**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KIAGE, GATEMBU & MURGOR, J.JA)**

**CRIMINAL APPEAL NO. 85 OF 2019**

**BETWEEN**

**MEHTAB AHMEDALI HUSSEIN SHAH.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the Judgment and order of the High Court of Kenya at Kiambu delivered by (Kamau, J ) on 14th August 2018***

***in***

***Nairobi High Court Criminal Appeal NO. 146 of 2017)***

**********

**JUDGMENT OF THE COURT**

The ***appellant, Mehtab Ahmedali Hussein Shah*** was charged with robbery with violence contrary to ***section 295*** as read with ***section 296 (2)*** of the ***Penal Code.*** The particulars of the offence are that on the 4th day of October, 2015 at around 9.30 a.m along Ruaka – Gachie road within Kiambu County with others not before court while armed with pistol, he robbed ***George Mwanga Onguso PW1*** *(George),* of a motor vehicle Reg. No. KCD 728A Toyota Probox valued at seven hundred and fifty thousand shillings (Kshs. 750,000/=) and at the time of such robbery used actual violence on George.

He also faced an alternative charge of handling stolen property contrary to ***section 322 (1) (2)*** of ***the Penal Code***, the particulars of which were that on the same day, in the course of robbing he dishonestly retained one motor vehicle Reg. No. KCD 728A Toyota Probox, the property of George knowing or having reason to believe that it was stolen goods. The appellant denied committing the offence.

The trial magistrate convicted the appellant and sentenced him to death as prescribed by law upon finding that the offence of robbery with violence was proved. He was dissatisfied with the decision, and appealed to the High Court (*J. Kamau, J.*), which upheld the conviction, and sentence of death.

Aggrieved by the decision of the High Court, the appellant has appealed to this Court on grounds that the High Court as first appellate court erred by dismissing his appeal without subjecting the entire evidence to a thorough, fresh and exhaustive examination and as a result arrived at an unfair, unjustified and manifestly unsafe decision; in failing to appreciate that the doctrine of recent possession was not applicable to the circumstances of the case; in failing to draw an adverse inference arising from the prosecution's failure to summon vital witnesses; in wrongly shifting the burden of proof of the appellant's alibi defence; and in failing to appreciate that the prosecution's case was not proved to the required standard.

In the submissions, ***Mr. Swaka*** learned counsel for the appellant submitted that identification of the appellant rendered the conviction unsafe as George did not provide a description of the appellant to the police before the appellant was arrested, and further that the learned judge was wrong to conclude that an identification parade was unnecessary.

On the question of recent possession, it was submitted that since the appellant was not found in possession of the stolen motor vehicle, and the property did not belong to the complainant, recent possession was not established. Finally, it was asserted that both the trial court and the High Court did not evaluate the evidence, as they failed to appreciate that, the appellant was not driving or stealing the motor vehicle, and no evidence linked the appellant to the offence, particularly as the appellant was found a long way off from the abandoned motor vehicle. Counsel also asserted that the courts below wrongly shifted the burden of proving the appellant's alibi defence to the appellant, yet it was

incumbent upon the prosecution and not the appellant to ascertain whether or not he was at Amagoro when the offence was committed.

With respect to the sentence, counsel asserted that based on the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 15 of 2015***, the sentence was harsh, and the trial court ought to have imposed a more lenient sentence.

On behalf of the respondent, learned State Counsel ***Ms. Matiru*** submitted that on the issue of recent possession, the appellant was found in Timboroa in the same vicinity where the stolen motor vehicle was tracked and apprehended, and he did not provide any explanation as to how he came to be hiding on top of a tree; in the vicinity of the motor vehicle.

Concerning the witnesses that were not called to testify, counsel submitted that all the witnesses necessary to prove the prosecution's case were called and any other witness evidence would have been superfluous.

The jurisdiction of this Court is clearly defined as determining only questions of law on second appeals. See ***Joseph Njoroge vs Republic [1982] KLR 388.***

We have considered the grounds of appeal and the parties' submissions and are of the view that the issues to be addressed are, i) whether the appellant was properly identified; ii) whether the doctrine of recent possession was established; iii) whether critical witnesses were not called; iv) whether the courts below shifted the burden of proof; v) whether they properly evaluated the evidence; and vi) whether the sentence was excessive.

Before addressing the issues, it would be prudent to set out the evidence. The facts were that George, who operates a taxi business, at Yaya Centre, was hired at about 10.30 a.m on 30th September, 2015 by a lady from West Wood apartments at Yaya Centre to go to Mugoya estate in South C. On arrival at the estate, she requested him to wait for her, as she wanted him to take her to Nairobi Hospital. After waiting 20 minutes, a boy came and asked if he was a taxi driver, as his boss needed to transport eggs from Ruaka to South C. The boy requested him for his mobile number.

On 1st October, 2015 at around 1.00 p.m, one Hussein called to inform him that he wanted to hire the taxi to carry eggs from Ruaka to South C. On 3rd October, 2015, Hussein called him again to inform him that he would require his services the next day as the eggs would be ready for collection. They agreed to meet at the Aga Khan Hospital the next day where Hussein planned to visit his mother.

When he arrived at the hospital the following morning, he called Hussein and after some time, a man he identified as the appellant came from the hospital, boarded the motor vehicle together with the boy he had met earlier, and they drove towards Ruaka.

On arrival at Ruaka shopping centre, they turned into a murram road whereupon, the appellant requested George to reverse because he had seen the boy's mother on the road side. Whilst reversing three men, one of whom was armed with a pistol forced George into the back seat, and the appellant, who was in the passenger's seat, took control of the vehicle and drove away. The assailants assaulted and robbed George, and forced him to drink a substance (blue) from a plastic bottle which intoxicated him. They then took him into a coffee plantation where they left him.

George managed to find his way to the main road where ***Githinji Gachanja (PW2)*** rescued and took him to Rueno Police Post, where he reported the robbery and gave his assailant's name as Hussein Uzi. He also informed ***David Njoroge PW3*** *(Njoroge)* the owner of the motor vehicle that it had been stolen. With the aid of a car tracking device fitted to his phone, Njoroge tracked the motor vehicle to Timboroa, heading in the direction of Eldoret. After four days, George identified the vehicle which had bullet holes all over, while Njoroge produced the documents for the motor vehicle.

On 4th October, 2015 ***PC Robert Odhiambo Ochola, Police Force No. 60355 PW 5*** based at the CID officers at Kiambu and attached to the Flying Squad, received a report of the theft of a motor vehicle from George who he said looked confused and disheveled. He also had an injury on his head; George reported how he had met with the appellant who he identified as Hussein Ali who wanted to be taken to Ruaka town to buy 400 crates of eggs to sell; After a brief stop at Aga Khan Hospital, they had proceeded to Ruaka, where he was robbed of the motor vehicle by four men, one of whom was armed with a pistol. They forced George to drink a liquid that intoxicated him, drove him into a coffee plantation and dumped him there. PC Ochola further stated that with the aid of Njoroge's motor vehicle tracking device, they located the motor vehicle at Mathara road, and after it was apprehended, the appellant ran away and hid in a bush. He was soon after found hiding in a tree by ***Cpl Kazungu Ngumbao Jeremiah Police Force No. 67972 (PW 7)*** based at Flying Squad, Nakuru. The appellant was arrested and taken to Nakuru CID offices, and later transferred to Karuri Police Station.

In his defence, the appellant denied committing the offence and stated that he was an electronics technician with a Digital company based in Nairobi; He had been in Amagoro in Malaba installing ceilings and was on his way back when he stopped to shop at Timboroa market. He was confronted by police officers, handcuffed, shown a Probox that had bullet holes and shattered windows, and thereafter taken to Nakuru and later transferred to Nairobi where he was charged with the offence.

Returning to the issues, and beginning with whether the appellant was properly identified, counsel for the appellant argued that in view of the divergence in opinion between the two lower courts with the trial court's finding that, the failure by the prosecution to conduct an identification parade weakened its case, and on the other hand, the High Court's finding that the appellant was properly identified and the failure to hold an identification parade did not weaken the prosecution's case, the question still remained to be determined whether or not the appellant was identified. Given this divergence, it becomes incumbent upon us to determine whether George identified the appellant.

In the case of ***Republic vs Karioki S/O Rushashio and another [1948] 23 KLR (I) 21*** it was stated that***;***

> ***"Failure to make identification at a parade is not necessarily fatal, as in Karioki's case, where identification was not made at the***

***parade, but only in court, the court held that the evidence was in the circumstances sufficient to establish beyond all reasonable doubts that the accused was one of the group present at the relevant time and a participant in the crime."***

In this case, it is not disputed that George was not amongst the officers who arrested the appellant. It is also not in dispute that no identification parade was conducted to identify him, instead, the appellant claimed that when George was called to the police station at Karuri, he saw the appellant through a window, and was also shown a photograph of him and that this enabled George to identify him. Though this may have been prejudicial to the appellant, it cannot be overlooked that the prevailing conditions for visual identification were favourable. The incident took place in broad daylight, and George was with the appellant for a reasonable period before he was robbed and dumped in the coffee plantation. He saw him when he came out of the hospital and during the drive to Ruaka which gave him ample time to see and identify the appellant. George recalled that he was of Indian appearance. The failure to hold an identification parade did not negate George's ability to identify the appellant, and, as was the High Court, we too are satisfied that George identified him as one of the robbers.

But that is not all. Coupled with his having been identified, the appellant was found in recent possession of the motor vehicle which unequivocally linked him to the offence. This brings us to the issue of whether the courts below rightly invoked the doctrine of recent possession. In the case of ***Isaac Nanga Kahiga alias Peter Nganga Kahiga vs Republic*****,** **Criminal Appeal No. 272 of 2005** (unreported), in these terms:

***"..... It is trite law 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 proved. In other words, there must be positive proof first, that the property was found with the suspect, and secondly that, the property is positively identified the property of the complainant, thirdly 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 another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses ....."***

And in the case of ***Hassan vs Republic (2005) 2 KLR 11***, it was held that;

***"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 a receiver".***

George was robbed of the motor vehicle in Ruaka. After he reported that it had been stolen, Njoroge used his tracking device to trace the vehicle to Timboroa, where it was subsequently apprehended. It was also in Timboroa where Cpl. Kazungu found the appellant hiding in a tree in the vicinity of the same motor vehicle that he had hired only a few hours earlier. As observed by the trial court and the High Court, the appellant did not explain how the motor vehicle he hired that same morning, which Njoroge tracked along the Nakuru -Eldoret road, came to be apprehended in Timboroa, in the same area where he (the appellant) was found hiding in a tree. In effect, the circumstances would lead to the conclusion that he was in recent possession of the motor vehicle stolen from George, and as such, the lower courts rightly invoked the doctrine in convicting the appellant. This complaint is therefore without merit.

On the complaint that the learned judge wrongly shifted the burden of proof with respect to the appellant's alibi defence when she concluded that he did not call any witness to testify on his mission to Amagoro, we find the complaint to be unfounded. This is because, the learned judge having found that the evidence placed the appellant at the scene of the robbery that morning, and thereafter at the scene of recovery of the motor vehicle, merely concluded that the alibi evidence proffered by the appellant that he was in Amagoro, was disproved by the evidence placing him at the scene and therefore, the burden shifted to him to explain how he came to be in possession of the motor vehicle.

In the case of ***Lenyesio Lekupe & Another vs Republic, Nakuru Criminal Appeal No. 145 of 2011*** an alibi defence was defined as;

***"An alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed, at the time of the alleged commission of the offence for which he is charged."***

Against the weight of the prosecution evidence which showed that after stealing the motor vehicle he drove it from Ruaka to Timboroa, we find, as did the courts below, that his alibi defence that he travelled from Amagoro did not dislodge the prosecution's case, with the result that he was required to explain how he came to be in possession of the motor vehicle. Since he did not provide any explanation, the only conclusion was that he was among the gang that stole the motor vehicle from George.

As concerns the issue that the members of the public and the two police officers who were guarding the motor vehicle were not called to testify, we would agree with counsel for the respondent that the witnesses who were called sufficiently placed the appellant at the scene of recovery of the motor vehicle, and therefore, any other witnesses testifying on the same evidence would not have added anything further to the prosecution's case. This ground is therefore without basis.

The penultimate complaint was that 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. The ingredients are distinctive, not conjunctive. Both the trial court and High Court, found that a gang of two or more people one of whom was armed with a dangerous, offensive weapon robbed George of a motor vehicle Reg. No KCD 728A, a Toyota Probox. They drugged, attacked and dumped him in a coffee plantation. When he reported the robbery at Karuri Police Station, PC Ochola saw that he was dirty and confused, and had a wound on his head.

The High Court reevaluated the evidence, and concluded that the ingredients for robbery with violence were properly established, and likewise we have come to the same conclusion, with the effect that we are satisfied 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 death sentence on the appellant as prescribed by law. But since then, the Supreme Court's decision in the case of ***Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 15 of 2015*** held that the mandatory character of the death sentence prescribed for the offence of murder by ***section 204*** of the ***Penal Code*** is unconstitutional. Relying on this decision the High Court directed that the appeal be referred back to the Chief Magistrate's Court for resentencing, if need be.

Since the High Court order in respect of resentencing is yet to be effected, we would also direct that the appeal be remitted back to the Chief Magistrate's Court for resentencing.

For the reasons aforestated, the appeal against conviction is dismissed, and we order that the appeal be remitted back to the Chief Magistrate's Court, Kiambu for resentencing in terms of the High Court's order.

***It is so ordered.***

***Dated and Delivered at Nairobi this 18th day of December, 2020.***

**P.O. KIAGE**

**.....**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU (FCIArb)**

**.....**

**JUDGE OF APPEAL**

**A.K. MURGOR**

**……**

**JUDGE OF APPEAL**

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

*Signed*

***DEPUTY REGISTRAR***