



IN THE COURT OF APPEAL

AT NAIROBI

ICORAM: NAMBUYE, KARANJA & KANTAL, JJA

CRIMINAL APPEAL NO. 131 OF 2015

BETWEEN

PAUL MULINGE.....1ST APPELLANT

FAROUK GITONGA..... 2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Mutuku & Korir, JJ)

dated 22nd November, 2014 In HC. CRA. NO. 84 OF 2012)

JUDGMENT OF THE COURT

This is an appeal arising from the Judgment of the High Court of Kenya at Nairobi (**S. N. Mutuku & W. Korir, JJ**) dated the 22nd November, 2013, dismissing the appellants' appeals against both convictions and sentences.

The background to the appeal is that the appellants were charged jointly in **count 1** with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. The appellants' also faced separate alternative counts of handling stolen goods contrary to **section 322(1) & (2)** of the Penal, which do not form part of the substratum of the appeal. We therefore find no need to set them out herein. The particulars of the offence of robbery with violence were that on the 31st day of October, 2011 at village two of Bura Location in Tana North District within Tana River County, being armed with offensive weapon namely a knife, jointly robbed **Pius Munyua** of his motorcycle Registration No. KMCM 822 F, valued at Kshs 82,000/=, one mobile phone make Nokia 6080 valued at Kshs 4,500/= and cash Kshs 1,600/= and at the time of such robbery threatened to use actual violence to the said **Pius Munyua**.

The appellants denied the offence prompting a trial in which the prosecution called seven (7) witnesses to prove the charge, while the appellants were the only witnesses for their respective defences.

The brief facts of the prosecution case is that **Pius Munyua Kisavi** (P.W.1), **Johnstone Obwoye Moger** (P.W.2), **Joseph Kople Mboga** (P.W.3), **Timothy Chelot Nyongesa** (P.W.4) and **Musa Mbu** (P.W.5) lived in the same locality. P.W.2, 3, 4 and 5 all knew P.W.1 as Mwalimu. They were also aware that he operated a *boda boda* motorcycle business at the Bura Township. On 31st October, 2011, P.W.1 was hired by two passengers. Enroute to the destination, the 2nd appellant requested him to stop the motorcycle for him (2nd appellant) to answer the call of nature. Upon stopping as requested, both passengers alighted. The first appellant demanded the motor cycle keys from P.W.1, while the 2nd appellant drew out a knife. They knocked him down and robbed him of all the items enumerated in count one of the charge sheet. P.W.1 reported the matter to police. **CPL Shadrack Olang** (P.W.7), booked the report in the Occurrence Book (OB). Thereafter, investigations were commenced into the matter. P.W. 2, 3, 4 and 5 came to learn of the robbery incident against P.W.1. On 2nd November, 2011, the 2nd appellant approached P.W.5 with an offer to sell him a mobile phone which P.W. 5 declined citing lack of money to buy the phone at the time. On the next day of 3rd November, 2011, the 2nd appellant made a similar offer to P.W.4 which offer P.W.4 declined also citing lack of money to buy the phone at the time. P.W.2, 3, 4 and 5 alerted P.W.1 of the 2nd appellant's offer to sell them a phone which they had declined to accept. After due deliberations over the issue with P.W. 1, they decided to leave for the 2nd appellant's house to confirm if the phone the 2nd appellant was offering to sell to P.W. 4 & 5 was what had been robbed from P.W.1. On arrival at the 2nd appellant's house, they informed him that they had come to buy the phone he had offered to sell to them as they then had money. The 2nd appellant came out of his house holding the phone which P.W.1 recognized as the one robbed from him on 31st October, 2011. Shortly thereafter, the 1st appellant also came out from the same house with a key holder hanging on one of his trouser pockets which P.W.1 also recognized as the key holder for the ignition key of his motorcycle also robbed from him on 31st October, 2011. With the help of other members of the public

P.W. 1, 2, 3, 4 and 5 arrested the appellants and took them to the village headman, who later handed them over to **PC. Cyrus Keter** (P.W.6). P.W. 6 escorted them to the police station where they were subsequently charged with the offence they faced.

Both appellants gave sworn evidence. It was their testimony that on 3rd November, 2011, they were both asleep in the house of the 2nd appellant when they heard a knock at the door. Then the 1st appellant's name was called out. When the 1st appellant went to respond to that call, he was attacked. The 2nd appellant went to intervene and he was also attacked. When the attackers were asked why the appellants were being attacked, a person named only as **Timona** removed a phone and a key holder from his pockets and alleged that those items had been recovered from the appellants of which they denied. They were thereafter frog marched to the village headman's home. On the way to the village headman's home they heard members of the public mention that a dismantled motor cycle parts had been found near **Muchiri's** house. The appellants maintained that nothing was recovered from them. Save for the 1st appellant's allegation that P.W.1 had a grudge with him over a land issue, both appellants denied hiring P.W.1's motor bike on the material date of 31st October, 2011, or robbing him of the items enumerated in count 1 of the charge sheet.

At the conclusion of the trial, the trial magistrate after analyzing and assessing the record made findings *inter alia* that the offence of robbery with violence against P.W.1 had been proved to the required threshold and that the appellants had been placed at the scene of the robbery through identification by P.W.1 as the persons who had robbed him and also through the doctrine of recent possession. The trial magistrate was therefore satisfied that on the evidence, P.W.1's phone had been recovered from the 2nd appellant, while the key holder for the motor cycle ignition key was recovered from the 1st appellant. On account of the above reasoning and findings, the trial magistrate found both appellants guilty of the offence as charged in count one, convicted them accordingly and sentenced them to suffer death in the manner provided for in law.

The appellants were aggrieved with that decision. They preferred an appeal to the High Court raising several grounds. The 1st appellate court Judges re-assessed and re-analyzed the record and found as had the trial court that the ingredients for proof of the offence of robbery with violence had been established to the required threshold, but rejected the evidence on the identification of the appellants by P.W. 1 as the persons who robbed him of the items enumerated in count one.

The 1st appellate court Judges then set out the ingredients for the application of the doctrine of recent possession as reiterated in the case of **Issac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic, Criminal Appeal No. 272 of 2005**. Applying the above threshold to the evidence on the record on the recovery of the phone and the key holder for the motor cycle keys, the Judges expressed themselves as follows:

“The evidence adduced before the trial court and which was not disputed confirmed that on the material night the complainant was violently robbed of his mobile phone, motorbike and Kshs 1,600/=. He reported the incident to the police. The people who robbed the complainant were armed with a knife which in the circumstances under which the complainant's property was stolen became an offensive weapon. The offence of robbery with violence contrary to Section 296 (2) of the Penal Code was thus committed.

There is also undisputed evidence that the complainant's stolen property was recovered on 3rd November, 2011. The complainant described his mobile phone in detail. He identified it by its age and a

cut on the top. He also clearly identified the ignition key of his motorbike. He stated that the key had a number. The appellants did not challenge the complainant's ownership of the mobile phone, key holder and ignition key”

As to whether the said items were recovered from the appellants, the Judges had this to say:

“Were these items recovered from the appellants? The answer is in the affirmative. P.W. 1 to P.W.5 described in detail how the items were recovered from the appellants. The 2nd appellant had been looking for a market for the mobile phone. Somebody had been looking for spanners to use in dismantling a motorbike. P.W. 7 appears to have given contradictory evidence when he stated that P.W. 6 told him that the mobile was recovered from the 1st appellant and the key was recovered from the 2nd appellant. We note that P.W. 6 and P.W.7 arrived at the scene after the appellants had been arrested and they may not be clear as to who had what. The contradiction does not change the overall picture which shows that the complainant's stolen property was recovered from the appellants.

The appellants' attempt to discredit the evidence of recovery clearly fails. It is noted that the 1st appellant only talked about having a land dispute with P.W. 4 during his defence but when this witness testified he never asked him any questions about the alleged land dispute. The claim by the appellants that P.W. 4 had the mobile phone and ignition key cannot be believed. How could this be possible and yet the robbers had taken them from the complainant?

We are also convinced, as the trial magistrate was, that it is the appellants who gave the name of Muchiri to the police and that is why he was arrested. The prosecution witnesses clearly testified that the dismantled motorbike was found in a bush not far from the appellant's house. We are therefore satisfied that the appellants were found with the complainant's property. The property was recovered a few days after the robbery. The appellants were in the process of disposing of the mobile phone. It cannot be said that the recovered items could have changed hands in that short period”.

On the basis of the above reasoning and findings, the first appellate court Judges affirmed the appellants' convictions and sentences.

Undeterred, the appellants are now before this Court on a second appeal, raising three grounds of appeal. It is the appellant's complaints that the learned Judges erred in law:

- (1) by failing to note that the concept of recent possession was wrongly applied;
- (2) by failing to properly re-evaluate and re-analyze the entire evidence on record as duty bound; and,
- (3) by concluding that the prosecution's case was proved beyond reasonable doubt, and failing to note that the same remained unproved as required in law.

The appeal was canvassed by way of oral submissions. Learned counsel **Mr. Amutallah Robert** appeared for both appellants, while **Miss Maina** the learned Senior Prosecution Counsel (SPPC) appeared for the State.

In support of the appeal, **Mr. Amutallah** argued all the three grounds of appeal as one. In summary, it was counsel's submissions that after the 1st appellate court Judges discounted the evidence on identification of the appellants as the persons who robbed P.W. 1; they settled for the application of the doctrine of recent possession to place the appellants at the scene of the robbery. Relying on the case of **Arum vs Republic [2006] eKLR**, counsel urged us to fault the Judges for misdirecting themselves on the evidence adduced by the prosecution and thereby failed to appreciate that P.W. 1 never entered the 2nd appellant's house and could not therefore have known which of the recovered item was recovered from which appellant; that the prosecution's evidence on the recovery of the said items was contradictory and should have been rejected; that the appellant's uncontroverted explanation and which the Judges failed to properly appreciate was that it was **Timona** who removed those items from his (**Timona's**) pockets and planted them on the appellants, which in counsel's view was a miscarriage of justice to the appellants, which we should interfere with and reverse.

As for an appropriate sentence should we affirm the appellant's conviction, counsel urged us to adopt the position taken by the court in the case of **Juma Anthony Kaikai & another vs. Republic [2018] eKLR**, and **Daniel Gichimu Githinji & Another vs. Republic [UR] CRA 27 of 2009** and temper with the death sentence handed down by the trial court and as affirmed by the 1st appellate court Judges and substitute it with a lesser sentence in line with the guidelines given by the Supreme Court of Kenya in the case of **Francis Karioko Muruatetu and another vs. Republic [2017] eKLR**.

Opposing the appeal, **Miss Maina** submitted that recent possession of items recently stolen from P.W.1 was proven; that the doctrine of recent possession was properly applied to place the appellants at the scene of the robbery; that the evidence on the recovery of the stolen items demonstrated clearly that the 1st appellant had the motor bike ignition key holder, while the 2nd appellant had P.W. 1's phone; that the two courts below found the evidence of P.W.2, 3, 4 and 5 on the recovery of those items credible and therefore believable. We were therefore urged not to interfere with the said concurrent findings of facts by the two courts below.

We were also urged to reject the appellants' submissions that they gave explanations for the alleged possession of items recently stolen from P.W.1, and instead affirm the 1st appellate court's decision that appellants gave no explanation as to why they were found in possession of items recently stolen from P.W. 1; that the 2nd appellant had attempted to sell the mobile phone to P.W.4 & 5; that the corroborative evidence of P.W. 2, 3, 4 and 5 confirmed that the 2nd appellant was found in possession of the phone, while the 1st appellant was found in possession of the key holder for the ignition key for the motorcycle; that the said items were positively identified by P.W.1, as those robbed from him; that the witnesses had no grudges with the appellants. They therefore had no reason to frame the appellants and fabricate the charge against them; that the 1st appellant's allegations of a grudge between him and P.W. 1 should be dismissed as it was only raised in his defence and was never put to P.W. 1 in cross-examination. It was therefore an afterthought.

In reply to the respondent's submissions, **Mr. Amutallah** still maintained that the evidence leading to the alleged recovery of items recently robbed from P.W. 1 was still contested as being doubtful; and still reiterated that the prosecution's case was not proved to the required threshold.

This is a second appeal. Our mandate under **section 361 (1)** of the Criminal Procedure Code is limited to considering matters of law only. In **Dzombo Mataza V. R [2014] eKLR**, the Court stated *inter alia* as follows:-

“As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court- see Okeno V. Republic [1972] E.A.32.

By dint of the provisions of section 361 1(1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below consider or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong.

“Accordingly, we must not “interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.”

See also **Njoroge Macharia V. R[2011] eKLR and Chemagong V. Republic [1984] KLR 213**).

We have considered the record in light of the rival submissions of learned counsel for the parties as well as case law cited by the appellants. In our view, we wholly agree with the concurrent findings of the two courts below that the evidence tendered proved the offence of robbery with violence to the required threshold.

What remains for determination is who were the perpetrators of the proven robbery. Having rejected the evidence of identification, what is left for our determination is whether the doctrine of recent possession was properly applied to place the appellants at the scene of the robbery

In the case of Hassan vs. Republic [2005] 2 KLR it was held *inter alia* 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.”

In Gicheru vs. Republic [2005] 1 KLR 688, the court adopted the definition of possession in Section 4 of the Penal Code to mean that:

“Being in possession of or to have in possession, includes not only having in 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 or benefit of oneself or of any other person, and if there are one or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession of each of them and further that when an accused person is found in possession of items which had been stolen a short while back the doctrine of recent possession applies”

In Issac Ng’ang’a Kahiga alias Peter Ng’ang’a Kahiga (supra), the ingredients for the application of the doctrine of recent possession were given *inter alia* as follows:

“...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, first that the property was found with the suspect, secondly that the 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 the instant appeal, the 1st appellate court analyzed and assessed the evidence on the recovery of the subject items as already highlighted above. We wish to adopt the same for purposes of the determination of this appeal on this issue as we find the same to be a true reflection of the summary of the witnesses’ accounts of the recovery of the subject items as to where recovered from and from whom. This was a concurrent finding of facts by the two courts below. We find no reason to differ with that finding. We are therefore satisfied as did the two courts below that the appellants were found in possession of items recently stolen from P.W.1, in respect of which no reasonable explanation was given. All that the appellants said was that it was **Timona** who removed them from his pocket and planted them on the appellants. As found by the two courts below, there was nothing on the record to show that P.W.2, 3, 4 & 5 who were found by the two courts below to be credible and believable witnesses and who were present during the recovery of those items from the appellants had reason to fabricate the recovery against the appellants. We were rightly urged to reject the 1st appellant’s allegation that P.W. 1 had a grudge with him over a land issue as it was raised as an afterthought and was never put to P.W. 1 on cross-examination.

Considering the above in light of the threshold for the application of the doctrine of recent possession, we entertain no doubt in our minds that the doctrine of recent possession was properly applied to place the appellants at the scene of the robbery for the reasons that: first, the property was found in possession of the appellants. Secondly, it was positively identified by P.W.1, a fact not disputed by the appellants as all they had put forth in their defences was that the evidence on the recovery of those items from them was a fabrication. Thirdly, the items had recently been stolen from P.W.1 only three days to the recovery, which satisfies the ingredient of having been recently stolen. In this regard we therefore find the appellants’ convictions safe.

As for the sentence, having confirmed the appellants’ convictions, we now proceed to reconsider an appropriate sentence in light of the guidelines given in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, given after the Supreme Court examined comparative jurisprudence on consequential orders and in the end stated thus:

“Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.”

This Court has already expressed itself on the mode of procedure with regard to compliance with the above Supreme Court guidelines on resentencing in circumstances where the Court has affirmed the conviction, but found it prudent to temper with the sentence handed down against an appellant by a trial court, and affirmed by a first appellate Court, in instances where the death penalty is the only lawful sentence for the offence such an appellant was convicted of.

In Juma Anthony Kakai Vs. Republic [2018] eKLR, where there was mitigation and the appellant was a first offender, the Court re-sentenced the appellant and substituted the death sentence with a sentence of twenty (20) years imprisonment from the date of conviction. In Peter Mwanja Munywoki & Anor.Vs. R. Criminal Appeal No. 256 of 2007, in which the appellant had been incarcerated for eighteen (18) years, the Court was of the view that remitting the matter back to the High Court or the trial court to reconsider the sentence would, in the Court’s view, cause further delay in the matter and add to the back log of cases. As the mitigation was already on record, the Court found it fit and in the interests of justice to set aside the sentence handed down against the appellant by the trial court, and affirmed by the 1st appellate court and substituted therefor a sentence of imprisonment for twenty five (25) years, to run from the date of the appellant’s first conviction on 4th October, 2001.

In Bernad Mulwa Musyoka Vs. R. Criminal Appeal No. 25 of 2016, the Court intimated that it has jurisdiction to direct a sentence re-hearing by the court (s) below or pass any appropriate sentence that the trial magistrate’s court could have lawfully passed. In Mohammed Hussein Mohammed Vs. Republic -Criminal Appeal No. 126 of 2015, the Court after taking into consideration the sentencing guidelines as enunciated in the Muruatetu case (supra), deemed it fit to interfere with the death sentence meted out against the appellant with respect to the offence of robbery with violence and substituted the same with a sentence of 20 years’ imprisonment which the Court deemed as commensurate to the circumstances of the case and the appellant’s culpability. Lastly, in Criminal Appeal No. 6 of 2009-Yohana Hamisi

Kyando Vs. R. the Court remitted the matter back to the High Court for rehearing on sentencing only, consistent with the guidelines pronounced by the Supreme Court in the **Muruatetu case.**

From the above survey of the trend in the Courts' pronouncements on the issue of re-sentencing, it is evident that the determining factor in deciding either to remit the matter to the trial court for resentencing or the court assuming that role and proceed with the resentencing exercise depends on the peculiar circumstances of each case. In the instant appeal, the appellants were arrested on 4th November, 2011 a period of about seven (7) years and over three (3) months ago. They were convicted and sentenced on 9th August, 2012, which is now a period of six (6) years and slightly over seven (7) months. The items robbed from P.W.1 were partly recovered. Besides being threatened and knocked down, no further violence was meted out against P.W.1. When given an opportunity to mitigate, all the appellants said was to ask for proceedings, notwithstanding that the prosecution intimated to the trial court that appellants were first offenders. It is therefore our view that the ends of justice will be met herein if we were to remit the appeal to the High Court for resentencing, only considering, that no mitigation was ever received from the appellants. We therefore direct that the appellants be produced before the High Court at Garissa for resentencing only within 14 days of the delivery of this judgment.

DATED & Delivered at Nairobi this 22nd Day of March, 2019

R. N. NAMBUYE

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.