IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), KARANJA & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 275 OF 2011

BETWEEN

TITUS MUINDI MUKOMA...…….…..…….. APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Ochieng & Warsame, JJ.) dated 17th May, 2011 in **H. C. CR. A. NO. 154 of 2007)**

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JUDGMENT OF THE COURT

1. Titus Muindi Mukoma (the appellant) has preferred this second appeal against his conviction for the offence of robbery with violence. As far as this appeal is concerned, we have no jurisdiction to entertain matters of fact by dint of ***Section 361 (1) (a)*** of the ***Criminal Procedure Code***. In ***Karani vs. R*** **[2010] 1 KLR 73** this Court expressed:

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law. Whether Betty and Chege were credible witnesses are matters of fact and we would be very reluctant to interfere with the concurrent findings of the two courts on such matters."***

2. In brief, the facts culminating in this appeal were that on the 29th March, 2004 **John Njogu Njoroge** (PW1) was contracted by Intra International to drive its motor vehicle make Toyota Prado, registration number KAQ 526M, from Mombasa to Nairobi. In his testimony, John stated that he noticed that there was an LG television set, slide projector, VCR, golf club and boxes inside the vehicle. While on transit, he was stopped by two robbers posing as police officers. They gained access into the vehicle under the guise of escorting him to the police station for purposes of verifying that the items therein were not stolen. Midway, John felt something pressing on his back which turned out to be a pistol. He was ordered to stop the vehicle and go to the back seat. One of the robbers took control of the vehicle and drove it. After a while, the vehicle was stopped and the items therein were offloaded. John was robbed of his mobile

phone make Nokia 2100, wedding ring and Kshs. 5,000/=. He was later abandoned in a bush but fortunately managed to find his way to the police station and report the incident.

3. CPL Kennedy Onyango (PW6) testified that on the 4th November, 2004 while investigating an unrelated matter, he received information that there were suspected robbers travelling in motor vehicle registration number KAR 478A along Langata road in Nairobi. He was able to intercept the said vehicle with the assistance of his colleagues. The vehicle had three occupants including the appellant. Upon searching the occupants and the vehicle, CPL Kennedy found a mobile phone make Nokia 2100 on the appellant. The three were arrested and further investigations were carried out.

4. In his evidence, CPL Kennedy said that the police sought the assistance of Safaricom to identify the holders of all SIM cards which had been used in the recovered handset. John's details came up and he was contacted by the police. John identified the recovered handset and even identified the appellant's photograph from several photographs he was shown at the police station thus, singling him out as one of the robbers. Thereafter, an identification parade was organized and he again picked out the appellant.

5. This prompted the police to search the appellant's house. The appellant was a tenant of **Anna Nduku Mutunga** (PW7). It is from this house that the appellant's cousin, **Justus Nzau Munyoki** (PW4), had earlier on collected all of the appellant's household items and personal effects with the exception of an LG television set. **Anna** had retained the television set as lien for unpaid rent by the appellant. The television set as well as the VCR which had been collected by Justus were confiscated by the police. Justus also produced receipts which he had taken from the appellant's house. The receipts were in respect of the confiscated items. According to **PC Aluzidi Lumasia** (PW10), the said receipts were not genuine.

6. Consequently, the appellant and one Charles Mbithi were jointly charged with one count of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code.*** In addition, the appellant was charged with an alternative count of handling stolen property contrary to ***Section 322(2)*** of the ***Penal Code***. The particulars of the main count were that on the 29th March, 2004 at Kiima Kiu along Mombasa/Nairobi road in Makueni District within the then Eastern Province, the appellant jointly with others not before court while armed dangerous weapons namely pistols robbed John NjoguNjoroge of motor vehicle registration number KAQ 526m make Toyota Prado,an LG television set, avideo player, aslide projector,mobile phone make 2100, a wedding ring and cash Kshs. 5,000/= all valued at Kshs. 4,600,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Njogu Njoroge. The details of the alternative count were that on the `` 14th December, 2004 at Makutano area in Machakos District within the then Eastern Province, otherwise than in the course of stealing, the appellant dishonestly handled one mobile phone Nokia 2100 S/No. 352512008810754, television set make LG S/No. 804R102824, a video cassette recorder S/No. JITA 00690 make Panasonic all valued at Kshs. 27,980/= knowing or having reasons to believe the said items to have been stolen or unlawfully obtained.

7. In his sworn statement, the appellant denied the charges against him. He maintained that he neither had a mobile phone nor was the stolen mobile phone recovered from him during his arrest. In fact, he saw the mobile phone in question for the first time in court when it was produced. He narrated that on the date of his arrest his co-accused had offered to give him a lift to town in his car. It was while they were on their way that they were arrested for no apparent reason.

8. The trial court weighed the evidence and concluded that the offence of robbery with violence had been established against the appellant only. In doing so, the trial court was convinced that the appellant had been positively identified as one of the robbers. The court expressed;

> ***"The complainant (PW1) said he was able to identify the accused because he sat with him as a co-driver. He also struggled with his hand as he pulled off his wedding ring off his finger. …. He was ordered to close his eyes he complied but as they travelled he would open his eyes and was able to have a glimpse of the accused hence being able to point out his image amongst the photographs he was given at the police headquarters. This evidence was corroborated by some other evidence of the accused's simcard having been used in the phone of the complainant is***

evidence that makes this court to safely overlook some discrepancies referred to.(Sic)***The evidence adduced leaves no doubt to the prosecution's case as to the identification of the accused by PW1. He positively identified him."***

As a result, the appellant was convicted of the offence and sentenced to death while his co-accused was acquitted for lack of evidence.

9. Aggrieved with the decision, the appellant filed an appeal to the High Court. On re-evaluating the evidence, the learned Judges in a judgment dated the 17th May, 2011 upheld the appellant's conviction albeit on different grounds from the trial court. In their view, the appellant's identification was not satisfactory for the simple reason that John had been shown the appellant's photograph prior to the identification parade being conducted. The evidence tendered by Safaricom in respect of the mobile phone was inadmissible. Its authenticity was not verified by a certificate envisioned under ***Section 65 (8)*** of the ***Evidence Act***. Be that as it may, the learned Judges found that the appellant had been found in recent possession of the television set and VCR which had been stolen from John.

As such, the logical inference was that he was one of the robbers.

10. Unrelenting, the appellant is before us on his second appeal which is predicated on the grounds that the learned Judges erred by;

- ***Upholding the appellant's conviction based on identification evidence.***
- ***Failing to re-evaluate the evidence tendered at the trial court.***
- ***Failing to draw a negative inference against the prosecution for its failure to summon essential witnesses.***
- ***Failing to appreciate that the prosecution had not proved its case to the required standard.***

11. In challenging the invocation of the doctrine of recent possession, Mr. F. Ogeta, learned counsel for the appellant, submitted that there was no evidence connecting the appellant to the alleged recovered items. In point of fact, the appellant had already been evicted from the house when the television set was found. The nature of the recovered items were such that they were capable of changing hands quickly. Hence, the doctrine of recent possession was not applicable since the items had been recovered eight months after they were stolen. He urged us to allow the appeal.

12. Mr. M. O'mirera, Senior Assistant Director of Public Prosecutions, opposed the appeal. Contending that there was overwhelming evidence against the appellant, he reiterated that John gave a description of the items which were stolen from the vehicle; some of the items were found in the appellant's possession. The prosecution established that the receipts which were produced by the appellant in respect of the recovered items were counterfeit. Moreover, the landlady confirmed that the television set which was recovered was in the appellant's possession. He argued that the appellant failed to give a reasonable explanation for having been in possession of the items which gave rise to the presumption that he was one of the robbers.

13. We have considered the record, the respective submissions of both learned counsel and the law. It is instructive to note that contrary to the aforementioned grounds of appeal, the High Court did not uphold the appellant's conviction on the basis of identification. It follows therefore that that ground must fail. In our view, the appeal turns on a single issue, that is, whether the doctrine of recent possession was properly applied by the High Court.

14. The essence of the doctrine of recent possession is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation as to how he came to be in possession of that property, a presumption of fact arises that he is either a thief or receiver. See ***Hassan vs. R*** **[2005]2 KLR 151**. The circumstances under which the doctrine will apply were considered in ***Isaac***

Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. R **[2006] eKLR** where this Court stated:

> ***"It is trite that 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 the 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. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other." [Emphasis added.]***

15. In that behalf, the High Court in its own words articulated thus-

> ***"The appellant was found in possession of some goods that had been stolen from the appellant (sic). Those were a television set and video recorder. In his defence, the appellant asserted ownership of the said items. However, we are satisfied that the goods did not belong to him. We say so because the receipts which he produced were proved to be fake. The said receipts did not match those that were issued by Kaributronics Limited.***
>
> ***If anything, the said Kaributronics Limited demonstrated that their receipts, bearing the numbers equivalent to those on the fake receipts, were issued to customers other than the appellant….***
>
> ***Therefore, the appellant was found in possession of items that had been stolen from PW1. As he was found in possession of recently stolen items, without any explanation, he was the robber who committed the subject robbery."***

16. We respectfully differ with the above findings of the High Court. As set out hereinabove, it was crucial for the prosecution to establish possession of the stolen television set and VCR by the appellant. It could do so only by demonstrating that firstly, the stolen items were found with the appellant; secondly, the said items belonged to the complainant; thirdly, the items found with the appellant were those that were stolen from the complainant; and fourthly, the said items had been recently stolen. It was not enough for the prosecution merely to establish that the appellant was found in possession of an LG television set and VCR. It had to prove that the items belonged to the complainant and that they were the items which were stolen on the material day.

17. The ownership of the said items was not established by the prosecution. The only evidence which was adduced was that John noticed that there was an LG television set and VCR in the vehicle. We note that during the trial none of the prosecution's witnesses claimed ownership of the same. How then did the learned Judges come to the conclusion that the television set and the VCR which were found in the appellant's possession were actually the ones which were stolen? The nature of the items found with the appellant are common and in wide circulation. Accordingly, there ought to have been evidence distinguishing the recovered items as those that were actually stolen. In light of the foregoing, we find that the prosecution had not proved that the appellant was in possession of the stolen television set and VCR.

18. However, it was **CPL Kennedy's** evidence that a mobile phone make Nokia 2100 bearing serial number 352512008810 was found on the appellant during his arrest. It is not in dispute that John produced a receipt of purchase of a Nokia 2100 bearing the same serial number as the recovered mobile phone. This clearly proved that the mobile phone belonged to John and was the one which was stolen on the material day. It was, indeed, the concurrent finding of two courts below that the said mobile phone belonged to John and was recovered from the appellant. The High Court, however, felt that the doctrine of recent possession would not apply because the recovery had been made eight (8) months after the robbery and that the mobile phone could have changed hands severally. That statement was not supported by the record. The appellant did not lay claim to the phone nor did he otherwise explain how he came to possess the same. In our view, the prosecution furnished a credible nexus between the finding of the phone on the appellant and the robbery.

19. In the end, and based on the foregoing reasons, the appeal lacks merit and is hereby dismissed. We uphold the appellant's conviction for the offence of robbery with violence.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of June, 2017.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR