IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 468 OF 2010

BETWEEN

BONIFACE MUGENDI KINYUA ....APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru

(Lesiit & Kassango JJ.) dated 29th October, 2010

in

H.C.CR No. 104 OF 2008)

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JUDGMENT OF THE COURT

1. Boniface Mugendi Kinyua was charged with robbery with violence contrary to **Section 296 (2)** of the **Penal Cod**e. The Information is that on the night of 18th October, 2004 at Kanguu village in Meru South District of the Eastern Province, jointly with others not before the court, armed with pangas, robbed Judith Karimi Muchungu of Ksh. 200,732/= one battery, two mobile phones, two oris watches, one torch bow, arrows, calculator all valued at Ksh. 216,612/= and at immediately before or immediately after the time of such robbery used actual violence to Judith Karimi Muchungu. An alternative Count II was handling stolen property contrary to **Section 322 (2)** of the **Penal Code**. The Information was that on the 20th day of October, 2004 at Ikuu village in Meru South District of the Eastern Province, dishonestly received one mobile phone serial no. 449192403782695 make Siemen C 35 and cash 162,700/- knowing or having reason to believe them to be stolen properties.
2. The background facts to this case are in the testimony of the complainant **PW1 Judith Karimi Muchungu** and **PW 4 Police Constable Albanus Musembi.**
3. **PW1 Judith Karimi Muchungu** testified that on 18th October, 2004 at 2.00 am she was asleep at her home with her husband Fanuel Muchungu, She testified as follows:

“While I was asleep I heard the door being banged and I woke up. I noted that two men were standing by the side of the bed and another man was on the ceiling directing his torch at us. They ordered us to sleep and cover ourselves. One man ordered me to give him money and I gave him Ksh. 4,200/- which was in the bedroom. The money was in a paper bag and the one who received the money said “mama unacheza”, the other said “piga mama risasi” then they asked me to give all the money I had. I was speaking while under the bed. On 17th October 2004, I had received money from my merry go round group so the thugs knew that I had a lot of money. I had Ksh. 196,532/=. I was the Secretary of the group known as Magumoni Catholic Women Muchuru Self Help Group. I was keeping the money so that I could bank it. When I heard the thugs threaten to shoot me, I told them to remove the money from under my bed in a paper bag and they removed it. I heard the thugs enter the other bedroom and hit my baby’s bed. When the thugs had gone I came out from under the bed to check the loss. The cash was gone, two mobile phones make Sagem 840 and Siemens C35 were missing, a car battery was gone, a torch, 2 batteries, a bow and arrows property of my husband were missing. They also took the groups minute book, calculator casio, receipt book and a list of people who had contributed the money. I never identified the intruders. I never saw their faces and their voices were not familiar. In total Ksh. 200,732/= was taken by the robbers”.

4. **PW 4 Police Constable Albanus Musembi** gave evidence that on 18th October, 2004 while at duty office a report of robbery with violence was made by Judith Karimi (PW1) and one suspect had been arrested by the police. He gave evidence as follows:

   “On 20th October, 2004, I and other officers removed the suspect from the cells and we took him to his home in Ikuu village. I was with PC Yusuf Ibrahim and PC Erick Kitonga. The suspect led us to his house where we conducted a search. We recovered one mobile phone make Siemens at his house. We also recovered a car battery which was among the things the complainant was robbed. We returned the accused to the cells. I then contacted the complainant who came with her husband and they identified the mobile phone. They produced a receipt bearing the serial number of the phone. They did not identify the battery. I visited the scene at Kirubia village. I found the main door broken into after being hit with a huge stone. I collected the stone as an exhibit. In the course of investigations, I learnt that the accused had been arrested by PC Yusuf and some cash money totalling Ksh. 162,700/= had been recovered in mixed denominations. The suspect had purchased items such as a bicycle, jacket, pair of sheets, belt. These items were produced in court as exhibits. The mobile phone was identified by PW 2 as his. He produced a receipt with a serial number which corresponded with the one on the phone”.

5. **PW 2 Phanuel Muchungu Erastus** testified as follows:

   “I re-call the 18th October 2004 at 2.00 am. I was asleep with my wife. I heard a loud bang on the main door. I was startled and I woke up to see two men standing inside the bedroom and another man on the wall. The ceiling had not been yet been fixed. The man on the wall illuminated the room with his torch and I was able to see two men in the room. I did not see their faces. One of them ordered me to sleep; the other ordered my wife to give them money. She them asked them to remove some cash from under the bed. I had the sound of a paper bag being pulled. While I was lying down, a knife was placed at my neck. The thugs removed two cell phones on the bedroom table which were a Siemens C 35 and a Sagem 840. They took my bow and arrows and a car battery. My wife had money from the women’s group but I do not know the amount of money that she had. She told me it was nearly Ksh. 200,000/=. After about 3 days, police officers came to our home and told the shamba boy to tell us to go to the police station. At the police station we were shown a mobile phone. I had carried the receipts. I had purchased the pone at Baituru Communications and the receipt is dated 22nd August

2004. The serial number of the Siemens phone is 449192403782695. We were informed there was a man who was arrested with the phone. I was not shown that man and I was not shown the recovered cash”.

6. In his defence, the appellant gave unsworn testimony. He testified that when he was arrested he had money and he explained the money was for business and he had saved money from his cereals business. He denied that on 20th October 2004 he was removed from the cells. That he was tortured at the police cells.
7. The trial magistrate having heard the evidence found the appellant guilty and he was convicted and sentenced to death. His first appeal to the High Court was dismissed by Justices Lessit and Kassango and this is a second appeal. Being aggrieved with the High Court's decision, the appellant has raised the following grounds of appeal in his memorandum of appeal:-

i. ***The High Court Judges erred in law when they failed to subject the whole of the evidence that was tendered to a fresh and exhaustive examination.***

ii. ***The High Court judges erred on a point of law in making the finding that the evidence of PW 5 was missing on record and in failing to take into account that PW5 failed to give his evidence in chief after an order had been made that the case to start de novo.***

iii. ***The High Court judges erred in relying on the evidence of PW 5 in cross-examination to uphold the conviction and sentence of the appellant.***

iv. ***The learned judges erred on a point of law in rejecting the appellant’s defence.***

v. ***The learned judges erred in law in convicting the appellant on the doctrine of recent possession.***

vi. ***The learned judges erred in law in failing to take into account that the trial court had failed to exercise the benefit of doubt in favour of the appellant.***

vii. ***The learned judges of the superior court erred on a point of law in enhancing the sentence that had been imposed by the trial court.***

8. Learned counsel Ms J. K. N’tarangwi for the appellant submitted that the main ground of appeal was the error on the part of the Honourable Judges relying on the cross-examination testimony of **PW 5 Police Constable Ibrahim Yusuf** when this witness was not examined in chief. It was submitted that under **Section 146 of the Evidence Act**, it is mandatory that a witness must be examined in chief before being cross examined and in this case, there was no examination in chief of **PW 5 PC Ibrahim Yusuf** after the court had ordered that the trial commence *de novo*. Counsel submitted that the learned judges erred in relying on cross-examination evidence to convict the appellant.
9. Counsel for the appellant faulted the Honourable Judges for relying on the doctrine of recent possession to convict the appellant. It was submitted that the charge sheet was defective as it indicated the stolen and recovered mobile phone Siemens C 35 belonged to **PW1 Judith Karimi Muchungu**. However, the evidence on record showed that the phone belonged to **PW 2 Phanuel Muchungu Erastus**. It was submitted that there should have been a separate count for the offence relating to the mobile phone which belonged to PW 2. The appellant further faulted reliance on the doctrine of recent possession stating that there was another person in the house in which the phone was recovered. That the house was not in exclusive control of the appellant. On the money recovered from the appellant, it was submitted that the Honourable Judges erred in rejecting the defence testimony and the reasonable explanation given by the appellant as to how he obtained the money from his cereals business. That the appellant’s explanation for the money was not rebutted. That the learned judges ought to have believed the appellant and given him the benefit of doubt. Counsel submitted that under Section 111 of the Evidence Act, the appellant is required to give a reasonable explanation on his possession of the goods; he is not expected to give a beyond

reasonable doubt explanation as this would be shifting the burden of proof to the appellant.

10. The State through the Assistant Director of Public Prosecution **Mr. Job Kaigai** opposed the appeal. He submitted that the prosecution's case was proved to the required standard and that the two lower courts had made concurrent findings on issues of fact. He submitted that the doctrine of recent possession was the determining factor in conviction of the appellant. A C 35 Siemens phone was recovered from the appellant's single room house and the other person who was in the house was the appellant's wife who ran away when the police arrived. The appellant was also found with money and the money was found wrapped in a paper bag albeit similar to the one PW1 had wrapped the money. As regards the issue that PW 5 was not examined in chief, the State submitted that PW 5 was not the only relevant witness. That the testimony of PW 4 was cogent and consistent and it demonstrated that the mobile phone was found in possession of the appellant.

11. In reply, counsel for the appellant submitted that paper bags are the same and the fact that the appellant had money wrapped in paper bag similar to what PW 1 had wrapped her money is no proof that the money found in possession of the appellant was stolen from PW 1. Counsel also argued that the testimony of PW 5 was relevant as it dealt with the issue of allegedly recovered money while PW 4's testimony related to the recovery of the mobile phone. It was submitted that it is a misconception to state that PW5 testimony was not the only relevant evidence.

12. This being a second appeal and by dint of **Section 361(1)** of the Criminal Procedure Code, Chapter 75, this Court's jurisdiction is limited to matters of law only. In ***Chemagong vs. Republic*, *(1984) KLR 213*** at page 219 this Court held:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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 s/o Karanja vs. Republic 17 EACA 146)."***

13. The appellant contend that the prosecution failed to call as witnesses the police officers who accompanied PW 4 PC Albanus Musembi to the appellant's house on 20th October 2004. The Officers who were not called to testify were PC Kajara and PC Gitonga. We are of the view that the failure by the prosecution to call these two police officers who were present at the time when the mobile phone was recovered did not any way affect the fact that the C 35 Siemens phone was recovered from the appellant's house as testified by PW 4. **Section 143** of the **Evidence Act**, (**Chapter 80 Laws of Keny**a) *provides that no particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.* In ***Julius Kalewa Mutunga -vs- Republic*, Criminal Appeal No. 31 of 2005 (Unreported),** this Court held that:

> ***"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive".***

14. The appellant faulted two lower Courts on their concurrent findings on the doctrine of recent possession. This court stated in ***Erick Otieno Arum – v- R*, Kisumu Criminal Appeal No. 85 of 2005** as adopted by the High Court in ***Morris Kinyalili – v – R 2012* eKLR** that to invoke the doctrine of recent possession, the prosecution must prove beyond reasonable doubt each of the following four elements:

i. ***That the property was stolen.***

ii. ***That the stolen property was found in the exclusive possession of the accused.***

iii. ***That the property was positively identified as the property of the complainant and***

iv. ***Possession was sufficiently recent after the robbery.***

15. The phrase "be in possession of "or have possession is defined in **Section 4 of the Penal Code**, **Cap 63** of the **Laws of Kenya**. Possession "*includes not only having in one's own personal possession, but who knowingly having anything in the actual possession or custody of another person or having anything in any place (whether belonging to or occupied by oneself or not) for the use of benefit or oneself or of any other person*."
16. In the instant case, PW 4 testified that the Siemens C 35 mobile phone was recovered in the single room house of the appellant. It was the appellant who led the police officers to his house. The appellant had the key to his house with which he opened the door and the police conducted a search whereby the C 35 Siemens mobile phone was recovered. It is our considered view that taking into account the definition of possession under Section 4 of the Penal Code, the Siemens C35 mobile phone was in the custody of the appellant and in the house belonging to or occupied by the appellant. The mobile phone was stolen on 18th October 2004 and recovered two days later on 20th October 2004. It was positively identified as an item stolen during the robbery committed against the complainant. We find that the appellant was in possession of the C 35 mobile phone which had recently been stolen.
17. The appellant contends that in his defence he offered a reasonable explanation as to how he came to be in possession of the money recovered. We have examined the evidence of the appellant and he neither refers to the recovered C 35 Siemens Mobile phone nor does he explain how he came to be in possession of the same or how the phone came to be in his house. It is a principle of law as stated in the case of ***Andrea Obonyo – v- R,*** **(1*962) EA 542, 549*** that where an accused person is found in possession of recently stolen property and in the absence of any reasonable explanation for his recent possession, a presumption of fact arises that he is either the thief or the receiver. In ***David Langat Kipkoech & Two Other, -v – R,*** ***Criminal Appeal No. 169 of 2004,*** it was emphasized that it is the duty of a person who is found in possession of recently stolen goods to offer an explanation as to how he came into possession. This statement is supported by the provisions of **Section 111 (1) of the Evidence Act, Cap 80 of the Laws of Kenya** which requires an accused person to explain his possession. The provision of **Section 111 (1)** of the **Evidence Act** states:

> ***"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him".***

18. *In* ***Paul Mwita Robi – v- R, Criminal Appeal No. 200 of 2008***, this Court stated:

> ***"Thus while the law is that generally in criminal trials the prosecution has the burden of proving the case against the accused throughout and that burden does not shift to the accused, however, in a case where one is found in possession of a recently stolen property like in this case, the evidential burden shifts to him to explain his possession. That explanation only needs to be a plausible one but he needs to put it forward for the court's consideration."***

19. It is our considered view that where an explanation which could reasonably be true is given for the possession then no inference of guilt on the basis of recent possession alone may be drawn even if the trial court is not satisfied as to the truth of the explanation and thus, to obtain conviction, it must be established by other evidence the guilt of the accused beyond reasonable doubt. In ***Michael Kionga & Esogo Kionga-v- R, Criminal Appeal No. 17 & 56 of 2004***, the issue was whether the appellant gave an explanation as to how he came into possession of a stolen blanket. This Court held that it is an error and misdirection not to address and consider the explanation given by an accused. It matters not whether such evidence of explanation is available through the defence or the prosecution's witnesses.
20. In the present case, the appellant offered no explanation as to how the Siemens C35 mobile phone came to be in his possession as it was recovered in his place of abode. PW 2 testified and produced a purchase receipt for the phone bearing a serial number that was the serial number of the recovered phone. This purchase receipt provides corroborative evidence that the phone did not

belong to the appellant and an explanation which is required by law was not provided by the appellant. There are two concurrent findings of fact by the two courts below that the police did recover the Siemens C 35 mobile phone from the house of the appellant. The appellant not having disputed or rebutted the recovery of the mobile phone in his house, we see no good reason to interfere with this finding of fact. The evidence on record does not have gaps that can lead to a benefit of doubt as to whether indeed the appellant was not in possession of the recovered mobile phone. There is no benefit of doubt in relation to the recovered mobile phone to be given to the appellant.

21. The appellant would like this court to come to the conclusion and find that since he offered some explanation on how he came to be possession of the money, the same explanation should be used to prove that he is innocent of possession of the recovered mobile phone. This submission cannot stand legal reasoning. The recovery of the mobile phone by itself invites a presumption that the appellant is either the thief or receiver not only of the phone that was recovered but all items that were stolen during the robbery. We find that the appellant's explanation of how he came to be in possession of the money from the proceeds of his cereals business is neither plausible nor convincing to dislodge the doctrine of recent possession in relation to the recovered mobile phone.
22. The appellant contend that the charge sheet was defective as it indicated that the Siemens C 35 mobile phone belonged to PW 1 yet the evidence on record reveals that the mobile phone belonged to PW2. We have considered this submission and **Section 382** of the C**riminal Procedure Code** cures the defect in the charge sheet.
23. On the issue that PW 5 did not give his evidence in chief, we note that it is the duty of the trial court and the first appellate court to evaluate the entire evidence on record before arriving at any conclusions on findings of fact. The evidence by PW 5 is on record. The appellant was represented by counsel and no objection was taken that PW 5 was not examined in chief. PW 5 had previously testified before directions were given that the trial was to commence *de novo*. We find no prejudice or miscarriage of justice was occasioned to the appellant through the testimony of PW 5. This ground of appeal fails.
24. On the issue of enhanced sentence, the facts of the case disclose the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The testimony of PW 1 and PW 2 point to forcible entry into the house of the complainant. The banging of the door and the threat to use of a knife against PW 2 and being in the company of another person all disclose the ingredient of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The States warned the appellant that it would apply for enhancement of the sentence. We see no reason to interfere with the enhanced sentence by the High Court.
25. The upshot of the foregoing is that we find there was sufficient evidence to support the concurrent findings on the doctrine of recent possession by the two lower courts. The learned judges did not err in upholding the conviction and enhancing the sentence meted on the appellant. Accordingly, the appeal herein is dismissed.

Dated and delivered at Nyeri this 28th day of November, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR