IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 33 OF 2015

BETWEEN

CHARLES NJOROGE NGIGE.....APPELLANT

AND

REPUBLIC.....RESPONDENTS

(Appeal from a judgment of the High Court of Kenya at Milimani Commercial

Courts (Kamau & Ogola,JJ) delivered on 13th November, 2013

in

H.C.CR. A NO. 314 OF 2010)

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JUDGMENT OF THE COURT

The appellant **CHARLES NJOROGE NGIGE** was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars were that: ***"On the 6th day of August 2008, at Ngara Area in Nairobi North District within Nairobi area province*** (sic) ***jointly with others not before court while armed with dangerous weapons (sic) namely pistol robbed GODFREY IKINGU NJENGA off (sic) motor vehicle registration No. KAD 166H Toyota Corolla, One mobile phone make Motorolla C118, and Kshs. 760.00, all valued at Kshs. 204,760.00 and at or immediately before or immediately after such robbery threatened to use personal violence to the said GODFREY IKINGU NJENGA."***

The appellant pleaded not guilty to the charge and the trial commenced before Hon. T. ole Tanchu, the then Senior Resident Magistrate, Makadara who recorded the evidence of **PW1, GODRET KEGE NJENGA** and **PW2 PENINA WAMBUI GICHUGU**. On 9th February, 2010 the trial was taken over by Hon. T. Mwangi, the then Senior Principal Magistrate Makadara who informed the appellant of his rights under Section 200 of the Criminal Procedure Code. The appellant did not wish to recall any of the witnesses and the court proceeded to record the evidence of **PW3 ONESMUS GITAHI, PW4 CPL RODGERS LUMIDI** and **PW5 PC ROBERT CHUMBA.** On 7th April, 2010 the court found that the appellant had a case to answer. In his defence, the appellant gave an unsworn statement in defence.

Upon conclusion of the trial and on 27th May, 2010, the appellant was found guilty and sentenced to death as by law prescribed. He was dissatisfied with the outcome of the trial and filed an appeal in the High Court. On 13th November, 2013 Ogola & Kamau, JJ dismissed the appellant's appeal, thus provoking this appeal.

This being a second appeal and by dint of Section 361 of the Criminal Procedure Code this Court is restricted to address itself on matters of law only. It will not interfere with the concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making their findings: See ***Chemagong versus Republic [1984] KLR 611***. See also ***Karinga versus Republic [1982] KLR 213*** at page 219 where this Court had this to say:-

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact 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 Kareri S/O Karanja versus Republic [1956] 17EACA 146]"***

The appellant filed his home grown grounds of appeal on 2nd December, 2013. However, this was amended by Mr. Nyachoti, learned counsel for the appellant vide an amended memorandum of appeal dated 1st July, 2015 and filed on 2nd July, 2015. In the memorandum of appeal, the learned judges of the High Court were faulted in several grounds which can be summarized as follows:

i. Not finding that the doctrine of recent possession was inapplicable in the case.

ii. That there was gross misdirection when the first appellate court shifted the burden of proof to the appellant.

iii. In failing to find that there were loopholes in the prosecution case.

During the plenary hearing before us on 9th December 2015, Mr. Nyachoti urged us to find that there was contradictory evidence as so the ownership of the motor vehicle as according to the charge sheet, it belonged to **GODFREY IKINGU NJENGA (PW1)** whilst **PENINA WAMBUI GICHUGU (PW2)** also claimed ownership.

It was counsel's further submission that the house where the number plate for motor-vehicle registration number KAD 166H was recovered from was not proved to be the appellant's and hence it was wrong to apply the doctrine of recent possession and that in any event no inventory was prepared to show the items allegedly recovered from the house belonged to PW2. Counsel further contended that it was also wrong to shift the burden of proof to the appellant to prove that the house was not his. He relied on the authority of **Duncan Muhoro Wachira v Republic Nairobi Criminal Appeal No. 256 of 2002** on application of the doctrine of recent possession.

Mrs Murungi, in opposing the appeal contended that PW1 was the special owner of the motor vehicle and that although no inventory was made of the items recovered, the same were recorded in the Occurrence Book and further that the appellant failed to explain how he came by the items.

We shall turn to these grounds of appeal shortly.

What then were the facts of the case as narrated in the trial court and accepted by the two courts below?

On 6th August, 2008 at about 12.00 a.m., PW1 a taxi driver of motor-vehicle registration No. KAD 166H, a Toyota Corolla Saloon was approached by three people. PW1's area of operation was Ruaka. The three gentlemen asked to be taken to Ngara and a charge of Kshs. 800/= was agreed upon. On the way, PW1 was robbed at gun point and his phone, a Motorolla C118 taken away. He did not recognize any of the assailants. The motor vehicle being driven by PW1 was owned by PW2 who had purchased it from PW3.

On 11th August, 2008 and acting on a tip of, PW4 arrested the appellant at Githunguri Trading Centre. The appellant led PW4 to his house where they recovered the registration number of motor vehicle registration number KAD 166D, as well as its insurance cover. These items were identified by PW2 and produced in court as exhibits by PW5.

In his defence, the appellant denied the offence and maintained that he was arrested for no apparent reason.

It was appellant's counsel's submission that the court erred when it shifted the burden of proof as regards ownership of the house where the registration number and the insurance cover of motor vehicle KAD 166H were retrieved from. However, from the record PW4 narrated to the trial court that after arresting the appellant at Githunguri Trading Centre, they proceeded to the appellant's house and recovered the two items besides others hidden between the cardboards and the wooden planks of the house. PW4 was led to this house by the appellant and in the compound they found the appellant's mother and a young girl. It is important to note that the appellant never denied that this was his house. Indeed he is the one who led PW4 to the house. It is therefore incorrect to allege that the prosecution shifted the burden to the appellant to prove that the house was not his, as this was not denied by the appellant who led PW4 to his house.

In our view, the prosecution proved beyond reasonable doubt that the registration number and the Insurance Cover of motor vehicle registration No. KAD were recovered hidden in the appellant's house. In **Peter Kariuki Kibue vs Republic Nairobi Criminal Appeal No. 21 of 2001 (unreported)** the appellant was found in possession of recently stolen items and the court held:

> ***"The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver. This is a rebuttable presumption of law based on the provisions of Section 119 of the Evidence Act."***

PW1 was robbed on 6th August, 2008 and the items were recovered from the appellant's house on 11th August, 2008. There is no dispute that the two items belonged to PW2, the owner of the motor vehicle. The appellant offered no explanation of how he came to be in possession of PW2's items. The doctrine of recent possession was properly invoked as the appellant was found in possession of items recently stolen and belonging to PW2.

The appellant's other ground of appeal was that there was contradiction as regards the ownership of motor-vehicle registration No. KAD 166H as the charge sheet indicated that PW1 was the owner whilst PW2 testified that she was the owner. On our part we find no such contradiction. PW1 was employed by PW2 and at the time of the robbery PW1 was driving the motor-vehicle, hence PW1 was the special owner.

There was also the contention that no inventory was prepared at the time the exhibits were allegedly recovered from the house of the appellant. In our considered view, there is no such legal obligation to have an inventory prepared at the time of recovery. The issue as to whether the exhibits were recovered from the appellant's house is a matter of evidence. We are satisfied that the appellant led PW4 to his house where the number plate and the insurance cover of motor-vehicle registration No. KAD 166H, were recovered from. We find that the trial court and the first appellate court evaluated and re-evaluated the evidence and came to the right conclusion that the appellant was guilty of the offence of robbery with violence contrary to section 296 (2) of the Penal Code. We find no reason to disturb the findings of the two courts below.

We believe we have said enough to show that this appeal is devoid of merit. It is hereby dismissed.

Dated and delivered at Nairobi this 22nd day of February, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR