IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO (P), J. MOHAMMED & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 24 OF 2016

BETWEEN

GEORGE ONYANGO .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (S.J. Chitembwe & George Dulu, JJ.)

in

HCCR.A No. 21 of 2011)

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JUDGMENT OF THE COURT

The trial court, having been satisfied that the appellant was involved in a robbery, in which the complainant's father's motor cycle was stolen, convicted and sentenced the appellant to death.

The court reached this conclusion after hearing evidence of how on the night in question at 9.00 p.m, the appellant emerged from a bar and sought to hire the services of the complainant who operated a motorcycle taxi to take him to Lurambi; that on their way, the appellant instructed him to take him, instead to a place called Kolomatangi; that at that point, the appellant demanded to be given the motor cycle; and that the appellant was joined by two of his confederates who threatened the complainant with pangas.

The court also heard that in the end, the appellant rode the motor cycle away while the two accomplices disappeared. A report was made to the police.

Fortunately, the next day, the complainant received information that someone was selling a motor cycle at a nearby trading centre. He proceeded to the place and was relieved when he found the appellant and the motor cycle which he identified as that which had been stolen from him. The appellant was arrested.

In his defence, the appellant denied any involvement in the robbery. He also denied trying to sell the motorcycle and explained that on the day in question, he met three people who ordered him to participate in a road excavation works which he declined. That infuriated the three, who together with some members of the public engaged him in a fight; that he was subsequently handed over to the police officers under the pretext that he had committed the offence of robbery, which he knew nothing about.

We have already stated that on the basis of this evidence, the appellant was convicted and sentenced to death.

His second appeal to the High Court was unsuccessful with the court, (Chitembwe and Dulu, J), after re-evaluating the evidence concluding that;

> **"The evidence of the prosecution witnesses in our view is straight forward and clear. There is no doubt that the motor cycle belonging to PW2 was taken away forcefully from PW1.**
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> **The incident occurred at night. Though PW1 stated that he identified the appellant through the voice, we doubt whether that**

would be positive identification in view of the evidence on record. He did not say that he knew the appellant's voice before. He also did not say which particular words were uttered by the appellant which would connect his voice to those words…. We are thus of the view that the appellant was not identified by PW1 through the voice.

From the prosecution evidence, it is clear that the appellant was found in possession of the motor cycle the next morning, less than 12 hours after the incident. He was seen by PW3 Vincent Lukato pushing the motor cycle. He tried to sell the motor cycle to Stephen (sic) **Lukato and an elder who did not testify….. In our view, the doctrine or resent** (sic) **possession applies in this case. The appellant was found shortly after the robbery incident to be in possession of the motor cycle and was even trying to sell it. He did not give an explanation as to how he came to be in possession of that motor cycle…… As such he was a principal offender and guilty of the offence as charged….We dismiss the appeal and uphold both the conviction and sentence of the trial court."**

Before us, the appellant now complains that the two courts below erroneously found that the elements of robbery with violence were established; that the High Court failed to re-evaluate the evidence; and that the trial court erred in imposing and the first appellate court in confirming the death sentence.

Arguing these grounds before us on behalf of the appellant, Mr. Onyango submitted that there was no evidence that the appellant was in the company of any other person; that the two men armed with pangas only emerged when the complainant raised an alarm; that common intention was not proved; that nothing linked them to the appellant; and that the appellant was himself not armed.

Secondly, it was argued that the High Court failed to re-evaluate the circumstances under which the motorcycle was recovered; and that had the learned Judges done so, they would have been satisfied that it was not found in the appellant's possession.

Finally, we were asked to find that the failure by the High Court to apply the case of **Francis Karioko Muruatetu & another vs. Republic** [2017] eKLR to reduce the sentence imposed, in the circumstances of this case, was also erroneous.

By the provisions of **section 361** of the Criminal Procedure Code, which has been applied in numerous decisions of this Court, such as **Karani vs. R** [2010] 1 KLR 73, on the second appeal like this, we are enjoined to consider only matters of law and cannot interfere with the decisions of those on facts, unless it is shown that the courts considered matters they ought not to have considered or that they failed to consider matters they should have considered or simply that they were plainly wrong in their decision looking at the evidence in totality. An omission such as that will be treated as a matter of law and the Court can interfere and set aside conclusions based on it.

There was concurrent factual finding by the two courts below that the robbery took place at night. In view of the fact that it was night time and the robber was unknown to the complainant, the only form of identification the prosecution eye witness relied on was voice recognition, which the courts discounted as unlikely. The courts also concluded that at the point of robbery, there were three assailants, none of whom were identified. Finally, they were in agreement that the only evidence linking the appellant with the crime was the fact that he was found the next morning in possession of the motorcycle that had been stolen from the complainant. There are other concurrent determinations but since they are on factual matters, therefore the only issue before us for our determination is whether the courts below properly applied the doctrine of recent possession to the facts of this case.

Though the trial court, in convicting the appellant, expressly relied on the doctrine of recent possession, unlike the High Court, it did not cite any authority that guided it in reaching that conclusion. The High Court, for its part, cited the case of **Maina and Others vs. Republic** (1986) KLR 301.

In that case, this Court applied the reasoning enunciated in the English case of **R V James Loughlin** [1951] Criminal Appeals Report of 1951 – 1952 at pg 69 where the court said –

"if it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker."

We cite the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic** Cr App. No. 272 of 2005(UR) where, like numerous others, the elements necessary to establish recent possession was considered thus;

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.

In other words, there must be positive proof:

i). that the property was found with the suspect;

ii). that the property is positively the property of the complainant;

iii). that the property was stolen from the complainant;

iv). 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."

We entertain no doubt that a day, indeed, a few hours after the complainant was robbed of the motorcycle, the appellant attempted to sell it to PW3, at which point he was arrested.

The complainant and his father who was the registered owner of the motorcycle identified the motorcycle, not only by pointing to its features, but also by producing the certificate of ownership.

From these circumstances, we are satisfied the learned Judges reached the correct conclusion by the proper application of the doctrine of recent possession. Accordingly, this ground fails.

On sentence, the inference by both courts that there was only one sentence prescribed, or the suggestion that there was no discretion was a misapprehension of the law which has now been restated beyond debate by the now famous **Muruatetu** case, that indeed, sentencing is a matter of judicial discretion. Both courts, guided by the factors of age of the appellant; that he was a first offender; that he did not use force on or harm the complainant; and that the stolen motorcycle was recovered the next day, ought to have reduced or substituted the sentence.

Having failed to do so, it falls on us, bearing in mind the above strictures, to set aside the sentence of death and substitute it with a sentence to a prison term of twenty (20) years with effect from the date of conviction by the trial court.

Dated and delivered at Nairobi this 4th day of December, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR