REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 97 OF 2017.

JOHNSON MWANYIKA MWANDIME...................................APPELLANT.

VERSUS

REPUBLIC..RESPONDENT.

(An appeal from the original conviction and sentence in the Chief Magistrate's court at Kibera. Cr. Case 4634 of 2014 delivered by Hon. B. Ojoo, PM delivered on 28th June, 2017).

JUDGMENT.

Background.

1. The Appellant herein was charged with two counts of robbery with violence contrary to Section 295 as read with 296(2) of the Penal Code. The particulars of count I were that on 12th October, 2014 along Mbagathi Road in Langata within Nairobi County, jointly with another not before the court, robbed Agnes Wanjiku Kinyanjui of one bag, national identity card, Equity Bank ATM card and Kshs. 4379/- in cash; all valued at Kshs. 5,000/-, and at the time of such robbery used actual violence to the said Agnes Wanjiku Kinyanjui. The particulars of the 2nd count were that on 9th October, 2014 along Mbagathi road in Langata within Nairobi County, jointly with another not before the court robbed Edwin Onyango Odoyo of one laptop make HP, one iPad 3, one Samsung galaxy phone, one Casio calculator, a 1000GB external hard disc, driving licence and Kshs. 4,500/- in cash; all valued at Kshs. 159,500/-, and at the time of such robbery used actual violence to the said Edwin Onyango Odoyo.

2. The Appellant was acquitted of the 1st count and convicted on the 2nd count. He was sentenced to suffer death. Dissatisfied with the conviction and sentence he proffered the present appeal. He relied on the grounds of appeal filed on 22nd May, 2018. They were that; (i)the learned magistrate misdirected himself by basing the conviction on the doctrine of recent possession whereas his possession of the complainant's identity card was not proved, (ii)he was not accorded a fair and impartial trial as enshrined by Article 25(c) of the Constitution when his application to recall PW1 was denied, (iii)the prosecution's case was not proved beyond a reasonable doubt, (iv)his defence was not considered, and (v)the evidence of PW1 was obtained in total violation of Article 50(4) of the Constitution.

Submissions.

3. The appeal was canvassed on 22nd May, 2018 with the Appellant acting in person whilst Ms. Aluda represented the Respondent. The Appellant relied on his written submissions filed on the same day whilst Ms. Aluda made oral submissions. The Appellant questioned the trial magistrate's reliance on the doctrine of recent possession as a basis for his conviction. His assertion was that the learned magistrate did not sufficiently analyze the evidence of PW2 in which he only testified as to the recovery of Kshs. 1,500/- from him. He submitted that the complainant never mentioned the recovery of his identity card from him. Further, that the identity card was never produced as an exhibit and that the issue of its recovery only arose in cross examination of PW2. Furthermore, the arresting officers testified that they only recovered money from his pocket. It was therefore his submission that the evidence supported his defence that he was not found in possession of the stolen goods. He submitted that it was a misdirection on the part of the trial magistrate to convict him based on the doctrine of recent possession.

4. The Appellant also alluded to a denial or violation of his right to a fair trial under Article 25(c) of the Constitution. He submitted that on 8th September, 2016 he made an application for PW1 to be recalled for further cross examination and the court issued an order to that effect. However, the prosecution closed its case on 30th March, 2017 without granting him the chance or opportunity to re-examine the witness. He added that although at this stage the court still allowed him to recall the witness, it was a futile exercise and in bad faith as the prosecution case had closed. On this basis he contended that his right to an impartial and fair trial was violated.

5. He further submitted that because he was required to pay for the witness statements, the evidence of PW1 was taken before he could be

supplied with witness statement. That this was clearly a contravention of Article 50(2)(c) of the Constitution which requires that an accused person be accorded adequate time and resources to prepare the defence. Furthermore, even after he got the statements, he was only given one and a half hours to read them which time was not sufficient given the seriousness of the offence. He pointed to the fact that the right to a fair trial was non-derogable and a denial of the same occasioned him a miscarriage of justice. He cited several cases to buttress the submission. He thus submitted that the prosecution had not proved the case to the required standard and urged that the conviction be quashed and the sentence set aside.

6. In opposing the appeal, Ms. Aluda submitted that the doctrine of recent possession was properly applied in convicting the Appellant as he was found in possession of the complainant's identity card. She submitted that PW1 was recalled and further cross examined by the Appellant and that therefore the Appellant could claim that his right to a fair trial was violated. With regards to the sentence, she submitted that the same should be reviewed bearing in mind the fact that the Appellant spent three and a half years in remand custody.

7. In reply, the Appellant submitted that with regards to the sentence the court should consider that he was a first offender, young and reformed. He therefore prayed for a lenient sentence.

Evidence.

8. **PW1,** Edwin Onyango Odoyo who was the complainant was a medical practitioner. On 9th October, 2014 at around 9.00 p.m he was walking along Mbagathi Road when he noticed two men following him. The men caught up with him and one of them hit him leading him to fall down. The men started hitting him trying to get him to release a bag he had. Once they took the bag they also rummaged through his pockets and then pushed him into a nearby river. He realized that he still had a phone in his pocket and called a relative who rushed him to hospital where he received treatment upon admission for three days. He recalled that on 12th October, 2014 he was on his way to his residence when he noticed police officers had barricaded a section of the road and there were two men lying on the ground. He was curious and stopped before asking the officers if he could view the arrested men. He recognized the men as those who had robbed him on 9th October, 2014. He went to the police station where he recorded a statement. He recalled that when the Appellant was searched he was found in possession of his identity card.

9. **PW2, APC Patrick Maina Nyambura** recalled that on 12th October, 2014 he was at work with his colleagues when at around 10.00 p.m. a young girl came running towards the gate. She was bleeding from the left hand and the right eyebrow and screaming. They approached her and she informed them that someone had stabbed her with a knife and her mother had been thrown in a ditch and she thought she was dead. They went to the scene where they found that the members of the public had responded to the screams of the lady. At the same time, the Appellant and his accomplice had been cornered by members of the public and they had to intervene to stop them from being further beaten by the mob. That while there, PW1 approached them and identified the Appellant as the man who had attacked him on 9th October, 2014. Seeing that the men might be dangerous they carried out a quick search and recovered Kshs. 1,500/-, PW1's identity card from the Appellant. **PW3, IP Touviq Suleiman Mbaya** who was with PW2 entirely corroborated his evidence.

10. **PW4, PC Jecinta Musyoki** from Langata Police Station was the investigating officer in the matter. She summed up the evidence of the prosecution witnesses. She confirmed that the Appellant was arrested by PW2 and 3 who were administration police officers. She also produced the medical examination report (P3 form) that was filled by Dr. Maundu on 13th October, 2014.

11. When put on his defence, the Appellant denied committing the offence. He recalled that on 12th October, 2013 he got up and went to work. He left work at around 8.30 p.m. and on his way home he came across four police officers who were in the company of a lady and an infant child. There was a man lying unconscious on the ground. They stopped him and started slapping him for being rude. He fell down and at that moment a man emerged and started claiming that he had robbed him. He was searched and found in possession of vegetables but he was arrested alongside the other man who died on the way to the police station. That on the next day he was called from the cell and asked to pay Kshs. 10,000/- but he did not have the money as a result of which he was charged.

Determination.

12. After carefully reevaluating and reanalyzing the evidence on record, I have deduced that the issues arising for determination are whether the Appellant's right to a fair trial was violated, whether the doctrine of recent possession was properly applied, whether the Appellant's defence was considered and whether the offence was proved beyond reasonable doubt.

13. On the first issue for determination, the Appellant submitted that his right to a fair trial was violated because he was compelled to proceed with the trial when PW1 testified without having the advantage of going through his witness statement. He submitted that although the witness statements were finally availed to him he was only accorded an hour and a half to go through them which was not ample time to prepare for the trial. He also took issue with the fact that PW1 was not recalled for cross examination against an order of the court.

14. With regards to the first limb of this submission it is clear that when the case came up for hearing on 3rd June, 2015 the Appellant submitted that he was not ready to proceed as he had not been supplied with witness statements. The prosecution informed the court that this was a delaying tactic as the Appellant had been supplied with the statements on 2nd February, 2015 and urged the court to proceed. The Appellant submitted that he lacked the means to obtain the statements. After hearing both the Appellant and the prosecutor, the trial court made the following finding:

> ***"From the record, the order for statements was made four months ago. The case has been mentioned a number of times and the accused never raised the issue of witness statements. The objection raised by the prosecution counsel is valid as there seems to be a delaying tactic. The accused will however be issued with fresh copies of witness statements. It is now 9.30 am. Hearing at 11.00am."***

15. This court has perused the record of appeal and is entirely in agreement with the trial magistrate's ruling. There is evidence that an order for supply of witness statements was made. On subsequent appearances in court, the Appellant did not complain that he did not have the statements until PW1 was ready to testify. Against this background, it is only safe to conclude that he complained because he did not want the case to proceed. The learned magistrate therefore did the right thing to accord him the time available under the circumstances to read through the statements.

16. On the second limb of his submission, after that day's proceedings the court made an order that PW1 be recalled for further cross-examination by the Appellant. Pursuant to that order PW1 was recalled on 3rd September, 2015 for this purpose. Clearly, the court was kind to the Appellant by according him a further opportunity to prepare his defence case. In so doing, it ensured the Appellant's right under Article 50(2)(c) was not infringed.

17. A further order was made on 8th September, 2016 for recalling of PW1 on ground of what the trial court termed the interest of justice. When the matter next came up for hearing on 7th November, 2016 the prosecution informed the court that they could not trace the witness but the court adjourned the matter to enable them to avail witnesses. On 1st February, 2017 the Appellant renewed his application and the court again ordered that PW1 should be recalled but when the matter next came up for hearing PW4 testified and the prosecution closed its case. The court record states:

> ***"Court: Noted. Accused asked whether he still wishes to recall PW1 for further cross-examination.***
>
> ***Accused: I do not wish to recall him. Let it be.***
>
> ***Court: Noted. Ruling on case to answer on 4.4.2017."***

18. The Appellant submitted that this was all academic as the prosecution had already closed its case. In the view of this court however, the trial court was still obligated to ask the Appellant to exercise his right to recall PW1 notwithstanding that the prosecution had closed its case on two grounds. First, a ruling on whether he had a case to answer had not been delivered. Secondly, under Section 150 of the Criminal Procedure Code the court has the power to summon any witness at any stage of the proceedings whose evidence it deemed important. Therefore, the Appellant having opted not to recall PW1when called upon waived his right to do so under the provision and cannot now be had to say that his right to a fair trial was violated.

19. I now consider whether the doctrine of recent possession was properly applied. This is purely the basis on which the Appellant was convicted. The criteria to be met before reliance on the doctrine was enunciated by the Court of Appeal in **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga *v.* Republic(**Criminal Appeal No. 272 of 2005**),** and quoted with approval in **Athumani Salim Athumani *v.* Republic[2016] eKLR,** as follows:

> ***"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 proof, 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."***

20. The Appellant faulted the reliance on the doctrine because the issue was brought up in the trial in the evidence of PW2 on cross examination. In the complainant's testimony, he reported that a number of items were stolen including his national identity card. He also testified that upon the arrest of the Appellant he was searched and his (PW1) identity card recovered. The identity card was produced as MFI 1. The Appellant cross examined the complainant who stated that he could not explain why the Appellant was still carrying the identity card. PW2 only stated that he recovered PW1's identity card in cross examination. PW3 who took part in the Appellant's arrest testified that when they searched the Appellant they recovered money and a number of identity cards including the complainant's. I have no doubt that the witnesses' evidence was corroborative; and that clearly PW1's identity card was recovered from the Appellant.

21. The other test is the lapse of time between the date the identity card was stolen and its recovery. It was stolen on 9th October and recovered on 12th October, 2014. It is clear that the period of three days between the robbery and recovery of the identity card meet the threshold of a period within which it was unlikely to have changed hands; after all it is not a fluid item likely to move from one person to another. I hold the view that the Appellant kept it because he had nowhere to take it as an identity card is often used for formal purposes, a purpose the Appellant had no need to utilize. His possession of the same pins him down to his participation in the robbery.

22. The doctrine of recent possession is a rebuttable persumption which places the burden upon an accused person to give an account of how he came by the stolen goods failing which an inference is drawn that he stole the goods. *See **Malingi v. Republic[1989] KLR 225** that:*

> ***"The doctrine being a presumption of fact is rebuttable. 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."***

23. In this case, the Appellant did not give an explanation as to how he came to possess the identity card, leading the court to conclude that he stole it during the robbery. I accordingly find that the Appellant's conviction was safe.

24. I add that all the elements of the offence of robbery with violence under Section 296(2) of the Penal Code were established. The robbers were more than one in number. They used violence against PW1 as attested by the injuries he sustained followed by an admission in hospital and of course he lost personal belongings. A proof of any of these elements establishes the offence and accordingly the Appellant was properly convicted.

25. On whether the Appellant's defence was considered, I have read the judgment of the trial court which found his defence to be a mere denial. On the part of this court, I have found that the same raised issues of mistaken identity, unprovoked arrest and corrupt practices. These are assertions that were unsubstantiated and more so ousted by the strong prosecution case. I do also dismiss the defence as lacking in merit. Although he claimed to have been injured at the time of his arrest, these are injuries that were well accounted for by the prosecution; they arose from a mob beating by members of the public after his arrest. They had nothing to do with the PW1's participation in the beating.

26. I now consider the sentence in light of the case of **Francis Karioki Muruatetu[2017] eKLR.** The Appellant made several submissions urging the court to be lenient in sentencing. They were that; he was a first offender, he was still young and that he had reformed since his arrest. Ms. Aluda urged the court to review the sentence and in so doing take into account the three years the Appellant was in remand. In addition, I consider the circumstances of the robbery. The complainant was tied up and thrown into a river and had to drag himself out of a situation in which he was in danger of drowning. As a result of the injuries he had to spend three days in hospital. Having considered the mitigating and aggravating factors in the case, I am of the view that although a death sentence is not warranted, a deterrent one is necessary.

27. My final orders are that I find that the prosecution proved its case beyond all reasonable doubts. I uphold the conviction. I however set aside the death sentence. I substitute it with an order that the Appellant shall serve ten years imprisonment. The same shall be reduced by two years nineteen days being the period the Appellant was in remand prior to sentencing. It is so ordered.

DATED and DELIVERED this 17th day of July, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. Mr. Momanyi for the Respondent.