IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 33 OF 2014

BETWEEN

DISHON MWANGI MAINA …..…….…….. APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court at Nyeri

(Wakiaga & Ombwayo, JJ.) dated 13th November, 2013

in

H.C.CR. A No. 56 of 2008)

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JUDGMENT OF THE COURT

1. The appellant with two other accused persons were charged with the offence of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code, Cap 63 of the Laws of Kenya***. The particulars were that on the 21st day of June 2006 at Ndimaini village in Nyeri District within Central Province while armed with dangerous and offensive weapons namely clubs robbed Laban Maina Njogu of cash Ksh. 60/= and a mobile phone make Motorola C113 serial number 359194001966454 valued at Ksh. 2,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Laban Maina Njogu.

2. The gist of the prosecution case against the appellant is the testimony of PW1 Laban Maina Njogu and PW2 Monica Waruguru Muthiga.

PW1 testified as follows:

> ***"On 21st June, 2006, at 10.00pm I was on the way from Ndumaini shopping centre to my home. I was walking alone. I had gone to the shopping centre to pass time. On the way I was 1 Km away from my home when I saw people emerge from the roadside thickets. It was dark; the people flashed a torch at me. I did not have any torch and I cannot tell how many torches I saw; I saw flood light from the right hand side and when***

I looked behind I also saw torches and people emerging from the left side of the road. The two groups approached me and they started assaulting me on my head, back and shoulder. I asked them what was going on and nobody talked as they continued to assault me. My pockets were ransacked and I was robbed my Motorola mobile phone and Ksh. 60/=; they ran way leaving me on the ground. I lay on the ground for about 30 minutes; I saw they had left and I went home. ..The next day I went to hospital for treatment and reported to the police. On 25th June, 2006, I received a report from the area chief to report to the police station which I did. I was able to positively identify my mobile phone on 26th June, 2006. Before I went to the police station I passed where I had purchased my mobile phone so that I could get the serial number. I left the receipt at the police station. The serial number is 359194001966454. I was told my mobile phone had been found with some people who had been arrested. I do not know who was found with it; I do not know how they were arrested but I was given the name of the suspect as Dishon Mwangi who is in the dock".

PW2 Monica Waruguru Muthiga testified as follows:

"I hail from Kiambara village. I am a business lady and I sell SIM cards at Ndumaini. I operate Simu ya Jamii; I also charge mobile phones. I know Dishon Mwangi the accused in the dock, he has been my customer, and he used to bring his mobile phone for charging. I have known Dishon since May, 2006. I started my business in January 2006. On 23rd June 2006, I was at my place of work when Dishon brought his mobile phone Nokia 2100 for charging. Before he left I asked him if he could allow me to use his phone with my SIM card to send a message and he allowed me. After I charged the pone, I inserted my SIM card and sent a message. In the evening at 6.00 pm the accused came and took the Nokia phone and he left another Motorola phone C113 and told me to charge it. Later police officers came and asked me about the Nokia which I had used. I told them it belonged to the accused and I told them we can trace the customer at Ndumaini. I also showed the police the Motorola C113 which the customer had left. I led the police to arrest the accused and the Motorola mobile phone was taken as the exhibit now in court".

3. PW5 Police Constable Daniel Hamisi testified that he had been assigned duties to investigate another case of robbery with violence committed on 20th December, 2005, at Ichamara village where one Loise Wanjugu was robbed by 4 men armed with rungus and she lost a Nokia 2100 mobile phone; it was while investigating this crime that he traced the Nokia mobile phone to PW2 who stated that the Nokia phone belonged to the appellant. That PW2 showed him a Motorola C113 mobile phone which she stated also belonged to the appellant. PW 2 led him to where he could arrest the appellant and he took the Motorola phone as an exhibit; that the appellant admitted ownership of both the Nokia and Motorola mobile phone; that the Nokia mobile phone was subject to a different criminal case in Karatina.

4. Upon hearing the case, the trial magistrate acquitted two of the accused persons but the appellant was found guilty of the charge of robbery with violence and sentenced to death. The appellant's appeal to the High Court *(Wakiaga & Ombwayo, JJ.)* was dismissed.

5. Aggrieved by the dismissal of his appeal by the High Court, the appellant in his homemade grounds of appeal has lodged a second appeal before this Court raising the following grounds:

i. ***That the learned judges erred in law by upholding the lower court's decision and failed to discover incaution of law as stipulated by the Evidence Act (sic);***

ii. ***that the learned judges erred in law by countermanding the lower court decision and failed to note that fair hearing was not provided as enshrined in law (sic);***

iii. ***that the judges erred in failing to note that the conviction and sentence was based on a defective***

charge;

iv. ***the learned judges erred in law by failing to put in mind the seriousness of the said offence.***

6. At the hearing of this appeal, the appellant was represented by learned counsel ***Mr. Gichuki Mwangi holding*** brief for learned counsel ***Mr. C.M. Kingori*** while the State was represented by the Assistant Director of Public Prosecution ***Mr. J. Kaigai***.

7. Counsel for the appellant adopted the home made grounds of appeal and urged them as one. He submitted that the appellant was convicted on the basis of the doctrine of recent possession yet no item was physically recovered from the appellant; that the appellant was convicted based on the testimony of a single witnesses PW2 who did not testify that the appellant stole the mobile phone or was involved in the alleged offence; that the testimony of PW2 was not credible as there was no corroborative evidence that the appellant left the mobile phone with PW2 for charging; that the appellant did not claim ownership of the mobile phone recovered from PW2; that there was nothing to connect the appellant with the mobile phone except the testimony of PW2. Counsel urged this Court to find that the appellant's constitutional rights were violated in that when he was arraigned before court, the old Constitution was in force and the appellant was detained for 10 days against the Constitution; that the delay in bringing the appellant before a court of law was not explained; that the rights of the appellant were further violated when the P3 Form tendered in evidence was produced by a clinical officer and not by a qualified medical doctor; that there was no evidence from PW1 that the appellant was involved in the robbery; that neither PW1 nor PW2 identified the appellant as one of the robbers and the learned judges erred in upholding conviction and sentence of the appellant.

8. The State in supporting the conviction of the appellant stated that the prosecution's case was proved to the required standard; that the appellant was convicted based on the doctrine of recent possession; that PW2 testified the mobile phone was in possession of the appellant and it was recovered within 3 days after the robbery; that the trial court found PW2 to be a credible witness. The State conceded that there was no direct evidence linking the appellant with the charge of robbery with violence and a lesser charge of handling stolen property should be considered. On the constitutional issues, the State submitted that under the old constitution an accused person could be brought to court within 14 days; that in the present case no constitutional right of the appellant was violated as he was taken to court within 10 days of his arrest. The State submitted that the clinical officer was qualified to sign and produce the P3 Form that was tendered in evidence.

9. We have considered the grounds of appeal and submissions by counsel and the State and we have examined the record of appeal. There is no doubt that the complainant PW1 was robbed. As to who robbed the complainant, we have analysed the judgment of the High Court and the record of appeal. PW1 did not identify any of his attackers; no identification parade was conducted to link the appellant to the offence of robbery with violence; PW2 did not testify that the appellant committed the offence of robbery with violence. We concur with the submission by the State that there is no direct evidence linking the appellant to the offence of robbery with violence. In cases where conviction for robbery with violence based on the doctrine of recent possession has occurred, there has been additional evidence in the form of identification or recognition of the accused or cogent circumstantial evidence linking the accused to the offence as charged. In the present case, the circumstantial evidence given by PW2 does not irresistibly point to the appellant as one of the robbers. It is our considered view that the two courts below erred in convicting the appellant for the offence of robbery with violence when there was no direct evidence or cogent irresistible circumstantial evidence linking the appellant to the offence as charged.

10. In his submissions before this Court, counsel for the appellant challenged the credibility of PW2 as a witness. In ***Hahn - v- Singh, (1985) KLR 716***, it was held that before an appellate court can come to a different conclusion from that reached by a trial court, it has to be satisfied that the advantage enjoyed by the trial court of seeing and hearing the witnesses was not sufficient to

explain or justify his conclusion. (See Lord Thankerton in ***Watt or Thomas - v- Thomas [194] AC 484 and Lord Bridge in Whitehouse - v- Jordan, (1981) 1 WLR 246,269).***

11. In ***Tayab - v – Kinanu, (1983) KLR 114,*** this Court stated that an appellate court will not interfere with a trial court's finding of fact based on assessment of the credibility and demeanour of witnesses who gave evidence, unless it was wrong in principle. In the instant case, we see no reason to doubt the evidence of PW2. This being a second appeal that is confined to points of law; we see no reason to disturb the finding on credibility of PW2 by the two courts below.

12. The testimony of PW2 reveals that the Motorola mobile phone was given to her by the appellant. The trial court as well as the High Court found that the appellant was in possession of the mobile phone. On this issue, the trial court stated as follows:

> ***"Where an accused is found in recent possession of goods alleged to have been stolen, he is under an obligation to explain how he came into such possession and that such possession is innocent, failure to do so leads to the inescapable conclusion that he is a thief or robbery".***

The learned Judges expressed themselves as follows on the doctrine of recent possession:

> ***"We do find that the trial magistrate properly evaluated the evidence before him and came up with a finding that the mobile phone was found on the appellant but he had taken the same for charging and therefore the doctrine of recent possession was applicable".***

13. ***Section 4*** of the ***Penal Code*** defines possession as follows:

"possession

(a "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person*;*

14. We are satisfied that from the testimony of PW2, the appellant was in possession of the Motorola mobile phone when he physically left it with PW2 for charging. The appellant offered no explanation as to how he came to be in possession of the recently stolen mobile phone. It is our considered view that the two courts below did not err in finding that the appellant was in possession of the recently stolen Motorola mobile phone. However, the High Court in concurring with the trial magistrate on the doctrine of recent possession erred to the extent that the presumption is that a person found in possession of recently stolen goods is either the thief or the receiver; the presumption is not that he is either the thief or robber as stated by the trial court. It is our considered view that in the absence of direct or circumstantial evidence linking the appellant to the charge of robbery with violence, the lesser offence of handling stolen goods contrary to ***Section 322 of the Penal Code*** was proved. ***Section 322 (1) of the Penal Code*** provides that a person handles stolen goods if *(otherwise than in the course of the stealing)* knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so. ***Section 322 (2)*** provides that a person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

15. The upshot is that we hereby quash the conviction of the appellant for the offence of robbery with violence and set aside the death sentence meted upon him. We substitute the same

with conviction of the appellant for the offence of handling stolen goods contrary to ***Section 322 (1)*** of the ***Penal Code*** and sentence him under ***Section 322 (2)*** of the ***Penal Code*** to a term of 10 (ten) years imprisonment with effect from 5th March, 2008, when he was convicted by the trial court.

Dated and delivered at Nyeri this 30th day of July, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR