IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWILU & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 18 OF 2013

BETWEEN

RAPHAEL YULU MUTUA ……..…… 1ST APPELLANT

WAMBUA SYOKI MUSAU ……..…… 2ND APPELLANT

ERICK KALOLU KIVELENGE……..…… 3RD APPELLANT

VERSUS

REPUBLIC ……...……...…. RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (Makhandia & Dulu, JJ.) dated 5th October, 2012

in

H.C. CR.A. No. 229, 230 & 231 of 2011)

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JUDGMENT OF THE COURT

This is a second appeal from the judgment of the Principal Magistrate's Court at Kilungu where the appellants **Raphael Tulu Mutia, Wambua Syuki Musau and Eric Kalulu Kiverenge** were jointly charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence were that on 8th January, 2011 at Kilome slaughter house jointly with others not before court they robbed Joseph Mwongela Kalili of a motor cycle registration number KMCK 365N make Kin Rod valued at Shs.123,000/=; a mobile phone make Nokia 2100 valued at Shs.3,500/=; black jacket valued Shs.2500/=; a pair of canvas shoes valued at Shs.1000/= and cash Shs.500/= and that immediately before the time of such robbery they threatened to use actual violence to the said person.

A trial was conducted before H. Nyakweba, Principal Magistrate and the appellants were convicted in a judgment delivered on 29th November, 2011 and they were sentenced to death.

A first appeal to the High Court of Kenya at Machakos (Asike Makhandia, J (as he then was) and George Dulu, J. was dismissed in a judgment delivered on 5th October, 2012. The appellants were dissatisfied

with the judgment of that court and have filed this second appeal premised on the supplementary memorandum of appeal filed on 27th July, 2015 and a further supplementary memorandum of appeal filed on 13th May, 2016 and on behalf of the 3rd appellant a supplemetary memorandum of appeal filed on 30th January, 2015.

In sum the grounds of appeal can be summarised as follows:- that the apellants were not accorded a fair hearing contrary to **Article 50(c)** of the **Constitution of Kenya, 2010;** that the alibi defence put forward by the 1st and 2nd appellants was not considered; that the evidence against each of the appellants was not considered separately as required by law; that the evidence did not prove the charge to the required standard; that the particuars of the charge sheet were defective; that there was no positive identification of the 3rd appellant and that the doctrine of recent possession on which the appellants were convicted was not proved.

The brief facts of the case as presented by the prosecution were that on 8th January, 2011 Joseph Mwongela Kalili (Mwongela) (PW1), a boda boda taxi operator was at 8 p.m. approached by the 2nd appellant who negotiated for a ride to the slaughter house past Kilome. Mwongela and the 2nd appellant rode as agreed but when they reached the designated destination, the 1st appellant appeared and the 2nd appellant requested him to pay the fare. There was a problem because change for Shs.1000/= note could not be found. While this was going on the 3rd appellant appeared suddenly and ordered Mwongela off the motor cycle saying they were thieves. The 1st and 2nd appellants then frog matched Mwongela to the bush, ransacked his pockets and took from him the items set out in the charge sheet. They abandoned him in the bush, ran to the motor cycle which had been left with the engine running and the three appellants sped off. Mwongela walked to Kilome market and reported the incident to his colleagues and also to a police officer who was on patrol. One boda boda taxi operator appeared and stated that he had seen three people riding a motor cycle to a place called Mutiluni. A phone call was made to a police officer Corporal Raphael Terer (PW5) and this officer with others managed to intercept and arrest the three appellants. Mwongela visited Mutiluni A.P. Post the following day, identified the motor cycle and saw the three appellants who had been arrested.

On cross examination by the 2nd appellant, Mwongela stated that he did not identify those who robbed him of the motor cycle.

When it was the turn of the 3rd appellant to cross examine Mwongela the record shows that the following request and the following order were made:

> ***"2ND ACCUSED: Before I continue to cross-examine this witness, I pray that OB. NO. 29/8/1/2011, Kilome police station and OB. NO. 32/8/1.2011 Kilome police station be availed to enable (sic) cross-examine him on their contents.***
>
> ***COURT: OB. 29/8/1/2011 and also OB/NO. 32/8/1/2011 together with abstracts be produced in court. PW.1 be and is hereby stepped down for further cross-examination by the 2nd accused on 20.9.11. Mention 8.8.2011.***
>
> ***H. NYAKWEBA S.R.M.***
>
> ***25.7.2011"***

The matter was adjourned and at the next hearing the record shows that Mwongela was recalled for purposes of further cross examination but there is no record on whether the order to produce occurrence book which had been made was complied with. We shall come to this aspect of the matter later.

On cross examination by the 1st appellant Mwongela stated *inter alia* that there was a fourth person involved in the robbery. He stated:

"The 2nd accused emerged with another after the 3rd accused had called him. He came with another fourth person. My motor cycle was taken by three people being the three in the dock. The fourth person took away my clothes and ran away."

Tom Kiio Kithome (Kithome) (PW2) was on the said date of 8th January, 2011 at 8 p.m. riding his motor cycle in Kilome near the slaughter house when he found a motor cycle parked at the road side and there were three people standing there while a fourth person was on the motor cycle. He stopped and enquired whether there was a problem but was told there was none. He went his way but later learned that Mwongela had been robbed of a motor cycle. He took Mwongela to Kilome Police Station to make a report. The next day he was called to the police station and he was able to identify the 3rd appellant as one of the persons he had talked to the previous night. He also recognized the 1st and 2nd appellants.

Christian Kyalo Mutungi (Mutungi) (PW3) on the same day at about the same time saw a person pushing a motor cycle from the Kilome direction, another person carrying a jerrican and a third person walking by their side. When they approached him, the person with the jerrican asked for some fuel because their motor cycle had run out of it. He had no fuel to give to them and they went their way. When he got a customer and was riding towards Mavivye he passed the same people still pushing the motor cycle. On reaching Malili he learnt that a motor cycle had been stolen. He told a police officer about the people he had seen and took three police officers towards Malili where he dropped them. He rode on and met the appellants who were now riding the motor cycle. He turned and followed them. When they approached where the police officers were Mutungi flashed his lights to attract the attention of the police officers. One police officer hit the motor cycle destabilising it and the three occupants fell down. The three appellants were then arrested. He later identified the three appellants as the persons who had fallen off the motor cycle. He said there was electric light which helped him to identify the appellants.

A.P.C. Stanley Maina (Maina) (PW4) of Mutiluni A.P. Post received a telephone call from Rapahel Terer (PW5) on the said night. He rode with Mutungi towards Mavivye and they met the appellants riding a motor cycle. He destabilised the motor cycle and was able to arrest the three appellants who had fallen down. He later escorted the appellants to Kilome Police Station where they were arrested and charged.

Raphael Terer received a report, interrogated the complainant and rearrested the appellants.

That was the case made out by the prosecution and the trial court found that there was a case to answer against the 3 appellants.

In an unsworn statement the 1st appellant who described himself as a farmer stated that on the date of the alleged offence he went to visit his brother at Manyani in Salama. He did not find his brother and on his way back home he met with administration police officers who ordered him to sit down. He was arrested for an offence he knew nothing about. He was surprised to be charged with the offence before the trial court.

The 2nd appellant also in an unsworn statement stated that on the material day he was in the company of a lady who he had met at Nunguni market. He agreed to escort the lady to her home upon her request. When they reached Mutiluni the lady excused herself and he entered a bar to wait for her. She did not return. He decided to hire a room at a lodging but instead met a police officer who arrested him because he was drunk. He was locked up and arraigned in court for an offence he knew nothing about.

The 3rd appellant similarly in an unsworn statement was on his way to Mutiluni when he caught up with a lady who he engaged in conversation. They were having a friendly chat when they met three men standing by the road side. One of the men was not happy that the 3rd appellant was talking to this lady and accused him of having affairs with other people's wives. He was detained and later charged with the offence which he knew nothing about.

The learned trial magistrate considered the evidence by the prosecution and the defence of the appellants and found that the prosecution had proved the case to the required standard, convicted the appellants and

sentenced them to death.

Their first appeal failed as we have already stated.

In an address before us when this appeal came for hearing on 16th May, 2016, Mr. A.O. Oyalo, learned counsel for the 1st and 2nd appellants, submitted that the case against the 1st and 2nd appellants had not been proved at all or to the required standard, and it was doubtful, according to learned counsel, whether the stolen motor cycle had been in possession of the appellant. In any event, continued counsel, the evidence of PW3 and that of PW4 was contradictory in material particulars as one claimed to have seen three people on the motor cycle while the other saw four people. Counsel faulted the trial court, and the first appellate court for admitting what counsel submitted to be inadmissible evidence, in that PW5 admitted in his evidence that he knew some of the appellants before the incident. Counsel faulted both courts for not considering the evidence of each of the appellants separately as required by law and he relied on the case of **Munyole v Republic [1985] KLR 662** where this Court held that in a joint trial involving more than one accused person, the evidence against each accused must be considered separately and the case against each accused must be such as to prove the guilt of that particular accused beyond reasonable doubt.

Mrs. Betty Rashid, learned counsel for the 3rd appellant submitted that the High Court had faulted in its duty of re-evaluating the evidence and analyzing it to reach its own conclusions. Learned counsel revisited the record and pointed out, as we did earlier in this judgment, that the 3rd appellant had requested production of Occurrence Book of Kilome Police Station and that although the trial magistrate ordered that the same be produced, it was not produced and that, submitted learned counsel, lack of production constituted a mistrial because the said document was a vital piece of evidence. On effect of failure to produce a document considered vital by the defence, learned counsel cited the case of **Lawrence Musyoki v Republic Criminal Appeal No. 323 of 2007 (ur)** where the record of the trial court did not indicate the language of the court and where, on this ground, the State conceded that the trial was a nullity and the court declared the trial a nullity with the result that convictions were quashed. It was also held there that cases that attracted retrial were ordinarily cases that had been decided recently. Mrs. Rashid submitted in this respect that the 3rd appellant had been in custody for a long time and a retrial was in her view not suitable.

On other grounds of appeal learned counsel for the 3rd appellant submitted that the doctrine of recent possession had not been proved to the required standard because, said counsel, the stolen motor cycle was not found with the 3rd appellant who, in any event, gave a detailed account of his movements which both courts did not consider. Learned counsel completed her submissions by pointing out that there was a variance in the value of the motor cycle as set out in the charge sheet different from the evidence and that such variance constitutes a grave miscarriage of justice which results in the trial being a nullity.

Mrs. G. Murungi, Senior Assistant Director of Public Prosecutions, while opposing the appeal, submitted that all the three appellants were arrested together while riding the stolen motor cycle and that such arrest was immediate. On contradictions in the prosecution evidence learned State Counsel was of the view that such contradictions, if at all, were minor and did not affect the prosecution case. Learned counsel submitted further that failure to produce occurrence book as ordered by the trial court did not occasion a miscarriage of justice as, according to counsel, there was other evidence which the trial court relied on to convict the appellants. Counsel concluded by submitting that the evidence led by the prosecution satisfied the doctrine of recent possession and the conviction was safe.

We have considered the record of appeal, the Memoranda of Appeal, submissions of learned counsel for the respective appellants and the respondent and have also considered the authorities cited and all the applicable law.

On the issue of identification the trial magistrate analysed the evidence adduced by the witnesses and was not satisfied that the complainant (Mwongela) or other prosecution witnesses had sufficient opportunity to interact with the appellants to be able to make a positive identification. The trial magistrate held:

"……It must be noted that this offence was committed at night when it was dark. The suspects were strangers to both PW1 & 2. There was therefore need for an identification parade. In ignorance of the law, when these witnesses heard that the suspects had been arrested, they marched to the A.P. Camp where its officers also in ignorance showed them the suspects. This was not a proper identification …… The complainant and his eye witness did not positively identify these people to be the three accused persons. ….."

The trial magistrate therefore disregarded evidence on identification but proceeded to consider other evidence. Such evidence was that the three appellants were intercepted by police and arrested while riding the stolen motor cycle and that there was no break in the chain of events – Mwongela was robbed of his motor cycle with a threat of violence and the stolen motor cycle was recovered about 1 hour later with one appellant riding it while the other two were pillion passengers on the same. The trial magistrate believed this piece of evidence finding it truthful and reliable and further finding that a person found in possession of a recently stolen item has a duty to explain how they came by that stolen item.

The High Court on first appeal, reanalysed the evidence and agreed with the trial magistrate that the prosecution had failed on the aspect of identification of the appellants. That court was however satisfied that the doctrine of recent possession had been proved and that the conclusion reached by the trial court was correct and safe.

It was the evidence of PW3 Mutungi that he followed the stolen motor cycle which was being ridden by the appellants and that upon reaching where police officers who included PW4 A.P.C. Maina was he flashed his lights to attract the attention of the officers and that:

"…… one officer hit the motor cycle with his leg and destabilized it. It rolled and all its occupants (sic) three occupants (sic) fell down. Each of the officers arrested one of the suspects ….."

A.P.C. Maina corroborated this evidence in every material particular when he testified that:

"…..We then stopped them and when they slowed down, I hit the motor cycle using my leg and it lost control. This motor cycle had three occupants whom we arrested. They are the three persons in the dock …. The motor cycle we recovered from them is the one in court ….Upon arrest we took the three to our A.P. Post ……"

So that there was no break in the chain of events at all. Although there was no proper identification of the appellants by the witnesses there was an unbroken chain where Mwongela was robbed of his motor cycle and the same was recovered while being ridden by the appellants about 1 hour after the robbery and the appellants were arrested at the scene of recovery of the stolen motor cycle. None of the appellants gave any explanation on how they came to have the stolen motor cycle and it was their duty to give an explanation, failure to which the trial court and the first appellate court were entitled to hold as they did that the appellants were the thieves. We dismiss the appellants' complaint on the issue of identification, which the two courts properly held as not having been proved and agree with those courts that the doctrine of recent possession was properly proved and it was safe to convict the appellants as charged, as they were found in recent possession of the recently stolen motor cycle and did not offer any explanation for such possession.

Counsel for the 1st and 2nd appellants and counsel for the 3rd appellant complain that the appellant's alibi defences, were not considered but were ignored. What were these alibi defences? The 1st appellant stated that he was in the company of a lady who left him at a bar and that he started consuming alcohol as he waited for her return but on her failure to return he was in the process of hiring a lodging for the night when he was arrested. The 2nd appellant stated that as he walked to Mutiluni he caught up with a lady who he engaged in conversation but that some men were not happy with him and caused his arrest.

The 3rd appellant on the material day went to Salama to look for his brother who had moved out of that place but that he was arrested on his way back home.

These were, to say the least, no alibi defences at all. The appellants should, in any event, have raised alibi defences early enough in the trial to enable that to be investigated. That was not done at all. The prosecution case on the doctrine of recent possession was however too strong that alibi defence, if there was any, was totally displaced by prosecution evidence.

The 3rd appellant requested for production of occurrence book of Kilome Police Station to enable him continue cross-examination of PW1, Mwongela. That request was granted; the trial was adjourned and the record shows that on the next hearing date PW1 was "recalled and reminded that he is still on oath" and there is a record of further cross-examination of the said witness who stated in sum that he reported the robbery incident to the police but did not give the registration number of the motor cycle.

Mrs. Rashid, learned counsel for the 3rd appellant, submitted that failure of the prosecution to produce occurrence book as ordered by the trial court contravened the 3rd appellant's fair trial rights making the trial a nullity.

Mrs. Murungi, learned Senior Assistant Director of Public Prosecutions, reminded us, firstly, that such issue was not raised before the High Court on first appeal and, secondly, that, if the occurrence book was not produced as ordered, it did not occasion a miscarriage of justice as there was other evidence which the trial court relied on to convict the 3rd appellant.

We have perused the record. The same has no direct reference on whether occurrence book was produced or not. What is shown is that the court resumed after adjourning to enable the prosecution to call for and produce occurrence book and that, upon resumption and PW1 being reminded on the oath he had earlier taken, further cross examination took place where PW1 Mwongela testified *inter alia* on how he reported the incident to police. It is unclear why the 3rd appellant requested or required production of the said occurrence book. The record does not show any basis being laid for the request. All that is shown is that the 3rd appellant started cross examining PW1 Mwongela but in the middle of this he merely said that before he could continue, occurrence books should be produced. The court quickly granted the request. When the trial resumed the 3rd appellant proceeded with cross-examination and there is no complaint from him that occurrence books were not produced. What is shown is that he proceeded with cross-examination.

A further perusal of the record does not show the 3rd appellant asking any relevant question in respect of occurrence book for Kilome Police Station in cross examination when police witnesses testified. It is therefore not clear whether the objective the 3rd appellant wanted to achieve through production or reference to occurrence book was met in other ways or not. We observe, also, that PW1, Mwongela was not the proper witness to produce an occurrence book for a police station at all, production which should have been sought of police witnesses who were part of the trial before the trial court.

Further, the 3rd appellant, on resumption of the trial and upon his being given opportunity to further cross examine PW1, Mwongela, did not raise an issue on absence of occurrence book which he had requested at the previous hearing a request which had been granted and the trial adjourned on that basis. We think the situation there was what was contemplated by

Section 382 of the **Criminal Procedure Code** which provides that:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, proclamation, order,***
>
> ***judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularly has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure***

of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

That provision allows higher courts to uphold findings of lower courts where irregularities are found in proceedings which do not affect the outcome of a trial and which errors, omissions or irregularities do not occasion a failure of justice. This has been the subject of judicial pronouncement – see for instance, this court's decision in **Joseph Maina Mwangi v Republic [2000] eKLR** where it was observed:

"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."

And there is further statute law. **Section 175 Evidence Act** as relates to admission or rejection of evidence provides that the improper admission or rejection of evidence shall not of itself be ground for a new trial or reversal of any decision in a case if it appears to the court before which the objection is taken, that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision.

Were the cases of each appellant considered separately as required in law? Our own perusal of the record shows that the trial court, and the first appellate court, considered the case of each appellant separately and came to the correct conclusion that the prosecution had proved the guilt of each appellant to the required standard.

We did not find any merit on any of the grounds of appeal and the effect of our findings is that the appeal is dismissed.

Dated and delivered at Nairobi this 8th day of July, 2016.

W. KARANJA

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JUDGE OF APPEAL

P.M. MWILU

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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