REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO.191 OF 2013

JOHN BOSCONJUE NDWIGA .....…… ……..…1ST APPELLANT

CHARLES MAINA GITAONGA ……2ND APPELLANT

IRENE WAWIRA MUTHONI……3RD APPELLANT

-VERSUS-

REPUBLIC ……..……RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 769 of 2010 in the Senior Resident Magistrate's Court at Wanguru – HON. B.M. OCHOI (S.R.M)

JUDGMENT

1. The three appellants ***John Bosco Njue Ndwiga, Charles Maina Gitonga and Irene Wawira Muthoni*** (herein after the appellant's were jointly charged before the Senior Resident Magistrate's court at Wanguru with the offence of robbery with violence contrary to ***Section 296)2***) of the ***Penal Code*** in that on the 11th October 2010 at Ngurubani town Kirinyaga South District within Central province they robbed Josephat ***Mugo Muriuki*** of a motor cycle registration NO. KMCA 815 A make Hongya valued at Kshs 80,000 and a mobile phone make Nokia 2300 valued at kshs 2,500 and at the time of such robbery, they killed the said ***Josphat Mugo Muriuki***. Each of the appellants denied the charges and after a full trial, they were convicted and sentenced to death.
2. The appellants were dissatisfied with their conviction and sentence. They filed their appeals separately which were subsequently consolidated when they came up for hearing.

In their grounds of appeal encompassed in their respective petitions of appeal, the appellants made several complainants which were by a large similar. And though the appellant's purported to introduce other grounds in their written submissions we find that this was done without leave of the court. We shall therefore confine ourselves to the grounds contained in their respective petitions of appeal.

As observed earlier, the appellants raided more or less similar grounds in their petitions of appeal which can be collapsed and summarized into the following three main grounds: _

i. **The learned trial magistrate erred in law and in fact in relying on uncorroborated evidence which was insufficient to sustain their conviction.**
ii. ***That the learned trial magistrate erred in law and infact by applying the doctrine of recent possession yet none of the items stolen from the deceased were found in their possession.***
iii. ***That the learned trial magistrate erred in law and infact by failing to consider their respective***

defences.

3. Turning to the facts of the case, we note that the prosecution case was supported by a total of twelve (12) witnesses.

Briefly, the prosecution case is that PW1 ***Levis Gathuma Njeri*** and the deceased were motor cycle taxi operators (boda boda riders). They had their working base at a place near POA filing Station. On the evening of 11th October 2010, PW1 and the deceased were waiting for customers when a lady approached the deceased and after taking for a while , he saw the lady board the deceased's motor cycle registration NO. KMCA 815 A makes Hongra green in colour and they rode towards Merica police station.

PW1 testified that he was the lady who rode away with the deceased in his motor cycle clearly trough electricity lights from the nearby petrol station and other lights at the stage fixed by the county Council. He identified that lady as the 3rd appellant herein.

That was the last time he saw the deceased alive. The following morning, he received information that a person had been found dead at Maisha Kamili village. He proceeded to the Maisha Kamili village and discovered that the dead man was his work mate ***Josephat Mugo (***herein after referred to as the deceased). At the scene, he saw a side mirror of a motor cycle and the cap the deceased had worn the previous night. He was present when the ceased body was taken to Kerugoya District Mortuary.

4. On the same night that the deceased was murdered that is , on 11th October 2010 at around 10p.m., the three appellants appeared in PW6's rental house at Makutano and requested him to host them for the night. PW6 recalled that Maina the 2nd appellant who he knew previously, explained that they were on route to Nairobi and since they had a motor cycle and it was late, they needed a place to sleep. He agreed to accommodate them for the night. He noted that they were in possession of a green motor cycle registration NO. KMCA 815 which they kept in his house.

   On the following morning, the 2nd appellant tried to sell to Maina mobile phone make nokia but he declined to buy saying he had no money . the 1st and 2nd appellant then left the house to look for a market for the mobile phone leaving the 3rd appellant and the motor cycle in the house. He also left for work.

5. At around 1p.m., he went back to the house and found the 3rd appellant only. She reported that the 1st and 2nd appellant had gone to Nairobi. By 7.30p.m. they had not returned from Nairobi and he took the 3rd appellant for dinner as he awaited their arrival.

The two appellants joined them later and they went to drink together at Universal Bar where he left them at around 9p.m. and went back to his house.

Meanwhile that morning as the murder of the deceased was reported to Wanguru police Station, PW3 and PW8 both police officers attached to Makutano police station received a tip off from an informer that there were three people who had been seen in Makutano area with a motorcycle registration NO. KMCA 815 A which was suspected to be stolen. Their informer led them together with other police officers at around 9pm and pointed out the three suspects. They immediately arrested the suspects who are the appellants herein and took them to Makutano Police Station. When clearing the table which the appellants had occupied before were arrested, PW7 ***Esther Nduku Damaris*** the waiter who had been serving them found a driving licence in the name of ***Josphat Muriuki Mugo*** with the photograph of the owner missing, she handed it over to her manager who testified as PW2. PW2 in turn handed over the recovered driving licence to the police at Makutano police station. The driving licence was produced in evidence as exhibit 1.

6. PW 12 CPL ***Richard Odhiambo*** was the investigating officer in this case. He recalled that on

12th October 2010 at 6.30 am, he accompanied the officer commanding Wanguru police station (O.C.S.) to a scene at Maisha Kamili area where the deceased's body had been found.

At the scene they found the deceased's body lying on its belly with his hands and legs tied at its back with a black rubber band. His neck was also tied with a rubber band. There was a cap and a broken side mirror of a motor cycle about two meters from the body. The O.C.S. summoned the scenes of crime personnel from Embu. PW11 Police Inspector ***Jackson Kiprop*** went to the scene and took several photographs of the body which he produced in evidence as exhibit NO. 5.

In the course of his investigations, PW 12 re-arrested the appellants at Makutano police station and took them to Wanguru police station where he charged them with the offence of robbery with violence. The deceased's motor cycle was not recovered since according to his investigations, it had been sold in Nairobi by the 1st and the 2nd appellant.

7. In their defence, the 1st and 3rd appellants elected to make unsworn statements while the 2nd appellant gave sworn statement. They each denied having committed the offence as alleged. In their statements in defence, the appellants only narrated how they were arrested together at Universal bar on the evening of 12th October 2010. In additional, the 3rd appellant claimed that she was PW6's wife and that at the time she was arrested, PW6 had gone out of the bar shortly to by her some food (chips).
8. When the appeal came up for hearing, the appellants chose to rely entirely on written submissions which they presented to the court.

   In their submissions, the appellant primarily challenged their conviction on grounds that no direct evidence linking them to the commission of the offence was adduced against them and that the trial magistrate erred in convicting them on the basis of circumstantial evidence which excluded the weapon allegedly used to murder the deceased which in their view was insufficient to prove their guilty as charged beyond any reasonable doubt. They also invited the court to note that none of them had been found in possession of any of the items stolen from the deceased and faulted trial magistrate for having relied on the doctrine of recent possession in convicting them.

   In addition, the 3rd appellant challenged her identification by PW1 as the lady who had hired the deceased and rode in his motor cycle before he met his violent death. The 1st appellant on his part also challenged hi identification by PW6 as one of the persons whom he had hosted in his house on the night of 11th October 2010.

9. In opposing the appeal, the state through the learned prosecuting counsel Mr Sitati submitted that the circumstantial evidence presented to the trial court by the prosecution in this case was credible and overwhelming.

Counsel further submitted that the learned trail magistrate correctly applied the doctrine of recent possession and that the appellants were rightly convicted.

He invited the court to dismiss the appeal for lack of merit.

10. This is a first appeal. We are alive to the duty of the first appellate court which has been settled by the Criminal Appeal in numerous authorities. In ***Simiyu & Another V Republic (2005) 1 KLR 192,*** the court stated that the duty of the first appellate court involved the following" to reconsider the evidence, evaluate and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions ....."

See also ***OKENO VS REPUBLIC(1992) EA 32, MWANGI VS REPUBLIC (2004) 2 KLR 28*** and ***SOKI VS REPUBLIC(2004) 2 KLR 21***. We are aware that in reevaluating the evidence on record, we must bear in mind that unlike the trial magistrate, we did not have the advantage of seeing or hearing

the witnesses.

11. we have considered the submissions made by the appellants, the state and the grounds of appeal. We have also re-examined the evidence on record. We find that the first issue for determination in this appeal is whether the offence of robbery with violence was committed in this case.

The offence of robbery is defined under section 295 of the penal code which states as follows:-

> "***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 property in order to obtain or retain the thing stolen or to prevent overcome resistance to its being stolen or retained, is guilty of the felony termed robbery".***
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> Under ***Section 296(2)*** of the ***Penal Code***, the offence of robbery with violence will be established if it is proved that in the course of the robbery, the robber was armed with a dangerous weapon or he was in the company of one or more people or immediately before or after the robbery actual violence was occasioned to the victim -**See**
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> **JOHANA NDUNGU VS REPUBLIC (1995) KLR 387 –**

In this case, though there is no direct evidence to show how Josphat Mugo parted with possession of his motor cycle on the night of 11th October, 2010, it is not disputed that he was found dead on the morning of 12th October, 2010 minus his motor cycle in circumstances that leave no doubt that he did not peacefully give away his motor cycle.

From the evidence of PW1, PW2 and the photographs taken by PW11 at the scene where the deceased's body was found, it is clear that the deceased was violently robbed of his motorcycle one of its side mirrors broken and fell near where his body was found the following morning.

According to the post mortem report,(exht 6) the deceased's upper lip, both hands and neck were bruised and the cause of his death was strangulation. There is therefore no doubt that the person or people who stole the deceased's motorcycle actually murdered him by strangling him to death either in the course of or after the robbery. We are therefore satisfied that the offence of robbery with violence was committed in this case.

12. the second issue which we must determine is whether any of the appellants participated in the robbery in which the deceased's motor cycle and Nokia mobile phone were stolen.

As correctly pointed out by the learned trial magistrate in his judgment and by the appellants in their submissions, there was no direct evidence adduced by the prosecution in this case linking the appellants with the commission of the offence.

This is because the victim of the robbery was murdered and dead men do not tell tales and nobody else apparently witnessed the robbery. We note that the prosecution's case was premised on purely circumstantial evidence to the effect that the three appellants appeared in PW6's rental house at Makutano on the same night the robbery was committed and they had in their possession the deceased's stolen motorcycle Registration No.KMCA 815 A.

According to the evidence of PW6 which was wholly accepted by the learned trial magistrate, he knew the 2nd appellant prior to that date and it was upon his Request that he agreed to host them for the night. He knew him because he was the boyfriend of Esther who was his girlfriend's employer. This claim by PW6 must be true because it was confirmed by the 2nd appellant in his sworn statement in defense.

13. The learned trial magistrate after believing PW6 found as a fact that the three appellants had been accommodated in his house on the night of 11thOctober 2010 and that they had with them the motor cycle stolen from the deceased the same evening.

On our part, we have no reason to fault the learned trial magistrate for this finding because it was based on his view regarding the credibility of PW6 who this court did not have the benefit of seeing or hearing. We however have no reason to doubt the credibility of PW6 because from the record, he appears to have been an independent witness in this matter who had no reason to give false evidence against any of the appellants.

It should also be remembered that according to PW6, on the morning of 12th October 2010, the 1st and 2nd appellants showed him a mobile phone make Nokia and invited him to buy it which offer he declined as he could not afford it.

And according to the particulars supporting the offence with which the appellants were charged, a mobile phone make Nokia 2300 was one of the items which had been stolen from the deceased. This gives rise to a reasonable inference that the mobile phone the 1st and 2nd appellants wanted to sell to PW6 must be the mobile phone which had been stolen from the deceased together with the motor cycle they took to his house.

14. In view of the foregoing, we have come to the conclusion that the appellants had possession of motor cycle registration No.KMCA 815 A and a mobile phone make Nokia just hours after the items had been stolen from the deceased. Having spent the entire night with them and spent a considerable part of the following day with the appellants, PW6 must have seen and got to know all the appellants very well even the first and 3rd appellants whom he did not know prior to the 11th October, 2010. It is not disputed that he knew the 2nd appellant before and therefore these are people he would have been able to positively identify at any other time. He could not have thereafter mistaken their identity and we find that his identification of the appellants as the people who came to his house on the fateful in possession of the stolen motor cycle was free from the possibility of error.

15. Contrary to the appellant's submissions, we are satisfied that the learned trial magistrate correctly applied the doctrine of recent possession in this case.

The doctrine of recent possession is a rebuttable presumption of fact. The presumption is to the effect that a person found in recent possession of stolen goods is presumed to be either the thief or a handler of the same knowing or having reason to believe that they were infact stolen unless he can account for their possession. This in effect means that once an accused person is found in possession of recently stolen goods, the burden of proof shifts from the prosecution to the accused to explain how he came to be in possession of the stolen goods in question. If no satisfactory explanation is given, then the accused person is taken to be either the thief or a guilty receiver of the stolen goods.

16. In this case, the appellants did not give any explanation regarding how they came to be in possession of the deceased's motor cycle and mobile phone just hours after the same had been stolen . They only gave a narration of how they had been arrested. From the evidence of PW1, the robbery must have taken place after 8.30 p.m. when he last saw the deceased alive riding away from their place of work in the company of a lady he identified as the 3rd appellant in this case. His identification of the 3rd appellant as the lady who rode away with the deceased that night cannot be wrong because the 3rd appellant appeared in PW6's house in the company of the 1st and 2nd appellant at 10 p.m. the same night together with the deceased's motor cycle.

This means that there was only a time lapse of about 1 ½ hours from the time the robbery took place and the time the appellants were seen with the motorcycle.

We are convinced that the motor cycle could not have changed hands within such a short period of time and having not offered any explanation regarding how they came to be in possession of the items stolen from the deceased, the appellants must be taken to be the robbers who violently robbed the deceased of the motor cycle and mobile phone after which they strangled him to death. This is why the deceased's driving license was found by PW7 on the table the three of them had occupied at universal bar before they were arrested. We agree with the learned trial magistrate that it could not have been mere coincidence that

the said driving licence was recovered on a table they had immediately occupied before their arrest.

The recovery of the deceased's driving license in those circumstance was further proof that the appellants were involved in the robbery that culminated in the deceased's death.

17. the appellants had also complained that the trial magistrate erred in law in failing to consider their respective defences. A look at the trial court's record shows that this complaint has no basis. It is clear from the judgment delivered by the trial magistrate he thoroughly analyzed the defences offered by each of the appellants before he dismissed them as untrue giving good reasons for so doing. We therefore find that nothing turns on this ground of appeal.

18. In the end, we are satisfied that the learned trial magistrate properly evaluated the evidence adduced before him and arrived at the correct finding that the circumstantial evidence presented by the prosecution proved the guilt of each of the appellants as charged beyond any reasonable doubt. We therefore find that the appellants were properly convicted.

Consequently, we do not find any merit in this appeal and we hereby dismiss it.

The result is that we uphold the each of the appellant's conviction and affirm the sentence imposed by the trial magistrate.

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 15th DAY OF JUNE 2014

H.I. ONG'UDI **C.W. GITHUA**

JUDGE **JUDGE**