IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 159 OF 2016

BETWEEN

JOHN MBURU KURIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the decision of the High Court of Kenya at

Nairobi (Ogola & Kamau, JJ.), dated 1`3th November, 2013

In

H.C. CR.A. No.319 & 321 of 2010)

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JUDGMENT OF THE COURT

The appellant **John Mburu Kuria**, together with two others were charged with the offence of Robbery with Violence contrary to **section 296(2)** of the Penal Code. The particulars of the offence were that on the 15th September, 2009 at Kaitegi Village, in Thika District within Central Province jointly robbed Patrick Thiongo Chege of a wallet, torch, driving licence, I.D. Card, ATM Card, badge, PSV and Motorolla C118 mobile phone all valued at Kshs.9,300/= and immediately before the time of such robbery wounded the said Patrick Thiongo Chege.

Upon hearing the case the trial court acquitted the third accused (Ezekiel Ngugi Ndungu) but convicted the appellant and the second accused (Peter Njuguna Gitau) and sentenced them to death. Being dissatisfied with the said conviction and sentence, the appellant and the second accused preferred an appeal to the High Court, (Ogola & Kamau, JJ.).

Upon re-evaluation of the evidence tendered before the trial court, the High Court dismissed the appeal by the appellant and affirmed the aforesaid conviction and sentence. However, the appeal by the second accused was successful and the High Court held that the conditions under which the second accused was identified were not favourable. The appellant then moved to this Court and filed this second appeal.

In his memorandum of appeal, the appellant raised three grounds of appeal as follows:

(i) That the trial and first appellate courts erred in law by failing to determine that the complainant gave unsworn evidence contrary to **section 151** of the Criminal Procedure Code.

(ii) That the trial and first appellate courts erred in law by finding that the appellant was properly identified through corroboration by the doctrine of recent possession which doctrine is not founded on any known law.

(iii) That the trial and first appellate courts erred in law by finding that the charge was proved beyond reasonable doubt despite not meeting the threshold set out in **section 296(2)** of the Penal Code.

The brief facts that gave rise to the appeal were that on the 15th September, 2009, at around 1.45 p.m. Patrick Thiongo Chege (PW1) was walking home when he was accosted by three men who assaulted him using a weapon he did not recognize and stole from him his wallet which contained a driving licence, Identity Card, PSV Card and ATM Card. The robbers also stole from him a Motorolla C118 and a torch. According to PW1 whilst he was being assaulted and robbed, he managed to flash his torch on the faces of his attackers and was able to recognize them. After being attacked the accused went to the house of one of his neigbours, Charles Ngugi Ndungu (PW2), and together they proceeded to Kirwara Police Station riding on a motorcycle owned by PW2. On their way apparently they met with the attackers and PW1 managed to recognize them once more. PW1 reported the incident at the police station and the police accompanied by PW1 mounted a search for the attackers and found them in a bar. A body search of the attackers conducted by the police found the wallet together with its contents and the phone in the pockets of the appellant. The appellant together with the 2nd and 3rd accused were arrested.

During the hearing of the case before us Mr. Kinyanjui Githeu appeared for the appellant. Counsel submitted that PW1 was not sworn and argued that an unsworn statement given in court is not evidence and it has no probative value. He contended that this omission could not be cured by **section 382** of the Criminal Procedure Code and that the omission occasioned a miscarriage of justice. Learned counsel submitted that the prosecution failed to charge the appellant with the offence of handling stolen property despite the property being found on him. He argued that the issue of identification and possession must both be present.

Mr. Peter Mailanya (Senior Assistant Director of Public Prosecution) appeared for the respondent and opposed the appeal. Counsel submitted that he had looked at the original proceedings and he saw that the word that was used is "sworn". He contended that PW1 was cross-examined by the appellant and that if there was such omission then under **section 382** of the Criminal Procedure Code no injustice was occasioned. On the doctrine of recent possession, learned counsel argued that the appellant was found with recently stolen property a few hours after the incident.

Counsel contended that the possession connects the appellant to the robbery and shows that he was one of the robbers.

We have duly perused the record of appeal. We have also considered the respective submissions of counsel. **Section 361** of the Criminal Procedure Code enjoins this Court to consider matters of law only when hearing and determining a second appeal. In ***Karingo vs Republic [1982] KLR 219***, this Court stated the principle underpinning **section 361** of the Criminal Procedure Code as follows:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did."***

We are of the view that only two issues turn for our consideration in this appeal. First is whether PW1 was sworn before he gave his evidence as required under the law and if he did not, what is the import of that omission. Secondly is whether the doctrine of recent possession was properly applied in this case.

The appellant contends that PW1 was not sworn before he gave his evidence contrary to **section 151** of the Criminal Procedure Code. That section provides:

> ***"Every witness in a criminal cause or mater shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath."***

We agree with counsel for the appellant that it is mandatory that a witness takes oath before giving evidence. Generally, all witnesses in criminal proceedings must therefore give sworn evidence. We have looked at the typed record and it appears that the trial court recorded that ***"PW1 is a man and states in Kiswahili…".*** Counsel for the respondent submitted that he has looked at the original proceedings which indicate that PW1 was sworn. We have also looked at the original proceedings and confirm that the typed record has a typing error. PW1 was indeed sworn, as were all other witnesses in the case. This ground therefore must fail.

The second issue is with regard to the doctrine of recent possession. We have noted above that soon after the robbery took place, the appellant was found with items that were stolen from PW1. The trial court stated as follows on the recovered items:

"Complainant's property was recovered in a short while after the robbery. I am also satisfied that the items recovered from the 1st accused belonged to complainant and with no explanation, he must have come into possession of them through the robbery."

The High Court on its part sated as follows:

> ***"He reported the matter to the police and together with the police they went in hunt for the attack. They found the attackers at the Cheers Bar. Upon a search, the police found the stolen items in the pocket of the 2nd appellant… Clearly, the identification of the 2nd appellant by the complainant was corroborated by the doctrine of recent possession. In other words the complainant did not just identify the 2nd appellant. The things stolen from the complainant were also found in possession of the 2nd appellant. The 2nd appellant did not in his defence explain how he came into possession of those items."***

It is trite law that this Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or they are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings. See the ***Karingo* case** (supra).

We do not see any reason to interfere with those findings of fact by the two below courts on the issue of the items recovered from the appellant. We note that the appellant did not give any explanation of how he came into possession of the stolen items.

In the case of ***Ogembo vs R [2003] 1 EA 222 at p. 225***, this Court differently constituted stated as follows:

> ***"Dealing with a similar point, the Court of Appeal for Eastern Africa (as it was then) said as follows in the case of R. v. Bakari s/o Abdulla [1949] 16 EACA 84.***
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> ***"That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any other charge however penal."***
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> ***"This principle was quoted with approval in the case of Obonyo vs. Republic [1962] EA 592. In this case the court stated as follows:***
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> ***"If all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal."***
>
> ***In this we are satisfied the circumstances of the case did not point to any other reasonable conclusion other than the conclusion that the appellant was one of the six robbers that terrorized the two families in Bureti District and that he was arrested with some of the stolen property a day after robbery in Kisii which is not far from Bureti considering the fact that the robbers had easy transport namely the stolen vehicle."***

In ***Matu vs Republic [2004] 1 KLR 510*** this Court whilst dealing with a similar situation concluded thus:

> ***"The inevitable conclusion therefore is that the appellant was in possession of the goods stolen from the complainant's kiosk and he could not offer any acceptable explanation of how he came by them. The two courts below came to the same conclusion and rightly so in our view, that the appellant was one of the robbers."***

We are in full agreement with the above decisions. Similarly in our case the appellant's situation is the same as in the above cases. However, notably the appellant was not only found in possession of the stolen items but was also recognized by PW1 at the scene of the crime. We therefore agree with the High Court that the identification of the appellant was corroborated by the doctrine of recent possession. The items found on the appellant were stolen from PW1 and he did not offer any explanation as to why and how, he was found in possession of items stolen and in his possession. The law requires him to give an explanation, which he failed to do. The only and reasonable conclusion which can be drawn from his conduct is that the items were stolen or unlawfully obtained, hence the inevitable conclusion is that the appellant was the thief in the subject robbery under our determination. We therefore think the appeal on that ground has no merit; this ground must also fail.

We need not say more in this appeal. We are satisfied that the appellant was properly convicted of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. Accordingly, we order that this appeal be and is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 4th day of May, 2018.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR