IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: WARSAME, M'INOTI AND KANTAI, JJA]

CRIMINAL APPEAL NO. 150 OF 2015

BETWEEN

SIMON KANUI MWENDWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Garissa (F.N Muchemi J. & S.N Mutuku J.) dated 11th September, 2014

in

H.C.CR.A. No. 124 of 2014)

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JUDGMENT OF THE COURT

1. The appellant, **Simon Kanui Mwendwa** was tried and convicted before the Senior Resident Magistrate at Mwingi for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

2. The brief circumstances that led to the conviction of the appellant were that: on 18th March, 2013 at around 9.00 a.m, **Aden Mohamed Ali** (**PW1**) was traveling to Nairobi from Garissa when his lorry developed mechanical problems at Mutyangombe area. He headed to a nearby hotel looking for an M-Pesa agent when he met a hostile crowd which accused him of being a member of Al-shabaab. He ran for safety but the appellant and another person grabbed him and led him to a thicket where they kicked him and took Kshs. 1,200 from his pocket, Kshs.15,000 from his socks, his wallet and his phone Model Nokia C2. After the ordeal, he was assisted by well-wishers who took him to the chief's camp to report the incident.

3. The assistant chief, **Simon Mulaba** (**PW2**) testified that he received a robbery report, that the suspects were in a nearby village and that the appellant and one Wambua Kisimba, were among the suspects who had robbed PW1. He mounted a search with the help of **AP Constale Vitalis Mwendo** (**PW3**), caught the appellant at about 9.00 p.m. and recovered the complainant's phone battery from him. The appellant was subsequently arrested by police and the following day, PW1 went to the police station and was able to identify the appellant as one of the assailants, his stolen phone make Nokia C2, which was recovered from the home of the second assailant who fled and was still at large and his Phone's battery which was in the appellant's possession and which he had marked with his initial "A".

4. Based on the forgoing, the appellant was placed on his defence and he gave an unsworn statement. He stated that he operates a *bodaboda* and a kiosk business near the stage where the incident occurred and that on the material day he noted a commotion involving PW1 and went to investigate. He maintained that he did not commit the offences alleged and that the charges were false.

5. In the end, the trial court found that the complainant had clearly identified the appellant as the one who stole his property; that the complainant's phone battery was recovered in the appellant's own phone; that the complainant was able to identify his phone battery based on an identifying

> "A" mark he placed on it and that the appellant did not give any explanation of how he came to be in possession of the phone battery recovered from him a few hours after the robbery. Consequently, the court convicted him on the main count and sentenced him to death.

6. Dissatisfied with this decision, the appellant filed an appeal in the High Court which was dismissed vide a Judgment dated 11th September, 2014. However, the learned Judges (Muchemi & Mutuku JJ.) faulted the trial court for finding that the complainant properly identified the appellant and for not invoking the doctrine of recent possession which was the relevant doctrine to apply.

7. Aggrieved, the appellant has preferred this second appeal now before us which is mainly predicated on the grounds that the learned Judges erred in law by: failing to find that the evidence adduced was contradictory and insufficient to warrant the conviction and sentence of the appellant; failing to find that the appellant was not properly identified as one of the persons who carried out the robbery and failing to consider the appellant's sentence and mitigation in view of the decision in ***SC Petition No 15 of 2015, Francis Karioko Muruatetu & Another v. Republic*.**

8. Addressing us on the merits of the appeal, **Mr. Oira**, learned counsel for the appellant, emphasized that the evidence on record was insufficient to convict the appellant. He pointed out that the complainant failed to give a description of his assailants and that the phone battery could not be the basis to convict the appellant.

9. Opposing the appeal, **Mr. Gitonga**, learned State Counsel urged that the doctrine of recent possession which was the basis of the appellant's conviction, was well established .The complainant had reported that his phone had been stolen and upon the appellant's arrest, he was found in possession of the said phone's battery. Overall, it was his view that the appeal lacked merit.

10. We have considered the record, rival submissions by counsel and the law. Our mandate as a second appellate court by dint of **Section 361** of the **Criminal Procedure Code** is limited to matters of law. The pertinent issue, as recognized by the first appellate court is whether the appellant was connected to the robbery as one of the assailants by virtue of the items found in his possession.

11. As was correctly stated in ***Isaac Ng'ang'a Kahiga & Another v Republic, Criminal Appeal No. 272 of 2005:***

> ***"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."***

12. It is plain from the record before us that the conviction of the appellant was sustained by the High Court on the application of the doctrine of recent possession and on the basis that the appellant was found with the stolen items belonging to the complainant. **PW2** and **PW3** who mounted a search for the appellant after the robbery both testified that they arrested the appellant at 9.00 p.m. on the material night and recovered a phone battery which was one of the items stolen from **PW1**. The appellant placed the said battery in his phone and it was identified by **PW1** as his because he had marked it with his initial 'A'.

13. As for the identification of the appellant, it has been contended that there was no identification parade to identify him and that PW1 did not render any description of the appellant.

14. It is clear that the trial court proceeded to convict the appellant on the premise that the appellant was identified by PW1 as being among the robbers and also on the fact that the appellant was positively identified as having in his possession items that were recently stolen from PW1. However, we find the question of identification to be a non-issue and we agree fully with the analysis and sentiment of the High Court that:

> ***"From the evidence of PW1, PW2 and PW3, it is clear that the evidence on the identification of the appellant is not clear. Specifically, there is no evidence as to who gave PW2 and PW3 the name of the suspect to enable them look for and arrest him given that PW1 did not know him before. However, that notwithstanding, the case does not rely purely on the identification of the appellant. There is evidence that after he was arrested, he was found in possession of a battery which was identified by PW1 as his by the identification mark he had placed on it."***

15. As has been stated in various cases before this court, the identification of an accused person may be strongly corroborated by the doctrine of recent possession. In the case of ***Athuman Salim Athuman v. Republic*, *Criminal Appeal No. 44 of 2015,*** this Court quoted the Supreme Court of Uganda in ***Bogere Moses & Another v. Uganda, Cr. App. No 1 of 1997*** where it was held that the doctrine of recent possession may be a more reliable form of identification evidence. The Court stated:

> ***"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."***

16. In the case before us, the appellant was caught red-handed with the complainant's phone battery which had been placed in his own phone. There was no doubt that the phone battery belonged to the complainant given that the phone battery had an identifying mark "A" which was the complainant's initial. The appellant was apprehended 12 hours after the robbery and was unable to offer any explanation as to how he came to be in possession of the stolen property. Instead, his defence was comprised of mere denials and shock at being arrested. Therefore, there can be no other logical inference from the appellant having in his possession stolen items other than that he was the thief who robbed the complainant. In the case of ***Hassan v. R, (2005) 2 KLR 151*** it was stated:

> ***"Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or the receiver".***

17. Having considered the evidence in its totality, we do not find any contradictions of a magnitude to suggest that the evidence against the appellant was unreliable. In our view, the evidence on record proved the offence of robbery with violence under **section 296(2)** of the **Penal Code** which the appellant was charged with and the doctrine of recent possession was correctly applied. Consequently, the appellant's conviction was well founded in law.

18. As to whether the sentence against the appellant is justified, we note that the trial court and the first appellate court did not consider the appellant's mitigation. In considering the appropriate sentence, this Court must therefore consider the appellant's mitigation. We find that the appellant was a first time offender, a fact that was not disputed by the prosecution. We however take note of the fact that even though some of the items robbed from the complainant was recovered, the brazen attack happened in broad daylight and was against an innocent person who was in the midst of earning his daily bread. In our view, a sentence of twenty years imprisonment would suffice in the circumstances.

19. In the end, the appeal succeeds in part in that we uphold the conviction of the appellant but set aside the death sentence imposed against him and substitute it for a term of 20 years imprisonment from the date of conviction. It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of August, 2020.

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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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