IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIHARA KARIUKI (PCA), MWILU & MUSINGA, JJ.A)

CRIMINAL APPEAL NO. 79 OF 2013

BETWEEN

AGNES MUENI MUTUKU ……...……..…............. 1ST APPELLANT

DAVID GATUNDU NGUGI ………………………….....2ND APPELLANT

AND

REPUBLIC …………………….............……….......…RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nairobi (Ochieng & Achode, JJ.) dated the 6th November 2012

in

H. C. Cr. A. No. 468 of 2007)

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JUDGMENT OF THE COURT

(1) On the 10th April, 2006, David Mwangi Waweru (David) was working as a taxi driver stationed along Koinange Street in Nairobi. At about 7:20 pm he was approached by two men and a woman who said that they wanted to be driven to Gitaru. When they reached Gitaru, it turned out that his passengers were robbers. One of the assailants grabbed the car keys and he was forced by the other two, who he later identified as the appellants herein, to the rear seat of the car. His assailants then produced six white tablets which he was forced to take. As a result, David became unconscious and woke up the following day besides the road in Kikuyu Township. He went and reported the matter to Kikuyu Police Station.

(2) On the 11th April, 2006, Corporal Joseph Getari Changa (PW5), who was at the time attached to the Birongo Police Patrol, was on patrol with other officers. He had information that the vehicle in question had been stolen and that a market was being sought for it. The vehicle had been parked somewhere the whole day, and in the evening, when it was being moved, he intercepted it. According to this witness, the 2nd appellant was driving the vehicle while the 1st appellant was his passenger. He arrested the appellants and they, together with the stolen vehicle, were taken to Kisii Police Station. In the car, Corporal Changa found a piece of paper with some phone numbers. He called one of the numbers and it was answered by James Kamau Githaiga (PW2) who is the owner of the vehicle. James went to Kisii Police Station where he confirmed that the stolen vehicle belonged to him.

(3) On the 18th April, 2006, two identification parades were conducted. In both parades, David identified the appellants by touching them.

(4) These are the events that led to the appellants' arraignment before the Principal Magistrate's Court at Kikuyu. They were charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of that offence were that on the 10th April, 2006, they, together with others not before the court, robbed David Mwangi Waweru of a motor vehicle make Toyota Corolla, Registration No. KAR 784Q, a motorolla C113 mobile phone, a pair of shoes and Kshs. 650.00, all valued at Kshs. 414,150.00, and at, or immediately before or immediately after the time of such robbery threatened to use actual violence to the said David Mwangi Waweru.

(5) In their respective defences, the appellants denied committing the offence they were charged with. The 1st appellant stated that she was arrested at a hotel in Kisii where she had gone to have a meal, while the 2nd appellant stated that he had hired the vehicle from David so that he could transport a haul of bhang and chang'aa from Kisii. The agreement between him and David was that he would return the vehicle by 6:00 am of the next day. However, the vehicle developed some mechanical faults, and David became annoyed and reported that it had been stolen so that his employer would not know that he had taken away the vehicle.

(6) The trial court disbelieved the appellants' version of events. Being satisfied that there was overwhelming evidence against the two appellants, the trial court convicted them, and sentenced each to death as provided in law.

(7) The appellants were aggrieved with that conviction, and they preferred an appeal to the High Court. They contended that the case against them had not been proven beyond a reasonable doubt; that the convictions were based on speculation and conjecture; that their defences were not considered by the trial court; and that the judgment did not tally with the evidence adduced.

(8) During that appeal, Miss Maina, appearing for the State, conceded the appeal on the grounds that the identification of the appellants was unsafe due to the fact that there were no lights where the robbery took place.

(9) In determining the appeal, the High Court evaluated whether the doctrine of recent possession was applicable to the circumstances of the case, and whether the identification of the appellants was sound enough to form a basis for conviction.

(10) Regarding the identification of the appellant, the first appellate court rendered itself in the following manner:

> ***"9. In the case before us no evidence was led as to the manner of lighting at Nginyo Towers where the complainant picked up his passengers, or at Gitaru where he was attacked. The record does not indicate how long the appellants were exposed to the witness and whether, while in the taxi enroute to Gitaru he was in any position to observe their faces.***
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> ***10. The record does indicate that he did not know his assailants before the attack, and that he did not give their descriptions to the police officers when he reported the robbery. For the foregoing reasons, we agree with the learned state counsel that identification was not sound."***

(11) The High Court, however, noted that the appellants were arrested a day after the complainant was robbed, and that at the time of their arrest, they were in possession of the vehicle. The court therefore tested the evidence to establish whether the doctrine of recent possession was applicable. On this point the first appellate court expressed itself as follows:

“23. Holding the circumstances of the case before us to the test in <u>Arum v Republic</u> [2006] 1 KLR 233], we are satisfied that the motor vehicle registration No KAR 784Q was found with the suspects and that it was the property of PW2 who had put it in the possession of the complainant, his driver. We find that the property had recently been stolen from the complainant, since it was stolen the evening before it was recovered.

24. We also, are of the view that a motor vehicle is a commodity of such nature and value as not to render it capable of being easily passed from person to person.”

(12) Based on this analysis, the court accepted the prosecution’s version of events and found that the appellants were properly convicted. The appeals were therefore dismissed.

(13) The appellants being still aggrieved, have now moved this Court challenging the decision of the first appellate court. Mr. Mogikoyo, learned counsel for the 1st appellant, relied on the fourth ground in the memorandum of appeal dated 14th February, 2014, which is that the High Court erred in law by invoking the doctrine of recent possession. Counsel submitted that in the High Court, the State had conceded the appeal on the issue of identification, but the court maintained the convictions based on the doctrine of recent possession. Counsel contended that this was an error as the evidence available was not enough to meet the standard required in law. He submitted that theft must be proved beyond reasonable doubt but in the instant case, the testimony of the complainant was unclear as to the fact of robbery since he did not describe the scene or the struggle. In addition, Mr. Mogikoyo submitted, there was testimony that the complainant appeared drunk; in counsel’s view, the prosecution ought to have given medical evidence to prove that the complainant had been drugged. Counsel asserted that the vehicle was not stolen from David (PW1),but he simply made up a story.

(14) Mr. Oyalo, learned counsel for the 2nd appellant, relied on the supplementary memorandum of appeal filed on the 24th June, 2014. The grounds contained therein are that the first appellate court misdirected itself in: basing its decision on the doctrine of recent possession; failing to re-evaluate the evidence as required by law; basing the convictions on speculation and conjecture; and in considering matters which were irrelevant to the matter at hand. Mr. Oyalo also adopted Mr. Mogikoyo’s submissions on the doctrine of recent possession, and submitted further that in the circumstances, it was reasonable to suggest that the 2nd appellant had hired the vehicle from David (PW1), and then it developed some mechanical problems.

(15) Mr. Omondi, Senior Assistant Director of Public Prosecutions, conceded the appeal. He argued that the ingredients of the doctrine of recent possession which had been approved by both courts below had not been met, since the stolen vehicle could easily have changed hands before it was recovered in Kisii. In addition, counsel submitted that the 2nd appellant gave a reasonable explanation as to why he was arrested in the vehicle, and as a result, upholding the conviction on the doctrine of recent possession was unsafe.

(16) In a second appeal, this Court’s jurisdiction is limited by ***section 361*** of the Criminal Procedure Code. As such, the Court has a duty to accept the findings of fact of the lower courts, unless those

findings cannot be supported in evidence. This has also been enunciated in various decisions of this Court in the line of ***M'Riungu v Republic*** ***[1983] KLR 455*** in which the Court rendered itself thus:

> ***"Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."***

(17) In ***Christopher Nyoike Kangethe v Republic*** ***[2010] eKLR*** *(Criminal Appeal No. 306 of 2005)* as well, the Court stated that:

> ***"An invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so. And the only compelling reason(s) would be that no reasonable tribunal could on the evidence adduced have arrived at such findings, or in other words, the findings were perverse and therefore bad in law."***

(18) We have considered the record of appeal as well as the rival submissions of the parties before us. The appellants were identified by David (PW1). The law on identification requires that identification evidence must be scrutinised with the greatest care before a court can rely on it to convict. In the words of this Court in

Francis Kariuki Njiru & 7 Others v Republic ***[2001] eKLR (Criminal Appeal No. 6 of 2001)*** this Court rendered itself as follows:

> ***"… The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."***

(19) In this appeal, it did not come out clearly in the evidence if David had a look at his assailants, and if there was any light that would have enabled him to do so. In addition, when David went to report the incident, he did not provide a description to the police of the people who robbed him. We therefore agree with the first appellate court that the identification of the appellants was not safe because the circumstances of identification were difficult.

(20) The first appellate court upheld the conviction of the appellants based on the fact that the vehicle found in their possession had recently been stolen. The main issue that arises for our determination is whether or not, on the evidence that was presented before the Court, this was the correct conclusion to make.

(21) The doctrine of recent possession can be the basis of a conviction. The circumstances in which the court may base a conviction on this were set out in

Gideon Meitekin Koyiet v Republic ***[2013] eKLR*** *(Criminal Appeal No. 297 of 2012)* where this Court stated that the doctrine of recent possession is applicable where the court is satisfied that the prosecution has proved the following:

> ***"a) that the property was found with the suspect;***
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> ***b) that the property was positively identified by the complainant;***

c) that the property was recently stolen from the complainant."

(22) Thus, where an accused person is found in the possession of goods that have recently been stolen, then the inference is that he is the one who stole them. This inference can, however, be dispelled if the accused person offers a reasonable explanation as to why he is in possession of the stolen property. See ***Hassan v Republic*** ***[2005] 2 KLR 11*** where the Court delivered itself in the following terms:

> ***"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver."***

(23) The 2nd appellant herein admitted in his defence that he was arrested near the vehicle. He testified that on the night of the 10th April, 2006, he had hired the vehicle from David, and when he informed David that the vehicle had developed mechanical problems, David was annoyed. This evidence came out clearly in the 2nd appellant's evidence when he stated that:

> ***"At 10 am my clients called me and wanted another supply of bhang. I telephoned my taxi driver and told him. We were to go to Kisii. We linked up at 4 pm and I paid him Kshs 10,000 as down payment. This is David Mwangi. At 7 pm, I went and David gave me another driver to go with. We left David at***
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> ***Gitaru. He wanted the motor vehicle by 6 am. He did not want the owner of the motor vehicle or other taxi driver to know of our dealings…. Our motor vehicle developed a mechanical problem when I was a kilometre away."***

(24) To our minds, this explains why this appellant was arrested near the subject motor vehicle. This finding is further strengthened by David's own testimony in cross examination where he stated that:

> ***"On 8th April 2006 you had hired me and I took the four of you to the same place."***

(25) It seems reasonable to us that David and the 2nd appellant met two days prior to him taking the car to Kisii.

(26) In addition, David's evidence as to whether or not he and the 2nd appellant had met before was quite contradictory. While we are aware that in any trial there are bound to be some minor inconsistencies, these inconsistencies should not be such that they affect the tenor and weight of the evidence. When he was cross-examined by the second appellant, David testified as follows:

> ***"the woman who alighted went out but did not know where she went. I had not known you before. Nobody else witnessed the incident. I did not know what drugs I was given. On 8/4/06 you had hired me and I took the four of you to the same place. When I was driving I was not looking at you. I described you to the police. My statement was recorded by police officers. I recorded that I could recognise my assailants if I saw them…. I do not do any business with you."*** *(sic)*

(27) David stated that he had never met the 2nd appellant before. He later stated that he had been hired by the 2nd appellant only two days prior, and that he knew him. He also stated that he never looked at the appellant when he drove him to Gitaru, but that he had informed the police that he could recognise his assailants. These inconsistencies, in our view, cast grave doubt as to whether or not David was actually attacked by the appellant, and as has been stated by this Court before, any doubt must go to the benefit of the appellant. See ***Parvin Singh Dhalay v Republic*** ***[1997] eKLR (Criminal Appeal No. 10 of 1997)*** where this Court stated:

> ***"We think that if there be other co-existing circumstances which would weaken***

> ***or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal."***

The conviction against the 2nd appellant therefore cannot stand.

(28) What of the 1st appellant? She testified that she was arrested at a restaurant where she had gone to have her dinner. Without the identification evidence, there is no evidence, save that of Corporal Changa (PW5), that ties the 1st appellant to the crime. It is noteworthy that the 2nd appellant, who admitted being in the vicinity of the stolen vehicle, stated that he was with one other person who ran away when the police arrived at the scene. He never made any mention of the 1st appellant, and this casts doubt as to whether or not she was arrested while in possession of the vehicle. The benefit of doubt in this case lies in her favour, and for this reason, we find that her conviction as well was unsafe.

(29) Given our reasons, we find that both these appeals are meritorious. In the result, we allow the respective appeals and order that each of them, the 1st and the 2nd appellants, be and are hereby respectively set free forthwith, unless either or both of them are otherwise lawfully detained.

Dated and delivered at Nairobi this 20th day of February, 2015.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.