IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KOOME, SICHALE & KANTAI, JJ,A)

CRIMINAL APPEAL NO. 140 OF 2015

BETWEEN

NICKSON LIGAKHA.....1ST APPELLANT

ERICK NYABERA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court at Kakamega (R.N. Sitati & A.C. Mrima, JJ) dated 31st July 2015 in H.C.CR.A Nos. 82 and 83 of 2014)

****

JUDGMENT OF THE COURT

[1] This is a second appeal against the judgment of the High Court at Kakamega (**R.N. Sitati & A.C. Mrima, JJ**) whereby the appellants' appeal against conviction and sentence was dismissed. The appellants were charged with the offence of robbery with violence contrary to ***section 296(2)*** of the **Penal Code**. The particulars of the charge being that on 5th December, 2013 at Kaluni Sub-location within Kakamega County, ***Nickson Ligakha*** and ***Erick Nyabera***, 1st and 2nd appellants respectively, while armed with offensive weapons namely metal rods, robbed the complainant ***Ibrahim Imbali*** **(PW1)** of one mobile phone make Nokia 1200 valued at Ksh. 2000, five hens valued at Ksh. 2600, and at or immediately before the time of such robbery wounded PW1.

[2] The prosecution case was predicated on two categories of evidence, direct and circumstantial. The direct evidence was recounted by **PW1**, who told the court that on 5th December, 2013 at 9.00pm, he had gone out of his house to answer a call of nature when he was confronted by two men at the door. They flashed a torch at him and one assailant hit him twice on the head and once on the ribs. **PW1 that** said he was able to recognize the first assailant by the torch light and named him as ***Nyabera,*** the 2nd appellant who was at the time wearing a red jumper. The assailants dragged **PW1** back to his house where they made him lie down and tied his hands behind his back with a rope. In the course of the manhandling, **PW1** said he was able to recognize the second assailant as ***Ligakha,*** the 1st appellant.

[3] The 2nd appellant ransacked the house while the 1st appellant stood guard. The thugs stole **PW1's** chickens (5) in number, a mobile phone Nokia 1200, a wallet among other items stated in the charge sheet from **PW1's** house and left him lying down. After the assailants left, **PW1** waited for about 10 minutes, struggled to get up and went to his neighbour one ***Caleb Aura*** **(PW2)** who freed him from the bindings and escorted him back to his house. By that time **PW1** was bleeding profusely from a wound in his head and his shirt was blood stained. **PW2** advised him to sleep and report the matter before the area chief the following morning which **PW1** did report to area assistant chief ***Cornelius Haraka Imbosa*** **(PW3)** and gave the names of the two assailants as ***Ligakha*** and ***Nyabera***.

[4] **PW3** instructed the complainant to report the incident to the police at Eregi patrol base where he was issued with a P3 form which facilitated his treatment at Vihiga District Hospital for the injuries sustained during the attack. A completed P3 form was produced in evidence by ***Dr. Oliver Mito*** **(PW5)** a doctor at Vihiga District Hospital. He testified that the injuries included cuts on the head and swelling behind the ears and he classified them as harm.

[5] As **PW1** had given the names of his assailants, **PW3** looked for the 1st appellant and questioned him about the incident and the 1st appellant disclosed that he and the 2nd appellant had bought some chicken and eaten some, and that the 2nd appellant was in possession of the phone that was stolen from **PW1**. It was the 1st appellant who led **PW3** to the house of the 2nd appellant where **PW1's** phone was recovered. **PW3** took the two suspects to Eregi patrol base and handed them over to the police. The investigating officer ***PC Mathew Mutinda*** **(PW4)**

took possession of the recovered phone and blood stained shirt which were produced at the trial as exhibits and he charged the duo as indicated above.

[6] The applicants pleaded not guilty and after evidence was adduced by the prosecution's witnesses, the learned trial magistrate found the appellants had a case to answer. Both appellants gave unsworn statement of defence and did not call any witness. The 2nd appellant contended that the charges against him were a frame up by the assistant chief who planted the phone on him during the search at his house. The 1st appellant stated that the complainant was his step-father and was framing him because of a land dispute.

[7] The trial court weighed the prosecution evidence against the defense and found the appellants' defence lacking in merit. Besides the direct evidence of identification, the evidence of the 2nd appellant being found in possession of the stolen phone pointed unerringly to both their guilt than their innocence. They were therefore found guilty as charged, convicted and sentenced to suffer death as a consequence.

[8] Aggrieved, the appellants appealed to the High Court against the conviction and sentence faulting the judgment of the trial court on grounds that the evidence of identification was insufficient to support the conviction. After evaluating the matter, the High Court found that the identification was water-tight as the attack took some considerable time, and visibility was facilitated by a powerful torch. Most importantly, the complainant recognized the assailants because they were his neighbours and he referred to them by name when he made the first report to the assistant chief. The court referred to the cases of **Simiyu & Another vs. Republic (2005) 1 KLR 192; Republic vs. Alexander Mutuiri Retere alias Sanda & Others [2006] eKLR** and **Lesarau vs. Republic (1988) KLR 783** where this Court spelt out the principles to bring to bear in a case of identification based on recognition by reason of long acquaintance. The appeal was therefore unsuccessful with the result that both the conviction and sentence were confirmed.

[9] Undeterred the appellants filed the instant appeal which as per the combined memorandums of appeal raised a total fourteen (14) grounds which may be paraphrased and summarized as follows;

> **"That the learned Judge erred in:**
>
> **i. upholding a conviction based on unsafe evidence of recognition;**
>
> **ii. incorrectly applying the doctrine of recent possession;**
>
> **iii. admitting a statement which has been obtained contrary to the Evidence Act;**
>
> **iv. failing to consider the appellants' defense of alibi;**
>
> **v. sentencing the appellants to mandatory death penalty without considering the appellant's mitigation; and**
>
> **vi. failing to re-evaluate the evidence afresh."**

[10] Elaborating on those grounds during the plenary hearing of the appeal, **Mr. Wangoda**, learned counsel for the appellants, relied on the written submissions dated 24th May 2019 where three (3) main issues were raised;

> **(i) that the identification was a dock identification as no identification parade was conducted following the arrest;**
>
> **(ii) that possession of the complainant's phone was not sufficiently proved as required under the doctrine of recent possession; and**
>
> **(iii) that the matter be referred back to the trial court for re-sentencing following the Supreme Court decision in Francis Karioko Muruatetu & another v Republic [2017] eKLR**

[11] Opposing the appeal, **Mr. Muia** learned prosecution counsel for the state, referred to his written submissions dated 22nd July, 2019. On the issue of identification, counsel asserted that the evidence against the appellants was largely that of recognition by **PW1** which was augmented by the fact that he gave their names on making the first report and that stolen items were recovered from the 2nd appellant. On the application of the doctrine of recent possession, it was Mr. Muia's position that the chain of events from the robbery to the recovery of the complainant's phone was sufficient to meet the requirements to prove recent possession. With regard to the death sentence, it was submitted that the ***Muruatetu*** decision ruled the mandatory nature of the death sentence unconstitutional, but did not preclude the imposition of the death sentence in deserving cases such as the present one.

[12] In a brief rejoinder on the submission on sentencing, **Mr. Wangoda** contended that the appellants' mitigation was not considered and that the death penalty was not proportionate to the offence committed.

[13] This is a second appeal and that being so by dint of ***section 361(1)*** of the **Criminal Procedure Code**, only matters of law fall for our determination. As we do so, we also bear in mind that we ought not to interfere with the concurrent findings of fact by the two courts below unless such findings were based on no evidence or they were based on a misapprehension of the evidence, or that the two courts below acted on the wrong principles in making the impugned decision. (See **Kaingo vs. Republic [1982] KLR 213).**

[14] Accordingly and as per the foregoing summary of the matter, we have carefully considered the record of appeal, the submissions and deliberated on the authorities cited. We surmise that the two central issues of law are the identification of the appellants and the evidence of

recent possession as matters that fall for our consideration. We will deal with them seriatim.

[15] On identification of the appellants, this Court has repeatedly emphasized that whenever the case against an accused person depends wholly or to a great extent on the correctness of visual identification, the court must examine closely the circumstances in which the identification by the witnesses came to be made; including the time spent with the accused, the kind of lighting at the time in question and the period between the original observation and the subsequent identification to the police. (See **Wamunga vs. Republic [1989] KLR 424**) With regard to identification by recognition of known persons, the court in **R vs. Turnbull (1973) 3 ALL ER 549** stated as follows;

> **"…Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

This Court gave further directions in **Maitanyi vs. Republic (1986) KLR 198** as follows;

> **"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case, no inquiry of any sort was made…If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description"**

[16] In their judgment, the learned judges fastidiously re-evaluated the identification evidence and stated thus; -

> **"…this court finds that the ordeal must have taken some considerable time. It span from the encounter at the door where PW1 was tied to the ground to being pulled into the house, the assailants demanding for money and eventually searching of the house and thereafter escaping. All these happened when the powerful torch was on and at any point in time at least one of the robbers was near PW1. As PW1was a neighbor to the robbers and so related to one of them, he knew them by appearances and names. He disclosed the names to PW3 when he made a report. He was equally familiar with their voices…"**

Thus the two courts below were clearly aware that mistaken identity can happen even in instances of identification by recognition. However, in this matter, both courts were convinced that there was positive identification based on two facts; first, that the appellants themselves admitted that they were well known to PW1 and the 1st appellant even stated in his defense that PW1 was his step-father; and second, that the source of light was clearly described as a powerful torch with sufficient light. Third, PW1 immediately gave the names of the assailants when he made the first report to **PW3**.

[17] Further the prosecution's case was not only hinged on the evidence of visual identification but was augmented by the evidence of the assistant chief who questioned 1st appellant and was led to recover the stolen phone at the 2nd appellant's home. This evidence was used to infer culpability under the doctrine of recent possession which was set down in **Malingi vs. Republic (1989) KLR 227** as follows;

> **"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 the possession after the prosecution has 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 a 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."**
>
> **(See also Isaac Ng'ang'a Kahiga alias Peter Ng'ang'aKahiga vs. Republic [2006] eKLR).**

[18] To us, the prerequisite conditions set out above were met by the prosecution's evidence as it was proved that the phone which was in 2nd appellant's possession was positively identified by **PW1** as the one that was robbed from him; the lapse of time between the robbery and the recovery of the phone was very short; and the stolen phone was found in the 2nd appellants house thus inferring possession. Furthermore, the 2nd appellant's explanation of how he came to be in possession of the stolen phone was not convincing and was disregarded by the two courts below and rightly so in view of the strong prosecution's case.

[19] This brings us to the second issue, whether the admission allegedly by **PW1** was admissible. In his grounds of appeal, the 1st appellant contended that the evidence incriminating him was obtained contrary to ***section 25A (1)*** of the **Evidence Act** which reads as follows;

> **"A confession or any admission of fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police and a third party of the person's choice"**

In the recent case of **Republic vs. Ahmad Abolfathi Mohammed & Another [2019] eKLR**, the Supreme Court held that there is a distinction between a 'confession' and an 'admission' and stated as follows;

> **"[48] We agree with the appellant that it is a matter of general public importance that the Police are given the freedom to**

carry out investigations with a view to detecting crimes. We also agree with it that interviewing suspects is a standard operating procedure in criminal investigations. In such interviews, Police are entitled to confront suspects with any report they may have received about the suspects' commission or involvement in the commission of a crime and demand an explanation. In response, a suspect may offer an explanation. If it happens that the explanation the suspect gives is an admission of a material, ideally the Police are required to invoke the provisions of Section 25A of the Evidence Act. If they do not, bearing in mind the distinction between an admission and a confession as stated above, such admission is admissible in evidence but, unlike a confession, it cannot on its own found a conviction. It will require corroboration to found a conviction. It would be absurd if admissions made in such circumstances were to be held inadmissible in evidence. It follows therefore that admissions, though not meeting the criteria set out in Section 25A (1) of the Evidence Act, are admissible. In the circumstances, we find that in its holding that "information from an accused person leading to discovery of evidence is not admissible outside a confession…."*, the Court of Appeal equated evidence proceeding from a suspect leading to discovery to a confession.***

[49] **The Court of Appeal noted, quite aptly, that it was never the appellant's case that the respondents had confessed to committing the offences that they were charged with. This appeal therefore, cannot turn on Section 25A of the Evidence Act because the respondents did not make a confession in terms of sections 25 and 25A of the Evidence Act"**

[20] Therefore, the upshot of the Supreme Court's decision is that a confession is a direct acknowledgement of guilt and must be voluntary and must be obtained in conformity with ***section 25*** of the **Evidence Act** and the **Evidence (Out of Court Confession) Rules 2009**. On the other hand, an admission is a statement by the accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tends to prove his guilt, but which, of itself, is insufficient to found a conviction. It is our finding that the 1st appellant's disclosure to **PW3** which led him to the 2nd appellant's house where the phone was found amounted to an admission or an action from investigation from which guilt can be inferred but cannot be a basis for conviction as a stand alone piece of evidence. The appellants referred us to the case of **John Nduati Ngure vs. Republic [2016] eKLR** where it was held that the statements of one accused cannot be used as evidence against a co-accused as it is of poor probative value. As the facts of this case show this is distinguishable as the appellants were not convicted purely on the statements made by the 1st appellant, but rather also based on other strong evidence of **PW1** as corroborated by the evidence of **PW3** regarding what he heard and saw based on his inquiries. For these reasons it goes without saying that this ground of appeal also fails.

[21] On sentencing, it is the appellants' prayer that their mitigation can be considered as the shackles hitherto placed on the judicial officers were unfettered in line with Supreme Court's case in the **Muruatetu (*supra*)** where it was stated thus;

"*[52] We …agree with the High Court's statement in Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness."

Further, while making it clear that it was not replacing judicial discretion, the Supreme Court advised the courts as follows;

"[71] As a consequence of this decision, paragraph 6.4-6.7 of the *[Sentencing Policy* guidelines] are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

a. age of the offender;

b. being a first offender;

c. whether the offender pleaded guilty;

d. character and record of the offender;

e. commission of the offence in response to gender-based violence;

f. remorsefulness of the offender;

g. the possibility of reform and social re-adaptation of the offender;

h. any other factor that the Court considers relevant.

[22] The trial magistrate sentenced the appellants to death for the reason that death sentence was mandatory for the offence of robbery with violence. The High Court also did not interfere with the sentence. In view of the new development in law, the appeal against sentence ought to be interfered with. The mitigation by the appellants was rancorously done before the trial court, understandably as the death sentence was mandatory, it was simply stated that the appellants were first offenders; it is only the 2nd appellant who stated that he had a wife and young children who needed his help. We have taken into account the offence committed and the violence that was visited on the complainant.

[23] Taking the totality of all the circumstances, and as explained above, we dismiss the appeal on conviction but interfere with the sentence which we substitute from death with a term of fifteen (15) years imprisonment from the date of conviction being the 6th of June, 2014.

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

M. K. KOOME

……...……..

JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

S. ole KANTAI

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR