REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Criminal Appeal 58 of 2009

MORRIS KINYALILI LIEMA..APPELANT

VERSUS

REPUBLIC...RESPONDENT

(*Being an Appeal from the original sentence and conviction in Mwingi Senior Resident magistrate's Court*

Criminal Case No. 20/2007 by Hon. D.Ochenja P.M. on 7/4/2009)

JUDGEMENT

1. The Appellant was charged, together with one, Musembi Ndonga, with the two counts of robbery with violence contrary to section 296(2) of the Penal Code in the Senior Resident Magistrate's Court at Mwingi. The facts to the first count state that on the nights of 20th-21stDecember, 2006 at about 3:30 am in Mwingi town, the Appellant together with others jointly robbed Sammy Musau Mutunga of Kshs. 8,500/= and a mobile phone (Nokia 3310) all valued at Kshs. 15,500/=. The facts stated that the Appellant and his accomplices were all armed with dangerous weapons namely pangas, stell bars, rungus, metal cutters, and other crude weapons, and that during or immediately after the time of that robbery, they used personal violence on the said Sammy Musau Mutunga.

2. The second count narrated that on the same night, and at the same place, and with the same cast of characters who were similarly armed, the Appellant and his accomplices robbed one, Matthew Kaberia of Kshs. 8,000/= and a Motorola Phone make C-113 all valued at Kshs. 11,000/ and that, at or immediately before or immediately after the commission of the robbery, they used actual violence on the said Matthew Kaberia.

3. The Appellant and Musembi Ndonga were arraigned before the Senior Resident Magistrate's Court at Mwingi. They each pleaded not guilty to the offences. A fully-fledged trial ensued. Eight Prosecution witnesses testified and the Appellant gave a sworn statement. His co-accused in the Court below, Musembi Ndonga, gave an unsworn statement. The Learned Magistrate D. Ochenja gave his considered judgment on 7th April, 2009. He convicted the Appellant of the second count and sentenced him to death as prescribed by law. He acquitted Musembi Ndonga after finding no evidence to link him with either offences. The Appellant was also acquitted of the first count of robbery with violence.

4. To prevent an anti-climax, we announce at the outset that we have allowed this appeal on three separate grounds. First, we find that there was failure to adhere to the terms of section 200(3) of the Criminal Procedure Code – which is fatal for any conviction. Second, we find that there was a fatal

failure to accord a fair hearing to the Appellant contrary to section 77 of the Old Constitution of Kenya which is applicable to the case. This was due to failure to produce in Court, despite repeated requests by the Appellant, the Occurrence Book extract with details of his arrest which he intended to use to marshall his defence. Third, having had an opportunity to peruse the Occurrence Book, we find evidence that is inconsistent with the conviction, and which we must resolve on behalf of the Appellant. The Learned State Counsel, Mr. Mukofu conceded the appeal when it came up for hearing although he was not specific on his reasons for such concession. We think he was right for whatever reason to concede the appeal as we shall show below.

5. We need not rehash all the evidence produced at trial in order to explain the reasons for our decision. Suffice it to say that the evidence adduced showed that PW2 and PW8 were both attacked in their houses on the fateful night. In both cases, the robbers gained entry by breaking doors. Both PW2 and PW8 claimed to have identified the assailants. They both picked up the Appellant and his co-accused in an Identification Parade. However, the Learned Magistrate concluded that the circumstances were simply not ideal for positive identification. He also concluded that the evidence of Identification Parade was unavailing to the Prosecution because the parade was conducted in violation of the judges' rules. In particular, the participants in the Identification Parade did not wear identical or even nearly identical clothes. The Learned Magistrate therefore concluded, and correctly so in our view, that no evidence of identification could sustain a conviction.

6. However, the Learned Magistrate then trained his eyes on evidence of recent possession of a cell phone of the make Motorola C-113 which was allegedly recovered from the Appellant when he was arrested on the same night the offences were committed. Persuaded that the cell phone was found in possession of the Appellant and finding no plausible explanation from the Appellant, the Learned Magistrate concluded that the presumption of guilt was not sufficiently rebutted. He, therefore, proceeded to convict the Appellant on the second count only. Since there was no connection between the Appellant's co-accused and the recovered cell phone, the Learned Magistrate acquitted the co-accused.

7. The Appellant was naturally aggrieved by the conviction and sentence. Hence he preferred this appeal before us, he urged two main grounds. First, he contended that the doctrine of recent possession was inapplicable to the case at hand. Second, he protested that he was denied a fair opportunity to defend himself contrary to section 77(1) (2) of the Old Constitution. As pointed out above, the Learned State Counsel conceded the appeal.

8. We will first deal with the doctrine of recent possession. This is a rule of law that permits an inference that where it is proved that property was stolen and the same property, recently after the robbery is found in the exclusive possession of a person, that person is presumed to have participated in the crime that resulted in the theft or robbery of that property. The presumption is a rebuttable one but the burden shifts to the accused person as soon as all the elements are proved to properly invoke the doctrine.

9. To invoke the doctrine of recent possession, the Prosecution must prove beyond reasonable doubt each of the following four elements:

§First, that the property was stolen;

§Second, that the stolen property was found in the exclusive possession of the accused;

§Third, that the property was positively identified as the property of the complainant; and

§Fourth, that the possession was sufficiently recent after the robbery. As to what constitutes "recent" possession is a question of fact depending on the circumstances of each case including the kind of property, the amount or volume thereof, the ease or difficulty with which the stolen property may be assimilated into legitimate trade channels; the property's character, and so forth.

10.In the case of *Malingi v Republic* [1989] KLR 225, the Court of Appeal had this to say about the doctrine of recent possession:

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 has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver.

11.In the instant case, the Learned Magistrate was persuaded that the cell phone (of the make Motorola C-113) was recovered on the person of the Appellant. The Learned Magistrate was also persuaded that the cell phone was the stolen property as it was positively identified by PW8. Finally, there was no question that the possession was sufficiently recent after the robbery.

12.We think the Learned Magistrate fell into error in failing to consider the inability of the Appellant to mount a defence which would have been aimed at refuting the central element of the doctrine of recent possession namely exclusive possession. It was the Appellant's case both in the Court below and before us that he was not found in possession of the cell phone. In order to prove that, he sought the Police to produce the Occurrence Book extract for the day of his arrest. That extract, though in the exclusive possession of the Police, was never produced in Court. The record shows that the Appellant requested for the Occurrence Book at least three times. It was never produced. The case closed without the Occurrence Book ever having been produced.

13.In our considered opinion, the Learned Magistrate should never have proceeded to convict the Appellant under the circumstances. We note that the Learned Magistrate did not even address the issue of the Occurrence Book in his judgment. We think this was a fatal error. We think so for two reasons. First, as we have hinted above, the Appellant wished to use the Occurrence Book to refute a central element in the doctrine of recent possession. It was incumbent upon both the Court and the Prosecution to ensure that he had this crucial piece of evidence which was in the sole possession of the Police in order to mount his defence. Failure to do so is a violation of his constitutionally-protected right to a fair trial. Even without more, that would have been enough to reverse the conviction. Besides, by such unexplained failure, we can only infer that had the O.B been availed, the evidence therein would have been adverse to the prosecution.

14.But there is more. We have now perused the Occurrence Book. It clearly shows that when the Appellant was arrested he had only Kshs. 1210/= on his person. There is no mention or indication that he was arrested with any cell phone. That is the inventory in the Occurrence Book. Official written records do not lie – or at least they are not supposed to. A brief consideration of the situation suggests why the Police were not so keen to produce the Occurrence Book in the first place: it would have disproved their allegation that the cell phone was found on the person of the Appellant. We must register, in the strongest terms possible, our disappointment with how the Police conducted themselves on this case. Both the Police and the Prosecutors must internalize the Constitutional command that every accused person is entitled to all evidence – including evidence that would tend to exculpate the accused person. This is not a discretionary rule that the Prosecution might choose to obey or not; it is a peremptory rule straight from the Constitution. Both the Police and Prosecutors should take heed.

15.As we pointed out at the outset, there is a third reason to allow this appeal. The record shows that the trial began in earnest before the Learned R. Odenyo, Senior Resident Magistrate on 29th November, 2007. SRM Odenyo only heard one witness. PW2 did not testify until 29th May 2008. By that time, the case was before the Learned D. Ochenja, Senior Resident Magistrate. The Learned D. Ochenja proceeded to hear all the remaining witnesses and concluded the trial.

16.Section 200(3) of the Criminal Procedure Code provides as follows:

Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been

recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall informed of that right.

17.Under this provision, it is the duty of a magistrate who takes over a criminal trial commenced by another magistrate to explain to the accused person the import of the section and to give the accused person an election whether to recall the witnesses who have already testified to come testify again or to be cross-examined. Our jurisprudence has established that failure to do so is fatal to a conviction. See, for example, *Migot v Republic* (1991) KLR 594.

18.We have examined the record of the trial in the Court below. It shows that the Learned D. Ochenja who conducted the trial at the latter stage failed to adhere to the mandatory terms of section 200(3) of the Criminal Procedure Code. We find the contravention of section 200(3) to have rendered the trial as a whole fatally defective.

19.We, therefore, quash the conviction and set aside the sentence.

20.The next question we must answer is whether we should order a retrial. Mr. Mukofu did not ask for one. We think he was right in not insisting on one. In answering the question whether a retrial should be ordered or not, we are guided by the principles which have emerged in our jurisprudence on when it is appropriate to order a re-trial. Overall, the following five principles govern the exercise of an appellate Court's discretion in granting or refusing a retrial:

a. First, a retrial may be ordered only when the original trial was illegal or defective. See *Merali v Republic* (1071) EA 221. This means that a retrial should not be ordered where the appeal succeeds due to lack of sufficient evidence. A re-trial should never be used by the prosecution to fill gaps in its case.

b. Second, a retrial should be ordered where the interests of justice require it and refused where it is likely to cause injustice or prejudice to the appellant. See *Ahmed Suman v Republic* (1964) EA 481.

c. Third, a retrial should be ordered only when it is likely that it will result in a conviction. As the Court of Appeal remarked in *Mwangi v Republic* (1983) KLR 522:

[A] retrial should not be ordered unless the appellate Court is of the opinion that on a proper consideration of the admissible evidence or potentially admissible evidence, a conviction might result.

d. At the end of the day, each case must be decided on its unique facts and circumstances.

21.We will now apply these principles to the instant case. We have allowed this appeal on the grounds of contravention of section 200(3) of the Criminal Procedure Code, it follows that the trial was defective and hence a nullity. However, we also allowed the appeal on the ground that the evidence on recent possession, which was the theory used to connect the Appellant to the crime, was not established beyond reasonable doubt since any doubt must be resolved on behalf of the accused person. In any event, we are not persuaded, given the Occurrence Book which we have had occasion to peruse, that a retrial is likely to lead to a conviction. It is, therefore, likely to be an exercise in futility.

22.It follows, therefore, that we will order that there be no retrial and that the Appellant be set free forthwith unless he is otherwise lawfully held in custody.

DATED and **DELIVERED** at **MACHAKOS** this **15TH** day of **JUNE 2012.**

J.M. NGUGI **ASIKE-MAKHANDIA**

JUDGE **JUDGE**