IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OKWENGU, WARSAME & MURGOR, J.JA)

CRIMINAL APPEAL NO. 65 OF 2016

BETWEEN

MOHAMMED BARRACK.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment and order of the High Court of Kenya at Nairobi delivered by the Hon. Justice Ogola & Kamau, JJ) on the 20*th* *day of December, 2013 in* Nairobi High Court Criminal Appeal NO. 318 of 2010

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JUDGMENT OF THE COURT

The appellant, Mohammed Barrack was charged with two counts of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code.*** The particulars of Count I are that on the 6th day of February, 2008 at around 10.30 p.m at Golden gate estate, Industrial area within Nairobi area province, jointly with another not before court while being armed with a dangerous weapon namely, a pistol, robbed ***Swidom Lazarus Githeka PW1*** *(Swindon)* cash Kshs. 16,000, a digital camera make Sony, two cell phones make Nokia 2626, two wireless Safaricom phones, make Vodafone, 125, Business cards and a note book all valued at Kshs. 68,900 and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to Swindon.

Under count II, the particulars were that jointly with another not before court, while being armed with a dangerous weapon namely a pistol, robbed ***Julius Munene Mwangi PW2*** *(Julius)* a mobile phone make Nokia 3310, and a driving licence all valued at Kshs 3,000 and at or immediately before or immediately after the time of such robbery threatened to use actual violence on Julius.

Briefly the facts are that, at about 10.30 p.m on 6th February, 2009 Swindon, the Managing Director of Rescus Holding Limited accompanied by Julius, a taxi driver were in the South C area checking on the company's security personnel. They proceeded to Zanzibar road, Kapito road along Golden Gate road, when they met two people standing near one of the unmanned gates. With the available City Council electric lighting, they saw one man walk towards the gate as if to open it while the second man came towards their car, and shouted, some obscenities, telling them to raise up their hands in surrender. Immediately thereafter, the one who had gone to open the gate rushed to them brandishing a pistol. One man slapped Swindon, and demanded his two mobile phones, a Nokia 2626 and the other a Telecom 125, and Kshs. 16,000/= and some coins were stolen. Also stolen was a digital camera make Sony. They also robbed Munene of his mobile phone and his driving licence. Just before they walked away, they took the ignition key from the car but unbeknown to them, left the engine running.

Swindon and Munene chased after the assailants in the taxi, overtook them and went to seek assistance from the nearby Chief's Camp. As they passed them, they noted that the appellant was wearing a red pullover, and that his companion wore a white shirt.

They returned with armed administration police officers to whom they pointed out the robbers. One robber managed to escape, but the appellant was immediately arrested. A Nokia 2626 was recovered from his trouser pocket together with Kshs. 3835. The following day, the pistol was also recovered.

After corroborating Swindon's evidence, Julius added that by removing the ignition key from the car, the assailants thought that they had immobilized the vehicle, and since the vehicle engine was still running, they followed them towards the Chief's Camp. He confirmed that the security lights on the streets and from the vehicle enabled them to clearly see the assailants; that after they were intercepted, the Administration police officers, arrested the appellant, and also recovered Julius' driving licence.

APC Richard Lando **PW 3** confirmed having arrested the appellant after he was pointed out to them by Swindon and Munene, and

recovering Swindon's Nokia 2626, Munene's phone and driving licence from him.

The appellant denied committing the offence and stated that he was heading home from his place of work, and had just alighted at the bus stage when he saw several people running. They passed him, but soon after police officers apprehended him, beat him up, stole his money, arrested and charged him with the offence.

The trial magistrate convicted and sentenced the appellant to death upon finding that the offence was proved to the required standard. The appellant was dissatisfied with the decision, and appealed to the High Court (Ogola and Kamau, JJ.), which upheld the conviction and sentence. The appellant was aggrieved by the decision, and appealed to this Court on the ground that; the High Court erred in;

i. relying on the evidence of visual identification yet failed to appreciate that it was made under hectic circumstance hence not free from error or mistake;

ii. relying on the evidence of chase and arrest yet failed to find that there was not a sound chain of clause.

iii. relying on the evidence pertaining the alleged recovery of items exhibited yet failed to find that the same was not proved beyond doubt.

iv. failing to find that the same was not proved under section 150 C.P.C.

v. failing to re-analyzing and re-evaluating the trial record before making their decision as required of them; and

vi. disregarding his defense.

Submitting on behalf of the appellant, ***Mr. Kogi*** stated that the conditions for visual identification were unfavourable, and since no identification parade was conducted, the trial court and the High Court were wrong to find that the appellant was properly identified. It was further argued that the description that he was wearing a red shirt was not reliable, and the complainants should have provided a description as to the appellant's height and weight.

With respect to the issue of recent possession, a Nokia phone 2626 and cash in various denominations was recovered from the appellant, and during the trial, it was not established which of the phones belonged to the complainant; that the receipt produced was not sufficient to prove ownership and a serial number should have been produced instead since the Nokia 2626 was a common phone. And as for the monies recovered, the sum retrieved bore no relationship to the sum the complainants claim was stolen from them.

On the question of the sentence, counsel argued that the life sentence imposed was harsh and excessive and that having regard to the ***Francis Muruatetu case, Petition No. 15 of 2015***), this Court was urged to review the sentence.

In response, ***Mr Gitonga Muriuki,*** learned counsel for the State submitted that all the ingredients for the offence were proved to the required standard; that the appellant was convicted on the basis of his having been identified, and on the doctrine of recent possession. On his identification, the two complainants pursued the appellant, and drove passed them, they returned with the police who effected the arrest, and hence rendering the identification complete; that there was adequate street lighting and lights from the vehicle which enabled them to see the appellant. Counsel asserted that on the basis of the facts, an identification parade was unnecessary.

Addressing the issue of recent possession, counsel submitted that after the appellant was searched, he was found with the complainants' property; that Swindon's mobile phone, money and Munene's driving licence were items recovered from him, as a consequence of which the courts below were right to have invoked the doctrine of recent possession.

Concerning the question of the sentence, counsel asserted that the decision on sentence in the case of ***Francis Karioko Muruatetu & Another vs Republic, (supra),*** was inapplicable to the circumstances of this case, and therefore this Court should not interfere with the sentence as imposed by the trial court and upheld by the High Court.

We have carefully considered the grounds, the parties' submissions, the record and the applicable law. This being a second appeal by dint of ***Section 361(2)*** of the ***Criminal Procedure Code***, this Court can only address a point or points on law. In the case of ***Karingo vs Republic (1982) KLR 213*** this Court stated,

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari C/O Karanja vs R (1956)17 EACA 146."**

Duly guided, we consider that the issues for our consideration are whether i) the appellant was properly identified; ii) whether the courts below rightly invoked the doctrine of recent possession; iii) whether the offence was proved to the required standard and in conjunction with this, whether the courts' below took into account the appellant's defence; iv) whether the High Court properly re-analysed the evidence, and v) finally whether the sentence was eligible for review.

In so far as the appellant's identification was concerned, the trial court stated;

> **"The accused were clearly identified by the witnesses. There was adequate lighting at the scene. They found them manning a gate. They had ample opportunity to see their features."**

On its part, the High Court was satisfied that the appellant was properly identified, and more particularly found that the stolen items recovered from him squarely placed him at the crime scene.

It is now for us to interrogate the evidence to determine whether the appellant's identification was properly made out. The first encounter with the assailants was at the gate on Golden Gate road when the appellant and his co assailant attacked and robbed Swindon and Munene after they had stopped at the unmanned gate. According to the two, there was City Council lighting at the gate that enabled them see their assailants; that after robbing them, the assailants took the car key from the vehicle's ignition but the action did not immobilize the vehicle. Swindon and Munene were then able to chase after the robbers and overtake them and seek assistance at the Chief's Camp.

As they passed them, they noted that the appellant was wearing a red sweater. They returned from the camp with Administration Police officers and, found the assailants walking along the same road, whereupon they pointed them out to the police who promptly apprehend the appellant.

Swindon and Munene again stated that the City Council electricity lighting along the road was adequate and it enabled them to identify the appellant. We find the arrest of the appellant in the two complainants rendered the need for an identification parade unnecessary, and the High Court was right in so concluding.

On the invocation of the doctrine of recent possession, both courts below were satisfied that the appellant was found in possession of Swindon's Nokia 2626 and Munene's driving licence.

In the case of ***Erick Otieno Arum v Republic, Criminal Appeal 85 Of 2005 [2006] eKLR*** this Court explained;

> **"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; 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."**

The evidence showed that the mobile phone that belonged to Swindon, and the driver's licence that belonged to Munene were retrieved from the appellant's pockets. In the circumstances, it became incumbent on the appellant to explain how the stolen items were in his possession. The appellant argued that notwithstanding, the discovery of the Nokia 2626, the receipts Swindon produced as proof of ownership were insufficient to demonstrate that he owned the particular phone.

Our consideration of the proceedings does not disclose any doubt as to who the phone belonged to or that the issue was raised in the courts below. To the contrary, both courts below were satisfied that the stolen phone belonged to Swindon, and on the basis of the concurrent finding of fact, we find no justification to interfere with that finding. The appellant also did not explain how and why he was in possession of Munene's driving licence, stolen during the robber incident.

In the case of ***Nyambane vs Republic [1986] KLR. 248***, this Court held that;

> **"An appellate court should be reluctant to disturb concurrent findings of facts on a second appeal unless there were compelling reasons."**

That said, despite, the onus having shifted to the appellant to explain how the items came to be in his possession, he failed to do so. This failure would point to him as being one of the robbers who robbed Swindon and Munene on the evening in question.

The next issue was whether the appellant's defence was disregarded. In addressing this issue the High Court had this to say;

> **"The Appellant was identified by PW1 and PW2 as they interacted with him for a few minutes under security lights and PW3 recovered the stolen items after searching the Appellant's pockets. In the absence of any evidence by the Appellant to rebut the Prosecution's case that he was indeed found in possession of the stolen items this court finds that his defence was a mere denial. Any alibi by the Appellant was quickly was wiped out immediately the said items were recovered from him".**

In other words, the High Court clearly took into account the appellant's defence, and upon placing it alongside the prosecution's case found that the appellant's defence was far out weighted by the prosecution witness evidence with the result that the appellant's alibi defence was effectively dislodged. Given the circumstances, we are satisfied that the appellant's defence was taken into account and as such, this complaint is unfounded.

As to whether the High Court failed to evaluate the evidence. In addressing this issue, we will begin by setting out what constitutes the charge of robbery with violence under ***section 296 (2)*** of the ***Penal Code***. The case of ***Johana Ndungu v. Republic Criminal Appeal No. 116 of 1995 (unreported)*** sets out the requirements 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."

The Court is not required to look for the presence of all three ingredients, as proof of one of the ingredients would suffice to secure a conviction. Both the trial court and High Court, found that a gang of two or more people one of whom was armed, robbed Swindon and Munene of their personal items including a mobile phone, money and a driving licence. The appellant was soon thereafter found in recent possession of the items that would lead to the inescapable conclusion that he was the thief.

In reevaluating the evidence, the High Court was satisfied that the ingredients for robbery with violence were properly established, and likewise we have come to the same conclusion, that the prosecution proved its case to the required standard, and in so concluding we uphold the conviction.

The final issue was that the trial court imposed the mandatory death sentence as prescribed by law on the appellant. The appellant has complained that the sentence of death imposed was harsh and excessive. Owing to the Supreme Court decision in the ***Francis Muruatetu case*** (supra) which was delivered after the appellant was sentenced, wherein the court found mandatory sentences to be unconstitutional, we find it necessary to interfere with the sentence imposed particularly in view of the immediate recovery of the stolen items and his mitigation that he suffers from chest problems.

For the reasons aforestated, the appeal against conviction is dismissed, we allow the appeal against sentence to the extent of setting aside the death sentence and substitute it with a sentence of fifteen years' imprisonment from the date of the appellant's conviction.

Those shall be the orders of the Court.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

….....

JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR