REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.773 OF 2007

(An Appeal arising out of the conviction and sentence of HON. K. BIDALI (MR.) - PM

delivered on 3rd August 2010 in Kiambu CM. CR. Case No.346 of 2007)

STEPHEN WANYOIKE WARUINGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Stephen Wanyoike Waruinge was charged with two others with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 2nd February 2007 at Kawaida Village in Kiambu County, the Appellant jointly with others, while armed with a dangerous weapon namely a knife and a metal bar robbed David Maina Ndungu of a television aerial, cash Kshs.3,000/-, photographs and 10 CDs all valued at Kshs.5,200/- and at or immediately before or immediately after the time of the said robbery used actual violence to the said David Maina Ndungu (hereinafter referred as the complainant). The Appellant was charged with other charges which were in the alternative to the main charge. He pleaded not guilty to the charges. After full trial, he was convicted of the main charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. His co-accused were acquitted. He was sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of visual identification that did not stand up to legal scrutiny. He faulted the trial magistrate for failing to take into consideration the fact that there existed a grudge between himself and the complainant that motivated him to lodge the criminal complaint against him. The Appellant challenged the decision of the trial court by stating that the evidence adduced by the complainant was not corroborated. He took issue with the fact that the trial court had relied on inconsistent and doubtful evidence to convict him. He was aggrieved that the trial court had failed to take into consideration his defence before arriving at the decision to convict him.

In a supplementary ground of appeal, the Appellant stated that his right to fair trial was infringed as provided under **Article 25(c)** of the **Constitution** and **Section 207(1)** of the **Criminal Procedure Code**. The Appellant stated that he was convicted on the basis of a defective charge sheet and a trial process that was riddled with irregularities that prejudiced him in the preparation of his defence. He took issue with the manner in which the evidence of the recovery of the stolen items was treated to convict him of the charge. He was of the view that the trial court did not properly apply its mind to the facts of the case and therefore reached the erroneous decision to convict him. For the above reasons, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He further made oral submission urging the court to allow his appeal. He stated that the complainant was a lover of his mother. He disapproved of the relationship. A lady by the name Terry Muthoni worked at the complainant's bar. Terry brought to him an amplifier so that he could repair it. He assessed the cost of repair at Kshs.1,600/-. After repairing the amplifier, the complainant failed to pay him. When he demanded to be paid the sum, the complainant got annoyed. The Appellant held the amplifier as security so that he could be paid his money. A confrontation ensued. On the night of 2nd February 2007, the complainant went to his house and knocked at his door. He refused to open the door. The complainant broke into his house and forcefully took away the amplifier. In the course of the struggle, the Appellant was cut by the complainant. He raised alarm. The police from the nearby Kawaida Police Post came to the scene. It was then that the complainant alleged that the Appellant had robbed him. The Appellant was arrested. The Appellant questioned why Terry Muthoni, who was a critical witness in the case, was not called to testify. He submitted that the said Terry Muthoni had claimed that he had robbed her. It was imperative that she be called to testify in the case. Other crucial witnesses were not called to testify in the case. He was of the view that taking into consideration the totality of the evidence that was adduced by the prosecution witnesses, the charge of **robbery with violence** under **Section 296(2)** of the

Penal Code was not established to the required standard of proof. He urged the court to allow the appeal.

Ms. Sigei for the State opposed the appeal. She submitted that the ingredients to establish the charge of robbery with violence were proved. She explained that the Appellant, in company of others, went to the complainant's business premises and robbed him together with his employee. The complainant identified the Appellant in the course of the robbery. The Appellant was known to the complainant prior to the robbery incident. This was due to the fact that the Appellant was a customer at the bar. The complainant was injured in the course of the robbery. When the incident was reported to the police, and a search was conducted in the Appellant's house, some of the stolen items were recovered. She urged the court to apply the doctrine of recent possession. She submitted that failure by the prosecution to call Terry Muthoni and others as prosecution witnesses did not in any way lessen or diminished the prosecution's case. She stated that the defence offered by the complainant was diversionary and did not dent the otherwise strong case that had been brought against him by the prosecution. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its verdict, this court is aware that it did not hear nor see the witnesses as they testified and therefore cannot make any comments regarding the demeanour of the witnesses. (See **Okeno –vs- Republic [1972] EA 32)**. The issue for determination by this court 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.

The court has carefully re-evaluated the evidence adduced before the trial court in light of the submission made by the parties to this appeal. From the evidence, it was clear that the prosecution relied on two pieces of evidence to secure the conviction of the Appellant. The first piece of evidence was the evidence of identification. The complainant, David Maina Ndungu testified as PW1. He told the court that on 2nd February 2007, while he was in a nearby premise where there was a pool table, he was informed that his bar was being robbed by a gang of robbers. He rushed to the scene and found the bar attendant by the name Terry Muthoni lying on the ground. He found the Appellant carrying CDs. He inquired from him what he was doing at the bar. The Appellant cut him with a knife that he had in his possession. He then walked out of the bar. The complainant raised alarm. Members of the public came to the bar. Terry Muthoni told him that she had been robbed of her handbag. The complainant reported the incident to the police at Kawaida Police Post.

On the same night at about 1.30 a.m., the complainant, accompanied by the police went to the Appellant's house. They found the Appellant. They recovered Terry Muthoni's handbag. It was produced into evidence. Unfortunately, Terry Muthoni was not called to testify as a witness during trial. The complainant testified that he recovered three of the CDs that were stolen from the bar by the Appellant. The three CDs were produced as exhibit in evidence. The complainant testified that he was positive that he had identified the Appellant because he knew the Appellant prior to the robbery incident. He was a regular customer at the bar. At the time of the robbery, there was sufficient bright light at the bar that enabled him to identify the Appellant. The robbery took about 15 minutes which was sufficient period to enable him identify the Appellant. The Appellant denied robbing the complainant. He attributed his problems with the complainant to the non-payment of repair costs of an amplifier. The Appellant told the court that he was not at the scene when the robbery took place.

On re-evaluation of this evidence of identification, this court is satisfied to the required standard of proof beyond any reasonable doubt that the complainant indeed identified the Appellant in the course of the robbery. The Appellant was known to the complainant. Infact, the complainant's identification of the Appellant was that of recognition. The Appellant was known to the complainant prior to the robbery incident. He was a frequent customer at the bar. As was held by the Court of Appeal in **Anjononi –Vs- Republic [1980] KLR 54 at P.60**:

> ***"Being night time the conditions for identification of robbers in this case were not favourable. This was however a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because he depends upon personal knowledge of the assailant in some form or other."***

Unlike the above case, there was sufficient light at the bar which enabled the complainant to be positive that he had identified the Appellant as one of the robbers. He recognized the Appellant. He even spoke to the Appellant. The Appellant wore no form of disguises to conceal his identity. This court is convinced that the Appellant was properly identified as being a member of the gang that robbed the complainant.

If there was any doubt that the Appellant was one of the robbers, that doubt was removed by the recovery of some of the robbed items from the Appellant's house. Immediately after the robbery incident, the complainant made a report to the police at Kawaida Police Post. They were referred to Karuri Police Station where PW5, Sgt Justine Luguso was assigned to investigate the case. The report was made on 2nd February 2007. On the same night, PW5 accompanied by other police officers and the complainant went to the Appellant's house. They found the Appellant and arrested him. They conducted a search in the Appellant's house and were able to recover the complainant's employee's handbag. The employee was known by the name Terry Muthoni. The Appellant did not lay claim to the handbag. From the evidence adduced by PW5, the contents of the handbag clearly proved that the handbag belonged to Terry Muthoni because it contained her personal beauty care items and her photographs. Three CDs which were robbed from the complainant's bar were recovered. These CDs were positively identified by the complainant. Although other items that had been stolen from other residential houses that had been broken into were recovered, those items did not form part of the evidence that led to the conviction of the Appellant on the charge that he was convicted of.

This court holds that the doctrine of recent possession applies in this case. The items that were robbed from the complainant's bar were recovered on the same night in the Appellant's house. The Appellant did not give an explanation of how he came to be in possession of the said items. The items were positively identified by the complainant. Indeed, at the close of the prosecution's case, the Appellant did not lay any claim on the items that were recovered from his house. The only inference that can therefore be drawn from the said recovery is that the Appellant had possession of the said items because he robbed them from the complainant. In **Athuman Salim Athuman –vs- Republic [2016] eKLR,** the Court of Appeal held thus in regard to the circumstances under which the doctrine of recent possession may apply:

> ***"The sense of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either***

the thief or a receiver (see <u>Malingi –vs- Republic (1989) KLR 225 HC and Hassan –vs- Republic (2005) 2KLR 151).</u> The circumstances under which the doctrine will apply were considered in <u>Isaac Nganga Kahiga alias Peter Nganga Kahiga –vs- Republic CR. APP. NO. 272 of 2005</u>, where the court stated:

"It is trite 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 prove, 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 time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other.""

In the present appeal, it was clear that the property that was robbed from the complainant's bar was positively identified. It was recovered in the Appellant's house a few hours after the robbery. The application of the doctrine of recent possession coupled with the evidence of recognition enabled the prosecution to establish, to the required standard of proof beyond reasonable doubt, that the Appellant robbed the complainant. His appeal against conviction lacks merit and is hereby dismissed.

On sentence, following the Supreme Court decision of **<u>Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR</u>**, this court is required to consider the mitigation of the Appellant before sentencing him. The Appellant told the court that he has been in prison for more than ten (10) years i.e. since his arrest in the year 2007. He told the court that at the time of his arrest he was 20 years old. In the period that he has been in prison he had reformed. He had learnt carpentry. Although the State opposed the Appellant's appeal for reconsideration of his sentence, this court is of the view that taking into consideration the circumstances that the robbery took place, and the age of the Appellant when he committed the offence, and the fact that he has been in prison for a period of ten (10) years, this court formed the view that the Appellant has been sufficiently punished. The death sentence that was imposed upon him is not justified in the circumstances of this case. The same is set aside. The Appellant's custodial sentence is sufficient. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF JUNE 2018

L. KIMARU

<u>JUDGE</u>