IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), OKWENGU & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 150 OF 2016

BETWEEN

BONIFACE SAVALI MULYUNGI.....1ST APPELLANT

JOSPHAT WAMBUA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court at Garissa

(Dulu & Muriithi, JJ.) dated 1st March, 2016 in HCCRA Nos. 13 & 14 of 2016)

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JUDGMENT OF THE COURT

The two appellants were jointly charged that on 27th March, 2014, at about 9.30am in Mwingi Township, while armed with a pistol, they robbed Esther Kilonzo of mobile phone accessories and other related items that she was in the process of delivering to customers. According to her, there were three men; one talking on the phone, one standing, and the third one sitting on a motorcycle that had no number plate.

While passing them, the man who was standing snatched the polythene bag in which she was carrying the aforesaid mobile phone items. When she attempted to scream, the man pointed at her what she believed was a pistol and ordered her to run away. At that stage, the three men mounted the motorcycle and rode away towards Kyuso Road. This incident was witnessed by a *boda boda* operator, Daniel Wambua, who was joined by other *boda boda* operators and gave chase.

In the meantime, the complainant reported the incident to the nearby Mwingi Police Station and with the police in a motor vehicle, they proceeded on the direction the suspects had traveled. After about 2 kms, the police, the complainant, Daniel Wambua and a host of boda boda riders caught up with two people who had been arrested by members of the public, who appeared to have administered instant justice on them. The complainant identified her bag and its contents which had been recovered from the suspects. She was able, at that point, to also identify the 1st appellant as the one who snatched the polythene bag from her at a gun point while the 2nd appellant was the person who was on the phone just before the robbery. The motorcycle, Kshs. 1,800 and the gun were, however, not recovered. The third suspect apparently escaped.

Both appellants were charged with robbery with violence contrary to **Section 296(2)** of the Penal Code but denied involvement in the robbery, the 1st appellant claiming that on the day in question, he arrived in Mwingi at 7.30pm by bus from Nairobi. On his way to the house, he was arrested by two police officers who simply took his two wallets and subsequently caused him to be charged with offences for which he had no knowledge.

For his part, the 2nd appellant said that he had come to Mwingi to sell chicken, which was his trade, and thereafter decided to go to a bar. It was while in the bar that he was arrested and later charged with an offence he did not commit.

The learned trial magistrate who was satisfied that the charge of robbery contrary to **section 296(2)** aforesaid had been proved against the appellants beyond reasonable doubt, convicted the two and sentenced them to death.

In dismissing their first appeal, the High Court (Dulu & Muriithi, JJ.) saw their task as limited to the determination of the question of identification of the appellants, whether the doctrine of recent possession applied in the circumstances of the case, the effect of failure to summon witnesses who were seen as crucial by the defence, and whether the appellants' defence of *alibi* received sufficient consideration.

Relying on the famous English case of **R vs. Turnbull** (1970) ALL ER 549, the learned Judges differed with the trial court insisting that though the robbery occurred in broad daylight at around 9.00 am, the complainant was seeing the robbers for the first time; that the robbery was sudden and the complainant must have been scared or perplexed; that she did not describe the appearance of any of the appellants; that, similarly, Daniel Wambua did not describe how the robbers looked. Dismissing the evidence of visual identification, the Judges concluded thus;

"…though the time of the incident was in broad daylight at about 9.00 am, it cannot be said that any of the eye witnesses was able to visually identify or describe the identity of any of the people who robbed PW1. None even attempted to make a description of whatever nature, regarding the appearance of any of the three. It cannot thus be said that the appellants or any of them was visually identified by the eye witnesses at the scene".

Having discounted the evidence of identification of the appellants, the Judges turned to the doctrine of recent possession and based their ultimate determination on it. They were convinced that the appellants were found in possession of items that had been stolen from the complainant a few hours before their arrest; that the complainant positively identified the items; and that the burden of proof shifted to the appellants who failed to explain their possession of the items.

On the contention that a crucial witness by the name Kyalo was not called by the prosecution, the Judges expressed the view that the failure was not due to indolence or bad faith; that the prosecution did their best and many times served the said witness with summon in vain; and that even the court itself issued a warrant for his arrest without success as he was said to have relocated to Garissa due to threats to his life. In their opinion, the trial court was entitled to determine the case on the basis of the evidence before it.

They also rejected the argument that the appellants' *alibi* defences were not considered, noting that throughout the trial, the defence of *alibi* was never raised. It was therefore, in their view an afterthought; and that, in any case, it was displaced by the prosecution evidence that placed the appellants at the scene.

With that, the appeal was dismissed, triggering this second appeal in which the appellants pray that we set aside the judgment and quash their conviction on the grounds that, both the trial and the first appellate court erred by; convicting the appellants without considering the circumstances surrounding the commission of the offence which did not amount to robbery with violence;

convicting the appellants without the prosecution's case being proved beyond reasonable doubt; failing to consider that crucial witnesses were not called to testify; convicting the appellants on the doctrine of recent possession without proof that the items belonged to the complainant; failing to consider that there was no identification of the assailants and; ignoring the fact that the first report did not support the evidence adduced by the prosecution's evidence.

In the submissions made before us, the appellants' counsel urged us to be guided by the decision in **Francis Karioko Muruatetu & another vs. Republic** (2017) eKLR and consider a suitable sentence.

Of these grounds and by **section 361** of the Criminal Procedure Code, we are only interested in matters of law and will not interfere with the findings of fact by the trial magistrate and the High Court unless it is demonstrated that they considered matters they ought not to have considered or that they failed to consider matters they should have considered or unless the two courts below were plainly wrong in their decision, looking at the evidence as a whole. Where it is demonstrated that these infractions exist, the Court will treat them as matters of law and disturb the conclusions. See **Karani vs. R** (2010) 1 KLR 73.

The learned Judges applied the doctrine of recent possession to convict the appellants and dismissed the prosecution's reliance also on the evidence of identification of the appellants in addition to the doctrine of recent possession. We reiterate that we are entitled to interfere with the conclusions of facts by the two courts below if, *inter alia*, they were plainly wrong in their factual conclusion, looking at the evidence as a whole. While we cannot quarrel with the overall conclusion, we think the learned Judges ought to have found, in addition to the doctrine of recent possession, that there was evidence of identification by physical appearance. This is based on the learned Judges' own assessment of the evidence. They stated, for example, of the identification of the appellants that;

> **"….having been tracked down straight from the scene of the robbery to the point of the arrest, in our view the doctrine of recent possession as espoused in the case of Julius Kiunga Mbirithia Vs. Republic - Meru Criminal Appeal No. 111 of 2013 eKLR applies in this case. On his part, PW2 gave chase without losing sight of them. He got the assistance of other *boda boda* operators who also gave chase. Though his motor bike ran out of fuel before catching up with them, they were caught by other *boda boda* riders and the robbed items recovered.…… PW2 stated that the appellants were arrested about 200 metres from the river where his motor bike ran out of fuel. It was PW2's evidence that he gave chase and did not lose sight of them as they rode ahead of him. He met other *boda boda* operators and informed them that those riding ahead of him were robbers and these *boda boda* operators also gave chase together with him until a point where the robbers turned into a murram road and PW2's motor bike ran out of fuel.**

Though PW2 stopped there, his colleagues continued with the chase. Shortly thereafter the police with the complainant arrived in a motor vehicle and PW2 boarded the same towards where the other *boda boda* operators had chased the robbers and found that two people had already been arrested and badly beaten".

The chain of events leading to the arrest of the appellants leaves no doubt that, immediately PW2 witnessed the robbery of the complainant, the three suspects remained on sight upto the point the appellants were arrested. As soon as they were arrested, the complainant, PW2 and the police arrived. The complainant, apart from identifying her bag and its contents, also identified the appellants. She was categorical that it was the 1st appellant who snatched the polythene bag from her at a gun point while the 2nd appellant was the person who was talking on the phone just before she was robbed. It was estimated that the episode, from the robbery to arrest, took 30 minutes.

In situations like the one before us, it is always important to remember the words in **Cleophas Wamunga vs. Republic** Criminal Appeal No. 20 of 1982, that;

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on the correctness of the identification".

There was no likelihood of mistaken identity in the instant case for the reasons we have reproduced in the above passage; that the appellants were closely monitored upto the point of their arrest.

We are also satisfied with the determination by the two courts below, that the items stolen from the complainant were shortly found in the possession of the appellants in circumstances that suggested that they were the robbers. The complainant was able to positively identify the polythene bag containing scratch cards, Yu lines, a charger, keys, receipt book, and a wallet. Though Kshs 1,080 that was in the wallet was not recovered, she identified the wallet as hers, as she did with the mobile phone charger and her house key on its holder. According to her, the robbery took place at about 9.30 am and the appellants were arrested at 10.00 am with her stolen stuff.

In **Eric Otieno Arum vs. Republic** (2006) eKLR, the Court cautioned and drew the following guidelines in applying the doctrine of recent possession;

"In our view, 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 the 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."

All the above conditions were met in this appeal and both courts below, as we have said, correctly applied the doctrine of recent possession. The ingredients of robbery with violence were established and the conviction was well founded.

In passing the sentence, the trial magistrate observed that the offence with which the appellants were charged **"carried a mandatory sentence"**. In upholding the sentence, the learned Judges, for their part, stated that: **"sentence of death is the mandatory sentence provided for by law"**.

In view of the law and the decision in **Francis Karioko Muruatetu** (supra), this statement cannot be correct. In **Francis Karioko Muruatetu** the Supreme Court left no doubt that any law that deprives the Court of the use of judicial discretion in passing sentence is not only harsh, unjust and unfair but also inconsistent with **Article 25** of the Constitution as the sentence imposed based on such minimum sentence provisions fail to conform to the tenets of fair trial that accrue to accused persons.

The trial and the first appellate courts were not helpless but had the discretion to consider suitable sentence if, in the circumstances of case, the appellants deserved it. Though the appellants declined to mitigate when given the opportunity, in our opinion, the appellants did not deserve death sentence. They were said to have been armed with a pistol, yet, that was not established by evidence. Apart from snatching the bag, they did not harm the complainant at all. The bag and its contents were recovered. Only Kshs. 1,800 was lost, yet it was them who incurred the wrath of an angry mob that beat them senselessly. They have been in incarceration for nearly 6 years.

Bearing all this in mind, what commends itself to us is a reconsideration of the death sentence. We allow the appeal on sentence by setting aside the death sentence and in its place order the appellants to serve 20 years imprisonment to take effect from the date of conviction.

Dated and delivered at Nairobi this 23rd day of October, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

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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