**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, GATEMBU & MURGOR, JJ.A)**

**CRIMINAL APPEAL NO. 61 OF 2009**

**BETWEEN**

**ALEX BONIFACE MULIUNGI …….....…… APPELLANT**

**AND**

**REPUBLIC …… RESPONDENT**

***(Appeal from a sentence of the High Court of Kenya at Nairobi (Ojwang & Warsame, JJ) dated 18th February, 2009***

in

**HC.CR.A. NO. 351 OF 2006**)

**********

**JUDGMENT OF THE COURT**

1. The appellant, Alex Boniface Muliungi, together with Phillip Musila Musyoka (the 2nd accused) were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The appellant faced an alternative charge of handling stolen property contrary to section 322(2) of the Penal Code. He was tried by the Magistrate's court at Kibera Nairobi and convicted alongside Phillip Musila Musyoka for the offence of robbery with violence contrary to section 296(2) of the Penal Code. His appeal against the conviction was dismissed by the High Court on 18th February 2009 but his co-appellant succeeded and was set free. Dissatisfied, he lodged the present appeal.

**The Facts**

2. On 4th March 2005 at about 9.00 p.m. Roda Mukonyo Kimundi (PW1) was in her living room at her residence in Kileleshwa, Nairobi and had just settled down to eat her dinner that was served by Josephine Nzisa (PW2) her househelp when she heard commotion in the kitchen. People then emerged from the kitchen and entered the living room. Two of them wore caps while another wore a mask; two of the assailants were armed with pistols while the third one had a big pair of scissors. One of them pointed a small gun at PW1 and warned her not to look at her attackers. Her mouth was sealed with adhesive tape and she was asked to produce her telephone which she did. Her hands were tied behind her back with telephone wires and she was made to lie down. PW2's

hands were also bound together and she was also ordered to lie down on the floor.

3. As PW1 lay down on the floor, she could hear noise upstairs. The assailants then escorted her upstairs where she found that her bedroom had been ransacked; on being asked for money, she directed the assailants to her wardrobe from where they took Kshs. 83,700.00 from a cash box; they also took jewellery, necklaces, watches and her passport. As the assailants moved in and out of the room PW1 engaged them in conversation in the course of which they implicated her watchman, the 2nd accused, as the one who was responsible for killing her dogs, and as the mastermind behind the attack. The assailants then took PW1's car keys after which she heard them exit from the house. She then called for help. Her father who was all along in a different room within the house came to the rescue. He switched the lights back on and unbound her hands. PW1 then called the police from Kileleshwa police station. The following day, PW1received information from Kilimani Police Station that her telephone had been recovered and she proceeded to the police station where she identified the telephone as hers.

4. Following investigations the 2nd accused referred the police to James Mulwa Kimanzi (PW3) who in turn led the police to the appellant. Police Constable Isaya Wanyama (PW8) together with Makhoha Brian (PW11) arrested the appellant. Stolen property, including a telephone and a watch that belonged to PW1 were also recovered from the appellant's kiosk. An identification parade was held at which PW2 picked out the appellant as one of the assailants. The appellant was subsequently charged alongside the 2nd accused. Based on the evidence of identification and the doctrine of recent possession the trial magistrate was satisfied that the charge against the appellant was proved. The trial magistrate proceeded to convict the appellant.

**The appeal**

5. The appellant appealed the judgment of the Magistrate's court to the High Court on grounds that the prosecution failed to prove its case beyond any reasonable doubt; that no incriminating items were found in his possession; that his constitutional rights under section 72(3)(b) of the Constitution had been violated in that he was not arraigned in court within the time stipulated; that he was convicted on uncorroborated evidence and that his defence was not considered.

6. Upholding the conviction the High Court stated:

> ***"We have considered all the evidence, as well as the systematic manner in which the learned Magistrate conducted her analysis. It is evident to us that the 1st appellant was a prime participant in the robbery-with-violence which took place on the material evening. Both the complainant and PW2 definitely perceived and identified 1st appellant at the*** *lucus in quo;* ***and over and above that direct evidence,there is circumstantial evidence which comes through the doctrine of recent possession of the complainant's cell phone stolen only the day before."***

7. In this second appeal the appellant has again challenged his conviction on the grounds that the circumstances and conditions prevailing at the *locus in quo* were not conducive to proper identification; that the lower courts erred in applying the doctrine of recent possession; that the High Court failed to reconsider, re-evaluate and analyze the evidence and come to its own conclusions.

**Submissions by counsel**

8. Mr. R. O. Oburu Odhiambo, learned counsel for the appellant, submitted that the critical question is on identification of appellant given the circumstances under which the offence was committed; that the offence was committed at 9.pm at night and nowhere is the intensity of light described; that PW 1 who was whisked up stairs by the attackers is the only one who knows what happened upstairs; that the circumstances were not suitable for identification; that the appellant was not identified either at the *locus in quo* or at the identification parade; that the evidence of PW2 is also

not reliable as the electricity had been switched off; that PW2 referred to the appellant as having a mark and it remains a mystery what the alleged mark was; that PW2 lay on her chest on the floor and there is doubt as to whether PW2 was in a position to identify the appellant; and that the parade identification was also not free from errors.

9. As regards the application of the doctrine of recent possession, Mr. Odhiambo submitted that the incriminating evidence was the telephone set of PW1; that it was PW 3 who had allegedly known the appellant and his co accused, who had led the police to the house of the appellant; that the telephone that was produced in court was different yet the conviction was hinged the telephone and that the evidence of recent possession is totally unreliable.

10. Finally counsel submitted that the High Court should have analyzed the discrepancies on identification and that it failed to do so and therefore reached conclusions that were not supported by reason and evidence, as it is obvious that PW1 did not identify anyone and identification by PW2 is suspect.

11. Opposing the appeal Mr. V. S. Monda, learned senior principal prosecution counsel submitted that the evidence placed the appellant at the *locus in quo* when the offence took place; that the evidence of identification coupled with the doctrine of recent possession also placed the appellant at the scene; that based on the evidence of the investigating officer PW 11 the appellant was found in possession of stolen items the day following the robbery; that PW 3 who led the police to the appellant was not an accomplice, a suspect or under arrest in this matter as suggested by counsel for the appellant and was merely assisting police in the arrest of the appellant; that the things recovered from the appellant with respect to which PW 11 prepared an inventory included the telephone handset which belonged to the complainant and that the doctrine of recent possession applies as the evidence of recent possession was watertight; that even though PW1 did not identify any of the assailants, a matter on which the lower courts misdirected themselves, PW2 identified the appellant at the *locus in quo* and at the identification parade and the lower courts properly evaluated the evidence in that regard. With that, Mr. Monda urged us to affirm the findings of the lower courts and uphold the conviction.

12. In his brief reply Mr. Odhiambo stated that the evidence of PW3 to the extent that it incriminates the appellant should be disregarded, as PW3 was himself a suspect.

**Analysis and Determination**

13. We have considered the appeal and submissions by learned counsel. This being a second appeal, our mandate under S. 361 of the Criminal Procedure Code is to consider the appeal on points of law. We must respect the concurrent findings of fact by the lower courts unless those are not based on evidence or are based on a misapprehension of the evidence or the courts can be shown to have demonstrably erred in principle . [See: **Peter Sabem Leitu -vs.- Republic [2013] eKLR**; **Njoroge -vs.- Republic [1982] KLR 388; M'Riungu -vs.- Republic [1983] KLR 455.]**

14. The first issue for our consideration is identification. The appellant's contention is that the circumstances under which he was allegedly identified were not conducive for positive identification; that the offence was committed during the night at about 9:00 p.m.; that the electricity in the complainant's house had been switched off; that both PW 1 and PW 2 who allegedly identified him were lying on the ground and tied up and that it was improbable that they could have been able to positively identify him.

15. Based on the record of the proceedings, PW 1 did not, by her own admission, identify the appellant as one of her attackers. PW2 was on the other hand able to positively identify the appellant. According to the appellant however, the testimony of PW 2 is not reliable and the identification parade was not carried out procedurally. The question for our determination therefore is whether there was a secure basis for the conviction of the appellant.

16.In **Cleophas Otieno Wamunga V R Cr. App 20 of 1982 Kisumu** this Court stated:

> ***"…What we have to decide now is whether the evidence was reliable and free from possibility of error as to find a secure basis for the conviction of the Appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification…"***

17.In effect, when the evidence implicating an accused person is based entirely on identification, that evidence should be watertight to justify a conviction. In assessing whether evidence, in a particular case, is watertight, there are many factors that call for consideration. In the famous English case of **Regina v Turnbull [1976] 3WLR 445,** the court set out factors for consideration in that regard including the length of time the witness had the accused under their observation; the distance between the witnesses and the accused person; the lighting situation; whether the observation was impeded in any way; whether the witness had ever seen or knew the accused person before or knew him; the length of time that had elapsed between the original observation and the subsequent identification to the police and whether there was any material discrepancy between the description of the accused given to the Police by the witness when first seen and his actual appearance.

18.In our view both the trial court and the High Court analysed the evidence of PW2 regarding identification of the appellant and proceeded with the necessary caution to ensure it was free from error. The trial court had this to say in that regard:

> ***"This accused person was also identified by the complainant's house-help at an identification parade. This witness was not shown the accused before the identification parade as the accused claimed. The circumstances described by this witness that enabled her identify the accused were conducive to a positive identification. The Court of Appeal held in the case of Raymond Hermes Odhiambo Criminal Appeal No. 77 of 2001 Mombasa that "the court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification …… That .... it has to reasonably conclude that the identification is accurate and free from the possibility error." The court on this issue, also looked at the case of Abdullah Bin Wendo and Anor VR 1953 20 EACA 166 and the case of Roria VR (1976) EA 583.***
>
> ***The accused person took a lot of time in that house from the evidence on record. The lights were on (electrical). This made it easy for any keen witness to identify them."***

19.The submission by learned counsel for the appellant that PW2's evidence had discrepancies as having referred to the appellant as having a mark is not borne out by the record. PW2 did not in her evidence say that the appellant had a mark on his body. Rather, PW2 stated that the attacker who was guarding them as they lay on the floor with PW1 had no mark on his body and that the attacker with the mark had gone upstairs with the other robber. Although the incident happened during the night at 9:00 p.m. when it is dark outside, the incident took place in the house where there was electricity lights for illumination. Although at some point the lights were turned off, the time that had passed was enough for PW2 to identify the appellant.

20.Further, PW 2 was able to pick out the appellant with ease during the identification parade. There is nothing to show, as submitted by counsel for the appellant, that the parade was not conducted in accordance with the law. According to PW10, Inspector Chacha Okwach, the identification parade was conducted in accordance with the rules; the witnesses were placed in a separate place from where they could not see members of the parade; the appellant was informed that he was at liberty

to invite a relative or legal counsel to participate in the parade; the members of the parade consisted of 9 other people with similar complexion and physical appearance as that of the appellant; the appellant chose his position in the parade; PW2 identified him by touching him on the shoulder; the appellant was asked if he was satisfied with the manner in which the parade was conducted and he said that he was satisfied (he said, "*Ni sawa*. *Nimetosheka*"). To use the language of the court in **David Mwita Wanja & Two Others v. Republic, Crim. App. No. 117 of 2005** it seems to us that the "*… parade was held with scrupulous fairness and in accordance with the instructions contained in [the] Police Force Standing Orders.*"

21. We are satisfied that with regard to PW2's evidence of identification, the lower courts proceeded on the correct basis and came to the correct conclusion.

22. The appellant also faulted the lower courts for relying on the doctrine of recent possession. It was the evidence of the prosecution that the stolen telephone was recovered in the appellant's house. As stated by this Court in **Arum vs. Republic Court of Appeal at Kisumu Criminal Appeal No. 85 of 2005** the doctrine of recent possession applies where the stolen property was found with the suspect; that the property was positively identified by the complainant; that the property was stolen from the complainant; that the property was recently stolen from the complainant. Applying those principles to the present case, the prosecution led evidence that demonstrated that the stolen telephone was recovered from the home of the appellant. PW4, Kennedy Kisuvuli, a photographer at CID Kilimani, printed photographs that were in the recovered telephone Samsung SGH-E700; those photographs were identified by PW5, the complainant's son, as pictures he had previously taken of his sister; the stolen phone was recovered from the appellant's house the day following the robbery and there are no co-existing circumstances that point to another person as having been in possession of the recovered telephone. The appellant offered no explanation as to why the stolen phone was found in his house. After reviewing and evaluating the evidence the High Court concluded that over and above the direct evidence against the appellant:

> "***There is the circumstantial evidence which comes through the application of the doctrine of recent possession of the complainant's cellphone, stolen only the day before. It may, in the circumstances of this case, be safely concluded that 1st appellant was the thief, that is, the robber, who stole the said cellphone. It is clear that 1st appellant was part of a gang of robbers who were armed with dangerous weapons at the time of the theft; and this brings him squarely within the terms of s. 296(2) of the Penal Code.***
>
> ***We find the 1st appellant to have been rightly convicted and sentenced; and we dismiss his appeal, uphold conviction, and affirm the sentence."***

23. On our part, we are satisfied that both courts correctly relied on the doctrine of recent possession.

24. The last issue we need to consider in this appeal is whether the complaint that the High Court failed to evaluate and analyse the evidence has merit. It is trite law that the first appellate court has a duty to reconsider the evidence on record as a whole, subjecting it to a fresh examination in order for it to form its own independent conclusion, keeping in mind that the court did not have the chance to observe the demeanour of the witnesses as they gave their evidence. See: ***Okeno v. Republic [1972] E.A*. 32;** and ***Ngui v. Republic [1984] KLR 739*.**

25. In our view, the High Court did not merely adopt the findings of the trial court. The High Court did evaluate the evidence after which it drew its own conclusions that the charge against the appellant was proved to the required standard on account of the direct evidence of identification and on application of the doctrine of recent possession. The High Court did discharge its duty and we do not think there is merit in the complaint that it did not do so.

26. For all the above reasons, we do not think there is merit in the appeal. It is accordingly dismissed.

**Dated and delivered at Nairobi this 9th day of May, 2014.**

**P. N. WAKI**

**……**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

**……**

**JUDGE OF APPEAL**

**A.K. MURGOR**

**……**

**JUDGE OF APPEAL**

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

**REGISTRAR**