then also arrested. That is when PW3 told the appellant he had stolen PW3's goats and was surprised when he was brought to court and charged with the present charge and not with an offence of stealing a goat. He denied the offence and stated that nothing was recovered from him. He insisted the charge was instigated by PW3 due to bad blood between them.

6. The appellant in his written submissions and in his petition attacks the judgment on the basis that the learned trial magistrate failed to observe that the appellant's fundamental rights were tampered with as stipulated in Article 49 of the Constitution; that the trial court convicted him on a defective charge; that the trial magistrate failed to observe that identification and recognition of the appellant was not favorable in the circumstances prevailing at the scene; that the trial magistrate erred in law and facts in relying upon exhibits whose presentation failed to meet the required standard of proof and finally that the trial court erred in failing to make a finding that the prosecution failed to summon vital witnesses mentioned during the trial for just decision to be reached.

7. The learned State Counsel Mr. Makori, opposed the appeal urging that the appellant was identified by PW1 and PW2 through the aid of moonlight and light from a headlamp of a tuktuk. He urged that PW3 testified that the appellant was searched and a mobile phone belonging to PW1 recovered. PW1 identified the mobile phone as it had a mark and other items were later recovered with assistance of the appellant who was leading the complainant, police and members of public. He relied on the case of **KIRIMI KATHURI V R CRIMINAL APPEAL NO. 50 OF 2013(**Embu).
8. We have carefully considered this appeal and have subjected the entire evidence adduced before the lower court to a fresh analysis and evaluation while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance for the same**. – See case of Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal NO. 272 of 2005).**

9. The trial court in its judgment found that the identification of the appellant by PW1 and PW2 to be shaky and that it required corroboration which court found in the recovered items from the appellant. The appellant was therefore found guilty of the offence on the basis of the evidence of being in possession of stolen items within a period of 1 day from the day the items were allegedly stolen.

10. The Court of Appeal citing the celebrated case of **Republic V Loughlin 35 Criminal Appeal R.69 in David Langat Kipkoech & Others V Republic Nairobi CA Criminal Appeal NO. 169 of 2004**(unreported) the Court stated that the doctrine of recent possession is simply one of the circumstantial evidence and that

> ***"if it is proved that the premises had been broken into and that certain property had been stolen from the premises and that 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 the house breaker and a shop breaker".***

11. The facts satisfy that doctrine of recent possession which was outlined by the Court of Appeal **in Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga V Republic CA Criminal Appeal NO. 272 of 2005**(unreported) as follows:-

> ***"It is trite law that before a court of law can rely on doctrine of recent possession as a basis for conviction in a criminal case, 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 the 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 the time, as has been stated over and over again, will depend on the easiness with which the property can move from one person to the other"***

12. We have re-evaluated the evidence of PW1 and PW2 and there is no doubt in our minds that PW1 was robbed at 7.30 p.m on 4.7.2011 by two men of a mobile phone Nokia 1280, and a coat containing Kshs.4,500/-, A mobile phone; simcard and coats are alleged to have been recovered from the appellant one day after robbery. PW1 testified that they recovered a mobile phone(MFI-1) from the appellant and he had put a mark on the phone under the battery "Paul &Chom" being names of the people who sold the phone to him. We note the other recovered items did not have any mark. PW2 was told of recovery of the items from the appellant and as he did not witness the recovery his evidence is hearsay. PW3 testified that PW1 had put a mark on the phone but did disclose the type of mark of PW4 testified that he recovered mobile phone from the appellant in which it was written the name "Paul Ekwam". The other items had no identifying marks. PW5 testified the Nokia 1280 had a mark written as "Paul Echon". We note from the evidence of PW1, PW3, PW4 and PW5 there is contradiction and inconsistencies as to the kind of mark found in the phone. The names given as the mark do not tally. There is contradiction as PW1 testified the mark was "Paul & Chom" whereas PW3 did not disclose the type of the mark; PW4 gave the mark as "Paul Ekwam". We find these marks are totally different and could not be of the same phone. The inconsistencies and contradictions are fatal to the prosecution case. Significantly the people who PW1 testified to have sold the phone to him were not called to give evidence for the prosecution nor did the complainant (PW1) produce any documentary evidence to prove ownership of the phone and other allegedly recovered items. We find that the complainant did not positively prove the property was his own. The mark alluded to was not proved was a special mark for the complainant and could not be a mark for any other person including even the appellant.

13. The appellant argued that he was not in possession of the recovered items at the time of the arrest and alluded to the fact that he was arrested on allegation of stealing PW3's goat and was surprised when he was charged with the offence of robbery with violence. The prosecution did not cross-examine the appellant on his sworn defence. We are concerned with the fact that PW1, PW3 and

PW4 alluded to the fact that the time of the arrest of the appellant there were many members of public yet no statement was recorded from any of them. PW5 testified the witnesses at the time of arrest were not ready to record statements and that all people from Alamachi were not willing to come to testify against the appellant for they were requested to record statement but refused. The owner of the house where the items were found did not also give evidence.

14. We find that it is possible the prosecution were selective in what kind of witnesses to call and in the process failed to call vital witnesses for fear of the witnesses giving unfavorable evidence in favour of the prosecution. We are in view of the above of the opinion that it is possible due to grudge between the appellant and PW3, that the appellant was framed and charged with the offence of robbery with violence.

15. Having carefully re-evaluated the entire evidence, we are not satisfied, that the trial magistrate correctly relied on the doctrine of recent possession as a basis for conviction as the ingredients of the doctrine of recent possession as set out in the case of **ISAAC NG'ANG'A KAHIGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CA.(SUPRA)** were not met. Having come to this conclusion we need not go into the other grounds of appeal as this ground alone disposes of the appeal.

16. Accordingly we find merit in this appeal and allow it. Consequently we quash the conviction and set aside the sentence. The appellant should be set free forthwith unless otherwise lawfully withheld.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF JULY, 2014.

J. LESIIT **J. A. MAKAU**

JUDGE **JUDGE**