IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 138 OF 2013

BETWEEN

MARTIN MULINGE MUTISO …….…… APPELLANT

AND

REPUBLIC……..……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Wendo & Ochieng, JJ) dated 21st September, 2004)

in

H. C. Cr. A. No. 215 of 2002)

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JUDGMENT OF THE COURT

Martin Mulinge Mutiso, (the appellant) was charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. On 17th July 2001 the second count was withdrawn as the 2nd complainant could not be traced. The particulars of the relevant count were that on the night of 24th day of November 2001 along the Mombasa/Nairobi Highway, whilst armed with dangerous weapons namely pangas, rungus, stones and sticks, the appellant robbed **(PW1)** ***Kennedy Mwangi*** of cash Kshs. 3,000/=, caterpillar boots valued at Kshs. 4,500/=, a Swiss wrist watch of value Kshs. 4,000/=, a leather belt valued at Kshs. 800/=, two complete spare wheels, two batteries and one clutch plate all valued at Kshs. 45,000/= and at immediately before or immediately thereafter, used actual violence on him.

The facts in brief are that, Kennedy Mwangi (PW1), was driving from Loitokitok to Nairobi along the Mombasa/Nairobi Highway with several passengers on the date and time in question. On reaching Ngokomi area, upon realizing that the vehicle's tyre had a puncture, stopped to change the tyre. As he was doing so, a gang of people threw stones at the vehicle, injuring Kennedy on the mouth, and proceeded to rob him of his property. As the attackers quarreled over the stolen items, Kennedy ran to Salama market where he made a report to the police. He was treated at Sultan Hamud Hospital and later at Machakos Hospital. Soon thereafter, he returned to the vehicle to find that two spare tyres and a battery had also been stolen from the vehicle. He stated that one of the attackers wore a white shirt and a black pair of jeans. It was while recording his statement that the police showed him two tyres that had been recovered and the appellant who was dressed in blue jeans suit and whitish trousers. According to Kennedy, during the robbery the scene was well lit with moonlight and from the headlights of other vehicles that were passing by.

Moses Tobiko Nguruna (PW2), ***James Ngugi Njoroge (PW3) and Simon Ngige Njoroge (PW7)*** who were passengers in the vehicle recounted how they had been attacked as they stopped to change a punctured tyre, but testified that they did not see who the attackers were. They reported the robbery of the two spare tyres and two batteries to the police.

PC Robert Matheka (PW5) was on duty at Sultan Hamud Police Station when a report was made that some people had been robbed while repairing a puncture. He visited the scene and was informed that two spare wheels had been stolen. The following day, PW5 returned to the scene with ***PC Patrick Etei (PW6)*** where an informer told them that one of the thieves was at Ngokomi market. They proceeded to the market where they arrested the appellant after he tried to run away. He subsequently led them to a bush where the two spare tyres were recovered, under some leaves. He was taken to the police station where he was charged with this offence. ***Dr. Patrick Litunya (PW9)***, a senior dental surgeon at Machakos Hospital, produced a P3 form, which confirmed that the complainant had been violently attacked resulting in injury to his mouth with loss of seven teeth.

In his defence which was unsworn the appellant stated that on the afternoon of 24th November 2001, after watering his cabbages, he had gone to the market to buy salt when he was arrested by P.C Matheka (PW5) who was accompanied by another police officer. He claimed that P.W5 had a grudge against him. He said that it was when he failed to give the officers Kshs 20,000/= which was demanded by P.W5's companion, that he was escorted to the police station where he was charged with the offences he said he knew nothing about.

Upon consideration of the entire evidence, the learned trial magistrate having found the charge against the appellant was proved to the required standard, convicted and sentenced him to death as by law prescribed. Being aggrieved with the decision of the trial court, the appellant filed an appeal in the High Court against both the conviction and sentence. The High Court (Wendoh and Ochieng JJ.) after hearing the appeal were satisfied that the prosecution had proved its case, and dismissed the appeal and upheld both conviction and sentence. The appellant being further aggrieved by the decision of the High Court lodged this appeal vide the '*petition of appeal*' filed in Court on 12th October 2004. A supplementary memorandum of appeal was filed later on 12th June 2014 by Otieno Ogola and company advocates. When they appeared before us, ***Mr. Otieno,*** supported by ***Mr Ogola,*** learned counsel for the appellant, abandoned the appellant's homemade grounds of appeal, and relied on the supplementary grounds of appeal which advanced three grounds of appeal, namely;

> *"1. The learned judges erred on a point of law in upholding the conviction of the appellant even after coming to a conclusion that there was no proper identification of the appellant.*
>
> *2. The learned judges erred in finding that the doctrine of recent possession was proved and further that the appellant failed to offer an explanation as to how he came to be in possession of the recovered items.*
>
> *3. The trial court misapplied the facts and applied wrong legal principles to the prejudice of the appellant."*

Mr. Otieno submitted that a witness referred to as an informer was not called to testify and the High Court should have considered that this was an important witness; that the prosecution had stated that the witness would testify, and the failure to call this witness was detrimental to the prosecution's case; that the High Court only found that the recent possession of the two spare tyres connected the appellant to the offence, and that there was no other evidence to support the conviction; that the appellant was not provided with an opportunity to offer an explanation of being in possession of the two spare tyres; that the charge sheet was defective as it specified that the appellant was armed with dangerous weapons yet no such weapons were found with him; and that the appellant's rights had been violated as injuries were occasioned to the appellant whilst he was in custody.

Mr. Orinda opposed the appeal, and submitted that a total of 10 witnesses testified, and the evidence was clear on the appellant's involvement; that the High Court confirmed the conviction on the basis of recent possession so that where a person is connected with the stolen items, the subject of the robbery which were properly identified, and no explanation was given as to how he came to be in possession of the stolen items, the only conclusion is that he is the robber. The evidence showed that the appellant was not found handling the stolen

items, but had led the police officers to the bush, where the stolen items were recovered, and this was how the appellant was connected to the robbery. Regarding the witness who did not testify, counsel submitted that the prosecution was not duty bound to call the informer, who had provided the evidence in confidence. On the violation of the appellant's rights, counsel submitted that this was not one of the grounds, and that it had not been raised in the trial court.

We have considered the record of appeal, the judgments of the trial court and the High Court, the submissions of respective counsel for the appellant and the State as well as the applicable law.

This being a second appeal we remind ourselves that under ***section 361(1)*** of the ***Criminal Procedure Code*** and as this Court pronounced in the case of ***Njoroge vs Republic (1982) KLR 388***,

> ***"On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on the evidence."***

On the issue to whether the failure to call a vital witness was detrimental to the prosecution's case, according to PW5 and PW6, an informer referred to as a good Samaritan had tipped them that 'a thief 'was at Ngomoki market. It was this evidence that led to the arrest of the appellant, and who soon thereafter led PW5 and PW6 to where the stolen items were hidden. To our minds, the value of the informer's evidence was limited to possession of the stolen items by the appellant, and unless the informer was an accomplice, which fact is not borne out by the evidence, we consider that such evidence would not have enhanced the prosecution's case. From the evidence, it was the appellant who led the police officers to the scene in the bushes where the two tyres were recovered. He therefore had constructive possession of the tyres. It was upon him, and not the informer, to proffer an explanation as to how the stolen tyres ended up being hidden at the site where they were recovered. In the circumstances, we see no prejudice that the appellant has suffered by the failure to call this witness, and for this reason, this ground fails.

Turning to the issue of identification of the appellant, Mr. Otieno submitted that since the High Court found that the appellant was not properly identified by the witnesses, the appellant could not be connected to the robbery, and consequently, the conviction was unsafe.

From the judgments, it is apparent that the trial court and the High Court did not base the appellant's conviction on the visual identification by any of the witnesses at the scene. It is undisputed that, the conviction was based on the doctrine of recent possession after the complainant was robbed of his property which included the two spare tyres which were recovered after the appellant led the police to the place where they were recovered.

In grounding the conviction on the recent possession of the two spare tyres, both courts below extensively addressed the issue. In particular the High court stated,

> ***"PW5 was with ……..(PW6) when they arrested the appellant who appellant later led to the hideout of the tyres. The evidence of the 2 was consistent… and it is our finding that the appellant after arrest led to the recovery of the stolen tyres for the vehicle of PW1 was driving some hours earlier during a robbery. Because of the shortage of time within which the recovery was made after the robbery it is unlikely that the tyres could have changed hands. The tyres were still within the vicinity of he (sic) robbery and under section 119 of the***
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> ***Evidence Act the court can draw a presumption that the appellant was one of the robbers In the case of Njoroge v Republic 1982-88 the Court of Appeal in considering the doctrine of recent possession, observed what the court should consider.***
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> 1. ***Whether the appellant was actually the man arrested with the stolen goods.***

2. ***Whether it was the stolen goods.***

3. ***Whether the appellant's defence raised any doubts on these matters.***

4. ***Whether the inference of theft at the time of robbery charged was properly drawn; whether it might be a case of receiving stolen property or mistaken identity.***

We have considered all the above and the defence by appellant did not offer any reasonable explanation as to how he came to know where the tyres were. We find that he was in recent possession of the tyres. Under the circumstances it was not necessary to charge the appellant with the offence of handling stolen property or possession. The charge of robbery with violence was proper."

The reproduction of this excerpt of the judgment shows that in upholding the conviction of the trial court, the High Court took into consideration, and applied the appropriate principles of recent possession in the instant case.

In the case of ***Maina & 3 Others vs Republic [1986] KLR 301***this Court cited with approval the oft cited case of ***R. vs Loughlin 35 Criminal Appeals R 69***,where the Lord Chief Justice stated,

"If it is proved that the premises had been broken into and that certain property had been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which a jury infer that he is the house breaker or the shop breaker."

In the case of ***Hassan vs Republic (2005) 2 KLR 11***, this Court restated the above principle as hereunder;

"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 a receiver".

Given the circumstances of this case, we are satisfied that the principles of recent possession were properly applied by the two courts below. It is without doubt that hours after the complainant was violently attacked and injured by robbers, in a robbery where two tyres amongst other items were stolen, it was the appellant who led the police officers pursuant to the then section 31 of the evidence Act (since repealed) to a place in the bush where the two stolen spare tyres were recovered. In his defence, he made no reference to the recovery of the said tyres, nor did he offer any explanation as to how they came to be in his possession. In the circumstances, under ***section 119*** of the ***Evidence Act***, the courts below were entitled to infer that the appellant was one of the robbers who robbed the complainant.

We find this appeal devoid of merit. Accordingly, we uphold the decision of the High Court and dismiss this appeal.

Dated and Delivered at Nairobi this 17th day of October, 2014.

W. KARANJA

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JUDGE OF APPEAL

D. MUSINGA

….....

JUDGE OF APPEAL

A. K. MURGOR

….....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR