REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 144 OF 2017

JADIEL GITONGA MUTETI.....APPELLANT

VERSUS

REPUBLC.....RESPONDENT

(An appeal from the Original Conviction and Sentence in Criminal Case No. 1181 of 2007

dated 3rd September 2009 in the Chief Magistrate's Court at Thika by Hon L.W. Gicheha -SRM)

JUDGMENT

1 **Jadiel Gitonga Mute** the Appellant herein was the accused at the Chief Magistrates Court in Thika Criminal Case No. 1181 of 2007. He was charged with Robbery with Violence Contrary to section 296(2) of the Penal Code. The particulars of the charge were that on the 18th day of January 2007 at Maporomoko Estate in Thika District within Central Province, the appellant jointly with Fredrick Ouma Indiego, Peter Nzambu Ngolo and Bernard Wambua Wandu robbed Martha Njeri Mwangi Kshs. 3,000/=, mobile phone and hand bag all valued at Kshs. 19,500 and used actual violence.

2 The Appellant and his accomplices denied the charge and the case proceeded to full hearing at the end of which the Appellant was found guilty and convicted and sentenced to suffer death. The rest of the accused persons were acquitted for lack of evidence. The Appellant has appealed against the whole judgment citing the following supplementary grounds:

(i) That the learned trial magistrate erred in law and fact in finding that there was variance between the particulars of the charge and the evidence in breach of the provisions of Section 214 of the Criminal Procedure Code.

(ii) That the learned trial magistrate erred in law and fact in relying on the doctrine of recent possession to dismiss the appellant's defense when the evidence on this issue was conflicting, unsatisfactory and on relation to a fast moving item (mobile phone).

(iii) That the learned trial magistrate erred in law and fact when she refused, failed or ignored to deal with the contradiction and the conflicts in the evidence adduced by the prosecution.

(iv) That the entire proceedings are incurably defective in that the trial Court failed to comply with mandatory provisions of Criminal Code 200(3) of the C.P.C.

(v) That the learned magistrate erred in both law and fact in rendering short shrift to te evidence offered by the appellant that the mobile phone recovered was not the same as the exhibit stated in the charge and failed to consider the defense case in breach of section 169 C.P.C.

(vi) That in any eventuality that the appeal does not succeed I beg this court to review my sentence in light of section 216 and 329 Criminal Procudure Code Cap 75 as read with Francis Karioko Muruatetu and another v Rep petition no. 15 of 2015.

3 A Summary of the evidence on record is as follows:

PW1 MARTHA NJERI MWANGI the complainant testified that on 18th January 2007 at around 8:00 p.m. she arrived at the gate to her house in Maporomoko Estate driving her motor vehicle KAU 955X(Rav 4). At the gate, she hooted and as she waited for the gate to be opened, she saw people suddenly surround her vehicle armed with pangas and rungus. The people started hitting her vehicle and in the process, her window was broken into pieces. She was then ordered to open her door, and hand over her hand bag

which she obliged.

4 She was then pushed to the floor and while there, they started beating her with pangas and rungus asking her how much money was in her hand bag. Meanwhile, a neighbour pressed her alarm and they all ran off.

5 After they were gone, she struggled to sit up and realized that she had cuts all over her arms and hands. She was then rushed to Naidu Hospital for first aid and then she was taken to Karen Hospital where she was admitted for 10 days.

6 She identified her hand bag (PEXB.1) which was black in colour, with white decorations and u shaped on top. Inside the hand bag was her Samsung mobile phone serial no. 359279/00/301040(EXB2), the box she bought the mobile phone in was produced as (PEXB.3).

7 Lastly, she confirmed that while she was being robbed, she did not identify any of her assailants and that she had an artificial hand fixed on the left hand as a result of he injuries.

8 **PW3 (JANICE SILINDI) & PW4(SAMUEL NGUGI KIARIE)** were the sister and brother in law to the Appellant. They told the court that the Appellant's wife came with a phone and requested PW3 to purchase it so that she could get fare to go home. PW3 in turn gave Appellant's wife Kshs. 2,000 as security for the phone whereby, PW3 was to return the phone to Appellant after he gave her Kshs. 2,000. Later on, Appellant brought **PW5 PETER MWANGI WANGARE** (a buyer of the phone) who paid PW3 the Ksh. 2,000 and inturn PW3 gave the phone to PW5.

9 According to the evidence of Pw5, Appellant told him the he was selling a phone, he became interested in purchasing the same hence, they left for Pw3' place and upon arrival and seeing the phone, they agreed that he purchases the same at Kshs. 5,000/=. He also confirmed that they did not enter into any sale agreement with the Appellant as he purchased the phone in the presence of PW3 and PW4 who were his close friends. However, on 22nd February 2007, he was informed that police officers were looking for him over the phone and he proceeded there, wrote a statement and identified the phone that had been sold to him by Appellant.

10 **PW6 THOMAS MURIUKI KORO** (the investigating officer) told the trial court of how he received a report of a robbery that took place at Maporomoko estate. PW1 was the victim and he also learnt that the robbers had made away with Kshs. 3,000 and a Samsung phone. Apparently, they tried to trace the stolen items but were unable. On 14th February 2008, they were called by employees of Chania estate and informed that documents had been seen at the farm. At the farm, they found some documents allegedly stolen from PW1's hand bag.

11 On 17th February 2007, they received information from Safaricom that PW1's phone was still in use. They traced the person using the phone to Kiandutu slums. Upon arresting the person who was using Pw1's phone, the person told them that it was Appellant who sold the phone to him.

12 Appellant was then traced and found in Meru South. On searching Appellant's house, they recovered Pw1's hand bag(PEXB 1). They then arrested him and he told them that he had sold the phone to (PW5). Pw5 was also traced and he brought the phone to the police station. Pw1 identified the phone as hers and the Appellant gave names of other accomplices who were also arrested. However, their houses were searched but nothing was recovered.

13 When placed on his defence the Appellant elected to make an unsworn statement and called no witness. In his defence, he stated that while at work, he received a report that his mother was unwell. On reaching home, he found her admitted at Florence hospital. He then stayed home until 17th February 2008 and on coming back, he was informed that the police were looking for him because of his Samsung 250 which he had taken from one Samuel because he owed him money. Afterwards, the said Samuel came to his house accompanied by police; they searched his house and took his bag, Identification card and took him to the police station.

14 When the appeal came for hearing the Appellant relied on his written submissions.

15 In his written submissions he challenged the issue of recent possession of the Samsung phone and hand bag and stated that PW1'sevidence was largely uncorroborated. He further submitted that the police did not call any Safaricom staff to verify their claims on how they narrowed down to PW5. He relied on **Isaac Nganga Kahiga Alias Peter Nganga Kahia V Republic Cr Appeal No. 272 of 2005 (unreported) CA.**

16 The Appellant further took issue with the fact his case was initially heard by Uniter Kidullah C.M who heard the first four witnesses, A.K KANIARU P.M (as he then was) took over the case and heard one witness and Mrs. L.W Gicheha SRM, took over and concluded the case. It was the Appellant's contention that the latter two magistrates in taking over the trial from the previous magistrates and having decided to proceed from where the previous magistrates had reached failed to inform the Appellant of his rights under section 200(3) of the criminal procedure code. He relied on **Bob Ayub Edward Gabriel Mbwana Alias Robert Mandia Vs Rep Cr App No. 106 Of 2009** and **Richard Charo Mole V Rep. Cr. Appeal No. 135 of 2004.**

17 The Appellant lastly submitted on re-sentencing and mitigation by relying on the case of **Francis Karioko Mauruatetu & Another V Republic & 5 Others [2017]EKLR** where it was held:-

> *"……..it is without doubt that the Court ought to take into account the evidence , the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence."*

18 Mr Maatwa for the State in response opposed the appeal. He submitted that the evidence was consistent as the recovery was done a month after the robbery which led to the arrest of the Appellant's accomplices. He urged the court to dismiss the Appellant's appeal as the appellant failed to explain the possession.

19 This is a first appeal and this court has a duty to re -evaluate and reconsider the evidence adduced and arrive at its own conclusion. It has also to bear in mind that it did not see nor hear the witnesses and give an allowance for that. This was the holding in the case of

Okeno vs Republic 1972 EA 32 where it was held:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandaya v R, [1957] E.A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v R,)[1957] E.A 570). 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, see Peters v Sunday Post, [1958] E.A 424."**

20 The Court of Appeal further in the case of **Muthoko & Anor [2008]**

KLR 297 held as follows:

> **"It was the duty of a first appellate court to analyze the evidence and come to its own independent conclusion bearing in mind that it did not hear or see the witnesses and making allowance for that**"

21 I have considered the evidence on record, the grounds of appeal, the submissions by counsel and the cited authorities. The appellant has raised a total of 5 grounds of appeal. Upon considering all I have stated above, I will narrow them to 3 issues which are:-

> **1. Whether the trial court complied with section 200(3) of the Criminal Procedure Code?**
>
> **2. Whether the ingredients the doctrine of recent possession were proved by the prosecution.**
>
> **3. Whether the sentence is lawful**.

22 With regard to the first issue for determination, on alleged failure to comply with the provisions of *Section 200*(3)of the Criminal Procedure Code, I observe that U.P Kidullah (CM) commenced the trial of the appellant and heard 5 witnesses for the prosecution and then left the station. A.K. Kaniaru (PM) then took over the hearing of the case. The record shows that on 28th November, 2008 the learned Magistrate recorded:-

> **"*Before Hon.A.K.Kaniaru,PM***
>
> **Prosecutor-CI Itaye**
>
> **Court Clerk Wairimu**
>
> **Inter: English/Kiswahili**
>
> **1st Accused- We can proceed from where we have reached**
>
> **2nd Accused- That is the position.**
>
> **3rd Accused-That is the position**
>
> **4th Accused-Yes I agree.**
>
> **Itaye -Prosecutor**
>
> **My winess is not available. He has gone to Kisumu to testify in another matter,**
>
> **Court Mention on 11/12/08. Hearing on 22/1/09.**
>
> **Several adjournments then followed before PW6's evidence was heard on 7th May 2009. This marked the close of the prosecution's case.**
>
> **On 1st July, 2009, the record reads:-**
>
> **Before L.W Gicheha, SRM**
>
> **Pros: C I Waliaula**

CC Njambi

Inter: English/Kiswahili

Accused-present

Section 200CPC is explained to accused and accused states:-

1st accused-I want to proceed from where the matter stopped.

L.W .GICHEHA

Senior Resident Magistrate."

23 The record above shows what transpired in court after Hon. U.

Kidula was transferred. Section 200 Criminal Procedure Code is the section that deals with such scenarios. It provides as follows:

> ***"200 (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -***
>
> ***(a) deliver a judgment that has been written and signed but not delivered by his predecessor or.....***
>
> ***(2) ….....***
>
> ***(3) 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 inform the accused person of that right.***
>
> ***(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."***

24 The record shows that A.K Kaniaru (PM) informed the appellant of the above provisions upon which appellant informed the court that the case proceeds from where the other court left. Further more, after the close of the prosecution's, case, the matter was taken over by Gicheha (S.R.M) where the Appellant also chose to proceed with the matter from where it had reached after section 200 Criminal Procedure Code had been explained to him. In my view, there was adequate compliance with the provisions of *Section 200 (3)* of the Criminal Procedure Code aforesaid. The record does not show that the Appellant requested for recall of any witness who had previously testified. The Appellant's complaint that the provisions of the above section were not explained to him suggests want of candour on his part. His complaint in that regard is rejected.

25 The evidence is clear that PW1 was not able to identify any of her attackers. What connects the Appellant to this offence is the recovery of PW1's handbag and phone a month after the incident.

I now turn to the most critical part of this appeal which is whether the ingredients of the doctrine of recent possession were proved by the prosecution. The doctrine of recent possession has been applied in numerous decisions of the Court of Appeal and the High court. In **Peter Ng'ang'a Kahiga v. Republic Cr App. No. 272 of 2005(UR)** set out the elements necessary for proof. The court in that case held:-

> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.***
>
> ***In other words, there must be positive proof:***
>
> ***i). that the property was found with the suspect;***
>
> ***ii). that the property is positively the property of the complainant;***
>
> ***iii). that the property was stolen from the complainant;***
>
> ***iv). 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."

This holding was also applied in the case of **Arum v Republic [2006] 1KLR 233**

26 Under the **Penal code,** *'possession'* is defined as either actual or constructive, thus:

> ***(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;***
>
> ***(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;***

27 In the instant case, the incident is said to have occurred at about 8.00 p.m. It was dark and PW1 did not identity the attackers. She however was clear that she was attacked by more than one person. She was also beaten and seriously injured by the use of crude weapons and she suffered serious injuries. According to the evidence of PW2, one of Pw1's hands was in fact hanging by the skin which indicated that she suffered severe injuries. PW1's attackers made away with her handbag (PEXB1) and cell phone (Samsung PEXB.2) I find that all the ingredients required to prove a case of robbery with violence under section 296(2) of Penal Code were established.

28 It was the evidence of PW4 that the phone (PEXB.3) was brought to his house by the Appellant's wife on 22nd January 2007 which was approximately 4 days after the robbery against PW1. According to the evidence of PW6, when they conducted a search at the Appellant's home, they recovered PW1's handbag (PEXB.1). In his defence, the appellant alleged that he got the phone from one Samuel. The said Samuel was not availed as a witness and neither was he identifiable by only one name. PW2-PW5 testified on the handling of this phone by the Appellant yet he never questioned them about the unknown Samuel. Furthermore, the appellant failed to explain why Pw1's handbag(PEXB1) was found in his house when PW6 conducted a search in the said house.

29 This court is therefore satisfied that the Appellant came into possession of the phone(PEXB.3) and hand bag(PEXB.1) as he was part of the gang that robbed PW1. His sister(PW3), brother-in-law(PW4) and friend(PW5) had no reason to implicate him and even come to court to testify that he was the one who was originally in possession of the phone before he sold it to PW5 at Kshs. 5,000/=. Pw1 identified the phone (PEXB3) and even produced the box she bought the phone with as (PEXB. 2). She also positively identified her hand bag (PEXB.1) as the same handbag found in the Appellant's house during the search. Hence, the trial court was correct in applying the doctrine of recent possession to this case.

30 **Issue No. (iii) Whether the sentence is excessive and harsh**

The Appellant has asked this court to reconsider his death sentence in view of the **Muruatetu case**. The Appellant's case was decided before the Supreme Court decision in the **Muruatetu case**. It is true the Appellant was given an opportunity to mitigate which he did. However at that time since the death sentence was mandatory the trial court could not exercise any discretion in sentencing however strong the mitigation.

31 I have now had a chance to consider the mitigation and the circumstances of the case. The complainant (PW1) suffered grievous injuries and the items stolen were valued at Kshs. 19,500/-. Her phone and handbag were recovered. After taking all this into account, I find that there is need to interfere with the sentence. I therefore set aside the death sentence and substitute it with a sentence of twenty (20) years imprisonment.

32 The result is that the appeal on conviction fails and is dismissed. The conviction is upheld. The appeal on sentence succeeds to the extent explained above. He will serve twenty (20) years imprisonment from date of conviction.

Orders accordingly.

Dated, signed and delivered this 4th day of October 2018 in open court at Kiambu.

.....

HEDWIG I. ONG'UDI

JUDGE