REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.113 OF 2014

(An Appeal arising out of the conviction and sentence of Hon. J.D. KWENA – SPM delivered on 22nd August 2014 in Githunguri SPM.CR. Case No.577 of 2013)

STEPHEN MWENDE *alias* GODWIN OMWANDA……..……
…….APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellant, Stephen Mwende *alias* Godwin Omwanda was charged with two (2) counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 7th May 2013 at Thuita Village in Githunguri, Kiambu County, the Appellant, jointly with others not before court robbed Daniel Njoroge of mobile phone make YU model ZTE Serial No.356039040 193930 valued at Kshs.1,500/- and Denis Mwania of his motorcycle make Boxer Registration No.KMCT 084 Z and Kshs. 300/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Daniel Njoroge and Denis Mwania. The Appellant was alternatively charged with **handling stolen goods** contrary to **Section 322(1)** & **(2)** of the **Penal Code**. The particulars of the offence were that on diverse dates between 7th May 2013 and 5th July 2013, at Eastleigh in Nairobi County, the Appellant otherwise than in the course of stealing, dishonestly retained one mobile phone Serial No. 356039040193930 make YU model ZTE knowing or having reason to believe it to be stolen property. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted of the main count. He was sentenced to death as is mandatorily provided by the law. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of a defective charge. He took issue with the fact that the convicting magistrate had not complied with **Section 200(3)** of the **Criminal Procedure Code**. The Appellant stated that he was convicted on the basis of contradictory and unsubstantiated evidence that was adduced by the prosecution witnesses. He was further aggrieved that

his right to fair trial had been infringed because he was not supplied with witness statements despite making several requests to court. He was of the view that on the basis of the evidence adduced, the trial court failed to make the correct finding that the prosecution had not discharged the burden of proof placed upon it. He faulted the trial court for relying on the doctrine of recent possession and circumstantial evidence to convict him where infact the co-existing aspects of the case weakened the case against him. He was aggrieved that the trial court had failed to consider his defence before reaching the verdict that he was guilty as charged. He therefore urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant represented to court written submission in support of his appeal. He also made oral submission urging the court to quash his conviction. He submitted that the evidence adduced by the prosecution witnesses was contradictory and did not connect him to the crime. There was no evidence that was presented to court that warranted his conviction by the trial court. On her part, Ms. Ngetich opposed the appeal. She submitted that the prosecution adduced sufficient evidence to connect the Appellant with the offence. In particular, she submitted that the trial court correctly applied the doctrine of recent possession in finding the Appellant guilty for the offence that he was charged with. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code.**

From the evidence adduced by the prosecution witnesses, it was clear that the Appellant was convicted by the trial court applying the doctrine of recent possession. According to PW6 Denis Mwania, on 7th May 2013 at about 9.00 p.m., he was hired by Daniel Njoroge and PW3 Samuel Kinuthia Kamoche to ferry them from Kwamaiko to Kibichoi. PW6 was at the material time a boda boda operator. He owned a motorcycle Registration No.KMCT 084 Z. He testified that the said Daniel Njoroge was his regular customer. The journey from Kwamaiko was uneventful until they reached a junction referred to as Thuita. They were stopped by four (4) men. They started beating them. PW3 realized that the four men were robbers. He managed to escape into a nearby coffee farm. PW6 testified that he was robbed of Kshs.300/- before he was left at the scene of the attack. Daniel Njoroge was hit with a metal bar on his head. He however managed to drag himself to his home. PW1 David Gachue Kamau, a brother of Daniel was told about the incident by a son to the said Daniel called Stanley Kamau Njoroge. He rushed to his brother's house and took the said Daniel to Kigumo Health Centre. He was transferred to Kiambu District Hospital on the same night before he was taken to MP Shah Hospital on the following day. Daniel succumbed to his injuries on 10th May 2013. PW3 and PW6 testified that they did not identify any of their attackers during the robbery.

PW2 Moses Njuguna testified that the said Daniel Njoroge was employed as a driver in a company called Capwell Industries based at Thika. PW2 stated that, as a matter of policy, the drivers employed by the company were issued with mobile phones. In the case of Daniel, he was issued with ZTE mobile phone, mobile No.0756888721. The mobile phone had a serial number 356039040193930. This number was recorded at the offices of the company when the same was issued to Daniel. PW2 told the court that he was informed by the family of Daniel that Daniel had been robbed of the mobile phone during a robbery

incident in which he sustained fatal injuries. This mobile phone was later recovered in the Appellant's possession after it was tracked by PW7 PC Erastus Matuanga then based at CID Githunguri Police Station and PW8 SGT Salim Juma based at Safaricom Security Department as a Liaison Officer. According to the said two witnesses, when it was established that the mobile phone had been robbed from Daniel, they tracked the phone using its serial number. According to PW7, they discovered that the person using the phone was one Stephen Mwende ID No.23357250. PW8 testified that the same mobile phone was being used through mobile number 07055412075 registered in the name of Godwin Omwende. What was interesting in their evidence is that it was apparent that no effort was made to trace either Stephen Mwende or Godwin Omwende.

PW7 testified that on 5th July 2013 he called the person identified as Stephen Mwende and requested to meet him. The person agreed to meet him at Eastleigh in Nairobi. He met him and requested him to hand over the mobile phone and his national identity card. He took over possession of the mobile phone. However, the person he arrested did not show him his identity card. As stated earlier in this judgment, it was the prosecution's case that since the Appellant was found in possession of the mobile phone that was robbed from Daniel, then, by virtue of that possession, the doctrine of recent possession ought to apply to find him guilty of being a member of the gang that robbed and fatally injured Daniel.

When he was put on his defence, the Appellant denied being connected with the robbery. He stated that his name was Stephen Mwende, a Ugandan Citizen from Mbale District in Uganda. He told the court that he came to Kenya to look for work. He worked in construction sites. He lived with his cousin called Josphat Matanda. He recalled that on 7th May 2013 he was working as a mason in the house of a man known as Miano in Githunguri. He denied participating in the robbery. He denied being found in possession of the mobile phone. He narrated the circumstances of his arrest which differed from the evidence of PW7. In essence, the Appellant was saying that he was a victim of mistaken identity.

We have carefully re-evaluated the evidence adduced before the trial court. We have considered the submission made before us on this appeal. As stated earlier in this judgment, the prosecution adduced no other evidence other than the evidence of the recovery of the mobile phone in possession of the Appellant to connect the Appellant with the robbery. The trial court applied the doctrine of recent possession to convict the Appellant. Was the trial court justified in applying the doctrine of recent possession in the circumstances of this case? The trial court was required to take into consideration the advice given in the case of **Malingi –Vs- Republic [1989] KLR 225** at Page 227 where Bosire J (as he then was) held thus:

> "***By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

The doctrine of recent possession is by its nature a rebuttable presumption of facts. There is no direct evidence connecting the Appellant with the robbery other than the recovery of the stolen item. The prosecution established to the required standard of proof that the mobile phone which was recovered from the Appellant was indeed the one that was robbed from Daniel. The company where Daniel worked produced evidence which established that indeed the particular mobile phone was issued to Daniel. Daniel had the mobile phone during the robbery that he was fatally injured. The prosecution adduced contradictory evidence in regard to who the mobile phone number that the particular mobile phone number was registered to. Whereas PW7 testified that it was registered in the name one Stephen Mwende, PW8 testified that it was registered in the name of Godwin Omwende. The police should have conducted further investigation to establish the bona fides of Godwin Omwende and what connection he had with Stephen Mwende or the person answering to that name. That gap in the prosecution's evidence raise

reasonable doubt as to the circumstances in which the mobile phone may have found its way from the time it was robbed from Daniel to the time it was found in the Appellant's possession.

This court takes judicial notice of the fact that a mobile phone is an item that changes hands within short period of time. In the course of two months, between the time of the robbery and the recovery of the mobile phone in the Appellant's possession, it could have changed hands several times. A mobile phone is not an item which can irresistibly point to the guilt of the possessor if it is found in such possession two months after the incident. While it is true that the Appellant's testimony in his defence was not helpful in regard to the circumstances that he was found in possession of the particular mobile phone, this court cannot, in the circumstances of this case, call upon the Appellant to give an explanation of how he came to be in possession of the particular mobile phone if the prosecution did not establish the person or persons who were using the particular mobile phone between the time it was robbed from Daniel to the time it was recovered in the Appellant's possession. There being no other evidence connecting the Appellant with the crime, this court is unable to find that the doctrine of recent possession was correctly applied by the trial court to secure the conviction of the Appellant.

The upshot of the above reasons is that the appeal lodged by the Appellant has merit. It is hereby allowed. His conviction is quashed. The death sentence imposed upon him is quashed. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 3rd DAY OF NOVEMBER 2015

L. KIMARU

JUDGE

G.W. NGENYE – MACHARIA

JUDGE