IN THE COURT OF APPEAL AT KISUMU

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU JJ.A.)

CRIMINAL APPEAL NO. 80 OF 2018

BETWEEN

FESTUS ATOLA AMBUCHI......................................APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma, (Muchemi & Onyacha, JJ.) dated 21st July, 2011

in

HCCRA. No. 20 OF 2008)

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JUDGMENT OF THE COURT

[1] This is a second appeal from the conviction and sentence of the appellant, **Festus Atola Ambuchi**, by the Chief Magistrate's Court at Bungoma in Criminal Case No. 2999 of 2006. The appellant had been charged with the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code. The particulars of the offence were that on 5th December 2006, along Kiminini-Ndalu Road in Bungoma District, the appellant jointly with others not before the

court while armed with dangerous weapons namely a firearm robbed Philip Ngugi of motor

vehicle registration Number KAN 167 F, Nissan Saloon, Mobile phone Nokia 1100, cash 2000/= all valued at Kshs.358,000/= the property of the said Philip Ngugi and at or immediately before or immediately after such robbery used actual violence on the said Philip Ngugi.

[2] The appellant entered a plea of not guilty and his trial soon thereafter ensued. The facts as presented during the trial were that on 5th December 2006, the complainant, Philip Ngugi (PW1), a taxi driver, was hired by a customer who turned out to be the appellant to transport his allegedly ailing mother to hospital at a fee of Kshs. 700/=. Along the way however, and near Ndalu forest, the appellant asked PW1 to stop the vehicle so that he could get the patient. He got out and soon thereafter, emerged with three men, one of whom was armed with a pistol. PW1 was threatened, forced into the backseat and the appellant took control of the motor vehicle. He was thereafter frog marched into the Ndalu forest tied up, robbed of his jacket, mobile phone, and 2000/= in cash. The appellant and his cohorts thereafter drove off in his motor vehicle in a different direction. Thirty or so minutes later, PW1 was rescued by a passerby, Maurice Agama Opiyi (PW2).

[3] PW2 recalled that while grazing his cattle in the forest he

stumbled

upon PW1 who had been tied and blindfolded and freed him. He had

also earlier on seen the appellant with three others emerge from the forest and drive away in PW1's stolen vehicle. PW3, Paul Rotich and PW 5 Cpl. Justus Walucho, both police officers were on the same day on police patrol when they came across a stationery motor vehicle in the middle of the road. On checking, the appellant who was the sole occupant and apparently tipsy attempted to flee from the motor vehicle but was pursued, arrested, escorted to the police station and charged with the traffic offence of obstruction. However, after the details of the robbery involving the subject motor vehicle and the involvement of the appellant emerged, the charge was enhanced to one of robbery with violence.

[4] PW5, IP Peter Okello was detailed with conducting police identification parade involving the appellant. He did so and PW1 was able to pick out the appellant as one who had hired him to take his ailing mother to hospital and only to turn on him midway the journey and robbed him of his motor vehicle in cohorts with others

[5] PW6 PC John Melly, the investigating officer, pieced up the evidence and being persuaded that the evidence gathered so far was sufficient to mount a prosecution of the appellant for the offence of Robbery with violence did so on 8th December 2006.

[6] In his defence, the appellant gave an unsworn statement denying the charge. He claimed that on the material day he had been drinking *chang'aa* and on his way home at about 8.45pm bumped into police officers who were on patrol. When searched, he was found in possession of a bottle of *Chang'aa* and he was then arrested and escorted to the police station who subsequently falsely implicated him in the robbery.

[7] The trial court, after evaluating the evidence, found that the prosecution had proved its case beyond reasonable doubt. It held that PW1's testimony was credible, that the identification parade was properly conducted, and that the recovery of the stolen motor vehicle in possession of the appellant corroborated the PW1's account. The appellant was accordingly convicted of robbery with violence and sentenced to death.

[8] The appellant, dissatisfied with both the conviction and sentence, lodged an appeal in the High Court of Kenya at Bungoma. His grounds of appeal were that: the trial court erred in relying on identification evidence that was not free from possibility of error, the evidence of the prosecution witnesses was contradictory, the defence was not adequately considered, and that the sentence imposed was harsh and

unconstitutional.

[9] The High Court, (Muchemi & Onyancha JJ.) upon re-evaluating the evidence, dismissed the appeal on conviction and partially allowed the appeal on sentence. It held that the PW1 had ample opportunity to identify the appellant during the robbery, that the identification parade was properly conducted, and that the recovery of the stolen vehicle in possession of the appellant, so soon after the robbery provided strong corroboration of his participation in the crime. The court further found that the defence offered was a mere denial and did not displace the strong prosecution's case. In the ultimate, it upheld the conviction but varied the sentence holding albeit wrongly, that "**Our law does not condone the punishment of death. We accordingly convert the appellant's death sentence to that of life imprisonment".**

[10] It is against that decision of the first appellate court that the appellant lodged this second and perhaps last appeal before this Court. The appellant contended that the first appellate court abdicated its duty of re-evaluating the entire evidence tendered during the trial with anxious care, before drawing its own conclusions. He further complained that the first appellate court erred in failing to determine whether the motor vehicle in question was a Toyota Saloon or a Nissan Saloon, its color, or whether any

fingerprints were lifted by the scenes

of crime personnel or verified by forensic expert evidence.

[11] The appellant also asserted that the court misdirected itself by relying on the weakness of the defence rather than weighing the inadequacy of the prosecution's case in upholding the conviction. Additionally, he complained that the court failed to establish inconsistencies in the evidence of PW1 and PW2 and improperly transferred the onus of proof onto him through the evidence of PW5 and PW6. He maintained that the court ought to have embraced the principles of circumstantial evidence to find that several co-existing circumstances weakened or destroyed the inference of guilt drawn from the doctrine of recent possession. Finally, he contended that the court erred in ignoring or rejecting his defence, which clearly indicated that he was an innocent victim of circumstances after being arrested from a drinking spree.

[12] During the plenary hearing of this appeal, the appellant was present from Manyani maximum prison, being represented by **Mr. Munuang'o**, learned counsel while **Ms. Mwaniki**, learned Assistant Director of Public Prosecutions appeared for the respondent. Both counsel opted to rely on their respective written submissions with limited oral highlights.

[13] Counsel for the appellant submitted that the first appellate court

abdicated its duty of evaluating the entire evidence tendered in the trial

court with anxious care, failed to assess relevant inconsistencies and contradictions, and did not properly weigh conflicting evidence before drawing its conclusions, thereby misdirecting itself in law.

[14] He further contended that the court erred in failing to determine whether the motor vehicle in question was a Toyota Saloon or a Nissan Saloon, its color, or whether any fingerprints were lifted and analyzed by forensic experts to verify who had handled the motor vehicle at the time of recovery. That the court also failed to appreciate that evidence led was at variance with the charge sheet and in particular with regard to when the offence was committed. Whereas the charge sheet alleged that it was committed on 5th December 2006 yet the plea was taken on 8th June 2006, a whole six months before the alleged commission of the offence.

[15] Counsel for the appellant also argued that the trial court misdirected itself by relying on the weakness of his defence rather than weighing the inadequacy of the prosecution's case before entering the conviction. He maintained that the first appellate court failed to establish inconsistencies in the evidence of PW1 and PW2 and improperly shifted the burden of proof onto him through the testimonies of PW5 and PW6. He invoked **Richard Munene v**

Republic

[2018] eKLR, where this Court held that substantial contradictions

and inconsistencies in the prosecution's evidence must be resolved in

favour of the accused.

[16] Counsel submitted that the trial court ought to have embraced the principles of circumstantial evidence, which would have revealed several co-existing circumstances weakening or destroying the inference of guilt drawn from the doctrine of recent possession.

[17] Finally, counsel contended that the court erred in ignoring or rejecting the appellant's defence, which clearly showed that he was an innocent victim of circumstances as he was arrested as he came from a drinking spree. He also argued that the appellant's right to legal representation was violated, citing **Thomas Alugha Ndegwa v Republic [2016] eKLR, David Macharia Njoroge v Republic [2011] eKLR** and **Karisa Chengo & 2 Others v Republic [2015] eKLR**, where this Court held that legal representation is essential in capital offences so as to prevent substantial injustice to an accused. Counsel, in the ultimate urged this Court to hold that the prosecution failed to prove its case against the appellant beyond reasonable doubt; that his constitutional rights were violated; that the conviction and sentence were therefore unsafe; and allow the

appeal as prayed in the memorandum of appeal.

[18] Counsel for respondent in opposing the appeal submitted that the prosecution proved its case beyond reasonable doubt. He relied on **Miller v Ministry of Pensions [1947] 2 All ER 372**, where Lord Denning explained that proof beyond reasonable doubt does not mean proof beyond any shadow of doubt but must carry a high degree of probability. He further cited **Johana Ndungu v Republic [1996] eKLR**, which set out the ingredients of robbery with violence under **Section 296(2)** of the Penal Code, namely that the offender is armed with a dangerous weapon, is in the company of one or more persons, or uses violence at or immediately after the robbery, which ingredients, counsel maintained were all proved. Counsel, in particular pointed out that the evidence of PW1 established that the appellant in the commission of the offence was in the company of others, one of whom was armed with a pistol, and that he was tied up and assaulted, thereby satisfying all the aforesaid statutory ingredients.

[19] On the doctrine of recent possession, counsel submitted that the appellant was found in possession of the stolen motor vehicle shortly after the robbery and failed to give any reasonable explanation for his possession. He cited **Eric Otieno Arum v Republic [2006] eKLR** and **Paul Mwita Robi v Republic**, **KSM,**

Criminal Appeal No 200 of 2008,

where this Court held that once an accused is found in possession of

recently stolen property, the burden shifts to him under **Section 111** of the Evidence Act to explain how he came into possession of the subject stolen property. Counsel argued that the appellant's silence and failure to discharge this burden entitled the court to draw the inference of his guilt.

[20] Addressing the alleged contradictions, counsel submitted that there were no material inconsistencies in the prosecution's case, and any minor discrepancies were satisfactorily explained and did not go to the root of the prosecution case. He therefore urged the Court to disregard them just like the two courts below.

[21] On the appellant's defence, counsel submitted that the statement was unsworn and uncorroborated, and therefore carried little or no probative value at all. He cited **Section 151** of the Criminal Procedure Code, which requires evidence to be given on oath, and relied on **Jamaal Omar Hussein v Republic [2019] eKLR** and **May v Republic [1981] KLR,** where it was held that unsworn statements are not strictly evidence and must be treated with caution unless they are corroborated. Counsel argued that the appellant's defence amounted to mere allegations and did not displace the strong prosecution's case.

[22] In conclusion, counsel submitted that the prosecution

discharged

its burden of proof beyond reasonable doubt, that the conviction was

proper, and that the sentence was lawful. He therefore urged this Court to dismiss the appeal for want of merit.

[23] This is a second appeal. By dint of **Section 361** of the Criminal Procedure Code, our remit is confined to consideration of matters of law only; we do not re-evaluate and re-weigh evidence as required of first appellate court, nor do we disturb concurrent findings of fact by the two courts below unless it is shown that those findings were based on no evidence, were made on the basis of misapprehension of the evidence or law, or that the courts took into account matters they ought not to have considered or failed to consider matters they should have, thereby making the decision plainly wrong in law. See **Karingo v Republic [1982] KLR 213, Karani v Republic [2010] 1 KLR 73**, and

M'Riungu v Republic [1983] KLR 455. It is with that refrain and legal framework, that we shall approach this appeal.

[24] The issues of law for our determination in this appeal are three in our view: whether; the first appellate court misdirected itself in law in its evaluation of the evidence tendered, the doctrine of recent possession was properly invoked; and whether lack of legal representation vitiated the proceedings.

[25] However before we commence our discourse on the above

issues,

we need to dispose of the issue of variance in dates between when the

offence was committed and when the plea was taken. We note that the issue was first raised in the submissions of counsel for the appellant. Indeed, when the appeal first came up for hearing on 11th July 2024**,** it was adjourned for that reason with the court noting thus **"... Mr Munuang'o has pointed out that there are glaring inconsistencies in the proceedings and the charge sheet, this requires confirmation from the original record of the trial court. As the original court file is not available today, hearing of the appeal is adjourned to 17th July 2024, for the original trial court file to be produced".** What followed was a game of musical chairs between the Deputy Registrars of this Court and the Deputy Registrars of the High Court of Kenya at Bungoma and Eldoret, the end game being that the said Record could not be availed. On this basis and with the concurrence of both counsel, when the appeal came before us for plenary hearing, we opted to proceed with the hearing of the appeal, the absence of the said original record aforesaid notwithstanding.

[26] Having carefully reviewed the record, we are satisfied that the assertion that the plea was taken long before the commission of the offence is clearly misplaced. All the witnesses who testified agreed on one thing, that the events leading to the commission of the

events

occurred on 5th December 2006. Indeed, even the appellant in his own

statement of defence refers to his arrest on the same date and subsequent arraignment in court two days later. It is not therefore possible as claimed by the appellant that the plea was taken long before the commission of the offence.

[27] To our mind the confusion in the dates when the offence was committed and when the appellant was arraigned in court was purely typographical error and excusable. And even if it was true, we do not think that it would have affected the overall outcome of the appeal as we would have rejected it anyway on the basis that it was being raised for the first time in this second appeal. It is trite that this Court is not open to entertaining and embracing an issue being raised for first before it in a second appeal and specifically by way of written submissions. See **Ogolla V Republic [2025] KECA 15 (KLR)** and **Makau & Anor V Republic [2025] KECA 661 (KLR).** In any event, what prejudice did the appellant suffer by the misdescription of dates? We discern none!

[28] Turning to the substance of the appeal, the appellant laments that the first appellate court failed in its duty to properly evaluate the evidence tendered in the trial court and in particular on the issues of identification, contradictions, and treatment of the defence. We note

that the two courts below found that PW1 had ample opportunity to

observe the appellant in broad daylight during when they were negotiating the terms of hire of the motor vehicle , the drive to Ndalu forest, the walk into the forest; all of which took more than thirty minutes; that appellant and his cohorts were not disguised at all; that the identification parade was conducted in accordance with the Force Standing Orders and resulted in PW1 positively picking out the appellant; and that PW2's account of seeing the appellant at the steering wheel and rescuing PW1 corroborated the sequence of events.

[29] The law requires caution and circumspection when dealing with evidence of visual identification and demands close scrutiny of the circumstances to eliminate the possibility of error: **see <u>Wamunga v Republic</u> [1989] KLR 424; <u>Maitanyi v Republic</u> [1986] KLR 198**. In the circumstances of this appeal, the two courts below addressed the duration, lighting conditions, proximity, and consistency of PW1's opportunity to observe, and further tested the dock identification with a parade compliant with the Standing Orders, which the appellant consented to and on which he raised no contemporaneous objection. This evidence of identification was further supplemented with the evidence of PW2 who witnessed the unfolding events at a distance and later saw the appellant on the

steering wheel of the stolen motor vehicle.

[30] Minor discrepancies about the colour of the clothes that the appellant wore during the robbery or the motor vehicle type and shade of colour, were all considered by both courts, which found them immaterial as to undermine the core issues in the case, consistent with **Richard Munene v Republic [2018] eKLR and Kiarie v Republic** **[1984] KLR 739,** which distinguish trifling divergences from fundamental inconsistencies. It is also not lost on us that some people are colour blind or do not know how to differentiate colours specifically of clothes and vehicles with multiple colours. Nonetheless we note that the first appellate court restated the cautionary principles and applied them to the facts, and its concurrence with the trial court's findings was tethered to evidence.

[31] As to the defence, an unsworn statement carries limited probative value as rightly submitted by counsel for the respondent. However, if corroborated, courts may accord it weight commensurate with its consistency with the proved facts. See **May v Republic (1981) KLR;** and **Jamaal Omar Hussein v Republic [2019] eKLR**. Both courts properly treated the defence as a mere denial that did not displace the strong prosecution case. Following our thorough review of the record we are of considered view that no

error of law is disclosed on this issue.

[32] On the doctrine of recent possession, we note that counsel for the appellant did not make any submissions on this issue. However the principles for the invocation of the doctrine of recent possession are now well settled: before a conviction founded on recent possession can be sustained, the prosecution must positively prove that the stolen property was found with the accused, that it was the complainant's property, that it was stolen, and that it was recently stolen; thereafter, if all the aforesaid are proved, the burden under **Section 111** of the Evidence Act falls on the accused to explain the possession of the property in a manner consistent with his innocence. See **Eric Otieno Arum v Republic** **(supra); Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic Cr. App. No. 272 of 2005;** *and* **Paul Mwita Robi v Republic (supra)**. The two courts below determined that all the above requirements were met. Indeed, the appellant was found in PW1's motor vehicle, barely five hours of its robbery, sitting at the wheel, attempted to flee when confronted, but was arrested; ownership and theft of the motor vehicle were proved; and no doubt the timing qualified as "recent".

[33] The appellant's explanation that they came across a stationary

motor vehicle while the police officers were escorting him to the police station after arresting him from a *chang'aa* den and who later falsely

implicated him in the robbery, was rejected as incredible pitted against the arresting officers' accounts and the sequence of events linking the motor vehicle to the robbery. The first appellate court, in our view correctly applied **Section 111**, and drew the permissible inference where no reasonable explanation was offered. We see no legal misapprehension of the doctrine, nor any misapplication that would warrant our interference with concurrent findings on the issue by the two courts below.

[34] On the right to legal representation and alleged substantial injustice, the appellant urged that being charged with a capital offence, he was entitled to state-funded counsel, and failure to inform or assign him counsel vitiated the proceedings all the way. **Article 50(2)(h)** of the Constitution guarantees assignment of counsel at State expense where substantial injustice would otherwise result. This Court in **David Macharia Njoroge v Republic (supra)**, recognized that right especially with regard to capital offences but cautioned against retroactive application and insisted that each case must turn on whether substantial prejudice occurred; and in **Karisa Chengo & 2 Others v Republic (supra)** it was clarified that substantial injustice arises where the accused is unable to afford legal representation and

the trial is compromised in one way or another.

[35] The trial in this case was undertaken under the rested constitutional dispensation or order, and the first appellate court assessed the fairness of the proceedings based on the record which included the opportunity for the appellant to cross-examine witnesses, his participation in the proceedings, and the weight of evidence hence finding no prejudice that could have compromised the trial or the first appellate court's findings. On second appeal, the question is strictly one of law: whether the absence of State-assigned counsel, in context, rendered the proceedings a nullity. Given the non-retroactivity of the principle and the requirement to demonstrate actual substantial injustice, and in the light of strong prosecution evidence meeting the statutory ingredients of robbery with violence as set out in **Johana Ndungu v Republic (supra),** we are not persuaded that a legal infirmity arose that vitiated the concurrent conclusions.

[36] In the result, and mindful of the narrow compass of a second appeal and the respect due to concurrent findings supported by evidence, we find no misdirection of law by the first appellate court on identification of the appellant, contradictions in the prosecution's case, the application of the doctrine of recent possession, or the treatment of the appellant's defence.

[37] On the whole, we are satisfied that this appeal is devoid of merit and is accordingly dismissed.

Dated and delivered at Kisumu this 13th day of February, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR