IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 62 OF 2015

BETWEEN

PETER WACHIRA WARUI…….…….....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Embu (Sergon, Ong'udi, JJ) dated 18th May, 2012

In

H.C.CR.A. NO. 33 OF 2009

****

JUDGMENT OF THE COURT

The appellant appeals against the dismissal by the High Court at Embu **(Sergon, Ong'udi JJ)** of his first appeal against the conviction and sentence of death imposed upon him by the Principal Magistrate's Court for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code.** There were four counts of that offence and he was convicted on two but the death sentence related to one only of them. He had also faced an alternative count of handling stolen property contrary to **Section 313** of the Penal Code.

The particulars of the charge were that on the 19th day of July 2007 at Waita Village in Kirinyaga District the appellant, jointly with others not before court, and while armed with dangerous offensive weapons namely pangas, rungus and iron bars, robbed various people of an assortment of items. Those items, with regard to the counts on which the appellant was convicted, were;

a. From JAMES MAINA KAHIGA (PW2), a water pump, mobile phone

Nokia 1600 and one sack of rice all valued at Kshs.20,800.

b. From FRANCIS KAHIGA NJIRAITI (PW3), Ksh.7,500 in cash.

The learned trial Magistrate after hearing the seven witnesses called by the

prosecution and the appellant who gave an unsworn statement, found the offences proved, which finding was upheld by the High Court, provoking this appeal.

The appellant at first filed some self-authored "***Grounds of Appeal***" which were abandoned by his learned Counsel **Mr. Wahome Gikonyo** in favour of Counsel's Supplementary Memorandum of Appeal dated and filed on 4th December 2015 which, in its four grounds, focused on the single issue of the appellant's *alibi* which is averred to have been improperly rejected by the two courts below.

Arguing the appeal before us, Mr. Gikonyo submitted that the appellant had raised an *alibi* defence, which the trial Magistrate peremptorily dismissed as a mere denial of the charge with a claim of having been framed; and which the first appellate court did not at all address. In this regard Counsel cited the case of **KIARIE –VS- REPUBLIC** [1984] KLR 739 where this Court held, at p.740, that;

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi."***

Mr. Gikonyo went on to contend that the evidence of the appellant's arrest with the water pump was questionable for, how was PW1 alone able to contain him? He also pointed out that by the time the police arresting officer PC PHILLIP KIGALI (PW7) arrived at the scene, he found the appellant arrested by members of the public with a water pump beside him, but the officer did not prepare an inventory which, in Counsel's view, cast doubt on the veracity of the evidence of recovery of the water pump and a mobile phone C113 from the appellant. Counsel relied on **JOHN MUTURA MURAYA –VS- REPUBLIC,** CRIMINAL APPEAL NO. 384 OF 2009 (Unreported) a decision of this Court at Nyeri (differently constituted) where the Courts stated;

> ***"In this case, the prosecution did not prove that the torch in question was recovered in the appellant's house. This is because APC David admitted that he did not take inventory of the items recovered from the appellant's house. Therefore the doctrine of recent possession could not be invoked."***

Counsel submitted that the two courts below ought to have weighed the appellant's alibi defence even if it was first raised in his unsworn statement, and cited the case of **JOHN WANDATI WAMALWA & ANOR –VS- REPUBLIC**, KISUMU CRIMINAL APPEAL NO. 49 OF 1999 (Unreported). He submitted that in the totality of the evidence, the appellant's conviction was not safe, and urged us to quash it and set aside the sentence.

Mr. Kaigai, the learned Assistant Director of Public Prosecutions supported the appellant's conviction and sentence. He urged that the facts were straight- forward. The appellant was arrested red-handed by ZACHARIAH MUGO KARIUKI (PW1) who was a night watchman at Garden Hotel at Kagio. The appellant was carrying a heavy water pump and was in the company of some two accomplices who, however, escaped. PW1's testimony was that he approached the appellant from behind, taking him by surprise and ordered him to put the water pump down. He then called the police who came and re-arrested the appellant. There was other evidence, the **ADPP** added, in that PW2 observed the appellant during the robbery and was able to pick him out at a subsequent identification parade. PW2 was the owner of the water pump.

On the question of the *alibi*, Mr. Kaigai contended that it was amply displaced because the appellant was arrested re-handed with the water pump within the vicinity of the *locus in quo*. The two courts below considered the *alibi* defence and properly rejected it.

The ADPP submitted that the appellant was required under **Section 111** of the Evidence Act to

give a plausible explanation for his possession of PW2's water pump and he failed to do so with the effect that the two courts below were right to reject his protestation of innocence. He urged that given the circumstances of this case, the authorities cited in support of the appeal are distinguishable.

We have considered the entire record and the rival submissions made before us. This being a second appeal, our remit, by dint of **Section 361** of the Criminal Procedure Code, is to consider matters of law only. See **HASSAN –VS- REPUBLIC** [2005] KLR 151. This Court's approach therefore is to leave undisturbed the concurrent findings of fact by the two courts below unless the same be shown to be based on no evidence; or the courts acted on a misapprehension of the evidence; or on a consideration of the entire record, the courts acted on wrong principles and arrived at conclusions that are plainly wrong and unsupportable. See **KARINGO –VS- REPUBLIC** [1982] KLR 213; **CHEMAGONG –VS- REPUBLIC** [1984] KLR 611.

Bearing those principles in mind, we are not persuaded that this is a case that warrants our rare interference with the concurrent factual findings of the two courts below. The two courts found as proved that the appellant was indeed one of a group of robbers who struck at Waita village in the wee hours of 19th July 2007. They were armed with various weapons of offence which they were not shy to use. They stole two sacks of unhusked rice, a ***"Honda 4.0"*** water pump and a Nokia 1600 phone from PW2. They came to PW2's house after terrorizing his father, PW3, stealing some Ksh.7570 from him and then ordering him to take them to PW2's house and there to ask PW2 to open the door so they could gain entry. PW3 was indeed able to identify the appellant at an identification parade mounted some time after his arrest.

The arrest itself, as pointed out by Mr. Kaigai, happened very shortly after the robberies. PW1 came upon the appellant who was slowed by the burden of the stolen water pump. He was thus unable to make his escape as did his accomplices. His arrest was red-handed and he was re-arrested by police officers, including PW7 right there where PW1 ordered him to sit. In those circumstances, it is clear that the doctrine of recent possession was properly applied to the case: the water pump was proved to have been the property of PW2; it was stolen by robbers; an hour or so afterwards it was found being carried by the appellant and he was unable to explain how he came by it. He was either the thief or a receiver of it and, given that he was identified by PW3 as one of the robbers, the former is the case. See **MUNGAI –VS- REPUBLIC** [1987] KLR 221. It has never been the law that an inventory by the arresting officer is a prerequisite for the doctrine of recent possession to apply. It is not necessary that the recent possessor be found by the police in order for the inference to be drawn. Any suggestion in **JOHN MUTURA MURAYA –VS- REPUBLIC** (Supra) cited by Mr. Gikonyo that an inventory must precede the application of the doctrine of recent possession cannot have been intended, and is definitely discordant with all the authorities on the point.

The appellant having been found with recently stolen items and having been picked out at an identification parade, we think that both the trial and the first appellate courts were justified in their rejection of the *alibi* defence, if that is was.

The appellant did not raise the issue of an *alibi* up until the time he gave his unsworn statement and stated as follows;

> ***"I recall on 19.7.2007 I went to Kagio town. It was in the morning. I met one Mzee who was in a plot he told me to stop I assist him. I did that. He asked me whether I had not seen people running. He called some people he told them that I looked like a thug and that my shoes had mud stains. They arrested me. They took me to a home where I saw a water pump machine placed outside a house. I was ordered to sit down. The Mzee called the police. He told them I was one of the suspects who had stolen in that plot. The police officers came. I was arrested."***

Given the evidence of PW1 that he arrested the appellant at Garden Hotel in Kagio town at about 5 a.m. of the same day, we very much doubt that what the appellant stated in his unsworn statement really amounted to an *alibi.* An *alibi,* which is latin for "***elsewhere***" is "***a defense based on the physical***

impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time". See, Bryan A. Garner (Ed. in Chief); **Blacks Law Dictionary,** 9th Edn p.84). Far from placing the appellant elsewhere, his unsworn statement appears to have placed him right at the place where he is said to have been found with the stolen water pump by PW1. There is nothing in the statement to suggest physical impossibility of his committing the offence.

But even were we to accept, as we do not, that the defence did amount to an *alibi,* we are satisfied that it was properly handled, it being sufficient that it be weighed against the weight of the prosecution evidence. See **WANGOMBE –VS- REPUBLIC** [1980] KLR 149.

We find also that the first appellate court by finding that the appellant was positively identified as having been among the robbers, and having, moreover, been found in recent possession of the stolen water pump, it effectively and properly rejected the defence of *alibi.* See **NGEIYWA –VS- REPUBLIC** [2004] 2 KLR 152.

The evidence against the appellant was overwhelming and his conviction sound. In the result, we find no merit in this appeal and it is accordingly dismissed.

Dated and delivered at Nyeri this 17th day of February, 2016.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR