IN THE COURT OF APPEAL

AT NAKURU

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

CRIMINAL APPEAL NO. 438 OF 2010

GEORGE NJOGU NJUGUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nakuru

(Emukule & Ouko, JJ.) dated 5th November, 2010

in

(H.C. CR. A. No. 237 of 2009)

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JUDGMENT OF THE COURT

[1] On the night of 24th day of September, 2006, there were a series of robberies committed to several residents of Kinamba Trading Centre in Laikipia District within the former Rift Valley Province. ***George Njogu Njuguna*** was charged with five counts of robbery with violence contrary to ***Section 296(2)*** of the Penal Code before the Principal Magistrate's Court at Nyahururu. Upon trial, he was found guilty on Count I and III, convicted and sentenced to death. He appealed before the High Court against the conviction and sentence but the appeal was dismissed. Emukule, J. and Ouko, J. *(as he then was)* upheld the judgment of the trial magistrate regarding the conviction and sentence in Count I but held that the death sentence in respect of Count III, be held in abeyance as a convict cannot die twice.

[2] The appellant filed the present appeal which by dint of the provisions of ***Section 361*** of the ***Criminal Procedure Code***, turns only on point of law. Mr. Maragia, learned counsel for the appellant relied on the following grounds of appeal contained in a supplementary memorandum of appeal:

1. ***That the learned Appellate Judges erred in law in failing to note that the evidence of recovery of items at the scene was shaky and uncorroborated.***

2. ***That the learned Appellate Judges erred in law in arriving at an erroneous finding of recent possession.***

3. ***That the learned Appellate Judges erred in law in failing to note and consider that the trial***

court had taken into consideration extraneous analysis of evidence which it used as a basis of finding a conviction hence occasioning a miscarriage of justice.

4. ***That the learned Appellate Judges erred in law in arriving at a finding that the Appellant had been properly identified despite overwhelming evidence to the contrary.***

5. ***That the Appellate Judges erred in law in failing to note that none of the complainants tendered evidence showing proof that they owned items alleged to have been recently recovered from the appellant.***

6. ***That the learned Appellate Judges erred in law in failing to note that the Prosecution's Case consisted of contradiction and inconsistencies which was fatal to the Prosecution's Case.***

7. ***That the learned Appellate Judges erred in law erroneously holding that the trial in a language that was not understood by the Appellant (the then Accused) at the trial court had not prejudiced him.***

8. ***That the learned Appellate Judges erred in law and in failing to note that the burden of proof had not been properly discharged hence shifted it to the accused.***

9. ***That the learned Appellate Judges erred in law and in failing to fault an erroneous finding by the trial court that there was a trail of blood from the house up to the place the accused were found lying unconscious.***

10. ***That the learned Appellate Court erred in law and in failing to note that the recovered items had not been dusted to reveal the last handlers.***

11. ***That the learned Appellate Court erred in law in failing to note that the trial court had not warned itself before passing its finding on identification of a single witness (PW 1), and making it a basis of conviction in respect to Count I.***

[3] In further arguments to support the above grounds, Mr. Maragia submitted that, the trial court relied on the evidence of identification of the appellant by Joram Njogu Wairimu (PW 1), one of the victims of robbery; the rest of the witnesses who were attacked namely: Jane Muthoni (PW 2), Ibrahim Gichingiri Wachira (PW 3), Jane Muthoni Kimani (PW 4) and Simon Kimani Wairimu did not identify the attackers. According to counsel for the appellant, PW 1 failed to give the description of the attackers to the police; there were about 30 police officers who were carrying out a search when they came across a person who had been shot; that is when PW 1 said he recognized the appellant as one of the members of the gang that robbed them at night because of the jacket the appellant was dressed in: nonetheless, the jacket was not produced as an exhibit and PW 1 did not describe the jacket when he reported the matter to the police; also the intensity or the proximity of the lights that enabled PW 1 to see the assailant was not stated.

[4] Mr. Maragia also took issue with the Nokia mobile phone that was recovered from the scene where the appellant was arrested; evidence was admitted that the mobile phone was recovered from the appellant; counsel argued that the learned Judges of the High Court stated that two mobile phones were recovered from the pockets of the appellant although it was clear from the evidence of PW 2, the wife of PW 1 said she never lost any phone. So, it is not clear whose mobile phone was recovered as no serial number was given; even though George Kabue Gichingiri (PW 6), attempted to give a serial number, he was not present when the phone was recovered, he only identified it at the police station and did not produce a receipt to prove ownership. Mr. Maragia urged us to find the appellant was a victim of mistaken identity, he was arrested after he was mistakenly shot on the leg and mouth while he was on his way from a night club; the appellant became unconscious and, therefore, he could not explain how he came to be in possession of the mobile phone.

[5] On the part of the State, Mr. Mutai, learned Senior Principal Prosecuting Counsel, supported the

conviction and sentence as upheld by the High Court. He submitted that when the robbers raided the house of PW 1, he turned on the lights. The police responding to the reports that had already reached them of a terror gang that was robbing the residents of the area shot some of the robbers who were fleeing from the scene. The appellant was arrested about 100 metres from the scene of robbery. He had sustained gunshot wounds which are not a normal occurrence. PW 1 who was a victim of robbery was able to identify the appellant as one of the robbers who had robbed from him a short while ago. The police also testified that they shot the robbers who were fleeing from the scene of robbery. In light of this evidence, the defence by the appellant that he was shot by mistake was dismissed by the two courts below. Mr. Mutahi urged us to dismiss the appeal.

[6] The appellant was convicted based on the evidence of PW 1. On 24th September, 2006, PW 1 and PW 2 a husband and wife were woken from their sleep at 3 a.m. by strange movements of people who were outside their house at Kinamba village in Nyahururu. PW 1 and his wife started screaming as the robbers broke the windows and the door of the house. Upon gaining access to the house, the robbers demanded to be given money and ordered PW 1 to lie down. He was hit with an axe and threatened with death if he did not produce money. PW 1 gave the robbers 20,500/= and his mobile phones. The robbers had also terrorised other homes and the victims of the earlier robberies had made their report to the police station.

[7] Responding to the report, P.C. Julius Kanundo, PW 7, and Reinheard Omboto, PW 8, arrived at the home of PW 1 while the robbers were still at the scene. When the robbers sensed the presence of police, they took off and while running away from the scene, the police officers shot at them. The police officers tried to pursue the robbers while following some blood but they lost the trail of blood and decided to take the injured victims to hospital.

[8] PW 4, heard gunshots at about 3.00 a.m., when he woke up and went out to check what was happening, he discovered the robbers had attacked and robbed his brother. In the company of other members of pubic, they went to the house of PW 1 and found the commotion after the police had shot the robbers. PW 4 and other members of public followed a trail of blood from the robbers who were shot at the scene. They found two people who were wounded lying down. One of the wounded died on the same day. The other was the appellant, who was found with mobile phones in his pocket. The appellant was arrested; he was hospitalized for the injuries sustained, on recovery he was charged with five counts of robbery with violence.

[9] The appellant denied the charges and in his unsworn statement of defence, he stated that on the material day, he was shot by robbers while on his way from a night club. He lost consciousness until 6.00 a.m., when he tried to beckon somebody for help, but the person raised an alarm. Members of Public surrounded him; he was arrested and charged with the present offence which he claims he knew nothing about. The evidence by the Prosecution's Witnesses was believed by the two courts below. The trial magistrate stated as follows in part of the judgement:

> ***"The accused's defence is that he was shot by robbers after he met them while coming out of a club. The court finds that defence incredible. It is highly unlikely that robbers could have shot him 50 Metres away from a night club and none noticed. A gun is such a powerful weapon that if fired can be heard over a kilometre away.***
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> ***Besides, the trail of blood from PW 1's house let to the fence where the robbers had jumped over and disappeared just a few metres from the thicket where the accused was found. It is not in dispute that the accused was found about 100 metres from PW 1's house. Moreover, PW 1 properly identified the accused as one of the robbers who assaulted and robbed him in his house.***
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> ***Therefore, the accused's defence is found to lack credibility and is hereby rejected. The upshot is that the court finds that the Prosecution has proved the charge in Count I against the accused beyond any reasonable doubt.***
>
> ***Accordingly, the accused is found guilty in Count I and is convicted under Section 215 of the***

Criminal Procedure Code.

Further evidence from PW VIII which the accused totally failed to challenge was that he recovered PW VI's mobile phone from his right side trouser pocket as they collected him from the thicket where he was found. The mobile phone a Nokia 3310 (exhibit 10) which was positively identified by PW VI had been stolen from him about four hours before. As such this is a fit case where the doctrine of recent possession applies. Under Section III of the Evidence Act, Chapter 80 Laws of Kenya, the burden of proof as to how the accused to be in possession of that mobile phone shifted to him and although it was not as heavy a burden as that on the Prosecution, he had to discharge it.

Under the doctrine of recent possession, a person in possession of recently stolen item(s) is presumed in the absence of any reasonable explanation to be either the thief or handler of the stolen item. In the present case, PW I was robbed at 3.00 a.m. and positively identified the accused. Before robbing PW I, the accused and his accomplices had robbed PW IV and his brother, PW VI around 2.00 a.m.

The accused in his defence says that he had been shot and wounded by thugs as he came from a night club. He never gave an explanation of how the complainant's mobile phone found its way into his pocket. As such an inevitable inference must be drawn that he was the thief.

The court, therefore, finds that with regard to Count III, the Prosecution has proved the charge against the accused beyond any reasonable doubt and the accused's defence is rejected as a sham.

The accused is, therefore, found guilty as charged and is accordingly convicted on Count III of the charge as well".

[10] The Judges of the High Court revisited the evidence as they were bound to do on a first appeal and arrived at concurrent findings as follows:

"We would only reiterate here the evidence on the question of identification. The appellant was clearly seen by PW 1 with the aid of electricity lights in the room. The appellant was not masked. The police came when the appellant and his accomplices attempted to flee and received gunshots across the mouth and leg. One of his friends died later in hospital from gunshot wound. The appellant was found with mobile cell-phones which were positively identified by the complainant.

We also agree with the trial court's finding that the appellant's unsworn statement that he was shot by thugs at a night club not worth of belief. It is a bull and cock story. It is incredible that he had gone to buy cattle for Dagoretti Slaughter House, his hired lorry had broken down, a mechanic was unable to repair it, and he still ended up in a night club. From the evidence of PW 1 and PW VIII, it is quite clear that the appellant and his accomplices were on a terror enterprise on the night of 24th September, 2006, robbing and looting not less than four different houses at Kinamba Trading Centre".

[11] As this is a second appeal, only points of law may be raised since this court will not disturb concurrent findings of facts made by two courts below unless those findings are shown to be based on no evidence. See ***Njoroge v Republic, [1982] KLR 288; Kairingo v Republic, [1982] KLR 213***.

Although the appellant raised many grounds of appeal in the supplementary memorandum of appeal, during the arguments before us, they all boiled down to two grounds; whether the appellant was positively identified and whether he was found in possession of mobile phones that were stolen from the complainants a few hours earlier. The appellant was arrested 100 metres away from the scene of robbery a few hours thereafter. The police were informed of a terror gang that was robing the residents of Kinamba village and they arrived at the scene of the last robbery that occurred in the home of PW 1 while

the robbers were still at the scene. The police shot at the robbers as they tried to escape from the scene. Some of them sustained injuries and fled from the scene leaving a trail of blood. The police took the injured people to the hospital and upon returning to the police station, that is when they were told two suspects were found with gunshot wounds. PW 1 said he was able to identify the appellant. He said in his evidence that he put on the light so as to locate the money which was under a seat. PW 1 stated that he recognised the appellant as one of the assailants who demanded money from him and hit him with an axe.

[12] Mr Maragia implored upon us to find that there was a likelihood of mistaken identity given the defence by the appellant. Moreover, PW 1 did not give a description of the attacker to the police. The circumstances of this case show that PW 1 identified the appellant almost immediately after the robbery. The identification took place within the vicinity of the scene of robbery. PW 1 was taken to a dispensary after the robbery; he was treated, upon returning home, he found members of public combing the areas for the assailants. Immediately thereafter, the appellant was found with gunshot wounds and PW 1 identified him as one of the attackers at the locus in quo. The circumstances of this case show there was no time for PW 1 to give a description of the appellant to the police as identification and arrest of the appellant were instantaneous.

[13] The police who shot at the robbers gave evidence and besides this, a Nokia mobile phone that was positively identified by PW 6 was recovered from the appellants. It is, also indisputable that the mobile phones were recovered from the two injured suspects shortly after the robbery. Apart from the identification of the appellant by PW 1, the fact that the appellant was also found with gunshot wounds within the vicinity and the direction where the robbers fled, left no other conclusion than that he was one of the robbers. See the case of ***SAWE VS R KLR, 2003*** page 365:

> ***"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on."***

[14] On our part, we have studied with care the judgment of both courts and have found no misdirection or errors in law by either court in their appreciation of the totality of the evidence.

In the upshot, we find no merit in this appeal. The evidence against the appellant was overwhelming. He was properly convicted. The appeal is dismissed.

Dated and delivered at Nakuru this 20th day of March, 2014.

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