IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 103 OF 2013

BETWEEN

RICHARD MWAURA NJUGUNA.....1ST APPELLANT

THOMAS MWAURA NYOKABI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the High Court of Kenya at Nairobi (Ochieng & Achode, JJ.) dated 20th February, 2012

in

H.C.CR.A No. 185 &187 of 2008.)

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JUDGMENT OF THE COURT

1. Our mandate in a second appeal such as the case before us is clearly spelt out under ***Section 361 (1)*** of the ***Criminal Procedure Code*** as being restricted to consideration of matters of law only. We reiterate the well-established principle that we are obligated to give deference to the concurrent findings of facts by the two courts below for the obvious reason we did not have the opportunity to observe the witnesses as they testified. Be that as it may, we are not bound by such conclusions where we are satisfied that they are not supported by the evidence or are based on perversion of evidence. See this Court's decision in ***Ahamad Abolfathi Mohamed & Another vs. R [2018] eKLR***.

2. With the foregoing in mind, the background facts of the appeal were that on 4th January, 2007 at around 9:00 p.m. while Paul Sonko Mark Lutaaya (PW1) was driving along Githurai Kimbo Estate both his vehicle and the one in front of him got stuck in the mud. Before he could take any action he heard a loud bang on the driver's window and upon turning his gaze towards the window he saw a man armed with a pistol. To make it clear that he was not playing games and perhaps to deter members of public from coming near the scene, the armed assailant fired warning shots in the air. He then ordered Paul to switch on his interior lights and demanded for money. Paul told him he had no money and instead handed over his mobile phone make Samsung 710N. The assailant was not satisfied and demanded for more.

3. Moments later, a second assailant emerged and also began harassing Paul while the armed assailant moved to the vehicle which was in front. The second assailant physically assaulted Paul as he continued demanding for money but Paul maintained he had no money on him. This caused the second assailant to lose patience which culminated with him stabbing Paul on the neck with a sharp object. Fearing for his life Paul begged him to spare him. Once again the armed assailant came back and the second one went to the vehicle in front. This time round the armed assailant took a cassette and torch from the vehicle and they left.

4. Thereafter, Paul reported the incident at the police station and the officer on duty got in touch with his colleagues who were on patrol in the said area. Since the incident had taken place not long ago, Paul was directed to go and join the police officers in the patrol car and lead them to the scene. While on the way to scene and just before reaching Progressive Butchery, CPL. Charles Matu (PW3) who was in the patrol car noticed four people on the road who looked suspicious. On stopping the vehicle two of them fled and he arrested a man and a young lady.

5. CPL Charles first took the man into the patrol car and conducted a search and recovered a mobile phone make Samsung 710 N. The said man was not able to give the phone number of the said phone let alone the pin for unlocking the same. Paul who was in the patrol car identified the phone as the one which had been stolen earlier and even identified the man (the 1st appellant herein) as the one who was armed

with a pistol. The young lady who turned out to be Grace Muthoni Wanjiru (PW2) was found in possession of a torch which was also identified by Paul as the one which had been stolen earlier.

6. However, Grace explained that earlier that evening she had visited the 1st appellant's wife and she identified him by his *alias* as Kunga. She knew Kunga since they had attended the same primary school. While she was still at Kunga's house, Kunga arrived in the company of the 2nd appellant who was also well known to Grace and asked them to accompany them to buy meat at Progressive Butchery. They obliged but unfortunately the butchery was closed. She testified that on the material day it had rained hence the ground was slippery and it was dark. As a result, Kunga gave her a torch he had to use for purposes of illuminating the ground as they walked.

7. To her utter surprise when the police vehicle stopped the 2nd appellant took to his heels leaving her and Kunga behind. She denied participating in or even having knowledge of the robbery. Nonetheless, they were both arrested and as they were heading back to the police station Grace pointed out the 2nd appellant who was walking by the roadside and he too was arrested. Whilst in the police vehicle and as CPL Charles searched him he recovered a wallet where the 2nd appellant was seated. Apparently, the wallet contained Paul's personal documents and which he later identified as the wallet stolen from him on the fateful day.

8. Based on the foregoing circumstances both appellants were arraigned and charged jointly in the Chief Magistrate's Court at Makadara with one count of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***. They also faced separate alternative counts of handling stolen property contrary to ***Section 322(2)*** of the ***Penal Code***. They both pleaded not guilty to the charges against them.

9. In his unsworn statement, the 2nd appellant stated that on the material day he was stopped by the police at around 10:00p.m as he was coming from visiting his uncle in Thika. He was asked to identify himself which he did and was later searched; the police took his wallet containing Kshs.500 and never returned it. He was then bundled into a patrol car where he found Grace. He denied that the wallet in question belonging to Paul was recovered on him. As far as he was concerned, the charges against him were a set up and to further bolster his suspicion he testified that Grace's mother had bribed the police with Kshs.4,000 to secure her release.

10. Ultimately, the trial court after weighing the evidence on record found both appellants' culpable of the main count of robbery with violence. The basis of their conviction was the identification by Paul and the stolen items which were found in their possession. Unlike the 1st appellant who was sentenced to death, the 2nd appellant was sentenced to be imprisoned at the pleasure of the President. As would be expected, both the appellants challenged their convictions and sentences in the High Court which appeal was equally dismissed.

11. Unrelenting the appellants were intent in taking a second bite of the cherry by filing this second appeal. Unfortunately, by the time this appeal was set down for hearing we were informed by the officer in charge of Kamiti Prison vide a letter dated 20th August, 2018 that the 1st appellant had passed away while undergoing medical treatment on 13th July, 2014. Consequently, the appeal with respect to the 1st appellant is hereby marked as abated and this judgment relates to the appeal preferred by the 2nd appellant (who we shall refer to as the appellant).

12. Moving on, to determine the appeal with the appellant's approval, the appeal is predicated on the grounds that the learned Judges erred in law by-

> ***a) Upholding the appellant's conviction whereas the provisions of Section 200 of the Criminal Procedure Code had been violated in light of the fact that the appellant was not informed of his right to re-call witnesses despite the trial being conducted by different magistrates.***
>
> ***b) Upholding the appellant's conviction on the strength of identification evidence which was not conclusive.***
>
> ***c) Failing to draw a negative inference against the prosecution by failing to call essential witnesses.***
>
> ***d) Failing to find that the offence against the appellant had not been proved to the required standard.***

13. At the plenary hearing, Mr. Nyachoti, learned counsel for the appellant, began by questioning the sentence meted out to the appellant. In his view, the appellant at the time of commission of the offence was a minor and assessment of his age was not carried out as required by the law prior to his sentencing. He urged us to allow the appeal on this ground or in the alternative, to reduce the sentence against the appellant.

14. He also took issue with the identification evidence since no identification parade was conducted which to him rendered the same a mere dock identification and useless. He went on to submit that an identification parade was crucial to test the veracity of the appellant's identification by Paul taking into account the difficult circumstances under which the incident occurred. In any event, Paul neither gave a description of the assailants prior to the identification nor tendered any evidence with respect of the intensity of the light he used to identify the appellant or how long the incident took place.

15. Mr. Nyachoti argued that the doctrine of recent possession was not applicable in this case. This is because Paul's wallet was not found on the appellant but on the seat. Besides, Grace who was found in possession of the torch which had been stolen was turned into a prosecution witness hence her evidence amounted to accomplice evidence and had no weight. In conclusion, he asked us to allow the appeal.

16. On her part, Ms. Maina, Senior Principal Prosecution Counsel, opposed the appeal and contended that the appellant's conviction was based on cogent evidence. She argued that the evidence of recent possession tied the appellant to the robbery. However, she conceded that the appellant's age was not assessed prior to sentencing and most probably he was a minor at the time of the incident.

17. We have considered the record, arguments advanced by counsel and the law. First of all, our perusal of the record reveals that the trial was commenced and concluded by the same magistrate, Mr. K. Muneeni, then Senior Resident Magistrate. It therefore follows that the

question of violation of ***Section 200*** of the ***Criminal Procedure Code*** does not arise. This might explain why the appellant's counsel did not submit on the same. Similarly, learned counsel did not address us on the issue of crucial witnesses being left out and as such, we find that the said ground lacks merit.

18. Principally, the appellant's conviction was based on identification evidence as well as the doctrine of recent possession. In identification, it is worth emphasizing that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. The criteria of testing such evidence was aptly set out in the *locus classicus* case of ***R vs. Turnbull & Others [1976] 3 All ER 549***, as follows:

> ***"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"*** [Emphasis added]

19. Was the identification evidence against the appellant positive and free from error? In that respect, Paul testified that he was able to get a good impression of the appellant while the robbery was going on using the interior lights of the car which had been switched on. Apart from the foregoing testimony there was no mention as to whether Paul gave a description of the assailants who were not known to him prior to the incident to the police. It is not clear how he was able to identify the appellant as one of the assailants. Was it through a unique feature or mark on the appellant? In our view, the foregoing raises more questions than answers. Therefore, the identification evidence by itself could not sustain a conviction against the appellant, a fact which the two courts below were alive to.

20. The other evidence which the two courts below relied on was that of recent possession. The essence of the doctrine of recent possession as succinctly put by this Court in ***Kazungu Kaviha Nyango & Another vs. R [2017] eKLR*** is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation as to how he came to be in possession of that property, a presumption of fact arises that he is either a thief or receiver.

21. Could the doctrine be invoked in the circumstances of this case? It is common ground that the appellant was apprehended on the same day that the incident took place, about a few hours thereafter. He was searched by CPL Charles who found the wallet in question in the seat that he was seated on. We understood the appellant's counsel to argue that since it was not found in his person but on his seat the same cannot be said to have been in his possession. We respectfully disagree with this argument and our position is reinforced by the definition given to possession under ***Section 4(a)*** of the ***Penal Code***:

> ***"(a) be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use of benefit of oneself or of any other person."*** *[Emphasis added]*

It does not matter that the wallet was not found in his pockets or his person but one thing is clear it was on his seat which could only mean it came from him and no one else. Like the two courts below, we are convinced that the stolen wallet was in the appellant's possession.

22. Having expressed ourselves as herein above, we equally concur with the two courts below that the doctrine of recent possession was applicable. This is because the appellant was arrested a few hours after the incident and not only was he in possession of the stolen wallet but he also failed to give a reasonable explanation of the said possession. See this Court's decision in ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. R [2006] eKLR***. This piece of evidence tied up the loose ends and implicated the appellant as one of the assailants that robbed Paul.

23. As for the allegation that Grace's evidence was accomplice evidence, we find that even assuming that was the position the same was corroborated by the independent and cogent evidence of recent possession. See this Court's decision in ***Stephen Kaleng Makalale & Another v. R [2010] eKLR***.

24. Last but not least, on the issue of sentence, the High Court erroneously proceeded from the basis that both the appellant and his co-accused had been sentenced to death. This might be why both counsel took a similar positon that the appellant was wrongly sentenced to death. The trial magistrate in issuing the sentence stated in his own words:

> ***"Accused are first offenders. Offence is capital. Accused 1 (Richard Mwaura Njuguna) shall suffer death as per the law prescribed. Accused 2(Thomas Mwaura Nyokabi) was a minor by the time he committed the offence. He shall be held in prison at the pleasure of the President of the Republic of Kenya."***

25. Furthermore, contrary to counsel's submissions the record indicates that the trial magistrate directed the assessment of appellant's age to be carried out before meting out the sentence. The relevant extract of the record is as follows:

> ***"1/4/08***
>
> ***Prosecutor:***

No records- first offenders.

Mitigation:

Accused 1

• • •

Accused 2

I am (sic) standard 6- pupil at Kahawa Primary School. I am 18

.

Court:

Sentence deferred till age of the accused assessed.

26. It is equally clear from the record that at the time the trial court was imposing the sentence the appellant was 18 years old as he indicated in his mitigation. It therefore means that during the commission of the offence he was 17 years old, a fact that the trial magistrate took cognizance of when he sentenced him under the provisions of ***Section 25 (2)*** of the ***Penal Code*** which reads:

> ***"Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody."***

27. Was this sentence appropriate? This Court in the case of ***Shadrack Kipchoge Kogo vs. R*** **- Criminal Appeal No. 253 of 2003 (UR)** while discussing circumstances under which an appellate court can interfere with a sentence succinctly stated:

> ***"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"***

28. The answer to the above question lies with the consideration and interpretation of ***Section 191(1)*** of the ***Children Act*** which stipulates:

> ***"191(1)***
>
> ***In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—***
>
> ***a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);***
>
> ***b) by discharging the offender on his entering into a recognisance, with or without sureties;***
>
> ***c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);***
>
> ***d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;***
>
> ***e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;***
>
> ***f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;***
>
> ***g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;***
>
> ***h) by placing the offender under the care of a qualified counsellor;***
>
> ***i) by ordering him to be placed in an educational institution or a vocational training programme;***
>
> ***j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);***

k) by making a community service order; or

l) in any other lawful manner.

29. The cardinal rule for construction of a statute is that it should be construed according to the intention expressed in the statute itself. See this Court's decision in ***Narok County Government & another vs. Richard Bwogo Birir & another*** **[2015] eKLR** & ***Halsbury's Laws of England, 4th Edition Vol. 44(1), para 1372*** . It is also common ground that in order to determine the intention of the legislature regard has to be given to the words used (see Lord Blackburn's dictum in **Direct United States Cable Co. –vs-The Anglo-American Telegraph Co. (1877) 2 A.C. 394**) and the legal context under which the statute is to apply (see the Canadian Supreme Court decision in **David Dunsmuir – vs-New Brunswick (2008) 1 S.C.R 190**).

30. From our reading of ***Section 191(1)*** of the ***Children Act*** it is clear to us that the opening phrase of *'in spite of the provisions of any other law'* denotes that notwithstanding any other law/statute which prescribes the punishment of children offenders, a court is required to take into account the provision in question when it comes to sentencing a minor. Our position is fortified by the sentiments of the Supreme Court of Canada in **Placer Dome Canada vs. Ontario (2006) 1 SCR 715,** with regard to the presumption against tautology in the interpretation of statutes. The Court observed and rightfully so, that every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. In other words, as Viscount Simon in **Hill vs. William Hill (Park Lane) Ltd. [1949] AC 530** at page 546 put it:

> ***"When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which had not been said immediately before."***

31. ***Section 191(1)*** sets out different ways in which a court can deal with a child offender. In our view, the provision is couched in a discretionary manner in that a sentencing court is required to exercise its judicial discretion in determining the manner in which to deal with a child offender. We also find that the manner in which a sentencing court can deal with an offender as set out in the said provision is not exhaustive as evidenced by ***Section 191(1)(j)*** which empowers such a court to deal with an offender in any other lawful manner. In our opinion, ***Section 191(1)(j)*** of the ***Children Act*** does not in any way conflict or oust the penalty prescribed under ***Section 25(2)*** of the ***Penal Code*** save that it allows a sentencing court to exercise its judicial discretion in determining the appropriate penalty.

32. As with the exercise of discretion in other areas of law a court should not act capriciously but within the confines of the law. Some of the factors that a court will take into account in exercising its discretion under ***Section 191(1)*** is to give effect to the best interests of the child as required under ***Section 4(2)*** of the ***Children Act*** which provides:

> ***"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."***

In point of fact, the context under which the ***Children Act*** was enacted was to give effect and promote the best interests of children. See also ***Article 53(2)*** of the ***Constitution***.

33. Apart from the best interests of the child being of paramount concern a sentencing court should also bear in mind the principles of proportionality, deterrence and rehabilitation; and as part of the proportionality analysis, mitigating and aggravating factors should also be considered. See the Supreme Court of India decision in **Soman vs. State of Kerala [2013] 11 SC.C 382**.

34. It is worth mentioning that this Court as well as the High Court have come across similar situations as the case before us, where the offender in question was a minor during the commission of the offence in issue but later attained the age of majority during sentencing. A case in point is the High Court case of ***Daniel Langat Kiprotich vs. State [2018]*** **eKLR** wherein the petitioner therein had challenged the death penalty meted out to him on account of the offence of robbery with violence on the ground that during the commission of the offence he was a minor. Ngugi, J. expressed the dilemma faced by courts in such situations. He expressed:

> ***"This often creates a dilemma for trial courts which may be faced with a juvenile who is only slightly below eighteen years old but who committed a serious offence such as (depraved heart) murder or rape or particularly vicious armed robbery. Since the statutory scheme provides that such a child cannot be sent to prison and since the law further provides that such a child can only be sent to a borstal institution for no more than three years, the options are limited to trial Courts even where on analysis and evidence such a Court might be persuaded that the almost-adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or her errors.***
>
> ***A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particularly vicious or serious one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn."***

35. Be that as it may, Ngugi, J. found that in the aforementioned scenario the sentencing court could impose an appropriate penalty commensurate to the circumstances at hand by invoking the omnibus provisions of ***Section 191(1)(j)*** of the ***Children Act*** as this Court had previously done in the cases of ***R vs. Dennis Kirui Cheruiyot*** **[2014] eKLR &** ***JKK vs. R*** **[2013] eKLR.** In particular this Court in the ***Dennis case*** held:

> ***"The best interest of the appellant as a minor offender ought to have been of paramount consideration when passing the sentence. The life of a minor should be preserved, he must also be rehabilitated which in our view includes being brought to bear***

the consequences of his omission, errors of judgment and disregard of the rule of law. Due to his omissions, an innocent life of a Kenyan was lost. Although the appellant was a minor, he must be brought to bear the consequences of his omission and lack of proper judgment. The appellant has served 5 years …; we do not however know whether that sentence was done as per the provisions of the Children Act or the Penal Code under which he was sentenced.

Whatever the case, life imprisonment is not provided for under the Children Act, but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence, and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence. It is for this reason that we are inclined to allow the appeal against the life sentence imposed by the trial court and substitute it with imprisonment for a period of 10 years from the date of conviction."

36. Based on the foregoing and in light of the fact that the appellant was in the company of another and also stabbed Paul in the neck during the incident we are of the view that the sentence issued by the trial court was not appropriate that is, being imprisoned at the pleasure of the President. Similarly, we find that committing him to a borstal institution as prescribed under ***Section 6(1)*** of the ***Borstal Institutions Act*** for a period of 3years will not act as deterrence for such an offence. In our view, a sentence of 10 years would be commensurate to the appellant's culpability.

37. Accordingly, we find that the appeal herein succeeds in part to the extent that we set aside the sentence issued by the trial court for imprisonment at the pleasure of the President and substitute the same with imprisonment for a period of 10 years effective from the date of his conviction on 28th May, 2008. Taking into account that the appellant has since served the aforementioned sentence we direct that he be set at liberty unless otherwise lawfully held.

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 REGISTAR