REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

(CORAM: G.K. KIMONDO & C.W. GITHUA JJ.)

CRIMINAL APPEAL NO. 17 OF 2013

JULIUS WACHIRA……..…..…..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. T. Nzyoki, Principal

Magistrate dated 30th January 2013 at Eldoret in Criminal Case No. 1935 of 2012)

JUDGMENT

1. The appellant was convicted on a count of robbery with violence contrary to section 296 (2) of the Penal Code. He was sentenced to life imprisonment.
2. The particulars of the charge read as follows-

> *"On the 26th day of April 2012 at Eldoret township in Uasin Gishu District within Rift Valley Province, jointly with others not before Court robbed Fredrick Kiprop of cash Kshs 4,000, one mobile phone make X2-01, ATM card for Co-operative Bank, national identity card all valued at Kshs 12,500 and at the time of such robbery threatened to use actual violence on the said Fredrick Kiprop."*

3. The appellant is aggrieved by his conviction and sentence. The original petition of appeal was filed on 7th February 2013. It raised three primary grounds: first, that, the exhibits alleged to have been in possession of the appellant were not connected to him; secondly, that his conviction was not based on sound evidence; and, thirdly, that his defence was not taken into consideration.
4. On 2nd October 2014, we granted leave to the appellant under section 350 of the Criminal Procedure Code to amend his grounds of appeal. The *amended grounds of appeal* can be condensed into four. First, that the learned trial Magistrate failed to consider that the key witness (PW1) was not at the scene of the robbery; secondly, that two vital witnesses were not called by the prosecution; thirdly, that the charge sheet was defective by omitting the name of PW2; and, fourthly, that the evidence tendered by the prosecution was contradictory and unreliable. In a nutshell, the appellant's case is that the charge was not proved beyond reasonable doubt.
5. At the hearing of the appeal, we warned the appellant that in the event his appeal failed, the Court was entitled to review or enhance the sentence. The appellant confirmed to us that he understood the full implications of proceeding with the appeal.
6. The appellant relied largely on his hand-written submissions filed on 2nd October 2014. In his oral submissions, he discredited the evidence of PW5 who was the investigating officer. He referred us

to page 15 of the record where the investigating officer stated that "the suspect was interrogated" but without disclosing who conducted the interrogation. At line 11 to 12, the investigating officer was absent. When PW5 was cross-examined at page 15 of the record, he said he "did not record the investigation diary". The appellant contended that the prosecution did not prove that the items recovered belonged to the complainant. In particular, the serial number of the cell-phone was not documented. Regarding identification, the appellant submitted that it was based on his clothing which was not produced as an exhibit. The appellant also took issue with the time lines provided by PW2, saying that at the time of the alleged theft at 6.00 in the morning, he was already in police custody. He opined that the prosecution did not prove the charge beyond reasonable doubt.

7. The State contests the appeal. The position of the State is that all the key ingredients of the offence were proved beyond reasonable doubt. In particular, the State submitted that the complainant knew the appellant as a *boda boda* operator and positively identified him; and, that the charge sheet was not defective merely by omitting to include PW2. In any event, learned State Counsel submitted that that was a matter curable under section 382 of the Criminal Procedure Code. The State conceded that PW1 was not at the scene of the robbery. PW1 however assisted the complainant (PW3) to arrest the appellant. The State submitted that the evidence was consistent and corroborated; that the prosecution was not obligated to call all or any number of witnesses at the trial; and, that the doctrine of recent possession applied in this case. In a synopsis, the State submitted that the appeal lacked merit and should be dismissed.
8. This is a first appeal to the High Court. We are required to re-evaluate all the evidence on record and to draw our own conclusions. In doing so, we have been careful because we have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
9. PW2 was the key witness. We shall reproduce his evidence in chief *in extenso*-

> *"I recall the 26th April 2012 at 6.00 a.m. I was at Spree Club. I was entertaining myself [sic] when two men came and offered to sell the mobile phone to the manager Spree Club one Julius. Julius did not have money. Julius came and asked me to assist the two men with money and to hold the mobile phone since the two were on a journey. I borrowed Kshs 2000 from Fred Kiptum. I had Kshs 1000 which I added up to the Kshs 2000 received from Fred Kiptum. I gave the two men the Kshs 3,000 who in turn gave to me a mobile phone. After an hour, the manager Julius came and in the company of police officers and called me. I went and met the police officers who asked me to give out the mobile phone. I gave out the mobile phone, a Nokia X2 which is the one before the Court marked MFI -1. The police officers were by themselves [sic]. I accompanied the police officers to Eldoret Police Station and recorded a statement. I found one of the two men who sold the mobile phone at Eldoret Police Station. The person I am referring to is the accused person. The accused was previously known to me and used to do motor cycle boda boda business"*

10. Upon cross-examination by the appellant, PW2 said that the appellant and another unknown person approached him. They sold the mobile phone to him at 6.00 a.m. He said he was unaware that the appellant was in custody at 4.40 a.m. He said he was unsure of the time he bought the mobile phone but that it was towards the morning.
11. PW3 was the complainant. He is a police officer. On the night of 25th and 26th April 2012, he entered Annex Pub in Eldoret town to answer a call of nature. As he was relieving himself, he was attacked by four men who stole from him Kshs 4,000, one mobile phone make X2-01, ATM card for Co-operative Bank, and national identity card. The attackers ran away. He was unable to give chase but he identified one of the men who wore a sky blue t-shirt. At about 3.00 a.m, he was alerted by a *boda boda* cyclist to check out a suspect who had entered Eldo Butchery in Eldoret. He identified him as his assailant. He was assisted by the public to apprehend the suspect. The suspect (appellant) gave information that led to the recovery of the mobile phone. The witness said he identified his phone which he had purchased a week earlier. The SIM card and memory card were missing. He never recovered the cash.
12. When cross-examined by the appellant he answered as follows-

> *"It is true I was attacked on the night between 25th and 26th April 2012. I was able to identify the accused person during the robbery and arrest because he was wearing a sky blue t-shirt. I managed to arrest the accused person on the same night and he led police officers to recover my mobile phone PMFI -1. A taxi man shouted and alerted me that I should check whether the accused person who was entering Eldo Butchery was the suspect. The sky blue t-shirt is not before the court. The accused person was wearing a sky blue t-shirt during the robbery and the arrest. I was able to identify the accused person by the sky blue t-shirt."*

13. We have then examined the defence proffered by the appellant. In his sworn testimony, he stated as follows-

> *"While coming out of City Butchery, I met with two men at the door who arrested me. One of the two men showed out [sic] a police ID. The two men were wearing civilian clothes. The two men escorted me to Eldoret Police Station and I was booked in the O.B. At 4.40 a.m. I was not told the offence I committed. At 7.00 a.m., I was called to the crimes office. I met three policemen and a man who was in handcuffs. The policemen inquired whether I knew the man in handcuffs. I told them that I did not know the man. I was placed back in the cells. After half an hour, I was called and my finger prints were taken. On the 27th April, 2012, I was escorted to the Court. I was surprised to learn that I was charged with robbery with violence……I deny committing the offence."*

14. We shall deal first with the question whether the trial court disregarded the appellant's defence. It is not true that the defence was not taken into consideration. The learned trial Magistrate was *not* convinced that the appellant was telling the truth. The learned trial Magistrate agreed that PW3 did not properly identify his attackers. But in the learned trial Magistrate's opinion, the appellant was positively identified by PW2.
15. The appellant submitted that the charge sheet was defective for failing to identify PW2 as a complainant. The items that were stolen belonged to PW3 Fredrick Kiprop. He was stated to be the complainant in the charge sheet. PW2 allegedly bought the cell phone from the appellant and another person. The appellant was facing a charge of robbery with violence. The person *robbed* was PW3 and *not* PW2. We thus find that the charge sheet was not defective.
16. The appellant also submitted that the State should have called Fred Kiptum and the manager of Spree Club (Julius) to shed light on the allegations by PW2. We remain alive that under section 143 of the Evidence Act, no particular number of witnesses is necessary to establish a fact. See *Joseph Njuguna Mwaura and others v Republic* Court of Appeal Criminal appeal 5 of 2008 [2013] eKLR, *Bernard Kiprotich Kamama v Republic*, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR. That ground of the appeal lacks merit.
17. We shall now turn to the identification of the appellant. Evidence of recognition is generally more reliable than identification of a stranger, but mistakes may sometimes be made by witnesses. In *Wamunga v Republic* [1989] KLR 424**,** the Court of Appeal held as follows-

> *"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."*

18. In *Republic v Turnbull & others* [1976] 3 All ER 549, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say-

> *"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."*

See also *Joseph Ngumbao Nzaro v. Republic* [1991] 2 KAR 212, *Richard Gathecha Kinyuru & another v Republic* Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR. *Obwana & Others v Uganda* [2009] 2 EA 333.

19. The learned trial Magistrate dealt at length with the issue of identification. He held as follows-

> *"The identification of the accused person by the complainant PW3 Fredrick Cheserek Kiprop during the robbery alone is not safe and cannot be the only basis for a conviction. However, the accused person was recognized by PW2 Mohammed Chepsiror Kosgei when he sold the mobile phone exhibit No. 1 on the material night while at Spree Club. PW2 Mohammed Chepsiror Kosgei testified that the accused person was previously known to him and used to do motor cycle boda boda business, a fact that the accused person never disputed."*

20. On our reappraisal of the evidence, we find that the appellant was *not* positively identified by the complainant, PW3. PW3 identified one of his assailants who wore a sky blue t-shirt. The appellant was arrested a number of hours later. PW3 said he was wearing a sky blue t-shirt. The t-shirt was *not* produced in evidence. PW3 was answering a call of nature. He did not say whether there was sufficient lighting. He never saw the *face* of the appellant. There were four assailants. The complainant and appellant were total strangers. There was nothing *unique* about the sky blue t-shirt. The identification by PW3 was thus *not* reliable. On that score, the learned trial Magistrate was correct.
21. PW2 on the other hand knew the appellant as a *boda boda* operator. They were not complete *strangers*. The appellant and another person approached him to sell the mobile phone to him. The transaction took some time. PW2 said the appellant was wearing a sky blue t-shirt. The appellant was later apprehended the same night by PW3 wearing a sky blue t-shirt. He led the police to PW2 and to the recovery of the cellphone. We however find a serious *gap* in the timelines. PW2 said that the appellant and another person sold him the mobile phone at Spree Club at *6.00 a.m*. He said he was *not* sure of the time but that it was towards the *morning*. PW3 on the other hand said that about *3.00 a.m*, he was alerted by a *boda boda* cyclist to check out a suspect who had entered Eldo Butchery. He identified the suspect as one of his assailants. PW3 was assisted by the public to apprehend the suspect (appellant). We agree with the appellant that that created *doubt*. Assuming the appellant was in police hands a few minutes after 3.00 a.m, he could not have been the same person who sold the mobile phone to PW2 at 6.00 a.m the same morning. The time gap of nearly two hours must be interpreted in *favour* of the appellant.
22. We agree with the appellant that the doctrine of *recent possession* does not apply in this case. For the doctrine to apply, three conditions must be present. First, the property must be found with the suspect; secondly, the property should be positively identified by the complainant; and, thirdly, the property must have been recently stolen from the complainant. See *Gideon Koyiet v Republic*, Court of Appeal, Criminal appeal 297 0f 2012 [2013] eKLR, *Samson Nyandika Orwerwe v Republic*, Court of Appeal, Nairobi, Criminal appeal 16 of 2013 [2014] eKLR, *Erick Gangai v Republic*, Kitale, High Court Criminal Appeal 125 of 2011 (unreported).
23. The appellant was not found in possession of the mobile phone. The phone was in possession of PW2 who alleged that the appellant and another person sold it to him. The complainant (PW3) claimed he had purchased the phone a week earlier. No purchase receipt was produced. The phone was not identified by any serial number or mark. The SIM card and memory card were missing. All that PW3 told the court was that the phone was his. He did not describe any of its characteristics to court. In our analysis, *two* of the key elements of the doctrine of recent possession were *absent* in this case. The doctrine could thus not apply.
24. The gaps we have identified in the evidence are not minor. They cast doubt on the prosecution's case. The burden of proof fell squarely on the shoulders of the prosecution. It did not shift to the appellant. See *Kiarie v Republic* [1984] KLR 739, *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332 at 334, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported). See also section 111 of the Evidence Act.
25. The key ingredients for a robbery with violence are detailed in section 296(2) of the Penal Code. It

provides as follows-

> *"if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".*

26. From our reappraisal of the evidence, we are unable to hold that the prosecution proved *all* the ingredients of the offence. The evidence of PW2 and PW3 did not prove beyond reasonable doubt that the appellant was one of the four men who attacked and robbed PW3. PW2 was not at the scene of the robbery. PW3 did not positively identify the appellant. In addition, there were gaps and contradictions in the timelines provided by PW2 and PW3. As we have stated, the doctrine of recent possession was inapplicable in this case. There is no room for presumptions in a criminal trial; the State shouldered the onus of proving the offence. *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).
27. For all of those reasons, we are *not* satisfied that the conviction was *safe*. The upshot is that the appeal is allowed. The conviction and sentence are hereby set aside. The appellant shall be released forthwith unless otherwise lawfully held.

It is so ordered.

DATED and **SIGNED** at **ELDORET** this 5th day of February 2015

G. K. KIMONDO **C.W. GITHUA**

JUDGE **JUDGE**

Judgment read in open court in the presence of-

Appellant (in person).

Ms. Oduor for the State.

Mr. Ekitela, Court clerk.