IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 38 AND 41 OF 2013

BETWEEN

DOUGLAS OWIYE ONYANGO.....1ST APPELLANT

ASSUMPTA S. KIVINDYO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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

at Mombasa (Odero& Muya, JJ.) dated 28th August, 2013

in H.C. CR. A. No. 6 & 8 of 2010)

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JUDGMENT OF THE COURT

1. Douglas Owiye Onyango (1st appellant), and **Assumpta Syuwai Kivindyo** (2nd appellant), were charged before the Chief Magistrate's Court at Mombasa with one count of robbery with violence contrary to **Section 296(2)** of the Penal Code. They were said to have jointly robbed **Victor Karanu** (the deceased), of several items as enumerated in the charge sheet presented to the court on 30th March, 2007, and immediately before or immediately after killed the deceased by strangulation.

2. Having denied the charge, the matter proceeded to full hearing with the prosecution calling a total of seven witnesses before closing its case. When placed onto their defence, both appellants opted to testify on oath and called no witnesses. After considering the evidence before the court and submissions by the prosecution and the appellants, the learned magistrate found both appellants guilty as charged, convicted them and sentenced them to suffer death in the manner prescribed by law.

3. Being aggrieved by the conviction and sentence, they moved to the High Court on first appeal in separate appeals challenging both conviction and sentence. The two appeals were however consolidated and heard together as **Criminal Appeal No. 6 of 2010.** After re-examining the evidence tendered before the court afresh and considering the appellants' grounds of appeal and the relevant law, the High Court (**Odero & Muya, JJ**.) relying on the circumstantial evidence and the doctrine of recent possession were satisfied that the charge had been proved against both appellants beyond reasonable doubt. The appeals were consequently dismissed, and the conviction and sentence upheld.

4. Undeterred, both appellants moved to this Court on second appeal through their homemade grounds of appeal in which the 1st appellant raises 4 grounds with the 2nd appellant raising similar grounds. The grounds discernible from the 1st appellant's memorandum of appeal are that the prosecution's case in both courts below was not proved beyond reasonable doubt; that the doctrine of recent possession was not properly applied as evidence of theft of the items from the deceased's house was insufficient; and finally, that his defence had not been considered by the two courts below.

5. The grounds relied on by the 2nd appellant were similar to those raised by the 1st appellant. They both urged us to allow their appeals, set aside the conviction and sentence and set them free.

6. This being a second appeal, only matters of law fall for own consideration by dint of **Section 361(1)** of the Criminal Procedure Code which provides as follows:-

> **"(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-**
>
> **(a) on a matter of fact, and severity of sentence is a matter of fact; or**
>
> **(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."**

That notwithstanding however, a brief synopsis is important to place the appeal in proper context. **Michael Kariuk**i (PW5), was the deceased's neighbour. A day before the deceased went missing he had heard suspicious noises coming from the deceased's apartment. He was perturbed because the deceased used to live alone and he had not seen any visitor there. When he enquired from the 1st appellant who was the caretaker, he told him that there was a woman inside the house. This drew more suspicion on the part of PW5 as the deceased's car was not in in its usual parking slot in the compound. He looked for the deceased and found him in a bar in town. He asked the deceased if he had left anybody in his house, but the deceased said he had not. The deceased confirmed to the witness later the same night that he had not found anything amiss in his house.

7. The following day as the witness returned to his apartment, he noticed one security light was not working. He saw the deceased drive into the compound at 10.00 p.m. and he went to his apartment. After about 20 minutes, PW5 heard a loud bang coming from the deceased's apartment but he did not go to find out if anything was amiss. He slept and went to work the following morning leaving the deceased's car in the compound. When he went back home the same evening, he found the deceased's car parked at the same spot he had left it, which was unusual as the deceased used to go to work earlier than this witness.

8. The deceased's maid and his sister, PW1, were to later come searching for the deceased who they had now realised was missing from his house. They contacted the school where the deceased used to teach and they learned that he had not reported to work, nor had he called to inform the school that he would be away. The matter was reported to the police station. 1st appellant who was the caretaker of the apartments was questioned. He could not explain whether the deceased had left the compound on the night in question. PW1 joined the police at the scene. The police officers went into the deceased's house and they started looking around for any leads as to where the deceased could have gone.

9. PW1 noted some items were missing from the deceased's house. They included the T.V, DVD machine and an iron box. The witness told the court that as she was going around the house the 1st appellant who was present was following her closely asking many questions. She left the scene and continued looking for her brother. She then went to the 1st appellant's house which was in the same compound and near the deceased's house, conducted a search inside and in the nearby toilet but found nothing. She then went to the nearby septic tank next to the toilet and that is where she encountered some foul smell. She lifted the cover from the septic tank and that is when she saw a body floating inside. She called the police who went to the scene and retrieved the deceased's body from the septic tank. The body had its hands tied with a rope and the mouth stuffed with a piece of cloth.

11. The police amongst them, PC John Mutinda (PW 2), arrested the 1st appellant and the watchman and the team went to the 1st appellant's house for a further search. From the house they recovered 1 table clock, a bag in which was 2 receipts for payment of rent in the deceased's name, a video cassette bearing the deceased's name on the cover; and a mobile phone make Nokia 1110. The carton packaging for the phone and its receipt were recovered from the deceased's house. When the phone was switched on, they found PW1's phone number and those of other members of the deceased's family. The same also contained numbers belonging to the appellants' family.

12. The deceased was taken to Coast Provincial General Hospital where a post mortem was conducted by Dr. Mandalya who concluded that the cause of death was "***asphyxia due to strangulation***". The appellants were arrested and taken to Makupa Police Station where they were subsequently charged with the charge in question.

13. In convicting the appellants, the learned trial magistrate found that the items recovered from the 1st appellant's house had been properly identified as belonging to the deceased. For instance, the serial number on the phone was the same one on the carton and receipt which were recovered from the deceased's house. The learned magistrate found the said items had been recovered barely 3 days after the disappearance of the deceased, and in absence of explanation from the appellants as to how they had come into possession of the same, the doctrine of recent possession was applicable. The learned magistrate also found the circumstantial evidence was incompatible with the innocence of the appellants and was corroborated by the evidence of recovery of the items recently stolen from the deceased. He found the case proved beyond reasonable doubt, convicted the appellants and sentenced them to death. That sentence was upheld by the High Court on first appeal.

14. As stated earlier, this being a second appeal, we must eschew delving into the factual aspect of the case and restrain ourselves to matters of law. We must also defer to the concurrent findings of fact by the two courts below and will not differ from such findings unless we are satisfied that on the evidence on record, no reasonable tribunal could have made those findings. (See ***Chemagong v. Republic (1984) KLR 213.***

15. Urging the appeal before us on behalf of the 1st appellant, Mr. Ngumbao learned counsel submitted that the learned Judges of the High court had failed to properly apply the doctrine of recent possession in this matter. He contended that the deceased's cellphone said to have been recovered from the 1St appellant had not been satisfactorily identified. Further, that the deceased had a habit of losing things and he could have lost the phone in question. Counsel also posited that there was no evidence that the clock had been stolen from the deceased's house saying that the 1st appellant had adduced evidence to the effect that he had been in possession of the said clock long before the robbery in question. He urged us to allow the appeal.

16. On his part, Mr Magolo learned counsel for the 2nd appellant submitted that the 2nd appellant used to live in the same house with the 1st appellant and she just happened to be in the same house with the stolen items, and there was no proof that she knew or had reason to believe the items were stolen or otherwise unlawfully obtained. According to counsel, the appellant had explained that the phone had been given to her by the 1st appellant who was her husband and that was sufficient explanation to exonerate her from the accusations levelled against her. He urged us to allow the appeal.

17. Opposing the appeal, Mr Yamina Principal Prosecution Counsel submitted that the issue of recent possession had been exhaustively analysed by the two courts below and it had been properly applied to the case. Further, that the 1st appellant had failed to rebut the presumption that he was the thief. He urged us to dismiss the appeal.

18. After taking into consideration the entire record, the appellants' grounds of appeal and the submissions by counsel, we identify the following two issues of law which will dispose of this appeal.

a. Whether the circumstantial evidence on record was sufficient to found a conviction;

b. Whether the doctrine of recent possession was applicable in the circumstances of this case.

19. On the first point, it is common ground that nobody saw the appellants rob the deceased or even dispose of his body into the septic tank. We note that although the learned Judges of the High court stated that they were ***"satisfied that guilt by way of circumstantial evidence had been proved"*** they failed to exhaustively re-analyse the circumstantial evidence in question. What appears to have happened is that the learned Judges combined the two issues above and subsumed the issue of circumstantial evidence into the doctrine of recent possession and based the conviction purely on the doctrine of recent possession. We cannot on second appeal deal with that re-analysis, and that is why when Mr Yamina attempted to canvass the issue of the smell coming from the septic tank, that submission was met by resistance from counsel from the appellants. We say no more on the issue of circumstantial evidence.

20. This leaves us with the issue of the doctrine of recent possession. The doctrine of recent possession applies when an accused person is found in possession of property that has been recently stolen from the complainant and he/she cannot proffer a plausible explanation as to how he came into possession of the said property, then a presumption is created that the possessor of the recently stolen item was the thief. For a conviction to be predicated on the doctrine of recent to be sustained, the prosecution must prove the following:-

1. That the property was found with the suspect;

2. That the property is positively the property of the complainant;

3. That the property was stolen from the complainant;

4. That the property was recently stolen from the complainant.

See this Court's decision in ***Stephen Njenga Mukiria & Another V Republic NKR Cr. Appeal No. 175 2003.*** This position was further amplified by this Court in ***Erick Otieno Arum v R [2006] eKLR*** as follows:-

> **"…Before a court of law can rely on the doctrine of recent possession as a basis of 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; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant….."**

21. Were these time honoured parameters met in this case? There was evidence from PW1 that there were several items that were found missing from the deceased's house. They included a clock, some video cassettes and some phones. When a search was conducted in the 1st appellant's house, they found the table clock which PW1positively identified as she was the one who had gifted it to the deceased. They found 1 video cassette with the deceased's name on it but most importantly, they recovered the deceased's phone, a Nokia 1110. The box in which the phone had been packaged for sale was in the deceased's apartment. The serial number on the box tallied with that on the phone. On being switched on, the phone numbers belonging to PW1 and other relatives and friends were still in the phonebook. On being questioned about the phone, the 1st appellant claimed that it belonged to the 2nd appellant. 2nd appellant on the other hand said it had been gifted to her by the 1st appellant on the night of 16th October, 2016 which was the same night the deceased went missing.

22. From this evidence, we are satisfied that the properties in question, particularly the Nokia 1110 cellphone was stolen from the deceased's house on 16th October, 2016 which is the night he disappeared as 2nd appellant said that was the date the phone was gifted to her by 1st appellant. The same was in our view properly identified by PW1 by its serial number and the fact that her phone number and those of other relatives and friends were still in the phonebook. Even assuming that the clock and cassette and other items were not stolen from the deceased on the night in question, the evidence in respect of the phone was sufficient to prove recent possession. We are satisfied that the doctrine of recent possession was proved and properly applied in this case. As found by the two courts below, the appellants, particularly the 1st appellant failed to explain how he got into possession of the said phone.

23. With regard to the 2nd appellant, she told the witnesses that she was given the phone by the 1st appellant who was her husband. In court however, she changed her story and denied having ever been found in possession of the deceased's phone. The recovery of the phone is a question of fact and we must defer to the concurrent findings of fact by the two courts below. We nonetheless find that the house from where the phone was recovered belonged to the 1st appellant. Even assuming that he had given the phone to the 2nd appellant, it is him who stole the phone and the same was recovered from his house barely 3 days later. We are inclined to give the 2nd appellant benefit of doubt as she

was merely arrested for the transgressions of her husband.

24. In conclusion, we find the appeal by the 1st appellant lacking merit. We dismiss it and uphold the findings of the two courts below. We nonetheless allow the appeal by the 2nd appellant, set aside the conviction and sentence against her and order that she be set at liberty unless otherwise lawfully held.

Dated and delivered at Mombasa this 26th day of July, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR