IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 2 OF 2015

BETWEEN

SHIDA KENGA MITSANZE ……. APPELLANT

AND

REPUBLIC ……..…… R ESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Kasango & Muya, JJ.) dated 19th March, 2014 In Criminal Appeal No. 208 of 2011)

JUDGMENT OF THE COURT

The central question in this appeal and indeed the only question before the two courts below, was whether the appellant was part of the gang of three men that robbed the complainant on the night of 5th December 2009. It was the only issue because the offence was committed at about 8.00 p.m. and there was conflicting evidence as to whether the complainant and the only other witness, PW2 were able to properly see and accurately identify their attackers. While the prosecution relied on both direct and circumstantial evidence and insisted that in totality the evidence pointed directly at the appellant, the appellant on the other hand denied participating in the robbery.

By **section 361** of the Criminal Procedure Code we shall only inquire into issues of law raised in this appeal and identification of a suspect in a criminal trial, as was stated in **Patrick Osiemo & others v R, Criminal Appeal No. 30 of 2009** is question of law, as is the application of the doctrine of recent possession. This Court will generally be hesitant to interfere with the concurrent factual findings of the two courts below unless the findings are based on no evidence, or on a misapprehension of evidence or if the court acted on wrong principles. See **M'Riungu v R (1983) KLR 455**.

The second principle relevant to this appeal is that where the only evidence against a suspect is that of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances and conditions for positive identification were favourable and free from any possibility of error before it can safely make it the basis of a conviction. See **Wamunga v R (1989) KLR 424**. Thirdly, recognition, as opposed to identification, is more satisfactory, more assuring and reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. See **Anjononi & Others v R (1981) KLR 594**. The final applicable principle in this appeal is that as a matter of common sense a court will presume that a man in possession of stolen goods soon after the theft is either the thief or has received them knowing that they have been stolen unless he can account for his possession. See the Supreme Court of Uganda case of **Bukenya Patrick &**

Another v Uganda Criminal Appeal No. 15 of 2001 to which learned counsel for the respondent referred us.

We turn to apply these principles to the appeal before us. The complainant who was motor cycle taxi (boda boda) operator asked PW2 to accompany him on one of his trips because it was at night. On their way back from Mtsengo where he had dropped off a passenger, they were stopped by three men. The motor cycle headlight picked the three and both the complainant and PW2 told the trial court they were able to recognize the appellant who was known to them before this night. A struggle over the motor cycle ensued and the complainant was thrown off the motor cycle. PW2 however was able to escape with it leaving the complainant behind at the mercy of the robbers, who attacked him with a knife inflicting severe injuries to his fingers and legs. They also stole his clothes, cash, shoes and a mobile phone, and only spared him when they saw headlight of an on-coming motor cycle. The complainant crawled to a nearby home where he was given first aid. Shortly PW2 joined him and rushed him to the hospital where he was admitted. Thereafter a report of this robbery was made to the police. But before investigations could begin, on the second day, it is alleged that stolen mobile phone was taken by the appellant to PW6's shop to be charged. PW6 recognized it as the property of the complainant and alerted the latter's brother, PW7 (erroneously described as PW5) as the complainant was still in hospital. Police officers were also alerted and an ambush laid. When the appellant returned to PW6's shop to collect the phone he was arrested and subsequently charged with robbery with violence contrary to **section 296(2)** of the Penal Code, and alternatively with handling suspected stolen goods contrary to **section 322** of the Penal Code.

In his sworn defence, as we have said earlier, the appellant denied involvement in the robbery but conceded that he had been sent by his uncle, **Sapota**, to go to PW6's shop to collect his phone which was being charged; and that his uncle had given him Kshs.20 and a receipt to take to PW6 in order to collect the phone. He was surprised when he was arrested while collecting the phone on claims that he had been involved in a robbery in which the phone was stolen.

Both courts below made concurrent findings that the complainant was violently robbed of personal items by a gang of 3 people; that two days after the robbery the appellant was found in possession of the phone, one of the items stolen from the complainant in the course of the robbery; that at the scene of the robbery the complainant and PW2 were able to see and identify the appellant with the aid of headlight of the motor cycle; that the robbers spent considerable time with the complainant and PW2 thereby affording the latter two sufficient opportunity to see them well; that, apart from the fact that the appellant was known to the complainant and PW2, he stood out from the rest because he was the only one who had dreadlocks; and that the appellant's defence drawing the uncle into the matter was an afterthought. With that the trial court convicted the appellant and sentenced him to death, a decision which was upheld by the High Court, thereby prompting this appeal. The appeal was brought on two broad grounds but only one was argued, that, the High Court erred in law in failing to re-examine and re-evaluating the evidence recorded by the trial court; that had it done so it would have found that there was no evidence to support the charge; and that the sentence imposed was extremely punitive, harsh and excessive considering the circumstances of the case**.**

Miss Otieno, learned counsel for the appellant submitted before us that after the trial magistrate made a finding that PW8 who investigated the crime was unreliable, and having identified material contradictions in the prosecution case, he ironically found that there was sufficient evidence to warrant a conviction. The contradictions related to the question whether or not, at the time of the robbery the appellant had dreadlock hair style; that the complainant and PW2 did not agree on the question of dreadlock; and that the list of stolen items in the charge sheet was contradicted by witnesses, with some excluding some items while others added some items. There was also, according to counsel, discrepancy on the value of the mobile phone.

On the injuries suffered by the complainant, it was submitted that there was no evidence that the complainant was attended by PW3, that there was failure to produce the blood-stained clothes worn by the complainant during the attack; and that it was not procedural for the same Clinical Officer to complete the P3 form and treat the victim. We do not understand this complaint.

Finally Miss Otieno urged us to allow the appeal because, in her view, the offence charged was not proved. Instead, and if anything, she said, the evidence presented only disclosed the alternative charge of handling suspected stolen goods.

The appeal was opposed by the respondent, and through the Principal Prosecution Counsel, **Mr. Yamina**, it was argued that the doctrine of recent possession was properly applied and the appellant's explanation as to his possession of the phone properly rejected; that the so-called contradictions were resolved by the trial court; that even if the evidence of PW8 was to be excluded, the trial magistrate found sufficient evidence in the testimony of PW7 (erroneously described as PW5); and that the other contradictions were minor and immaterial.

Most of these issues are clearly matters of fact which we have no jurisdiction to entertain. They were however raised, not for our determination as we, unlike the High Court, cannot re-evaluate that evidence, but as a way to show that had the High Court re-evaluated it, it could not have found the offence proved. We think however, the contradictions were effectively resolved by both courts below and found to be immaterial and we find no compelling reason to depart from those findings.

On identification, again the two courts below found as a matter of fact that, although the attack occurred at night the appellant was recognized by both the complainant and PW2 who had known him for some time before the date of the attack; that he spent some time with the victims; and that the appellant stood out due to his dreadlock hair style, a fact which the appellant himself admitted in his defence. We cannot interfere with those findings of fact as it is clear to us they were based on evidence presented before the trial magistrate who had the opportunity to observe the demeanour of the witnesses and found the evidence of the complainant and PW2 credible. That evidence received further consideration, re-evaluation and analysis by the first appellate court which also found it credible.

Regarding the application of the doctrine of recent possession, it is common factor that the appellant was arrested when he went to collect the mobile phone from PW6. The trial court believed PW6 when he testified that the phone was delivered to him by the appellant who gave his name as Sapota which was the name in which the former issued the receipt. From the point of his arrest, and throughout the trial the appellant did not suggest that the phone belonged to his uncle. Without appearing to shift the burden, it was incredible, bearing in mind the seriousness of the offence, and the consequences of a conviction, that the appellant would fail to direct the police at the point of his arrest to his uncle.

The doctrine of recent possession, as circumstantial evidence must point to the suspect exclusively and no co-existing factor likely to weaken the inference of the suspect's guilt must exist. See **R v Kipkering Arap Koske & another (1949) 16 EACA 135**. Secondly for the court to convict on this doctrine there must be proof that the item found in the suspect's possession was stolen; that it was stolen a short period prior to its possession; by the suspect, that the lapse of time from the time of its loss to the time the suspect was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item; and that the owner of the item was able to positively identify it as his. Where these factors are proved, a rebuttable presumption that the suspect was either the thief or receiver of stolen item arises. See **Arum v R, Criminal Appeal No. 85 of 2005**.

The complainant was able to identify the phone from a clear mark, CM inscribed on it being initials representing his name, Cosmas Mramba. PW6 who had borrowed the phone from the complainant and used it for some time and was therefore familiar with it and its features also quickly recognized it. The phone was recovered only two days after it was stolen. The inference properly drawn by the trial court and confirmed by the High Court and which the appellant failed to rebutt was that he was part of the gang that robbed the complainant on the night in question. This evidence taken together with the evidence of direct recognition of the appellant, leaves us in no doubt that he was properly identified. All the essential ingredients of the offence were proved.

We, for these reasons, find no merit in the appeal which we accordingly dismiss.

Dated and delivered at Mombasa this 27th day of May, 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