REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 27 OF 2013

[Consolidated with Criminal Appeals Nos. 28, 30 and 31 of 2013]

MARY WAITHERA KAMUIRU

LILIAN WAMBUI

SIMON NJOGU WANJIKU

ANTONY MWANIKI MWAURA …………...………….. APPELLANTS

VERSUS

REPUBLIC ………………………….…………………. RESPONDENT

(Being consolidated appeals from the original conviction and sentence dated 14th March 2014 in Criminal Case No. 1572 of 2012 by the Chief Magistrate's Court at Machakos (Hon. P. N. Gesora, SPM)

JUDGMENT

INTRODUCTION

1. The Appellants who were charged as accused 1 - 4 respectively, in the trial court, were on 14th March 2014 convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code, and sentenced to suffer death in accordance with the law in Criminal Case No. 1572 of 2012 by the Chief Magistrate's Court at Machakos (Hon. P. N. Gesora, SPM).

2. The counts of the charge sheet and particulars of the offences are set out in full below:

> "***Count 1*** *– Robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code.*
>
> ***Particulars***
>
> ***Mary Waithera Kamuiru, Lilian Wambui, Simon Njogu Wanjiku and Anthony Mwaniki Mwaura:*** *On the 2nd day of November, 2012 at about 11.00p.m at Machakos county*

within Eastern Province, jointly with others not before court, while armed with dangerous weapon namely firearm, robbed ***David Mwangi Wanjohi*** *of a motor vehicle registration number KBA 839Y Toyota NZE valued at Kshs. 560,000/=, Techno mobile phone valued at Ksh. 3,600/=, a pair of shoes valued at Ksh. 2,000/= and cash Ksh. 4,400/= all valued at Ksh. 570,000/= , and at the time of robbery used personal violence to the said David* ***Mwangi Wanjohi.***

Alternative Charge

Count II *– Handling stolen goods contrary to Section 322 of the Penal Code.*

Particulars

Mary Waithera Kamuiru, Lilian Wambui, Simon Njogu Wanjiku and Anthony Mwaniki Mwaura*: On the 3rd day of November, 2012 at about 2.00a.m at Ibirikani along Emali-Loitoktok road within Kajiado county, otherwise than in the course of robbery, jointly dishonestly retained a motor vehicle registration number KBA 839Y Toyota NZE, knowing or having reason to believe it to be a stolen good.*"

Brief description of the prosecution's case

3. The prosecution's case in sum is that the Appellants were on the morning of 3rd November 2012 at 2.00am at a road block along Emali – Loitoktok road within Kajiado County, found in possession of motor vehicle KBA 839Y a Toyota NZE and other personal items which had been robbed from one *David Mwangi Wanjohi* a taxi driver earlier that night. The said robbery took place at about 11.00pm on 2nd November 2012 at Machakos County allegedly by the 1st – 3rd Appellants, who had during the robbery beat the said taxi driver and drugged him before throwing him into a roadside bush at Sultan Hamud and proceeding towards Email – Loitoktok. The prosecution relied on identification of the 1st and 2nd Appellants by the taxi driver at an Identification parade organized for that purpose, and upon the doctrine of recent possession of stolen property by virtue of all the four Appellants being found in the stolen motor vehicle at the police road block along Emali – Loitoktok road.

4. The prosecution's sequence of events started with the hiring of the taxi driver by the 1st Appellant to drive her to Machakos on a business trip, where she met the 2nd Appellant and 3rd Appellant, with the three later accosting him on the way back towards Nairobi, tying up his hands and throwing him off the vehicle, and taking control of the car after which they changed course towards Loitoktok through Emali town, and picked the fourth Appellant somewhere along the way. They were arrested at the road block when the police became suspicious after the car's alarm went off and the four Appellants then in the car were unable to discharge it giving conflicting information as to the ownership of, their presence in the car, and where they were headed. The Appellants were then detained at Loitoktok police station and the vehicle retained pending investigations. The Taxi driver was able to report at Sultan Hamud Police station that the vehicle had been stolen from him the previous evening, and the car was tracked to Loitoktok, and thereafter the four Appellants were subsequently charged with the offences before the court.

The Defence's case

5. The Appellants' defences were as varied as there were Appellants, all of whom except the 2nd Appellant who testified on oath, gave unsworn statements in defence without calling any witnesses. The 1st Appellant who claimed to be an onion dealer operating from Emali indicated that she was on her way to Loitoktok to get onions from her depot there for her friend, the 2nd Appellant, who wished to buy some and who was accompanied by the 3rd and 4th Appellants.

6. The 2nd Appellant testified that she and her friend the 1st Appellant had at the request of the latter come

by Taxi driven by the complainant from Nairobi to Machakos where the 1st Appellant was meeting her business clients, and after several taking beers had become drunk and dozed off on their way back, only to awake and find the 1st, 3rd and 4th Appellants in the car and the taxi driver missing. The 1st Appellant informed her that the taxi driver had been left at Emali and had given her the car to collect her father Sineti and take him to hospital. They were then arrested at the Email-Loitoktok road block where she learnt that there was a problem relating to the vehicle's ownership with the 1st Appellant, to her surprise, informing the police that the vehicle was hers and the 3rd Appellant stating that he was teaching the 1st Appellant how to drive. She was cross-examined by the prosecution and by the co-accuseds.

7. The 3rd Appellant who said that he worked and resided at Emali had at 10.30pm on 2nd November 2012 been given a lift by the occupants of a saloon vehicle from Emali to Loitoktok, only to be arrested at a road block on the way.

8. The 4th Appellant who said that he was a catering student who resided at Embakasi Nairobi, had been invited to help out at a wedding at Kinama area of Loitoktok. He said that he had travelled from Nairobi and had at Emali secured a lift in a vehicle which he had helped jump start, and on getting to Biringaya they were stopped at a road block and the police said the vehicle was stolen. They were subsequently charged before the court.

<u>Judgment of the trial Court</u>

9. In his judgment delivered on 14th March 2013, the learned Senior Principal Magistrate, P. N. Gesora ruled as follows:

> ***"****PW3 and PW4 were also categorical that when they intercepted the vehicle herein all the accused herein were therein. This in my view is prima facie evidence that they had a hand in the theft of the motor vehicle when applying the doctrine of recent possession unless proper explanation is given by them. The defences put were disjointed, lack any flow and tore into each other thereby raising serious doubts as to their veracity.*
>
> *A1 failed to address the pertinent issues as regards her traveling from Nairobi to Machakos. She was silent on what transpired when they were intercepted and arrested and even the details contained in her alibi failed to meet the threshold to shake the prosecution case. She was also positively identified by PW2 at the identification parade.*
>
> *A2 did give some details of how she came to be arrested but in my view she also failed to exonerate herself from any liability. This is clearly demonstrable from the happenings of that evening. She was in PW2's vehicle when they left Machakos and even after he was attacked she never did anything to stop this. She was an accomplice. She had every opportunity to stop and alight if she felt there was something wrong and indeed there was something very wrong with the absence of PW2 from the vehicle. She was positively identified at the identification parade further fortifying my holding.*
>
> *As for A3 and A4 they conceded to have been in the stolen vehicle. PW3 and PW4 were clear in their testimonies that he did engage them as regards the possession of the vehicle. A4 was totally unable to prove that he was a student and secondly that he had been invited to go and work in Loitoktok. Nothing would have been easier for him to call his friends to buttress his defence and also get documentation to show that he indeed was a student in a certain college.*
>
> *The parade conducted by PW5 was watertight and complied with the law and cannot be faulted. The investigating officer pieced together the evidence gathered from different quarters which laid the basis of him charging accused.*
>
> *In conclusion, I find and hold that he did well and even the recovery of safari boot*

shoes in the hind seat of the vehicle linked accuseds to having stolen the vehicle from PW2 who positively identified them on the hearing.

I find and hold that the ingredients of the charge herein main count have been sustained. This was as well orchestrated moved that resulted in having PW2 into a trap and they stole his vehicle. Accused are therefore guilty and are convicted on the main charge accordingly."

10. The charge sheet showed the offence of handling stolen property under section 322 of the Penal Code as an alternative charge, and the trial court's judgment convicting the Appellants on 'the main charge' and not making any findings on the charge of handling stolen property is, therefore, proper.

THE APPEALS

11. The Appellants were aggrieved by the judgment of the trial court and their filed respective appeals – being criminal Appeals Nos. 27, 28, 30 and 31 of 2013, which were consolidated for hearing and determination under the present court file.

12. The 1st Appellant raised several grounds of appeal in her supplementary grounds of appeal – that the trial court erred in law and facts in basing conviction by invoking the doctrine of recent of possession of the motor vehicle, which she alleged had not been established to have been in her exclusive control and on a defective duplex charge sheet; that the credibility of the complainant PW2 was doubtful; that the identification parade evidence was defective as the complainant PW2 had not indicated ability to identify the assailant as required under chapter 46 of Force Standing Orders; and that the court erred in rejecting her defence and accepting her co-accused's evidence in respect to her.

13. For the 2nd Appellant, Lillian Wambui, the Amended Memorandum of Appeal faulted the trial court for reliance on the doctrine of recent possession; alleged failure by the trial court to consider the appellant's defence; alleged in-sufficiency of evidence to prove the charge and alleged non-compliance with section 177 of the Criminal Procedure Code, which provides for the restitution of property found on an accused person.

14. The 3rd Appellant set out in his amended grounds of appeal his challenge on the trial court's judgment that the court had allegedly erred in its consideration of the doctrine of recent possession with respect to the motor vehicle in that it had not been shown that the Appellant had knowledge of its being stolen; in overlooking the absence of a first report by the complainant identifying the appellant or giving his description; in relying on the evidence of an accomplice without seeking for corroboration; insufficiency of evidence with witnesses appearing to have been coached; accepting evidence adduced through the written submissions; accepting production of photographs without sufficient ground under section 77 of the Evidence Act; and in failing to consider the alibi defence of the 3rd Appellant.

15. The 4th Appellant's grounds of appeal were argued by Counsel, Mr. Dixon Konya, who emphasized alleged lack of evidence linking the 4th Appellant to the alleged robbery having not been alleged to have been present during the robbery of the vehicle or to have been in possession of the vehicle, safari shoes or bag which were believed to have been the property of the complainant in the case; failure of the trial court to consider, evaluate and give reasons for rejecting the appellant's defence; and the trial court's shifting of the burden of proof to the 4th Appellant to prove his alibi.

16. For the Respondent, Prosecution Counsel Mr. Cliff Machogu filed written submissions in which he argued that the conviction of the Appellants was safe and according to law, as the prosecution had proved that the Appellants had jointly robbed the complainant (PW2) of his motor vehicle and other personal belongings, and prior to or during the robbery used actual force against him by beating him up with the 1st and 2nd Appellants being positively identified by the complainant at an identification parade and the 3rd and 4th Appellants as accomplices under the doctrine of recent possession having been 'arrested inside the motor vehicle which had been robbed' ***Bukenya & Ors. v. Uganda*** (1972) E.A. 549, that the

prosecution had in its discretion called all crucial witnesses necessary to prove the charge and was not obliged to call any other witness; that the doctrine of recent possession applied as it was positively proved that the Appellants were in possession of the vehicle which belonged to the complainant and which was recently stolen from the complainant, citing ***Eric Otieno Arum v. Republic*** (2006) eKLR; and that the trial magistrate had dutifully considered the appellants' defences given in sworn testimony in the case of the 2nd Appellant and unsworn statements by the others, "however he dismissed their defence as one that was disjointed and lacked flow, thus it did not cause any doubt on the prosecution evidence."

17. At the hearing, the Appellants relied on their respective submissions without oral argument, save for in the case of the 2nd Appellant, who supplemented her written submissions by oral argument on the issue of defective charge sheet, with reply by the Counsel for the DPP, and judgment was reserved.

ISSUES FOR DETERMINATION

18. From the appellants' grounds of appeal and submissions filed in support and opposition thereto the following issues arise for determination in the consolidated appeals:

a. Whether the Appellants were charged under a defective Charge Sheet;
b. Whether the offence of robbery with violence was proved;
c. Whether the Appellants were properly identified as having been involved in the alleged robbery;
d. Whether the doctrine of recent possession was correctly applied in the circumstances of this case; and, therefore,
e. Whether the Appellants were involved in the robbery with violence, if proved, and consequently guilty of the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

19. In determining the issues raised herein, the Court as a first appellate court must consider both the issues of law and fact involved and in accordance with the well known authority of ***Okeno v. Republic*** (1972) E.A. 32, evaluate the evidence adduced before the trial court to reach its own conclusion, (allowance being had for the fact that it shall unlike the trial court not have seen and heard the witnesses), before considering whether the conclusions of the trial court will be supported.

DETERMINATION

Preliminary

20. At the out-set an issue raised as to the Language of the Court in plea taking not being disclosed to the prejudice of the Appellants can shortly be answered. There can be no prejudice where the accused pleaded not guilty and was tried in a full trial which was conducted with interpretation in a language he understood. It might have been different if the accused had pleaded guilty to a charge read and explained to him in a language that he did not understood and therefore suffered prejudice of conviction and sentence of an own plea of guilty. Moreover, from the record of the trial court, it is clear that the Appellants made elaborate cross-examination of the prosecution witnesses, and of their co-accused (2nd Appellant) who implicated the other appellants in her testimony, indicating their understanding of the language used by the court in the proceedings.

21. As to whether the judgment in this case was competent within the provisions of the Criminal Procedure Code, Section 169 of the Criminal Procedure Code requires a court which convicts (or acquits as the case may be) and sentences an accused to identify the provision of law under which the conviction and sentence are based. In this case, without stating the applicable provisions of law, the trial court said that it found that *'the ingredients of the charge here in main count has been sustained.'* No prejudice, however, was shown to have been suffered, within the meaning of section 382 of the Criminal Procedure Code by the default to state the section of the law under which the accused was convicted as this was clear from the reference to the main charge which was the offence of robbery with violence under section 296 (2) of the Penal Code.

Burden on Proof

22. It is trite that even where the accused raises an alibi, the accused does not thereby assume the burden to prove the alibi and therefore his innocence. See ***Karanja v. Republic [1983] KLR 501***. In all criminal cases, the legal burden of proof lies with prosecution throughout the trial to prove the guilt of the accused and never shifts to the accused to prove his innocence. See ***Woolmington v. DPP*** (1935) AC 462. However, in cases where the doctrine of recent possession applies, once the prosecution proves possession by an accused of recently stolen goods, the evidential burden of proof shifts to the accused to show that his possession of the goods was innocent and thereby rebuttal to the presumption of fact that he is a thief or handler. See ***Malingi v. Republic*** (1989) KLR 225.

23. What the trial court did shift was the evidential burden of proof after the Appellants were found inside the motor vehicle alleged to have been stolen, to prove that their possession of, or presence in, the vehicle was innocent, not having been involved in the theft thereof or otherwise handling of the stolen property.

Whether the charge sheet was bad for duplicity

24. The complaint by the Appellants was that the charge sheet set out two different sections of the Penal Code, sections 295 and 296 (2) of the Penal Code. It has been held that the correct section of law to charge the offence of robbery with violence is section 296 (2) of the Penal Code and that to charge under both sections 295 and 296 of the Penal Code is incorrect. See ***Mwaura v. Republic***, (2013) eKLR:

> "The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides ***that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal***. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."

25. The main charge for which the Appellants were convicted was framed as a charge for 'robbery with violence contrary to section 295 as read with 296 (2) of the Penal Code', which in accordance with the authority of ***Mwaura v. R,*** supra, which is binding on this court, rendered it duplex as the two offences under sections 295 and 296 (2) of the Penal Code are different.

26. What does the court do with a duplex charge? Is it fatally defective as to lead to automatic acquittal of the Appellants? Does the court order a retrial or does it order an acquittal? While considering a duplex charge in the case of the offence of obtaining by false pretences, in ***Makupe v Republic***, Criminal Appeal No 98 of 1983, the Court of Appeal at Mombasa on July 18, 1984 (Kneller JA, Chesoni & Nyarangi Ag. JJ A) held that in general a retrial will be ordered when the original trial was illegal or defective and it will not be ordered where the conviction is set aside because of insufficient evidence. The court must in ordering a retrial take the *view that had the case been properly prosecuted and admissible evidence adduced, a conviction might fairly result.* See ***Munyole v Republic,*** Court of Appeal, at Kisumu December 5, 1985 (Hancox, Nyarangi JJA & Gachuhi Ag JA) 1985 KLR 662.

27. The question for determination in this appeal, therefore, becomes whether there is sufficient evidence to support the charge of robbery with violence against the Appellants to warrant a retrial. The Court will then consider, consistently with the duty of the first appellate court under ***Okeno v. R,*** supra, the available evidence to determine whether there is evidence that may support a conviction for robbery with violence, which is the offence expressed in the charge to have been preferred against the Appellants.

28. If the court, considers that there is evidence upon which a conviction may result, then it will, without prejudice to the findings of the trial court, direct that a retrial be held; if it considers that there is no evidence to support the preferred charge of robbery with violence, an acquittal will be ordered on the basis of the duplicity of the charge.

Whether the offence of robbery with violence was proved;

29. Of course, the motor vehicle the subject of the charge which from the evidence was owned by PW1

could have been stolen from the complainant herein as its special owner within the meaning of section 268 of the Penal Code which provides as follows:

> *"**268. Definition of stealing***
>
> *(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or **special owner thereof,** any property, is said to steal that thing or property.*
>
> *(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—*
>
> *(a) an intent permanently to deprive the general or special owner of the thing of it;*
>
> *(b) an intent to use the thing as a pledge or security;*
>
> *(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;*
>
> *(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;*
>
> *(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and **"special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.**"*

30. As held in ***Oluoch v Republic,*** (1985) KLR 549 Court of Appeal, at Kisumu December 7, 1984 Chesoni, Nyarangi & Platt Ag JJA) (*Obiter*) the offence of *'robbery with violence is committed in any of the following circumstances: a) **The offender is armed with any dangerous and offensive weapon or instrument**; or b) **The offender is in company with one or more other person or persons**; or c) **At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes, or uses other personal violence to any person.**'*

31. The evidence of the complainant PW2 is that he was attacked by Appellants 1, 2 and 3 while driving the vehicle when they requested him to stop for one of them to answer to a call of nature before they reached Kyumvi junction, where he was supposed to drop the 2 and 3rd Appellants on his way back to Nairobi with the 1st Appellant. He testified that he was hit with a blunt object on the mouth by the 3rd Appellant who sat on the front passenger seat and then beat up by all three Appellants who put him in the back seat of the vehicle, tying his hands and forcing him to drink a liquid contained in a soda bottle after which he fell unconscious. He claimed to have been injured and that he had a P3 (police medical examination report) showing that he was injured, but the same was not produced in evidence.

32. Although the charge set out in the particulars that the attackers were armed with a fire arm, there was no evidence of any firearm having been used in the alleged attack, and the court has no basis to assume that the blunt object with which PW2 alleged to have been hit was a firearm. The case for robbery with violence cannot therefore be proven on the basis of possession by the attacker of a dangerous weapon under the first criterion of the ingredients of robbery with violence.

33. However, if PW2 is believed, the theft would have qualified as a robbery with violence on account of the number of attackers being more than two persons under the second criterion. However, as no medical report was produced to prove the injuries claimed by the complainant, the case would not qualify as robbery with violence on account of wounding, beating, striking, or using other personal violence on any

person, during the robbery.

34. Is the complainant PW2 to be believed that he was attacked by the three Appellants robbing him of his employer's vehicle and his personal belongings –shoes, money and wallet, mobile phone, jacket, driving licence and PSV card? There was not much contestation that PW1 was the owner of the vehicle KAB839Y which was produced as PEx. No.2 and for which he produced documents ownership and agreement of sale from its previous owner. There was also no contest that PW1 had employed PW2 as his driver and that he PW2 had control of the vehicle on the material date, 2nd November 2012.

Analysis of Evidence

35. Although *"unsworn statement is not, strictly speaking, evidence…. but it should be considered in relation to the whole of the evidence"* (***May v. Republic***, C.A. Cr Appeal No. 24 of 1979 (1981) KLR 129), this court has considered the evidence presented by the witnesses for the prosecution, the 2nd Appellant and the unsworn statement so the other appellants.

36. PW2's testimony as to how he was robbed of the motor vehicle by the Appellants 1, 2 and 3 is full of inconsistencies making it difficult to accept his version of events. PW2 claimed to have been hit by a blunt metallic object which could have been a gun and to have had his injuries recorded in a medical examination report P3 which was he did not produce in evidence before the court. He claimed to have been tied on the hands yet he makes reference to having been tied on his legs when he said:

> ***"I woke up at 4.00am in a place I didn't know. I was alone in the bush minus shoes and mobile phone. I heard vehicles passing and I went and found myself on the Highway. I met with a boda boda operator who told me that I was in Sultan Hamud. I untied myself on the legs and I walked to Sultan Hamud Police Station with my hands tied."***

37. If it were true that he was tied, on the legs, he omitted to narrate in his testimony very significant evidence as to how, with his hands tied, he untied himself on the legs to enable him get from the bush where he had been thrown to the main road where he met the *boda boda* rider who directed him to Sultan Hamud police station. In addition, he neglects to explain why the *boda boda* rider did not untie him on the hands before he went to report the matter at the police station.

38. In this connection, the investigating officer, PW5, produced a cloth strap which he said was recovered from the vehicle and which he confirmed was the one used to tie the complainant, saying:

> ***"We conducted a search of the vehicle and recovered safari boots shoes which the complainant stated were his and a strap that was used to tie him,"***

If the strap had tied the complainant who was thrown out of the car at Sultan Hamud after being robbed of the car and he went to report to Sultan Hamud Police station with his hands still tied at 4.00am on 3rd November 2012, how would the cloth strap that was used to tie him be recovered in the vehicle two hours earlier at 2.00am when the Appellants were arrested at Ibirikani along Emali-Loitotok road?

39. In addition, if it were true that the 1st Appellant had called the complainant to arrange for the taxi hire to Machakos, the prosecution would have been able to obtain telephonic evidence from the mobile phone providers of the complainant to show the details of the communication between him and the 1st Appellant, and even the particulars of the ownership of the phone line from which the communication was made. Such evidence might have removed the doubt as to the involvement of the 1st Appellant and, through the 1st Appellant's number, the prosecution might have been able to piece together any communication that could have established any conspiracy to commit the offence. As it stands the prosecution evidence indicates glaring defaults in investigation of the matter.

40. In addition the soda bottle allegedly recovered from the car by PW3 which presumably was the bottle which contained the stupefying drink that PW2 was forced to drink was not presented for forensic

analysis for any traces of the drug.

41. It would appear that if there was any theft of motor vehicle, the complainant PW2 was part of the plan to steal PW1's car, and the complainant herein only reported to the police as a part of a cover-up to pretend that the vehicle had been robbed of him. However, as the charge herein was for the robbery with violence of the motor vehicle from, and personal effects of, the complainant PW2, that offence had not been proved to the required standard.

Identification of the Appellants

42. Appellant 1 was identified by PW2 at the identification parade conducted by PW6 by touching. According to PW2 she had hired PW2 to take her to Machakos from Nairobi at about 5.00pm on the 2nd November 2012 reaching about 6-7.00pm. PW2 must be taken to have observed his passenger through the one-two hour journey from Nairobi to Machakos and could, therefore, positively identify her at a parade conducted on the 4th November 2012 only a day after the incident, when the Appellant was said to have been in the same clothes that she wore on the material date following their arrest in the same night.

43. There is no question whether the 2nd Appellant was properly identified by the complainant at the identification parade. Although at the identification parade, the complainant PW2 had 'pointed out' the 2nd Appellant rather than touched her as required by identification parade rules, the 2nd Appellant did in her sworn testimony, confirm that she and the 1st Appellant had hired the taxi driver PW2 to take them from Nairobi to Machakos. She was not shaken in her cross-examination by the Appellants and the prosecution, and she conceded that she had been identified by the complainant - ***"PW2 picked me out and I accepted as he is the one that drove us."***

44. PW3 and PW4 were not identified at the Identification parade.

45. We therefore find that the 1st and 2nd Appellants were properly identified as having been with the complainant on the material date, and we dismiss the alibi given by the 1st Appellant.

Doctrine of recent possession

46. The doctrine of recent possession applies where possession by the suspect is established of property belonging to the complainant which was recently stolen from him. In ***Erick Otieno Arum v. R*** (2006) eKLR, the Court of Appeal (Tunoi, Okubasu and Onyango Otieno, JJA) held:

> *"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 alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely the adduced evidence after analyzing it and after it accepts that which it considers the correct and honest version."*

47. PW3 and PW4 were consistent on the evidence of recovery of the motor vehicle at a road block Obirikani (variously called by witnesses Ibirikani and Mbiriganya) along Emali – Loitoktok road at about 2.00am on 3rd November 2012. The Appellants also confirmed the incident and the only discrepancies were on what they allegedly told the police officers PW3 and PW4 at the road block. PW3 and PW4 became suspicious when the Appellants could not discharge the alarm on the vehicle when it went off and

when the Appellants gave conflicting accounts of themselves. We therefore find that the Appellants were proved to have been in the motor vehicle the subject of these proceedings on the day following the alleged theft, a time difference of less than five (5) hours, as PW2 had placed the time of robbery at between 9.00 - 10.00 pm on 2nd November 2012. Being in possession is however a term of art which is different from being found inside a motor vehicle.

Possession of the motor vehicle

48. If it could be shown that all the Appellants were in the motor vehicle pursuant to a common intention to steal the car, all of them would be taken to have been in possession of the vehicle. See section 2 of the Penal Code and section 21 of the Penal code which respectively provide for definition of possession and common purpose as follows:

> *"2.* ***"possession"—***
>
> *(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;*
>
> ***21. Joint offenders in prosecution of common purpose***
>
> *When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*

The prosecution was under a duty to show common purpose among the Appellants or that each had consented to the 1st Appellant's possession of the motor vehicle or that they had the motor vehicle in the 1st Appellant's possession for their benefit or the benefit of another person.

49. If no common intention was proved and PW2's version of events were believed, then the recovery of the motor vehicle at Obirikani road block with the Appellants would put the Appellants 1, 2 and 3 in possession of the vehicle which they had stolen from the PW2 earlier in the evening of 2nd November 2012. The 4th Appellant would not be taken to be in possession of the vehicle, it not having been proved that he was in the vehicle pursuant to some common design with the other appellants.

50. If the defences of the 2nd and 3rd Appellants that they were in the vehicle pursuant, respectively, in the case of the 2nd Appellant to an invitation by the 1st Appellant to accompany her to meet business clients and in the case of the 3rd Appellant to having been granted a lift in the vehicle, were accepted, the Appellants 2 and 3 would be exonerated leaving only the 1st Appellant who was driving the vehicle as the person found on possession thereof.

51. The prosecution did not adduce evidence from which a common purpose or intention to steal the motor vehicle could be discerned so as to bind all the Appellants. Most importantly, theft having not been proved as found above, the Appellants or any of them could not be held to have been in criminal possession of the motor vehicle.

Findings of the appellate Court

52. On the basis of the evidence presented before the trial court, as set out in the record of the

proceedings, this Court makes the following findings with respect to the appellants:

1. Appellant I

While it was clear from the testimony of PW2 and that of the 2nd Appellant that the 1st Appellant did hire the complainant to take her to Machakos either alone or with her friend the 2nd Appellant, the fact of theft of motor vehicle was not proved to the required criminal law standard of beyond reasonable doubt.

2. Appellant II

By her own admission in her sworn testimony before the Court, the 2nd Appellant was in the vehicle with the complainant PW2 on 2nd November 2012 but the allegation of theft of the motor vehicle was not proved.

3. Appellant III

Weighed against the sworn testimony of PW2 and the 2nd Appellant, the denial by unsworn statement of the 3rd Appellant is inadequate and the court accepts the position that the 3rd Appellant was with the 1st and 2nd Appellants on the 2nd November 2012 before the alleged robbery. However, the fact of the robbery was not proved to the required standard.

4. Appellant IV

By all accounts of relevant witnesses in the case, that is PW2, PW3, PW4 and the 2nd Appellant, the 4th Appellant only joined the three Appellants after the vehicle was allegedly stolen. His defence that he was an innocent lift hiker could only be upset by cogent evidence of common purpose by the prosecution which was not forthcoming.

The result of the analysis of evidence is that there is no sufficient evidence which could in a lawful trial fairly result in a conviction of the Appellants. It may be suspected that the Appellants (and even the taxi driver because of the inconsistencies of his story) were all part of a plan to steal the motor vehicle belonging to the PW1, and the PW2 had made a report to the police 5 hours later as part of a cover-up, but suspicion no matter how strong cannot be the basis of a conviction.

Acquittal or retrial

53. To order a retrial in the circumstances of this case would only permit the prosecution to fill in gaps in its case which was insufficient to prove the charge of robbery with violence beyond reasonable doubt. This would offend the principle of retrial set out in ***Makupe*** case, supra, that-

> ***"In general, a retrial will be ordered when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of the insufficiency of the evidence or for the purpose of enabling the prosecution to fill up gaps in the evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the appellant (or accused)."***

Conclusion

54. Accordingly, having found that the charge facing the Appellants in the trial court was defective for duplicity and further that there is insufficient evidence to support the charge of robbery with violence even if a retrial was ordered, the court considers that it is in the interests of justice that the Appellants be acquitted of the charge of robbery with violence under section 296 (2) of the Penal Code.

55. As regards the alternative charge of handling stolen property, it not having been proved that the motor vehicle which was being driven by the 1st Appellant and in which the other three Appellants were travelling was stolen from the complainant, the question of being found in possession of stolen property does not arise and the Appellants are consequently acquitted of the alternative count of handling stolen property contrary to section 322 of the Penal Code.

56. There were gaps and inconsistencies in the prosecution's evidence relating to the theft of the motor vehicle, whose benefit must be given to the Appellants.

Judgment of the Court

57. Following our analysis of the evidence presented in the trial court, we determine that the trial court's conclusion that the Appellants were by reason of the doctrine of recent possession guilty of the main charge of robbery with violence not capable of support, and the conviction of the 1st, 2nd, 3rd and 4th Appellants is therefore quashed and their sentences set aside.

Orders

58. Accordingly, for the reasons set out above, we direct that each of the four (4) Appellants in the consolidated appeals be set at liberty forthwith unless they are otherwise lawfully held.

DATED AND DELIVERED THIS 11TH DAY OF FEBRUARY 2016.

P. NYAMWEYA

JUDGE

EDWARD M. MURIITHI

JUDGE

In the presence of: -

1st Appellant present in person

2nd Appellant present in person

3rd Appellant present in person

Mr. Konya for the 4th Appellant

Mrs. Saoli for the Respondent

Ms. Doreen - Court Assistant