IN THE COURT OF APPEAL AT NAKURU

(CORAM: WARSAME, MATIVO & GACHOKA,

JJ.A.) CRIMINAL APPEAL NAK NO. 63 0F 2018

BETWEEN

SWALEH MUHAYA LUBANGA.....1ST APPELLANT

VITALIS SHIKOLI MAHINDU.....2ND

APPELLANT AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kericho (Mumbi Ngugi, J.) dated 3rd October, 2018

in

H.C.CRA No. 29 OF 2017)

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JUDGMENT OF THE COURT

1. **Swaleh Muhaya Lubanga** (1st appellant) and **Vitalis Shikoli Mahindu** (2nd appellant) were jointly charged in the Chief Magistrate's Court at Kericho with the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code. The particulars of the charge were that on the night of 16th and 17th September, 2012 at Kipchimchim area in Kericho

District within

the then Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely pangas and rungus, robbed Everlyne Bii of cash Ksh. 15,000/=, one LCD Dell computer monitor valued at Ksh. 15,000/=, Dell computer keyboard valued at Ksh. 6,500/=, Dell computer mouse valued at Ksh. 1,200/=, two mobile phones (Nokia and Samsung) valued at Ksh. 22,000/=, six aluminum sufurias valued at Ksh. 6,000/=, three pairs of shoes valued at Ksh. 3,000/=, slippers valued at Ksh. 70/=, 20 kgs of dry maize valued at Ksh. 1,500/= and 5 litres of milk valued at Ksh. 360/=, all valued at Ksh. 62,130/=, the property of Everlyne Bii, and at the time of such robbery used actual violence to the said Everlyne Bii.

2. In the alternative, the appellants were charged with the offence of handling stolen property contrary to section 322(2) of the Penal Code. The appellants pleaded not guilty to the charges and the matter proceeded to trial.

3. In brief, the facts culminating in this appeal were that the complainant (PW1) was asleep in her house at Kipchimchim on the night of 16th September, 2012 when at around 11:00

p.m.

she was awakened by noise. She switched on the electric lights and two men entered her bedroom, warning her not to scream and threatening that they had been paid Ksh. 50,000/= to kill her. The attackers ordered her to lie down and disconnected her alarm by cutting it with a panga. They demanded money and took Ksh. 15,000/= from her handbag. They cut her on the left hand with a panga.

4. One of the attackers, whom she identified as the 2nd appellant, kicked her repeatedly during the course of his interrogation and made boastful utterances that they had perpetrated such crimes for a considerable period without apprehension. He directed the 1st appellant to ransack the premises. The assailants took various items including her mobile phone, her son's mobile phone, computer equipment, sufurias, shoes, slippers, maize and other household effects. Prior to their departure, they restrained PW1 in the bathroom. They also tied up her housemaid, Rebecca Musieka (PW2). The lights were on throughout the incident which lasted approximately two hours, enabling both PW1 and PW2 to see the attackers clearly.

5. On 19th September, 2012, acting on information from police informers and having traced the suspects using mobile phone data, police conducted a raid at Grassland Estate, Kericho in response to a series of robberies in the area. The appellants were arrested at their rented premises. Various items were recovered from their room including the computer monitor, keyboard, mouse, mobile phones, sufurias, shoes, maize and other household items. Hellen Chepkorir (PW3), who had rented the room to the appellants on 31st August, 2012, witnessed the recovery and signed the search certificate. On 20th September, 2012, an identification parade was conducted by CIP Abdirahman Mohammed (PW4) at Kericho Police Station. Both PW1 and PW2 positively identified the appellants by touching them during separate parades. Consequently, the appellants were arraigned and charged in court.

6. In their sworn statements, the appellants denied taking part in the robbery. The 1st appellant maintained that he was a second- hand clothes trader and the items recovered were his household belongings. The 2nd appellant stated he was a

supervisor for

Unilever Tea Development and the recovered items belonged to him. Both claimed their photographs had been shown to the witnesses before the identification parade, rendering it improper. They maintained they were framed for offences they did not commit.

7. Upon weighing the evidence, the trial court found the appellants guilty of the main count of robbery with violence. They were convicted and sentenced to death. However, as the appellants were already serving a death sentence from a prior conviction, the sentence was held in abeyance.
8. Aggrieved with their convictions and sentence, the appellants preferred appeals before the High Court which were dismissed vide a judgment dated 3rd October, 2019.
9. The learned Judge of the High Court observed that PW1 had switched on electric and fluorescent lights, the perpetrators did not cover their faces, and they stayed in the house for about 2 hours giving PW1 and PW2 ample opportunity to observe them clearly. The learned Judge found that the identification parade was properly conducted in accordance with Police Standing

Orders, that the appellants were found in recent possession of items recently stolen and were unable to give an account of how they came into possession of them, and that the defences were mere denials which did not displace the strong prosecution evidence. Accordingly, the High Court upheld the conviction and sentence.

10. Dissatisfied, the appellants have now appealed to this Court on five grounds which may be summarized as follows:

    a. That the prosecution failed to prove the charge beyond reasonable doubt;
    b. That the identification parade was improperly conducted;
    c. That the doctrine of recent possession was improperly invoked;
    d. That their defence was disregarded; and
    e. That the sentence of death is harsh and unconstitutional.

11. At the hearing, the appellants were represented by learned Counsel Sanjay Bhansali, who relied on written submissions. The respondent was represented by Mr. Omutelelma, learned Senior Prosecution Counsel, who also filed written submissions which he relied on.

12. We have carefully considered the grounds of appeal, the written submissions by both parties, and the record of appeal. The main issues for our determination are:

    i. ***whether the identification evidence was reliable;***
    ii. ***whether the doctrine of recent possession was properly invoked;***
    iii. ***whether the appellants' defence was considered; and***
    iv. ***whether the sentence is appropriate.***

13. The appellants contend that the identification evidence was unreliable as the incident occurred at night, witnesses failed to give proper descriptions, and the identification parade was improperly conducted with photographs being shown to witnesses beforehand.

14. In **Wamunga v Republic [1989] KLR 424**, this Court emphasized the need for caution when considering identification evidence and set out factors to be examined: the length of observation, distance, lighting conditions, prior knowledge of the accused, and any special reasons for remembering the accused.

15. The record shows that this was not a case of fleeting glimpse

identification. PW1 switched on electric lights in her bedroom

and fluorescent lights in the corridor immediately upon realizing there were intruders. The lights remained on throughout the two hour ordeal. The robbers did not cover or conceal their faces. PW1 and PW2 were in close proximity to the appellants during this extended period. The 2nd appellant repeatedly kicked PW1 while questioning her, and gave instructions to the 1st appellant who ransacked the house. These were sustained observations under adequate lighting at close range.

16. The learned Judge of the High Court properly found: "*The perpetrators did not cover their faces. They stayed in the house for about 2 hours and so PW1 and PW2 were able to see them clearly*."

17. Regarding the identification parade, PW4 testified that he followed Police Standing Orders in conducting separate parades for each appellant, that the appellants signed the parade forms without raising objections at the time and that the complaints now raised appear to be afterthoughts.

18. The appellants contend that PW2 was shown photographs of

the 2nd appellant before the identification parade, which vitiated the parade. The High Court acknowledged this concern, noting that

PW2 had indeed testified in cross-examination that she was shown photographs before the parade. However, the learned Judge found that this irregularity did not fatally undermine the prosecution case. Had PW2's evidence been the only evidence linking the 2nd appellant to the offence, there would have been cause for concern. However, it was corroborated with PW1's identification (who had not been shown photographs), the strong primary identification at the scene under favorable lighting conditions over 2 hours and the recovery of stolen items from the appellants' residence which are clear testimonies, placing the appellants at the scene.

19. We agree with the approach taken by the High Court. The primary identification at the scene was the critical evidence. PW1 and PW2 observed the appellants at close range under electric and fluorescent lighting for approximately 2 hours. The identification parade, while procedurally important, served only to confirm what had already been established at the scene. Any irregularity concerning PW2's viewing of photographs was outweighed by the totality of the evidence. We therefore find no

error in the concurrent findings of both courts below that the identification evidence was reliable and credible.

20. On the second issue, the appellants challenge the application of the doctrine of recent possession, arguing that most items were ordinary household goods, that ownership by the complainant was not proved without receipts, and that they provided explanations for their possession.

21. In **Isaac Ng'ang'a Kahiga v Republic, Criminal Appeal No. 272 of 2005**, this Court held that before relying on the doctrine of recent possession, four elements must be established: First, the property was found with the suspect; second, the property is positively the property of the complainant; third, the property was stolen from the complainant; and lastly the property was recently stolen from the complainant.

22. The first element is not in dispute. PW3 testified that she rented a room to the appellants on 31st August 2012. On 19th September 2012, police recovered the stolen items from that room in her presence. Both appellants signed the search

certificate

23. On the second element, PW1 identified the computer monitor by unique inscriptions written by her child: "*Kenya, Kericho Primary, Bii*". She identified her Samsung phone by its cover and her son's Nokia phone. She identified six sufurias, shoes by size and color, and maize in a distinctive "Unga Feeds" sack. The appellants' argument that receipts were required is misconceived. The appellants' argument that receipts were required is misconceived. The law does not mandate any particular form of proof for establishing ownership.

24. In **Eric Otieno Arum v Republic [2006] eKLR**, this court held that for the doctrine of recent possession to apply, there must be proof that the property 'is positively the property of the complainant.' PW1's identification of the items through unique inscriptions ('Kenya, Kericho Primary, Bii'), distinctive features (phone covers, maize in 'Unga Feeds' sack), and the totality of items matching those stolen just 2-3 days earlier constitute sufficient positive proof of ownership.

25. The third element, that the property was stolen is established by the testimony of PW1 and PW2. Lastly, the fourth element that

the property was recently stolen from the complainant is clearly met, as the robbery occurred on 16th /17th September 2012 and recovery was made on 19th September 2012, a mere 2-3 days later.

26. Once these four elements are established, Section 111 of the Evidence Act places an evidential burden on the accused to explain their possession. The appellants' explanation that these were their household belongings was unsupported by any evidence. They provided no receipts, no witnesses, no documentation. They could not explain the inscriptions on the computer monitor or the suspicious coincidence of possessing all items matching those stolen from PW1 days earlier.

27. Both the trial court and High Court found the appellants' explanations evasive and unconvincing. We see no reason to disturb these concurrent findings of fact. The doctrine of recent possession was properly invoked.

28. The appellants contend their defence was disregarded. This is not borne out by the record. The trial court in its judgment set out the defence evidence in detail before analyzing and

rejecting

it. The High Court similarly considered the defence and found it consisted of mere denials that did not displace the prosecution evidence. Rejection of a defence after proper consideration and analysis is not the same as disregarding it. Consequently, this ground lacks merit.

29. Having considered all the grounds of appeal against conviction, we are satisfied that the prosecution proved its case beyond reasonable doubt, the identification evidence was reliable, the doctrine of recent possession was properly applied, and the defence was properly considered and rejected. The appeal against conviction fails.

30. The final ground relates to sentence. The trial court sentenced the appellants to death, treating the sentence as mandatory under **Section 296(2)** of the Penal Code. The High Court upheld this sentence.

31. In **Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae), Petition E018 of 2023 [2024] KESC 34 (KLR),** the Supreme Court clarified that the death sentence under

Section 296(2) of

the Penal Code for robbery with violence remains valid and constitutional.

32. In the present case, both courts below correctly imposed the death sentence as prescribed by law. We therefore see no basis to upset the concurrent findings of the two courts below. We agree that the death sentence is appropriate, legal and lawful. In the circumstance, this ground fails as well.

33. In the end, the appeal before us lacks merit and it is accordingly dismissed.

Dated and delivered at Nakuru this 30th day of January, 2026.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR