



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MURGOR, SICHALE, JJ. A)

CRIMINAL APPEAL NO. 1 OF 2018

BETWEEN

THOMAS MAINGI MULU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from to conviction and sentence of High Court of Kenya

at Nairobi (Nyakundi, J) dated 14th October 2016

in

H.C.C.R.A. No. 1(C) of 2015)

JUDGMENT OF THE COURT

Thomas Maingi Mulu, the appellant, was charged with the offence of robbery with violence contrary to the **Section 296 (2)** of the **Penal Code** (Chapter 63 Laws of Kenya).

The particulars of the offence are that on 2nd August 2013 at about 4pm at Kimana within the Loitokitok District in the Kajiado County, jointly with others not before the court while armed with a Ceska pistol, the appellant robbed **Geoffrey Mpoke Parsanka PW1**, (*Geoffrey*), the complainant of a lorry registration Number KBQ 894 J Mitsubishi Canter, the property of **Robert Dominic Masaku PW3** (*Masaku*), mobile phones and cash of Kshs. 4,430.

Briefly, the facts are that, on the material day, Masaku instructed Geoffrey, his driver to transport two cows from Kimana in Loitokitok District to Kikoko in Ukambani. Accompanied by his turnboy **Michael Mbodo Mulu PW3** (*Mbodo*) they set off for Kimana. On arriving at Kimana, they did not find the person they were to meet, but were instead directed to a place on the road to Ndanarariri where the cows were to be located. After about two kilometers, they saw four people standing near a herd of cattle. They stopped and were informed that they were to transport 20 cows. By this time, the motor vehicle was also carrying 25 bags of maize.

Geoffrey parked, alighted and went to the back of the motor vehicle. On reaching the back, he saw a person pointing a pistol at him. At that moment, the gang beat and kicked Geoffrey and Mbodo and thereafter ordered them at gunpoint to climb into the back of the lorry. The lorry was then driven into a forest in the Amboseli National Park, where it came to a stop. Geoffrey and Mbodo were ordered to alight, whereupon, their hands and legs were tied. Two of the robbers then drove away in the motor vehicle, while two were left to guard them. A short while later, the two remaining robbers also left them. They managed to untie themselves, and with the assistance of a good Samaritan they found their way back to Loitokitok. Geoffrey telephoned Masaku from Loitokitok Police Station to inform him of the robbery. In the meantime, **Dr. Stephen Mwangela Mutiso (PW4)** based at Loitokitok District

Hospital treated both Geoffrey and Mbodo for injuries they sustained during the robbery.

On receiving the report that the lorry had been stolen Masaku checked the tracking device installed in his laptop. It showed that the lorry was headed towards Taita Taveta and was at a place called Njukuni. Upon alerting Loitokitok Police Station of the robbery, it was agreed that he would collect **Ag. IP Munga Mbwale (PW8)** and another police officer from the police station, and give chase to the motor vehicle. Masaku also telephoned a police officer at Taita Taveta to request him to stop the lorry.

APC Collins Mutembei Marangu (PW6) and **Corporal Hariet Uryazi Kombo (PW7)** attached to CID Loitokitok and stationed at Chala Administration Police Camp, Taita Taveta received a call informing them of a stolen lorry was being driven towards Taita Taveta, and requesting them to apprehend it. When they went to the Chala – Loitokitok road, they saw a lorry registration Number KBQ 894 J Mitsubishi Canter being driven towards them. They stopped the lorry and arrested the driver, who was the appellant. A passenger who was also in the motor vehicle alighted and escaped into the darkness.

In his defence the appellant stated that he had left Loitokitok at about 11am to visit his sick aunt in Chala. On arrival at around 1 pm, he found that his aunt was very ill and when he telephoned his uncle, one Dickson to inform him of her worsening condition, it was agreed that Dickson would come to Chala to take her to the hospital. Dickson insisted that the appellant wait for him at Chala shopping centre. At about 8pm when he went to relieve himself, two vehicles arrived at the shopping centre. An Administration Police officer alighted from one of the vehicles and demanded that he identify himself. Thereafter he was arrested, and taken to Loitokitok Police Station where he was charged with the offence which he denied.

Upon hearing the evidence and the submissions of the parties, the trial court (Hon. M. O. Okuche) found the appellant guilty as charged and sentenced him to death as by law prescribed. The appellant was aggrieved with the decision, and appealed to the High Court (Nyakundi, J.) which upheld the conviction and sentence.

Aggrieved by the High Court's decision, the appellant now appeals to this Court on the grounds that the trial court and the High Court erred in convicting him on the basis of a defective charge sheet; violating his rights to a fair trial by charging him under **section 296 (2)** of the **Penal Code** instead of **section 295** and failing to comply with **section 207** of the **Criminal Procedure Code**; relying on the doctrine of recent possession to convict the appellant which conclusion was reached on the basis of inconsistent and hearsay evidence; finding that the appellant was properly identified when no identification parade was conducted; disregarding the appellant's defence and alibi evidence; relying on photographs of the motor vehicle that were produced by an unauthorized person instead of on the production of the actual motor vehicle; finding that the prosecution had proved its case in accordance with the stipulations of **section 296 (2)** of the **Penal Code**.

The appellant filed written submissions which were highlighted by learned counsel **Mr. S. Kariuki**, wherein it was submitted that the charge sheet was defective since it indicated the time of the commission of the offence as 4 pm, yet the prosecution witnesses testified that they were robbed of the motor vehicle at 7pm. Next counsel asserted that the appellant was not afforded a fair trial under **Article 50** of the **Constitution**, as by charging him under **section 296 (2)** of the **Penal Code** instead of under **section 295** of the **Penal Code** as read with **section 296 (1)** and **(2)** of the **Penal Code**; the appellant was being called upon to plead to charges the nature of which were not specified, and that furthermore, contrary to the stipulations of **section 207 (1)** of the **Criminal Procedure Code**, the charge was not read out to him in detail.

On the issue of the doctrine of recent possession, counsel submitted that the evidence was riddled with inconsistencies, and in particular the prosecution failed to produce the motor vehicle in court contrary to the **section 322 (2)** and instead relied on photographs of the motor vehicle taken and presented in court by an unauthorized person; that after the alleged stolen motor vehicle was returned to the owner on the material day it ceased to be regarded as stolen; that furthermore nothing showed that the appellant stole the motor vehicle, as no fingerprints were lifted from the motor vehicle, which in any event had been tampered with.

Counsel further submitted that the appellant was not properly identified because no identification parade was conducted, and consequently, nothing linked him to the robbery. Counsel argued that the appellant's alibi evidence that he was drinking in a bar at Chala shopping centre before his arrest, further supported the contestation that he could not have been at the scene of the robbery at Kimana which took place earlier.

Turning to the assertion that the offence was not proved, counsel submitted that, since no weapon was recovered from the appellant, and he was not in the company of one or more robbers at the time the offence was committed, and nothing showed that Geoffrey and Mbodo suffered any violence from the appellant, the offence was not proved to the required standard.

Submitting on behalf of the State, learned senior public prosecuting counsel **Mr. Gitonga Muriuki** opposed the appeal, and stated that the charge sheet was proper as both Geoffrey and Mbodo testified that the robbery took place about 4pm or thereabouts, which was the time indicated in the charge sheet.

On the conviction based on the doctrine of recent possession, counsel contended that it was properly applied to the circumstances of the case, as the lorry that belonged to Masaku was stolen from Kimana and recovered in the appellant's possession after it was intercepted by PW6 and PW7 near Chala Primary school in Taita Taveta with the appellant at the wheel; that in his defence the appellant failed to explain how he came to be in possession and control of the motor vehicle. It was submitted that Masaku's ownership of the lorry was not challenged, and furthermore, that the location in which the lorry was found, and the direction in which it was headed only served to show that the appellant intended to deprive Masaku of his property. Regarding the photographic evidence, counsel submitted that they were properly produced in accordance with the requirements of the law.

Counsel concluded that the offence was committed by the appellant in the company of three others, he was found in possession of the stolen lorry, all of which pointed to him as being one of the robbers that robbed Geoffrey and Mbodo at Kimana.

We have considered these submissions and carefully read the record of appeal. This being a second appeal and by dint of the case of **M' Riongu v Republic [1983] KLR** and a contingent of other authorities, as well as **section 361(2)** of the **Criminal Procedure Code**, this court can only address a point or points of law, and not interfere with the finding of facts as made by the two courts below, unless such findings are not supported in the record and or they are indeed perverse.

Bearing the above in mind, the issues for consideration are whether the charge sheet was defective; whether the appellant's right to a fair trial were violated by his having been charged under **section 296 (2)** of the **Penal Code** instead of **section 295** of the **Penal Code** and whether the charges preferred were not read out to the appellant in detail; whether the doctrine of recent possession was properly applied; whether the

appellant was properly identified when no identification parade was conducted; whether or not the courts below considered the appellant's defence and alibi evidence; whether the trial court rightly relied on the production of photographs of the motor vehicle, instead of the production of the actual lorry in court; and finally whether the offence was proved to the required standard.

Beginning with the assertion that the charge sheet was defective due to inconsistencies in the time that the offence occurred, the charge sheet specified the time of commission of the offence as 4pm while both Geoffrey and Mbodo clearly testified that they were robbed of the motor vehicle at about 4pm or thereabouts at Kimana, Loitokitok District. We can therefore find no discrepancy or inconsistency in the time of commission of the offence. This ground is therefore without merit.

As to whether the appellant was not subjected to a fair trial because he ought to have been charged under *sections 295*, as read with *296 (1)* and *(2)* of the *Penal Code* instead of *section 296 (2)*, the learned judge pointed out that the issue raised was definitively settled by this Court in the cases of *Joseph Njuguna Mwaura vs Republic [2013] eKLR* and *Johana Ndungu vs Republic [1996] eKLR*. In those cases this Court reiterated that *section 295* merely provided for the definition of robbery, and that *section 296 (2)* set out the offence as well as the ingredients that are necessary for a court to reach a conviction in a case of robbery with violence. This Court emphasized in *Joseph Njuguna Mwaura vs Republic (supra)* that;

“...It is these ingredients which will need to be explained to such an accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296 (2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment.”

In the instant case the appellant was charged under *section 296 (2)*. The charge sheet indicated that he robbed Geoffrey and Mbodo of the motor vehicle, mobile phones and cash while armed with a pistol which information sufficiently detailed the offence the appellant was facing. We find as a result that his rights were not violated. We also do not agree with the allegation that the charge was not read out to him in detail contrary to *section 207 (1)* of the *Criminal Procedure code*. The record shows that the charges were read to the appellant and the consequences of a conviction explained to him in full. This ground is therefore without basis.

Turning to the offence, we would begin by observing that the trial court convicted the appellant having found that the doctrine of recent possession was properly established, and not on whether he was positively identified in an identification parade. The trial court found that;

“... it is the evidence of PW6 and PW7 that when they arrested the accused person he was in possession of this motor vehicle which had just been stolen hours earlier. In this situation, the prosecution would rely on the doctrine of recent possession and not identification parade, I do find so.”

In other words, the trial court was satisfied that the appellant was connected to the robbery of the motor vehicle by virtue of having been found in possession of it a few hours later, and not because an identification parade where he should have identified him as one of the assailants. Reaching a similar finding, the High Court stated that;

“The court relied adequately on the doctrine of recent possession against the appellant. The appellant was found with the PW3's motor vehicle which had been indisputably violently robbed from PW1 and PW2 at gun point a few hours earlier. There was a green jungle cap at the front cabin of the vehicle. PW1 and PW3 gave a description in their evidence that appellant was wearing the cap during the robbery.”

The court concluded;

“ The appellant was arrested being in actual possession of the motor vehicle far away from the custody of the owner. He had taken physical control with another not before the court. The intention as can be inferred was to deprive the complainant permanently of his property. It was not normal for the appellant to drive the complainant's motor vehicle without consent or authority having acquired it through commission of an offence.”

Whether or not the doctrine of recent possession was applicable to the circumstances of a case was considered in the case of *Malingi vs Republic (1989) KLR 225* where this Court stated thus;

“By application of the doctrine (of recent possession) 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. Firstly, that the item he has 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 items 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. The doctrine being a presumption of 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 or was a guilty receiver”.

In effect, in view of the concurrent finding of the two courts below we are also satisfied that the evidence pointed to the appellant as having been found in recent possession of the motor vehicle. With Masaku having produced a log book and other documentation that demonstrated that the motor vehicle belonged to him, the burden then shifted to the appellant to explain how he came to be driving Masaku's motor vehicle towards Taita Taveta. Notwithstanding that he provided a long winding statement as to why he was in Chala, he did not explain how he came to be in possession of Masaku's lorry. He, instead complained that the courts below disregarded his alibi defence that he was waiting for his uncle Dickson at Chala shopping centre since 1pm.

As observed by the learned judge, the appellant's alibi defence sought to demonstrate that he was at Chala shopping centre, and not driving

the motor vehicle towards Taita Taveta when he was arrested. This was so as to dislodge the prosecution's case that he was the person who robbed Geoffrey and Mbodo at Kimana at 4pm. The judge stated;

“From the prosecution case and on evaluation I find several pieces of cogent evidence to confirm that appellant was nowhere else but at the scene of the robbery. That thread of evidence flows from the testimony of PW1, PW2, PW3, PW5, PW6 and PW7.”

We agree. When the prosecution's evidence is analysed sequentially, an unbroken chain of events emerges which pointed to the appellant as being one of the members of the gang of robbers that stole the lorry from Geoffrey and Mbodo. PW6 and PW7 apprehended him as he drove the same motor vehicle in the direction of Chala shopping centre. His having been intercepted whilst driving the motor vehicle effectively discounted the alibi evidence that he had been waiting at the shopping centre for his uncle. As a consequence, the courts below rightly disregarded it. This ground is therefore unmerited and we accordingly dismiss it.

As concerns the grievance that the trial court was wrong to rely on the production of photographic evidence of the motor vehicle produced by an unauthorized person, **section 78 (1)** of the **Evidence Act** specifies that a certificate produced together with any photographic prints by an officer appointed by the Director of Public Prosecutions shall be admissible.

The evidence shows that after the motor vehicle was photographed, a compact disc of the photographs was sent to **IP. Johnson Kuria PW9**, a Scenes of Crime officer gazetted vide Gazette Notice No. 217/2012 of 6/8/13. IP Kuria stated that he signed and referenced the photographs as 1870/13 dated 18/8/13 and prepared a report of the photographs. The same officer produced the photographs and report in court as exhibits 2 (a) to J and report 2 (b). Nothing showed that IP Kuria was not a duly authorized officer, or that the certificate and photographs produced were inadmissible. Similarly, the appellant did not contend that the offence concerned a different motor vehicle, from the photographs of the motor vehicle produced in court, thereby necessitating its production in court. As such we find this complaint to be unfounded and it is accordingly dismissed.

The appellant ultimately asserted that the prosecution's case was not proved beyond doubt, in particular that, the appellant was in the company of more than one assailant, or that he was not found in possession of the weapon used to assault Geoffrey.

To this end, we will begin by setting out the ingredients that constitute the offence of robbery with violence under **section 296 (2)** of the **Penal Code** which were restated in the case of **Johana Ndungu vs Republic Criminal Appeal No. 116 of 1995 (unreported)** in these words:

“(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.

(1) If the offender is armed with any dangerous or offensive weapon or instrument, or

(2) If he is in company with one or more other person or persons,

or

(3) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”

In ascertaining whether the ingredients of the offence are proved, it is settled that the Court is not required to reach a finding that all three ingredients were proved, as proof of one of the ingredients would suffice to secure a conviction. In this case the appellant, who was a member of a gang of four robbers, violently attacked and robbed Geoffrey and Mbodo of a motor vehicle belonging to Masaku at gunpoint. The treatment notes, the P3 form and Dr. Stephen Mutiso's evidence all confirm that Geoffrey sustained injuries from the attack on his face, chest and stomach. The recovery of the motor vehicle in the appellant's possession pointed to him as being one of the gang members who violently attacked, robbed, and seriously injured Geoffrey. As were the courts below, we too are satisfied that the ingredients for the offence of robbery with violence were established beyond reasonable doubt. The conviction was safe and we have no reason to interfere with it.

Though the issue of the appellant's sentence was not raised, following the Supreme Court decision in the case of **Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015** where the court found the mandatory death sentence to be unconstitutional, we consider it essential to review the mandatory death sentence imposed on the appellant. Much as the **Muruatetu case (supra)** was concerned with the interpretation and application of **section 204** of the **Penal Code** on the offence of murder, we consider that the apex court's reasoning would be applicable in much the same way to the mandatory death sentence specified by **section 296 (2)** of the **Penal Code** for the offence of robbery with violence.

The trial magistrate sentenced the appellant to death after observing that *“... the only sentence provided herein is death sentence,”*. With this in mind, and, the appellant having mitigated that he had a family and had been long suffering in prison, as well as appreciating that the motor vehicle was recovered, we would review the appellant's sentence, and substitute it therefore with a custodial sentence of 25 years' imprisonment to run from the date of conviction in the trial court.

For the avoidance of doubt, we would uphold the High Court's decision to dismiss the appeal against conviction, but set aside the sentence of death by substituting it with 25 years' imprisonment to run from the date of conviction in the trial court.

It is so ordered.

Dated and delivered at Nairobi this 19th day of June, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR