REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 4 OF 2014

PATRICK KIRIMI M'BURA ……..... APPELLANT

VS

REPUBLIC……..RESPONDENT

JUDGEMENT

The appellant Patrick Kirimi M'bura, was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge are that on 1/1/2013 at Isiolo, he robbed Dennis Mugambi Muriithi of a jacket, cash Kshs.900/=, ignition key for motor cycle and driving licence. In the alternative, he was charged with the offence of handling stolen property contrary to Section 322 (1) of the Penal Code. The appellant denied the offence and after a full trial, he was found guilty, convicted on the main charge and sentenced to suffer death by hanging. Being aggrieved by the said conviction and sentence, the appellant filed this appeal. The petition of appeal was filed on 17/1/2014. The grounds upon which the appeal is premised are as follows:

1. **That the Court failed to consider that he was kept in police custody for more than 24 hours;**

2. **That the Court failed to consider how the report was made;**

3. **That the appellant's defence was not considered**.

The appellant therefore, urges this court to allow the appeal, quash the conviction and set aside the sentence. The appellant appeared in person. He filed written submission in which he raised two broad grounds: that the offence of robbery with violence was not proved to the required standard of proof, that is beyond any reasonable doubt and secondly, that his Constitutional rights were infringed because he was kept in police custody for over 24 hours.

Learned Counsel for the State, Mr. Musyoka opposed the appeal for reasons that there was overwhelming evidence adduced by the prosecution witnesses against the appellant; that PW1's evidence was corroborated by PW2, 3 and 4's evidence; that the appellant was found in possession of a jacket that had been stolen from the complainant during the robbery and that the court invoked the doctrine of recent possession. Counsel also argued that the ingredients required to prove an offence of robbery with violence were established. He relied on the decision in **Oluoch V Rep (1985) KLR 549** where the court set out the ingredients to be proved in such a case. As respects the allegation that the appellant's rights were infringed, Counsel argued that under Article 49 of the Constitution, he should have been produced in court within 24 hours and if he was not, he should have raised it in the trial court buthaving failed to do

so, he waivedhis right to the claim; that in any event, if any right was breached, the appellant would be entitled to damages in a civil suit. Counsel urged the court to dismiss the appeal.

As the first appellate court, it behoves us to examine and analyze all the evidence adduced in the trial court afresh so that we can arrive at our own independent findings and conclusions on both the facts and the law. See **Kiilu & Another V Rep (2005)1 KLR 174**where the Court of Appeal held thus:

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions.."***
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> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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.."***

Before we analyze the evidence, it is necessary that we summarize the evidence that was adduced in the trial court. The complainant, Dennis Mugambi (PW1) operates*'boda boda'*transport (motor cycle) services at Isiolo. On 1/1/2013, about 5.00 a.m., he had dropped off a customer at Kula Mawe and was returning to the town when his petrol ran out. He left the motor cycle with a watchman at Annex Lodge to watch over it, ashe went to get fuel. He walked along the footpath towards Total Petrol Station and when walking through Baraza Park, he met two men who attacked him, beat him up, and as he tried to free himself, they took his blue/black and grey stripped jacket and in the jacket was KShs.900/=, ignition key to the motor cycle and driving licence.He ran back to the watchman and they waited till 7.00 a.m., and they went back to the scene but found nobody except his cap. He made a report to the Police.

Naftaly Kubai (PW2) was working as watchman at Annex Lodge and hereiterated what PW1 told the court, that he had left with him his motor cycle to go get petrol only to return claiming to have been robbed.

Stanley Mungathia Samuel (PW3) also a *boda boda* rider at Isiolo told the court that PW1 informed him of the robbery that had occurred on 1/1/2013. PW3 knew PW's jacket and on 3/1/2013, about 10.00 a.m. he saw someone wearing a similar jacket to that of PW1. PW3 called PW1 on phone as PW3 trailed the person who was wearing the jacket. PW1 caught up with PW3, they stopped the person who had the jacket, who is the appellant. PW1 checked the inner pocket of the jacket and found his driving licence. They escorted the appellant to the Isiolo Police Station where he was arrested and the jacket and driving licence were retained as exhibits.

PC Cyrus Wahome (PW4) of Isiolo Police Station was allocated this case on 1/1/2013 as a report had been booked in the OB. On 3/1/2013 PW1 went to the station with theappellant whereby PW1 and 3 handed over the appellant with whom they had arrested in possession of a jacket that PW1 claimed was his and it had his driving licence.

When called upon to defend himself, the appellant told the court that he lives at Makutano in Meru and works as a conductor on a lorry; that on 1/1/2013 they did not work but on 2/1/2013 they took sand to Isiolo and arrived at Maili Tatu at 9.00 a.m. and the driver sent him to buy engine oil at Isiolo, and as he went back, he met a motor cycle rider who stopped him and claimed the jacket he was wearing was his. He maintains that the jacket was his but did not know how PW1's driving licence got to be in the jacket.

We have carefully considered both the submissions, the prosecution and defence evidence. The complainant was allegedly robbed at 5.00 a.m. He was not able to identify any of the robbers because it was dark and the conditions were not conducive to proper identification.

The first complaint made by the appellant is that he was kept in police custody for over 24 hours, thus

infringing his Constitutional right. Article 49 (1) (f) of the Constitution guarantees the rights of an arrested person. It provides that an arrested person has the right to be brought before a court as soon as reasonably possible but not later than 24 hours after being arrested. The appellant claims to have been arrested on 3/1/2013 and was arraigned in court on 7/1/2013 and that no explanation was given for the delay. It is trite law that where there is a violation of any Constitutional right, it must be raised at the earliest opportunity possible. In **Mwalimu V Rep (2008)KLR 111**, the Court of Appeal, when considering Section 72 (3) and 84 of the retired Constitution which is dealt with a similar issue, said as follows:

> ***"4. Section 84(1) of the Constitution suggested that there had to be an allegation of breach before the Court could be called upon to make a determination of the issue and the allegation had to be raised within the earliest opportunity.***
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> ***5. The appellant did not complain in the trial Court that he was not brought to Court as soon as was reasonable practicable. Therefore, there was no merit in the ground of appeal alleging a breach of his constitutional right."***

We have perused the trial court's record and note that the appellant never raised that issue before the trial court. Had he raised it, the police would have been called upon to explain the delay just in the event that the case fell under the exception given under Article 49 (i) and (ii) that is, if the 24 hours ended outside the ordinary court hours or on a day that is not a court day, then he would have been produced on the next day. The delay may have been caused by some good reason. The complaint is made rather late in the day because this court cannot call for that explanation. In any event, even if this court were to find that a violation was committed, it would not have any bearing on the innocence or guilt of the appellant as that can be vindicated in a separate petition in the High Court under Article 22 of the Constitution (enforcement of Bill of Rights). This is not the correct forum to raise the said issue and that ground must fail. See also**Julius Kamau Mbugua V Rep CRA No. 50/2008:**

> ***"a trial court can take cognizance of pre-charge violation of personal liberty, if the violation is invoked and affect the criminal process. As on illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial of where an accused has trial related prejudice as a result of death of an important witness in the meantime and the witness has lost memory, which cases the trial court could give appropriate protection likean acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil rights, thoughtConstitutional in nature, which is beyond the statutory duty of a criminal trial court and which is by Section 72 (6) expressly compensable by damages".***

Whether the offence of robbery with violence was committed: To prove an offence of robbery with violence, the prosecution must prove one of the following ingredients:

1. **The offender is armed with any dangerous and offensive weapon or instrument; or**

2. **That the offender was in the company of one or more other persons; or**

3. **That immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any persons.**

See **Oluoch V Rep(1985) KLR 549.**

In the case of **Dima Denge Dima & Others V Rep CRA 300/2007**it was held that one only needs to prove one of the above ingredients.

The Court of Appeal stated thus:

> ***"the elements of the offence under Section 296 (2) are three in number and they are to be read,not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence".***

In the instant case, the complainant told the court that he was accosted by two people who started beating him but he managed to release himself and flee. It seems he did not receive any serious injuries because he did not attend any doctor. The offence of robbery with violence was committed because the assailants were two and they did steal from PW1. The question is who committed the offence?

As pointed out earlier in his testimony, PW1 was not able to identify any of the assailants because it was dark. The appellant was however, arrested in possession of a jacket which PW1 claimed was his. The jacket was recovered on 3/1/2013, 2 days after the robbery. PW1 and 3 said that inside the jacket was PW1's driving licence which had been stolen during the robbery. The question is whether the appellant was found in recent possession of the said jacket and driving licence? We note that the trial court did not invoke this doctrine. In **Erick Otieno Arum CRA 85/2005**, the court said:

> ***"To invoke the doctrine of recent possession, the prosecution must prove beyond reasonable doubt each of the following:***
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> i. ***That the property was stolen;***
>
> ii. ***That the stolen property was found in the exclusive possession of the accused;***
>
> iii. ***That the property was positively identified as the property of the complainant and***
>
> iv. ***Possession was sufficiently and recent after the robbery".***

What constitutes recent possession is a question of fact that depends on the circumstances of each case including the kind of property, the amount or volume of the stolen property; the ease or difficulty with which the said property maybe assimilated into legitimate trade channels and the character of the property. In this case, the appellant was found in possession of the jacket and driving licence only 2 days after the robbery. The appellant claimed that the jacket was his but he could not explain how the complainant's driving licence got to be in his jacket pocket. When cross-examined in his defence, he said:

> ***"I do not know how the driving licence of the complainant came to be in the jacket I was wearing. The jacket I was wearing was not borrowed. It was mine".***

From the above quote, it is clear that the appellant acknowledged that the complainant's driving licence was in the jacket he was wearing and he could not give a reasonable explanation how it got there. Even though the jacket looked like any other and PW1 had no special mark on the jacket, yet the presence of his driving licence in the jacket went to prove that it is the same jacket that had been stolen from him 2 days earlier. In **Paul Mwita Robi V Rep CRA 200/2008**, the Court of Appeal said:

> ***"Thus, while the law is that generally in criminal trials the prosecution has the burden of proving the case against the accused throughout and that burden does not shift to the accused, however, in a case where one is found in possession of a recently stolen property like in this case, the evidential burden shifts to him to explain his possession. That explanation only needs to be a plausible one but he needs to put it forward for the court's consideration".***

In this case, having been found in possession of the driving licence, the appellant had a duty to give a reasonable explanation but the appellant did not have any plausible explanation as to how he came by the complainant's jacket and driving licence. The license bears the respondent's nameDennis Mugambi and particulars. In the end, we have no doubt that the appellant was found in recent possession of PW1's jacket and driving licence which had been stolen 2 days earlier. It was incumbent upon him to give a

plausible explanation as to how he came to be in possession which he failed to do and we therefore find his defence to be a bare denial and does not dislodge the complainant's testimony.

PW4 PC Cyrus Wahome testified that on 7/1/2013, he was allocated this case to investigate whereby a report had been made and booked in the OB that a jacket, driving licence and KShs.900/= had been stolen and that on 3/1/2013, PW1 and 3 took appellant to the police station with the recovered driving licence and jacket.

The first report to the police stationdoes corroborate PW1's evidence as to what he had lost during the robbery. The appellant's submission that the driving licence was not produced in court is misplaced because it was produced as PEX 2 by PW4. In the case of **Terekali V Rep (1952) EACA**, the court considered the importance of the first report when it said:

> ***"… Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against late embellishment on made up case. Truth will always come out from a statement taken form a witness at a time when recollection is very fresh and there has been no time for consultation with others …".***

The offence was committed on 1/1/2013, the report of the robbery was made on the same day. We find that the prosecution evidence was cogent and believable.

The appellant denied having been at the scene of crime on the day the said offence was allegedly committed. He said that he was in Nkubu on 31/12/2012 and that on 1/1/2013 he did not go to work till 2/1/2013 when he went to Isiolo. In essence the appellant was raising the defence of alibi. The general rule of law is that the burden of proving the guilt of a person before any reasonable doubt never shifts whether the defence set up is one of alibi. Ordinarily, for one to avail himself of the defence of alibi, he should raise it at the earliest instance possible so that the prosecution can have an opportunity to rebut it. In **Karanja V Rep (1983) KLR 501** the Court of Appeal held:

> ***"1. The word "alibi" is a Latin verb meaning "elsewhere" or "at another place". Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, ie when he was initially charged.***
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> ***2. In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought.***

In this case, the defence case is an afterthought. But in any event, even if the prosecution set out to rebut the alibi, it may not have achieved much because the said alibi is very vague as it does not specifically state where the appellant was on 31/2/2011 and 1/1/2012 or the person/s he was with. Even though the prosecution could have sought the leave of the court under Section 309 CPC to adduce evidence in rebuttal, it was unnecessary to do so considering what we have stated above, that the alibi was very vague. We therefore dismiss the alibi as an afterthought and untrue.

Having analyzed all the evidence on record and having considered the grounds raised by the appellant and all the submissions, we are of the firm view that the prosecution adduced sufficient evidence to find a conviction and the conviction is well founded. We confirm it. The court cannot interfere with the sentence because the death sentence is the only legal/lawful sentence available to the

court under Section 296 (2) of the PC. We find the appeal to be devoid of merit and it is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF JULY, 2015

R.P.V. WENDOH **J. A. MAKAU**

JUDGE **JUDGE**

PRESENT

Mr. Musyoka for State

Faith/Ibrahim, Court Assistants

Appellant, Present in Person