IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & ODEK, JJ.A)

CRIMINAL APPEAL NO. 192 OF 2014

BETWEEN

GEORGE ONYANGO KISERA.....1ST APPELLANT

BENARD OCHIENG OOKO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya

at Kisumu (H.K. Chemitei & A.O. Muchelule, JJ.) dated 7th July, 2015

in

HCCRA No. 157 of 2010)

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JUDGMENT OF THE COURT

The appellants were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars were that on 21st March, 2010 at 11:00pm at Muhoroni Township in Muhoroni District within Nyanza province jointly while armed with pangas, robbed Francis Ochieng Opiyo of one mobile phone make Nokia 1110, one black jacket, one black leather belt, a hat, spectacles and Kshs. 4,500 all valued at Kshs. 12,750 and at or immediately before or immediately after the time of such robbery beat the said Francis Ochieng Opiyo. In the alternative count, the appellants were charged with handling stolen property contrary to section 322 (2) of the Penal Code. The particulars were that on 24th and 25th March, 2010 respectively in Muhoroni, the appellants otherwise than in the course of stealing dishonestly retained one mobile phone make Nokia 1110, a black jacket and a leather belt knowing or having reasons to believe it to be stolen property. The appellants denied the charges.

The prosecution in a bid to prove its case against the appellants called a total of three witness. Their case was that on the material day the complainant, **Francis Ochieng Opiyo *(PW1)*** was heading home from Muhoroni town at around 11pm when he was accosted and assaulted by four people armed with pangas and powerful torches. They then robbed him of the items detailed in the charge sheet. The complainant was subsequently treated at Muhoroni sub-district hospital for the injuries he sustained during the attack. Thereafter he reported the incident at Muhoroni police post. The case was taken up by **PC Jackson Omariba *(PW3)*** who apparently had a mobile phone which had been booked in as prisoner's diary and which according to the complainant, fitted the description in the occurrence book by the complainant concerning the robbery in which he was a victim. PW3 then inquired from the 1st appellant where he got the phone from and when he failed to get satisfactory answer, he called the complainant who was able to positively identify the mobile phone as his courtesy of the faded keypad and the names in the phonebook which belonged to his customers and friends.

Following further interrogation, the 1st appellant, conceded that the phone had been given to him by the 2nd appellant and upon going to the 2nd appellant's house, PW3 found his wife and in the process recovered a black jacket which matched the complaint's stolen jacket and the description that it had torn pockets both inside and outside. The 2nd appellant's wife was arrested for giving an unsatisfactory answer as to how she had come by the jacket. The complainant was then called to the station and was able to positively identify the jacket. PW3 then in the company of his colleagues mounted a search for the 2nd appellant whom they succeeded in arresting while in possession of and or wearing the belt which matched the description of the belt that had been stolen from the complainant. When the complainant was called to

the station, he was able to once again identify the belt as his. He was however unable to recognize his assailants or could not identify them due to the strong light from the torches the assailants were armed with.

In his defence, the 1st appellant denied the charge and urged that he was arrested for failing to attend court on the material day and that the phone belonged to him. The 2nd appellant also denied the charge stating that he was arrested while drinking changaa and did not have the money demanded as bribe by the police. He denied knowledge of the belt and jacket allegedly found in his possession.

Following a full trial, the appellants were convicted on the main count and sentenced to death.

The appellants were dissatisfied with the decision of the trial court and appealed to the High Court. The learned Judges of the High Court **(Chemitei & Muchelule, JJ)** in their determination observed that the evidence of identification was doubtful as the complainant did not allege to have recognized or identified any of the assailants. The doctrine of recent possession was however applicable as the appellants were found in actual physical possession of the items stolen from the complainant so soon after the robbery and which the complainant was able to positively identify. The appellants never gave any explanation as to how they had come by the items. In the premises the appeal was found to be unmeritorious and was accordingly dismissed.

Aggrieved by the judgment of the High Court, the appellants filed in this Court the present and perhaps last appeal in which they have raised four grounds that the learned Judges erred in law in failing to; appreciate that the appellants did not receive a fair trial having not been accorded their constitutional right to counsel as enshrined in Article 50 (1) (h) of the Constitution; appreciate that the appellants were not properly identified; appreciate that the evidence adduced by the respondent failed to meet the legal threshold to warrant a conviction; and to consider that the sentence meted out against the appellants was unconstitutional and inconsistent with international best practices.

When the appeal came up for hearing, **Mr. Odongo,** learned counsel appeared for the appellants whereas **Mr. Kakoi,** Principal Prosecution Counsel appeared for the State. Mr. Odongo submitted orally whereas Mr. Kakoi relied entirely on his written submissions.

Mr. Odongo abandoned the appeal on conviction with regard to the 1st appellant. However, he pursued the appeal on sentence with regard to the same appellant. As to the 2nd appellant counsel pursued the appeal both on conviction and sentence.

On sentence, counsel relied on the case of **Francis Karioko Muruatetu & another V Republic** ***[2016] eKLR*** in submitting that we should re-look at the mandatory death sentence imposed on the appellants. That the sentence of death was no longer a mandatory sentence.

On conviction of the 2nd appellant, counsel submitted that the appellant's conviction was based on the doctrine of recent possession; that the complainant had stated that his belt was black leather with the buckle; and that he replaced with a synthetic material but the trial magistrate in his judgment referred to the belt as having been made from cloth with a metallic buckle. That only the belt was produced in court hence the doctrine of recent possession was not properly invoked.

In opposing the appeal, Mr. Kakoi submitted that the right to counsel under Article 50 of the Constitution is only available when the court forms the opinion that substantial injustice would otherwise be occasioned and in the instant case no such injustice was occasioned to the appellants. With regard to identification and application of the doctrine of recent possession, counsel submitted that the complainant did not identify the people who attacked him. However, the appellants were linked to the robbery by being found in possession of the items stolen from the complainant immediately after the robbery. The appellants were unable to give satisfactory explanation as to how they had come by the items. In the premises, the doctrine of recent possession was properly applied. Counsel further submitted that all the essential ingredients of robbery with violence were met as the complainant was attacked by four people; was slapped on the left ear with a panga; the assailants were armed with pangas and indeed robbed him. As regards the sentence, the appellants were convicted and sentenced at a time when death sentence was a mandatory sentence. However, in view of the Supreme Court decision in the Muruatetu case *(supra)*, this Court was at liberty to revisit the sentence imposed.

This being a second appeal, we are legally constrained to consider only issues of law raised in the appeal and not to consider matters of fact found by the trial court and revisited by the High Court on the first appeal. This is by dint of **section 361 (1) (a)** of the Criminal Procedure Code and as was held in **M'Riungu v. Republic (1983) KLR 455** where the Court observed;

> ***"Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law."***

We have carefully considered the record of appeal, submissions by counsel and the law. The main issues that fall for our determination are whether the doctrine of recent possession was properly invoked and whether this Court should revisit the sentence of death imposed on the appellants in view of the Supreme Court decision in the Muruatetu case.

With regard to the doctrine of recent possession, **the trial court** as well as the first appellate court found that the explanation given by the 2nd appellant as to how he had come by the complainant's items was not true so as to oust the application of the doctrine. An inference of guilt was drawn based on the 2nd appellant's physical and actual possession and control of the black leather belt belonging to the complainant so immediately after the robbery. The doctrine of recent possession as was held by the majority of the Supreme Court in the Canadian case of **Republic v Kowkyk (1988) 2 SCR 59** can be summarized as follows:-

> ***"Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether***

the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply." *Emphasis ours.*

Further in the case of **Isaac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic Cr App. No. 272 of 2005 (UR**) this Court held:

> **"It is trite that before a court of law can rely on the Doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof;**
>
> **i. that the property was found with the suspect;**
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> **ii. that the property is positively the property of the complainant;**
>
> **iii. that the property was stolen from the complainant;**
>
> **iv. that the property was recently stolen from the complainant.**
>
> **The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other".**

We are satisfied that the two courts below were justified in invoking the doctrine of recent possession. The stolen items were recovered immediately after the robbery on the 2nd appellant's person. The 2nd appellant failed to put forward a plausible explanation of how he came to be in possession of the stolen items and his defense did not deny being in possession of the stolen items either. From the foregoing, we are satisfied that the prosecution's case against the 2nd appellant was overwhelmingly watertight and that the High Court properly directed itself in dismissing the appeal. There are no reasons for us to interfere with the concurrent findings of the two courts below. In the premises, the appeal against conviction fails in respect of the 2nd appellant. The 1st appellant, as already stated, did not challenge his conviction in this appeal.

With regard to the sentence, the Supreme Court in **Francis Karioko Muruatetu & another v Republic (supra),** held at para 69:

> ***"Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."*** Emphasis ours.

Additionally, the Supreme Court stated at para 111 of the said judgment that:

> ***"It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein …"*** Emphasis ours.

Section 204 of the Penal Code provides that **"Any person convicted for murder shall be sentenced to death**." Similarly **section 296(2)** of the Penal Code provides that the offender convicted for robbery with violence in circumstances stipulated therein; ***"shall be sentenced to death."***

In the case of **William Okungu Kittiny v Republic Criminal Appeal No. 56 of 2013**, this court recently held at para 9 that:

> ***"From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in para. 69, applies Mutatis Mutandis to section 296 (2) and 297 (2) of the penal code. Thus, the sentence of death under section 296 (2) and 297(2) of the penal code is a discretionary maximum punishment."***

The decision of the Supreme Court in **Muruatetu's case** (supra) has an immediate and binding effect on all other courts and that the decision did not prohibit perse courts below from ordering sentence re-hearing in any matter pending before those courts. Accordingly, this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed.

Even though the Supreme Court did not outlaw the death sentence, we are of the view that in the circumstances of this case, the death sentence was not warranted. The appellants gave mitigating circumstances but the trial magistrate considered that her hands were tied. It is not therefore necessary to order a sentence re-hearing their mitigation being on record. The appellants have been in custody for 9 years. The complainant did not sustain any serious injuries following the incident. In the circumstances, a sentence of imprisonment would serve the interest of justice. For the foregoing reasons, the appeal against conviction by the 2nd appellant is dismissed. However, the appeal against sentence by both appellants is allowed. The sentence of death is set aside and in substitution therefor the appellants are sentenced to 15 years imprisonment with effect from 22nd October, 2010 when they were convicted and sentenced.

Orders accordingly.

Dated and delivered at Kisumu this 3rd day of July, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.