IN THE COURT OF APPEAL

AT NAIROBI

(Coram: WAKI, NAMBUYE & KIAGE, JJA.)

CRIMINAL APPEAL NO.23 OF 2013

DANIEL MUNUVE MUNYITHYA …....................………1st APPELLANT

DAVID MWANZA MUTEMI ……….................…..........2ND APPELLANT

V E R S U S

REPUBLIC ………………………………………………RESPONDENT

(*Being an appeal against the judgment of Mr. Justices Asike Makhandia and George Dulu given on 5th October 2012*

in

Machakos HCCR.CASE Nos. 190 &191 of 2001

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JUDGMENT OF THE COURT

This is a second appeal by **DANIEL MUNUVE MUNYITHYA** and **DAVID MWANZA** (the appellants) their first having been dismissed by the High Court (Makhandia J as he then was, sitting with Dulu J) which confirmed their conviction and sentence of death imposed by the Senior Resident Magistrate's Court at Mwingi for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**.

The appellants initially filed separate grounds of appeal on documents they each styled **"Notice of Appeal"** but their learned counsel, Mr. Mutembei, abandoned those and based the appeal on the supplementary memorandum of appeal filed on 12th March 2014 in respect of both appellants. It raises some seven grounds of grievance which can be summarized as follows:-

a. The prosecution evidence was uncorroborated and insufficient to prove the case against the appellants.

b. The exhibits allegedly recovered from the appellants were identified by a single witness who was insufficient for the doctrine of recent possession.

c. The learned judges failed to independently evaluate the evidence.

This being a second appeal, we are restricted to a consideration of matters of law only and will not go into

an analysis or examination of factual issues (see **Section 361** of the **Criminal Procedure Code)**. For context however, we state briefly the facts of the case as found proved by the two courts below as follows:-

On the night of 24th August 2009, Simon Musyoka Muthama (PW2) was walking towards Kamuwongo Trading Centre. On reaching the Apostolic Church near the centre, he met some two people standing beside the road. They greeted him and he responded as he walked on. About a kilometer and a half later, he realized the duo was following him. They took hold of him, hit him with a stick and demanded money from him at peril of death. One rummaged through his trouser pockets and helped himself to some KShs.3,575. The other used an axe to hack PW2 on the jaw and head leaving injuries, later confirmed as 'harm' by a clinical officer, before taking his clothes and an assortment of items including bread, cake, tea leaves, a pen and a kikoi before the attackers fled.

Unable to walk from the beating, PW2 slept in the bush until the next morning when, revisiting the scene of his nocturnal misadventure, he found a coiled walking stick and a blue slipper of the left foot. He picked those two items and proceeded to the area Assistant Chief **PATRICK KIMANZI MAITHYA** (PW2) to whom he reported the incident and handed over the two items. Pw3 immediately recognized the walking stick as belonging to **DANIEL MUNUVE MUNYITHYA,** the 1st appellant herein whom he traced to the local market and requested that he accompany him to the Chief's Office. Interrogated, the 1st appellant admitted to being the owner of the walking stick as well as to participation in the crime naming the 2nd appellant as his accomplice, which led to the latter's immediate apprehension as he walked to Kamuwongo market.

A search at the home of the appellants conducted by PW3 in the company of the chief **DANIEL MUTHENGI** (PW4) and Corporal **ABED RUNGU** (PW6) led to the recovery of the items forcefully stolen from the complainant as well as the counterpart of the slipper found at the scene. These items were identified by the complainant at the Chief's office as well as in court where they were subsequently produced.

When placed on their defence, the appellants each elected to give unsworn statements and each denied the charge stating in essence that they were arrested and charged with an offence about which they knew nothing. Both courts below found the charge proved and the appellants were each sentenced to death upon conviction of which were both confirmed by the High Court.

Arguing the appeal before us, Mr. Mutembei submitted that the evidence presented before the trial court was not watertight and did not even meet the threshold of a *prima facie* case enunciated in **RAMANLAL BHATT –VS- R [1957] EA 332**. He assailed the prior courts of arriving at conclusions based on their own theory as opposed to the evidence as deprecated by the predecessor of this Court in **OKALE & OTHERS VS- R [1965] EA555** and for relying on circumstantial evidence that did not meet the evidentiary threshold set out in a long line of authorities including **R –Vs- KIPKERING ARAP KOSKE & ANOTHER [1949]16 EACA 135** which was cited by this Court sitting at Nyeri in **DANIEL MUTHOMI M'MARIMI VS REPUBLIC 2013 eKLR**.

Counsel also charged that the learned Judges of the High Court did not re-evaluate the evidence but merely repeated or copied what the trial court had done with the result that they committed the same error with regard to recent possession as the trial court did. He therefore urged us to allow the appeal.

Opposing the appeal, Ms Nyamosi, the learned Assistant Director of Public Prosecutions contended that the evidence relied on by both courts below was sufficient as it hinged mainly on recent possession of the complainant's items that were peculiar in character and recovered from both appellants within hours of their being forcefully wrested from him. She asserted that the case was proved beyond reasonable doubt and that the learned Judges of the High Court fully and conscientiously discharged their duty as the first appellate court.

Having considered the record before us, the grounds of appeal and the submission from the bar by respective counsel for the parties, we have come to the conclusion that the appellant's complainants

against the learned Judges of the High Court are not merited. The primary duty the learned Judges bore was that of subjecting the case to a re-hearing by way of re-evaluating, re-assessing, re-analyzing the evidence by subjecting it to a fresh and independent review before arriving at their own conclusion as to the guilt or otherwise for the appellant while bearing in mind that they lacked the advantage of hearing and observing the witnesses as they testified. (**See PANDYA VS.R [1957] EA.336; GABRIEL KAMAU NJOROGE VS. R** [1982-88] 1134). Quite apart from the learned Judges' own statement at the end of the judgment that they had conducted their own independent re-evaluation of the evidence presented before confirming the conviction of the appellant without any hesitation, our own perusal of record shows that the learned Judges indeed conducted a thorough and exhaustive analysis and evaluation of the evidence on their own. It was an independent and searching evaluation that shows false the complaint that it was not done.

We are satisfied that the learned Judges properly appreciated the law on recent possession, the one issue on which the fate of the appellants turned, before finding it proved. They were correct in applying the decision of this Court in **MALINGI –VS- REPUBLIC** **[1989]KLR 225** and finding that its parameters had been established namely that;

i. The appellants had possession of stolen items,
ii. The items were stolen a short period previously,
iii. The lapse of time, bearing in mind the nature of the items; and
iv. Absence of co-existing circumstances pointing to any other person(s) as the possessor(s) of the items.

The appellants were unable to provide any plausible or reasonable explanation for their being in possession of goods very recently stolen from the appellant in the course of a violent robbery with the result that they were, in law the robbers. It is a commonsensical presumption that properly applied to the case and the learned Judges were right in upholding the conviction.

In the face of the concurrent findings of fact by the trial and the appellate courts which we set out earlier in this judgment including the recovery of the appellants' personal items at the scene of the robbery, which provides compelling circumstantial evidence and their recent possession of the stolen items and which we cannot lightly interfere with **(see KARANJA & ANOR VS R** [2004]2KLR 140), we are satisfied that the appellants' convictions were safe.

We have come to the inevitable conclusion that this appeal lacks merit and we accordingly dismiss it.

Dated and delivered at Nairobi this 4th day of July 2014.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

REGISTRAR