IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO 204 OF 2014

BETWEEN

DANCAN OTIENO OPONDO..........................APPELLANT

AND

REPUBLIC..RESPONDENT

(An appeal from the judgment and sentence of the High Court of Kenya at Kisii (Chemitei & Maina, JJ.) dated 25th November 2014 in H.C.Cr.A 54 of 2012)

JUDGMENT OF THE COURT

1) Dancan Otieno Opondo, the appellant herein, was charged, together with three others with four counts of the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code with one alternative count of handling stolen goods contrary to **Section 322(2)** of the Penal Code. He was also charged with a fifth count of being in possession of public stores contrary to **Section 324(3)** of the Penal Code.

2) Following a trial in the Magistrate's Court at Kisumu the appellant was convicted of two counts of the offences of robbery with violence contrary to **Section 296(2)** of the Penal Code, handling stolen property contrary to **Section 322(2)** of the Penal Code, and being in possession of public stores contrary to section 324(3) of the Penal Code.

3) He was sentenced to suffer death on the two counts of robbery with violence while the sentences on the other charges were held in abeyance. His co-accused were acquitted under **Section 215** of the **Criminal Procedure Code** for lack of sufficient evidence.

4) During the trial the prosecution called a total of nine (9) witnesses. In a nutshell the evidence was that: on 16th April 2011 between 12:30 am and 1:30 am**, Pascalia Taabu Okongo (Pascalia)**, who was the complainant in the third count of robbery with violence, and **Shadrack Mutinda Mutunga (Shadrack)**, the complainant in the second count, were each walking on their way home. **Pascalia** testified that she had her phone, a Nokia1680, a lunchbox and a charger. As she walked, she saw three people approach her and she heard a voice ordering her to lie down. She testified that she thought that they were police officers and she therefore lay down on the ground. The assailants demanded her phone, which she handed over to them. She was then hit with a metal rod, causing her to lose consciousness. She gained consciousness some time later, and went and reported the incident to the police and then returned home.

5) On the other hand **Shadrack** who had been drinking in a bar, left the bar for his home on 16th April, 2011 at about 1:00 am. He had on him Kshs 500 as well as his Nokia 2600 phone. When he got home, he knocked on the door. As he waited for his wife to open the door, he saw three people wearing police jungle jackets. One of them had a gun, and another had a piece of metal. He was hit with the metal bar and he fell down. The assailants searched him and took the money and the phone. It was **Shadrack's** further testimony that there was security light and that he saw the assailants clearly and marked their faces. He was able to identify the appellant who was short and had a scar on the face.

6) Pintu Ouma Oyier (Pintu) a tout who worked with the bus companies in the town testified that on 16th April 2011, at about 1.30am he noticed a suspicious man at his place of work near the Triton Petrol Station. He called out to the person, who it turned out was the appellant, but the appellant ran away. **Pintu** raised an alarm and some boys pursued the appellant. As the appellant ran away, he threw down a plastic pistol as well as a metal bar pleading with the people who were pursuing him. The appellant was however apprehended. In his possession he had a polythene paper bag which contained two phones and police military jackets. He also had two mobile phones, one being a Nokia 1680. The appellant was handed over to **PC Andrew Wekesa (PC Wekesa)** together with the recovered items. This was at about 4:00 am that morning. In the course of the investigation, **Pascalia** identified the Nokia 1680 phone that had been recovered from the appellant as her phone that she was robbed of.

7) The appellant gave sworn evidence in his defence and did not call any witnesses. He testified that he was at the material time engaged in

the business of selling foodstuffs at the bus stop. He worked between the hours of 7:00 pm and 6:00 am. On the material night, he reported for duty. At about 3:30am, he saw **Pintu** approach him. He knew **Pintu** well as they were neighbours. He explained that **Pintu** had a grudge against him because he (that is Pintu), wanted his wife to sell foodstuff at the bus stop. It was this grudge that made **Pintu** to have him arrested. The appellant denied being in possession of any of the items that were recovered, and stated that he was merely taken to the police station and charged.

8) The trial court rejected the appellant's defence, and made a finding that he was not only in possession of the stolen phone and the public stores but also that he did not provide any reasonable explanation for his possession of the items. As already stated, the trial court found the appellant guilty and convicted him of the two counts of robbery with violence, handling stolen property and being in possession of public stores. The appellant appealed to the High Court against his conviction and sentence but the appeal was dismissed.

9) Aggrieved by the decision of the High Court, the appellant filed this second appeal raising various grounds of appeal to wit: that the prosecution did not prove its case beyond reasonable doubt; that the lower courts were wrong to rely on the doctrine of recent possession as a justification to determine that he was guilty; and that his rights under Article 50 of the Constitution were violated as he was not availed the evidence that was to be relied upon by the prosecution.

10) When the appeal came up for hearing, the appellant was represented by learned counsel, **Mr. Robert Maua** while the State was represented by **Mr. Tumaini Wafula**. In his written submissions, counsel for the appellant submitted that the prosecution failed to prove its case; that the trial court and the first appellate court relied solely on the uncorroborated evidence of **Pintu**, and failed to take into consideration that the witness had a grudge against the appellant; that **Pintu's** evidence was highly questionable and required corroboration by an independent witness; and that failure to do this left several gaps in the prosecution case. In counsel's view, the fact that **Pintu's** evidence was not corroborated led to a miscarriage of justice.

11) The second ground of appeal posited was that the lower courts erred in relying on the doctrine of recent possession to sustain a conviction against the appellant when the stolen items were planted on him by **Pintu** with whom he had a disagreement; that the recovery of those items was done against the dictates of the law; and that the entire incident was actually designed by **Pintu** and the police to frame the appellant.

12) The appeal was opposed by the respondent who also filed written submissions. Learned prosecuting counsel, **Mr. Wafula** urged us to disregard the appellant's submissions as they raised various matters which require this Court to make a determination on facts, which fall outside the purview of the Court's jurisdiction as provided in law.

13) On the substance of the appeal, **Mr. Wafula** submitted that the prosecution proved its case beyond reasonable doubt; that the evidence showed that the appellant, together with others while armed with weapons, committed a series of robberies on the night of 16th April 2011; and that the appellant was arrested the morning after the robberies while in possession of some of the items stolen during the robberies, which included jungle jackets. The appellant was accordingly properly charged with the offence of possession of public stores. The respondent contended that the fact that the appellant was found with a stolen mobile phone only a few hours after the robbery, was sufficient to bring the doctrine of recent possession into play, and that the only conclusion that could be drawn from the possession of the items was that the appellant was involved in the robberies committed against the complainants.

14) The respondent submitted further that the appellant had all the relevant evidence that the prosecution relied upon as guaranteed by Article 50 of the Constitution. He noted that the trial court had ordered that the appellant, together with his co-accused, be provided with the witness statements, and that the record bears out the fact that the appellant fully participated in the trial by listening to witnesses, cross-examining them and tendering his defence. For the foregoing reasons, the respondent urged us to find the appeal unmeritorious and dismiss it.

15) This is a second appeal and our duty is confined to consideration of matters o the law only.

In **Dzombo Mataza v Republic [2014] eKLR** this duy was spelt out by this court the following terms:

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court …. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."***

16) In addition, as stated by this Court in ***Julius Kaunga v Republic [2008] eKLR,*** this Court will not interfere with concurrent findings of fact unless we are of the opinion that the findings were based on no evidence or on a perversion of evidence.

17) Our consideration of the record of appeal as well as the rival submissions of the parties reveal two issues of law that we must consider: The first is whether the two courts below erroneously relied on the doctrine of recent possession as a basis for conviction of the appellant. In ***Isaac Ng'ang'a Kahiga & Another v Republic [2006] eKLR,*** this Court held that:

> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property…."***

18) Pascalia and **Shadrack** both testified that they were each robbed between the hours of midnight and 1:30 am on the material night by three people wearing jungle jackets and who were armed with a toy pistol and a metal bar.

19) The ingredients of the offence of robbery with violence were succinctly laid down by this Court in **Oluoch v R, [1985] KLR 549**

in which it was held that robbery with violence is committed in any of the following circumstances:

"(a) The offender is armed with any dangerous and offensive weapon or instrument; or

(b) The offender is in company with one or more person or persons; or

(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person."

20) The use of the word 'or' shows that the presence of any set of these circumstances is sufficient to prove the offence of robbery with violence. In the circumstances of this case, the prosecution proved to the required standard, through the evidence of **Pascalia** that a robbery took place and that during the robbery; **Pascalia** was accosted, robbed and injured by persons who were armed with a metal bar and a toy pistol. The metal bar was intended to cause injury to the complainant and therefore was a dangerous weapon within the meaning of Section 89(4) of the Penal Code (See **Juma Mohamed Ganzi V. Rep [2005] eKLR**). Further, as stated by this Court in **Michael Ng'ang'a Kinyanjui V Republic [2014] eKLR,** a toy gun is an offensive weapon for the purpose of the Penal Code. We therefore find that the ingredients of the offence of robbery with violence were established as there was sufficient evidence that **Pascalia** was attacked and robbed by more than two persons who were armed with what qualifies to be dangerous weapons and that she was subjected to violence during the robbery.

21) It was alleged that the appellant was found in possession of a Nokia 1680 mobile phone which **Pascalia** identified as one of the items which she was robbed of during the robbery. In his defence, the appellant stated that the items had been planted on him by **Pintu** due to a disagreement between them. We have considered this line of defence, and note, like the first appellate court did, that even after being afforded an opportunity to do so, the appellant did not cross-examine **Pintu** on the aspect of a prior disagreement between them. He instead suggested that the arrest was improper.

22) In his evidence, Pintu testified that he participated in the arrest of the appellant on the material night at the bus park with the help of members of the public, and that at the time of his apprehension, the appellant was found in possession of a polythene bag which contained some jungle uniforms together with two mobile phones. The appellant was also found in possession of a toy gun and a metal bar which were both identified by Pascalia and Shadrack as the objects that were used by the assailants during the robbery. The appellant was found in possession of the items a few hours after the robberies had taken place.

23) The appellant conceded that he was apprehended at the bus stop which gives credence to **Pintu's** evidence. Further, **PC Wekesa** testified that the appellant was taken to the police post at the bus park by **Pintu** and other members of the public, and that the aforestated items were handed over to him. **PC Wekesa's** evidence was therefore consistent with the evidence of Pintu. We therefore find that the appellant's defence that the recovered items were planted on him by **Pintu** was properly rejected.

24) In **Titus Muindi Mukoma v R Criminal Appeal No 275 of 2011**, this Court stated as follows regarding the doctrine of recent

possession:

> ***"The essence of the doctrine of recent possession is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation as to how he came to be in possession of the property, a presumption of fact arises that he is ether a thief or a receiver."***

25) The circumstances under which the doctrine of recent possession will apply were succinctly laid down by this Court in **Erick Otieno Arum v. Republic [2006] eKLR** as follows:

a) that the property was found with the suspect;

b) that the property was positively identified by the complainant;

c) that the property was stolen from the complainant; and

d) that the property was recently stolen from the complainant.

26) Further, in **Beumazi Ndoro Chaila V. Republic [2016] eKLR**, this Court stated as follows:-

> ***"The essence of the doctrine of recent possession is that when a person is found in possession of recently stolen property, and cannot provide a reasonable explanation for that fact, the court may infer that he or she either stole the property or received knowing that it was stolen. Though referred to as "doctrine" this is simply a matter of a court drawing an inference from common piece of circumstantial evidence that the accused possessed recently stolen property. The inference is drawn from possession of recently stolen property rather than recently taking possession of stolen property."***

27) The doctrine of recent possession is a rebuttable presumption of fact and the appellant is called upon to offer an explanation in rebuttal, which if he fails to do, an inference is drawn, that he either stole or was the guilty receiver. See **Hassan V R (2005) 2 KLR, 151.**

28) In the instant appeal, the appellant was found with a cell phone that was identified by **Pascalia** as hers a few hours after the robbery and he did not give any reasonably credible explanation of how he came to be in possession of the cell phone a few hours after the robbery. Accordingly, we find that the doctrine of recent possession was properly applied and the appellant was properly convicted of the offence of robbery with violence in regard to the third count which involved **Pascalia**.

29) As regards the conviction of the appellant for count 2 of robbery with violence in relation to **Shadrack**, the High Court found as follows:-

> ***"We agree with the appellant that PW2 (Shadrack) could not have identified any of his attackers. No evidence of an identification parade was tendered in this case so where did PW2 identify the appellant?…The evidence in this case was not watertight… his evidence of identification was therefore not reliable…"***

30) In light of the above clear findings, made by the High Court regarding the identification of the appellant by **Shadrack;** and the appellant not having been found with any items that were stolen from **Shadrack** during the robbery; and there being no other evidence tendered by the prosecution to implicate the appellant with the charge of robbery with violence in respect to count 2, relating to **Shadrack;** the conclusion by the High Court sustaining the appellant's conviction for this robbery charge was not supported by any evidence. We find that the High Court erred in finding that there was sufficient evidence to sustain a conviction for the offence of robbery with violence in respect of count 2, relating to **Shadrack.**

31) The trial court convicted the appellant of an alternative court of handling stolen goods contrary to **Section 322(2)** of the Penal Code. That conviction was upheld by the first appellate court.

32) The particulars of the charge in relation to the alternative count of handling stolen goods were that on the material day at Kisumu Bus Park in Kisumu District within Nyanza Province, otherwise that it the course of stealing, dishonestly retained one mobile phone make ISD serial number (IMSI) 358863001184180 knowing or having reason to believe it to be a stolen good.

33) From the evidence on record, there was no evidence adduced upon which it could be concluded that this particular mobile phone was recently stolen, or reason to believe that the phone was a stolen properly. In the circumstances, we find there was no evidence to sustain this charge. Accordingly we quash the conviction on the alternative charge of handling stolen goods and set aside the sentence that was imposed on the appellant in this regard.

34) The trial court also convicted the appellant of the offence of possession of public stores contrary to **Section 324(3)** of the Penal Code. The High Court upheld the conviction. **Section 324(3)** of the

Penal Code provides as follows:-

> ***"(3) Any person conveying or having in his possession, or keeping in any building or place, whether open or enclosed, any stores being the property of the disciplined forces, which may reasonably be suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, shall be guilty of a misdemeanour."***

35) The evidence adduced before the trial court was that the appellant was found in possession of two jungle jackets. The witnesses that the jackets were similar to military jungle jackets. However, no evidence was adduced by any member of the disciplined force to prove that the two jungle jackets that the appellant was found in possession of, actually belonged to the disciplined forces. In the circumstances, we find that there was no evidence to support the concurrent findings of the two courts below that the jungle jackets found in the appellant's possession constituted public stores. Accordingly, we quash the conviction and set aside the sentence meted out on the appellant in regard to the charge of being in possession of public stores.

36) Regarding the sentence that was meted out on the appellant, on the charge of robbery with the violence, the trial court rendered itself as follows:

> ***"The accused person chose not to mitigate despite being given the chance. I am therefore left with no reasons to deviate from the sentence provided by law. I accordingly, sentence the accused to suffer death in count, count 3 and the alternative count and count v will remain in abeyance." (sic)***

37) This being a second appeal, this Court's jurisdiction to consider the sentence is limited to where a sentence has been enhanced by the High Court, or the subordinate court had no power to pass the sentence. None of these circumstances arise herein. To the contrary, we have no reason to interfere as the record shows that the trial magistrate properly exercised his discretion in sentencing and imposed the sentence provided by law as the circumstances warranted it.

38) The upshot of the above is that:

> (1) We uphold the conviction of the appellant in regard to count 3 for the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code and uphold the death sentence imposed by the trial court and confirmed by the first appellate court.

(2) We quash the conviction of the appellant in regard count 2 which is the charge of robbery with violence contrary to **Section 296(2)** of the Penal Code, and set aside the death sentence imposed on the appellant in this regard.

(3) We quash the appellant's conviction for the offence of handling stolen goods contrary to **Section 322(2)** of the Penal Code and also quash the conviction in regard to the charge of being in possession of public stores contrary to **Section 324(3)** of the Penal Code.

This judgment has been delivered in accordance with Rule 32(2) of the Court of Appeal Rules, Githinji JA having ceased to hold office by virtue of retirement.

Dated and delivered at Kisumu this 3rd day of April, 2020.

HANNAH OKWENGU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL