IN THE COURT OF APPEAL

AT KISUMU

[CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMED, JJ.A]

CRIMINAL APPEAL NO. 185 OF 2014

BETWEEN

DAVID OCHIENG AKOKO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a conviction and or Judgment of the High Court of Kenya

at Kisii, ***(Sitati & Maina, JJ)*** *dated 24th July, 2014*

in

HCCRA.NO. 12 OF 2011)

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JUDGMENT OF THE COURT

[1] David Ochieng Akoko, who is the appellant before us was charged jointly with two others before the Senior Principal Magistrate's Court at Migori for the offence of Robbery with Violence contrary to section 296(2) of the Penal Code and an alternative charge of handling stolen property contrary to section 322(2() of the Penal Code. The appellant also faced a second charge of having suspected stolen property contrary to section 323 of the **Penal Code.**

[2] Following a trial in which nine (9) witnesses testified for the prosecution, and the appellant and his co-accused also gave evidence in their defence, the trial magistrate acquitted the appellant's co-accused but convicted the appellant on both counts and sentenced him to death on the first count, and 3 years imprisonment on the second count.

[3] Being dissatisfied with the judgment, the appellant appealed to the High Court against his conviction and sentence, challenging the finding of the trial magistrate on identification; the rejection of his explanation concerning the recovered items; and the acceptance of the prosecution evidence which in the appellant's view was uncorroborated, speculative and lacked probative value.

[4] In their judgment, the learned Judges of the High Court, (Sitati and Maina JJ) made a finding that the appellant was in possession of the complainant's stolen goods, hardly three (3) weeks after the robbery, and that in accordance with the doctrine of recent possession, the evidence pointed at the appellant having been one of the robbers. They therefore upheld the appellant's conviction and sentence and dismissed his appeal.

[5] The appellant is now before us in this second appeal, in which he has challenged the judgment of the High Court on six grounds contained in his supplementary memorandum of appeal that was filed on 6th April, 2018. The grounds raised in the memorandum includes, faulting the learned Judges of the High Court for convicting him without proper identification, accepting the doctrine of recent possession when the appellant had proved ownership of the alleged items; convicting the appellant with the offence of robbery with violence when the charge is defective and the ingredients of the offence have not been proved; failing to re-evaluate the evidence on record, and sentencing the

appellant to mandatory death sentence without considering his right to mitigation.

[6] During the hearing of the appeal, the appellant was represented by **Mr. Wilberforce Wangoda** who filed written submissions that he orally highlighted. **Mr Sirtuy** Principal Prosecuting Counsel who represented the state also made oral submissions. Counsel for the appellant submitted that the appellant was not identified by any of the prosecution witnesses; that the learned judges noted that there was no direct evidence to connect him with the offence; and that they nevertheless convicted him of the charge. Counsel argued that the doctrine of recent possession that was applied by the learned judges of the High Court was not applicable. This was because the complainant did not positively identify the recovered goods nor did the complainant prove ownership. Nor was it proved that the recovered goods were actually stolen during the robbery. It was maintained that the alleged recovered goods were ordinary common items with no peculiar features and that the appellant's contention, that he owned those items was not dis-approved. Counsel for the appellant relied on **James Karani M'ikombo – versus- Republic, Nyeri Civil Appeal No. 30 of 2010.**

[7] With regard to the charge, it was argued that none of the ingredients of the offence of robbery with violence such as being armed with dangerous or offensive weapon; being in the company of one or more other persons; wounding, beating, or striking or using personal violence to any person was established. In that regard, **Oluoch vs Republic [1985] KLR 549** was relied upon. Finally, the appellant maintained that he was denied his right to mitigation and therefore the mandatory sentence of death imposed upon him was not proper.

[8] On his part **Mr Sirtuy** urged the Court to dismiss the appellant's appeal maintaining that the stolen goods were properly identified by the complainants and were recovered from the appellant three (3) weeks after the robbery; and that the doctrine of recent possession was properly applied as the defence of the appellant did not shake the prosecution evidence.

[9] We have carefully considered this appeal, the submissions made before us and the authorities cited. We bear in mind that this being a second appeal, it is confined to matters of law only, and that this Court is bound by the concurrent findings of fact made by the two lower courts, unless it is established that the findings were not based on evidence ***(Sasi v Republic [2009] KLR 353).***

[10] The appellant has raised the issue of identification, the application of the doctrine of recent possession, and the propriety of the charges against him. These are issues of law that merit consideration by this Court. In regard to identification, the learned judges of the High Court found that there was no direct evidence to connect the appellant with the offence and that none of the witnesses identified him as having participated in the robbery. The evidence against the appellant was hinged on the recovery of the alleged stolen items. The appellant did not deny being in possession of the goods but maintained that they were his.

[11] In regard to the identification of the goods, the learned judges were satisfied with the prosecution evidence, noting that the complainant:

> ***"Identified the initials KA on the flowers, a burn on the curtain and a paint stain on the carpet. She also identified a place on the Bible where her husband's name had been cut off. The clock had no mark but its cover was found lying outside the complainant's house the morning after the robbery. We are satisfied that P.W.3 positively identified the articles as hers both at the accused's house and at the trial. The appellant's contention that those items did not have marks at the time they were taken from his house flies in the face of the record. At the trial, not only were the goods identified by P.W.3 but by her husband, P.W.2. their house help, P.W. 1 and their children. The appellant's claim to these goods which itself was not supported by any evidence cannot therefore hold".***

[12] It is evident from the above that the learned judges addressed the evidence regarding the identification of the goods, and were satisfied that the recovered goods were indeed the goods stolen from the complaint's house. In addition, the learned judges addressed and rejected the defence of the appellant in which he contended that the items recovered were his. At the end of the day it was really a question of credibility. The trial magistrate, who saw the witnesses testify and assessed their demeanour, believed the complainant's evidence and rejected the appellant's evidence. Similarly, the first appellate court found the complainant's evidence more credible.

[13] On our part, we find no reason to depart from these concurrent findings of the two lower courts. We find that the complainant identified the recovered goods as hers, and that the appellant's defence was properly rejected. The fact that the appellant was found with several items stolen from the complainant's house during the robbery leads to an irresistible conclusion that he was one of the robbers rather than a mere handler or receiver of the stolen goods. **[14]** In regard to the second charge, it was necessary to establish that the Police acted under section 26 of the Criminal Procedure Code that gives the Police powers to stop, search and detain any person reasonably suspected of having in his possession suspected stolen property. In this case the evidence of Police Constable Patrick Galo (PW8) was that acting on information they went to a house where they found the appellant and upon searching the house recovered the goods. Therefore the police were not acting under section 26 of the Criminal Procedure Code, and consequently the ingredients of the offence under section 323 of the Penal Code was not established.

[15] In regard to the charge sheet, in **Oluoch vs Republic** (supra), an authority that was cited by the Public Prosecuting Counsel, this Court stated that a charge of robbery with violence may be established if any of the following circumstances are established: either the offender is armed with a dangerous weapon or offensive weapon; or the offender is in the company of one or more persons; or immediately before or during the robbery the offender wounds, beats or uses personal violence on any person.

[16] The evidence established before the trial magistrate revealed that the complaint's children **Geoffrey Odongo** and **William Obura,** who were in the house when the robbers struck, both testified that the robbers were three. The two witnesses were both injured during the robbery and appropriate P3 forms were produced. It is therefore evident that the circumstances established revealed that the elements of the charge of robbery with violence was established.

[17] Finally, as concerns the sentence, the trial magistrate sentenced the appellant to death on the first count of robbery with violence and also imposed a further sentence of three years imprisonment on the second count. Having imposed the sentence of death, the trial magistrate ought to have held the sentence in regard to the second count in abeyance. The record of the trial court shows that the appellant was given an opportunity to mitigate, but indicated that he had nothing to say. The appellant is therefore not being sincere when he claims not to have

been given an opportunity to mitigate.

We are alive to the fact that the Supreme Court decision in ***Francis Karioko Muruatetu & another versus R. & others***, Petition No. 15 of 2015, has ruled that the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is unconstitutional. As we stated in **Wiilam Okungu Kittiny, Kisumu Criminal Appeal No. 56 of 2013**, the reasoning of the Supreme Court in Muruatetu decision can be extended to cover the mandatory sentence provided under Section 296(2) of the Penal Code. We believe that had the trial magistrate had the benefit of this judgment, she would have exercised her discretion in sentencing, rather than being tied down to imposing the mandatory death penalty.

[18] The upshot of the above is that we allow the appellant's appeal against conviction to the extent of quashing the conviction on the second count, and setting aside the sentence of three years. We also allow the appeal against sentence in regard to count one and substitute the sentence of death with a sentence of 20 years imprisonment from the date of conviction by the trial court. To this extent only does the appeal succeed.

Those shall be the orders of this Court.

Dated at Kisumu this 7th day of December, 2018.

E. M. GITHINJI

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JUDGE OF PPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.