REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 46 OF 2015

BETWEEN

ISAAC KINYUA THUKU ……..…..……..……..1ST APPELLANT

MOSES IRERI MWANIKI ……....…….2ND APPELLANT

WILSON MUTHUMA KANAMPIU...…..……. 3RD APPELLANT

AND

REPUBLIC ……..……..…….. RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Achode & Ngugi, JJ.) delivered on 10th December, 2013

in

H.C. Criminal Appeal Nos. 131,133 & 134 of 2010).

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JUDGMENT OF THE COURT

1. This is a second appeal from the judgment of the High court in Nairobi in HC CR. Appeal No. 131 of 2010. Consequently, this Court is enjoined by dint of the provisions of **Section 361** of the Criminal Procedure Code to consider only matters of law. In so doing, the Court will not interfere with concurrent findings of fact arrived at by the courts below unless it is shown demonstrably, that the same were based on no evidence (See ***Karingo v. Republic*** ***[1982] KLR 219*** and also ***Okeno v. Republic*** ***[1972] EA 32***). The test to be applied is whether the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered, or that looking at the evidence, they were plainly wrong.

2. In order to contextualize this judgment, we will give a glimpse of the background material that informed the two courts below. On a rainy night during the wee hours of 7th February, 2009, at a residential area in Kikuyu town, within Kiambu County, there was a series break in and robberies of several houses in the area. One of the victims, was David Gathirwa Ngure (PW 1) who heard some noise at around 12.38 a.m. On peeping outside, he saw several persons cutting iron sheets off the neighbouring houses and breaking in. The only light illuminating the area were the torches carried by the attackers. He locked himself in his sitting room, but soon he heard the attackers breaking into his house as well. Fearing for his life, he ran out through a back door and ran away, only to return when the police had been summoned to the area.

3. Meanwhile, at around 6.30 a.m., while at Dagoretti police post and following a tip off from a good Samaritan, PC 47014 David Mweu (PW 5) had been alerted of some suspected robbers being beaten at Ndunyu (Dagoretti market). Accompanied by two other police officers, he went to the scene and on arrival; they found four young men on the ground being beaten up by a mob using ‘nyahunyo’ (a rubber whip), kicks and stones.

For good measure, the mob even had petrol on standby ready to set fire to the four. On interrogating the crowd, they were informed that the four had stolen a television set and remote control; both items which were present at the scene; and that the 1st appellant was caught while in the process of selling the TV to the scrap dealers at the market. According to PW 5, the 1st appellant was a known thief at the market and had been arrested several times prior for robbery with violence. The police rescued the appellants from mob lynching members of public and

detained them at the police post.

4. While at the police custody, the three were interviewed and the 3rd appellant revealed to PC No. 74537 Josphat Muya (PW 4) that he, together with his co accused and others who were still at large, jointly perpetrated the robbery on the material date and how they made away with two gas cylinders, 2 mobile phones and a DVD player. He then promised to show the police where they had taken the DVD player. He led the police some 150 metres away to the home of one David Kiberenge Ndung'u (PW 2) who upon demand produced the said DVD player.

5. Upon being interviewed by the police, PW 2 revealed that the DVD player had indeed been left by the 2nd appellant who had visited him earlier in the day accompanied by the 3rd appellant. According to PW 2, the 3rd appellant had claimed to be unwell and in need of Kshs.700/- for purposes of treatment. On his part, PW 2 was unwilling to part with the loan without any form of security. However, the 2nd appellant promised to furnish security later in the day and PW 2 advanced him the money.

Shortly thereafter, the 2nd appellant took the DVD player to PW 2's home. The Player was to act as security for the loan. The machine was left with PW2's wife (Judith Njoki- PW 3).

6. The 3rd appellant then took the police to the place the robbery had taken place. The police officers were led towards Kikuyu area, to a residential site and upon interviewing the residents, it emerged that indeed a robbery had taken place as stated by the 3rd appellant. One resident, PW 1 in particular stated that he had lost some items in the robbery. PW 1 stated that upon his return from hiding, he found his house ransacked and his 21 inch television set, a DVD player, a mobile phone, a gas cylinder and wallet containing Kshs.7,000/- gone. He was thus urged by the police to accompany them in order to find out if the items so far recovered were his. Armed with supporting documents to prove ownership, he was able to make a positive identification of the TV, DVD player and the remote control.

7. The 3rd appellant explained how the loot had been divided amongst the three appellants, which led the police to prefer charges against the three appellants. The other persons hitherto detained over the matter, having been exonerated by the investigations, were then set at liberty. The appellants were subsequently arraigned before Kikuyu Principal Magistrate's court and charged as follows:-

> ***'ROBBERY WITH VIOLENCE C/SEC 292(2) OF THE PENAL CODE:***
>
> ***(1) ISAAC KINYUA THUKU (2) MOSES IRERI MWANIKI (3) WILSON KANAMPIU:*** *On the 7th day of February, 2009 at Kikuyu Town in Kiambu West District within Central Province, jointly with others not before court robbed DAVID GATHIRWA NJURE one Sharp Television 14 inch, Sharp remote, one Royal tech DVD, one Samsung 250 mobile phone and gas cylinder all worth Kshs.36,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said DAVID GATHIRWA NJURE*
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> ***COUNT II: HANDLINNG STOLEN GOODS CONTRARY TO SECTION 332 (2) OF THE PENAL CODE:***
>
> ***(1) MOSES IRERI MWANIKI (2) WILSON KANAMPIU:*** *On the 7th day of February, 2009 at at Dagoretti Centre in Nairobi Area Province, otherwise than in the course of stealing jointly dishonestly handled one 14 inch sharp television, sharp remote and one royal tech DVD valued at Kshs.10,200/-knowing it to be stolen property.'*

8. The appellants denied the charges and trial began in earnest, with the prosecution calling six witnesses who gave evidence in support of the charges. At the close of the prosecution's case, the learned trial magistrate (**L.M. Njora Senior Principal Magistrate)** found the three appellants had with a case to answer and put them on their defence. They each elected to give unsworn statements of defence without calling any witnesses. The 1st appellant narrated how on the material day, he reported at his place of work at the Dagoretti Slaughter house then went home. Later on, he went back to the slaughter house to collect his dues only to be waylaid by members of 'Mungiki' (an outlawed sect) who beat him up and they ran away when the police came. The police then allegedly apprehended him for no reason and later charged him with offences he knew nothing about.

9. On his part, the 2nd appellant stated that he had been approached by a member of 'Mungiki' at Steers hotel in Dagoretti one Saturday and asked to join the sect but he refused. Upon walking out of the said hotel, he found a group of 15 people who threatened to kill him or take him to jail should he fail to join them; they then allegedly proceeded to beat him up and took him to the slaughter house, whereupon the police were called in and he was arrested and later charged. The 3rd appellant's defence was that he had lost his national identity card on 2nd February, 2009 and that when he went to the police station to report the loss, he was apprehended instead and charged with a robbery he knew nothing about.

10. Convinced of the appellants' guilt, the learned trial magistrate by a judgment delivered on 4th March, 2010 convicted the appellants on both counts and sentenced them to suffer death. Dissatisfied, the appellants lodged an appeal at the High court, which was dismissed vide a judgment delivered on 10th December, 2013 by **Mumbi & Achode, JJ**. who upheld the findings of fact and law reached by the trial court; hence this second appeal.

11. This appeal is premised both on the homegrown grounds of appeal filed by the appellants as well as the supplementary grounds of appeal filed by the 1st and 2nd appellants' respective counsel.

In a nutshell, the appellants contend that the first appellate court erred by;

a) failing to reconsider and re-evaluate the evidence ;

b) failure to find that section 107 of the Evidence Act was never complied with;

c) failure to find that the case was never proven beyond reasonable doubt as by law required;

d) Failure to consider the appellants' respective defences.

In addition, to the above, each appellant also raised some independent grounds of appeal. For the 1st appellant, he also contended that the court erred by;

a) Violation of Article 77(2) (1) of the Constitution;

b) Violation of Sections 169 and 211of the Criminal Procedure Code as well as;

c) Violation of Section 163 of the Evidence Act.

For the 2nd and 3rd appellants, the additional grounds were that the first appellate court erred by;

a) acting on a defective charge sheet;

b) misapplication of the doctrine of recent possession;

c) shifting the burden of proof on the 2nd and 3rd appellants with regard to the recovered items;

d) Rendering a conviction based on hearsay evidence;

e) Failure to find the testimony of PW 2 and PW 3 untrustworthy and;

f) Basing the conviction on an irregular confession whilst failing consider the provisions of sections 25A and 29 of the Evidence Act.

12. Urging the appeal was learned counsel Mr. Ratemo, for the 1st appellant who also held brief for Mr. Ogutu, for the 3rd appellant, while Mr. Manzi was on record for the 2nd appellant. The State was represented by Senior Principal Prosecution counsel Ms. Maina. In his oral address to us, Mr. Ratemo urged us to consider the issue of sentencing. Further he challenged the evidence of identification of the 1st appellant on the grounds that the name of the person who identified him was doubtful. Counsel submitted that since the 1st appellant was convicted based on the identification by a sole witness, the identification was improper. He added that the evidence was also fraught with inconsistencies as to how the stolen items were recovered and that the arrest was not done immediately. Consequently, he advanced the idea that the first appellate court failed to re-evaluate the evidence afresh and set aside the conviction in light of these discrepancies.

13. For the 2nd appellant, Mr. Manzi submitted that the conviction was fatally defective, having been premised on hearsay evidence. Citing the case of ***Kanyati v. Republic***, counsel contended that a statement that is issued by a person who has not been called to testify constitutes hearsay evidence which is inadmissible in court. In this case, he said, PW 5 was unable to identify any of the members of the public who beat up the 2nd appellant. Moving on to the doctrine of recent possession, counsel contended that none of the recovered items were found in the possession of the 2nd appellant. In particular, that the recovered DVD player was never even proved to have been handled by the 2nd appellant. For the foregoing reasons, the 1st, 2nd and 3rd appellants urged the appeal be allowed.

14. Opposing the appeal, Ms. Maina for the State submitted that the conviction was sound and that the case was proven to the required standard. To begin with, the appellants were shown to have given the DVD player to PW 2 as security. In addition, the 3rd appellant took the police to the scene of the crime and furthermore, PW 1 positively identified the DVD, TV and remote recovered as being the same items he had lost during the robbery. Counsel wondered what a coincidence these items were found with appellants when they were arrested in the hands of mob justice. Coupled with the accomplice evidence, which was well corroborated it was sufficient to prove the appellants' culpability.

15. We have considered the record of appeal, the grounds and the rival submissions as mentioned earlier, this is a second appeal and this Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings.

See ***Chemangong -vs- R. [1984] KLR 611***.

We discern three issues for determination:

a) Whether the first appellate court failed to re analyze and re- evaluate the evidence

b) Whether the impugned decision was unsupported by the law and;

c) Whether death sentence meted on the appellants is proportionate to the offence.

16. On the first issue, the appellants have impugned the decision of the first appellate court for among others, failure to find that; the case against all the appellants was never proven beyond reasonable doubt; the identification of the 1st appellant was improper and; that their respective defence was never considered. As to whether a case of robbery with violence was proven beyond reasonable doubt; the ingredients

of what constitutes the offence were well spelt out by this Court in the case of ***Oluoch v. Republic (1985) KLR*** as follows:-

> ***"Robbery with violence is committed in any of the following circumstances;***
>
> ***a) The offender is armed with any dangerous or offensive weapon or instrument or;***
>
> ***b) The offender is in the company of one or more person or persons or;***
>
> ***c) At, or immediately before, or immediately after the time of the robbery, the offender wounds, beats, strikes, or uses other personal violence on any person."*** (Emphasis added)

17. Going by the testimony of PW 1, which was accepted by the two courts below, the robbers were several and they were armed with pangas (machetes) with which they used to cut the iron sheets and break into the victims' houses. Undoubtedly therefore, this was a case of robbery with violence. In addition, it was the 3rd appellant who led the police to the recovery of the DVD player and TV which were positively identified by PW1. In addition to this, the circumstances of the 1st and 2nd appellants' arrest left no doubt as to their participation coupled with the fact that they were named by the 3rd appellant; this evidence of an accomplice, was solidified by the fact that the three appellants were together when they were rescued by PW 6 and other officers from a mob which was baying for their blood after they were found with stolen property which was later identified by PW 1. In our view the appellants' culpability was established.

18. Moving on to the question of whether the appellants were properly identified, it is abundantly clear from the record that the appellants' identification was never an issue at trial. Rather, the conviction of the appellants was primarily based on the material given to the police by the 3rd appellant, which happened after all the appellants were rescued from mob justice; this information led to recovery of stolen items and to the scene of crime where PW 1 was able to identify his stolen items. This is how the issue of identification was addressed by the first appellate court:-

> ***"The issue of identification did not arise, either in the case before the lower court or in this appeal. The trial magistrate observed that none of the persons who committed the offence had been identified at the time of the robbery, and that no identification parade had been conducted. Indeed, we observe that PW 1 stated that at the time of the robbery, which was at night, while raining and that the people who robbed them had torches, he did not recognize any of the attackers."***

Indeed, the evidence of PW 1 was that he was unable to recognize or even see the attackers owing to the darkness and the rain. At no point did the witness purport to identify the appellants. Consequently, this ground of appeal fails.

19. On whether the appellants' respective defences were considered, the same were duly weighed and found to be without merit in view of the prosecution's evidence. The 1st and 2nd appellants claimed that shortly prior to their arrest, at separate incidents, some members of 'Mungiki' had tried to force them into joining the outlawed sect and that upon refusal, the police were called in and the two were arrested and charged for a robbery they knew nothing about. The 3rd appellant on his part claimed he visited the police station to report a lost identity card and was also equally arrested for an offence he did not commit. The two courts below found the defence evidence implausible as it did not challenge the already damning evidence against the appellants.

20. As to the second issue of whether the impugned judgment was supported by the law, the 2nd and 3rd appellants have faulted the first appellate court for failing to find that the conviction was based on hearsay evidence; that the trial court misapprehended the doctrine of recent possession, and; that the conviction was based on an irregular confession. To begin with, the question of hearsay evidence was never raised before the two courts below. Furthermore, both courts below found that given the information provided by the 3rd appellant it led the police to the house belonging to PW 1 and PW2, where he (the 3rd appellant), together with the 2nd appellant had left the DVD. The said DVD was recovered from PW 1 and PW2, who also corroborated the story as told by the 3rd appellant. Therefore, the 2nd and 3rd appellants' contention that there was hearsay evidence is belated, without basis and fails.

21. Similarly, the allegation that the information given by the 3rd appellant was irregular because it was analogous to 'confession' has been raised for the first time in this appeal. At trial, no objection was raised regarding the admission of the said evidence. Even at the hearing of the defence case, none of the appellants claimed that the information was improper because at the face of it was not a 'confession' in the strict sense but information by a suspect that led to further investigations and recovery of stolen items. In any event it is inappropriate to raise a new matter which was not subjected to an opinion of the two courts below as a ground of appeal. That would amount to litigation in instalments. This Court in ***Alfayo Gombe Okello v R. [2010] e KLR*** had this to say as regards such an issue:

> ***"…the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."***

This ground of appeal therefore fails.

22. Turning to the doctrine of recent possession, the 2nd and 3rd appellants raised this ground with the 2nd appellant arguing that none of the recovered items were found in his possession and that the first appellate court erred by failing to find as much. Again, the first appellate court addressed itself on this aspect as thus;-

> ***"We note from the judgment of the (trial) court that she found that the 1st and 2nd appellants were found in actual possession of the TV and remote stolen from PW1, while the 2nd and 3rd appellants were found in possession of the DVD which had been given as security to PW2. She therefore found them guilty under the doctrine of recent possession."***

The circumstances of how the appellants were arrested, the investigations that followed led the police to exonerate the other persons who were detained as suspects, but the appellants were heavily implicated as demonstrated above.

23. On whether there were contraventions of the law, such as **Section 77** of the old Constitution as raised by the 1st appellant, which made provisions of what constitutes fair trial; there was no elaboration on how he was denied a fair trial. Besides these were matters the appellants should have raised in the first instance before the trial court. On the allegation that the impugned judgment went against the provisions of **Section 169** of the Criminal procedure Code; which is concerned with contents of a judgment. We find, the appellants failed to demonstrate in what manner the impugned judgment may have offended this provision. The record is clear the appellants were given an opportunity to tender their defence and they opted to give unsworn testimony without calling any witnesses. The appellants have not demonstrated in what way the trial court violated this provision or what prejudice they suffered as a result. Therefore, this ground too, fails.

24. Finally on sentence, we must take cognizance of recent developments in the Law in this area and apply it to the present case, particularly because the same is advantageous to the appellant. In its recent decision in ***Francis Karioko Muruatetu and Another vs Republic, (2017) eKLR*** the Supreme Court of Kenya, pronounced that the mandatory aspect of the death sentence as the only lawful sentence was unconstitutional. The Court therefore effectively removed the fetters placed on the courts' discretion when passing sentence in cases which hitherto carried the death penalty as the only lawful sentence upon conviction. This decision allows us to interrogate whether the death sentence meted against the appellants is proportionate and the best option. In determining the best sentence the mitigating factors to consider is the age of the offender, whether they are first offenders, remorsefulness and possibility of reform and social re-adaptation of the offenders, the aggravating circumstances in the commission of the offence among other factors.

25. When the appellants were convicted on 4th March, 2010, death sentence was the only one prescribed, the record shows the appellants were young (the trial magistrate described them as 'lads') they were first offenders and they all pleaded for leniency. Based on the foregoing, we are inclined to interfere with the death sentence meted out to the appellants and substitute the death penalty with a sentence of 15 years which we deem proportionate in the circumstances of this matter. Consequently, although the appeal on conviction must fail. We set aside the death sentence and substitute therefor a sentence of 15 years from the date of conviction.

Dated and delivered at Nairobi this 8th day of February, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR