IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 54 OF 2013

BETWEEN

SIMON KAGWI NGECHU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru

(Wendo & Emukule, JJ.) dated 14th March 2013 in H.C.CR.APP.No. 142 of 2011)

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JUDGMENT OF THE COURT

1. Simon Kagwi Ngechu, the appellant, was charged and tried before the Senior Principal Magistrate at Naivasha and convicted on 21st June 2011 for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was sentenced to death. On appeal, the High Court upheld the conviction but set aside the death sentence and substituted the same with life imprisonment.

2. In this second appeal, which under Section 361 of the Criminal Procedure Code must be confined to matters of law, the appellant has again challenged his conviction on the grounds that he was not positively identified; that the doctrine of recent possession was improperly invoked when the same was not proved; and that crucial witnesses were not called.

3. According to learned counsel for the appellant, ***Miss. L.N. Cheloti***, the appellant was convicted without sufficient evidence; that one of the complainants, Sgt David Kiprono Mosonik, PW1, did not make a report to the police as required under Section 89 of the Criminal Procedure Code; that PW1 was improperly involved in tracing and arresting the appellant; that the appellant was not booked in the occurrence book with any of the items allegedly found on him upon his arrest; that the courts below erred in relying on the doctrine of recent possession; and that persons who witnessed the arrest of the appellant should have been called as witnesses and an adverse inference should therefore be drawn. In that regard reference was made to the decision of this Court in ***David Mwingirwa vs. Republic [2017] eKLR***.

4. It was submitted further that the appellant was not properly or positively identified; that only one witness, PW1, identified him and the evidence of one witness cannot be said to be credible, it was urged. Counsel referred to a decision of this Court in Ibrahim ***Natiki Watua vs. Republic [2018] eKLR*** in support of the argument that the courts below did not test the evidence of identification with the requisite care.

5. Opposing the appeal, ***Miss N. Kibera***, learned Prosecution counsel, submitted that the appellant was positively identified by PW1 at the point of arrest and subsequently by PW2 and PW4 at the identification parades. Further, the appellant was found in possession of PW4's cell phone; and the conviction was based on positive identification and on the doctrine of recent possession.

6. It was submitted that even though an application by the prosecution for adjournment in order to call more witnesses was refused by the trial court, all crucial or necessary witnesses testified and the offence was proved to the required standard.

7. Based on the prosecution evidence tendered before the trial court, the facts in brief are that, on 18th November 2009 at about 7.00 p.m., Sgt David Kiprono Mosonik (PW1), Police Constable Leboi Leting (PW2) and Evanson Mahiti Mwithiga (PW4) were amongst the 11 passengers who boarded a Nairobi bound matatu, Prestige Shuttle, Registration Number KAB 800K at Nakuru town driven by Evans Gekonge (PW3). On leaving the terminus in Nakuru town, the first stop was at Nakuru Police Station where the passengers were searched before proceeding on the journey to Nairobi.

8. Along the Naivasha-Nairobi stretch of the road at a place known as Kinungi, one of the passengers in the vehicle slapped the driver, PW3, and warned him *'not to try anything funny.'* The passenger then commanded him to stop the vehicle. PW3 complied. PW3 was then pushed off from the driver's seat on to the middle seat and that passenger took over the driving.

9. Meanwhile two other passengers, who had been busy chewing miraa, pulled out knives from the wrappers of miraa, and embarked on searching and robbing the passengers of their mobile phones, money and any valuables they could find. The vehicle was then driven off the highway and into a forest where all the passengers were ordered to get out of the vehicle as they were each searched by the robbers. The robbers then ordered the passengers to lie on the ground and ordered not to wake up until the robbers had gone. The robbers then walked away with their loot and disappeared into the night. It was about 10.00 p.m.

10. After the robbers had departed, PW1 led the passengers in prayer after which they found their way out of the forest and drove to Naivasha Police Station where they reported the incident. There, Police Constable Patrick Karimi (PW5) took charge of the matter, interrogated the passengers and inspected the matatu. As he did so, a Samsung cell phone, that had dropped in the matatu was discovered. None of the passengers claimed it. Fortuitously, that phone rang and PW5 answered it. According to PW5, the caller, who identified himself as *"Kagwe"* requested him not to switch off the phone as it belonged to him.

PW5 continued to engage the caller in conversation. The caller indicated that he was at a place called *"Staff Complex"* eating meat. PW5 decided to trace the caller.

11. Together with PW1 and two other police officers, PW5 drove to the so called Staff Complex. On the way there, he maintained communication with the caller over the same phone. On reaching the Staff Complex, it was agreed that PW1, who indicated that he would be able to identify the assailants, would disguise himself, enter the Staff Complex, and whilst inside, PW 5 would make a call on the phone to see who would answer it. PW5 remained outside, made the call, and PW1 saw the appellant pick up his phone to answer a call. PW1 then signaled to PW5 who moved in, pounced on the appellant and searched him and found him in possession of two other cell phones in addition to the one he was using, and arrested him alongside those in his company. PW1 was categorical that the appellant was indeed one of the assailants. One of the cell phones recovered from the appellant was identified by PW4 as his. It had been stolen during the robbery inside the Matatu.

12. Chief Inspector Alloys Orioki (PW6) was based at Naivasha Police station at the time. He conducted identification parades at which PW2 and PW4 identified the appellant as one of the assailants by picking him out in the parades.

13. Can it then be said that the identification of the appellant was faulty? In his testimony, PW1 narrated that on boarding the matatu at Nakuru, he found three passengers in the vehicle who were chewing miraa; a long wait ensued before the matatu embarked on the journey to Nairobi; that he complained why the vehicle was delaying and other passengers supported him and they started to converse with the miraa chewing passengers as they waited for the vehicle to fill up; that he even bought some coffee to warm themselves as they conversed and waited for the matatu to fill up. It was the same miraa chewing trio that later turned into assailants. There can be no doubt therefore that PW1 had ample opportunity to see who he was interacting with and he was quickly able to identify the appellant at the Staff Complex as one of those passengers with whom he was waiting for the matatu to fill up at the Nakuru terminus. We are unable to conclude, as urged by the appellant, that his identification was in any way faulty.

14. Furthermore, PW2 and PW4 who were also passengers in the vehicle and were also victims of the robbery easily identified the appellant at the identification parades conducted by PW6. Moreover, one of the cellphones that was stolen during the robbery in the matatu was found in the appellant's possession upon his arrest a few hours after the robbery. The doctrine of recent possession was properly applied. See decision of this Court in ***Isaac Wanga Kahiga alias Peter Nganga Kahiga vs Republic, Criminal Appeal No. 272 of 2005***.

15. There is also no doubt in our minds that the doctrine of recent possession was properly invoked and applied. PW4's cellphone was stolen during the robbery. The same evening the same cellphone was recovered from the appellant who did not even bother to offer any explanation how he came to possess it.

16. There was therefore overwhelming evidence against the appellant which displaced his defence that he was arrested as he went about his business and charged with an offence for which he knew nothing about.

17. As to the complaint that crucial witnesses were not called, the case of ***David Mwingirwa vs. Republic*** (above) to which we were referred is a re-statement of the principle in ***Bukenya and others vs. Uganda [1972] E. A. 549*** to the effect that although the prosecution has a discretion to decide who are the material witnesses and whom to call, there is a duty on the prosecution to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. The court itself has a duty to call any person whose evidence appears essential to the just decision of the case and if the prosecution calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution. In this case, no such inference is applicable, as the prosecution called such witnesses as were necessary for the court to reach a just finding.

18. In conclusion, the evidence presented by the prosecution was more than adequate to support the charge. Indeed, as already noted, the evidence was overwhelming. The result of the foregoing is that the appeal is devoid of merit. It is accordingly dismissed.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of December, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR