IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, KIAGE, M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 326 OF 2011 [R]

BETWEEN

JOHNSTONE MUTULILI MUTUKA..... APPELLANT

AND

REPUBLIC..... RESPONDENT

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

(Ochieng & Warsame, JJ.) delivered on 19th May, 2011

in

H.C. CR. A. 552 OF 2007)

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JUDGMENT OF THE COURT

1. The appellant, JOHNSTONE MUTULILI MUTUKA, filed an appeal in this court on 26th May 2007 against the judgment of the High Court dated 19th May 2011 which upheld his conviction by the Senior Resident Magistrate on three counts of robbery with violence c/s 296 (2) of the Penal Code. Death sentence on each of these three counts was meted out to him by the Senior Resident Magistrate, (Hon. Karani (Ms)) on 21st September 2005 in Makadara, Nairobi, in Criminal Case No. C.M. Cr. C. No.2310 of 2005 to run concurrently. As we have stated in many appeals, and as correctly observed by the superior court below in its judgment which is the subject of this appeal, if an accused person is sentenced to death on any one count, the trial Court should suspend the sentences in respect of other counts on which the accused is convicted. The three counts on which the appellant was charged, convicted and sentenced to death were as follows:-

    "COUNT 1

    CHARGE: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE

    MUTUA KULI (2) JOHNSTONE MUTULILI MATHUKU:- On 3rd day of March 2005 at Aquva Agencies Industrial Area within the Nairobi area, jointly with others not before

court while armed with dangerous weapons namely pistols robbed Vinodkumar Natverlar Patel a Cellphone make Alcatel, One Gold Ring, a driving licence and an identity card all valued at Ksh.20,000/= and at or immediately before or immediately or immediately after the time of stealing used actual violence to the said Vinodkumar Natverlar Patel.

<u>COUNT TWO</u>

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

1. <u>MUTUA KULI (2) JOHNSTONE MUTULILI MATHUKU</u>: On the 3rd day of March 2005 at Aquva Agencies Limited in Industrial Area within Nairobi area, jointly with others not before court while armed with dangerous weapons namely pistols robbed Paul Kasinga Wambua Ksh.1,000/=, a cellphone make Nokia 3210, a Driving License and identity card all valued at Kshs.6,000/= and at or immediately before or immediately after the time of stealing used actual violence to the said Paul Kasinga Wambua.

COUNT THREE

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

1. <u>MUTUA KULI (2) JOHNSTONE MUTULILI MATHUKU</u>:- On the 3rd day of March 2005 at Aquva Agencies Limited in Industrial Area within Nairobi Area, jointly with others not before Court while armed with dangerous weapons namely pistols robbed Francis Iseu Katiwa Ksh.1,000/=, Jacket, Passport, Driving License and a Standard Bank ATM/VISA Card and at or immediately before or immediately after the time of stealing used actual violence to the said Francis Iseu Katiwa;

2. Following his conviction and sentence, the appellant moved to the High Court on appeal. His appeal on conviction and sentence was dismissed whereupon he preferred a second appeal to this Court.
3. Initially, the appellant filed a memorandum of appeal without counsel. Subsequently, counsel was appointed to act for him by the State. Mr. Ondieki of the firm of Ondieki & Ondieki Advocates came on record and filed a supplementary memorandum of appeal dated 15th July 2013 containing eleven grounds of appeal as follows:

1. *The superior court erred in law by confirming the conviction on the basis of a defective charge sheet.*
2. *The superior court erred in law by failing to appreciate that section 214 of the Criminal Procedure Code was never complied with to the prejudice of the appellant.*
3. *The superior court erred in law by failing to appreciate that section 74 (1) of the former Constitution was contravened.*
4. *The superior court erred in law by relying on circumstantial evidence that did not meet the required legal standards.*
5. *The superior court erred in law by relying on the doctrine of recent possession that did not meet the required legal standards.*
6. *The superior court erred in law by confirming the conviction yet the charges were never proved beyond reasonable doubt as critical witnesses never testified.*
7. *The superior court erred in law by failing to re-evaluate the entire evidence and draw their own conclusions.*
8. *The superior court misapprehended the facts and applied wrong legal principles to the prejudice of the appellant.*
9. *The superior court erred in law by shifting the burden of prove (sic) to the appellant contrary to the law.*
10. *The superior court erred in law by confirming the death sentence which offends the values and*

principles of constitutionalism.

4. The main thrust of the appeal was that the conviction was on a defective charge and that the application of the *doctrine of recent possession* did not meet the threshold in law and further, that the evidence of identification was not free from the possibility of error. The superior court below, it was contended, failed to re-evaluate the entire evidence and to draw its own conclusions. In addition, it was contended that there was no proof beyond reasonable doubt and that the burden of proof was shifted to the appellant.
5. The evidence adduced in the trial court shows that on 3rd March 2005 in Industrial Area, Nairobi, robbers robbed one Vinodkumar Natverlar Patel, Paul Kasinga Wambua, and Francis Isau Katiwa outside the business premises of Aquva Agencies Company whose compound was being guarded on the material date by Abdi Ibrahim of Mukuru kwa Njenga slum area. Abdi Ibrahim who testified as PW5 reported for work at Aquva Agencies at 6.00 a.m. on 3rd March 2005. He was at the gate at 11.30 a.m. on that day when three people posing as customers pushed the gate-door and entered the compound. Then shortly afterwards, three other people entered. One of the three who had entered first returned to the PW5 and ordered him to lie down while one of the others put a gun on his head and told him to be quiet. In the compound were cars belonging to customers. At that time, Paul Wambua, a driver, who then testified as PW3 had just driven into the compound in a Ford Everest. He parked the car and as he was alighting, he saw three men one of whom approached him and pointed a gun at him as he told him to stop which he did for fear of getting shot. The gunman searched him and robbed him of Shs.1,000/=, a mobile phone Nokia 3210 worth Shs.5,000/=; and a wrist watch valued at Shs.10,000/=. As this robbery was going on, there were workers and customers in the shop. In his evidence, PW3 testified that he saw the robber and that he could not forget how he looked. One of the other robbers went to the side of the car Virod Patel was seated and ordered removal of radio cassette. It could not detach. Virod Patel who testified as PW2 is the one who drove Paul Wambua to Aquva Agencies in the Ford Everest. But before driving into Aquva Agencies, he drove to BP Petrol Station next door. The robbers followed them and one went to PW3's window while the other went to PW2's window. The robber who went to Vinod Patel's window had a gun and he took his identity card, hospital card, Nakumatt card, KWS card, Alcatel mobile worth 8,000/= and a gold ring. The robbers were seen by Vinod Patel and Paul Wambua as they robbed each of them. Justus Gitobu Wambutura, a businessman, who testified as PW1 was also at Industrial Area at 11.00 a.m. on 3rd March 2005 with a view to buying pipes at Aquva Agencies. At Aquva Agencies, he left his driver, Mr. Kitiwa, in the car at the parking lot and went into the shop. As he was about to leave the shop to go to his car, he saw a youthful person standing near his driver wearing his coat over his shoulders and pointing a pistol at the driver's head. He also saw another youth removing rings from an Asian man who had parked a vehicle. He suspected a robbery was going on. He went back into the shop. He watched the scene from the shop. The distance was about 20 metres or thereabouts. He alerted the shop attendants who closed the doors to the shop. He, Justus Gitobu Wambutura, called the police and informed them of the ongoing robbery. When he peeped through the glass window and saw the youth leaving, he dashed to his car and told his driver, to drive away. On reaching the junction of Enterprise Road, he saw police officers in a landrover and stopped them and informed them of the robbery. The police swung into action and drove in the direction the robbers had gone while Mr. Wambura drove back to Aquva Agencies.
6. It was PC Lawrence Chirchir (PW6) in company of PC Otieno, PC Wekesa, and PC Jogera who after getting the report of the robbery gave chase and headed to Kayaba slum area in pursuit of six suspects. On entering Kayaba slums, they saw 5 men running and two of them drew pistols so Chirchir fired two shots whereupon the suspects disappeared towards South B. They gave chase. They arrested the appellant whom they took to Aquva Agencies.
7. At Aquva Agencies Paul Wambua (PW3) rang the number of his cellphone. It rung. It was in the pocket of the appellant. Paul Wambua gave the PIN number of the mobile to the police.
8. When the appeal came up for hearing before us, learned counsel for the appellant, Mr. Ondieki, contended that the charge was defective mainly because it initially referred to Nokia 3310 in count one instead nokia 3210 and urged that undue prejudice was occasioned to the appellant by the amendment to the charge (which entailed correction of "Nokia 3310" to read "Nokia 3210") because no opportunity was given to the appellant to cross-examine on the amended charge. On

the allegations of torture by the appellant said to have resulted in violation of his constitutional rights, there was no evidence adduced in the trial court but reference of torture featured in cross examination of prosecution witness number PW5 who denied that the appellant was tortured. There was no evidence adduced in relation to when, where and how the alleged torture was carried out. At any rate, if proved, which it was not, torture could give rise to a civil claim but would not be a bar to prosecution save where, unlike here, prosecution is based solely on inadmissible extracted confession. In Morris **Ngacha Njuguna & 3 Others versus R** (Cr Appeal No.232 of 2006) the issue of violation of constitutional rights of one of the appellants was raised for the first time in this Court. The Court expressed the following view:

> ***"If the 2nd appellant felt his rights under the constitution had been violated, the best course of action would have been to file an appropriate application under the provisions of the constitution to enable the relevant court investigate the issue. As the matter stands now, the issue having not been raised in the two courts below, we can only base our decision on the material before us. The material is inadequate and on that basis it cannot be said that the 2nd appellant's rights under S.82 (3)(b) of the Constitution were breached."***

9. On the application of the doctrine of recent possession, the appellant was found barely 30 minutes after the robbery in possession of a Nokia 3210 which belonged to Paul Wambua, the complainant in Count 2 who testified in the trial court as PW3. The appellant did not give a satisfactory explanation as to how he came by the mobile phone. The discovery of the mobile phone on the appellant was made when PW3's mobile number was dialed and the cellphone rung in the pocket of the appellant where it was found. Although the appellant's counsel contended that the application of the doctrine of recent possession did not meet the threshold in law, it is not difficult to see that the ingredients that constitute the doctrine were all there. The doctrine applies where it is proved that a person is found in possession of goods so soon after they have been stolen and fails to give a credible explanation of how he came by them as a consequence of which an inference is made that he was either the thief or is guilty of dishonestly handling the stolen goods (**see R v. Loughlin, 35 Cr. App. R. 69**). In the instant appeal, the mobile phone was in the pocket of the appellant from where it was recovered barely an hour after the robbery. Did the appellant give a plausible explanation as to how he came by it? He did not. And in his unsworn statement, he merely criticized the prosecution for having described the mobile-phone as Nokia 3310 instead of Nokia 3210 but he did not lay any claim to it.
10. Mr. Ondieki attacked the High Court and the trial court for failing to analyse the evidence and for making a finding that the prosecution had proved the guilt of the appellant beyond any reasonable doubt. It was his submission that the standard of proof in criminal cases was not attained and that the burden of proof which should have reposed on the prosecution throughout was shifted to the appellant. But was it? At no time throughout the trial did the trial magistrate place any burden on the appellant to disprove any allegation but when the appellant was found in possession of a recently stolen mobile phone (Nokia 3210) it behooved him to explain how he came by it. He did not. Mr. Ondieki contended that it was due to the failure of the trial court and the High Court to analyse the evidence that the appellant was convicted.
11. Mrs Mary Oundo, Principal Prosecuting Counsel, opposed the appeal. She contended that the charge was not fatally defective as contended by the appellant's counsel and that its amendment did not occasion any prejudice to the appellant. Mrs. Oundo contended that while there was no evidence of torture to justify the claim made by the appellant, as regards the doctrine of recent possession, the appellant failed to offer any reasonable explanation as to how he had come by mobile phone found in his possession so soon after the robbery. Miss Oundo expounded on the application of the doctrine of recent possession and urged the Court to find that evidence had been adduced to establish all the requisite ingredients of the offence of capital robbery under Section 296(2) of the Penal Code. She urged us to dismiss the appeal as it lacked merit.
12. As this is the appellants' second appeal this Court is enjoined to examine only issues of law. We cannot question the concurrent findings of fact by the trial and the first appellate courts unless there was no evidence at all upon which such findings were based or if there was evidence, it was of such a nature that no reasonable tribunal could be expected to base any decision on it. Indeed

Section 361 of the Criminal Procedure Code, Cap 75, enjoins us to deal with issues of law only. Section 361 states:

> ***"361. (1) A party to an appeal from a subordinate court may, subject to subsection (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; or"***

13. This point was emphasized in the case of **Gachuru Versus Republic [2005] 1 KLR 688**, in which the Court held:

> ***"1. As a second appeal, only points of law may be raised since the Court will not disturb concurrent findings of facts made by the two courts below unless those findings are shown to be based on no evidence."***

14. In **Njoroge v. Republic** [1982] KLR 388 this Court stated as regards a second appeal:-

> ***"on a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the Court is bound by the concurrent finding of facts made by the lower Courts unless those findings were not based on evidence. However, if there was a misdirection in the trial Court or in the superior court below, this Court can interfere. But it is not every misdirection that will attract the intervention of this Court. In the case of Kiarie v. Republic [1984] KLR 739 the Court quoted paragraph 18 on page 942, Archbold on Criminal Pleading Evidence and Practice, 40th Edn which states:***
>
> > ***"misdirection as to the evidence to be of any avail to an appellant must be of such nature and circumstances of the case must be such that the jury would not have returned their verdict had there been no misdirection."***

15. In short, not every misdirection would entitle the Court to upset a finding of fact by the trial or first appellate Court.
16. In the present appeal we are alive to and have considered these principles of law. The issues of law raised in the appeal are:-

1. whether the evidence proved the guilt of the accused;
2. whether the standard of proof was that required in criminal cases;
3. whether the trial and first appellate courts evaluated the evidence;
4. whether the doctrine of recent possession was properly applied;
5. whether the amendment to the charge occasioned miscarriage of justice to the appellant and
6. whether the alleged torture and violation of the appellant's constitutional right was proved and whether it did bear on the appellant's defence with regard to fair trial

17. We have already dealt with issues numbers 2, 4, 5 and 6. That leaves only issues 1 and 3.
18. As rightly observed by the superior court below, the evidence of identification against the appellant was unreliable. But the fact that so soon after the robbery the appellant was found in possession of a mobile phone that belonged to PW3 and was not able to offer any plausible explanation as to how he came by the cellphone was evidence cogent enough to conclude that the appellant was the robber. That the appellant was found in possession of the mobile phone barely an hour after the robbery provided a classic case for the application of the doctrine of recent possession, one of the best enunciations of which is found in the English case of **R vs. Loughin 35 Cr. App. R. 69**(supra) in which the English Court stated:

> ***"If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very short afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop***

breaker."

19. Under Section 296(2) of the Penal Code under which the appellant was charged and convicted, the ingredients of the offence of robbery with violence are constituted if the offender was armed with any dangerous or offensive weapon or instrument or was in the company of 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. The evidence shows that the robbers were six and that they had a gun. The ingredients of the offence in S.296(2) (supra) were complete.
20. In this appeal, we are satisfied that both the trial court and the first appellate court analysed the evidence correctly and in our view reached the correct conclusion that the evidence proved the guilt of the appellant beyond any reasonable doubt. This answers issues numbers 1 and 3. In the premises, we find no merit in the appeal. We hereby dismiss it.

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

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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I certify that this is a

True copy of the original.

DEPUTY REGISTRAR