IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.)

CRIMINAL APPEAL NO. 54 OF 2014

BETWEEN

PETER KIMANI KABANDO …….....……..APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Embu (Sergon, Ongundi,JJ) Dated 18th May, 2012

in

H. C. CR.A. NO. 168 OF 2009)

****

JUDGMENT OF THE COURT

Introduction and background.

1. The appellant ***Peter Kimani Kabando*** was tried and convicted on 3rd September, 2009 by the Senior Resident Magistrate at Siakago (**S. *M. Mokua)*** for the offence of robbery with violence contrary to S**ection 296 (2)** of the Penal Code. It was alleged in the charge sheet that on the 18th day of December, 2008 at Kwamiti Village, Mbeti South Location in Mbeere District of the Eastern Province, jointly while armed with offensive weapons (pangas and pieces of wood) he robbed ***Agnes Njeri Kimotho of Kshs. 25,000.00*** and a mobile phone Make Nokia 1110 S/No. 354842015836411 worth **Kshs. 2,500** and at or immediately after or before the time of such robbery used actual violence to the said ***Agnes Njeri Kimotho***. Upon his conviction he was sentenced to the only sentence known in law for this offence-death.

2. On the material day of 18th December 2008, PW1 **Agnes Njeri Kimotho** left her business at 8.00 pm headed home. On the way she was attacked by unknown assailants and robbed of the items enumerated in the charge sheet among them a mobile phone. Two days later on 20th December, 2008 the appellant who was said to be a cousin to **James Ngari Kigoro** was found with the mobile phone. It was alleged the appellant made his way to the home of PW3 to either pledge or sell it to PW3. PW3 took the phone from the appellant and in return gave the appellant Ksh. 700/- with a promise to give the balance later on. PW5 **Asenath Irima Kigoro,** a mother to PW3 and PW6 **Eileen Muthoni** a wife to PW3

confirmed PW3's testimony. The phone was later on traced to PW3 who in turn led police to the arrest of the appellant who was charged with the offence stated in the charge sheet. At the trial, the court believed the testimony of the prosecution witnesses and disallowed the defence for failure by the appellant to give a reasonable explanation on how he came to be in possession of the stolen phone, found appellant guilty and convicted him as charged.

3. The appellant was aggrieved by that decision and he appealed to the High Court (***Sergon and Ongudi,JJ***) which in its judgment dated the 18th day of May, 2012 dismissed the appeal. He is now before us on a second appeal in which he initially raised three undated home-made grounds of appeal. Subsequently, learned counsel for him, ***Mr. H. K. Ndirangu,*** filed supplementary memorandum of appeal raising five (5) grounds namely:-

- ***"The Superior Court erred in law in failing to re-evaluate or re-evaluate properly the prosecution evidence and therefore came to the wrong conclusion in confirming the conviction.***

- ***The Superior Court failed to take into account that the particulars in the charge sheet and the date of apprehension report were such that the appellant could not have been involved in the robbery.***

- ***The learned judge of the Superior Court erred in law in making presumption as to the date of arrest while no evidence was adduced to clarify the discrepancy in the charge sheet.***

- ***The learned judge of Superior Court erred on doctrine of recent possession by failing to appreciate that the alleged stolen property was found with the appellant, and the cell phone was recovered from 3rd party.***

- ***The learned judge of Superior Court erred in failing to come to conclusion that the evidence of robbery by the appellant was in conclusive to convict."***

Appellant's submissions.

4. Learned counsel ***Mr. Ndirangu*** urged us to allow the appeal on the grounds that PW1 (***Agnes Njeri Kimotho***) never identified her assailants; the appellant was therefore convicted on the basis of alleged evidence of recent possession; the appellant was not found in possession of the mobile phone allegedly stolen from the complainant; the said mobile phone was found in the possession of PW3 (***James Ngari Kigoro)*** who had been arrested in connection with the subject robbery and his evidence should have been treated with caution and not acted upon to found the appellant's conviction in the absence of other supportive credible evidence.

5. It was ***Mr. Ndirangu's*** further argument that PW3's evidence was also shaky in that it had been contradicted by his alleged key supportive witnesses namely PW5 (***Asenath Irima Kigoro***) who was his mother and PW6 (***Eileen Muthoni***) his wife. PW3 alleged that he was at his home with his wife (PW6) and child when the appellant allegedly brought the phone. He never mentioned the presence of any other grown up person. Whereas his wife (PW6) and his mother (PW5) alleged that PW5 was also present when the phone was allegedly brought to PW3 by the appellant ***Mr. Ndirangu*** asserted that this contradiction was never reconciled by the two courts below and should therefore be resolved by this Court in favour of the appellant.

6. Turning to the issue of recent possession, ***Mr. Ndirangu*** urged that it was not clear whether the phone was given to PW3 on a sale or as a lien. This discrepancy too, argued ***Mr. Ndirangu,*** was never reconciled by the two courts below and, being a major contradiction, it should be resolved in favour of the appellant.

7. It was also ***Mr. Ndirangu's*** argument that since the appellant explained to PW3 that he had been given the phone by one ***James Njiru,*** the possibility that the phone could have come from a 3rd party who may have been the one involved in the robbery should not have been ruled out by the two courts below. On

that account, we were urged to find that the evidence on recent possession was faulty and should not have been relied upon by the two courts below to found and affirm the appellant's conviction.

8. Turning to the discrepancy in the date of arrest, ***Mr. Ndirangu*** urged us to find that the two courts below failed to reconcile the contradiction in the date of the arrest and the date the appellant was arraigned in Court and find that the conclusion reached on this discrepancy by the two courts below was wrong. They should have believed the appellant when he asserted that he was arrested at a funeral long before the commission of the alleged offence.

The Respondent's submissions.

9. In response, ***Mr. Kaigai,*** learned Assistant Director of Public Prosecutions urged us to dismiss the appellant's appeal on the grounds that the prosecution case was proved to the required standard; there was overwhelming evidence that the appellant left the mobile phone with PW3 as a lien; PW3 was traced with the phone through Safaricom; PW5 and 6 were believed by the two courts below when they testified that they were present when the appellant brought the phone to PW3 and this court should not disturb that finding.

10. Turning to the application of the doctrine of recent possession, it was ***Mr. Kaigai's*** assertion that this was properly applied by the two courts below as the appellant failed to give a reasonable explanation on how he came to be found in possession of the recently stolen phone. The appellant's defence had therefore been completely displaced by the evidence tendered by the prosecution**.**

11. On the alleged discrepancy in the charge sheet, ***Mr. Kaigai*** urged us not to disturb the reconciliation done by the two courts below as the alleged discrepancy, if any, was minor and curable under **Section 382** of the Criminal Procedure Code. Furthermore, it did not cause any prejudice to the appellant in any way**.**

Analysis and determination.

12. This is a second appeal. By dint of the provisions of **Section 361 (1)** of the Criminal Procedure Code, we are enjoined to consider matters of law only. As was stated in the old case of ***Rex v. Hassan Bin Said [1942] EACA 62***:-

> ***" A second appeal lies only upon questions of law. In such a case this Court is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings though it may think it possible or even probable that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the findings of fact. This being a question of law.***

13. That position has since been restated in numerous other appeals and we take it from the case of ***Ganzi & 2 others v. Republic [2005] 1KLR 52,*** where the court stated thus :-

> ***"The Court of Appeal cannot interfere with the concurrent findings of facts by the trial court and the High Court unless they are based on no evidence or unless they were arrived at as a result of misdirection or non direction of such a nature that without them it is reasonably possible that the appellant could not have been convicted".***

14. We have considered the grounds of appeal, record of appeal, the rival submissions of counsel, and the law.

15. On the proper exercise of the first appellate court's mandate, we associate fully with the case of ***Kiilu and another versus Republic [2005] KLR 174*** wherein it was held *inter alia* that:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and drew its own conclusion.

(ii) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own conclusion only then can it decide whether the magistrate findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses"

16. It is clear from perusal of the record that the first appellate court was alive to the above requirement when it stated as follows

> ***"As a first appellate court we are enjoined to reconsider and re-evaluate the evidence before us and arrive at our own independent decision. We also bear in mind that we never saw nor heard the witnesses....."***

17. The court then set out a summary of the evidence tendered before the trial court, and re-evaluated that evidence in the light of the findings of the learned trial magistrate before proceeding to affirm the appellant's conviction and sentence. We find no fault in the procedure adopted by the first appellate court in the discharge of its mandate.

18. As for the evidence on possession the first appellate court made the following observation:-

> "***PW3 was found in possession of this phone (Exb.2) He gave a plausible explanation on how he came to be in possession. This evidence was supported by the evidence of PW5. (his mother) and PW6 (his sister)*** (sic).
>
> ***PW3 said the appellant is his cousin and he lent him money (Kshs.700/=). All that the appellant did was deny giving PW3 the phone. The learned trial magistrate saw the witness*** (sic). ***He believed them. Their evidence was quite systematic. They had no reason to lie against the appellant. PW3 stated that appellant had come to him with the phone on 20th December, 2008 just two days of the robbery. This fits well in the doctrine of recent possession.***
>
> ***The court found that the defence of the appellant did not challenge the prosecution testimony in any way. He did not believe it. The evidence was well considered by the learned trial magistrate. There is no law which states that one may only be convicted when found in actual possession of a stolen item".***

19. **Section 4** of the Penal Code cap 63 Laws of Kenya defines "possession" and gives instances when a person may be said or deemed to be in possession of any item. These include instances where first, one has the item in his actual possession; second, where one knowingly has anything in possession or custody of another person for the benefit of oneself; third, where one has anything in any place for the use or benefit of oneself or any other person; and fourth, where one person has possession of the item with the knowledge and consent of others who also have knowledge and consent to its possession.

20. Once possession is established, all that an accused person is expected to do is to give a reasonable and plausible explanation as was set out in the case of ***Gachuru versus Republic [2005] 1 KLR 688*** wherein it was held *inter alia* that "***where an accused person is found in possession of items which had been recently stolen, the doctrine of recent possession applied.***"

21. In this case, it is undisputed that PW1 who was the victim of the robbery, did not identify any one. One of the items stolen from her was the mobile phone. It was traced two days later while in the possession of PW3. PW3 admitted he was found in possession of the said mobile phone; he was arrested

and locked up in connection with the said possession; he indicated to the police at the earliest opportunity that it was the appellant who sold the phone to him; it is the said indication that led to the arrest of the appellant. When cross-examined, he stated that the appellant had pledged the mobile phone as he wanted money; PW3 trusted the appellant because he was his cousin; his wife and child were present when he gave **Kshs. 700/=** to the appellant; and that the arrangement was for borrowing.

22. PW5 stated that PW3 was her son; she was at the home of PW3 when she saw appellant seated with PW3; thereafter they came to where she was and she heard PW3 tell his wife, PW6, that the appellant wanted to borrow money and pledge the mobile phone he had; she witnessed PW3 take the money from his wife PW6 and then hand it over to the appellant. She maintained in her cross-examination that she was present when the appellant gave the mobile phone to PW3 in exchange for money.

23. PW6 was the wife of PW3. She recalled that the appellant came to her home looking for her husband PW3. She saw them sit down and discuss something and shortly thereafter the husband came and informed her that the appellant wanted to borrow money and was pledging a mobile phone. She maintained in her cross-examination that she saw the appellant with the mobile phone.

24. ***Mr. Ndirangu*** took issue with the above account of events because first, according to him, the two courts below did not reconcile the contradiction as to whether the exchange of the money for the mobile phone between PW3 and the appellant was for a sale or a pledge of the said mobile phone. Second, the issue of PW5 not having been mentioned by PW3 to have been present during the exchange; and third the failure by the two courts below to appreciate that PW3 having been arrested as a suspect, his evidence should have been treated with caution.

25. The record is clear that there are two versions as to whether the exchange of the money and the mobile phone was on account of a sale or a pledge. This appears to have escaped the scrutiny of the two courts below. **Section 382** of the Criminal Procedure Code CAP 75 Laws of Kenya enjoins a court of law faced with such a contradiction to consider it and then determine whether it is material or curable. See the decision in the case of ***Josiah Asuna Angulu versus Republic; Criminal Appeal No. 277 of 2006 (UR)*** wherein a reconciliation of a contradiction led to the substitution of a conviction for a lesser offence; and in ***Charles Kiplang'at Ng'eno versus Republic Nakuru Criminal Appeal No.77 of 2009 (UR)*** wherein a reconciliation of the contradiction led to the acquittal of the appellant.

26. The issue in contest in this case was possession of a recently stolen mobile phone. It mattered not whether it landed in possession of PW3 on a sale or a pledge. What was crucial was that both PW3 and the appellant handled a recently stolen item. Both were required to explain how they came to be in its possession in line with the principle of law set out above.

27. PW3 explained that he accessed it through the appellant. He was supported by PW5 and 6 who confirmed they were present during the exchange. It is correct that PW3's evidence is silent as to whether there was any other person besides his wife and child. However, it is our considered view that even if the testimony of PW5 were to be discounted, that of PW6 was supportive of the testimony of PW3. **Section 143** of the evidence Act Cap 80 Laws of Kenya stipulates clearly that "***no particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact".*** The two courts below considered the testimony of the two witnesses and found it credible. In fact, the 1st appellate court said they were systematic. We have no reason to doubt the soundness of that concurrent finding.

28. As for the assertion that PW3 was a suspect, indeed he was, and that is why he was arrested. That suspicion was, however, discounted the moment PW3 gave an explanation of how he came to be in possession of the stolen item which explanation was believed by the police, leading to the arrest of the appellant. The two courts below did not make much of the said arrest of PW3. We likewise do not make much of that arrest because the appellant skirted that issue when he was given a chance to defend himself.

29. ***Mr. Ndirangu*** submitted that the appellant failed to give a plausible explanation because he was unrepresented at his trial and was therefore disadvantaged. We find nothing on the record to suggest that

this was the position as the appellant raised no complaint with regard to his inability to comprehend the proceedings. He participated not only actively but fully right from the start to the finish. We find nothing wrong on the part of the two courts below in arriving at the conclusion that the appellant had failed to give an explanation as to how he came to be in possession of the recently stolen item and was therefore the thief.

30. Turning to the issue of the discrepancy on the date of the appellant's arrest and the date of the commission of the alleged offence, we find that the trial court made no reconciliation of the disparity between the date of the appellants' arrest and the date of his arraignment in court, which read 12th August, 2008 and 23rd January, 2009 respectively. The first appellate court however took note of it as it had been raised in the appellant's submissions before it. It was considered and the court arrived at the only plausible conclusion that this was a typing error. The respondent has invited us to affirm that finding. We entirely agree. Support for this stand is from the appellant's own evidence wherein he made no mention of the date of the arrest and the month and year when he was arraigned in court. He simply said he was arrested at a funeral long before the commission of the offence.

31. In the result, we agree with the first appellate court's conclusion that the evidence placed the appellant at the scene of the robbery and was part of it. We find no merit in this appeal. It is accordingly dismissed.

Dated and Delivered at Nyeri this 13th day of May, 2015.

P. N. WAKI

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR