IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 68 OF 2016

BETWEEN

HUDSON MWEREMA LUGALIKI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kakamega (Sitati & Njoki Mwangi, JJ.) dated 28th January, 2016 **in HC. CR.A. No. 80 of 2014)**

JUDGMENT OF THE COURT

The central issue for determination in this appeal is whether the principles governing the doctrine of recent possession were satisfied by the prosecution because as we shall see in the evidence that was presented before the trial court none of the witnesses identified the robbers who went to the home of **Benard Malesi (PW1 Malesi)** on the night of 1st of June 2012 where they robbed him of various items.

Following that robbery the appellant **Hudson Mweremi Lugaliki** was arrested and charged on one count of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. It was stated in the charge sheet that on the night of the 1st June, 2012 at Muraka village in Kakamega jointly with others not before court while armed with crude weapons namely pangas, iron bars and sticks they robbed Malesi of a motor vehicle make Toyota Premio registration mark KAR 002A valued at Shs.400,000, a mobile phone make Nokia 2220 IMEI Serial No. 355371044853618 valued at Shs.5,000, six pairs of shoes, two laptops make HP, a DVD player make Sanyo, 3 shirts, cooking fat , one kilogram of omo all valued at Shs.650,000 and that immediately after the time of such robbery they threatened to use violence against Malesi.

The prosecution called 6 witnesses who included Malesi (a teacher) and his worker Nahashon Gulenywa (PW4). The two testified that on the night of 1st of June, 2012 at about 1.30 a.m. they were asleep in different rooms in Malesi's compound when they were woken up by noises made by several men who had powerful torches. Fearing for his life Malesi used a side door from his bedroom and went to the garage where he hid in the boot of his car. Robbers were able to break into his house, ransacked it and stole the items that we have stated in the charge sheet. Unlucky for him the robbers came to the garage and discovered his hide out. They were able to open the boot and found him. He told them where some money in the bedroom was and after they had taken it they drove out of the compound after starting the car with some difficulty with him still in the boot. Somewhere along the way within Kakamega he was lucky to successfully open the car boot, jump out and escape with few injuries suffered after a fall. His worker Nahashon had been confronted by the thieves but because of the powerful torches they had he could not recognize any of them. They injured him slightly when he tried to look at them.

Malesi escaped to a local bar which was still open and he was assisted to Kakamega Police Station where he made a report. He and Nahason recorded statements accordingly and it was their evidence that they did not identify any of the robbers. So the issue of identification which is one of the grounds of appeal is not relevant here.

Mary Kathigi Manani (Manani - PW2), a fruit seller at a place called Mundete in Kakamega who supplied fruits to Sabatia Eye Hospital on a day she could not remember in June 2012 met a cateress at Sabatia Eye Hospital (**Judith Monyani Judith - PW3**) who asked her whether she could get her a phone. Manani knew a young man (the appellant) who had a phone to sell. She knew the appellant because he had worked for her at her hotel and she knew his home and according to her he was trusted and so she advised Judith that she could buy the phone from the appellant . She aked the appellant if he still had a phone to sell and he brought her a phone. Manani showed Judith the phone and Judith liked it. She bought it for Shs.1000. It later transpired that the phone was stolen and investigations led police to both Judith and Manani and that is how the appellant was arrested.

Those facts were confirmed by Judith the buyer of the phone. Judith gave the phone to be used by her husband **Stanford Muhema Bandi (Bandi PW5)** who worked at the Provincial Commissioner's Office in Kakamega. The phone that was recovered from Judith and her

husband (Bandi) had the serial number that was identified by **Malesi (PW1)** and Nahashon (PW4) as the one stolen when they were attacked on 1st of June, 2012.

Police Constable David Kurgat (PW6) of C.I.D. Office, Kakagema was the Investigations Officer who after receiving a report of the robbery conducted investigations and recovered the stolen motor vehicle and also the phone. He testified in court and produced the items as part of the evidence.

Put on his defence the appellant denied the charge stating that on the night in question he was asleep in his house but that the next morning while going about his business of selling mandazi he was arrested and charged with the offence which he knew nothing about. He wondered why he was not put on an identification parade and stated that none of the stolen items were found in his house which was searched by the police.

The trial magistrate analysed the prosecution case and the defence offered and found that the case had been proved to the required standard and the appellant was convicted and sentenced to death.

A first appeal at the High Court of Kenya at Kakamega was heard and dismissed in a judgment delivered by **Ruth Sitati** and **Njoki Mwangi, JJ.** dated 28th January, 2016. Those are the findings that provoked this appeal.

There are 4 grounds set out in the Memorandum of Appeal drawn by **Sala and Mundany Advocates** for the appellant. The first ground relates to identification which as we have already stated is irrelevant here because there was no identification of the robbers by PW1 and PW2. It is further said that the judges of the High Court on first appeal erred in upholding the conviction of the appellant when the prosecution had not discharged the burden of proof beyond reasonable doubt. The judges are faulted for applying the doctrine of recent possession while according to the appellant the requisite elements were absent and the doctrine was inapplicable. Finally, that the High Court was wrong to uphold the lower court's decision to condemn the appellant to a sentence which was excessive, harsh, illegal and unconstitutional.

This appeal came up for hearing before us on 1st August ,2019 when **Miss Maureen Olony** appeared for the appellant while **Miss Lubanga** appeared for the respondent. Both lawyers had filed written submissions which we have considered. In a brief highlight of the written submissions Miss Olony submitted that the burden of proof was not discharged by the prosecution but that it had been shifted to the appellant contrary to law. On the doctirine of recent possession learned counsel relied on the case of **Isaac Nganga Kahiga and Another v Republic [2006] eKLR** for the proposition that for the doctrine of recent possesion to be invoked property stolen must be found with the accused person. In an alternative submission counsel asked us to find that the sentence imposed was harsh and impose a sentence of 5 years imprisonment to the appellant.

Misss Lubanga relied entirely on written submissions filed in the appeal and had nothing useful to add.

We began this judgment by identifying the central issue of the doctrine of recent possession because the whole prosecution case rested on whether that doctrine was established to found the conviction of the appellant on the robbery with violence charge. The trial magistrate found that the doctrine of recent possession had been established although he doubted the role of Manani (PW2) whose conduct appeared suspicious in the whole transaction involving the stolen phone. The High Court on first appeal identified the doctrine of recent possession as the relevant issue for determination. The judges considered the facts and applied various case law and found that the doctrine had been established and thus the conviction of the appellant was sound.

For the doctrine of recent possession to apply it must be proved that the complainant's property that had recently been stolen was found with the accused person - see **Isaac Nganga Kahiga v Republic** (supra).

It is in the evidence that when Malesi and Nahashon were attacked on the night of 1st June, 2012 various items including a motor vehicle and a Nokia type phone were stolen. They were attacked by more than one person going by the many torches that were being flashed in the compound. Malesi was threatened with violence while Nahashon was injured.

Judith (PW3) gave direct cogent evidence of how she acquired a phone from the appellant upon the advise of Manani (PW2). The phone that the appellant sold to Judith had recently been stolen from the complainant. The phone was properly identified in court through its serial number and appearance. The appellant was well known to Manani who had worked for her in her hotel. There was no break in the chain of events from when the phone was stolen from the complainant to the time it was sold to Judith and when it was recovered. The prosecution established that the appellant was one of the robbers who attacked the complainant on the night of 1st of June 2012 and stole the phone that was recovered not long thereafter.

The ingredients of robbery with violence were established and in view of the doctrine of recent possesssion having been established the judges of the High Court were right in upholding the conviction of the appellant for the offence that he was faced with. In the premises we are satisfied that the conviction was sound and the appeal on conviction fails and is dismissed.

The appellant was sentenced to death. The record shows that when mitigation was called for the appellant did not say anything in mitigation. The sentence was imposed on 3rd of July, 2014 and the High Court judgment was on the 28th January, 2016. The Penal Code provided for the death sentence for a person convicted of robbery with violence under **section 296 (2)** of the said **Code** and the sentence imposed was lawful. Recent developments in Kenya have however shifted from that position. The Supreme Court of Kenya was asked in the case of **Francis Muruatetu v Republic [2017] eKLR** to answer the question whether imposing a death sentence as a mandatory sentence was lawful or constitutional. That court found that the provision imposing death sentence as a mandatory sentence was not constitutional. Courts have since then been freed to consider the circumstances of each case including particular circumstances and mitigation that apply to each particular case. We have considered the circumstances of the case that was before the trial court. Although the complainants were harassed and Nahashon slightly injured the circumstances do not appear to be aggravating in the case. We have given due

consideration to the circumstances and we think that a sentence of 10 years imprisonment is a fair sentence herein. We therefore set aside the death sentence imposed against the appellant and instead order that the appellant serve a period of 10 years imprisonment from the date that he was sentenced by the trial court.

Those will be the orders of the court.

Dated and delivered at Kisumu this 21st day of November, 2019.

R.N. NAMBUYE

JUDGE OF APPEAL

ASIKE-MAKHANDIA

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR