IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 83 OF 2014

BETWEEN

DICKSON NDWIGA NJERU ……..……. APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Khaminwa &

Makhandia, JJ.) dated 31st July, 2008

in

H.C.CR.A No. 46 of 2007)

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JUDGMENT OF THE COURT

1. ***Dickson Ndwiga Njeru,*** the appellant was charged with one count of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code*** and an alternative charge of handling stolen property contrary to ***Section 322(2)*** of the ***Penal Code*** in the Senior Principal Magistrate's Court at Embu.

2. The particulars of the main count were that on 21st December, 2005 at Kavutiri Sub-Location in Embu District within the then Eastern Province, the appellant jointly with others not before court being armed with dangerous weapons namely pangas robbed Nyagah Kathuguyah cash Kshs. 250/=, a mobile phone, a wrist watch and torch all valued at Kshs. 14,300/= and at or immediately before or immediately after such robbery used personal violence on the said Nyagah Kathuguyah. On the alternative count, the particulars were that on 21st December, 2005 at Manyatta Police Station in Embu District within the then Eastern Province, otherwise than in the course of stealing retained one Seiko wrist watch knowing or having reason to believe it to be stolen.

3. The appellant pleaded not guilty to all counts and the prosecution called a total of five witnesses. It was the prosecution's case that on 21st December, 2005 at around 8:30 p.m. while PW1, Nyagah Kathuguyah (Nyagah), was at the junction near his home three torches were pointed at his face by some people who

ordered him not to run away, those people identified themselves as policemen. Being suspicious that the said persons were not police men, Nyagah ran away screaming; the assailants ran after him and managed to trip Nyagah before he could reach the gate to his father's compound; the assailants sat on Nyagah and stole his mobile phone make Erickson 710, wrist watch make Seiko 5, a torch and cash Kshs. 250/=.

4. Meanwhile, PW2, Christopher Muchangi Nderi (Christopher), PW3, Elias Kariuki Njeru (Elias) and PW4, Stanley Kimathi (Stanley) who were in Christopher's house were attracted by the screams and came out of the house. Christopher pointed the torch he had towards the scene and saw three people on top of another person; the assailants ran away and Nyagah got up and ran towards Christopher, Elias and Stanley and informed them what had happened. They then ran after the assailants who had fled towards Manyatta; one of the assailants' entered a tea plantation and they followed him; as he was running the assailant fell down and they apprehended him. He was armed with a panga. The said assailant was the appellant. The appellant was taken to Manyatta Police Station wherein PW5, P.C. Michael Cheruyot (PC Michael) searched him and recovered a wrist watch make Seiko 5 which was identified by Nyagah as the one which was stolen from him. The appellant was re-arrested, arraigned and charged in court.

5. In his defence, the appellant gave unsworn statement. He testified that on the material day he had gone to visit his in-laws at 10:00 a.m. and left at around 7: 30p.m. After walking for about 100 yards from his in-laws house he met with some people who ordered him to sit down. He complied and the said people inquired where he was coming from, he informed them and gave them his Identification Card. Upon realizing that he was not from the area, the said people begun beating the appellant and later took him to the police station. The appellant maintained that the wrist watch in question belonged to him and produced a receipt in support of his contention.

6. Satisfied that the prosecution had proved its case to the required standard, the trial court convicted the appellant for the offence of robbery with violence and sentenced him to death. The appellant preferred an appeal in the High Court against the said conviction and sentence. The said appeal was dismissed by a judgment dated 31st July, 2008. It is that decision that has provoked this second appeal based on the following ground: -

- ***The learned Judges of the High Court erred in law and facts in failing to properly re-evaluate the evidence on record thus arriving at a wrong conclusion that the case was proven to the required standard.***

7. Mr. Kimunya, learned counsel for the appellant, submitted that the prosecution did not prove all the ingredients of the offence of robbery with violence. He urged us to allow the appeal.

8. Mr. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal submitted that the two lower courts had made concurrent findings and this Court ought not to interfere with the same. The appellant was chased by PW1, 2, 3 & 4 and arrested on the same day. The appellant's conduct was inconsistent with his innocence. This is because he gave a fabricated receipt alleging it was proof that the wrist watch belonged to him.

9. We have anxiously considered the record, submissions by counsel and the law. By dint of ***Section 361*** of the ***Criminal Procedure Code*** we are restricted to only consider matters of law in this second appeal. In ***Chemagong -vs- R (1984) KLR 213*** at page 219 this Court held,

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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."

10. It is not in dispute that Nyagah was not able to identify his attackers during the incident. The only evidence against the appellant was that he was pursued and apprehended by members of public immediately after robbery; he was also found in possession of the stolen wrist watch, soon after the robbery.

11. It was the prosecution's uncontroverted evidence that upon hearing screams, Christopher, Elias and Stanley went to Nyagah's aid. The assailants ran away and Christopher, Elias, Stanley and Nyagah ran after them; they pursued the appellant and managed to apprehend him in a tea plantation; they never lost sight of the appellant during the pursuit. Thereafter, they took the appellant to the police station wherein the stolen wrist watch was recovered on him. In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- R-Criminal Appeal No. 272 of 2005***, this Court held,

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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 person to the other."

12. PC Michael testified that the appellant was brought to the police station by members of public; he searched him and recovered a wrist watch on him. The trial court found that PC Michael was a truthful witness and we see no reason to interfere with the said finding. See this Court's decision in ***Nelson Julius Irungu –vs- R- Criminal Appeal No. 24 of 2008***.

13. Nyagah identified the recovered wrist watch as the one which had been stolen. He was able to identify the wrist watch by its glass which he testified had been replaced when the original one broke. We find that the burden then shifted to the appellant to give a reasonable explanation of how he came to be in possession of the recovered wrist watch. In ***Malingi –vs- R(1988) KLR 225***, this Court expressed itself as herein under:-

"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case recent…"

14. The appellant averred that the wrist watch which was recovered on him was his. He produced a receipt in support of that contention. The trial court examined the said receipt and observed as follows: -

"The accused in unsworn defence said the wrist watch was his and he produced a receipt as exhibit D-1. This receipt is a mere fabrication. It was not shown to the prosecution witnesses when they were cross-examined. Secondly, it has cancellations one reading Kshs. 38,000/= and cancelled and another reading Kshs. 3,800/=. It does not show where it originated from. Where the particulars of the seller should be bears the name of the accused and where the name of buyer would be has the name Seiko 5 watch. …….. I reject the receipt as from the foregoing it is clear it is a mere fabrication."

We have examined the copy of the said receipt which is on record and we see no reason to interfere with the foregoing findings by the trial court. Consequently, we find that the explanation tendered by the appellant for being in possession of the stolen wrist watch does not hold any weight. In ***Hassan –vs- R (2005) 2 KLR 11***, this Court expressed itself as follows:-

"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"

15. We find that the appellant having been found in possession of the stolen wrist watch immediately after the robbery leads to the inevitable conclusion that he was involved in the said robbery. In ***George Otieno Dida & Another -vs-R [2011] eKLR*** the appellant therein had been found in possession of the stolen goods less than five hours after the robbery and this Court held that:-

"There are concurrent findings of fact by both the trial and first appellate courts that indeed there were robberies, several items including the ones produced in court were stolen in the course of those robberies, and the appellants were found in possession of the same only five hours or less after the robberies.....In our view, the evidence against the appellants though circumstantial, raised a rebuttable presumption of fact under section 119 of the Evidence Act, Cap 80 Laws of Kenya, that they were either the thieves or guilty receivers. The evidence excludes the latter because they were found in possession only less than 5 hours after the theft and it is not reasonably possible that the goods would have within that short time have changed hands."

16. It was the appellant's contention that the prosecution had not established the commission of the offence of robbery with violence on the part of the appellant. ***Section 296*** of the ***Penal Code*** provides:-

"296(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

17. In ***Johana Ndungu –vs- R- Criminal Appeal No. 116 of 1995***, this Court expressed itself as herein under: -

"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 ingredient of robbery under section 295 is use of or threat to use actual violence against any person or properly at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section;-

- ***If the offender is armed with any dangerous or offensive weapon or instrument, or***
- ***If he is in company with one or more other person or persons, or***
- ***If at, or immediately before, or immediately after the time of the robbery, he wounds beats, strikes or uses any other violence to any person.***

Analyzing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in Section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly."

18. We are of the considered view that the prosecution did prove that the appellant was armed with a panga and that he was in the company of two other robbers during the robbery. In ***Dima Denge Dima & Others –vs- R- Criminal Appeal No. 300 of 2007***, this Court held,

"The elements of the offence under Section 296 (2) are three in number and they are to be read, not conjunctively, but disjunctively. One element is enough to found a conviction."

We find that the prosecution did establish to the required standard that the appellant did commit the offence of robbery with violence.

19. Consequently, we find that the appeal herein lacks merit and is hereby dismissed.

Dated and delivered at Nyeri this 14th day of April, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR