IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 493 OF 2010

BETWEEN

JOSEPH WAMBUA MASOO ….....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Ojwang & Azangalala, JJ) dated 22nd September, 2010

in

H.C.CR.A.NO.263 OF 2008)

****

JUDGMENT OF TGHE COURT

The appellant was convicted by the Senior Resident Magistrate, Kwale on three counts of robbery with violence contrary to ***section 296(2)*** and was sentenced to death. He was initially charged with two others. The 3rd co-accused, ***John Muganda Muia*** was however acquitted by the trial court at the conclusion of the trial under ***section 215*** of the Criminal Procedure Code for want of evidence whereas the appellant and the remaining co-accused, ***John Munuve Musyoki*** were convicted and sentenced to death. The duo then proceeded to the High Court by way of appeal. Whereas the appeal by ***John Munuve Musyoki*** was successful, the appellant was not that lucky. His appeal was dismissed.

On 4th October, 2007 at about 10.10 p.m. ***Nils Filip Ossian Andersson*** (PW1) the complainant in count 1 was headed home after having had dinner with his wife, ***Ida Orgy Anderson*** and a visiting couple when about 200 metres from his home at ***Kinondo Kwetu Hotel***, two tyres of his vehicle were deflated by a sharp object placed on the road. He called his driver, ***Hamisi Athman Mohamed (PW3)***, the complainant in count 2 who immediately came to the scene in the company of the security officer at the hotel, ***William Ngala Chirao*** (PW2), the complainant in count 3. PW1 the attackers instructed that the visiting couple and his wife be taken home as they changed the tyres. Suddenly, the trio who remained behind heard something like a gunshot. Then four to five men appeared from behind the vehicle and ordered them to lie down. They complied whereupon they were asked for money. From PW1 they took Kshs.5,000/-, Sony Erickson phone, a wristwatch and a pair of leather shoes. From PW3, his Motorola phone, open shoes, pen knife and a cap were taken, whereas from PW2 in count three, they took away his

Nokia 3310 and a wristwatch. In the process the attackers seriously assaulted the trio. When all of a sudden a motor vehicle appeared from the direction of the hotel, the attackers disappeared into the forest. None of the complainants were able to identify any of the attackers. Eventually the complainants drove to the hotel and called the police from Diani Police Station as well as the security group. The injured and in particular PW2 was taken to Diani Hospital where he was treated and discharged. He was subsequently examined by a clinical officer at Msambweni District Hospital on 10th October, 2007 one ***Allani Tomoit Cherop*** (PW5) who thereafter filled his P3 form. He classified the injuries sustained as harm and the object used as blunt.

In the meantime, ***Bakari Hamisi Likongo*** (PW4) was at his place of work at ***Kibunduni*** where he operates a video shop on 5th October, 2007. At about 11.00 a.m. the appellant approached him and informed him that he had a Motorola cell phone to sell. The asking price was Kshs.4,000/-. PW4 expressed interest in the transaction. However they negotiated and agreed at Kshs. 3,000/-. as the purchase price. PW4 duly paid the appellant part payment of the purchase price in the sum of Kshs.2,300/- leaving a balance of Kshs.700/- to be collected the following day. The appellant then left him with the cell phone. Next door to PW4's business was a repairer of cell phones by the name, ***Charles*** PW4, immediately approached him so that he could show him how to operate the same. Upon examining the phone, ***Charles*** told PW4 that he suspected the cell phone to belong to his landlord, a ***Mr Hamisi (PW3)***. He gave ***PW4 Hamisi's*** telephone number and they called him. PW3 confirmed that he had been a victim of robbery the previous night and had indeed lost his cell phone in the process. PW4 told him that his cell phone was being sold to him and that seller was coming for the balance of the purchase price the following day and he should therefore alert the police. On the following day at about 3 p.m. the appellant came for the balance of the purchase price. As the police had been alerted and had laid an ambush, they soon thereafter appeared and PW4 showed them the appellant whom they arrested. At the time, PW4 was holding the cellphone and the balance of the purchase price in his hand ready to pay the appellant. He thereafter handed over the cell phone to the police.

P***.C. Stephen Muli*** (PW6) and ***P.C. Muhia*** were part of the police squad that lay in wait for the appellant. After arresting the appellant he volunteered to take them to where his alleged accomplices were. The appellant took them to a house. However as they approached a person emerged therefrom and escaped. When they searched the house they recovered a Sony Erickson phone and a pen knife. Nonetheless they found another person in the house and they arrested him. That person was the appellant's second co-accused. The two however denied residing in the house. They however agreed to take the same police officers to ***Ibisa Corner*** where they claimed to reside. They proceeded there and upon searching the house they were able to recover 11 metal bars with nails believed to have been used in deflating the tyres of the motor vehicle during the robbery. They were also able to recover therefrom a cap and white leather shoes. The two were then taken to the police station and handed over to ***P.C. Mureithi*** (PW8) the investigating officer and ***CPL Issa Wachira*** (PW7) for further investigation. On 6th October, 2007 they received information from a member of the public that someone was selling a cell phone suspected to be stolen at a video shop. An ambush was laid by PW6 and ***P.C. Muia*** and the appellant was arrested from whom they recovered a Motorola phone. The appellant then took the police to a house from where they recovered a Sony Erickson cell phone, pen knife, wallet, metal spikes and bars. A second house belonging to the appellant and second co-accused was similarly visited and a recovery of white leather shoes and a cap was made. The appellant and co-accused then mentioned one ***John Nganda Muia*** as one of their accomplices though he was a matatu tout during the day. They led the police officer to him and he was duly arrested at White House area. He was the third co-accused during the trial. PW8 thereafter called the complainants to the station for purposes of identifying any of their stolen items. PW1 positively identified his stolen Sony Erickson cell phone, PW3 his Motorola cell phone and pen knife and as for PW2 he identified his wristwatch.

Put on his defence, the appellant denied at the trial that he committed the offence. Instead he claimed that on 6th October, 2007 at about 12.00 p.m. whilst at his place of work he saw a man he knew as ***Charles*** with another person. They had been business buddies with ***Charles*** but following some disagreements they split among themselves the business. Whereas his business flourished, that of ***Charles*** foundered. Since then ***Charles*** held a grudge against him. The man ***Charles*** had come with was a police officer and after introductions, he asked for a trade licence for his business. He did not have,

accordingly the police officer arrested him and took him to Diani Police Station. The following day he was taken to court with two others whom he did not know and jointly charged for offences he had nothing to do with.

The trial magistrate believed the evidence of the prosecution and convicted the appellant and his second co-accused on the doctrine of recent possession. This is how the learned magistrate delivered herself on the issue:

> ***"The shot (sic) time span from the time of the robbery and the time of arrest of the accused also mitigate (sic) against the accuseds (sic). Accuseds (sic) have failed to explain how they came to posses (sic) such property (sic) of the complainant so soon after the robbery. In my view there is only one reasonable explanation, that they were part of the group who attacked the complainants and robbed them of their property ..."***

On appeal, the High Court dismissed the appellant's appeal and allowed that of his co-appellant. Again the dismissal of the appeal was on the basis of the application of the doctrine of recent possession. This is what the High Court had to say:-

> ***"... As for the 1st appellant, we have found that the prosecution proved beyond reasonable doubt, that he was on 5th and 6th October, 2007 found in possession of property which had been stolen from the 1st and 2nd complainant on 4th October, 2007. Both complainants identified their property and proved to the required standard that the same had been robbed from them. The 1st appellant did not claim ownership of the same property. He offered no explanation as to how he came to be in possession of the property. It was his duty to do so (****see section III of the Evidence Act Cap 80 Laws of Kenya****). In his defence, the 1st appellant denied the offence and testified on how he was arrested at the instigation of his former business partner ostensibly for operating a business without a licence. Like the trial magistrate, we found the 1st appellant's defence incredible and the learned principal magistrate was right in rejecting the same.****"***

Undeterred the appellant mounted this second and perhaps last appeal initially in person but later ***Timothy Njeru Esq***., advocate came to his aid. On 10th August, 2011, the said advocate filed a supplementary memorandum of appeal in which he impugned the decision of the High Court on the grounds that the doctrine of recent possession was wrongly applied, hearsay evidence was admitted whose veracity could not be tested, key witnesses were not called, court relied on contradictory evidence, the charge was defective, and that the sentence imposed was unconstitutional.

When the appeal came before us for plenary hearing on 22nd April, 2013 ***Mr Njeru*** learned counsel for the appellant submitted that the doctrine of recent possession was inapplicable as the appellant was not found in physical possession of stolen items. The alleged cell phone was not physically found in his possession. The other items were found in a house which did not belong to him. The owner of the house was not called to testify as to who was the tenant in the house as the police were never sure to whom the house belonged. The appellant could not have explained possession for an item he did not have. In aid of his submissions, counsel referred the Court to the following authorities – ***Peter Lohma Esinyon vs Republic (2010)*** eKLR & ***Dennis Saina Ndiema & Anor vs Republic*** (2010) eKLR.

On hearsay evidence counsel submitted that the trial court believed and acted on the evidence of one ***Charles*** when he was never called as a witness. This was extremely prejudicial to the appellant. The court under ***section 150*** of the Criminal Procedure Code had power to summon the witnesses such as ***Charles*** but it did not. As for contradictions, counsel submitted that there were contradictions as to where the stolen items were recovered. Counsel then abandoned the ground about the sentence of death being unconstitutional.

Mr Wohoro, learned Senior Assistant Director of Public Prosecutions opposed the appeal and submitted that the appellant was arrested on the basis of information provided by PW3. He was arrested

at PW3's business premises and a cell phone recovered from him. This was a day after the robbery. The applicant did not account how he ended up at the place where he was arrested. He had come to collect the balance of the purchase price of the cellphone. Ownership of the cellphone was proved. The appellant did not claim ownership of the cell phone. Concluding his submissions, ***Mr Wohor***o stated that in his defence, the appellant did not controvert the evidence of his possession of the cell phone.

The appeal before us is obviously a second appeal and that being so, we can only deal with matters of law by dint of ***section 361*** of the Criminal Procedure Code. However, as we listened to counsel for the appellant prosecute the appeal we could not help wondering whether he had paid any attention to the aforesaid provisions of the law. He argued the appeal as though this was a first appellate court which must re-evaluate and re-consider the evidence tendered in the trial court before reaching its independent conclusion in terms ***Okeno vs Republic*** (1977) EA 32. Obviously such an approach should be frowned upon.

Turning to this appeal, there was overwhelming evidence that the complainants were robbed by a gang of robbers of the various items listed in the charge-sheet on the night of 4th October, 2007. In the process, PW2 was seriously injured. Subsequent thereto, some of the items were recovered from the appellant and a house belonging to the appellant and one of his co-accused. Those items were positively identified by the complainants as belonging to them and had been stolen from them during the robbery. Those items were recovered a day or so after the robbery. The appellant did not offer any explanation as to how he had come in possession of the Motorola cellphone belonging to PW3 nor did he claim ownership of the same. These were concurrent findings of fact by the two courts below. There was evidence to support those concurrent findings of fact. There are no grounds warranting our interference with those concurrent findings of fact in the circumstances.

The only issue of law brought out in the submissions of the appellant was whether given the set of facts, the two courts below were right in invoking the doctrine of recent possession. The plank taken by the appellant is that having not been found in physical possession of the Motorola cell phone and the same having been in the possession of PW4 the doctrine was in applicable to him. Indeed counsel argued that the police should have waited until the balance of the purchase price was passed over to the appellant before pouncing and arresting him. This would then have squarely connected the appellant with the cellphone.

Our response to this submissions is to ask a rather rhetorical question just as posed by ***Mr Wohoro*** in his submissions, how did the appellant end up at the business premises of PW4? There is unconctroverted evidence that the previous day, he had offered to sell a Motorola cellphone to PW4. Indeed he had been paid part of the purchase of Kshs.2,300/- leaving a balance of Kshs700/- which was to be collected the following day. This is the amount the appellant had come to collect when he was arrested. Secondly, the appellant cannot claim not to have been in possession of the cell phone. Having sold it to the PW4 and PW4 having not paid the full purchase price, the cellphone in law still remained his as the property therein had not fully passed on PW4. Much as the cell phone was in the actual possession of PW4, the appellant was in our view and in law still in constructive possession thereof pending the conclusion of the transaction. Finally, we would revert to the definition of "possession" in ***section 4*** of the Penal Code.

By the definition of possession in ***section 4*** of the Penal Code, a person who is not in personal possession is nevertheless deemed to be in possession if he knowingly has anything in the actual possession or custody of any other person or if he has anything in any place (whether or not occupied by him) for his use or benefit or for use and benefit of any other person. This definition answers the appellant's twin submissions that, the cell phone was not found in his actual physical possession but that of PW4 and that the other stolen items were found or recovered in a house whose ownership was not proved and he could not therefore be held to account for those items.

Both the trial and High Courts appreciated that though the appellant was not found in physical possession of some of the stolen goods, nonetheless made a finding that he and co-accused had led the police to two houses from which stolen goods were recovered and from that fact concluded that the

appellant had knowledge of the possession of stolen goods by the co-accused and thus in law all of them were in joint possession of the stolen goods. Again there are no grounds for our interfering with the concurrent finding of fact by the two courts below that the appellant and the 2nd co-accused led police to two houses where most of the stolen goods were recovered.

How and when is the doctrine of recent possession invoked? The doctrine of recent possession is a rule of law that permits an inference that where it is proved that property was stolen and the same property recently after the robbery is found in the exclusive possession of a person, that person is presumed to have participated in the crime that resulted in the theft or robbery of that property. The presumption is a rebuttal one but the burden shifts to the accused person as soon as all the elements are proved to properly invoke the doctrine. Those elements and which the State must prove beyond reasonable doubt are:-

- ***That the property was stolen;***
- ***The stolen property was found in the exclusive possession of the accused;***
- ***The property was positively identified as the property of the complainant***
- ***The possession was sufficiently recent after the robbery. As to what constitutes "recent" possession is a question of fact depending on the circumstances of each case including the kind of property, the amount or volume thereof, the ease or difficulty with which the stolen property may be assimilated into legitimate trade channels; the property's character, and so forth.***

In the case of ***Malingi vs Republic*** (1989) KLR 225 this Court had this to say about the doctrine of recent possession:-

> ***"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 their 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; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver."***

Evidence is galore that at about 10.10 p.m. PW1, PW2 & PW3 were accosted and robbed of several items by a gang of robbers. Among the items stolen from PW3 was a Motorolla cellphone. Hardly a day later the appellant offered to sell the said Motorolla cell phone to PW4. PW4 being suspicious romped in the police and the appellant was arrested. The cellphone and indeed other items recovered from the houses that the appellant led the police were positively identified by the aforesaid complainants as belonging to them and which they had been robbed during the incident the previous night.

It is readily obvious that all elements of the doctrine of recent possession apply with particular force. If we may repeat evidence is unmistakable that there was a violent robbery; some items were stolen from the victims during the robbery; some of these items found on the 1st appellant were positively identified by the victims; and the period of time that elapsed before the recovery of the items on the appellant was so short that it is implausible that the appellant acquired the items though other legitimate trade channels.

With this permissible inference, it was incumbent on the appellant to explain how he came to be in possession of the items. He offered no explanation. Instead he chose to blame one ***Charles*** for his woes after ***Charles*** failed in his business as he prospered. In our view, it was quite alright for the two courts

below to refuse to accept this explanation and dismiss it as implausible. With this finding, we do not consider it necessary to consider the other grounds of appeal raised by the appellant.

In the final analysis we are satisfied that on the evidence on record, the conviction of the appellant was inevitable. Accordingly, the appeal is dismissed.

Dated and delivered at Nairobi this 16th day of May, 2013.

E. M. GITHINJI

….....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

….....

JUDGE OF APPEAL

F. SICHALE

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR