IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 11 OF 2015

BETWEEN

HUDSON LUKUYANI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kakamega **(Chitembwe & Dulu, JJ)** dated **14th October, 2014 in HCCRA NO. 161 OF 2013**

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JUDGMENT OF THE COURT

The appellant **Hudson Lukuyani** appeals to this Court against the decision of the High Court at Kakamega **(Chitembwe** and **Dulu, JJ)** dismissing his appeal against his conviction and sentence of death for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** entered by the Chief Magistrate's Court at Kakamega.

He had been found guilty of having robbed one **Geoffrey Khalaka Lukhabi** of motorcycle registration number KMCM 716B make Kaka Eagle valued at Kshs.86,000 on 3rd November, 2012 at Muranda Location, Lihanda Sub-location in Kakamega East District of the former Western Province. He did so in the company of two co-accused while armed with dangerous weapons, and threatened to use actual violence on the complainant.

The evidence, as was led by the prosecution and believed by both courts below, was that on the material day the complainant Geoffrey Lukhabi, a hawker of *"short cake"* and *mandazi* who plied his trade on a motorcycle was going about his business riding from Shinyalu towards Muranda. It was at about 8.00p.m. and the path being muddy, he stopped to remove mud from the wheels, when some three men approached and asked him to give them a ride to Muranda. He declined stating his motorcycle was not for ferrying passengers, whereupon one of them, who was armed with a panga, aimed it at him. PW1 dodged and the strike missed him, cutting off the motorcycles side mirror. The attackers demanded that he give them his phone but PW1 tucked it in his pocket and ran off, leaving the motorcycle behind. Even though the motorcycle head light was off, its indicator lights were on and PW1 was able to make out the tallest of his attackers whose hair was in dreadlocks or Rasta braids. He was later to identify him as the appellant herein who took off with the motorcycle.

After running from his attackers, PW1 made a call to his brother **Nelson Atsanga (PW2)** on his cell phone. The latter came with four other brothers to where PW1 was and they reported to Muranda Administration Police Post regarding the incident. Together with **APC Victor Koech PW5** they followed the motorcycle tyre marks. These led them to a house but as it was at night and PW5 was not in uniform, he advised that they resume the search the next morning.

On 4th November, 2012, PW1, accompanied by PW5 and another Administration Police Officer, **Jackson Kwendo** went to that same house and on knocking the door was opened by the dread-locked appellant. He denied any knowledge of a stolen motorcycle, but a quick search in the house revealed it parked right next to the appellant's bed. Its side mirror was lying on the ground next to it. The appellant led the Administration Police Officers to the homes of two other persons with whom he was later charged with by **PC Abdidek Sharrif Mohammed (PW4)**. Those two were acquitted by the trial court for insufficient evidence while the appellant was convicted on account of the evidence of identification and having been found in recent possession of the motorcycle. His defence that he was merely framed was disbelieved.

In the present appeal, the appellant through his advocate **Mr. Gerald O. Kimayo** has filed a Memorandum of appeal raising two complaints, namely;

"(1) THAT the learned Judges erred in law in finding that the prosecution had proved its case to the required standard;

(2) THAT the sentence meted against the appellant was harsh given the circumstances."

Written submissions were filed on the appellant's behalf for which his learned counsel **Mr. Mshindi** relied without highlighting. The thrust of the very brief submission was that the case was not proved beyond reasonable doubt. The conviction was based on identification evidence but the only lighting available that night was from the indicator lights from the motorcycle and no evidence was led on the intensity of the light and how long the encounter was to assure a mistake-free identification.

Mr. Sirtuy, the learned Principal Prosecution Counsel did not address us on this point. On our own consideration of it, however, there is room for doubting whether the identification of the appellant was free from the possibility of error. First, it is noteworthy that the identification was by a single identifying witness under difficult circumstances. It was at night with the only light being the flashing of the motorcycle indicator. There indeed was no evidence led as to the intensity of that light and the distance between the same and the appellant.

It has long been the law that courts must approach the evidence of identification with caution and circumspection and test it rigorously because of the potential for miscarriage of justice inherent in mistaken identity. The predecessor of this Court addressed this issue more than a half a century ago in ***RORIA -vs- REPUBLIC [1967] 583*** at ***P 584*** as follows;

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER, L.C. said recently in the House of Lords in the course of a debate on s.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

'There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten - it is in a question of identity.' "

Now, had the evidence of identification been all there was to this case, the appellant's conviction would certainly have been unsafe. But there was more. As we have already pointed out, PW1, PW4 and other witnesses were able to follow the motorcycle tyre prints and these led them to a house within which the Rasta-dread locked appellant was found. In that house, in the bedroom, was the motorcycle with its side mirror chopped off and lying on the floor. This was without question the motorcycle stolen from PW1 in the robbery that occurred the night before. It is this recovery of the recently stolen motorcycle, with the appellant neither making a claim to it nor explaining how he came to be in possession of it, that gave the trial court certitude in the appellant's guilt. It's reasoning, which cannot be faulted, was as follows:-

"I believe him (PW1) because at recovery he also identified him to the police before they searched his house and made the recovery of the motorcycle exhibit P1. The recovery of the motorcycle was made less than 12 hours after laying evidence to PW1's claims.

Even if the court were to make a finding that he was not properly identified (which is not the case) recovery of one motorcycle which he lay no claim to being in possession of recently stolen, property which he has not accounted for how it came into his possession."

The law on recent possession is really based on a commonsensical conclusion to be drawn from facts which show that a person has been found in possession of goods recently stolen under circumstances that lead to an inference that he must be the thief. In ***MATU -vs- REPUBLIC [2004] 1 KLR 570,*** this Court traced the principle or doctrine to an English decision, although that was by no means the earliest formulation of the doctrine thus;

"In Republic v Loughin 35 Cr. App. R 69, the Lord Chief Justice of England said:

'If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop breaker.' "

We think, with respect, that in the present case the evidence led by the prosecution satisfied the principles for the application of the doctrine of recent possession as established in, among others, ***ARUM -vs- REPUBLIC [2006] 1 KLR 233*** with this Court holding that;

"1. Before a Court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof:

a. that the property was found with the suspect;

b. That the property was positively the property of the complainant;

c. That the property was stolen from the complainant;

d. That the property was recently stolen from the complainant."

We are satisfied therefore, as were the two courts below, that the prosecution did prove beyond reasonable doubt that the appellant was the

lead robber who attempted to strike PW1 with a panga. He was in the company of others and it is in the course of that robbery that the motorcycle was stolen. His guilt was established and his conviction was well-founded. The appeal against conviction therefore fails and is dismissed.

The appellant's other complaint relates to the sentence of death imposed which was based on the two court's understanding that it was the only sentence provided for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The mandatory nature of the death sentence having been declared unconstitutional by the Supreme Court in ***FRANCIS KARIOKO MURUATETU & ANOTHER -vs- REPUBLIC (Petition Nos. 15 & 16 of 2015)***, we are now urged that the same is harsh in the circumstances.

The Republic is not defending the imposition of the death sentence against the appellant and we recorded Mr. Sirtuy as stating that he was conceding the appeal on sentence especially because the victim of the robbery was not injured. This Court has in many cases applied the ratio in ***MURUATETU*** (Supra) to other offences other than murder, and on that basis interfered with mandatory sentences which were imposed by trial and first appellate courts their discretion in sentencing having been fettered. See ***WILLIAM OKUNGU KITONY -vs- REPUBLIC Criminal Appeal No. 56 of 2013***.

Having given due consideration to the submissions made and the circumstances of the offence, we set aside the sentence of death and substitute therefore a prison term of twenty (20) years.

Orders accordingly.

DATED and delivered at Kisumu this 31st day of October, 2019

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR