**IN THE COURT OF APPEAL**

**AT MOMBASA**

**CORAM: MAKHANDIA, OUKO & M'INOTI JJ.A.**

**CRIMINAL APPEAL NO. 44 OF 2015**

**BETWEEN**

**ATHUMAN SALIM ATHUMAN……..APPELLANT**

**AND**

**REPUBLIC.……..……..…..……RESPONDENT**

**(Appeal from the judgment of the High Court of Kenya at Mombasa, (Muya, J.) dated 18th July 2014**

**in**

**H.C.CR.A. NO. 96 OF 2013)**

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**JUDGMENT OF THE COURT**

Upon being convicted by the Principal Magistrate's Court at Kwale, for the offence of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code*** and being sentenced to death on 6th June 2013, the appellant, ***Athuman Salim Athuman,*** lodged an appeal in the High Court at Mombasa. On 18th July 2014, ***Muya, J***. found the appeal bereft of merit and dismissed it in its entirety. The appellant was aggrieved and lodged this second appeal premised on four grounds, which we shall consider shortly.

The background to the charge against the appellant was the events that took place on the night of 2nd September 2011 at Kombani Market, Tiwi Location, Kwale County. According to the evidence that was adduced by the prosecution, on the material day the complainant, ***Swaleh Mohammed Tenga (PW1),*** was taking refreshments at Kombani Bar, Kombani Market, when a friend of his called Bakari and two other people who were unknown to him, joined him. One of the two was the appellant.

The four ordered drinks and were together in the bar for between forty-five minutes to one hour. When the bar closed, PW1 with the two strangers re-located to a nearby disco. After a while, PW1 opted to retire for the night and his two new companions offered to get him a motorcycle *(boda boda)* to take him home. As PW1 got on the motorcycle, the appellant switched the same off and with his companion set upon PW1, assaulted him and robbed him of a Nokia C3 phone valued at Kshs. 10,500/-, a wallet

containing Kshs 800/- and ATM and voter's cards. Fearing for his safety, the owner of the motorcycle, ***Salim Hamadi Baya (PW4)*** rode off and left PW1 with his assailants, who soon escaped.

PW1 reported the incident at Diani Police Station at around 4.30 a.m. and was treated at Kaya Medical Clinic. He was also issued with a P3 Form. When ***Dr. Alfred Baya (PW3)*** examined him on 5th September 2011, he noted a swollen face and a tender neck. The injuries were approximately two days old and had been caused by a blunt object. He classified the degree of injury as harm.

Subsequently PW1 went to his friend Bakari to inquire the identity of his assailants. Bakari led him to their respective homes, but the suspects were not there. At the appellant's home, he met the appellant's uncle. A few days later that uncle called and informed PW1 that the appellant had been arrested whilst trying to sell a phone. PW1 then proceeded to Diani Police Station where he found the appellant under arrest and identified him as one of the assailants. He also identified his stolen phone.

The evidence of PW4 was to confirm that PW1 was attacked as he was boarding PW4's motorcycle, which the appellant switched off as he pulled PW1 off. He identified the appellant as one of the people who had attacked PW1, stating that he had been seeing the appellant at Kombani Market stage, though he did not know his name. It was PW4's evidence that new security lights and his motorcycle lights, which were switched on, lighted the scene. He did also state that he had seen PW1 and his assailants as they left the bar.

The other important witness was ***Bakari Omare Sheilla (PW2),*** the Chief, Mkongani location. The gist of his evidence was that about a week before the incident, the appellant went to see him concerning a land transaction in which he was receiving Kshs 50,000 as vendor. Barely three days later, the appellant met PW2 and pawned a phone for Kshs 2,000/-, claiming to have spent the Kshs 50,000 to construct a building. After two days the appellant advised PW2 that he was unable to redeem the phone and that PW2 should pay a further Kshs 4,000 and keep the phone. Upon looking closely at the phone, PW2 noticed that it had PW1's Facebook page and other details. He alerted the chief of PW1's location, who confirmed that PW1 had reported a robbery incident. The appellant was then arrested and handed over to Diani Police Station.

Put on his defence, the appellant elected to give an unsworn statement and called no witness. The substance of his defence was that he had purchased the phone from one Masoud on 28th August 2011 for Kshs 2000. He confirmed that he had received Kshs 50,000/- in the presence of the chief, but stated that on 12th September 2011 the chief summoned him to his office and demanded to be given Kshs 10,000/- from the 50,000/-. After the appellant refused to part with his money, the chief was annoyed and arrested him, accusing him of having stolen a phone. He offered to take PW1 and the chief to Masoud but they found that he had taken his wife to hospital. Subsequently he was charged with the offence of robbery with violence, which he did not commit.

The appellant's appeal, as prosecuted by his learned counsel ***Mr. Nabwana*** is premised on the following grounds, which contend that the first appellate court erred by:

> ***i. ignoring his alibi defence;***
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> ***ii. misapplying the doctrine of recent possession;***
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> ***iii. relying on unsafe identification evidence; and***
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> ***iv. relying on contradictory evidence, which did not prove the prosecution case beyond reasonable doubt.***

On the first ground of appeal, Mr. Nabwana submitted that both the trial and first appellate courts had failed to consider the appellant's alibi defence in which he stated that he had left for his rural home on 1st September 2011 while the complainant alleged to have been robbed of the phone on 3rd September 2011.

Relying on ***DAVID EKUSI LOKUYU V. REPUBLIC, CR APP NO. 389 of 2006 (NAKURU)***, learned counsel submitted that while an alibi defence may be implicit, it must be considered and that the trial court had erred by merely dismissing the appellant's defence as evasive.

Regarding the doctrine of recent possession, counsel advanced the peculiar proposition that once a suspect has been identified, the doctrine of recent possession has no application. It was submitted that having found that the appellant had been positively identified, the court had no business invoking the doctrine of recent possession. On the application of the doctrine, it was further submitted on the authority of ***ARUM V. REPUBLIC [2006] 2 EA 10*** that possession must be positively proved, which was not the case here because the phone was found in possession of PW2 rather than of the appellant.

As regards the identification of the appellant, it was contended that it was not positive within the principles in ***R. V. TURNBULL & OTHERS [1976] 3 ALL ER 549*** and that PW1 had not described the appellant when he first made his report to the police. In addition, it was submitted, no identification parade had been held. In the circumstances it was contended, on the authority of ***MWANGI V. REPUBLIC [2005] 2 KLR 371***, that the trial court had relied only on dock identification, which was worthless.

Lastly regarding contradictions in the prosecution case, it was contended that the evidence adduced did not prove the case against the appellant beyond reasonable doubt. Among the contradictions that the prosecution case was alleged to suffer from were that the make of the phone stolen from PW1 was not specified in the charge sheet; that the phone was not produced in court as an exhibit; and that loss of the phone was not mentioned in the first report to the police. In counsel's view, the conviction of the appellant was not based on the weight of the evidence but on theories put forward by the trial court, a practice which the predecessor of this Court decried in ***OKETHI OKALE & OTHERS V. REPUBLIC [1965] EA 555.***

***Mr. Kiprop,*** learned Principal Prosecution Counsel opposed the appeal as unmeritorious and urged us to dismiss the same. Counsel submitted that the appellant's purported alibi defence was an afterthought because it was raised in the appellant's unsworn defence, when he could not be subjected to cross-examination and when the prosecution had no opportunity to respond. Counsel submitted that if the appellant had a genuine alibi defence, he could have raised it at the earliest opportunity to enable the prosecution investigate its truthfulness and respond to it, rather than so late in the proceedings.

On the doctrine of recent possession, counsel urged that the stolen phone was in law found in possession of the appellant and that he had failed to offer a reasonable explanation of how he had come by it. It was also submitted that contrary to the appellant's submission, the doctrine of recent possession was applicable to corroborate the identification of the appellant as one of the robbers. The respondent relied on the judgment of the Supreme Court of Uganda in ***KAKOOZA GEOFFREY V. UGANDA, CR. APP. NO. 3 of 2008*** in support of that proposition.

As for the identification of the appellant, it was contended that the same was safe. Counsel argued that PW1 had spent about 45 minutes to one hour with the appellant and his accomplice and was able to observe and identify them. We were accordingly urged to find that the identification was safe and to uphold the concurrent findings of the two courts below which were satisfied as to the identification of the appellant.

Lastly on whether the prosecution evidence was riddled with contradictions, Mr. Kiprop submitted that it was not; that the make of the stolen phone was disclosed in the charge sheet; that the stolen property was sufficiently described as required by the Criminal Procedure Code; that from the record PW5 was recorded as having produced the phone as an exhibit; and that any contradictions in the prosecution evidence were minor rather than fundamental and could not therefore vitiate the conviction of the appellant.

Since this is a second appeal, by dint of ***section 361*** of the ***Criminal Procedural Code***, we are enjoined to consider only matters of law. We also bear in mind that this Court will pay homage to concurrent findings

of fact by the two courts below and will not readily interfere with their findings unless it is satisfied that they took into account matters they ought not to have considered or that they failed to take into account matters they should have considered or that, based on the evidence as a whole, they were plainly wrong in which event the appeal will involve matters of law. ***(KARANI V. REPUBLIC [2010] 1 KLR 73.)***

It is trite that by setting up an alibi defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case. ***(SSENTALE V. UGANDA [1968] EA 365).*** The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution ***(WANG'OMBE V. REPUBLIC [1976-80) 1 KLR 1683).*** As was stated in ***R. V. CHEMULON WERO OLANGO (1937) 4 EACA 46***, the purpose of the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act.

It is not in dispute that the appellant raised what he calls his alibi defence for the first time in his unsworn statement of defence. Even then he merely stated that he left for his rural home on 1st September 2011, without stating whether he remained there as of 2nd September 2011 when the offence was committed at Kombani Market. Since his defence was an unsworn statement, the prosecution was not able to cross-examine him to clarify or otherwise impeach the alibi defence. To the extent that an alibi defence can be implicit, and the appellant bears no burden of proving his alibi, he is entitled to the benefit of the doubt and we shall therefore take it that he had indeed raised an alibi defence.

The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. Way back in 1939 in ***R. V. SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6 EACA 145***, the former Court of Appeal for Eastern Africa upheld the a decision of the High Court in which it was stated:

> *"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".*

***(See also R. V. AHMED BIN ABDUL HAFID (1934) 1 EACA 76*** and ***WANG'OMBE V. REPUBLIC [1976-80] 1 KLR 1683).***

The Supreme Court of Uganda, in ***FESTO ANDROA ASENUA V. UGANDA, CR. APP NO 1 OF 1998*** made a similar observation when it stated:

> ***"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."***

Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the respondent that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed in ***GANZI & 2 OTHERS V. REPUBLIC [2005] 1 KLR 52,*** this Court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence. In the circumstances of this appeal, we are satisfied that when weighed against the evidence of his identification at the scene which we now turn to consider, the appellant's alibi defence was completely displaced.

Two witnesses, PW1 and PW4, identified the appellant. PW1's evidence was that after being joined at

Kombani Bar by Bakari and two other people who included the appellant, they continued enjoying themselves together for between 45 minutes and one hour. When Bakari left the appellant continued in the company of the two strangers until the bar eventually closed, when they relocated to a nearby disco. The appellant and his accomplice offered to assist PW1 to get *boda boda* transport home after which they attacked and robbed him as he was getting onto the motorcycle. PW4's evidence confirmed that it was the appellant who switched off the motorcycles and pulled PW1 from it. His further evidence was that he was familiar with the appellant who he was used to seeing at the market, though he did not know his name. New security lights at the scene and the beam from his motorcycle aided the identification of the appellant.

This evidence satisfied the two courts bellow that the identification of the appellant was positive and safe. For our part, we do not have any basis for disagreeing with these concurrent findings. We are satisfied that the evidence of identification of the appellant by PW1 and PW placed him at the scene of the robbery at the time it occurred, thus effectively displacing the appellant's alibi defence. As PW4 testified that he recognised the appellant as a person that he had been seeing at the stage, no useful purpose would have been served, contrary to the appellant's contention, by holding an identification parade. As was stated in ***AJODE V. REPUBLIC (2004) 2 KLR 81,*** no identification parade is required in cases of recognition.

As regards the doctrine of recent possession, we do not think there is any substance in the assertion that it is not applicable if an accused person has been identified. The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how be came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. (See ***MALINGI V. REPUBLIC*** **(1989) KLR 225 H.C** and ***HASSAN V. REPUBLIC*** **(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 V. REPUBLIC, CR. APP. NO. 272 of 2005,*** 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."***

Identification of an accused person therefore may be properly corroborated by the doctrine of recent possession. Indeed in ***BOGERE MOSES & ANOTHER V. UGANDA*****, CR. APP. No 1 of 1997** the Supreme Court of Uganda suggested that the doctrine of recent possession may be more reliable form of identification evidence, when it stated:

> ***"It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witness evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable, while the latter solely depends on the credibility of the eye witness."***

We find that in this appeal, all the ingredients set out in ***ISAAC NG'ANG'A KAHIGA (supra)*** regarding applicability of the doctrine of recent possession were satisfied. The appellant's argument that the stolen phone was in possession of PW2 rather than in his own possession has no merit because possession under the doctrine is not confined to physical possession of the stolen property. ***Section 4*** of the Penal Code defines ***"possession"*** to include:

> ***"…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."***

While the phone was physically in possession of PW2, his possession of the same was with the consent or permission of the appellant who, purporting to be the owner thereof, had pawned and later on attempted to sell it to PW2. Nor do we find that the appellant had offered any reasonable explanation of how he came by the stolen phone, since he claimed to have bought it from Masoud on 28th August 2011, some five days *before* PW1 was robbed of the same phone on 2nd September 2011.

The only hitch as regards the applicability of the doctrine in this case is the fact that the phone does not appear to have been produced in evidence as an exhibit. Evidence on the recovery of the phone was properly led and the phone was duly marked for identification. Subsequently it was identified by PW1 and the investigation officer, PW5 is recorded as stating that he wished to produce the same as an exhibit, but the record of the trial court does not indicate that the phone was indeed produced as an exhibit. It is not even listed in the memorandum of exhibits.

Having however concluded that the appellant was properly and positively identified by PW1 and PW4, it matters not whether the doctrine of recent possession was applicable in this case. The identification of the appellant was reliable and safe.

The last issue relates to contradictions in the prosecution case. Having considered the evidence in its totality, we do not find any contradictions of the magnitude that would suggest that the evidence against the appellant was concocted and unreliable to the point of vitiating the conviction. (See ***SANGO MOHAMED SANGO & ANOTHER V. REPUBLIC, CR APP NO. 1 of 2015 (MALINDI)).*** Contrary to the appellant's assertion, the charge sheet did refer to the make of the stolen phone (Nokia) although it did not specify the exact model (E3). In our view, the description was sufficient to satisfy the requirements of ***section 137*** (c) of the Criminal Procedure Code.

Ultimately we have come to the conclusion that this appeal has no merit and the same is accordingly dismissed in its entirety. It is so ordered.

**Dated and delivered at Mombasa this 11th day of March 2016**

**ASIKE-MAKHANDIA**

**…….**

**JUDGE OF APPEAL**

**W. OUKO**

**…….**

**JUDGE OF APPEAL**

**K. M'INOTI**

**…….**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**