**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KIHARA KARIUKI (PCA), KARANJA & KANTAI, JJ.A**

**CRIMINAL APPEAL NO. 45 OF 2015**

**BETWEEN**

**ROBERT WANGORO & ANOTHER.............................APPELLANTS**

**AND**

**REPUBLIC..................................................................RESPONDENT**

***(An Appeal from a Judgment of the High Court of Kenya***

***at Nairobi (Mbogholi & Achode, J.) dated 8th April, 2014***

***in***

***H.C.CR.A. NO. 458 & 459 OF 2009)***

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**JUDGMENT OF THE COURT**

This is the second appeal by **Robert Wangoro** and **David Wafula Manga,** (appellants) their appeal to the High Court having been dismissed on 8th April, 2004. The appeal before the High Court, emanated from the decision of Hon. Abdul Lorot, Senior Resident Magistrate, Githunguri, in Criminal Case No. 113 of 2008. Before that court the appellants who are Ugandan nationals, were charged jointly with one charge of robbery with violence contrary to **Section 296(2) of the Penal Code**, and attempted robbery with violence **Contrary to Section 297(2) of the Penal Code**. They also individually faced one count each of being unlawfully present in Kenya contrary to **Section 13(2) of the Immigration Act Cap 172 Laws of Kenya.**

They both pleaded not guilty on all counts and the matter proceeded to full hearing. After hearing a total of six witnesses from the prosecution and the unsworn statements of defence proffered by the appellants, the learned magistrate found the charges proved beyond “any iota of doubt” and convicted them on all the charges. They were sentenced to death in respect of counts 1 and 2 and to six months each in respect of the count of being unlawfully present in Kenya.

The sentences of counts 2, 3, and 4 were kept in abeyance.

Aggrieved by that conviction and sentence, they both proceeded to the High Court on appeal, where they

challenged both conviction and sentence. After hearing the appeal, the High Court, (Mbogholi & Achode, JJ) found the appeals lacking in merit and dismissed them. They are challenging that decision before this Court. They filed some homemade Memoranda of Appeal on 24th April, 2014 each containing seven grounds of appeal, which are a replica of each other. Learned counsel, Mr. Ratemo Oira, who represents both appellants in this appeal filed supplementary memoranda of appeal on 23rd September 2015 whose grounds are also similar. At the hearing of the appeal, Mr. Oira informed the Court that he was relying on all the memoranda of appeal on record.

We shall advert to these grounds later. For now, we shall rehash, albeit very briefly, the evidence adduced before the trial court in order to put this appeal in its proper perspective.

In a nutshell, Duncan Gacheru Ng'ang'a (PW1) and his wife Margaret Wanjiku (PW2) were asleep in their house in Ndureri village in Gatamaiyu location on the night in question. They heard a loud bang on their door and they woke up. Duncan said that he sat on the bed facing the door when the robbers forced their way into the bedroom. Both witnesses told the court that the robbers who were three in number entered the house while flashing their torches. The robbers, who were armed with pangas ordered the witnesses to keep quiet and cover themselves. PW1 was however uncovered so that he could show the robbers where he had kept the money. It was PW1's evidence that as he directed them to where the money was, and as one of them was counting the money, he was able to see the robbers clearly by the light from their lit torches. Margaret said she was also able to see the robbers as they counted the money. After stealing the money and cell phones belonging to PW1 and PW2, the robbers left.

Their next target was Joseph Kimani Kamunya (PW3) who told the court that he was asleep in his house when he heard the loud bang on the door. He armed himself with a panga and confronted the intruders. He also switched on the electric lights in the bedroom. He said that he saw two of them, and when they saw him approach holding the panga, and with his wife and daughter screaming for help, the robbers escaped without stealing anything.

The neighbours responded to the calls of distress. They grouped and boarded two vehicles and followed the robbers. They found three people somewhere armed with pangas. They ordered them to drop the pangas. One of them managed to run away but two of them were apprehended. A quick search on the first appellant yielded Ksh. 8000/= in cash, and a cell phone. From the 2nd appellant Ksh. 5,500/=, and a cell phone were also recovered. When they were asked to give the numbers of the cell phones, they said they did not know them.

A short while later, the group met the complainants who had been robbed earlier. They told PW3 and his group that they had been robbed of Ksh 20,000/= in cash and two cell phones, whose numbers they gave. On being shown the cell phones recovered from the appellants, they identified them positively as those robbed from them a few hours earlier. This evidence of the citizen arrest and recovery of the cash and cell phones was corroborated by Elias Kimani Gitau (PW4) and Samuel Mwika Nganga (PW5).

The appellants were later handed over to the police officers who escorted them to Kibichoi police station where they were charged with the offences in question. In their defence, while admitting that they were actually Ugandan nationals living in Kenya illegally, both appellants denied involvement in any of the offences they were charged with. They were nonetheless convicted and sentenced to death. Their appeal to the High Court was not successful and so they ended up in this Court. Their grounds of appeal can be compacted as follows:-

That they were not properly identified by the witnesses; that they were convicted on insufficient evidence; that the learned Judges of the High Court failed to re-evaluate the evidence before the trial court as enjoined by law; that their evidence in defence was not considered; that possession of the stolen items was not proved to the required standard; and lastly that there was no corroboration.

In his oral submissions in court, Mr. Oira repeated these grounds. He dwelt at length on the ground of insufficient identification of the appellants by the complainants. He submitted that the circumstances prevailing at the scene were not conducive for a proper error-free identification.

Mr. Kivihya, the learned Assistant Director of Public Prosecutions maintained that there was sufficient light in the room and also enough time to enable the witnesses to see the appellants clearly.

We do not nonetheless find it necessary to dwell on this issue as clearly, the learned Judges of the High Court upheld Mr. Oira's submission on that issue. We say so because the learned Judges were succinct on their finding that, although the witnesses may have positively identified the attackers, the identification was not fool proof, and the same could not therefore be relied upon to convict.

The learned Judges in their re-evaluation of the evidence disregarded that evidence. They relied purely on the evidence relating to the recovery of some of the properties stolen from the complainants which were recovered on the appellants.

In effect, the learned Judges invoked the doctrine of recent possession to uphold the conviction against the appellants. Although, Mr. Oira made heavy weather of the issue on identification, which was not even an issue in this appeal, he failed to address the more germane issue of the doctrine of recent possession, which is what nailed his clients in the High Court.

On his part, Mr. Kivihya, learned Assistant Director of Public Prosecutions submitted that there was sufficient evidence to convict the appellants. The charges of robbery and attempted robbery were proved, he submitted, and further that the cell phones stolen from the complainants were recovered from the appellants. He told the Court that the appellants had been unable to operate the phones in question and could not even tell their numbers. Moreover, the complainants identified them positively and even unlocked them using their correct passwords. Mr. Kivihya said that the learned Judges had also re-evaluated the evidence of the trial court and arrived at their own findings. He reminded us that this Court cannot interfere with concurrent findings of fact of the two courts below, and urged us to dismiss this appeal for lack of merit.

We have considered the record before us, the grounds of appeal and the rival submissions of counsel. Having done so, we reiterate as we have done many times before that this being a second appeal, by dint of **Section 361** of the **Criminal Procedure Code,** only matters of law fall for our consideration. (See **Kaingo vs Republic, [1982] KLR 219** where this Court pronounced itself as follows;

> ***"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 Karari C/O Karanja v. R (1956) 17 EACA 146)"***

The court on second appeal will also be wary of upsetting concurrent findings of fact from the two courts below unless it is apparent that on the evidence presented and accepted by the trial court, no reasonable tribunal could have reached that conclusion. Additionally, the court has loyalty to accept the concurrent findings of fact of the two courts below provided they are based on clear evidence which was adduced at the trial. See **Bernard Mutua Matheka vs Republic (Criminal Appeal No. 155 of 2009** unreported**).**

From the grounds of appeal and the submissions of counsel, it is our considered view that this appeal revolves principally around two issues. Firstly, whether the learned Judges of the High Court re-evaluated the evidence adduced before the trial court and arrived at their own independent conclusion; and secondly whether there was sufficient evidence to convict the appellants.

On the first issue, a cursory look at the judgment will show that indeed the learned Judges went to great length to re-evaluate the evidence in question. We note that it was after a thorough re-evaluation of the said evidence that they were actually able to conclude that identification of the appellants was not foolproof, and faulted the trial magistrate for relying on the same. They then analysed the evidence on the doctrine of recent possession and found it sufficient to support a conviction. That ground of appeal must therefore fail.

On the second issue, and as stated earlier, we cannot at this stage upset concurrent findings of fact of the

two courts below unless they fall outside the parameters set out in the **Kaingo case** (supra). Both courts found that the appellants were found with the cell phones belonging to the complainants only a few hours after the robbery. They could not even tell their numbers or passwords. The two courts below rightly found the doctrine of recent possession was applicable in this case. We have no reason to upset those concurrent findings.

Our finding therefore, is that there was sufficient evidence to sustain convictions on all counts. On the belated submission by learned counsel for the appellants that the charge sheet was defective, we find that there was nothing wrong with the charge sheet and the charges against the appellants were proper. We also find that all the ingredients of the charges of robbery with violence contrary to **section 296(2)** and attempted robbery contrary to **section 297(2)** respectively were proved as by law required. The robbers were more than one and they were armed with dangerous weapons. It matters not that no actual physical violence was visited on any of the complainants. On this issue, we can only restate our findings in **<u>Nicholas Ouma Obonyo v R</u>, Cr. No. 47 of 2006** where we succinctly reiterated the law as follows:-

> *"**We think it would be appropriate to say a little bit more about the charge of robbery with violence contrary to** section 296(2) of the Penal Code**. We can do no better than cite what this Court has already said in its decision in** Johana Ndungu v. republic, Criminal appeal No. 116 of 1995 (unreported) **in which it was stated,** inter alia:*

***In order to appreciate properly as to what acts constitute an offence under** section 296(2) **one must consider the sub-section in conjunction with** section 295 of the Penal Code. **The essential ingredients of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or after to further in any manner the act of stealing.***

***Thereafter the existence of the afore-described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in** section 296(2) **which we give below and <u>any one</u> of which if proved will constitute that offence under the sub-section:***

> *1. **If the offender is <u>armed</u> with any dangerous or offensive weapon or instrument, or***
>
> *2. **If he is <u>in company</u> with one or more other person or persons, or***
>
> *3. **If at or immediately before or immediately after the time of the robbery he wounds, <u>beats, strikes or uses any other</u> <u>violence</u> too any person."** [Emphasis supplied]*

The state only needed to prove one of the three pre- requisites of robbery outlined and emphasized above. Two of them were proved beyond reasonable doubt.

In the circumstances, we find this appeal devoid of merit and dismiss it accordingly.

***Dated and delivered at Nairobi this 11th day of March, 2016.***

**P. KIHARA KARIUKI, (PCA)**

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**JUDGE OF APPEAL**

**W. KARANJA**

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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***