IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MARAGA, MWILU & OUKO JJ.A.

CRIMINAL APPEAL NO. 247 OF 2009

BETWEEN

STEPHEN MUTUA MUTUMBA alias OSAMA ……..….APPELLANT

AND

REPUBLIC ……..RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Machakos (Lenaola & Warsame, JJ) dated 19th August, 2009

in

HCCRA NOs. 3, 4 & 5 OF 2006)

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JUDGMENT OF THE COURT

1. In the beginning four (4) persons, namely, **STEPHEN MUTUA MUTUMBA** alias **OSAMA, JOB MWANIA MUTUKU** alias **BOYEE, MICHAEL MULINGE MULI,** and **RICHARD MUTETI MULI** alias **Doctor** were charged before the Machakos Chief Magistrate's Court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. They took plea on the 9th day of December 2003 and denied having committed the offence. At the conclusion of the trial the 4th accused person, **Richard Muteti Muli** was acquitted for lack of any evidence tending to show that he was part of the gang that robbed the complainant on 26th/27th September, 2003. The first, second and third accused persons were, however, found guilty as charged, convicted and sentenced to suffer death as by law provided. Their appeals to the High Court suffered the following fate, that of **STEPHEN MUTUA MUTUMBA** alias **OSAMA** (the appellant) was dismissed for lack of merit whereas those of **Michael Mulinge Muli** and **Job Mwania Mutuku alias Boyee** were allowed**.** Dissatisfied, the appellant brought the appeal now under consideration.

2. The appellant had on 13.1.2011 filed on his behalf by counsel ten (10) supplementary grounds of Appeal – (supplementary to his own that he had filed in person earlier and which were abandoned at the hearing of the Appeal) as well as four (4) grounds of Appeal headed "MEMORANDUM OF APPEAL" filed by a different Advocate on 21/3/2011. The Supplementary Memorandum of Appeal dated and filed on 13/1/2011 and the Memorandum of Appeal dated the 18th March 2011 and filed on 21/3/2011 which was treated as a further supplementary memorandum of appeal, were used as the material upon which the

appeal was founded. The main grounds raised were that the provisions of sections 207, 214 and 360 of the Criminal Procedure Code were contravened to the prejudice of the appellant, the burden of proof was wrongly shifted to the appellant and that the adduced evidence was not credible.

3. When arguing the appeal, learned Counsel Mr. Nyachoti representing the appellant submitted that the conviction could not stand, because when the charge sheet was amended the appellant was not required to take a fresh plea and was not informed of his right to recall PW1. Placing reliance on the authority of **JASON AKUMU YONGO V R – Nai. Crim. Appeal no. 1 of 1983,** counsel submitted that that was such a grave error that rendered the trial a nullity irrespective of the weight of the evidence. He submitted that the identification of the appellant by PW1 was not plausible as the conditions prevailing at the time of the commission of the offence were not favourable for positive identification. On the doctrine of recent possession, counsel submitted that the appellant denied being in possession of the goods said to have been robbed off PW1. Counsel concluded his submissions that the appellant did not receive a fair trial as the trial magistrate conducted two trials involving PW1 and her spouse and the trial court was possessed of inherent bias, hence the convictions was unsafe and he urged us to allow the appeal.

4. Learned Principal Prosecuting State Counsel, Ms. Oundo, in opposing the appeal submitted that no error had been made in the amendment of the charge and the identification of the appellant could not be faulted as the same was proper. Counsel added that the doctrine of recent possession was properly applied by the court and no bias was shown to exist on the part of the trial court. Counsel urged us to dismiss the appeal as one without merit.

5. This being the second appeal we are only concerned with points of law on the authority of a myriad of cases on this point such as the authority of **DAVID NJOROGE MACHARIA V R [2011]e KLR** wherein it was stated that under **section 361 of the Criminal Procedure Code;**

"Only matters of law fall for consideration and the court 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."

6. And so what are the points of law that arise in this appeal? Let us start at **section 214 of the Criminal Procedure Code** which provides as hereunder:

"214(1) where at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case."

We were referred to the charge sheet to see the amendment made to the charge. We noted that the particulars of offence indicated that the model of the mobile telephone robbed off the complainant was Motorola. "Motorola" was then cancelled in ink and on the margin of the charge sheet the words "Nokia 330" are written against the cancellation on 'Motorola'. That is the amendment that was effected by the court on the 3rd March 2004 upon the application of the Prosecutor and that is the amendment complained of in the appellant's ground 1 in the Memorandum of appeal.

To that we state as follows, the amendment made was of such a nature as to give the actual description of the telephone in issue. That amendment came very early in the trial of the appellant and the appellant had every opportunity to take issue with it. He did not. The underlying principle for consideration is whether that amendment occasioned an injustice. We were shown none and on our part and despite a thorough scrutiny of the proceedings we find none. We come to the considered conclusion on this point, therefore that that amendment was a correction of a minor error which did not occasion a failure of justice and we determine that the same is indeed curable under the provisions of **section 382 of the Criminal Procedure Code** which provides,

"subject to the provisions hereinabefore contained, no finding, sentence or order passed by a court of

competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

We find nothing that should have required the appellant to be called upon to re-plead once the amendment discussed hereinabove was made. At any rate we have not been told that the appellant could have changed his plea to one of guilty. We find and hold therefore that the provisions **of section 207 of the Criminal Procedure Code** were not breached.

7. The case law on the point supports the view we have taken in (6) above. Suffice to refer to the authority of **R V POPLE [1951]1 KB 53** which was quoted with Approval by this court in the case of **JASON AKUMU YONGO V R Crim. Appeal no. 1/1983** which the appellant relies on. The relevant part goes as hereunder:-

"---- In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person ----"

We adopt the above.

8. We were told that the High Court erred in law when it did not find that **section 360 of the Criminal Procedure Code** was contravened. That is the third ground in the Memorandum of Appeal. That section provides that every appeal from a subordinate court except one from a sentence of a fine shall abate on the death of the appellant. We are at a loss as what this ground is in aid of and say no more on the same.

9. Great issue was taken on the identification of the appellant as being a member of the gang that committed the offence the subject of this appeal. We have addressed our collective minds to the issue. It was alleged that the gang of robbers took what was described by the complainant as a "long time" in her house. The complainant herself admitted that it was pitch dark in her house and she could not even find her way to the door to open for the robbers when they demanded it until they (robbers) lent her their torch which torch they retrieved as soon as they gained entry into the house. Whilst in the house she says she saw members of the gang from the flash lights of their torches and that is how she was able to identify them at the identification parade mounted by the police. That caused us some anxiety which we resolved when we discussed the Identification Parade itself as will be explained elsewhere in this judgment.

10. It turned out that there were two incidents of robberies involving the complainant and her spouse. The first one was on the night of 26th/27th September 2003 and the other was on 19/10/2003. The police arrested various people at various times and in an attempt to identify the perpetrators of the two robberies staged one identification parade and it was at that **one identification parade** that both the complainant and her spouse identified the appellant as one of their attackers. Only one Identification Parade Form was filled in respect of the two robberies. The complainant went to the parade first, identified the appellant and her spouse followed soon after and similarly identified the appellant whom we were told was asked to change positions after the complainant had identified him. We were not told that he was required to disguise himself in any manner say, by a change of attire. The complainant said there were six (6) men on the parade. The officer who conducted the parade (PW2) said there were eleven (11) people on the parade only to change that during cross-examination to nine (9). The appellant (as well as his co-accused persons) said that both the complainant and her spouse were at the police station when the appellant was brought in after arrest and they must have seen him. He raised the complaint which was duly recorded in the Identification Parade Form. If ever there was a flawed identification parade this has to be it for the above reasons in addition to being a parade that breached all the known aspects, precautions and norms of one. The appellant was identified by the complainant and her spouse as part of the gang that robbed them

on two different occasions in the circumstances explained above. No precaution was taken to deter the complainant from meeting and talking to her spouse before his turn to undertake the identification of the appellant. The anomalies of the total number of the members of the parade, the manner of conducting the same, coupled with the filing of **one** Identification Parade Form in respect of **two** distinct robberies must vitiate this identification process. We so hold. The High Court, like the trial court gave the issue of identification a very casual treatment for which they must be faulted. The identification of the appellant was flawed, lacking in any credibility whatsoever and we so find.

11. We now turn to the doctrine of recent possession upon which the appellant's appeal to the High Court was dismissed. The law is that before the doctrine can be applied the court must ensure that possession of the recently stolen items is positively proved and that such recently stolen property was found with the suspect; the complainant must prove the ownership of such stolen property and of course that the property is recently stolen, **see Stephen Njenga Mukiria & Another V R NAK Criminal Appeal no. 175 of 2003.**

Further, that doctrine of recent possession proceeds on the basis that:-

"If it is proved that premises have been broken into and certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of the property, that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker" – per Lord Chief Justice of England Lynskey in **R V JAMES LOUGHLIN [1951] Criminal Appeals Report of 1951 – 1952 at pg 69.**

The complainant identified a small black suitcase, a thermos case and an LG radio cassette as some of the items stolen from her house on the night of the robbery. These items were said to have been recovered from the appellant's room when the police broke into it. The version of the appellant as to how the police gained entry into his house differs from that of the Prosecution but both agree that there was a search at the appellant's house and goods were taken therefrom, some of which were treated as lost and found whilst some, as given above, were said to be part of the complainant's. The record does not show an inventory of all the goods retrieved from the appellant's house. It merely shows, at page 79 of the record, an inventory of what the prosecution described as lost and found property. That inventory includes usual clothing as might be found in anyone's house. Why the prosecution chose to make this selective inventory which does not include the items identified by the complainant in court as hers and as part of what was robbed off her on the material night raises doubts as to whether those items were recovered together with those in the inventory at page 79 of the record, from the appellant's house. That doubt must weaken the prosecution case and obviously result in a finding, as we hold, that the doctrine of recent possession does not apply to this case because one of the ingredients of that doctrine as shown earlier in this judgment, is that such stolen property was found in the possession of the appellant. In this case possession by the appellant was not proved to the required standard of proof and hence the inapplicability of the doctrine of recent possession.

12. The issue of fair trial occupied a considerable place in the appellant's counsel's submissions. Fair trial is at the centre of any Justice System and is a serious matter of law. The High Court did not give due regard to the allegation of bias by the trial court against the appellant whom the trial court had tried, convicted and sentenced in a separate case (CMCCr. Case no. 4750/2003) wherein the complainant in that case was the spouse of the complainant in the appellant's trial. That circumstance should ordinarily raise the antennae of extreme caution on the possibility of apparent bias on the part of the trial court. It is only natural. We think that if the High Court had given due consideration to this aspect of the trial, it would have arrived at a different finding from that which it arrived at. The High Court did not. On our part we have considered the allegation of bias and found that it negated a fair trial of the appellant.

We are of the very considered view that the appeal under consideration has real merit and we must allow the same. We so do. The consequence is that the appellant shall forthwith be set at liberty unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 14th day of June, 2013.

D. K. MARAGA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL