IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 334 OF 2013

BETWEEN

MARTIN KIRIMI MUGAMBI ..... 1ST APPELLANT

DAVID MUTUMA ALIAS GATUNE ..... 2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court at Meru

(*Lessit and Makau, JJ.) delivered on 12th July, 2012*

in

***H.C.CR. Appeal No. 200 and 201 of 2008*)**

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JUDGMENT OF THE COURT

1. The 2nd appellant died before this appeal was heard his appeal abated and consequently the appeal is by the 1st appellant.
2. David Mutuma alias Gatune (*2nd appellant now deceased*), Martin Kirimi Mugambi (*1st appellant*) and Norah Wanjiru Mbishara, were charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code.** The Information is that on 11th December 2005 at Kaguru village, Kigane sub-location in Meru Central District within the Eastern Province, jointly with others not before Court while armed with dangerous weapons namely Pangas, Rungus, Axe and building stones robbed Johnson Mwongera Nkanata cash Ksh. 7,800/=, one video deck make Panasonic S/No. J 7TA08910, one blood pressure measuring machine make Hartmann, two mobile phones make Nokia 2100 S/no. 353358004201559 and Sagem 815 S/no.33205735003530, one belt, one wrist watch and two pairs of sport shoes all valued at Ksh. 43,000/= and at immediately before or immediately after such robbery used actual violence to the said Johnson Mwongera Nkanata. The appellant was charged with second and third counts of Handling stolen goods contrary to **Section 322 (1)** and **322 (2)** of the **Penal Code**.
3. The prosecution evidence against the appellant was given by **PW 1 Johnson Mwongera**

Nkanata. He testified that on 11th December, 2005 he and his children and house help were at home sleeping and at 4.00 am he heard noises from outside. He saw someone hit the electric bulb for the security light outside and the light went off. He then heard his rear house door violently hit again and again and the door gave in. People entered the house and went to the bedroom of his children. He heard them demand mobile phones while asking for him. The children showed the thugs his bedroom whereupon the thugs hit the door with a stone and it didn't open. He asked them what they wanted and they responded "money". He asked them to go outside and get the money through the window. Some of the thugs went outside and he gave them Ksh. 700/= which they said was little. They came back inside the house and this time broke the door to his bedroom and four (4) thugs came in. Some thugs had torches while others had knives and they demanded money or they kill him. PW 1 testified that his bedroom is en-suite and has a toilet and bathroom and the toilet light was on. In that light he testified he saw some of the thugs. They took away his Nokia 2100 mobile phone and an extra cash of Ksh. 7,800/=. They ordered him to lie down and shortly thereafter he heard one of the thugs say "*Woaria*! *Woaria*!" He heard gun shots and all was quiet. Shortly thereafter, the police came in and PW 1 learnt that a neighbour had called the police. Together with the police, PW 1 checked what had been stolen from the house and found that it was one video deck (Panasonic), mobile phone Sagem 815, one belt, one digital blood pressure machine, sports shoes, (2 pairs), one wristwatch all valued Ksh. 43,000/=. PW1 continued to testify that the police left at 5.00 am and promised to do investigation; that at 6.30 am, the police came back and said they had recovered some items fitting the description of the stolen goods. He accompanied them to Nkubu police station where he identified the video deck, the high blood pressure machine and the Sagem mobile phone and some cash Ksh. 900/= in denominations of Ksh. 100/= and 50/=. That on 13th December, 2005, he participated in an identification parade and identified the appellant as one of the thugs who robbed him; he said the electric light in the toilet enabled him to see the thugs.

4. **PW 2 Peter M'Inoti Mutuma** testified that he is a son to PW 1 and on 11th December 2005 he was asleep at their home in his room and at 4.00 a.m. when thugs invaded the house. He heard noises at the rear of the house and he put on the lights in his room. The noises persisted and he locked his room. The noises came near his bedroom and the door was hit, the lock came off and it opened. Four people entered with pangas, axes and rungus. They ransacked the house and several items were stolen. That on 13th December, 2005, an identification parade was conducted and he identified the 2nd accused who is the 1st appellant in this appeal. That the 2nd accused (*1st appellant)* was armed with a panga and he was the one who asked for the mobile phone and money. That the appellant would walk in and out of all bedrooms and there was bright electric light that enabled him to properly see him.
5. **PW 3 Stella Kinya** a house help in PW 1's home, testified that on 11th December, 2005 at 4.00am while asleep people entered their bedroom. They were ordered to cover themselves but she pretended to do so. She looked at the thugs and saw one person who asked for money. The person she saw was the 1st accused who is the 2nd appellant (*now deceased*). She testified that the 1st accused did not cover his face. That there was light from the electric light in the house.
6. The High Court (**Lessit and Makau, JJ.)** by a judgement dated 12th July 2012 convicted and upheld the conviction and death sentence meted out on the appellant. Aggrieved by the decision, this appeal was lodged citing five grounds compressed as follows:

i. ***The learned Judges of the High Court erred on a point of law in upholding the conviction of the appellant after making a finding that the circumstances under which the identification was done was difficult and further erred in failing to test the evidence on identification with the greatest care.***

ii. ***The learned Judges erred on a point of law in failing to subject the whole evidence that was tendered in the trial court to a fresh and exhaustive examination.***

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

iv. ***The learned Judges erred on a point of law in failing to take into account that the trial court***

had applied the law regarding the doctrine of recent possession discriminatively against the appellant and the trial court having acquitted a co-accused person on the same set of evidence it was an error to convict the appellant.

v. ***The learned Judges of the High Court erred on a point of law in failing to make a finding that the doctrine of recent possession was not applicable against the appellant as the requirement for its application was not proved beyond reasonable doubt and the judges further erred on a point of law in making a finding that the appellant failed to offer an explanation as to how he came into possession of the recovered items.***

7. At the hearing of the appeal, learned counsel **Ms J. K. Ntarangwi** appeared for the appellant while the Assistant Director of Public Prosecution **J. Kaigai** appeared for the State.
8. Counsel for the appellant elaborated on the grounds of appeal and laid emphasis on the fact that no description of the attackers was given to the police at the earliest opportunity. Counsel submitted that PW 3 never identified the appellant as the attacker even at the Identification Parade. That the electric lighting alleged to have existed at the scene of crime was not tested as to its brightness and intensity. It was submitted that the appellant was not given an opportunity to cross-examine PW2 as he was very sick. Counsel reiterated that the Honourable Judges erred in selectively applying the doctrine of recent possession. Counsel posed the question how come the trial court found that reasonable doubt existed to acquit the 3rd accused yet the same doubt was not extended to the appellant?
9. The State opposed the appeal and submitted that the prosecution had proved its case to the required standard of proof beyond reasonable doubt. The Assistant Director of Public Prosecution, Mr. Kaigai, submitted that credible and consistent evidence against the appellant was given by PW1 and PW 2 whose testimonies positively identified the appellant and the recovered items. That from the testimony of PW 1, there is no doubt that indeed the robbery took place. The State emphasized that the basis of the appellant's conviction is the doctrine of recent possession and the high blood pressure machine recovered from the appellant was not a day to day item. The State admitted that whereas it was true that the description of the appellant and his co-accused was not given to the police, this was due to the quick succession of events from 4.00 am to 6.30 am when the goods were recovered. It was submitted that the learned Judges did consider the defence by the appellant and found it wanting. Counsel urged this Court not to interfere with the concurrent findings of fact by the two courts below.
10. In reply, counsel for the appellant reiterated that the doctrine of recent possession was applied selectively. That the recovery of items under the bed should not be used when the 3rd accused person was not the only person in the house where the goods were recovered. Counsel emphasized that when the trial court acquitted the 3rd accused, the appellant should also have been acquitted because the prosecution evidence was the same. The 3rd accused in her evidence before the trial magistrate testified as follows:

> ***"I am Norah Wanjiru Bishara. I am a carrot and sukuma wiki seller. I recall on 12th December 2005, I woke up at my place at Nkubu town and started going to the market to look for carrots. I bought carrots and started going back to the house. I met with three askaris. They asked me my name and I told them. I was arrested. I was taken to Nkubu Police Station and told I was staying with robbers. I was put together with these accused, who I didn't know. No parade was conducted on me. PW1, PW 2, PW4, PW5 never said they saw me. I did not commit the offence.***

11. The trial magistrate in acquitting the 3rd accused expressed herself:

"The 3rd accused was not identified during the robbery. None of the witnesses said they saw her. She is, when everything is considered, in this case because she was with the other accused in the same room when police were making arrests. It was incumbent upon the prosecution to prove that she was with the others during the robbery. It is not enough to assume that she committed the offence merely because she was found with the others at the time of arrest. The

court also needed to be shown that she possessed, along with the 1st and 2nd accused, the items found where she and others were arrested".

12. Our consideration of the testimony of the 3rd accused and the reasoning of the trial magistrate requires that the testimony of PW 4 who was the arresting officer should be considered. The arresting officer testified that on the material day it had rained at night and the area was muddy. That upon visiting the scene of crime he was able to see traces of footmarks. Upon reaching the house of the accused persons, the shoes of the accused persons were muddy and the stolen items were recovered in the house. We are satisfied that the testimony of PW4 is credible; coupled with the fact that the 3rd accused was not identified in an identification parade, we find that both the trial court and the High Court did not err in their evaluation of the evidence on record particularly the acquittal of the 3rd accused and the evidence inculpatory of the appellant. We hasten to add that criminal responsibility is individual liability and we are satisfied that the evidence on record is inculpatory of the appellant. It matters not whether co-accused persons are exculpated by the evidence on record, what is material is whether the evidence is inculpatory of the appellant.

13. Relating to the other grounds of appeal, we have considered the rival submissions by counsel. We have examined the record of appeal and the judgement of the High Court. This is a second appeal which must be confined to points of law. As was stated in ***Kavingo – v – R, (1982) KLR 214***, a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. This was further emphasized in ***Chemagong vs. Republic, (1984) KLR 213*** at page 219 where 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 EACA146)"***

14. In the instant case, one ground of appeal pertains to identification of the appellant. The evidence identifying the appellant was given by PW 1 and PW 2 who testified that using the electric light in the house they were able to see and identify the appellant. Both witnesses were able to pick out the appellant in the identification parade conducted on 13th December, 2005. The learned Judges in their judgment pronounced themselves as follows in relation to identification and lighting in the room:

"The conditions of lighting in the rooms where PW 1 and PW 2 were are given as electricity lighting. The brightness is not described. It is however clear that PW 2 had a fleeting glance at their assailants because the robbers were in his room long enough to demand and receive money and a phone from him. As for PW1, the robbers spent time collecting various items from his room and yet they did not prevent him from looking at them during that period. The two victims were not in the same room at the time they were robbed and therefore we cannot find that they corroborated each other's evidence on identification. In the circumstances, there was in our view a need for other independent and material evidence to implicate the appellant to the offence.... Due to the difficult circumstances under which the two identified the appellant, the need for other evidence to implicate the appellant cannot be over emphasised. We have sought for other evidence which implicates the appellant with the offence. We find other evidence which implicates the appellant is that of recovery of the goods stolen from PW 1."

15. The Honourable Judges of the High Court have aptly described the conditions of lighting in their judgment. We are satisfied that the conditions of lighting were adequate in the present case and the learned Judges did not err in arriving at this conclusion. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where conditions for identification are difficult, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances, it is safe

to act on such identification. In ***Wamunga vs. Republic*****, (1989) KLR 424** it was stated that:

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.'***

16. Pertaining to description of the attackers, all three key witnesses PW 1, PW 2 and PW 3 did not give any description of the appellant or attackers to the police prior to the identification parade **(See *Charles Gitonga Stephen – v- R eKLR 2006*).** If at all PW 1 and 2 properly identified the appellant as one of the attackers, they should have given a detailed description of the suspect as was stated in the cases of ***Moses Munyua Mucheru – v- R, Criminal Appeal No. 63 of 1987*** and ***Juma Ngondia – v- R, Criminal Appeal No. 13 of 1983*** and ***Peter Njogu Kihika & Another, – v- R Criminal Appeal No. 141 of 1986***.

17. Due to the difficulty in conditions for visual identification and the failure to give prior description of the appellant and other attackers to the police, we find that the learned judges did not err in seeking independent corroborative evidence that would implicate the appellant with the offence. The learned judges were correct in giving less weight to the evidence of visual identification of the appellant by PW1 and PW 2.
18. We now consider whether the learned judges erred by seeking to examine whether there was independent corroborative evidence available on record. We also consider whether the defence of the appellant was properly taken into consideration by the learned judges. The learned judges found corroborative evidence on the recovery of recently stolen goods and invoked the doctrine of recent possession to convict the appellant. The Honourable Judges expressed themselves:

> ***"Regarding the recovery of the stolen items, the appellant contends that the evidence was insufficient to justify a conviction. The recovered goods were properly identified as PW1's property. The Blood Pressure (BP) machine was a special gadget. PW1 had one piece of the gadget which he fitted into the machine in court. The learned magistrate observed that the gadget PW 1 had fitted perfectly into the Blood Pressure machine and was a perfect fit. It is our view that a BP machine is not a common gadget a household would be expected to have. Besides, other stolen items recovered matched to the last item what PW 1 had reported stolen from his house that night. The recovery was made the same night. The goods were recovered from a house where the appellant and his co-accused were found. The recovery was within two to three hours after the robbery. PW 4 who arrested the appellant stated that the appellant's shoes were muddy and that night it had rained. Considering all these factors, the appellant needed to explain what he was doing in that house, why his shoes were muddy and how he came by the stolen items".***

19. When the appellant was called to explain his possession of the recently stolen and recovered items, the explanation given was that he denied being arrested in the house where the goods were recovered. He therefore denied possession of the items. The learned judges expressed themselves as follows:

> ***"We find that by denying possession and the circumstances of his arrest as explained by PW 4, the appellant did not give an explanation for his presence in the house and the possession of the stolen goods. We have considered the fact that the stolen goods were found in a house where the appellant was found few hours after they were stolen and lack of an explanation and we find that the doctrine of recent possession applied to the case".***

20. We have considered the appellant's ground that the learned judges erred in applying 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.

21. 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*."
22. 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 property may be assimilated into legitimate trade channels and the character of the property.
23. It is a principle of law as stated in the case of ***Andrea Obonyo – v- R*** **(1962) *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 Others - -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. Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of a recently stolen property is especially within the knowledge of the accused and pursuant to the provisions of **Section 111 (1),** the accused has to discharge that burden. 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."***

24. *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."***

25. 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 or explanation is available through the defence or the prosecution's witnesses.

26. In ***Patrick Ngesa Ogama – v- R, eKLR 2006,*** the court held that a microphone is not an item in common circulation; it does not change hands quickly because not many people or institutions use it. In the instant case, the learned Judges found that a Blood Pressure Machine is not a common gadget a household would be expected to have. It is a special item and the gadget PW 1 had fitted perfectly well with the recovered machine. In the present case, we note that there are two concurrent findings of fact by the two courts below that the appellant was found in possession of recently stolen items. It is our considered view that the special and unique nature of the Blood Pressure Machine that was recovered in the house where the appellant was found is sufficient, independent and corroborative evidence that implicates the appellant to the crime. Under Section 111 of the Evidence Act, it was incumbent upon the appellant to explain his possession of the Blood Pressure Machine and other items stolen from PW1. The appellant's defence and bare denial that he was not in the house where the items were recovered does not dislodge the testimony of PW4 who arrested him in the house.

27. **PW 4 PC Samuel Chaada** testified as follows:

> ***"A complaint had been received on 11th December 2005 that a robbery had taken place. We went to the scene. We started investigations. We followed footmarks and we lost trace. We came to Nkubu Market near Makaburini area. We got information that some suspicious people had been seen at a plot. We found 3 accused in one room. It was muddy outside. The shoes they had were very muddy. We suspected them. We searched them. The first accused had a brown belt in his trouser pocket. He had money (Ksh. 450/=); the second accused had Ksh. 450/=. We conducted a house search. Under the bed there was a bag. In the bag were a video deck, blood pressure machine and mobile phone. We asked all the accused about the items, they were unable to prove they owned them. The items matched those the complainant had told us. We arrested the accused. We sent for the complainant who came and positively identified the items. We did not show the complainant the suspects. We conducted an Identification Parade later and PW1 and PW 2 identified the 2nd accused (the appellant)".***

28. Our evaluation of the judgment by the learned Judges of the High Court shows that they correctly and properly considered the defence evidence and weighed it against the testimony of PW4. We find that no error was committed in so far as the doctrine of recent possession was applied.

29. In sum total, we find that this appeal has no merit and it is dismissed.

Dated and delivered at Nyeri this 13th day of November, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR