



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, J. MOHAMMED & KANTAI J.J.A)

CRIMINAL APPEAL NO. 34 OF 2015

BETWEEN

APPOLLO OLENJA APITSA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kakamega,

(Chitembwe & Dulu, JJ.) dated 3rd October, 2014

in

HCCR. NO. 20 OF 2014)

JUDGMENT OF THE COURT

Background

[1] **Appollo Olenja Apitsa** (the appellant) is before us in this second appeal in which he challenges the dismissal of his first appeal by the High Court (**Chitembwe and Dulu, JJ.**). The appellant was charged before the Chief Magistrate's Court at Kakamega with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the charge were that the appellant jointly with his co-accused,

Joseph Shimwama alias Brown (Brown) on 25th October, 2012 in Kakamega Central District within Western Province, with others not before court while armed with dangerous weapons namely pangas, rungus and axes, he robbed **MOW** of his one monitor, one radio cassette make Sony, one Nokia mobile phone 1208, assorted clothes and pairs of shoes all valued at approximately Kshs. 50,000/- and immediately before the time of such robbery used actual violence against the said **MOW**.

[2] The appellant was also charged with the alternative count of handling stolen goods contrary to **Section 322(2) of the Penal Code**. The particulars of the charge were that on 26th November, 2012 at Maraba Estate, Kakamega District within Western Province, otherwise than in the course of stealing, he dishonestly handled one mobile phone make Nokia 1208 IMEI No. 353190036457929 knowing or having reason to believe it to be stolen property.

[3] In count II, the appellant was charged with gang rape contrary to **Section 7 of the Sexual Offences Act, No. 3 of 2006**. The particulars of the charge were that on 25th October, 2012 in Kakamega Central District within Western Province in association with others not before court he intentionally and unlawfully caused the penetration of his male genital organ namely penis into the female genital organ of one **LNO** in turns without her consent. The appellant's co-accused **Joseph Shamwama alias Brown** was also charged with a separate count of gang rape.

[4] Both the appellant and his co-accused denied the charges and the matter proceeded to full trial with the prosecution calling six (6) witnesses including the complainants, **MOW (M)** and **LNO (L)**. In a nutshell, the evidence was that: M testified he was a caretaker at

[particulars withheld] Deliverance Church and that he and his family lived in the Church compound; that on 24th October, 2012 he was at his home sleeping with his wife, **L** at [particulars withheld] Estate at Kakamega; that at around midnight he heard the door to his house being banged and four people entered, carrying torches; that they were armed with *rungus* and *pangas*; that the intruders ordered **M** to keep quiet and started touching **L** as if they wanted to rape her; that **M** tried to raise his head but the intruders hit him on the head with a *panga* and cuffed his hands and legs.

[5] **L** testified that the appellant pulled her out of her bed, dragged her out of the house and ordered the other assailants to rape her then he went back into the house; that there was moonlight and that she was able to identify the appellant because of the appearance of his face and ears; that four of the intruders, among them, **Brown**, took her outside the house and raped her in turns causing her to scream; that the assailants stopped raping her when the appellant came out of the house and ordered her to go back into the house and lock the door. It was **L's** further testimony that shortly after the rape ordeal, she ran to the house of their neighbor, **Rev. JMW (Rev. W)** and informed him that she and **M** had been attacked by intruders. **Rev. W** accompanied her back to the house where they found **M** cuffed and seriously injured. They untied **M** and took him to Kakamega Provincial Hospital. **L's** clothes were taken to Nairobi for tests by the Government Chemist.

[6] **M** was not able to identify any of the intruders but later realized that his mobile phone, radio, computer monitor and clothes were missing. **Rev. W** testified that he had bought the mobile phone that was stolen from **M**; and that he reported the matter to the Kakamega Police Station. **Sgt. Maurice Amwayi (Sgt. Amwayi)** attached to the CID office at Kakamega, received instructions to trace the mobile phone stolen from **M**. He testified that he got information from Safaricom that the appellant was in possession of the mobile phone and he and **Sgt Hezron Mokenya (Sgt Mokenya)** arrested the appellant in Kakamega town at the place where he worked as a mechanic; that upon arrest, they asked him to take them to his house where they conducted a search and found various mobile phones. Later, **Ms** was shown one of the mobile phones recovered, which he identified as his. He testified that it was a grey Nokia 1208 with a flowery case and that he had saved his wife's phone number among the contacts.

[7] **Sgt Mokenya** testified that he and **Sgt Amwayi** recovered the mobile phone that had been stolen from **M**; that **M** was able to identify the mobile phone as his as he had set the mobile phone in such a way that it indicated '**Mama L**' when switched on. **Sgt Mokenya** produced the mobile phone as an exhibit.

[8] In his defence, the appellant gave an unsworn statement and did not call any witnesses. He stated that he loaned his friend, one **Abona**, KShs 1,500 for purposes of paying his wife's medical bills; that the said friend gave him the mobile phone as security for the loan; that **Abona** did not repay the loan or collect his mobile phone; that the police asked him to take them to his friend's home to corroborate his story; and that the police later refused to be taken to his friend's house.

[9] The learned trial magistrate convicted the appellant on count I for robbery with violence and sentenced him to death. The learned trial magistrate also convicted him on count II for gang rape and sentenced him to 20 years imprisonment but directed that the sentence remain in abeyance in view of the sentence of death in count I. The trial court found the appellant's co-accused, **Joseph Shimwama alias Brown (Brown)** not guilty of the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** and the offence of gang rape contrary to **Section 7 of the Sexual Offences Act** and acquitted him under **Section 215 of the Criminal Procedure Code**.

[10] Aggrieved by the decision of the trial court, the appellant preferred a first appeal to the High Court against both conviction and sentence on the grounds: that his right to fair hearing was violated; that the prosecution failed to prove the charges beyond reasonable doubt; that he was not properly identified as the perpetrator of the offences; and that the learned trial Magistrate erred by failing to include the points for determination, decision and reasons for the decision in the judgment as prescribed under **Section 169(1) of the Criminal**

Procedure Code.

[11] The State opposed the appeal on grounds that the evidence on record proved beyond reasonable doubt that the appellant was one of the attackers; that the identification of the appellant by the complainant was positive; and that the learned trial magistrate complied with **Section 169(1) of the Criminal**

Procedure Code.

[12] The learned Judges of the 1st appellate court upheld both the conviction and sentence on the charge of robbery with violence which was based on the application of the doctrine of recent possession of recently stolen goods. The learned Judges reasoned that the appellant was found with the complainant's mobile phone in November, 2012 barely a month after the robbery on 25th October, 2012; and that the appellant did not give a reasonable explanation on how he came into possession of the complainant's mobile phone.

[13] The learned Judges quashed the conviction on the charge of gang rape basing their finding on the fact that there was no identification parade conducted to confirm that the appellant participated in the gang rape; and that dock identification by

[14] Undeterred, the appellant filed this second appeal against both conviction and sentence on the grounds that the learned Judges erred in law; in upholding the trial court's finding that the appellant was properly convicted and sentenced to death in count I for robbery with violence based on evidence founded on the doctrine of recent possession; and by failing to re-evaluate the evidence and make a finding that the evidence does not support the main count in count I but the alternative count of handling stolen goods contrary to **Section 322(2) of the Penal Code**.

Submissions by Counsel

[15] At the hearing of the appeal, learned counsel, **Mr. Ombaye** appeared for the appellant while **Ms. Lubanga** held brief for **Mr. Mule**, learned counsel for the respondent. Both parties elected to rely on their written submissions.

[16] The appellant argued that the doctrine of recent possession was misapplied in that the mobile phone was found in his possession twenty one (21) days after the commission of the offence. He urged that the period of twenty one (21) days cannot be termed as “very shortly afterwards” as in the case of **R. v Loughin 35 Criminal Appl. 269** where the drinks stolen were found in the appellant’s possession two (2) hours after commission of the offence.

[17] The appellant further contended that none of the prosecution witnesses positively identified him during the commission of the offence and that the evidence was therefore not sufficient to prove the offence of robbery with violence but supported the alternative charge offence of handling stolen goods. Finally, relying on the case of **Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015**, the appellant urged this Court to hold that the death sentence imposed on the appellant was unconstitutional.

[18] In opposing the appeal, the respondent submitted that the essential ingredients of the offence of robbery with violence had been proved by the prosecution; and that the trial court and the 1st appellate court properly applied the doctrine of recent possession to this case.

Determination

[19] We have considered the record, the submissions, the authorities cited and the applicable law bearing in mind that our mandate as the 2nd appellate court is limited to consideration of matters of law only. In this respect, **Section 361 of the Criminal Procedure Code** states as follows:-

“361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”

[20] Further, as stated by this Court in **Chemagong V Republic [1984] KLR 213**, this Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown to have acted on wrong principles.

[21] One of the main issues for determination in this appeal is whether the doctrine of recent possession was properly invoked to uphold the appellant’s conviction for the offence of robbery with violence. The elements that must be proved by the prosecution for the court to rely on the doctrine of recent possession were set out in the English case of **R. v Loughin** (supra), as follows:-

“if it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker.”

[22] This Court in **Titus Muindi Mukoma v R Criminal Appeal No 275 of 2011** 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 either a thief or a receiver.”

See: **Hassan V R (2005) 2 KLR, 151**

[23] In **Erick Otieno Arum V Republic [2006] eKLR** this Court succinctly laid down the circumstances under which the doctrine of recent possession will apply:

- a) that the property was found with the suspect;
- b) that the property was positively identified by the complainant;

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

[24] We note from the record that the prosecution established through the evidence of the Investigating Officer, **Sergeant Hezron Mokenya** that the appellant was found with the mobile phone; that the mobile phone was positively identified by the complainant, **M**; and that the mobile phone was stolen from **M**.

[25] Regarding the appellant's contention that the mobile phone was not recovered in his possession "very shortly afterwards", we note that the time of recovery of stolen goods may vary from case to case. Consequently, we find that the appellant's contention that the recovery of the mobile phone in his possession was not recent cannot stand. In **Isaac Ng'ang'a Kahiga & another v Republic [2006] eKLR**, this Court held as follows:-

"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..."

[26] The doctrine of recent possession is a rebuttable presumption of fact. Once the prosecution established the elements of the doctrine of recent possession, the appellant was required, under **Section 111 of the Evidence Act**, to give a reasonable explanation in rebuttal as to how he came into possession of the mobile phone. In this respect, we note that the appellant admitted that he was in possession of the complainant's mobile phone and offered the explanation that the mobile phone was offered by a third party (his alleged friend) as security for a loan.

[27] In **Malungi V R [1989] 225**, this Court stated 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 his possession after the prosecution has proved certain basic facts; that the item he had in his possession has been stolen; it has been stolen a short period prior to their 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 the 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 items." (Emphasis supplied).

[28] Both the trial court and the 1st appellate court found the appellant's explanation to be unreasonable as he did not lead the police to his alleged friend. Having failed to offer a plausible explanation in rebuttal, an inference was rightly drawn that he either stole the mobile phone or was a guilty receiver. In this regard, we are satisfied that the two courts below did not err in their findings and on the whole, we find that both the trial court and the 1st appellate court properly applied the doctrine of recent possession.

[29] The next issue for our determination is whether the learned Judges erred by failing to find that the evidence adduced did not support the main count of robbery with violence but the alternative count of handling stolen property.

