IN THE COURT OF APPEAL

AT KISUMU

CORAM: MUSINGA, GATEMBU, MURGOR, JJA

CRIMINAL APPEAL NO. 109 OF 2014

BETWEEN

LUKAS KERARIO SANGAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and Judgment of the High Court of Kenya

at Kisii (Makhandia & Sitati, JJ) dated 23rd September, 2011

in

H.C.CR.A NO. 257 OF 2010)

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JUDGMENT OF THE COURT

1. The appellant, Lukas Kerario Sangai, was 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 2nd February 2010 at Mabera Trading Centre in the then Kuria District within the then Nyanza Province, while armed with a dangerous weapon namely a panga, robbed Leonard Khamara Wasike of a mobile phone make Nokia 1100 valued at Kshs. 6,500.00 and immediately before or immediately after the time of such robbery wounded the said Leonard Khamara Wasike. He was tried before the Senior Resident Magistrate's Court at Kehancha and convicted, based on the doctrine of recent possession, in a judgment delivered on 9th December 2010. The appellant was subsequently sentenced to death.

2. On appeal, the High Court, in its judgment delivered on 23rd September 2011, was satisfied after evaluating and analyzing the evidence, that the trial magistrate was right in invoking the doctrine of recent possession and upheld the conviction.

3. Still dissatisfied, the appellant instituted this second appeal. Before us, learned counsel for the appellant, Mr. James Mochere, referred to the appellant's supplementary memorandum of appeal filed on 21st February 2017 in which the appellant had complained that: the High Court failed to properly evaluate the evidence; that the trial court erred in upholding the conviction based on the evidence of a single witness and on the doctrine of recent possession; that he was denied the opportunity to communicate with

an advocate; that he was not presented to court within 24 hours of his arrest; that his defence was not given due consideration.

4. However, counsel confined his address to the complaint that the High Court failed to properly evaluate the evidence and erred in upholding his conviction based on the evidence of a single witness and based on the doctrine of recent possession and abandoned all the other complaints.

5. According to counsel, had the High Court properly evaluated the record, it would have noted that the appellant was presented to court after 9 days; that the mobile telephone allegedly stolen from the complainant was not recovered immediately; that there were inconsistencies between the testimonies of PW 1 and PW2 regarding the recovery of the mobile telephone; that PW1, the complainant, stated that the appellant was searched at the AP's camp where the mobile telephone was recovered while PW2 stated that the same was recovered when the appellant was searched at a junction of roads; that the identification of the mobile telephone by means of alleged inscription of the complainant's initials and payroll number at the back of the telephone is doubtful as the payroll was not produced to confirm that it was indeed the complainant's payroll number that was inscribed; and that the complainant's telephone number was not given nor was it established that the telephone belonged to him.

6. Counsel further submitted that contrary to the observation by the High Court that the appellant did not offer any explanation regarding how he came to be in possession of the telephone, the court failed to have regard to the fact that the appellant denied having committed the offence. Counsel also took issue with the assertion by the complainant that he was able to identify the panga allegedly used by the appellant to assault him. According to counsel, it is unlikely that the complainant would have been in a position, during the assault, to see the handle of the panga by which he subsequently claimed to have identified it.

7. Given those inconsistencies and anomalies, counsel concluded, the lower courts should have found that there was reasonable doubt as to the appellant's guilt and should have acquitted him.

8. Opposing the appeal, learned prosecution counsel Mr. L. K. Sirtuy submitted that the appellant was properly convicted and that there is no merit in his appeal; that the appellant was arrested soon after the robbery and the complainant identified his mobile telephone that was recovered from the appellant; that the appellant was arrested in the presence of the complainant and the doctrine of recent possession was properly invoked and the conviction is safe. According to counsel, the defence put forth by the appellant did not displace the prosecution case.

9. Counsel went on to say that the issue of delay in presenting the appellant to court was not raised before the lower courts; that in any case, even if there was delay in taking him to court, his remedy lay in a claim for damages.

10. We have considered the appeal and submissions by counsel. This is a second appeal. Section 361 of the Criminal Procedure Code provides the standard by which a second appeal, such as the present appeal, may be entertained by this Court. That provision limits the grounds on which this Court can entertain an appeal to matters of law. Only issues of law, therefore, may be raised and considered in a second appeal. See **M. Riungu v. Republic [1983] KLR 455**.

11. The main complaint by the appellant is that the High Court did not properly evaluate the evidence and that had it done so, it would have come to the conclusion that the doctrine of recent possession did not apply.

12. Undoubtedly, it was incumbent upon the High Court, before concluding that the doctrine of recent possession applied, to review and re-evaluate the evidence and to enable it draw its own conclusions. [See **Okeno vs. R [1972] E.A 32**.]. In effect, the question in this appeal is whether the doctrine of recent possession was properly invoked.

13. The complainant, PW1, stated that on the material day, 22nd February 2010,(the date of 2nd February 2010 was indicated in the charge sheet) he had left his place of work at Alliance One Tobacco Company

at Suba Kuria at about 8.30 pm and was on his way to his house in Mabera Centre; that near the door to his house, along the corridor that leads to his house, he was trying to make a call on his mobile telephone when someone, whom he said he recognized as someone he "*was always seeing at Mabera Market*", appeared in front of him, holding a panga, and demanded the phone from him; that he resisted and the assailant cut him with the panga on the left 2nd finger whereupon the complainant surrendered the phone; that the assailant commanded him to run away, hit him on the left thigh after which the complainant ran away.

14. PW1 stated further that when he ran away, he went to his landlord's house and reported what had happened to him and gave a description of his assailant as someone he knew "*who had a "rasta" hairstyle*". He said that the landlord telephoned the Administration Police from Mabera Administration Police Camp who responded immediately; that the Administration Police officers met the complainant and the landlord who were on the way to the Administration Police Camp; that they proceeded to the camp; that PW1 explained to the Police what had happened; that other Police officers came with one man and enquired from him whether the was the person who had robbed him; that he recognized him as the person who had assaulted and robbed him of his phone; that on being searched, the mobile phone was recovered from his pocket. According to PW1, "*inside the battery slot I had put my initials L.W. meaning Leonard Wasike and my payroll No. 0204 with a red marker. I identified it by the same marks*." The mobile phone was produced before the trial court and shown to bear those marks inside the battery slot.

15. Administration Police Constable Shadrack Mangare, PW2, testified that he was at Mabera DO's camp on 22nd February 2010 when PW1, who was bleeding on the right index finger, made a report that he had been robbed of his mobile phone and his finger cut in the process of the robbery; that together with his colleagues they went to look for the robber accompanied by the complainant; that they proceeded to the junction of Alliance One Tobacco Co where they "*saw someone and the complainant told us he was the robber*"; that the suspect had a panga which had some blood stains and on searching the suspect, "*they recovered from the left bottom pocket of his jacket a mobile phone Make Nokia 1100*" which the complainant identified as his on opening the battery cover; that the complainants initials LW were inscribed in red colour behind the battery slot; that they took the suspect to the camp and onto Isebania Police Station.

16. The appellant, in his defence, stated that he is a farmer and a foot baller and that on the material day he had spent his day in the shamba and went to practice football in the afternoon; that he then returned home at about 5.00pm and then went to the home of one Marwa Gati to drink some chang'aa where he was arrested and taken to the police station where he was subsequently charged with an offence that he knew nothing about.

17. When convicting the appellant, the trial court found that:

> ***"The accused person was arrested only minutes after the robbery and was found by PW2 armed with a panga. PW2 also recovered from the accused person's jacket pocket a mobile phone which the complainant identified as his, by the initials "LKW" below the battery slot."***

18. On its part, the High Court after reviewing and evaluating the evidence had this to say:

> ***"The appellant was found in possession of recently stolen phone hardly an hour after the commission of the offence. The period between the robbery and when appellant was found in possession thereof is so short that one cannot claim, that the phone had passed through several hands before it landed with the appellant. In any event the appellant has not advanced such defence. Neither did he dispute being found in possession. Nor did he claim that the case was a set up. There could not have been any reasons for the police to confront him with tramped up charges. It cannot be that he was found in a chang'aa den. In those circumstances, the doctrine of recent possession applies."***

19. There are therefore concurrent findings by the lower courts that the appellant was found in possession of the complainant's mobile phone that the complainant positively identified. This Court cannot interfere

with concurrent findings of fact by the two courts below unless such findings are not based on any evidence at all or are based on a misapprehension of the evidence or if the findings are plainly wrong such that no court, properly directing itself, would make such findings. As this Court stated in **Adan Muraguri Mungara vs. R [2010] eKLR**, we must:

> **"Pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."**

20. In our view, the findings by the lower courts are well supported by the evidence. That evidence shows that the mobile phone that was stolen from the complainant was recovered in possession of the appellant moments after the incident. The appellant gave absolutely no explanation about how he came to be in possession of the same. In the absence of any explanation, the inevitable inference is that he was the thief.

21. The complaint that the appellant was taken to court 9 days after the arrest, the robbery took place in February 2010 is unfounded. That was before the Constitution of Kenya, 2010 was promulgated. Under the old Constitution, the requirement was for a person who is arrested and who is not released to be brought to court as soon as reasonably practicable and in any event within 14 days of his arrest where he is arrested upon reasonable suspicion of his having committed an offence punishable by death.

22. For those reasons, this appeal is devoid of merit. It is hereby dismissed.

Orders accordingly.

Dated and delivered at Kisumu this 20th day of July, 2017.

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.

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DEPUTY REGISTRAR