



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, KIAGE & MURGOR, J.J.A)

CRIMINAL CASE NO. 71 OF 2017

BETWEEN

STANLEY KIARA KALII.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgement of the High Court at Machakos (B. T. Jaden & J. M. Nguji JJ)

dated 15th October, 2013 in H.C.CR.APP. No. 84 of 2007)

JUDGEMENT OF THE COURT

[1] *Stanley Kiara Kalii* (the appellant) is before this Court challenging his conviction for the offence of robbery with violence mainly on the ground that the evidence with regard to his identification as one of the perpetrators of the offence was not safe to warrant his conviction. This is a second appeal and that being so, we are aware of the remits of this Court's jurisdiction as provided for under **Section 361** of the **Criminal Procedure Code** is only on points of law.

[2] Equally, we are cognizant that we are required to give deference to the findings of fact by the two courts below. See **M'Riungu vs R [1983] KLR 455**. Nevertheless, we can interfere with such findings of fact where they are not based on any evidence at all, or on a misapprehension or perverted construction of the evidence or it is apparent that on the evidence, no reasonable trial court could have reached that conclusion, which would be the same as holding that the decision is bad in law. See **Karani vs. R [2010] 1 KLR 73**. Before delving into the crux of this appeal however, a brief background will place it in context and perspective.

[3] On 30th May, 2006 at about 10 pm, **Charles Makathu Musinga (PW1)** and his wife **Nzemi Makathu (PW2)** residents of Imuatine Village, Kaliku location within Kitui County were attacked while at their home by three thugs who were armed with offensive weapons namely *pangas* and metal rods. When the thugs struck their home, **PW1** was asleep in the bedroom while his wife was outside preparing to take a bath. One of the thugs was left outside keeping guard over **PW2** while the other two proceeded to the bedroom flashing torches. The thugs demanded to be given money and **PW1**, who was a stock trader at Zombe Market, while fearing for his life, gave the thugs Kshs. 78,000 being his daily collection. The thugs menacingly threatened to kill the complainants unless they were given more money thus **PW2** gave them Kshs. 10,000 which she was keeping in the house as the treasurer of her church.

[4] The thugs went on to search the house, and stole **PW1's** wrist watch and a pair of slippers. They then tied the two complainants and left, but the complainants were able to call for help from neighbours who came to their aid. From the outset **PW2** said she was able to recognize one of the assailants and gave his name as **Museveki Musava** (named assailant). The neighbours who responded to the distress call were **John Musembi (PW3)** and **Wanza Munyu (PW4)**, who used to be a village elder. They joined the complainants who had mentioned the name of one of the assailants and followed foot prints that led them to Kaliku School. Before proceeding further they reported the matter to the Kaliku Administration Police Post. The report was received by **APC Mohamed Difo (PW7)** who joined the team and the manhunt for the assailants went on in earnest up to the morning hours.

[5] **Mulwa Kyutto (PW5)** used to run a food canteen at Kabati Market. He testified that he had employed Martin **Musyoka Muteti** (2nd accused) at the said canteen and on 29th May, 2006, while the co-accused at the trial court was at work, he was visited by a stranger whom he identified as the appellant. The 2nd accused person identified the stranger to PW5 as his cousin and borrowed Kshs. 50 from him to assist his cousin with bus fare to which PW5 obliged. However, the 2nd accused did not come to work the next day which was the day the offence was committed.

[6] The evidence of PW5 was one of the circumstantial aspects was taken together with the evidence of how the appellant was arrested to connect him with the offence. As the search went on for the assailants, it was reported to the search team that **Museveki**, who had been named as one of the assailants, was spotted at Kabati Market taking tea with two other people. Word had already spread that **Museveki** was being sought in connection with the said robbery so when the members of public saw him with the appellant and his co-accused at the trial court, they descended on the three and started beating them. **Museveki** managed to escape but with serious injuries while the appellant and his co-accused were not so lucky. They were arrested and upon being searched, they were each found with Kshs 19,000 and the wrist watch that belonged to **PW2**. She positively identified it she had inscribed her initials on it. It was found in the pocket of the appellant. That is how the appellant with his co-accused at the trial court were charged with two counts of robbery with violence contrary to **Section 296 (2)** of the Penal Code. The particulars being: -

“Count I: That on the 30th day of May 2006 at about 10.00 p.m. at Imuatine Village, Kawala Sub-location, Kaliku Location in Kitui District of the Eastern Province, while armed with offensive weapons namely pangas and metal rods jointly with another not before court robbed Charles Makathu Musinga Kshs.78,000/= and one electronic watch make Casio valued at Kshs.200/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence on the said Charles Makathu Musinga.

Count II: That on the 31st day of May 2006 at around 11.00 a.m. at Kabati market, Zombe Location in Kitui District of the Eastern Province, otherwise than the course of Robbery dishonestly handled cash Kshs.19,000/= knowing or having reasons to believe the same to be stolen or unlawfully obtained.”

[7] The appellant and his co-accused were tried before the Principal Magistrate’s Court at Kitui, where eight (8) witnesses testified in support of the prosecution’s case. The appellant was found to have a case to answer and when put on his defence he gave sworn evidence. He denied the offences and stated that on 31st May, 2006 he was carrying out his business of buying chicken at Zombe Market when he was arrested. Upon weighing the prosecution evidence against the defence of the appellant, the trial court arrived at the conclusion that the prosecution’s case was proved beyond reasonable doubt.

[8] The trial court relied on the evidence of identification and the doctrine of recent possession in arriving at the conclusion that the appellant was guilty as charged. The appellant’s defence was found unconvincing in the face of the prosecution’s case, and he was sentenced to suffer death. The appellant’s appeal before the High Court was also dismissed by the two judges who heard it. The High Court concurred with the trial court that the circumstances prevailing when the offence was committed were conducive for a positive identification and moreover the appellant was also found in possession of the stolen goods.

[9] Unrelenting, the appellant has filed this second appeal before us that challenges the evidence of identification which he contends was insufficient to support a safe conviction; that the evidence did not meet the threshold in support of the doctrine of recent possession and that his defence that was credible was not taken into account. During the plenary hearing, which took place virtually through “Go to Meeting” platform due to the prevailing COVID 19 Pandemic, **Mr. Oira Ratemo**, learned counsel appearing for the appellant, elaborated on the aforesaid grounds and further relied on the written submissions that were filed by the appellant in person.

[10] Counsel for the appellant submitted that there was a possibility of a mistaken identity because the appellant was arrested by members of public simply because he happened to be a stranger in the town where the robbery had taken place. The complainants named **Museveki Mutava** as one of the assailants but the appellant was not named as one of them. The suspect who was named was lynched by the mob and his co-accused was acquitted. Counsel urged us to find that no identification parade was conducted to rule out the possibility of a mistake and, moreover, the fact that the appellant was found in possession of Kshs. 19,000 in his pocket was not sufficient evidence that it was the same money that was stolen from the complainants.

[11] According to Mr Oira, the circumstances under which the appellant was arrested by the mob among two other suspects who were lynched, taken with his defence should have created doubts as to whether the second count of handling stolen property was proved. On sentence, counsel urged us to consider the appellant was sentenced to death which was the only sentence prescribed by the law then. Counsel submitted that nowadays with the Supreme Court’s decision in the case of **Francis Karioko Muruatetu & Another vs. Republic - Petition No. 15 of 2015** consolidated with **Petition No. 16 of 2015 (Muruatetu case)** the mandatory death sentence is unconstitutional. Counsel urged us to consider the circumstances under which this offence was committed, and that the complainants were not injured, but the appellant was beaten by the mob and that he has been incarcerated since June 2006.

[12] This appeal was opposed by **Ms Wang’ele** learned counsel for the prosecution. She relied on her written submissions and made some oral highlights stating that the ingredients of the offence of robbery with violence were proved as the appellant was in the company of two others and was armed with a panga and they used threats to rob the complainants. On identification, counsel submitted that although the offence took place at night, the complainants testified that there was light emanating from a lantern that was hanged on the wall. Besides, the place was illuminated by lighting from the torches used by the assailants which evidence was accepted by the two courts below and, according to counsel, no material has been presented in this appeal to challenge those findings of fact.

[13] Further counsel for the respondent made reference to the evidence of **PW7** and **PW8** the police officers who arrested the appellant and produced the *panga* and the wrist watch that was found with the appellant in addition to Kshs.19,000 that was recovered from him. Furthermore, the appellant could not explain how he came to be in possession of those items. On sentence, counsel urged us to find there was no mitigation offered and should we be inclined to interfere with the sentence, that we should remit the matter to the High Court for re-sentencing.

[14] As intimated in the opening paragraphs, this being a 2nd appeal, only matters of law fall for our determination by dint of the provisions of **Section 361 (1)** of the **Criminal Procedure Code**. As such we have discerned only two issues of law deserving our consideration to wit; whether the High Court properly re-evaluated the evidence of identification and whether the burden of proof for the doctrine of recent possession of the wrist watch was properly invoked and proved before the two courts below.

[15] Counsel for the appellant poked holes on the evidence of identification by **PW1** and **PW2** who saw the appellant for the first time during the robbery, when the circumstances for positive identification were not conducive. We have revisited this evidence and it is clear to us that even the High Court judges were well aware of the dangers of solely relying on evidence of identification which took place at night. It is perhaps for that reason that the judges cautioned themselves on the said dangers of relying on evidence of identification at night and this is what they stated in a pertinent paragraph of the impugned judgement: -

“The main issue for this court to grapple with is whether the Appellant was one of the robbers. Both PW1 and PW2 testified that there was light from a hurricane lamp that was in the house and they could see well. Indeed, the evidence of both PW1 and PW2 is that they were able to recognize one of the robbers as a neighbour by the name Museveki Musava. PW1 stated that the lamp was at the wall while PW2’s evidence is that the lamp was at the corridor but the door was open. Both witnesses also described the robbers as having used torch light. According to PW1 the torch light was used to flash all over the house. PW1’s further evidence was that at some point the Appellant directed the torch light on himself and asked PW1 if he knew him. The encounter between the complainants and the attackers was in close proximity. There was time for the complainants to observe them during the handing over of the money, the conversations held and the flashing around the house with torch light by the attackers. We are therefore satisfied that the circumstances of the offence were conducive to positive identification. We note that this was evidence of recognition which is more reliable than that of mere identification.”

“A case of recognition, not identification is more satisfactory, more assuring and more reliable than that of identification of a stranger because it depends on the personal knowledge of the assailant in one form or the other.” (See Anjoni vs. Republic).

[16] The evidence of identification was buttressed by the evidence of the recovery of the stolen goods. **John Musembi PW3**, a neighbour who went to the complainants’ rescue and who participated in tracking down the robbers narrated to the trial court how they followed footprints and made inquiries which led them to **Kabati** area where they caught up with the robbers and arrested the appellant. The assailant who was named as Museveki by the complainants was lynched by the mob. According to **PW3**, the appellant was arrested with a *panga* and with PW 2’s wrist watch. **PW3** described the *panga* as having a black rubber band and further stated that the watch was marked with the initials **“CM”**. These were the same items that were produced as exhibits before the trial court.

[17] On our own analysis, we find that when the complainants were robbed at night, they mobilized neighbours and police that night who mounted a manhunt for the assailants. It is evident that the complaints were able to name one of the assailants as **Museveki** and they followed the footsteps and made inquiries as to where he was seen, whereupon the search led to a shopping centre where **Museveki** was seen in the company of the appellant and the co-accused person before the trial court. Unfortunately for the appellant, in addition to being identified by the complainants as one of the robbers, he was found in possession of the wrist watch that was stolen a few hours before. We find the chain of events here were not broken such as to give room to a mistaken identity as the appellant was arrested a few hours after the robbery and in the company of **Museveki** who was identified by way of recognition. We find that although the robbery took place at night, the circumstances under which the appellant was arrested left no doubt that he was positively identified.

[18] The next issue is whether the doctrine of recent possession was properly applied in this case. According to **PW3**, when the appellant was arrested he was found in possession of a *panga* and a wrist watch. **PW2** and **PW4** stated that they found the appellant had already been arrested by **PW7** and **PW8** who restrained the members of public from lynching them. These are the police officers who joined the manhunt for the robbers. The two officers gave evidence of how the appellant was found with a *panga*, the wrist watch and Kshs.19,000. **PW2** was able to identify her wrist watch which she had inscribed with her initials **“CM”** while **PW1** identified the *panga* because it had a rubber band. In our view the circumstances under which the appellant was arrested with an item that were stolen a few hours earlier raised a rebuttable presumption of fact under **Section 119** of the **Evidence Act** that the appellant was either the thief or was a guilty receiver of stolen items. In **George Otieno Dida & Another vs. Republic [2011] eKLR** the appellant therein had been found in possession of stolen goods less than five hours after a robbery and this Court held that:-

“There are concurrent findings of fact by both the trial and first appellate courts that indeed there were robberies, several items including the ones produced in court were stolen in the course of those robberies, and the appellants were found in possession of the same only five hours or less after the robberies..... In our view, the

evidence against the appellants though circumstantial, raised a rebuttable presumption of fact under section 119 of the Evidence Act, Cap 80 Laws of Kenya, that they were either the thieves or guilty receivers. The evidence excludes the latter because they were found in possession only less than 5 hours after the theft and it is not reasonably possible that the goods would have within that short time have changed hands.”

[19] The present case is on all fours with the above case. We find that the appellant was found with the properties robbed from **PW1** and **PW2** only a few hours after the robbery and he did not offer any explanation as to how he came to be in possession of the stolen items.

Therefore, the conclusions of the two courts below were correct based on evidence of recent possession. From the foregoing there can be no explanation other than that the appellant was one of the robbers. We have no basis whatsoever for departing from those concurrent findings.

[20] On the issue of sentencing, it is now a well beaten path, that an appellant who was convicted and sentenced to a mandatory death sentence can apply for resentencing following the decision in the case of *Muruatetu* (supra) in which the Supreme Court found the mandatory nature of a sentence that denies the trial court the judicial function of meting out a proportionate sentence went against the dictates of a fair trial which is a guaranteed right under the Constitution. The appellant's trial and appeal were before the *Muruatetu* case, and as the two courts stated, death was the only sentence provided by the law at that time. It is understandable why the appellant did not offer any mitigation because death was the only sentence. That also explains why the trial magistrate did not take into account the submission by the prosecutor that the appellant was a first offender. It is therefore evident to us that in sentencing the appellant, the trial magistrate did not exercise his discretion nor did he take into account the submission by the prosecutor that the appellant was a first offender.

[21] We find that this is an appropriate case in which this Court ought to intervene as the appellant did not get a fair trial in so far as sentencing was concerned. This Court has the discretion to impose an appropriate sentence or remit the case back to the High Court for re-sentencing. As we have already substantially dealt with the appeal, and the appellant having already served over fourteen years' imprisonment, we find it expedient to bring this matter to conclusion by imposing what we consider an appropriate sentence. Given that the appellant was a first offender, that during the arrest he was subjected to mob justice and there was no physical injury inflicted on the victims of the robbery, there were no aggravating circumstances to this offence. Accordingly, we are of the view that the almost fifteen (15) years the appellant has been in incarceration is sufficient punishment that would serve the ends of justice.

[19] For above the reasons, we dismiss the appeal against conviction, but allow the appeal against sentence to the extent that the death sentence imposed by the two courts below is set aside and substituted with a sentence that is commuted to the period already served. Unless the appellant is otherwise lawfully held he is to be set at liberty forth with.

Those shall be the orders of the Court.

Dated and delivered at Nairobi this 9th day of October, 2020.

M. K. KOOME

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JUDGE OF APPEAL

P. O. KIAGE

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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