REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOs.144 & 146 OF 2017

YUSSUF KIMANI WANGARE.....1ST APPELLANT

DAVID MWANGI MUTURI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Mutuku (SRM)

delivered on 28th September 2017 in Kibera CM CR. Case No.150 of 2014)

JUDGMENT

The Appellants, Yussuf Kimani Wangare and David Mwangi Muturi were charged with the **offence of robbery with violence** contrary to **Section 296(2)** of the **Penal Code.** The particulars of the offence were that on 14th January 2014 at Dagoretti Market in Nairobi County, the Appellants, jointly with others not before court, robbed Bernard Ngugi Mwangi (the complainant) of his mobile phone make Itel valued at Kshs.2,500/- and at the time of the robbery, threatened to use actual violence to the complainant. They were further charged with the offence of **breaking into a building and committing a felony** contrary to **Section 306(a)** of the **Penal Code.** The particulars of the offence was that on the same day and in the same place, the Appellants entered into a building owned by Stanley Mwangi Ngugi where they committed a felony namely stealing of assorted hardware items, bicycle spare parts and airtime scratch cards all valued at Kshs.17,000/-. In the alternative, they were charged with **handling stolen property** contrary to **Section 332(2)** of the **Penal Code.** The particulars of the offence were that on the same day and in the same place, they were found with the items listed in the above charges knowing or having reason to believe them to be stolen goods. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, they were found guilty of the first count of **robbery with violence.** They were sentenced to death.

The Appellants were aggrieved by their conviction and sentence. They each filed separate appeals against the said verdict. In their grounds of appeal, the Appellants raised more or less similar grounds of appeal. They faulted the trial magistrate for failing to reach the verdict that they had been charged with a duplicitous charge sheet which prejudiced them in their defence. They were aggrieved that they were found guilty on the basis of the evidence of identification and on the application of the doctrine of recent possession yet the evidence adduced did not support such finding. They took issue with the fact that the evidence adduced by the prosecution witnesses was not corroborated to the required standard of proof. They faulted the trial magistrate for failing to find that the circumstance of their arrest raised reasonable doubt that they were the ones who had indeed committed the offence. They were aggrieved that their respective cogent and plausible defences were ignored by the trial magistrate before she reached the impugned decision finding them guilty as charged. They were finally aggrieved that the death sentence that was imposed upon them was unconstitutional and therefore they ought to benefit from a resentencing exercise by this court in the event that their appeal on conviction is disallowed. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentence that was imposed upon them.

During the hearing of the appeal, the Appellants presented to court written submission in support of their respective appeals. In essence, they argued that they had not been properly identified nor was the evidence adduced against them properly evaluated to enable the trial court reach the finding that they were the ones who had committed the offence. In particular, they submitted that the victim of the robbery did not properly identify them during the course of the robbery. No identification parade was conducted to confirm their alleged identification by the complainant. As regard the application of the doctrine of recent possession, it was their case that they were not found in possession of the robbed items because the witnesses who testified told the court that the stolen items were dropped by the robbers when they were confronted by the police. In the circumstances therefore, it was the Appellants' case that the prosecution's case was full of contradictory and inconsistent evidence that did not establish the prosecution's case against them on the charge of robbery with violence to the required standard of proof beyond any reasonable doubt.

Ms. Nyauncho for the State opposed the appeal. She submitted that the prosecution had adduced sufficient cogent and corroborative evidence

that established the Appellants' guilt to the required standard of proof. She explained that the Appellants broke into the house where the complainant was sleeping and robbed him of several items which were listed in the charge sheet. One of the items was a mobile phone. Before the robbers gained access to the house, the complainant called his father who was able to notify others who informed the police. The police arrived at the scene immediately after the robbery and saw three men with a sack near the complainant's place of residence. There was sufficient electric security lights. When the Appellants saw the police, they dropped the sack and ran away. One police officer remained at the scene with the dropped sack while others gave chase. They arrested the Appellants and returned them to the scene of crime. The Appellants were identified by the complainant at the scene of crime. The items that were robbed from the complainant were recovered in the sack that was dropped near the scene of crime. Those items included the complainant's mobile phone. It was the prosecution's submission that it had established its case on the charge brought against the Appellants to the required standard of proof beyond any reasonable doubt. As regard sentence, learned prosecutor was not averse to the court resentencing the Appellants. She proposed the Appellants be sentenced to serve ten (10) years imprisonment on account of the fact that during the robbery, the complainant was not hurt. The value of the items stolen did not in the circumstances justify a harsher custodial sentence.

This being a first appeal, this Court is mandated to re-evaluate the evidence afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge –vs- Republic [1982 – 88] 1 KAR 1134** stated this on the duty of the first appellate court;

> ***"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."***

In the present appeal, the issue for determination is whether the prosecution established the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the rival submission made by the parties to this appeal. It was clear from the evidence that the Appellants were convicted on the basis of the evidence of identification and on application of the doctrine of recent possession. According to the complainant, he was asleep in his place of business at Dagoretti market on the night of 14th January 2014. He testified that about 1.00 a.m., he was woken up by a bang on his door. He peeped through the door and saw three men. He frantically made a call to his father who testified as PW2. The assailants managed to gain entry into his house. They ordered him to lie down. He was therefore not able to note the physical features of the assailants. Nor was he able to see clearly the clothes that they wore. They asked him for money. He told them that he didn't have any. They ransacked the house. They then ordered him to surrender his mobile phone. He surrendered his Itel mobile phone. They collected some hardware items that were kept in the house.

The complainant told the court that after the assailants had left, the police arrived thereafter to his house and told him that they had arrested the suspects. This is what the complainant told the court:

> ***"I didn't see them when they were arrested. I first saw them in court. At the station, the police asked me if I am the one who called. I confirmed and they told me the case will proceed. I saw my phone in court and was told it was found with 1 suspect. I didn't see them in the station. They were locked. I did not know them before. I cannot tell who they are. I could not identify them physically…"***

PW4 PC Robert Mbunga and PW5 CPL. Barnabas Wanjohi were at the material time attached to Riruta Police Station. They told the trial court that on the material night of 14th January 2014 at about 2.00 a.m., they were on patrol at Dagoretti market. They received a report that a hardware business premise had been broken into. They went to the hardware. While on the way, they met with three men who were carrying a sack. When they saw them, they dropped the sack and ran away. PW4 was left at the scene guarding the dropped sack. PW5 testified that he and other police officers gave chase and managed to arrest two of the three men. They arrested them a distance of about 50 metres from where the sack had been dropped. One of the men managed to escape. They brought the two men back to the scene of crime. PW4 testified that PW5 and other police officers returned to where he was left guarding the sack after about 30 minutes.

In their defence, the Appellants testified that they were going home after having a night out in a bar when they were confronted by the police. They were arrested. They denied involvement in the robbery. When they were returned to the scene of crime, the sack was opened and among the items found were the items that were stolen from the complainant. PW4 and PW5 testified that the complainant identified the Appellants at the recovery scene. This evidence of identification was obviously contradicted by the evidence of the complainant himself.

It was clear from this evidence that the finding reached by the trial court to the effect that the complainant had identified the Appellants at the scene of crime had no basis in evidence. Further, the testimony of PW5 does not establish to the required standard of proof that indeed it was the Appellants who had abandoned the sack and ran away from the scene. The reason for this is because it was at night. Although PW5 testified that there were security lights, this court was not persuaded that PW5 had constant and unimpeded sight of the robbers for the distance of 50 metres in a build-up market area. Secondly, it was not clear from his evidence how PW5 and his colleagues managed to subdue the Appellants before arresting them.

The Appellant's defence to the effect that they were arrested while they were going home from a bar has a ring of truth in it. In any event, this court upon evaluating the evidence reached the conclusion that the defence adduced by the Appellants raised reasonable doubt regarding the manner of their arrest. In the premises therefore, this court holds that, taking into totality the circumstances in which it is claimed that the Appellants were arrested, it is not possible for this court to conclusively reach the determination that the Appellants were properly identified.

In **Maitanyi –Vs- Republic [1986] KLR 198 at P.200,** the Court of Appeal while considering the evidence of identification made in difficult circumstances held thus:

> ***"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA***

166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

> ***"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".***

In the case of **ABEL MONARI NYANAMBA & 4 OTHERS V REPUBLIC [1996] eKLR** the Court of Appeal Stated:

> ***"This court has repeatedly stressed that it is unsafe to uphold a conviction based on improper identification. The law in this regard is well set out in the cases of ABDALLAH BIN WENDOH V R (1953) 20 EACA 166 and RORIA V R [1967] E.A. 583. The holding in the case of R V ERIA SEBWATO [1960] EA 174 is:-***
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> ***"Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction."***
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> ***Though the learned judge warned himself of the dangers of convicting on the evidence of one witness, did he correctly apply his warning to the evidence" Yes, he did so, but, the identification or recognition by PW1 of the appellants was not foolproof or cogent. This witness, we conclude, did not beyond reasonable doubt identify or recognize any of the appellants as the assailants of the deceased."***

In the present appeal, this court cannot with, certainty, reach the conclusion that the evidence of identification that was adduced by the prosecution witnesses was watertight as to exclude the possibility of mistaken identity given the time the robbery took place and the circumstances of the Appellants' arrest.

There was other evidence that was adduced by prosecution to support its case against the Appellants. This was the application of the doctrine of recent possession. For the doctrine of recent possession to be applied to support a conviction, the court must be satisfied of certain conditions as was held by the Court of Appeal in Simon Kang'ethe v Republic [2014] eKLR:

> ***"Section 111 of the Evidence Act provides that; existence of circumstances bringing the case within the exception or exemption from or qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge and such person is upon him…"***
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> **In Ogembo -versus- Republic [2003] 1EA it was held that:**
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> ***"For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen."***
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> **Recently, this court in Moses Maiku Wepukhulu & Paul Nambuye –versus- Republic CRA No.278 of 2005 (Koome, Mwera & Otieno Odek, JJA) quoted with the approval what constitutes the doctrine of recent possession in the case of Malingi v R [1989] KLR 225:**
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> ***"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 have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the 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 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. (emphasis added). The doctrine being a presumption of fact 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 it or was a guilty receiver."***
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> **As was aptly stated in the case of HASSAN V R (2005) 2 KLR 151:**
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> ***"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.""***

In the present appeal, PW4 and PW5 testified that they confronted three men while they were on patrol at Dagoretti market. When the three men saw them, they dropped a sack that they were carrying and ran away. This court has re-evaluated the evidence and reached the conclusion that the evidence adduced by PW4 and PW5 that they did not lose sight of the three men while they were chasing the assailants was incredible. The circumstances prevailing at that time of the night and the timelines adduced by PW4 led this court to disbelieve their evidence that the Appellants were the three men who dropped the sack. That being the case, an important element for the application of the doctrine of recent possession to apply was not satisfied. That element is that the prosecution was required to establish to the required standard of proof beyond any reasonable doubt that the property which was stolen from the complainant were found in the Appellants' possession. That being the case, the doctrine of recent possession could not possibly be applied to secure the conviction of the Appellants.

The upshot of the above reasons is that the appeals lodged by the Appellants have merit. They are allowed. The conviction of the Appellants by the trial court is quashed. They are acquitted of the charge. The death sentence imposed upon them is set aside. They are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF OCTOBER 2019.

L. KIMARU

JUDGE