REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HIGH COURT CRIMINAL APPEAL NO. 97 OF 2010

JOSPHAT KARIUKI MUNGAI…….APPELLANT

VERSUS

REPUBLIC OF KENYA…….……..RESPONDENT

(From original conviction and sentence in Criminal Case No. 1850 of 2009 of the Principal Magistrate's Court at Nyahururu - Mr. T. Matheka)

JUDGMENT

Josphat Kariuki Mungai (the appellant) was tried, convicted and sentenced to death for the offence of robbery with violence, contrary to **section 296** (**2**) of the **Penal Code**. The particulars of the charge read that on the 2nd day of August, 2009 at Ziwani area in Laikipia West District, within Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely pangas and stones, robbed Antony Ngunjiri Ngari of his motorcycle Registration Number KMCA 445H make focin valued at Kshs. 82,000/= and immediately before the time of such robbery used actual violence to the said Antony Ngunjiri Ngari. The appellant faced an alternative charge of Handling stolen goods contrary to **section 322** (**2**) of the **Penal Code.**

The trial magistrate after a full trial convicted the appellant after invoking the doctrine of recent possession to convict the appellant and sentenced him to death as prescribed by law for offences under section 296 (2) of the Penal Code. The appellant, being dissatisfied with the conviction and sentence, preferred this appeal.

The petition of appeal contains six (6) supplementary grounds of appeal which can be summarized as follows:

i. The identification of the appellant as the person who committed this offence is not supported by evidence.
ii. That the offence of robbery with violence is not proved to the required standard.
iii. The doctrine of recent possession does not apply in this case.
iv. The Prosecution failed to call material witnesses
v. The trial court failed to consider the appellant's defence.

He therefore prays that this court do quash the conviction, set aside the sentence and set him at liberty forthwith. The appellant also relied on written submissions and urged some grounds orally.

The Learned State Counsel Ms. Idagwa opposed the appeal. The Learned Counsel submitted that PW1 was confronted by two robbers who wanted to hit him when carrying a passenger, he dodged and fell. The robbers rode off on the motor cycle but other cyclists who PW1 had informed of the robbery intercepted,

beat up and arrested the appellant. PW1 went to the scene and found the appellant arrested. That PW2 and PW3 and their fellow cyclists met the appellant with the motor cycle at Thomson Falls Lodge where they chased him and caught up with him; PW5 stated that he received information about a person being assaulted by members of public, he went to the scene and arrested the appellant. Counsel submitted that the appellant was found with the stolen motor cycle soon after the robbery and was therefore in recent possession. When asked why he did not stop after being confronted by members of the public, the appellant said he could not have stopped when he saw the members of the public. The Learned State Counsel urged this court not to interfere with the conviction and sentence.

Brief facts of the case before the trial court were as follows, Antony Ngunjiri Ngare (PW1) was carrying a pillion passenger (customer) on his motor cycle registration number KMCA 445H from Nyahururu Town to Ziwani. On reaching Ziwani, the said customer showed him where he wanted to alight. As he went off the road for the passenger to alight, two people suddenly emerged from the bushes; one of them had a panga and the other a rungu. The one with the rungu tried to hit him, he dodged and fell with the bike. He managed to run away toward Mairo Inya. On looking behind, he saw the robbers taking off with the motor cycle toward Nyahururu. He informed his colleague, David Muturi (PW2) about the robbery and asked the fellow cyclists to intercept the robber. He thereafter hitch-hiked to Nyahururu Police station where he reported the incident. Meanwhile, PW2 mobilized fellow motor cyclists to intercept the robbers. Those with PW2 included PW3 Francis Njau Ngure. They headed towards Ziwani on their motor cycles. They met the rider, gave chase till the rider hit a rock, fell and they arrested him and took him to the police station where PW1 came and found the motor cycle recovered and the appellant arrested. The motor cycle had been recovered at Jimrock in Nyahururu less than an hour after the robbery. The recovered motor cycle was tendered in evidence as an exhibit.

When called upon to defend himself, the appellant gave a sworn statement in which he denied committing the offence. He said that in fact he was PW1's passenger when they were attacked by robbers along the way. The rider stopped and disappeared and he took the motor cycle and rode back to the place he had hired it. On the way he saw about twenty (20) motor cyclists, but before he got to his destination, he hit a stone fell and the group of cyclists caught up with him and beat him up.

A court sitting on first appeal is under a duty to examine and evaluate afresh all the evidence adduced in the lower court with a view to arriving at its own independent conclusions whether to, or, not to uphold the judgement of the lower court. In discharging that duty, the court is always alive to the fact that it did not have the advantage of observing the witnesses testify as to form an opinion on their demeanour. This requirement has been reiterated by our courts so often that it has gained notoriety and no court can be excused in failing to remind itself of that requirement.(see: **Ajode v. Republic** (**2004**) **2KLR 81**).

We shall now analyse and evaluate the evidence as we consider the grounds raised by the appellant. The appellant lamented that his identification as the person who committed the offence was not supported by evidence. He submitted that the trial court erred in relying on contradictory and inconsistent evidence of the prosecution witnesses and relied on the case of **Dinkerrai Ramkrishan Pandya v. Republic** (**1957**) **EALR 336** to support his argument.

He argued that there was doubt as to whether he was a robber or a pillion passenger. He first referred this Court to the testimony of PW1 and PW3 to highlight the contradictions as to the robber's description where PW1 said *"I recorded in my statement that my passenger told me to turn into a junction. As soon as I turned, I saw these attackers; I fell with my motorbike and ran away. I do not know where my passenger went after that…I was not given the description of the robber but I was told it was the customer who had turned robber…He showed me where he wanted to alight. I went off the road for him to alight. Two people emerged from the bushes. They had weapons, one had a rungu, I dodged the rungu that was directed at me. I fell with the bike. I left the bike and ran…"* PW3 stated, *"I was told that the customer who Antony had, had robbed Antony of his motor bike…"* He added that PW5 stated *"you spoke when I arrested you. You said you were the complainant's passenger…the complainant said you were a passenger"*.

He also submitted that PW3 said he was not present at the time of the robbery and that PW4 said PW1

knew who attacked him because he was wearing a black jacket but no jacket was produced in court during the hearing. The appellant argued that PW3 in his evidence stated that he was informed that PW1's customer had robbed him of the motor cycle and that this is inconsistent with the testimony of PW1 and PW2 therefore it does not give the proper description of the robber.

Secondly, that PW1 in his written statement stated that he identified the suspect as the one who emerged from the bush in a black jacket, that the said jacket was not brought to court but in any event there is no doubt that the appellant was arrested, beat up and injured and the clothes were soiled with blood. It is not clear why the prosecution failed to avail the jacket which PW4 in his testimony referred to as being bloody for identification in court. The appellant stated further that although PW1 stated in court that the appellant is the one he identified as being tall and dark, he did not indicate so in his written statement and urged this court to disregard PW1 PW2 and PW3's testimonies.

In **Republic v. Turnbull and Others** (**1976**) **3 ALL ER 549**, the court discussed the criteria to be considered when relying on evidence of identification under unfavourable circumstances. The court said:

> ***"…the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Finally, he should remind the jury of any specific weakness which had appeared in the identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives are sometimes made."***

The conditions under which PW1 saw the robbers were stressful and it must just have been a fleeting glance. However, we find that this was cured by the testimonies of PW1, PW3 and PW4. PW1 was categorical in his testimony that the appellant was not his passenger rather he was one of the robbers who emerged from the bush. PW1 had been with the passenger and must have observed and seen him at the time they began the journey to Ziwani. He explained the circumstances under which he had identified the appellant which position was corroborated by the testimony of PW4 when he stated that PW1 did not know his passenger other than by physical appearance. During the trial, PW1 gave a description of his passenger's physic *vis á vis* that of the appellant's and the description PW1 gave for one of the robbers who emerged from the bush suited that of the appellant. At the scene where the appellant had been arrested, PW1 was clear to the fact that the appellant was not his passenger. PW3 in his testimony affirmed that the appellant (who had been identified by PW1 after being arrested) was indeed the one in possession of the motor cycle and was apprehended after the chase which fact the appellant did not dispute. In **Dinkerrai Ramkrishan Pandya's** case (supra) the testimonies of the witnesses were inextricably interwoven on all the vital matters to which they spoke that it was impossible to separate the truth from untruth with any reasonable certainty unlike the instant case. We therefore find that the appellant was positively identified.

Under grounds (ii) and (iii) the appellant urged that the offence of robbery with violence was not proved to the required standard and that the doctrine of recent possession does not apply in this case. We shall deal with the two grounds together. The appellant argued that despite explaining how he got possession of the motor cycle, he was not heard. Relying on the authority of **Hassan v. Republic** (**2005**) **2 KLR 151**, the Court of Appeal held that:

> ***"…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..."***

The appellant stated that having explained to the trial court that he merely used the motor cycle to rescue

himself from the robbers and was going to report to the police which position was confirmed by PW2, PW3 and PW5, the trial magistrate ought not have found him guilty. On this ground, we are guided by the decision of the court in **Isaac Nganga Kahiga *alias* Peter Njenga Nganga Kahiga v. Republic, Criminal Appeal No. 272 of 2005**, where the guidelines on what should be considered before a conviction can be based on the doctrine of recent possession were set out. The court said:

> ***"it is trite law that before a court of law can rely on the doctrine of recent possession as a basis of 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, and secondly, that the property is positively the property of the complainant, thirdly, 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 properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect; and recovery of the alleged property; and in our view any discredited evidence on the same cannot suffice no matter how many witnesses."***

It is common ground that the appellant was found in possession of the motor cycle soon after the robbery and it was positively identified by the complainant as his; the possession was recent hardly an hour after the robbery and therefore sufficient to invoke the doctrine of recent possession. The appellant therefore had a duty to explain reasonably how he came into possession of the motor cycle. During the trial, the Appellant while cross-examining PW1 raised an issue of the death of PW1's passenger to which PW1 responded *"… **I never heard that my passenger was killed by the robbers**…"* It is questionable that the appellant raised such an issue yet he claimed to have been PW1's passenger. That question negates the fact of the appellant's defence that he was PW1's passenger. The appellant's testimony in itself is inconsistent when in examination-in-chief, he says the robbers chased the motor cycle rider and that is when he got the chance to ride the motor cycle to Nyahururu; then in cross-examination, he stated that it is not true that the robbers followed the owner of the motor cycle. We are not convinced that the robbers, if they truly ran after PW1, chose to run after PW1 and left behind the motor cycle which is of more value. We therefore find the appellant's testimony and explanation to be lacking credibility and is unbelievable.

PW1 stated that he was attacked by robbers who were armed with a panga and a rungu. The particulars of the charge mention pangas and stones but not a rungu. PW1 in his testimony said that one of the robbers with the rungu tried to hit him, but he dodged. The incident happened very fast for PW1 to see clearly and whatever the case, whether a panga or rungu, it was a dangerous weapon. However, this aspect of attack was not controverted by the appellant. Addressing our minds to substantive justice without undue regard to technicalities; section 295 creates the offence of robbery while section 296 (2) provides the ingredients for the offence of robbery with violence.

> ***295. "Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is guilty of the felony termed robbery."***

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

In the case of **Johana Ndungu v. Republic, Criminal Appeal No. 116 of 1995,** the Court of Appeal stated in detail what proof was necessary to found a conviction in a case of robbery with violence under ***section 296 (2)*** of the Penal Code. It stated:

> ***"In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s. 295 of the Penal Code. The essential***

ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s. 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

(1)If the offender is armed with any dangerous or offensive weapon or instrument, or

(2)If he is in company with one or more other person or persons, or

(3)If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

We are therefore satisfied that the particulars of the charge meet the criteria set out in the cited case. The appellant was with another person, and they were armed. We are alive to the requirement that proof of any one of the ingredients of robbery with violence is enough to found a conviction under section 296 (2) of the Penal Code. We find no material defect in the charge sheet and the defence inferred none. We are satisfied that the appellant was not prejudiced on account of the manner in which the charge was drawn and find that the ingredients of robbery with violence were proved.

