IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 34 OF 2014

BETWEEN

CHARLES MATU MBURU ……..…… APPELLANT

AND

REPUBLIC ……...…… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Wakiaga & Ombwayo, JJ.) dated 30th January, 2014

in

H. C. CR. A No. 268 of 2010)

****

JUDGMENT OF THE COURT

1. ***Charles Matu Mburu,*** the appellant herein, was charged in the Chief Magistrate's Court at Nyeri with one count of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code,*** Chapter 63, Laws of Kenya and three alternative charges of handling stolen property contrary to ***Section 322 (2)*** of the ***Penal Code.*** The appellant was also charged with one count of rape contrary to ***Section 3(1)*** of the ***Sexual Offences Act, No. 3 of 2006*** and an alternative charge of indecent act with an adult contrary to ***Section 11(6)*** of the ***Sexual Offences Act.***
2. The particulars of the charge of robbery with violence were that on the night of 11th and 12th November, 2008 in Nyeri District within the then Central Province, the appellant jointly with others not before the court, while armed with dangerous weapons, namely pangas, rungus and axes robbed EWN of a mobile phone make Motorola C113 serial number 358901001216776, one radio cassette player make National Star serial number 299025, one bag, two mattresses, unknown number of bed sheets and blankets, unknown cash money, one blue rain coat, two hospital receipts numbers 1128 and 298 and one bed cover all valued at Kshs. 25,700/= and at or immediately before or immediately after the time of such robbery killed the said EWN
3. The particulars of the first alternative charge of handling stolen property were that on 13th November, 2008, in Nyeri District within the then Central Province, otherwise than in the course of stealing, the appellant dishonestly assisted in the disposal of a mobile phone make Motorola C113 serial number 358901001216776 valued at Kshs. 2,500/= the property of the deceased,

EWN, for the benefit of Hosea Kabara Nyoike knowing or having reasons to believe it to be stolen goods. On the second alternative charge of handling stolen property, the particulars were that on 26th July, 2009 at Ihumbu Village, Muranga South District within the then Central Province, the appellant otherwise than in the course of stealing dishonestly retained one blue rain coat valued at Kshs. 1,500/= the property of the deceased, EWN, knowing or having reasons to believe it to be stolen goods. On the third alternative charge, the particulars were that on 26th July, 2009 at Soweto Village in Nyeri North District within the then Central Province, the appellant otherwise than in the course of stealing dishonestly handled two blankets and one bed cover all valued at Kshs. 1,600/= the property of the deceased, Esther Wangui Ngatia, knowing or having reasons to believe them to be stolen goods.

4. On the count of rape, the particulars were that on the night of 11th and 12th November, 2008 in Nyeri District within the then Central Province, the appellant jointly with others not before the court, intentionally and unlawfully committed an act of penetration with his genital organs of the deceased, EWN. The particulars of the alternative charge of indecent act with an adult were that on the night of 11th and 12th November, 2008 in Nyeri District within the then Central Province, the appellant jointly with others not before court, committed an indecent act with an adult namely the deceased, EWN, by causing his genital organs to touch her sexual organs.
5. The appellant pleaded not guilty to all charges. The prosecution called a total of 15 witnesses in support of its case against the appellant. It was the prosecution's case that PW1, Josephat Mwangi Wanduma (Josephat) and EWN (deceased) were good friends; Josephat used to keep his cattle in the deceased's homestead. On 11th November, 2008 Josephat did some work for the deceased at her home and left at around 6:30 p.m. Before leaving Josephat and the deceased agreed they would meet the following day at the deceased's home. The following morning of 12th November, 2008 Josephat went around the deceased's compound calling out her name because he could not see her; however, the deceased never responded. He then went into the kitchen and noticed that the kitchen was dirty; still there was no sign of the deceased. When he left the kitchen he saw PW2, Juliana Wothaya Kiboi (Juliana), coming into the compound. Juliana used to do casual work for the deceased. Josephat informed Juliana that he had not seen the deceased. Concerned about the deceased, both Josephat and Juliana went to the main house to look for her. They saw that the door was slightly opened; Juliana entered the house first and screamed; she told Josephat that the deceased had been killed. It was Josephat's evidence that he saw the deceased lying on the ground on her stomach; the deceased's hands and legs had been tied with pieces of cloth and her mouth had been stuffed with a piece of cloth. He also noticed that the deceased had been hit on the left side of her forehead and blood had splashed everywhere. The incident was reported to the police.
6. On the same day, 12th November, 2008 at around 9:30 a.m., PW6, PKN (P), the deceased's son, was informed of her death. P went to the scene on the same day and noticed that the deceased's mobile phone make Motorola C113, radio cassette make National Star, beddings and two mattresses were missing. He also testified that he suspected some money had been stolen from the deceased since her purse was empty. He gave evidence that it was his brother, PW7, CMN (C), who had purchased the mobile phone for the deceased while he had purchased the radio. He testified that the deceased's body was taken to Outspan mortuary and post mortem was conducted which established that the cause of her death was strangulation and that the deceased was also raped.
7. On 13th November, 2008 at around 11:00 a.m. while PW4, Joseph Kingori Wanjiru (Kingori) was on his way to Kanyugu's homestead, he met one Mathenge who informed him that there was a man who wanted to sell his mobile phone. Kingori was interested and asked Mathenge to take him to see the man. Mathenge took Kingori to the appellant who was seated by the road side. According to Kingori the appellant was not known to him. The appellant showed Kingori the mobile phone which was in good condition. It was Kingori's evidence that the appellant informed him he was selling the mobile phone in order to get money to go home in Mukurweini. Kingori informed the appellant that he had no money but that he would take him to PW3, Hosea Kabara Nyoike (Hosea), to see if he would be interested in purchasing the mobile phone. Hosea purchased the phone from the appellant at a cost of Kshs. 600/= and gave it to his father in law, PW5, Maccom Mathenge (Maccom). Neither Kingori nor Hosea knew the deceased prior to the said day. It was Hosea's evidence that he purchased the mobile phone from the appellant because he

had been introduced by Kingori and Mathenge who were known to him.

8. The appellant used to work for the deceased between the years 2001 to 2003. On 19th November, 2008 the appellant was spotted near the deceased's homestead; he was arrested by the deceased's sons and neighbours and taken to the Chief's Camp on suspicion that he was involved in the deceased's death. The appellant was later transferred to Mweiga Police Station where he was re-arrested by PW8, Sergeant Nicholas Kiplimo (Sergeant Nicholas), and placed in custody pending investigations. Sergeant Nicholas testified that the appellant was released on 22nd November, 2008 for lack of evidence but was required to report at the Police Station periodically; the appellant appeared on two occasions and later absconded.
9. The investigating officer, PW13, Sergeant Jacob Mureithi (Sergeant Jacob), with the assistance of Safaricom established that the deceased's mobile phone was activated a few hours after the incident on 12th November, 2008 at 1405 hours by cell phone no. 0712220011. It was also Sergeant Jacob's evidence that they were able to get details of other subsequent users of the mobile phone. On 20th February, 2009 the mobile phone was traced to PW5, Maccom, in Kiururumi Village. Maccom was arrested and interrogated; he informed the police that it was Hosea who had given it to him. Hosea and Kingori were also arrested and interrogated; Kingori and Maccom were later released; however, Hosea was charged with the offence of robbery with violence and remanded in custody for two months. He was subsequently released and the charges against him were dropped.
10. Sergeant Jacob gave evidence that Hosea described the person who sold the phone to him; the deceased's sons informed him that the said description matched that of the appellant who used to work for the deceased and who had earlier been arrested at Mweiga Police Station. After conducting investigations and looking at the appellant's statement at Mweiga Police Station he noticed that the deceased had given his contact number as 0712220011; the said number matched the number that first activated the deceased's mobile phone after the incident. Sergeant Jacob was able to trace the appellant's home in Maragwa within Ihumbu Village; however, he was informed by members of public that the appellant had not been seen for about three months. On 26th July, 2009 following information from members of public, the appellant was arrested in Maragwa. Sergeant Jacob searched him and found in his wallet two receipts made out in the deceased's name from Dr. Mate. After searching the appellant's house in Maragwa a Safaricom Sim cage indicating the number 0712220011 was found under his bed; a blue rain coat was also found in the house. The appellant led the police to where he had been staying for the last three months in Narumoru in Soweto Village; two blankets and a bed cover which were identified by P and C as belonging to the deceased were recovered from the said house. C identified the blue rain coat that was found in the appellant's house as the one he had given the deceased. C also identified the mobile phone that was found in possession of Maccom as the one he had bought for the deceased. He also tendered receipt of its purchase as evidence; the receipt had the same serial number as the mobile phone recovered from Maccom. Thereafter, Kingori and Hosea identified the appellant as the person who sold the deceased's mobile phone in two separate identification parades. The appellant was charged and arraigned in court.
11. In his defence, the appellant gave a sworn statement. He denied committing any of the offences he was charged with. He testified that he used to work for the deceased and they had a good relationship. The deceased had given him a parcel of land to cultivate while he was working for her. After leaving the employment of the deceased in the year 2003, the appellant went back home at Maragwa. He was later informed by one Joseph that the deceased had been killed and was scheduled to be buried. The appellant traveled to attend the funeral at the deceased's home where he was arrested and subsequently released. He testified that he was later arrested for allegedly selling the deceased's phone to Hosea. He maintained that he had never met Hosea. He maintained that the items that were recovered in his house were given to him by the deceased while he was working for her; the receipts were in the blue rain coat which the deceased had given him; he did not know the contents of the receipts since he could not read; he carried the receipts around but forgot to give to the deceased's family when he went to attend the funeral. He maintained that he had no reason to steal from or kill the deceased because she had always been good to him.
12. After considering the matter on merit, the trial court found that the prosecution had tendered overwhelming evidence against the appellant and convicted him on both counts and the alternative charges. The appellant was sentenced to death on the count of robbery with violence and the

sentences for the other offences were held in abeyance. Aggrieved with the conviction and sentence, the appellant preferred an appeal in the High Court. The High Court (Wakiaga & Ombwayo, JJ.) vide a judgment dated 30th January, 2014 dismissed the said appeal. It is that decision that instigated this current appeal based on the following grounds:-

- ***The 1st appellate court erred in law in upholding the conviction of the appellant without first critically examining and evaluating the evidence adduced before the trial court and drawing its own conclusions.***

- ***The 1st appellate court erred in law in not finding that failure to call a material witness, in this case, the government chemist occasioned a miscarriage of justice to the appellant.***

- ***The 1st appellate court erred in law in not finding that the conviction of the appellant was based on contradictory testimonies of PW3, PW4 & PW5.***

- ***The 1st appellate court erred in law in upholding the conviction of the appellant based on insufficient evidence of recent possession.***

- ***The 1st appellate court erred in law in not finding that the prosecution did not prove its case against the appellant beyond reasonable doubt.***

13. Mr. Muchiri wa Gathoni, learned counsel for the appellant, submitted that the High Court did not properly re-evaluate the evidence tendered at the trial court but merely adopted the trial court's findings. He argued that the print outs from Safaricom indicated that calls were made from the deceased's phone using number 0712220011 at 2:05 p.m.; no evidence was tendered as to how the print outs were generated; no certificate was issued by Safaricom verifying the contents of the print out as required under ***Section 65*** of the ***Evidence Act.*** According to Mr. Muchiri, the main evidence was based on the said print outs which could not be verified. He submitted that despite DNA being referred to by the prosecution, the results of the same were never tendered in court. He maintained that the evidence of PW3, Hosea, and PW4, Kingori, contradicted each other; the prosecution failed to call Mathenge who was a crucial witness. Mr. Muchiri submitted that Hosea and Kingori admitted that they did not know the appellant prior to the day he allegedly sold the mobile phone to Hosea; the identification of the appellant by Hosea and Kingori after many months was suspect. He argued that the prosecution had not proved its case to the required standard. He urged us to allow the appeal.
14. Mr. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal, submitted that the appellant was in recent possession of the mobile phone stolen from the deceased. Hosea gave clear and cogent evidence which was corroborated by Kingori. He argued that the deceased's son, Patrick, tendered the receipt of purchase of the said mobile phone and identified the deceased's personal items which were found in the appellant's possession. The appellant never explained how he got possession of the said items. Mr. Kaigai submitted that the two lower courts considered the appellants defence and rejected the same; the two lower courts came to the same conclusion that it was the deceased who had committed the offences. He submitted that the prosecution had explained at the trial court that the DNA results were not ready for trial at the Government chemist. Mr. Kaigai urged us to dismiss the appeal.
15. We have considered the record of appeal, the grounds of appeal, submissions by counsel and the law. This being a 2nd appeal and by dint of ***Section 361*** of the ***Criminal Procedure Code***, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***Mwita –vs- R (2004) 2 KLR 60.*** In ***Kaingo -vs- R (1982) KLR 213*** at p. 219 this Court said:-

"A second appeal must be confined to points of law and this Court will not interfere

with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"

16. In view of the aforementioned, the issues arising for the court's determination are:-

- ***Was the appellant's identification proper and free from error?***

- ***Was the doctrine of recent possession properly invoked by the two lower courts?***

- ***Did the High Court properly re-evaluate the evidence before the trial court?***

17. It is not in dispute that the deceased's mobile phone was found in the possession of Maccom; Hosea had given Maccom the said mobile phone. The two lower courts made concurrent findings that the appellant was positively identified by PW3, Hosea, and PW4, Kingori, as the person who sold the deceased's mobile phone to Hosea on 13th November, 2008. The identification was through two separate identification parades. In ***Kariuki Njiru & 7 others –vs- R- Criminal Appeal No. 6 of 2001***, this Court stated:-

> ***"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error."***

18. In this case, the appellant was not known to Hosea and Kingori prior to the incident. In fact both Hosea and Kingori testified that they met the appellant for the first time on 13th November, 2008 when he allegedly sold the deceased's mobile phone to Hosea. They both maintained that they had received a strong impression of the appellant's physical attributes on the material day. However, from the record neither Hosea nor Kingori testified that they gave the description of the appellant to the police when they were initially interrogated over the deceased's mobile phone. In ***Maitanyi -vs- R(1986) KLR 198*** this Court held,

> ***"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description."***

19. On the other hand, PW12, Corporal Daniel Nyagah (Corporal Daniel), testified that Hosea and Kingori gave the description of the person who sold the said mobile phone; the said description matched the appellant. It is not clear from the record whether any description was given or whether it was given at the first possible opportunity when Hosea and Kingori were arrested. Further, Corporal Daniel did not tender evidence of the details of the description allegedly given by Hosea and Kingori prior to the arrest of the appellant and the aforementioned identification parades. In ***Simiyu & Another –vs- R (2005) 1 KLR 193,*** it was held,

> ***"In every case in which there is a question as to the identity of an accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of and by the person or persons to whom the description was given."***

20. It is on the basis of the description given by a witness that a fair identification parade is organized to test the accuracy of the said identification. Where an identification parade is conducted without a witness first giving the description of an assailant amounts to a dock identification. In ***James Tinega Omwenga –vs- R- Criminal Appeal No. 143 of 2011***, this Court expressed itself as

follows:-

> ***"The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless."***

21. Having expressed ourselves as herein above we find that there was uncertainty on the identification evidence and the same was not watertight. We are of the view that the prosecution ought to have called Mathenge as a witness because he was the one who allegedly introduced the person who sold the mobile phone to Hosea and Kingori; he would have shed light on the identity of the said person. From the record, it is clear that the said Mathenge was well known to Hosea and Kingori and he had been interrogated by the police. In ***Bukenya & Others -vs- Uganda (1972) EA 549,*** the predecessor of this Court held:-

> ***"It is well established that the Director has discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

22. The two lower courts also based the appellant's conviction on the doctrine of recent possession. This Court has in several cases, outlined the principles governing the doctrine of recent possession, and when it may apply. In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- R -Criminal Appeal No. 272 of 2005***, this Court held,

> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."***

Possession of the stolen item can either be actual or constructive as defined under ***Section 4*** of the ***Penal Code*** which provides,

> ***" (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 of benefit of oneself or of any other person."***

23. The two lower courts found that the appellant was in recent possession of the deceased's mobile phone. This is because firstly, as per the finding of the two lower courts, the appellant was positively identified as the person who sold it to Hosea. However, as discussed herein above, the said finding fails on account that the said identification was not proper and free from error. Secondly, the two lower courts found that it was the appellant's mobile phone number 0712220011which first activated the said mobile phone a few hours after the incident. In this respect, the two lower courts' findings were based on the print- outs of the call history of the

deceased's mobile phone from Safaricom Ltd.

24. ***Section 65(8)*** of the ***Evidence Act*** provides:-

> ***" In any proceedings under this Act where it is desired to give a computer print- out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say-***
>
> ***(a)Identifying a document containing a print-out or statement and describing the manner in which it was produced;***
>
> ***(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by the computer;***
>
> ***(d) dealing with any of the matters to which conditions mentioned in subsection (6) relate.***
>
> ***Which is certified by a person holding a responsibility position in relation to the operation of the relevant device or the management of the activities which the document relates in the ordinary course of business shall be admissible in evidence."***

In this case, the computer print-outs that were produced by the prosecution of the call history on the deceased's mobile phone do not contain the certification mentioned in the above provision. Further, no evidence was tendered on how the said print-outs were generated. We agree with the appellant's submission that the said print-outs had not been verified by Safaricom, hence they were inadmissible. We find that the two lower courts erred in relying on the said print-outs.

25. On the other items namely, the medical receipts, blue rain coat and beddings which belonged to the deceased, it was not in dispute that they were found in the possession of the appellant. Consequently, the burden shifted to the appellant to offer a reasonable explanation for the said possession. In ***Malingi –vs- R(1988) KLR 225,*** this Court expressed itself as herein under:-

> ***"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case recent…"***

26. The appellant contended that he did not steal the said items; it was the deceased who had given him the said items when she was still alive. It was not in dispute that the appellant had worked for the deceased for a period of three years. It was the appellant's uncontroverted evidence that he had a good relationship with the deceased as his former employer to the extent that he was given a parcel of land to cultivate by the deceased. Patrick also testified that after the appellant left employment he continued going to the deceased's property to cultivate the parcel which had been given to him. The appellant testified that he found the medical receipts in the pocket of the blue rain coat which the deceased had given him; he carried the said receipts in his wallet with the intention of giving them back to the deceased before she died; after her death he intended to give them to her relatives but forgot to do so. Taking into consideration that there was no evidence of bad blood between the appellant and the deceased, we find it plausible that the said items were given to the appellant by the deceased. We find that the two lower courts erred in invoking the doctrine of recent possession.

27. There was no eye witness account of what transpired on the night of 11th and 12th November, 2008. The only evidence which was available was circumstantial which in our view did not irresistibly point to the guilt of the appellant. In ***R-vs- Kipkering Arap Koske & Another (1949)16 EACA 135,*** it was held,

> ***"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving the facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the accused."***

28. Having expressed ourselves as herein above we find that the High Court did not properly re-evaluate the evidence at the trial court. Had the High Court done so, it would have found that there was no evidence connecting the appellant with the offences he was charged with. In ***Njoroge –vs- R (1987) KLR 19*** this Court stated:-

> ***"1. It is the duty of the first appellate court to remember that the parties are entitled, as well on the questions of fact as on the questions of law, to demand a decision of the court and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions. The court should however bear in mind that it has neither seen nor heard the witnesses and it should make due allowance in that respect.***
>
> ***2. If the first appellate court fails to carry out that duty, it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Misdirections and non-directions on material points are matters of law."***

29. Lastly, without prejudice to the foregoing, we find that the trial court erred in convicting the appellant on the alternative charges having already convicted him on the main counts. This Court in held,

> ***"Where an accused person is convicted on the main charge, the usual practice is to make no findings on the alternative charge so that if on appeal the court thinks that the main charge was not proved but the alternative one was, the court can substitute a conviction on the alternative charge which would still be available on the record."***

30. The upshot of the foregoing is that we allow the appeal herein and quash the conviction and set aside the death sentence meted out on the appellant. We hereby order the appellant be set at liberty until otherwise lawfully held.

Dated and delivered at Nyeri this 8th day of October, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR