IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 43 OF 2016

BETWEEN

DOUGLAS GITONGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

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

at Meru (Lesiit & Makau, JJ) dated 24th July, 2014

in

H. C. Cr. A. No. 60 of 2012)

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JUDGMENT OF THE COURT

1. The issues of law that arise in this appeal are on identification and whether the doctrine of recent possession applies. The appellant was charged, tried and convicted by Isiolo Senior Principal Magistrate **(M. Maundu)** for the offence of robbery with violence and was sentenced to death. Eight witnesses, including the appellant, testified on the main count in the charge sheet which alleged that on 4th September, 2011 at Isiolo township, jointly with others, while armed with a sword, they robbed **Q I Y (Q)** of her purse, Sh. 5000 cash, mobile phone and her racksack, and in the process they killed Ramadhan Adan Kara **(deceased).** There was an alternative count of dishonestly handling the racksack knowing it to have been stolen. He appealed to the High Court **(Lesiit & Makau, JJ.)** against the conviction and sentence but his appeal was dismissed, hence this second and final appeal before us.

2. Q was a brave young girl from Moyale, aged 17, who was attending [particulars withheld] Girls Secondary School in Isiolo. On the fateful day she had travelled from Nairobi going back to school and arrived in Isiolo at about 7 pm. She met the deceased whom she knew before since his sisters are in the same school. The deceased offered to walk her to Bulapesa estate where she was staying with relatives. They used a spotlight as the walkway was muddy with pools of water. At a point near Jamia Mosque, three men emerged and blocked their way. The men pretended to borrow the spotlight but one of them attacked the deceased as the other two pounced on Q and took her purse containing Sh.5000, a mobile phone and other personal items. The person who took it ran off and told the other one to rape Q. As he

tried to remove her clothes she screamed for help. She also heard the deceased pleading with his assailant not to kill him before he fell down. Someone from inside the mosque who heard the commotion shouted enquiring what was happening and the person assailing Q ran away. The person who was attacking the deceased released him, took Q's bag (racksack) which had fallen down and ran off with it. But Q ran after him and grabbed him by the collar. He dropped the bag and hit her on the shoulder before running away. Q went in hot pursuit screaming. Members of the public came out including **Hussein Issack Ibrahim (PW3)** who was coming from Jamia mosque prayers and who blocked the assailant's path and arrested him. The attacker was the appellant.

3. His arrest was about 25 meters from the place the first attack occurred. As Q was returning to the spot, she met the deceased coming towards them holding his chest with a knife protruding and blood oozing out. He was pleading that the man arrested should not be released. Soon after, he collapsed and was taken to hospital where he died the following day while undergoing treatment. Members of the public set on the appellant intending to lynch him but he was rescued by **Cpl. Albert Okumu (PW5)**, **PC Stanley Rono (PW6)** and other officers from Isiolo police station who arrived at the scene and re-arrested him. Q was positive that it was the appellant who stabbed the deceased and took off with her bag. She did not lose sight of him in the chase, there were lights from Jamia mosque, and she had a good look at him when she grabbed him. In cross examination she affirmed that she saw the appellant struggling with the deceased, removing a knife from his jacket and stabbing him, before picking up her bag and running off with it.

4. Hussein (PW3), who arrested the appellant and pointed him out in court, confirmed that he heard a woman's screams and headed towards them. He found a girl struggling with a man saying the man had robbed her and killed a man. The man was holding a bag. Hussein managed to overpower the man and was shortly assisted by other members of the public. A short distance from the scene he saw the deceased whom he knew before and the deceased told him to ensure the man he had arrested was not released. He accompanied the police to the station to record his statement and identify the person he had arrested as well as the bag he had.

5. Another member of the public who saw the chase by Q was **Ahmed Noor Ali (PW2)** who was on his way home near Jamia mosque. He first saw two young people running away and went past him telling him they had been attacked. Then a girl emerged chasing a tall man. She was screaming for help alleging the man had robbed her. A short distance away he saw a man holding his chest with a protruding knife saying the man being chased by the girl had stabbed him and pleaded for his arrest.

6. In his defence, the appellant who was a painter living alone in a rented house in Isiolo town, said he had been drinking at a bar in Jua Kali area of Isiolo when he left to go home at about 7 p.m. At a point near Alfara mosque he met four men who spoke in a language he did not understand. He passed them but they said in Kiswahili *"huyu anatunyamasia"*. When he turned back he was wrestled down and cut on the right hand with something. As he tried to resist he was knocked out with a metal bar and only came to at Isiolo police station the following day.

7. It was on the basis of such evidence that the trial court found that the identification of the appellant was not in doubt and convicted him. The High Court, after re-evaluating the evidence, similarly believed the evidence of Q, Hussein, Ali, Cpl Okumu and PC Rono as consistent and probative of the identification of the appellant. The High Court went further to hold that the appellant was found in possession of the complainant's bag and was unable to offer any reasonable explanation for such possession. The appellant's defence was dismissed as an afterthought as there was no challenge during cross examination of the prosecution witnesses who testified on the manner of his arrest.

8. As stated earlier, the appellant has urged two grounds of appeal on identification and recent possession. Learned counsel for him **Mr. Mutegi Mugambi** submitted that there was no proper evaluation of the evidence relating to identification. Had there been, he contended, it would have become apparent that there was no lighting at the scene otherwise the torch used by the deceased and Q would have been unnecessary; it was rainy and therefore expected to be cloudy making visibility difficult; and the intensity of the alleged electricity lighting from Jamia mosque was not explored. In his submission, it was not possible to make any positive identification in those circumstances. Counsel conceded, in line with the

appellant's defence, that the appellant was at the scene of the crime but submitted that his presence was misunderstood and mistaken. According to him, the appellant was running away from his own attackers when Q mistook him for one of the robbers who had attacked her and the deceased, and followed him. He was innocently at the scene on his way home.

9. As for the bag which was allegedly found in possession of the appellant, counsel submitted that there was no evidence that the appellant had the bag with him when he was arrested. The evidence from Q was that the bag was dropped by the person who was running away. Hussein, however, said the appellant was carrying the bag when he arrested him. It is a contradiction in evidence which counsel submitted can only be resolved in favour of the appellant. It was erroneous for the High Court to make the finding that the appellant was arrested with the bag. At all events, counsel concluded, on the authority of ***Abdi Yusuf Maalim vs Republic [2015] eKLR***, the appellant was under no obligation to give an explanation for a bag he was not found in possession of.

10. In response to those submissions, learned Senior Prosecution Counsel **Mr. Moses Kahiga Mungai** supported the concurrent findings that the appellant was positively identified at the scene. Q never lost sight of him in the chase and was at close proximity when she grabbed him. In his view, the defence was an afterthought because it was never put to the prosecution witnesses. As for the doctrine of recent possession, he submitted that the possession was complete when the appellant stole it even if he did not have physical possession at the point of his arrest. In this case the arrest was made only 25 meters away.

11. We have considered the appeal, and the submissions of counsel. Our approach at this stage is, of course, to respect the concurrent findings of fact by the two courts below and only interfere where there are compelling reasons to do so, and that is only where *no reasonable tribunal could on the evidence adduced have arrived at such findings or* the findings are perverse and therefore bad in law. See ***Christopher Nyoike Kangethe vs Republic [2010] eKLR.*** *This Court has also stated many times that:*

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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. (Reuben Karari s/o Karanja vs Republic 17 EACA 146)."*** see ***Chemagong vs Republic (1984) KLR 213*** at page 219.

12. On the issue of identification, the usual caution emphasized by this Court in numerous decisions must always be followed. We take it from the case of ***Cleophas Otieno Wamunga vs Republic (1989) KLR 424:-***

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification".***

13. Various measures have been designed to minimize the danger and once again we take some of the factors for consideration from the English case of ***R. vs Turnbull [1976] 3 ALL ER 549*** which has been cited with approval in this country:-

> ***"How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused's actual appearance?"***

14. In this case, identification of the appellant at the scene of the crime was not made by a single witness. In evaluating the evidence, the High Court stated in part, as follows:

> ***"PW1 testified that she did not loose sight of the appellant until he was arrested as the road was straight and there was light from Jamia Mosque. That they could see properly save the ground and that is why they were using a spotlight. That she saw the appellant properly when she grabbed him and that she was following him closely till he was arrested. PW2 testified that he saw PW1 chasing a tall man as she was seeking for help alleging that person had robbed her but before reaching PW2 he diverted. He saw someone following them holding his chest and he told him the person fleeing had stabbed him. He helped the stabbed person and they followed PW1 and saw public surrounding the tall person who was fleeing. PW3 testified he found a man and a girl struggling. That the man was carrying a bag and that darkness had started setting in but it was not dark. The girl was screaming and he joined them and separated the two. PW1 shouted saying the man had robbed her and killed her companion. PW3 then got hold of the appellant, struggled with him as they fought and eventually overpowered him down*** *(sic)****. People came and at about 25 metres he saw another crowd and on checking he found that it was the deceased who had a knife stuck on his chest. PW3 was at the scene when police came and re-arrested the appellant after he had telephoned PC Leboo. He accompanied police officers to police station. PW5 and PW6 found the appellant having been arrested and beaten by public and took him to police station. We find that the evidence of PW1, PW2, PW3, PW5 and PW6 to be consistent. PW1 identified the appellant at the time of the attack. There was electricity light and spot light which enabled PW1, to identify the appellant. PW1 never at the time of attack lost sight of the appellant any time and he was arrested by PW3 who found the appellant struggling with the complainant. PW1 and PW2 identified the appellant. PW1, PW2, PW3, PW5 and PW6 evidence placed the appellant at the scene of the crime. We find that the evidence of PW1, PW2 and PW3 do not only place the appellant at the scene of the crime but that he was caught red handed."***

15. It is apparent from those findings that the High Court considered the issue of lighting and believed Q that there was sufficient lighting for visibility save that a torch was needed to identify muddy wet spots on the ground. It examined the proximity of Q to the appellant when she grabbed him and the evidence that she did not lose sight of him in the chase and found opportunity for positive identification. The supportive evidence of Hussein who did not let go of the appellant until other members of the public and the police came and rearrested him, leaves no doubt about the presence of the appellant at the scene. It was all about the credibility of those witnesses which we have no reason to impeach. At all events, the appellant concedes his presence at the scene, claiming only that it was innocent but was mistaken. We do not find any error in principle in the manner the High Court re-evaluated the evidence on identification and agreed with the trial court in that respect. We reject the first ground of appeal.

16. As for the doctrine of recent possession, the principles have been spelt out in numerous decisions of this Court. The court must be satisfied that the prosecution has proved that:

> ***(a) the property was found with the suspect;***
>
> ***(b) the property was positively identified by the complainant;***
>
> ***(c) the property was stolen from the complainant;***
>
> ***(d) the property was recently stolen from the complainant.***

See ***Erick Otieno Arum vs Republic*** ***[2006] eKLR*** , ***Stephen Njenga Mukiria & Another vs Republic, Criminal Appeal No. 175 of 2003*** and ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs Republic, Cr App. No. 272 of 2005(UR).***

17. There is no doubt in this case that the bag in issue was identified in court by Q as hers. There is no doubt that it was stolen from her and the stealing was recent. The only quarrel the appellant has is the finding by the High Court that he was found in possession of the bag. The High Court said the following

in its finding:

> "***We have carefully considered the evidence of PW1 and PW3 in which the appellant was arrested with the PW1's handbag. The appellant in his defence did not offer any reasonable explanation of his being in possession of the complainant's handbag and this leads us to the conclusion that he was the robber as he was arrested at the scene of crime. In this regard we are guided by the Court of Appeal in the decision of the case David Mutune Nkongo vs Republic Cr. App. No. 536 of 2010 (UR) where the Court of Appeal referred to its own decision in Hassan vs Republic (2005) eKLR 11 where as regards recently stolen goods it delivered itself thus:-***
>
> > ***"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for the possession a presumption of fact arises that he is either the thief or receiver."***

18. That finding must have been based on the evidence of Hussein that:

> ***"I found a man and a girl struggling. The man was carrying a bag".***

In cross examination he said:

> ***"When I arrested you, you were carrying this bag (MFI1)".***

Q on her part testified as follows:-

> ***"The person who was with Ramadhan (deceased) took my bag which had fallen down. He went away with it. I followed him. I caught up with him. I grabbed him by the shoulder. He ran away. I followed him screaming. As he was fleeing he met with another person who arrested him. We arrested him about 25 meters from the scene."***

In cross examination:

> ***"It is me who arrested you after the robbery. You were carrying my bag. You freed yourself. You dropped the bag and started running away. You were arrested by another person as I was seeing."***

19. We have considered the complaint that the appellant never had in his possession the stolen bag but we take the view that he was. The moment he took the bag without the consent of the owner completed the act of "asportation" which is an essential element of theft. It is not necessary to show that the item was moved a substantial distance, but only that it was moved. Temporarily dropping it afterwards would not divest the thief of possession. Possession by definition need not be actual or physical. It is defined in **Section 4** of the **Penal Code** as actual or constructive, thus:-

> ***(a)"be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;***
>
> ***(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them."***

20. Again we find no error in principle made by the High Court when it found that the doctrine of recent possession applied in this case. In truth it was an overkill because the finding on identification was sufficient to sustain the charge facing the appellant. It would not matter therefore whether the issue of recent possession was ignored or not. The second ground is also rejected.

21. On the whole this appeal is devoid of merit and we order that it be and is hereby dismissed.

Dated and delivered at Nyeri this 10th day of October, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR