REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL 28 OF 2017

(From original conviction and sentence Criminal Case. 799 of 2010 of the

Senior Principal Magistrate's Court at Wanguru – B. M. OCHOI- SRM)

ANTHONY NGUGI MWANGI.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

JUDGMENT

1. The appellant Anthony Ngugi Mwangi was convicted for the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** and was sentenced to death in the Senior Resident Magistrate's Court at Wanguru.

2. The appellant was dissatisfied with the conviction and sentence and filed this appeal which raises the following grounds:-

a. The learned trial Magistrate erred in law and facts by not considering that the charge sheet was defective as it was drawn centrally to Article 50(2)(6) of the Constitution and Section 137(f) of the Criminal Procedure Code.

b. The learned trial Magistrate erred in law and facts by relaying on the DOCTRINE OF RECENT POSSESSION yet the four major elements were not met and not proved to the required legal threshold.

c. The learned trial Magistrate erred in law and facts by dismissing the appellant defence without advancing any cogent reasons yet the same was comprehensive enough to water down the respondents case.

d. The learned trial Magistrate erred in law and facts in treating the prosecution case in isolation of defense case which was an erroneous approach in criminal trial.

e. The learned trial Magistrate erred in both law and facts by not considering that the case was full of contradictions and inconsistencies.

f. The learned trial Magistrate erred in law and facts by not considering the case was full of contradictions and inconsistencies.

The appellant prays that:-

- **Appeal be allowed.**
- **The conviction be quashed.**
- **The sentence be set aside.**
- **He be set at liberty.**

3. The State opposed the appeal in submissions filed by Geoffrey Obiri, Assistant Director of Public Prosecutions. He prays that the appeal be dismissed.

4. The brief facts of the case are that on 31/10/10 the complainant StepheneWaweru (PW-1-) was on his way home at about 11.00 Pm when he met three men who started beating him and took away his jacket. He decided to go and lookfor a taxi. He then went back to the scene and recovered the jacket. He was robbed Kshs 2,000/- a Memory Card 2 GB and a Camera make Sony valued 18,000/-. The following day he reported the matter to the police. Later on 5/11/10 he received a call from a shopkeeper who informed him that he had seen some people who had a camera which he suspected to be stolen. The people were trying to buy a memory card. He told them to go back after 20 minutes. PW-1- went to the shop and met Jack (PW-2-). The one (1st accused) who was in company of another was arrested.

5. Later on 18/11/2011 the complainant was at a boutique when a gentleman by name Benson approached him and wanted to sell a camera to him. The complainant recognized the camera as his. He agreed to buy the camera. The complainant called the In-charge and informed him. He went and asked Benson how he got the camera and he said he was given the camera to go and sell. Benson said he was given the camera by the appellant who in turn said he was given the camera by two people. The complainant identified the camera as his as he had put a mark S.W on the cover and he had a receipt for it. The appellant was then charged.

6. I have considered the evidence tendered before the trial Magistrate. This being a 1st appellate court, this court has a duty to analyse the evidence and evaluate it and come up with its own independent finding. However, I should consider that unlike the trial Magistrate, I did not have a chance to see the witnesses when they testified and leave room for that. The case of **Okeno –v- R (1972) E. A 32**refers:-

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R (1975) EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

7. I have considered the evidence tendered. The trial Magistrate in his Judgment stated:-

> ***"I think that in the Particular circumstances of this case the time lapse between the date of robbery and discovery of the goods (camera) was not such that it would be unreasonable to hold that the accused possession thereof on that date was sufficient to form a conclusion that 2nd accused participated in the robbery. In my view it can be stated that the camera was found in possession of the 2nd accused shortly afterwards."***Page 49 of the record line 16 – 22.

8. With this the trial Magistrate concluded that the appellant could not offer any acceptable explanation of how he came to possess the camera and found that the prosecution had proved the case of robbery with violence against the 2nd accused.

9. Based on this finding I find that the main ground for consideration is whether the trial Magistrate erred by relying on the doctrine of recent possession to convict the appellant.

10. For the court to rely on the doctrine of recent possession it must be proved that –

> ***"The appellant had in his possession goods which after they were stolen and could not offer an explanation of how he came to possess the goods and such possession must lead to an inference that he only came to possess the goods after stealing them."***

The Court of Appeal in the case of **Erick Otieno Arum –v- Republic 2006 KLR -----** when dealing with the issue of doctrine of recent possession held that:-

> ***"In our view, 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, 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."***

11. For the court to make an inference of guilt, the prosecution must prove that:-

- **The accused possessed the property.**
- **That property is positively identified as belonging to the complainant.**
- **That the property was recently stolen from the complainant.**

12. Applying these considerations to the circumstances of ho case, the evidence tendered by PW-2- is that the appellant showed him a camera and told him to look for a buyer. He looked for a buyer who demanded to see the camera. He went back to the Appellant took the camera and went with it. The intended buyer said he had money. On the way back PW-2- met the complainant andhe told him he had a camera he was selling. The complainant saw the camera and said it looked like his. PW-2- took the complainant to the shop of the appellant. He then learnt that the appellant was arrested.

13. The robbery was committed on 31/10/10 and PW-2- had the camera on 18/11/2010. This possession was not recent. The doctrine of

recent possession is that the item was recently stolen and has not changed hands. From the testimony of PW-1- on 5/11/2010 the said camera had been seen with some people. It had changed hands.

14. The appellant was not in possession of the camera. The camera was with PW-2- when the owner identified it. In his defence the appellant testified that he had bought the camera on 15/11/2010 from another customer. This defence shows that the camera had changed hands. There was no proof that the appellant came into possession of the camera after robbing the complainant. The appellant in his defence on oath stated that he was not involved in the robbery of the camera. The complainant had indeed not identified the appellant as one of the robbers during the robbery. The trial Magistrate indeed found that the complainant had not identified the attackers.

15. The appellant having not participated in the robbery, could not have possessed the camera after robbing the complainant. The trial Magistrate erred by considering the aspect of recent possession. The camera was in possession of PW-2- when it was recovered and so recent possession by the appellant could not arise. PW-2- was an accomplice as he was in possession of the camera. He had undertaken to sell the camera for a commission.

16. The trial Magistrate erred by holding that the appellant was found in possession of the camera. The conclusion by the trial Magistrate that the appellant could not offer any acceptable explanation of how he came to possess the camera and that it was safe to conclude that the 2nd accused was one of the robbers Page 50 line 13 – 17 was clearly against the wait of the evidence. The trial Magistrate having found that the complainant did identify the robbers the issue of the appellant having participated in the robbery did not arise.

17. The trial Magistrate shifted the burden of proof to the appellant when he stated that-

> ***"2nd accused could not offer any acceptable explanation on how he came by it"*** Page 50 line 14 & 15.

Article 50 (2) (a) of the Constitution states: -***"Every person has a right to a fair trial which includes the right;-***

> ***a) To be presumed innocent until the contrary is proved.***
>
> ***The appellant had no burden to prove his innocence. Even after that the trial magistrate convicted the appellant, he proceeded to state – "Evidence of identity was not sufficient against either of the accused person ----"*** It was a grave in justice to convict for robbery with violence.

18. The evidence tendered before the trial Magistrate did not support the doctrine of recent possession. The time lapse was long. The appellant offered a plausible defence on how he came into possession of the camera. This was not disapproved as the Investigating Officer admitted that he did not conduct any investigations. There was no other evidence on how the appellant came to possess the camera other than what the appellant told the court. There was contradictions on the evidence of PW 1, 3 & 4 which raised doubts on their testimonies. Where doubts are cast in a criminal case they must go to the benefit of the person charged. The prosecution had the burden to prove the charge against the appellant beyond any reasonable doubts. In **Woolmington –v- D.P.D (1935) A. C 462 PP 481** on the legal burden of proof in criminal matters was stated :-

> ***"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception --- No matter where the charge of where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."***

19. This common law tradition is the legal position in criminal cases in this Country. The trial Magistrate erred by shifting the burden on the appellant to proof his innocence. The trial Magistrate erred by relying on the doctrine of recent possession against the weight of the evidence. I find that the evidence tendered before the trial Magistrate was insufficient and did not prove the charge of robbery with violence beyond any reasonable doubts. The appeal has merits. I allow the appeal and order that:-

> **1. The conviction is quashed.**
>
> **2. The sentence is set aside.**
>
> **3. The appellant is set at liberty unless otherwise lawful held.**

Dated at Kerugoya this 13th day of February 2020.

L. W. GITARI

JUDGE