On the ground that the prosecution failed to call Sergent Oluti and Charles Wanjau as witnesses, the appellant submitted that if these two were called the court would have arrived at a different conclusion. To support this argument, the appellant relied on the decision of **Nganga v. Republic Criminal Appeal No. 50 of 1988 C.A Nairobi and Bukenya v. Uganda** (**1972**) **EA 549** where it was held respectively that:

"…the prosecution may elect not to call a material witness but they do so as their own risk of their case…"

and

"…the court is entitled under the general rule of the evidence to draw an inference that the evidence of these witnesses uncalled if called would have been adverse to the prosecution case…"

He urged that without the evidence of the said witnesses who may have had a better view of the alleged robbery, the trial magistrate ought to have formed an adverse inference that their evidence might have favoured the defence herein. The law is clear that no specific number of witnesses is necessary to prove a fact. ***Section 143*** of the **Evidence Act** states as follows: -

"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

There are of course instances when the failure to call some witnesses will attract adverse inference and that is when the evidence on record is barely sufficient to prove the case. In **Bukenya & Others v. Uganda** (**1972**) **EA 549 it was stated: -**

"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be

adverse to the prosecution case."

(Emphasis ours.)

On whether it is mandatory to call an investigating officer as a witness, we are guided by the decision of Court of Appeal in **Harward Shikanga alias Kadogo & Another v. Republic 2008 eKLR** where it was stated**:**

> ***"We think that in all cases, it would be good practice which prosecuting authorities ought to comply with, but the mere failure to comply with it, i.e calling an investigating officer, cannot automatically result in an acquittal. Each case would have to be considered on its own circumstances in order to determine the effect of such a failure on the entire case for the prosecution."***

In the instant case, PW2 and PW3 who were in company of Charles Wanjau gave an account of what transpired when they intercepted the motor cycle which the appellant was riding. The circumstances under which the appellant was apprehended were also furnished by PW4 and PW5. The appellant selectively read and quoted the excerpts of the **Bukenya case** (supra). The evidence on how the appellant was apprehended was not "*barely sufficient"* but sufficient and the omission to call Charles Wanjau and Sergent Oluti attracts no adverse inference. We therefore decline to fault the prosecution for their failure to call Charles Wanjau and Sergent Oluti.

On the final ground, the appellant submitted that the trial court failed to consider his defence which was detailed and should have been accepted by the said court as the truth. A reading of the trial court's judgment at page 4 to 6 shows that the appellant's defence was considered. The Learned trial Magistrate stated as follows:

> ***"… The accused person's defence is that he was the pillion passenger and that he took the motor bike to escape from the robbers. There is nothing in the accused's evidence to show that the robbers attacked him. He said that when the robbers attacked, they went after the complainant after he stopped the motor bike and ran away…His defence is full of incredible utterances…Secondly; the police station is almost the same distance from the roundabout to Barclays Bank where he headed. The route he took was also suspicious and really if he was taking the motor bike to where he had hired it, why did he not stop when he met the other motor bike riders instead of letting himself be chased down?...From the evidence on record and the conduct of the accused person it appears if the accused was the pillion passenger then he was in with the robbers. If not, he was definitely one of the robbers…The accused's defence would have been believable if he had driven to the police station, or driven to the stage where he alleges to have hired the motor bike, or if he had stopped when he met the other motor bike riders who had been alerted by the complainant or if he had ridden to his home which he alleged was near the scene of robbery where he could have got some help from his neighbours…His conduct immediately after the robbery was not that of an innocent person…"***

We have considered all the evidence afresh and are satisfied that the grounds of appeal raised by the appellant have no merit. Having so found, we confirm the conviction. As regards the sentence, in view of the recent position taken by the courts that this court has discretion in regard to sentence under section 296(2) of the Penal Code and considering that PW1 was not injured during the robbery and the motor cycle was recovered, we find the death sentence to be harsh. We hereby set aside the death sentence and substitute it with fifteen (15) years imprisonment without remission. It is so ordered.

DATED and DELIVERED this 28th day of August 2013.

R. P. V. WENDOH

JUDGE

A. MSHILA

JUDGE

PRESENT:

……for the appellant

……..for the respondent

……..Court Clerk