IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 134 OF 2014

BETWEEN

PAUL MWENDA …… APELLANT

AND

REPUBLIC ……..…...…….. RESPONDENT

(Appeal against judgment of the High Court at Meru delivered by (Makau & Gikonyo, JJ) on 28th November, 2013

in

MERU HCCR. A. No. 27(B) of 2011*)*

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JUDGMENT OF THE COURT

The appellant, **PAUL MWENDA** was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on the 23rd day of July 2010 at Gakoromone area in Meru jointly with others not before court, robbed **JACOB MUTHUKU** of Kshs.500 and a hat and immediately before the time of such robbery threatened to use actual violence to the said **JACOB MUTHUKU**.

The trial proceeded before Andriessen, the then Principal Magistrate Meru who recorded the evidence of **JACOB MUTHUKU, (PW1), JOTHAM MUGAMBI, (PW2), NICHOLAS MURETHI (PW3)** and **PC JACKSON NGETICH (PW4)** as well as the sworn testimony of the appellant. In a judgment dated 15th June, 2011 the learned Principal Magistrate found the appellant guilty and sentenced him to death as by law prescribed.

The appellant was dissatisfied with the conviction and sentence and filed an appeal in the High Court. In a judgment dated 28th November, 2013 Makau & Gikonyo, JJ, dismissed the appellant's appeal, thus provoking this appeal.

During the plenary hearing before us on 4th November, 2015 Mr. Kaumbi, learned counsel for the appellant abandoned the home made grounds of appeal filed by the appellant in person. Instead he relied on two grounds contained in the supplementary grounds filed by him on 28th October 2015. These two were:

> ***"1. The learned judges erred in law by failing to properly evaluate the defence of the accused which adequately revealed that there was reasonable explanation why the accused was in possession of the alleged 'stolen property' and there was no sufficient test laid on ownership of the 'cap.'***
>
> ***2. The learned judges failed to re-evaluate the entire evidence on record so as to reach a conclusion that Kshs. 500.00 was stolen from the person of the complainant yet no evidence to that effect was tendered."***

It was counsel's submission that the 1st appellate court failed to re-evaluate and re-analyze the evidence against the appellant; that the doctrine of recent possession was inapplicable and that the issue of Ksh.500/= allegedly stolen from PW1 during the robbery was an afterthought.

In response, Mr. Muigai, the learned prosecuting counsel did not oppose the appeal. He conceded that it was not satisfactorily shown that the cap belonged to PW1 and hence the doctrine of recent possession was inapplicable.

This being a second appeal, our mandate is as stated in Section 361 of the Criminal Procedure Code. It provides:

> ***"361 (1) A party to an appeal from a subordinate court may subject to sub-section (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:-***
>
> ***(a) On a matter of fact, and severity of sentence is a matter of fact;***
>
> ***(b) Against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate had no power under section 7 to pass that sentence."***

The above provision of law has been enunciated in several decisions of this Court. In **Njoroge –vs- Republic (1982) KLR 388,** this Court at page 389 held;

> ***"On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence..' See M'Riungu -vs- Republic (1983) KLR 455."***

This Court has also stated in many previous decisions that it will not interfere with concurrent findings of fact by the two courts below unless it is found that the findings were based on no evidence or are based on misapprehension of the evidence or the two courts below are shown to have demonstrably acted on wrong principles in arriving at those findings. See **Chemagong v. Republic [1984] KLR 611** and **Kiarie v. Republic [1964] KLR 739.**

Similarly, in **M'Riungu v. Republic [1983] KLR 455** the Court held:-

> ***"Where a right of appeal is confined to questions of law, the 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 decisions 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 (Martin v. Glyneed Distributors Limited (T/A MBS Fastenings – The Times of March 30, 1983."***

It is against this background that we have considered the grounds of appeal urged before us, the concurrence submission of counsel, the proceedings of the trial court and the judgments of the two courts below us.

As can be discerned from the record, PW1 worked as a waiter in a hotel. On 23rd July, 2010 at about 5.00 p.m. he was attacked by "3 robbers." In court he named the appellant as one of the robbers. It was his further evidence that with the help of the police, they arrested the appellant on the same day and found him wearing his hat. He described his hat as ***"pink blue (fleece) with green"*** colour. It was his further testimony that upon being asked, the appellant maintained that he was the owner of the hat.

On the other hand **PW2 JOTHAM** told the trial court that on 20th October, 2010 he was having tea at the hotel where PW1 was robbed. He responded to the appellant's wails and he found him being robbed. It was his evidence that he saw the appellant remove the hat from PW1's head.

PW3 NICHOLAS MUREITHI was a cook in the hotel. He also responded to PW1's wails. He said he found the robbers running away and he was able to identify the appellant who was also fleeing, as he knew him from his physical appearance.

PW4 PC JACKSON NGETICH of Meru Police Station was on patrol when he encountered the complainant who was in a search party for his assailants. According to him, the complainant ***"… identified one"*** of the robbers whom they found at a public toilet wearing the stolen hat.

In his sworn statement, the appellant denied the offence. In cross-examination on being asked about the cap he stated:

> ***"The hat is mine. It wasn't his. I was told to remove the cap in prison. I was surprised to hear him say the cap is his."*** Whilst in cross-examination he maintained ***"I bought cap at Gakoromone. It is 2nd hand."***

In her judgment, the trial magistrate whilst discounting the appellant's defence rendered herself as follows:

> ***"That the complainant had asked him to sell him a jiko and upon his declining that the complainant fabricated this case is allegation is a line of defense*** (sic)***. I can only form an afterthought*** (sic) ***as he did not raise it during cross-examination of PW1. And honestly speaking I do not for one second imagine that would be sufficient basis to fabricate a case of this serious magnitude on the accused. Even presuming it were so this would not explain how the accused came to be in possession of the complainant's hat.***
>
> ***I noted the hat was very unique and distinct***. (Emphasis added) ***It was allegedly bought by the complainant at a second hand market. PW2 saw him wearing it on the same day. It is quiet uncommon to come across two similar second hand items within a specific area. There is no doubt the cap belonged to the complainant. That it was recorded*** (sic) ***within the same day it was robbed from the complainant leaves no doubt the Doctrine of Recent Possession aptly applies."***

Firstly, it behooves us to point out that the recording of the evidence was very sketchy. Indeed, even when PW1 mentioned the appellant by name in his evidence in court as one of the assailants, there was no inquiry as to whether this was dock identification or whether he had supplied the name of the appellant before the arrest. On the other hand PW2 said he identified the appellant as ***"I had seen him around the hotel where I had been a customer for 6 months."*** However, it was not stated how he identified the appellant. It appears that PW2 identified the appellant after the latter had been arrested. We say so because no identification parade was carried out. It is also important to point out that PW2 gave the date of the incident as 22nd October, 2010 whilst PW1 gave the date of the attack as 23rd July, 2010, a difference of about 3 months.

The conviction by the trial court and the affirmation by the 1st appellate court was based on the doctrine of recent possession. The trial court found that the hat that the appellant was found with belonged to PW1 as, according to the trial magistrate, it was ***"very unique and distinct"*** and further to that ***"it is quite uncommon to come across two similar second hand items within a specific area."*** With all due respect to the trial magistrate, that was an erroneous statement. It is indeed possible to find similar second hand items within an area. It is our view that PW1 ought to have positively identified the hat and it was not sufficient to base the conviction on the basis that it was ***"unique and distinct"*** and that being a second hand hat, it could only belong to PW1. It is indeed possible that the hat belonged to the appellant who may also have bought it as a second-hand item. The High Court fell into the same error when it stated: ***"The doctrine of recent possession is also applicable here as the appellant was found in possession of recent stolen property."*** With respect, it is our considered view that the hat was not positively identified by PW1and his ownership of it was therefore not established.

As to appellant's identification the trial magistrate stated as follows:

> ***"The accused by his own admission conceded he lived and worked in Gakoromone therefore it is indeed very probable that both PW2 and PW3 did recognize him."***

Again, and with respect, we find that the trial court erred in basing the conviction on a ***"probability"***, as the standard of proof in a criminal trial is that of beyond reasonable doubt. The proof in the circumstances of this case did not meet that threshold. Further the High Court stated that ***"from the evidence of the prosecution, there is no doubt that the appellant was identified by recognition by PW1, PW2 and PW3. These people knew the appellant and would not be mistaken about his identity."***

With due respect to the Judges of the High Court, PW1, PW2 and PW3 did not recognize the appellant. PW3 stated that he identified him from his back as he was fleeing. PW2 did not state that he recognized the appellant. As for PW1, it was not clear whether this was dock identification.

In our view, the conviction of the appellant was based on a misapprehension of the evidence and the two courts below acted on wrong principles in invoking the doctrine of recent possession when the cap was not positively identified to be the property of PW1. We shudder to think that the appellant may actually have been innocent. It is our further view that Mr. Mungai for the state rightfully conceded to the appeal and we are grateful for his candour.

The upshot of the above is that this appeal is allowed and conviction is quashed and sentence set aside. The appellant is to be set free forthwith, unless he is otherwise lawfully held.

Dated and delivered at Meru this 17th day of December, 2015.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

……..

JUDGE OF APPEAL

I certify that this a

True copy of the original

DEPUTY REGISTRAR