



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, GATEMBU & J. MOHAMMED, JJ.A.)**

**CRIMINAL APPEAL NO. 125 OF 2019**

**BETWEEN**

**DAVID KANYITTA NYORO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya*

*at Nairobi (Kimaru, J.) dated 29<sup>th</sup> September, 2016*

*in*

*H.C. Cr. App. No. 107 of 2015)*

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**JUDGMENT OF THE COURT**

1. The appellant, David Kanyitta Nyoro, has in this second appeal challenged his conviction and sentence for the offence of robbery with violence.
2. In the night of 14<sup>th</sup> February 2014, David Kabea Ngethe (Ngethe) and his wife Mary Kabura Ngethe (Kabura) were in their home at Golden Palm Estate, Njathaini area, Kiambu County when they were attacked and violently robbed. Ngethe had arrived home late that night and proceeded to the bedroom leaving his wife in the sitting room. Shortly thereafter it started raining and he heard his wife screaming. On descending downstairs, he saw a man wearing a jacket and retreated. He was then confronted by two men who picked his phone and ordered him to go downstairs. He saw that his wife, who was sitting on the staircase, had injuries on the head and had several cuts. He was ordered to sit down at the table room. One of the attackers went into the bedroom of Ngethe’s son and moved out with a laptop after which the attackers left. In addition to the phone and the laptop, the attackers also stole keys for Ngethe’s pick up, a Vanier clipper and cash. After the attackers left, Ngethe took his wife to Aga Khan Hospital where she was hospitalized for over a week.
3. In his testimony Ngethe narrated that the person who picked his phone was wearing a jacket, was slim, tall and had a fresh wound. He explained that the attackers were wearing heavy jackets and “marvin” on their heads, and that there was bright electricity light in the bedroom and in the table room.
4. Ngethe reported the incident at Kiambu Police Station where he recorded a statement and investigations commenced. A few days later he was informed by the police that a person had been arrested in connection with the robbery and that an identification parade would be mounted. He was required to attend the identification parade to see if he could identify the assailants. An identification parade was organized and conducted by Inspector Hannington Mwazanga (PW7) at which Ngethe picked out the appellant and identified him as one of the attackers who robbed him.

5. Ngethe's wife, Kabura, testified as PW2. Her testimony in relation to what transpired at their home on the night of 13th/14th February 2014 corroborated that of her husband. She added that after her husband arrived home that night, he left her in the dining room eating; that by instinct she felt nervous and decided to leave the dining room; that as she approached the staircase, she saw the kitchen door was open and suddenly somebody in a black jacket confronted her; that she was then hit with a walking stick and fell on the stairs; that the attacker had worn a hat covering the face and she did not see his face clearly at that point, but the lights in the sitting and dining room area were on and she could see the person was slim and tall; that suddenly two more people came in and they attacked her with a club and "objects like axes" and she sustained eight cuts and fell down; that one of the attackers, "slim tall guy had a wound on the face"; that the attackers then left her and proceeded to the bedroom and they came downstairs with her husband, and after the assailants had left, her husband took her to Aga Khan Hospital where she remained hospitalized under treatment until 20th February 2014.

6. Two of the items stolen from the complainants' home that night, namely, Ngethe's phone and the laptop bag in which the laptop was taken, would eventually lead to the arrest, charge and conviction of the appellant. Having obtained the International Mobile Equipment Identity (IMEI) number or serial number (354851057843938) of the stolen phone from its packaging or box obtained from the complainant's house, the investigating officer, Police Constable Tom Odhiambo (PW12), formally requested Safaricom to trace the usage of the phone over a period of time immediately after it was stolen.

7. Upon receiving that request, Corporal Daniel Hamisi (PW10), a law enforcement officer attached to Safaricom, accessed the Safaricom computers and retrieved communication data in respect of the said IMEI as well as the subscriber details of the phone numbers with which that phone had communicated during the period immediately after the robbery. He established that two Safaricom sim cards had been used with the stolen phone shortly after it was stolen, one of which was used to communicate with the appellant's mother, one Jane Wairimu Nyoro, which led to the arrest of the appellant. The second sim card used with the same phone communicated with the appellant's co-accused who was said to be the appellant's wife or girlfriend.

8. Police Constable Tom Odhiambo stated that the appellant's co-accused was traced using sim card (number 0708008295) that was used to communicate with the stolen phone and was arrested at Dacha Apartments in Githurai 45, Nairobi.

9. On 26<sup>th</sup> February 2014, Peterson Mugendi Stanley (PW3), the caretaker at Dacha Apartments was in his house at those apartments when he was alerted that there were police officers outside. They wanted access to the appellant's house where he resided with the co-accused but they could not immediately gain access. The police requested the caretaker to secure the appellant's room, G4, by locking the room with an additional padlock, which he did.

10. The appellant's co-accused returned to the apartments the following day, when the caretaker alerted the police officers who in turn responded within 20 minutes; the room was opened and upon entering and searching the same, the police officers recovered a laptop bag, and house rent receipts in respect of the apartment G4 in which the appellant was named as the tenant. According to PW3, the appellant and the co-accused were husband and wife and resided in the apartment with one child.

11. The complainant's son, Lewis Elijah Ngethe (PW4), whose laptop was stolen with its laptop bag from his parents' house during the robbery, furnished the police with the serial number of the stolen laptop. Although the laptop itself was not recovered, he was able to identify the laptop bag that was recovered from the appellant's house by the initials he had inscribed on it, namely, LEN, an abbreviation of his three names.

12. Other witnesses who testified at the trial included the complainants' gardener/shamba man, Fredrick Mulinge Mutunga, PW5, who opened the gate for PW1 when he got home late at night on the day the robbery took place; Corporal Julius Kiptanui (PW6) who testified on the attempt by the appellant to escape from custody; Dr. Zephania Kamau (PW8) who testified on the nature of injuries Kabura sustained during the robbery; Police Constable Jackson Kiprop (PW9) from CID scene of crimes who scouted the scene of crime and took photographs; and James Kimanda (PW11) from the Registrar of Persons office who testified on the identities of the persons registered as subscribers of the phone numbers that were used in communication with the stolen phone.

13. In his defence, the appellant stated that he is a boda boda operator and was at work normally on 26th February 2014 and had dropped off various passengers at various places and returned to the stage when two police officers approached him and arrested him with another customer, taken to Kiambu Police Station and charged with an offence he knew nothing about.

14. On her part, the appellant's co-accused, Catherine Wangari Njeri, stated that she was a casual worker; that on 27th February 2014 she was at Daja apartments looking for casual work to wash clothes; that while there, people she did not know came and asked her who the owner of the house next to where she was; that she indicated that it belonged to her customer; that they asked her to accompany her to the police station where she was placed under arrest and charged.

15. Upon reviewing and evaluating the evidence, the trial court was satisfied that the prosecution had established its case against the appellant; that the ingredients of the offence of robbery with violence were proved; that the appellant was positively identified as one of the attackers; and that besides identification, there was circumstantial evidence that linked the appellant to the offence. With that, the appellant was convicted and sentenced to death. The appellant's co-accused was however acquitted.

16. On the appellant's first appeal, the High Court concluded that

*“the evidence of identification against the appellant was not watertight as to be free from possibility of error or mistaken identity”* on the basis that the complainants had not, in their first report to the police, given a clear description of the assailant. The High Court however reaffirmed the finding by the trial court that *“the evidence of recovery of the laptop bag and the mobile phone connected the appellant to the robbery.”*

17. The appellant has in the present appeal challenged the decision of the High Court on grounds that that court failed to re-evaluate the entire evidence afresh and reached a wrong decision; that the prosecution case was full of contradictions; that the prosecution did not discharge its burden of proof; and that Section 169(1) of the Criminal Procedure Code was not complied with by the trial court.

18. On behalf of the appellant, **Mr. Ntenga Marube**, learned counsel, submitted that the doctrine of recent possession did not apply; that PW1 did not identify the laptop bag although PW4 stated that the bag was his; that the appellant's co-accused stated that the laptop bag was given to her by somebody else, a cousin, and that only the 2nd accused, the appellant's girlfriend, knew about the bag; that even though the appellant may have paid the rent for the house where the laptop bag was found, he was not in charge of the house.

19. As regards the use of the stolen phone, counsel submitted that the same was used by the appellant's co-accused and not the appellant and there was therefore no connection with the appellant.

20. Counsel concluded by urging that should the Court find the appeal lacking in merit, it should refer the matter back to the trial court for re-sentencing.

21. Opposing the appeal, **Ms. Mary Wang'ele**, learned Senior Prosecution Counsel, began by taking issue with the High Court on the issue of identification. Counsel submitted that the High Court had no basis for interfering with the findings of the trial court in that respect; that the trial court had the distinct advantage of observing the demeanor of PW1 and observed that he was a truthful witness; that the description of the assailants was indeed given to the police when the robbery was first reported; that an identification parade was conducted at which the appellant was picked out; and that the High Court had therefore no basis for interfering with the trial court's findings on identification.

22. On the issue of recent possession, it was submitted that the ingredients of the doctrine were fulfilled; that the appellant was in constructive possession of the laptop bag; that the laptop bag was found in a house where the appellant was living and paying rent and was known to have been residing there; that the testimony of the caretaker at Daja Apartments, PW3 confirmed that the appellant and the co-accused were living together where the laptop bag was recovered; and that the reason the appellant's co-accused was acquitted was merely because there was no mention by PW1 or PW2 in their testimony, of a female attacker during the robbery.

23. As regards the sentence, counsel submitted that the death sentence was justified in the circumstances of this case; and that the appellant attempted to escape from custody and was convicted for that offence. The Court was urged to uphold conviction and sentence.

24. In reply, Mr. Marube pointed out that there is no cross appeal regarding the finding by the High Court on identification and that this Court cannot therefore address it.

25. As for sentence, Mr. Marube cited the Supreme Court case of **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR** and submitted that the trial court wrongly proceeded on the basis that the death sentence was mandatory, and the sentence should therefore be reconsidered.

26. We have considered the appeal. In a second appeal such as this, our mandate is limited to matters of law by dint of Section 361(1) of the Criminal Procedure Code. See **Chemagong vs. Republic [1984] KLR 611**. As also held in **Karingo vs. Republic [1982] KLR 213**:

*“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 unless 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 Karoti S/O Karanja versus Republic [1956] 17 EALA 146).”*

27. Bearing that in mind, the only issue we have to consider is whether the appellant was rightly convicted based on the doctrine of recent possession. The relevant circumstances in this case, as already noted, were that during the night of 14th February 2014, the home of PW1 and PW2 was broken into as a result of which PW2 sustained injuries and a mobile phone as well as a laptop in a laptop bag stolen from their home. PW1 stated that he witnessed the attackers take away the laptop as they left the scene.

28. Lewis Elijah Ngethe, the son of PW1 and PW2, confirmed in his testimony that he found his laptop missing from his room and that

*“my laptop was stolen with its laptop bag.”* The laptop bag was recovered from the appellant’s house at Ndaja Properties.

Peterson Mugendi Stanley (PW3), the caretaker at Ndaja properties was present when the police officers searched the appellant’s house and recovered the laptop bag and house rent receipts. In his words the police *“only picked a bag hanged on the wall”*. The bag was produced as an exhibit before the trial court and PW3 identified it as the bag that was recovered. PW3 was clear that the house where the bag and the receipts were recovered was occupied by the appellant and his wife, the co-accused, and their child.

29. The investigating officer, Police Constable Tom Odhiambo, PW12, who arrested the appellant as well as the appellant’s co-accused stated that the laptop bag (produced as prosecution exhibit 1) was recovered from the appellant’s residence, house number 4 Daja Apartments in Githurai 45, where the appellant lived with the co-accused; that the appellant’s co-accused who was present at the time the laptop was recovered claimed that the bag belonged to her cousin.

30. PW4, Lewis Elijah Ngethe, easily identified the recovered laptop bag as the bag that was stolen as *“it has a mark”*. The recovery of the laptop bag was made at the time the appellant’s co-accused was arrested on 27th February 2014, just about ten days after the robbery incident. Other than the unsubstantiated claim by the appellant’s co-accused that the bag belonged to her cousin, the appellant did not offer an explanation how the bag came to be in his house. In our view, the ingredients of the doctrine of recent possession were established.

31. In *Isaac Ng’ang’a Kahiga & another vs. Republic [2006] eKLR* to which we were referred, this Court stated that:

***“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. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.”***

32. Furthermore, there was other credible evidence connecting the appellant to the crime. The evidence of PW12, the investigating officer, and that of PW10, Corporal Daniel Hamisi, who was attached to Safaricom established that PW1’s mobile telephone stolen in the course of the robbery was used to call the appellant’s mother shortly after it was stolen and linked the appellant to the same. As the trial court stated:

***“From a chain of these events ranging from use of the stolen mobile phone and recovery of a stolen laptop bag from accused one’s house, it is clear that there is a connection between accused 1 and the robbery at the home of PW1. The chain is too strong to break. Even without identification, which is there anyway, I would still convict based on this circumstantial evidence. It would not be by sheer coincidence that accused is identified at the scene of robbery, stolen phone used to communicate with him, and a stolen bag found in his house. Even under the doctrine of recent possession we can circumstantially connect accused 1 with the offence.”***

We respectfully agree. There is accordingly no merit in the appellant’s appeal against conviction.

33. As regard sentence, the appellant has urged us to reconsider the same. He was sentenced to suffer death. In meting out the sentence, the trial court expressed that, *“the offence committed is very serious. The penalty is mandatory. I have no chance but to sentence accused to hang until pronounced dead as per the law established in respect of count 1.”* The Supreme Court of Kenya has since, in the case of *Francis Karioko Muruatetu & another vs. Republic (supra)* determined that the trial court has a discretion in sentencing. As this Court recently expressed in *Francis Simiyu vs. Republic [2020] eKLR*:

***“On sentence, we note that the trial court upheld the death sentence on the basis that it was the only available sentence for the offence charged. Following the MURUATETU decision, (supra) the courts do retain a discretion and may impose a sentence other than that of death upon returning or upholding a conviction for robbery with violence.”***

34. In mitigation, the appellant appeared remorseful and sought leniency stating that he was epileptic and on medication and had one child who was dependent on him. Bearing in mind also that he had a prior conviction for attempting to escape from lawful custody, a deterrent sentence is called for. We set aside the death sentence imposed by the trial court and substitute therefore a custodial sentence of 30 years from the date of conviction. To that extent only the appeal succeeds.

Orders accordingly.

*Dated and delivered at Nairobi this 20<sup>th</sup> day of November, 2020.*

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**