IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GATEMBU, MURGOR & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 26 OF 2016

BETWEEN

BONFACE ATONDOLA YABATA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (Chitembwe & Dulu, JJ.) dated 11th February 2015 and delivered by (Sitati, J.) on 12th March 2015

in

H.C.CR.APP. No. 208 of 2013)

****

JUDGMENT OF THE COURT

1. The appellant, Bonface Atondola Yabata, was charged with two counts of robbery with violence contrary to section 269(2) of the Penal Code. The particulars of the offence on the first count were that on the night of 27th/28th July 2011 at 2.40 a.m., at Ikhonyelo village, Lubao Sub-location, Kakamega, jointly with others not before the court robbed Douglas Arkhama Matasio of TV make Sonny 14 inch, cell phone make Nokia 6233, wallet porch, assorted clothes, four pairs of shoes, Nakiva radio, Sonnetec radio and cash money Kshs.15,000.00 all valued at Kshs.70,800.00 and at the time of such robbery used personal violence to the said Douglas Arkhama Matasio.

2. On the second count, the particulars of the offence were that on the same night at Ikhonyelo village, Lubao Sub-location, Kakamega, jointly with others not before the court robbed Hesborn Shihembekho Mademba-one pair of shoes, cell phone Samsung, cell phone Nokia C117, electrical torch, and axe and one panga (machete) also cash money Kshs.500.00 all valued at Kshs.11,600.00 and at the time of the robbery used personal violence to the said Hesborn Shihembekho Mademba. He faced two alternative charges of handling stolen goods contrary to section 322(1)(2) of the Penal Code.

3. He was tried before the Magistrate's court at Kakamega and convicted on the two counts of robbery. The trial court was satisfied that the appellant was positively identified by the complainants, Douglas Arkhama Matasio (PW1) and Hesborn Shihembekho Mademba (PW2). That court also invoked the doctrine of recent possession being satisfied that shortly after the robbery, the appellant was found in

possession of the complainants' goods that were stolen during the robbery.

4. On appeal, the High Court upheld the convictions on the basis of the doctrine of recent possession but parted company with the trial court on identification having found that the complainants, "…*did not positively identify the appellant*."

5. In this second appeal the appellant complains that the courts below erred; that the case against him was not proved to the required standard; that in any event, having regard to the decision of the Supreme Court in ***Francis Karioko Muruatetu and another vs. Republic [2017] eKLR***, the death sentence, which the trial court said was the only sentence available, should be set aside.

6. Urging the appeal before us, learned counsel for the appellant, ***Mr. O. Omondi***, submitted that for a conviction to be based on the doctrine of recent possession, it must be established that the property must be found or recovered from the suspect; the property must positively be the complainant's; was stolen from him; and that the same was recently stolen from the complainant. In that regard, counsel referred to the decision of this Court in ***David Mugo Kimunge vs. Republic [2015] eKLR,*** among others.

7. According to counsel, the necessary elements for application of the doctrine of recent possession were not established; and that the appellant offered a plausible defence that the alleged stolen items were planted on him.

8. In the alternative, counsel for the appellant submitted that considering the age of the appellant, the number of years he has spent in jail, and the fact that the alleged stolen items were returned to the complainants, the death sentence imposed should be substituted with a custodial sentence. Reference was made to the decision in ***Francis Karioko Muruatetu and another vs. Republic*** (above).

9. Opposing the appeal, ***Mr. E. Kakoi*** learned Principal Prosecution Counsel began by pointing out that on a second appeal such as this, the jurisdiction of the Court is confined to matters of law; that the prosecution did prove its case against the appellant to the required standard and all ingredients of the offence of robbery with violence established. Although the High Court found that the complainants did not positively identify the appellant, counsel nonetheless submitted that the appellant was positively identified.

10. As regards application of the doctrine of recent possession, it was submitted that there was cogent evidence that the stolen items were recovered from the appellant soon after the robberies and the same were confirmed to belong to the complainants.

11. With regard to the sentence, counsel conceded that the Court may interfere with the death sentence. He submitted that a custodial sentence of not less than 20 years should be given.

12. We have considered the appeal and submissions. This being a second appeal, our mandate is limited under Section 361(a) to matters of law. In effect, unless it be demonstrated to us that the first appellate court considered matters it ought not to have considered or that it failed to consider matters it ought to have considered or that looking at the entire decision that court was plainly wrong, we cannot interfere. If it is so demonstrated, our considering such matters amounts to considering matters of law in which case it would be accepted that the first appellate court failed to revisit the evidence that was before it afresh, analyse it and evaluate it as is required of it in law. See ***Njoroge vs. Republic [1982] KLR 388*** and ***Chemagong vs. Republic [1984] KLR 611***.

13. Bearing those principles in mind, the only issue for determination in this appeal is whether the prosecution proved its case against the appellant to the required standard, and in particular, whether the courts below properly invoked the doctrine of recent possession.

14. The background in brief is that on the night of 27th/28th July 2011, Douglas Arikhama Matasio (PW1) and his uncle Hesborn Shihembekho Mademba (PW2) were asleep in their respective neighbouring homes in Ikonyero village. Robbers broke into their houses, attacked them and robbed them of their

possessions.

15. In the case of PW1, he was asleep in his house alone when he heard a bang at his grandfather's house. Shortly thereafter, the door to his house was also hit with a stone, robbers armed with pangas and torches entered his house, tied him, ordered him to sleep on the floor, demanded Kshs.100,000.00 or else threatened to kill him. They took his cell phones, Nokia 6322 and Motorola 27, his wallet with Kshs.5,000, his National Identity card and his ATM cards. His clothes, two radios and shoes were also taken. PW1 was then taken outside and then escorted to his uncle's house (PW2) who was ordered to open the house.

16. The same night at about 1.30 a.m., PW2 heard his nephew, PW1, asking him to open his house as the police wanted to see him. He declined to open. Unable to break down the main door, the robbers entered the house from the kitchen side. On flashing his torch, he saw about 8 people armed with pangas, rungus and torches. On entering the house, the robbers ordered him to surrender, hit him with a panga and as a result he sustained injuries. His child had at this time ran off and alerted neighbours who started screaming forcing the robbers to go away. In the process, the robbers carried with them PW2's torch, axe from the kitchen, panga, his wife's Nokia cell phone and his work boots.

17. Throughout that ordeal, PW2's wife, May Super Chuma (PW3) was hiding in the roof and after the robbers left, she accompanied her husband to hospital where PW6, Duncan Miningwa, a clinical officer at Kakamega Hospital attended to PW2's injuries and completed a P3 form. She stated that the robbers took away a panga, torch, Nokia phone, Samsung phone, axe, Kshs.500.00, and her husband's company boots.

18. Administration Police Constable Erick Okinda (PW7) was on duty on the night of 27th/28th July 2011 at Lubao AP Post. A report was received that a gang of robbers were terrorizing residents at Ikonyero village. He went to the scene and advised PW2, who had sustained injuries from the attack, to go to hospital. PW2 informed him that robbers had forced their way into his house and had taken Kshs.500.00, his company boots, raincoat, an axe and panga.

19. At PW1's home, PW7 was informed that the robbers had also stolen numerous items as narrated by PW1. He went on to say that thereafter, at about 5.30 a.m. they left the scene and, on the way, found "*a suspect waiting to board a motor vehicle*" carrying a bag. That they ordered him to stop and on searching his bag found 2 pangas, electric cable extension, 2 small radios, 1 pair black boots, 2 pairs of trousers, 2 white boots, I navy blue rain coat and some t-shirts. The suspect had his national identity card from which they identified him as the appellant. They returned to the AP camp where PW1 and PW2 subsequently identified their properties amongst those found in the bag in the appellant's possession. The appellant was then taken to Kakamega Police Station.

20. Upon completing his investigations and recording witness statements, the investigating officer, Police Constable Moses Mungai (PW5) of Kakamega Police Station, charged the appellant with the offence of robbery with violence when he failed to account how he had come into possession of the complainant's things.

21. In his defence, the appellant stated that he had alighted from a bus at Lubao market and was approaching a cow seller; that on alighting at the bus stop, police officers approached him and enquired from him why he as standing there; that he explained that he was on a mission to buy a cow and had Kshs.23,070.00 in his possession for that purpose; that on discovering that he had money, the police officer escorted him to the police station where he was relieved of the money and asked to leave but declined to do so without his money. He was subsequently charged and saw the alleged stolen items for the first time in court. The appellant produced a bus receipt to support his claim that he had indeed travelled on that day and could not therefore have been at the scene of crime.

22. The trial court was not impressed by the testimony of the appellant. The court preferred the testimony of PW7 who the court found to be candid. In that regard, the trial magistrate expressed,

"I keenly followed the cross examination of the administration police officer who arrested the

accused APC Erick Okinda. Accused is said to have been arrested at 5 a.m., with a bag containing some of the stolen things just about 5 a.m., from the scene of crime (sic) ***and after 3-4 hours after the robbery claims that accused had Kshs. 23,000 which was taken never featured.”***

23. The court observed that the officer (PW7) was candid and that the complainants had identified the things inside the bag which had been stolen from them in the robbery. The trial court found that "*the evidence of recovery is overwhelming against the accused*" and that "*his explanation is neither here nor there*" and "*cannot be believed*."

24. The High Court on its part was equally satisfied that PW1 and PW2 were robbed on the night of 27th July 2011; that it was established that some of the stolen items that were recovered were found in the appellant's possession. The High Court stated:

"It is clear that the appellant was arrested near the scene. It is the evidence of PW7 that the scene was about 200 metres to the place where the Appellant was arrested and about 500 metres to Lubao market. The robbery had taken place at night and the Appellant was arrested at about 5.30am. The contention by the Appellant's counsel that the defence evidence raised some doubt on the prosecution case is not true. We find that the defence case does not raise any doubt. The place of arrest is Lubao just near the scene of crime. There is no suspicion that the stolen items were recovered from another persons *(sic)* ***and planted on the Appellant."***

25. In dismissing the ticket produced by the appellant in support of the claim that he had disembarked from a bus at the time of his arrest, the High Court noted that the ticket was for "*Okambo Express*" and indicated it was fare from Musoli to Kakamega for 28th July 2011, and that the ticket "*does not give the name or the time of the travel*."

26. In effect, there were concurrent findings of fact based on evidence by the two courts below placing the appellant at the scene of crime by reason of his possession of the claimants' property stolen in the course of robbery. As held in ***Karingo vs. Republic [1982] KLR 213***:

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karoti S/O Karanja versus Republic [1956 17 EALA 146]." [Emphasis added]

27. We are ourselves satisfied that there was evidence on the basis of which the courts below found as they did. We have no basis for interfering with those findings. It was proved to the required standard that the stolen property was found with the appellant. It was positively identified by the complainants and was recently stolen from them. See ***Isaac Wanga Kahiga alias Peter Nganga Kahiga vs. Republic, Criminal Appeal No. 272 of 2005***. The doctrine of recent possession was properly invoked. The result is that we uphold the convictions.

28. That leaves the question of sentence. Upon his conviction, the court considered the mitigation by the appellant and stated that the law provides one sentence, namely death, and proceeded to impose it. However, as submitted by counsel, the Supreme Court has since declared in***Francis Karioko Muruatetu & another vs. R. & others***, (Supra) that the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is unconstitutional. This Court has since applied the principle in that case to the mandatory sentence provided under Section 296(2) of the Penal Code. See ***David Ochieng Akoko vs. Republic [2018] eKLR*** and also***Willam Okungu Kittiny, Kisumu Criminal Appeal No. 56 of 2013***.

29. In mitigation before the trial court, the appellant stated that he stayed with his father, has a family and children. Having regard to all the circumstances we set aside the death sentence imposed by the trial court and substitute therefor a custodial sentence of 25 years imprisonment from the date of conviction by the trial court. We allow the appeal to that extent only.

Dated and delivered at Kisumu this 31st day of January, 2020.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR