REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CORAM: MARAGA, MWILU & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 106 OF 2008

BETWEEN

JOHN KAHONGO MWANGI ..... APPELLANT AND

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi

(Ojwang & Warsame, JJ) dated 15th July, 2008 in

HCCR.A. NO. 190 OF 2007)

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JUDGMENT OF THE COURT

The appellant, ***JOHN KAHONGO MWANGI***, was charged, tried, convicted and sentenced to suffer death on a single count of robbery with violence contrary to *Section 296(2) of the Penal Code* before the Senior Resident Magistrate's Court at Makadara. The particulars of the offence were that:

"On the first day of March 2005 at Eastleigh Nairobi within the Nairobi area jointly with another not before court being armed with dangerous weapons namely pistols robbed ADAN IBRAHIM MOHAMED his mobile phone make Nokia 1100 valued at Kshs.5600/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ADAN IBRAHIM MOHAMED."

The prosecution case was that on 1st March, 2005, the Complainant, Adan Ibrahim Mohamed (PW1), was on his way to his butchery from a nearby Mosque, in the company of PW2. As they approached Deliverance Church, Eastleigh, they came upon some seven youths who ordered them to surrender everything they had to them. One of the assailants used a pistol to threaten PW1 and PW2 as he searched their pockets. He took PW1's Nokia 1100 mobile phone and cash and run away.

As PW1 and PW2 proceeded to PW1's butchery, they met police officers on patrol and informed them of the violent robbery that had just occurred.

Shortly thereafter, they heard shouts from members of the public that the assailants had been apprehended by the police. PW1 positively identified the appellant and his mobile phone was recovered

from the appellant. PW1 produced a receipt as proof of ownership of the mobile phone and was able to switch the phone on using his Personal Identification Number (PIN). Thereafter, he was charged with capital robbery and as stated, convicted and sentenced to death.

Aggrieved by the conviction and sentence, the appellant first appealed to the High Court but the learned Judges Ojwang J *(as he then was)* and Warsame J *(as he then was)* found the appeal devoid of merit and dismissed it.

In his appeal to this Court, the appellant challenges the decision of the two learned Judges of the High Court on several grounds as captured in the

Memorandum of Appeal filed on July 2008. These grounds of appeal can be summarized as follows:

- ***The prosecution case was not proved beyond reasonable doubt.***

- ***The evidence was contradictory and inconsistent and the judges failed to exhaustively re-analyze and re-evaluate it.***

- ***The conviction based on identification was erroneous.***

- ***Due consideration was not given to the defence.***

- ***The conviction based on recent possession was erroneous.***

Learned counsel Mr. Mogikoyo for the appellant submitted that the prosecution case was full of material contradictions with the result that the same was not proved beyond reasonable doubt.

Learned counsel submitted that the learned Judges of the High Court failed to conduct a proper and thorough evaluation of the evidence with the result that they affirmed a conviction that was based on evidence that was riddled with contradictions and inconsistencies such as the time the incident took place and the number of assailants who attacked PW1 and PW2.

Learned counsel faulted the identification evidence upon which the appellant was convicted. He contended that the same was poor and not free from the possibility of error as the incident occurred when it was dark and there was no electric lighting.

On the issue of recent possession, Mr. Mogikoyo submitted that there were material contradictions and inconsistencies in the evidence regarding where the mobile phone was found. From the record, PW1 and PW2 were silent on where the mobile phone was recovered whereas PW3, the arresting officer contradicted himself by saying on one hand that it was recovered from the appellant's jacket pocket and later claiming that it was recovered from the trouser pocket. Learned counsel submitted that this was a material contradiction that goes to the root of the matter. Counsel argued that had the High Court carried out an indepth analysis, it would have come to a different conclusion. Counsel urged us to allow the appeal.

The State opposed the appeal with Mr. Ondari, the Senior Assistant Director of Public Prosecutions *(the SADPP)* contending that the conviction of the appellant as entered by the Subordinate Court and confirmed by the High Court was safe and proper.

The SADPP submitted that the appellant was arrested with recently stolen property hardly 15 minutes after the violent robbery occurred. He submitted that the mobile phone was positively identified by the complainant as his, with a receipt evidencing the serial number that tallied with the mobile phone found in possession of the appellant. Further, PW1 was able to switch on the mobile phone using his Personal Identification Number (PIN) as further evidence of ownership of the mobile phone.

The SADPP submitted that the vital issue is that the mobile phone was found in the appellant's

possession and not in which item of clothing it was found in. He submitted that the inconsistencies in the evidence regarding where the mobile phone was found were immaterial. The SADPP further submitted that the Applicant's defence was an afterthought which he did not raise in cross examination.

Counsel further submitted that the High Court properly re-evaluated the evidence on record. Further, there being a concurrent finding of fact that the appellant was found in possession of the mobile phone, in the absence of any other reasonable explanation, there was no other conclusion than that the appellant was the robber.

We have considered the record, the submissions by learned counsel and the law.

As a second appellate court, our jurisdiction is limited by *Section 361 of the Criminal Procedure Code* to hearing appeals on matters of law. This

court reiterated this view in ***NJOROGE V R, (1982) KLR 388 at 389*** **as follows:**

"… 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'R iungu v R, (1983) KLR 455.***

Having duly considered the record and the facts of this appeal, we are unable to find that the conviction of the appellant was based on no evidence. We, therefore, give the concurrent findings of fact by the two courts below their due respect and consider the questions of law raised in the appeal.

The determination of this appeal turns mainly on the questions of identification and doctrine of recent possession.On the issue of identification, we are guided by the case of ***FRANCIS KARIUKI & OTHERS V R, CR.A NO. 6 OF 2001,*** **where this Court held:**

"… 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."

From the record, we find that PW1 and PW2 gave the description of the appellant to the police officers at the earliest opportunity.

The High Court in its judgment stated:

"We recognize and appreciate that many people do not even properly identify/recognize others in daylight. However we think there was (sic) sufficient circumstances within which PW1 and PW2 could recognize the appellant as one of the attackers. The evidence of PW1 and PW2 is that it was the appellant who was armed with a pistol. No doubt a toy pistol was recovered from the appellant after a search was conducted on him by PW3. We think that there is credible evidence that the appellant was the person who was arrested after PW3 and others gave a chase to a group of robbers. The appellant was found with a toy pistol used against the complainant and PW2. He was also found in possession of a mobile stolen from PW1. He did not offer any explanation as to how he came into possession of or (sic) such incriminating evidence. We think he was one of the robbers who earlier robbed PW1 and stole his mobile phone."

Further, this court in the case of ***MAITANYI V R, (1986) KLR 198***, stated as follows:

"…There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness

receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained."

It is clear from the evidence of PW1 that within 2 to 3 minutes after the robbery, they met police officers on patrol and gave the description of the robbers. **PW1 stated in his evidence:**

"We described how they looked. The police followed the way we had come from. We stayed where we were and followed shortly and found they had been arrested."

On the question of recent possession, we are guided by the case of ***OGEMBO V R, [2003] EA*** where it was held that:

*"**For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen."***

Further, in the case of ***MALINGI V R, [1989] 225*** this Court stated:-

"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; that the item he had in his possession has been stolen, it has been stolen a short period prior to their 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; that there are no co-existing circumstances which point to any other person as having been in possession of the items." **(Emphasis added).**

See also ***ISAAC NGANGA KAHIGA ALIAS PETER NGANGA KAHIGA, CR.A No. 82 OF 2004 (unreported).***

The doctrine is a rebuttable presumption of fact. Accordingly, the appellant is called upon to offer and explanation in rebuttal, which if he fails to do, an inference is drawn, that he either stole or was a guilty receiver.

As was aptly stated in the case of ***HASSAN V R, (2005) 2KLR:***

"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 the receiver".

In the instant appeal, PW1 and PW2 identified the appellant as the assailant and PW1's mobile phone was found in the appellant's possession. The doctrine of recent possession was clearly applicable and the courts below correctly applied the same. In the circumstances, there is no basis for interfering with the findings of the trial court and the High Court.

Whatever contradictions there may have been in the prosecution evidence consisted of minor discrepancies and inconsistencies. They were not of a material character and did not weaken the probative weight of the evidence on record.

The learned Judges of the High Court cannot, therefore, be faulted for finding as they did. We are satisfied that the appellant was convicted on sound evidence and the case against him was proved beyond any reasonable doubt. In the result, we find that the appellant's appeal has no merit and we accordingly dismiss it in its entirety.

Dated and delivered at Nairobi this 30th day of May, 2014.

D. K. MARAGA

JUDGE OF APPEAL

P. M. MWILU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR