IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 45 OF 2017

BETWEEN

BERNARD NJERU KAMWARA .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Chitembwe & Muya, JJ.) dated 5th November, 2015

in

***H. C. Cr. A. No. 36 of 2012*)**

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JUDGMENT OF THE COURT

1. Austin Odiwour (PW1) and Benson Baya Msanzu (PW2) were engaged as salesmen by Ocean Distributors Limited; their duties included the supply and sale of various cigarette brands stocked by their employer. To that end, the two were issued with motor vehicle registration number KBK 043E, make Toyota Hilux, to facilitate the performance of their duties.

2. On 12th June, 2010 at around noon while in the course of duty, Austin and Benson made a stop at Kibaoni Takaungu wherein Benson went to a client's shop leaving Austin inside the vehicle. After a while, Austin decided to stretch his legs but before he could get out of the vehicle, two men emerged from both sides of the vehicle. As per Austin, one of the men, who he described as hefty, lifted his shirt exposing a pistol tucked under his belt. As would be expected, this caused Austin to cooperate with the assailants without putting up any resistance, and the two assailants got into the front cabin of the vehicle pushing Austin in the middle.

3. Moments later, Benson made his way back to the vehicle and by the time he noticed the two assailants, it was too late. A third assailant who was armed with a knife was already behind him. Benson was ordered to lie down on the cabin floor as the third assailant got into the driver's seat. Despite numerous attempts the assailants were at first unable to start the vehicle engine and instead they set off the car alarm. This caused the assailants to panic and one of them ended up cutting Austin on his upper back.

4. Ultimately, the assailant seated on the driver's seat managed to start the vehicle and he drove towards Mavueni as the other two robbed Austin and Benson of their mobile phones and cash. Thereafter, the driver slowed down and Benson was thrown out of the moving vehicle. Fortunately, Benson was not hurt and he was able to inform his employer what had happened, who in turn, alerted the police.

5. Meanwhile, the assailants continued demanding more money from Austin. He did not have any more. Suddenly, the vehicle was brought to a halt and Austin was taken to a nearby bush by the assailants. Austin overheard the assailants deliberating on what to do with him. One of them had suggested that they should shoot him but the rest were not keen on the idea fearing that the noise would attract attention. However, the assailants' discussion was interrupted when a boy herding goats emerged. Afraid of being detected, the assailants left Austin, who was by then bleeding profusely, and drove off. Eventually, a woman came to Austin's rescue and with the aid of some police officers, he was taken to hospital.

6. Subsequently, Inspector Ronald Kimanzi (PW5) and PC Christopher Mosop (PW6) were briefed by members of the public that the vehicle in question had been abandoned near Mavueni Primary School. Whilst still at the scene Inspector Ronald got wind that a suspect in connection to the incident had been arrested by members of the public about 4-5km away.

7. Apparently, three occupants had been seen coming out of the vehicle in question and fleeing in the direction of Bahari Girls. It would seem that around 3:30 p.m. a male passenger who also came from the same direction boarded a matatu at Mavueni heading to Mombasa. After a few metres, the driver of the matatu in question, Gibson Kirimi (PW3), noticed another matatu behind him signalling him to stop which he did at Takaungu.

8. Passengers in the other matatu clamoured for the passenger who had apparently gotten into Gibson's matatu at Mavueni with a black bag to alight. The said passenger happened to be the appellant who was then seated behind Gibson. According to Gibson, there was a black bag on the floor close to the appellant, which he believed was the same one that the appellant boarded the matatu with; further, a female passenger identified the said bag as belonging to the appellant.

9. The appellant obliged and came out of the matatu with the black bag. The bag was searched and 10 packets of Sweet Menthol cigarettes, a knife and toy pistol were recovered, at least as per Gibson. Immediately, a crowd that had gathered began assaulting the appellant who was later rescued by Inspector Ronald and his colleagues who arrived in the nick of time. The appellant was first taken to hospital and then re-arrested by the police.

10. Subsequently, the vehicle which had been towed to the police station was searched and it appears that in one way or another, the assailants had managed to access the rear cabin of the vehicle wherein sales proceeds as well as stock were kept. This is because after taking stock, Austin discovered that Kshs.118,141.10 and 3856 packets of cigarettes were missing.

11. Based on the foregoing, an identification parade was organized and both Austin and Benson picked out the appellant as one of the assailants who had robbed them on the material day. They also identified the packets of Sweet Menthol cigarettes found on the appellant as one of the brands which was stolen. Consequently, the appellant was charged in the Senior Resident Magistrate's Court at Kilifi with two counts of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***.

12. The particulars of the first count read that on the 12th day of June, 2010 at Kibaoni/Takaungu in Kilifi District within the then Coast Province, the appellant jointly with others not before the court robbed Austin Odiwour of a mobile phone Nokia 3110, cash Kshs.118,141.10 and 3856 packets of cigarettes all valued at Kshs.365,404.22 and immediately before or immediately after the time of such robbery wounded the said Austin Odiwour.

13. On the second count, the particulars were that on the above mentioned date and place, the appellant jointly with others not before the court, being armed with dangerous weapons namely a pistol and a knife robbed Benson Baya Msanzu of his Nokia 3310 mobile phone and cash Kshs.150 all valued at Kshs.2,880.

14. On the totality of the prosecution's evidence, the trial court found that the appellant had a case to answer hence placed him on his defence. In his unsworn statement, the appellant denied committing any of the offences. He testified that on the material day at around 10:30 a.m. he had gone to see one Mzee Kahindi in Kiwandani area concerning a parcel of land he was interested in. He waited for Mzee Kahindi's family members to turn up for purposes of negotiating the purchase price. Nonetheless, they were unable to agree on the purchase price and he decided to go back home.

15. He left Mzee Kahindi's home at around 3:30 p.m. and went to Mavueni to board a matatu to Mombasa. Moments later the matatu he was in was stopped and passengers in the other matatu demanded that the last person to board the matatu he was in was ordered to alight. He alighted and the next thing he remembers is that the said passengers pounced on him and brutally assaulted him until he lost consciousness. When he regained his senses, he realized he had been arrested and his phone and cash had been stolen.

16. Upon weighing the evidence, the trial court did not attach any probative value to the identification evidence. For the reason that firstly, Benson had testified that both Austin and himself had seen the appellant prior to the identification parade. Secondly, the appellant was the only person in the line-up with a bandage on his forehead, which to the trial court was a clear violation of the Police Force Standing Orders with regard to identification parades.

17. Nevertheless, the trial court was satisfied that the fact the appellant was found in possession of some of the stolen cigarettes a few hours after the incident and in close proximity of the scene led to the irresistible conclusion that he was involved in the robbery. Therefore, the trial court convicted the appellant on both counts and sentenced him to suffer the death penalty on the first count.

18. Aggrieved with the aforementioned decision, the appellant preferred an appeal in the High Court which was dismissed by a judgment dated 5th November, 2015. Unrelenting, the appellant has filed this second appeal faulting the learned Judges (Chitembwe & Muya, JJ.) for:

a) Denying the appellant the right to legal representation hence infringing on his right to a fair trial.

b) Failing to discharge their duty as a first appellate court; and/or failing to properly re-evaluate the evidence on record thus arriving at the wrong conclusion.

c) Failing to appreciate that the sentence meted out to the appellant was excessive and harsh.

19. Miss Otieno, learned counsel for the appellant, contended that the prosecution had failed to establish theft of cigarettes that were supplied by Austin and Benson; possession of the stolen cigarettes was a crucial ingredient for the offence of robbery with violence. In her view, a photocopy of the daily stock returns, whose author was unknown and produced by the prosecution, did not establish that fact Further, invoices evidencing sales supposedly made by Austin and Benson were also not produced. All in all, there was no evidence to substantiate that the cigarettes alleged to have been stolen were actually stolen.

20. Counsel also argued that there was no basis for the two courts below to invoke the doctrine of recent possession to justify the appellant's conviction.

This is because the appellant's defence was to the effect that he had no bag when he boarded the matatu; he was assaulted by a mob and arrested while unconscious. It followed therefore, the woman alleged to have seen the appellant with the bag in question, being a crucial witness, should have been called to give evidence. Failure by the prosecution to call her as witness warranted an adverse inference being drawn against the prosecution's case.

21. Last but not least, Miss Otieno submitted that the sentence meted out to the appellant was harsh taking into account the surrounding circumstances.

Expounding on that line of arguments, she stated that the injuries sustained by Austin were minor; the appellant was a first offender who was 30 years old at the time and the sole breadwinner for his family. She urged us to substitute the death penalty with a lenient sentence bearing in mind that the appellant has been in custody since the year 2010.

22. On his part, Mr. Isaboke, Senior Prosecution Counsel, opposed the appeal maintaining that there was overwhelming evidence against the appellant. He urged that the appellant was arrested shortly after the incident by members of the public and could not explain the contents of his bag. He also argued that in the event the Court was inclined to interfere with the sentence it should not impose a sentence of less than 30 years imprisonment in light of what he called impunity of the robbers who terrorised law abiding people in daylight.

23. We have considered the record, submissions by counsel and the law. By dint of ***section 361*** of the ***Criminal Procedure Code***, our jurisdiction as the second appellate Court is restricted to matters of law only. In the discharge of our mandate, we bear in mind the cardinal principle of law that enjoins us not to interfere with the concurrent findings of fact by the two courts below. Be that as it may, we are not bound by such findings where they are not based on evidence, or are otherwise based on a misapprehension of the evidence. See ***Mwita vs R [2004] 2 KLR 60***.

24. As this Court succinctly put it, the right to legal representation is universally acknowledged as a fundamental right. See ***Kazungu Kaviha Nyango & another vs R [2017] eKLR***. It is enshrined under ***Article 50 (2) (h)*** of the ***Constitution*** which was implemented vide the enactment of the ***Legal Aid Act, 2016***. The said Act came into force on 10th May, 2016 long after the trial, and the first appeal had been concluded thus it is not applicable in this case.

25. Nonetheless, prior to the enactment of the said Act, this Court had held in a number of decisions that an accused person is entitled to legal representation as envisaged under ***Article 50 (2) (h)*** where substantial injustice would otherwise be occasioned in the absence of such legal representation. See ***Moses Gitonga Kimani vs R [2015] eKLR.*** Expounding on what substantial injustice entails, this Court in ***Karisa Chengo & 2 Others vs R [2015] eKLR*** expressed:

> ***"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."*** *[Emphasis added]*

26. Was the appellant's right to legal representation violated in this case? We do not think so. Our position is informed by the record which clearly indicates that from the commencement of the trial the appellant was represented by an advocate he had retained until he indicated his desire to continue without such representation. In particular, on 10th November, 2011 the appellant in his own words said:

> ***"The advocate has frustrated me. He was fully paid. I have to pay him Kshs.3,000 for him to come. The case has delayed due to his absence. I wish to proceed on my own from now on."***

In addition, despite the High Court's concern with respect to his legal representation, the appellant's response was as follows:

> ***"I had an advocate. He was not even attending at the lower court. I wish to proceed on my own."***

27. Certainly this was not a case of an appellant being unable to afford legal representation and/or being denied such representation. The appellant out rightly and voluntarily elected to represent himself. Besides, it is evident from the record that the appellant understood the nature of the charge against him and participated in the trial and in the first appeal.

28. It is common ground that the only evidence against the appellant was circumstantial. It is trite that for circumstantial evidence to result in a conviction, it must meet a certain threshold which was aptly observed by this

Court in ***Musili Tulo vs. R [2014] eKLR*** as follows:

"It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-

i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

29. Applying the above mentioned criteria, we find that the events relied on by the prosecution formed an unbroken chain which pointed to the appellant's guilt to the exclusion of any other person. We say so because the first piece of evidence was that Austin and Benson were robbed on 12th June, 2010 between noon and 1:00 p.m. by three assailants of their personal items, money, a vehicle as well as cigarette stock they had.

30. Contrary to Ms. Otieno's submission, there was ample evidence that some of the cigarettes were missing. In that regard, Austin testified that after taking stock he noticed that 3856 packets were missing which was corroborated by the copy of the daily returns produced at the trial court. It was also Austin's uncontroverted evidence that he was the one who prepared the daily returns in question. We, like the two courts below, are convinced that the cigarettes were stolen.

31. The second piece of evidence was that the vehicle was found abandoned near Mavueni Primary School which was not far from where Austin had been dumped by the assailants. Moreover, members of the public saw three occupants coming out of the vehicle and fleeing in the direction of Bahari Girls. A few hours later, at around 3:30 p.m. the appellant who came from the same direction flagged Gibson to stop the matatu he was driving and he got in. Barely after driving a short distance, Gibson was signalled to stop by another matatu at Takaungu and the appellant was asked to alight.

32. The third piece of evidence was that the passengers who asked the appellant to alight also indicated that he had a black bag. It cannot be coincidental that passengers who were in a different vehicle would mention a black bag which was on the floor near the appellant and contained the same brand of cigarettes that had been stolen a short while. We understood Miss Otieno to argue that there was no evidence linking the appellant to the bag since the woman who claimed that it belonged to the appellant was not called as a witness.

33. We respectfully disagree because apart from the said woman, Gibson gave evidence that he also saw the appellant enter into the matatu with a black bag. As far as the trial court was concerned, Gibson was truthful witness and we see no reason to interfere with that finding since it is the trial court that had the opportunity to observe his demeanour when he gave evidence. See ***Martin Nyongesa Wanyonyi vs R [2015] eKLR***. In any event, ***section 143*** of the ***Evidence Act*** is clear that the prosecution is under no obligation to call any number of witnesses to prove a fact.

34. The icing on the cake was that upon the bag being searched 10 packets of Sweet Menthol cigarettes were recovered, which Austin and Benson identified as some of the stock which had been stolen on the material day. We cannot help but note that the appellant did not offer any reasonable explanation for possession of the cigarettes hence the two courts below rightfully invoked the doctrine of recent possession.

35. The essence of the doctrine of recent possession 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. See ***Hassan vs R [2005] 2 KLR 151***. Consequently, we are clear in our minds that the appellant's conviction was within the confines of the law.

36. On the issue of sentence, it is trite that an appellate Court will review or alter a sentence only where it is demonstrated that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied; or that the sentence is illegal or unlawful. See ***Kenneth Kimani Kamunyu vs R [2006] eKLR***.

37. Taking into account the holding by the Supreme Court in ***Francis Karioko Muruatetu & Another vs R [2017] eKLR***, a sentencing court is required to consider mitigating factors before imposing a suitable sentence even where the law prescribes for a mandatory death penalty such as in this case. Our perusal of the record reveals that the trial court did not consider any of the mitigating factors and simply sentenced the appellant on the basis that the death penalty was the mandatory prescribed sentence. As such, we are inclined to interfere with the sentence in question and substitute the same with a sentence of 15 years imprisonment which we deem as commensurate to the circumstances of the case and the appellant's culpability.

38. The upshot of the foregoing is that the appeal herein succeeds in part to the extent that we set aside the death penalty imposed on the appellant and substitute the same with a sentence of 15 years imprisonment from the date of his conviction.

Dated and delivered at Mombasa this 9th day of May, 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