[30] The appellant was charged with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**. This Court succinctly laid down the ingredients of the offence of robbery with violence in **Oluoch V Republic [1985] KLR 353**

and held that:-

"Robbery with violence is committed in any of the following circumstances:-

a) The offender is armed with any dangerous and offensive weapons or instrument; or

b) The offender is in company of 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." [Emphasis added].

[31] This Court in **Daniel Muthoni V Republic [2013] eKLR** found that proof of any of the three elements of the offence of robbery with violence would be enough to sustain a conviction under

Section 296(2) of the Penal Code.

[27] Applying the above principles to the instant appeal, it is clear from the evidence on record that all the three ingredients for the

offence of robbery with violence were proved. The evidence of **M** and **L** that their house was invaded by about eight people who were armed and who hit and injured **M** was uncontroverted. The evidence of **Patrick Mambiri**, a senior clinical officer at Kakamega Provincial Hospital who produced the P3 form corroborated the evidence of **M** on the injuries he sustained from the robbery.

[32] The appellant contends that none of the prosecution witnesses positively identified him at the scene of the crime. From the record we note that although the learned Judges of the 1st appellate court found that the dock identification by **L** was insufficient to sustain a conviction for the offence of gang rape, they found that the doctrine of recent possession was sufficient to sustain the conviction for robbery with violence.

[33] We are inclined to agree with the learned Judges of the 1st appellate court. We are satisfied that the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** was proved. In this respect, we are guided by the case of *David Mugo Kimunge v Republic [2015] eKLR* where this Court cited the decision of the Supreme Court of Canada in *Republic v. Kowkyk (1988)2 SCR 59* as follows:-

“Upon proof of the unexplained possession of recently stolen property, the trier of fact may – but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.”

[34] Further, this Court, in the case of *Athuman Salim Athuman v Republic [2016] eKLR* cited the Supreme Court of Uganda in the case of *Bogere Moses & Another v. Uganda, Cr. Appeal No. 1 of 1997* as follows:-

“It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witness evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable while the latter solely depends on the credibility of the eye witness.”

[35] Accordingly, based on the applicable law, we find that there is no reason to interfere with the findings of both the trial court and the 1st appellate court on the appellant’s conviction for the offence of robbery with violence.

[36] Regarding the sentence that was meted out on the appellant on the charge of robbery with violence, the appellant urged this Court to set aside the death sentence on the ground that it is unconstitutional.

Section 296 (2) of the Penal Code provides as follows:-

“(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.” (Emphasis supplied).

[37] Following the decision of the Supreme Court of Kenya in

Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015 consolidated with Petition No. 16 of 2015 (Muruatetu’s case), held at para 69 that;

“... section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty.”

[38] Similarly, this Court, in *William Okungu Kittiny v Republic [2018] eKLR* held that:-

“...the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to section 296 (2) and section 297 (2) of the Penal Code. Thus the sentence of death under Section 296 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with the Constitution.”

[39] We observe that the appellant was a first offender and we note what he said in mitigation. We note that the appellant attacked the complainant and his family in their home and committed the robbery and in the process inflicted injuries on the complainant. The injuries were confirmed by medical evidence. The two courts below sentenced the appellant to death. This was the sentence prescribed in law as the law stood then. As we have shown, jurisprudence in this country has since changed and mandatory sentences as prescribed by Parliament are

subject to the discretion of courts. In that regard we are persuaded that the death sentence imposed was not deserving and we are entitled to interfere with that judgment of the lower courts. Considering all circumstances and factors of the case we set aside the sentence imposed and substitute thereof a sentence of twenty (20) years' imprisonment from the date of conviction.

[40] The upshot is that the appeal against conviction is dismissed while the appeal against sentence is allowed. Accordingly, the sentence of death is set aside and in substitution therefor, the appellant is sentenced to twenty (20) years imprisonment with effect from 18th February, 2014 when he was sentenced by the trial court.

[41] 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.

[42] Orders accordingly.

Dated and delivered at Nairobi this 8th day of May, 2020.

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR