IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 193 OF 2016

BETWEEN

ANDREW NTHIWA MUTUKU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (B. Thuranira Jaden & J.M. Ngugi, JJ) dated 15th October 2013

in

HCCRA No. 65 & 66 of 2012)

****

JUDGMENT OF THE COURT

[1] This is a second appeal, as ***Andrew Nthiwa Mutuku***, (appellant) was charged, tried, convicted and sentenced to suffer death for the offence of robbery with violence by the Principal Magistrate's court at Kagundo on 4th May, 2012. Aggrieved by the said conviction and sentence, the appellant unsuccessfully appealed before the High court which appeal was dismissed on 15th October, 2013; it is the subject matter of this appeal.

[2] A brief synopsis of the evidence that led to the conclusions by the two courts below was that on 31st October, 2010 at about 7.30 pm as **Duncan *Kimathi Muide* *(PW1)***, was preparing to close his shop at Mwala Trading Centre, it was raided by about three hooded thugs who were armed with a gun and other dangerous weapons. ***PW1*** was just outside the shop at the time when his late wife ***Eunice Mbula Kimathi*** (she was killed during the said attack) told him in Kikamba that thugs had come. On entering the shop, ***PW1*** saw one of the thugs pushing his wife while another was pointing a gun at him demanding that he surrenders all the money. He complied by giving them Ksh.160,000 which was in the shop. As one of the thugs was leading ***PW1*** out of the shop, the other one who was armed with a gun fired two gunshots at his wife who was fatally injured and by the time ***PW1*** called for help and took her to Mwala Hospital, she was pronounced dead. The thugs took off with the money and stole several items from the shop that were listed in the charge sheet and were also produced as exhibits during the trial. ***PW1*** however did not recognize the attackers.

[3] The robbery was also witnessed by ***Mary Syombua Kiio***, **(PW2),** and a neighbour who runs a beauty shop next to PW1's shop. She testified that she was called by ***PW1's*** employee one ***Elizabeth Mwelu Mutua*** **(PW3)** who had managed to sneak out when she saw the thugs and informed ***PW2*** that there were attackers at ***PW1's*** shop. Once ***PW2*** stepped out with her husband to see what was happening, they were confronted by gun wielding thugs, she and her husband fled through her shop to hide, and as they fled, they heard gun shots. In the process the thugs passed by her shop and stole her mobile telephone a Nokia 2600 which was later recovered by

the police. She was able to identify it by keying in her pin number, it was also produced in evidence and formed part of the series of matters that connected the appellant with the offence.

[4] It would seem the watershed of the evidence that connected the appellant to the offence was given by ***PC Geoffrey Ombati*** **(PW4)** and ***PC Philip Omayo*** **(PW5)** both police officers who were on duty at a road block on 31st October, 2010. At about 9.30 pm they stopped a saloon motor vehicle registration No KAL 435N white in colour, which was being driven towards Nairobi. The vehicle had three occupants and the appellant was the driver. The police officers ordered the driver to stop and to alight so that he could open the boot for them to search the vehicle. It was at that moment that **PW4** noticed one of the passengers trying to open a bag, he cocked his gun and ordered the two passengers to step aside. The two passengers stealthily escaped in the darkness but the appellant was not lucky. He was arrested by these police officers. They found a gun with eleven rounds of ammunition inside the bag and other items which were listed as a grey jumper, blue muffin, a black raincoat, a jumper, jacket, a plug and spanner.

[5] The gun was examined by ***CIP Alex Muidindi Mwandawiro*** **(PW6)** a ballistic expert attached to the CID Headquarters who confirmed that it was a fire arm. The used cartridges that were shot at the scene of crime were also collected during the investigations. They were also examined and it was said that they were discharged from the said firearm. The vehicle was taken to the police station and on being searched further by ***Ag. SSP Shem Nyamboki***, **(PW7)** a Nokia phone was recovered. He took it to **PW2** who claimed it was hers and she was able to identify it by keying in her pin number. Through investigations, **PW7** was able to pick the particulars of the passengers who had escaped and the appellant led the police to Mbini area where they searched and recovered two tins of washing powder, scratch cards and rubber binding straps. Also the witnesses confirmed during the trial that the vehicle that was recovered had been seen at Mwala Township that evening.

[6] It was on that basis that the appellant was charged with two counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code, one count of possession of firearm contrary to ***section 89 (1)*** of the Penal Code, and one count of possession of ammunition contrary to ***section 4(1)*** of the Firearms Act.

(i) The particulars of the 1st count are that:

> ***"on 31st October 2010, at Mwala Trading Centre in Mwala District within Machakos County, jointly with others not before court, while armed with offensive or dangerous weapons, namely a Patchet firearm,serial number KR 20430 robbed Duncan Kimanthi Muindi cash Ksh. 160,000, assorted airtime scratch cards of Safaricom, Zain and Yu, sixty three satches of assorted cigarettes valued at Ksh. 212,130. and at or immediately before or immediately after the time of such robbery shot dead Eunice Mbula Kimanthi."***

(ii) The particulars of the 2nd count are that:

> ***"On the 31st day of October, 2010 at Mwala Trading centre in Mwala District within the Machakos County, jointly with others not before court while armed with offensive or dangerous weapons namely Patchet firearm serial number KR 20430 robbed Mary Syombua Mutua cash 400/= and one mobile phone make Nokia 2600 all valued at Kshs.4900/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Mary Syombua Mutua."***

(iii) The particulars of possession of firearm and ammunition are that;

> "***On the 31st October 2010, at Koma Shrine area in Matungulu District within Machakos County, the appellant had in his possession, without a firearm certificate, a firearm namely a Patchet, and eleven rounds of ammunition of 9 MM caliber***."

[7] The appellant was found to have a case to answer and when put to his defense, he gave sworn testimony stating that he was a taxi driver and on the material day at 5.30pm he was hired to pick two men from Tala town; that on the way, they were stopped at a roadblock and he was arrested at the scene; that he had not been aware that the bag contained a firearm and ammunition or that there was a carton of cigarettes in the boot of the vehicle. He did not call any witness.

[8] Upon weighing the evidence of the prosecution against the defence, the trial court found the appellant's defence of *alibi* short of merit that did not dent what the trial court considered a strong prosecution's case that linked the appellant to the offence. The court applied the doctrine of recent possession to find the appellant guilty on the charge of robbery with violence contrary to ***section 296(2)*** of the Penal Code, possession of firearm and possession of ammunitions. He was sentenced to death for the charge of robbery with violence, and the sentence for the other offences was held in abeyance.

[9] Before the High Court, the appellant faulted the judgment of the trial court on the grounds that; the evidence of the prosecution witnesses was contradictory, inconsistent, unreliable and lacked corroboration; that crucial witnesses were not called; that an identification parade was not conducted; that the prosecution case was not proved beyond a reasonable doubt; that the trial magistrate shifted the burden of proof on the appellants and that the defense of *alibi* was rejected without any valid reason. After evaluating the matter, the High Court applying the doctrine of recent possession as stated in **Arum vs. Republic (2006) 1 KLR 233 that:-**

> ***"In our view, before a court of a 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; and lastly that the property was stolen from the complainant, and lastly that the property was recently stolen from the complainant. The proof as of time, as has been stated over and again, will depend on the easiness with which the stolen property can move from one person to the other."***

Upheld the appellant's conviction and sentence prompting the present appeal.

[10] The appellant filed a Memorandum of Appeal dated 22nd August 2017 raising eight (8) grounds of appeal as follows;

> ***"(i) That the learned judges erred in upholding the sentence which was in breach of the constitution and international law;***
>
> ***(ii) That the learned judges erred in law in failing to sufficiently address the issue of burden of proof and quantum of evidence;***
>
> ***(iii) That the learned judge failed to consider the fact that there was no positive identification of the appellant;***
>
> ***(iv) That the learned judges improperly applied the doctrine of recent possession without corroborating evidence;***
>
> ***(v) That the learned judges failed to fully consider the appellant's defense of alibi;***
>
> ***(vi) That the learned judges erred in finding that the prosecution had proved its case beyond a reasonable doubt;***
>
> ***(vii) That the learned judges failed to consider the grounds of appeal and submissions thereby arriving at the wrong conclusion; and***
>
> ***(viii) That the learned judges failed to re-evaluate the evidence afresh."***

[11] This is a second appeal, and we remind ourselves of the duty of loyalty to the concurrent findings of the courts below us. In the words of this Court in ***Adan Muraguri Mungara vs. Republic [2010] eKLR:***

> ***"As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."***

[12] During the plenary hearing of the appeal learned Counsel **Dr. Khaminwa,** appearing for the appellant, submitted that the matter had been poorly investigated as the prosecution had failed to trace the owner of the taxi to ascertain that the appellant was indeed not a taxi driver; that the firearm was not recovered on the appellant but rather it was in the passenger's bag. On those grounds counsel argued that the prosecution had failed to meet the standards for recent possession as established by the case of **Arum vs. R** (supra) and prayed for the appeal to be allowed.

[13] Opposing the appeal, **Mr. O'mirera** (Senior Assistant Deputy Public Prosecutor) submitted that there was overwhelming evidence against the appellant since he had failed to explain how he came to be in possession of the stolen items; that the complainants positively identified the recovered property; that it was the appellant's duty to produce the owner of the taxi in support of his defense; and that no adverse inference could be drawn against the prosecution for allowing the investigating officer to produce the postmortem report.

[14] We have carefully considered the record of appeal and the submissions by respective counsel, we find there are principally three issues for determination, that is:

> ***(i) whether the High Court properly re-evaluated the evidence that led to the conviction for offence of robbery with violence;***
>
> ***(ii) whether the doctrine of recent possession was established sufficiently to link the appellant to the use of violence which is a necessary ingredient or element in the commission of the offence of robbery with violence; and***
>
> ***(ix) whether the offence charged in count 1 was established and proved beyond reasonable doubt as required by law.***

[15] We find that the High Court fastidiously re-evaluated the evidence before concluding that the appellant was guilty of being in possession of the stolen property, firearm and ammunitions as charged when the Judges rendered themselves as thus;

"The 1st appellant did not deny having been stopped while driving the motor vehicle in question. What the 1st appellant contends is that he was a taxi driver and that he had been hired by a customer to ferry him from Tala to Nairobi. During cross-examination, the 1st appellant stated that he did not see his customers carrying anything and nor was he shown the firearm at the scene of arrest.

The evidence of PW5 and PW6 the arresting officers shows that they found a bag and a carton of assorted cigarettes from the motor vehicle. As the driver of the motor vehicle, the 1st appellant would at least know whether he opened the boot of the motor vehicle for the carton of cigarettes to be placed there. The learned trial magistrate disbelieved the 1st appellant's evidence that he was a taxi driver. As the court that heard and saw the witness, we have no reason to disagree with the learned trial magistrate."

[16] From the above excerpt, it is clear that the 1st appellate court was aware of its duty and did in fact re-examine and re-evaluate the evidence before accepting the findings of the trial magistrate. There is no set format for re-evaluation of evidence. This Court has previously followed the dicta by the Uganda Supreme Court in the case of **Uganda Breweries Ltd vs. Uganda Railways Corporation [2002] 2 EA 634**, stating thus;

"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first appellate court".

[17] The appellant was driving a motor vehicle that was stopped by police, officers who testified before the trial court and whose evidence was admitted was that they found a bag inside the vehicle that contained a firearm and some other stolen items that were positively identified by the victims of the robbery. Although this evidence was accepted by the two courts below, counsel for the appellant was emphatic that the appellant was a taxi driver who was hired by passengers who escaped once the vehicle was stopped. Counsel further urged us to consider that the investigations carried out by the police were shoddy in that no evidence was produced to deny those assertions that the appellant was hired to transport the robbers who escaped. The two courts below found the evidence of the police officers credible, the officers had explained that the appellant did not get an opportunity to escape as he was driving the vehicle and the police officers eyes were on him as they demanded that he opens the car boot. In addition, the appellant led the police to Mbiline area a place where other stolen items were recovered.

[18] The issue to interrogate further is whether the aforesaid evidence was sound to sustain a conviction based on the application of the doctrine of recent possession. Bosire, J. (as he was then) in **Malingi vs. Republic (1989) KLR 227** rendered himself as follows:

"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain the possession after the prosecution has proved certain basic facts. Firstly, that the item he had in his possession had been stolen a short period prior to the possession, that the lapse of time from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of a fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."

See also **Isaac Ng'ang'aKahiga alias Peter Ng'ang'aKahiga vs. Republic [2006] eKLR** and **Reuben NyakangoMose& Another vs. Republic [2013] eKLR.**

[19] To us two of the prerequisites conditions were met by the prosecution's evidence as it was proved that the stolen items were in the appellant's possession shortly after they were stolen; and that the lapse of time between the robbery and the recovery of the items was short. On the third condition, we find that there were no co-existing circumstances which point to any other suspect. This was because although two arresting officers was that two other suspects fled the scene at the roadblock when they became aware of the looming threat of arrest, the appellant was convicted not only on the presumption that as the driver of the motor vehicle, he was in active association with the two fugitives but that he was found in possession of the stolen items and he led the police to a place where further recoveries of items that were positively identified as having been stolen during the robbery were found.

[20] The counsel for appellant advanced an argument that during the hearing of this appeal, the defense of *alibi* was not treated in accordance with the provisions of ***section 211 (1)*** of the **Criminal Procedure Code**. It is well established that the purpose of *alibi* defense is meant to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act. The principle has long been accepted that an accused person who wishes to rely on a defense of *alibi* must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. In **R. vs. Sukha Singh S/O Wazir Singh & Others (1939) 6 EACA 145**, the predecessor of this Court stated thus:

"If a person is accused of anything and his defense is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of

inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

[21] We appreciate that the appellant had no obligation whatsoever to offer any defence whatsoever. The burden remained with the prosecution to prove every element of the offences he faced as well as upstage the defence of alibi. The two courts below accepted the evidence surrounding the arrest and declined the *alibi*

sentence which we substitute therefor with a term of twenty five (25) years from the date of conviction.

Dated and delivered at Nairobi this 8th day of November, 2019.

M. K. KOOME

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR