REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, MARAGA, & MWILU, JJ.A)

CRIMINAL APPEAL NO. 279 OF 2007

BETWEEN

JOHN MAINA MACHARIA……APPELLANT

AND

REPUBLIC……RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia) dated 1st February 2007

in

HC.CRA NO. 378 OF 2004)

****

JUDGMENT OF THE COURT

1. **JOHN MAINA MACHARIA**, the Appellant, was charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge alleged that on the 19th March 2003 at Second Avenue in Eastleigh in Nairobi within Nairobi Area, jointly with others not before court, and being armed with dangerous weapons namely pistols, he robbed Francis Mutuku Kavithi of his motor vehicle Registration Number KAP 762B Isuzu Trouper pick-up valued at Kshs.1.4 million and at or immediately before or immediately after the time of robbery, threatened to use personal violence to the said Francis Mutuku Kavithi.

2. The appellant pleaded not guilty to the charge but after trial before the Chief Magistrate's Court at Makadara, he was convicted and sentenced to death. His appeal to the High Court having been dismissed he has preferred a second appeal to this court.

3. In his supplementary memorandum of appeal the appellant complains that his trial was a nullity for failure by the trial court to indicate the language used at the trial and record the coram properly to ascertain if the provisions of **Section 85(2)** as read with **Section 88** of the **Penal Criminal Procedure Code (**the CPC) were complied with; that the High Court erred in sustaining his conviction on the doctrine of recent possession when the goods allegedly found with him had not been set out in the

particulars of the charge and had, contrary to **Section 121** of the **CPC,** been released to the complainant before his appeal had been determined; and that the learned Judges of the High Court failed to properly re-evaluate the evidence on record which was riddled with irreconc0ilable inconsistencies.

4. Presenting the appeal before us, Mr. Ataka, learned counsel for the Appellant argued that the trial court's failure to record the language used or to properly record the coram leaves the appellate court in doubt as to whether the appellant understood or followed the proceedings and whether the prosecution case was conducted by a qualified prosecutor as required by **Section 85(2)** of the **CPC**. On ground two, counsel submitted that for the doctrine of recent possession to form the basis of a conviction, the appellant should be found in possession of stolen goods and fail to offer an explanation as to how he came to be in possession of them. In this case, counsel continued, it is not clear if the alleged stolen goods were found on or next to the Appellant as there was evidence that he had tried to throw them away. Besides, the goods were not particularized in the charge sheet as being among the things stolen from the complainant hence there was no proof that they were indeed stolen property. To worsen the situation, counsel further argued, contrary to **Section 121** of the **CPC,** the trial court released those goods before the appeal was even lodged and without recourse to the appellant.

5. Lastly, learned counsel for the Appellant argued that had the High Court properly re-evaluated the evidence on record as it was obliged to, it would have realized that the appellant was mistaken for one of the people who robbed the complainant and it would not have dismissed that issue as a minor inconsistency.

6. Opposing the appeal, Ms Murungi, Senior Assistant DPP, submitted that this appeal has no merit. The record shows that the language of the court was Kiswahili and the Appellant fully participated in the trial. The question of his failure to follow the proceedings does not therefore arise. Regarding the conduct of the prosecution case, she submitted that at no time did any unqualified prosecutor conduct the prosecution case.

7. Ms. Murungi also dismissed the contention that the trial court erred in convicting the Appellant on the doctrine of recent possession. She said the appellant was found with personal items that had been stolen from the complainant. She saw nothing wrong in releasing those items to the complainant immediately after trial.

8. We have considered these submissions and carefully read the record of appeal. The appellant's pleas to declare his trial a nullity on account of the trial court's failure to state the language used during the trial and the rank of the police prosecutor who conducted the prosecution case have no basis. When the Appellant first appeared in court on 21st March 2003, the record shows that he pleaded in the Kiswahili language as there was interpretation from English to Kiswahili. Thereafter there was always a court clerk in court and although the record does not subsequently state the language used, the appellant participated fully in the trial and except for PW5 for whom he had no question, he cross-examined all the other prosecution witnesses. When he was put on his defence, he chose to make an unsworn statement after which he closed his case. Therefore the claim that he did not follow the proceedings has no basis. As regards the rank of the police prosecutors, except during the mentions on 27th June 2003 and 28th August 2003 when P.C. Marabu appeared, a police officer of or above the rank of Inspector of Police appeared for the prosecution. The High Court was therefore right in relying on the case of **Nassoro Mohammed Mwabuya V.R, Mombasa Criminal Appeal No. 155 of 2004** and finding that the recording of the coram "as before" on 21st April 2004 meant "the same as in the immediate proceedings entry" when I.P. Kariuki appeared for the prosecution. In the circumstances we find that **Section 85(2)** of the **CPC** was not violated.

9. The grounds of mistaken identification and reliance upon the doctrine of recent possession can be handled together. The prosecution case was that after the complainant had "bought-take away food" from the café of Noel Mutuku, (PW2) at about 9.30 p.m., a man confronted him as two others sandwiched him and snatched his car keys from him. As they were unable to start the car, they ordered him to get in and drive on. PW2 who had witnessed the incident raised an alarm and many people started chasing the car. Before it went far, it was obstructed by a handcart and stopped. The robbers then jumped out of the

vehicle and started running away with members of the public in hot pursuit. PC Masira Atey (PW3), a police officer who was on patrol duties in the area, joined the chase and apprehended the Appellant. On a quick search he recovered from the Appellant a wallet containing the complainant's driving licence, voting card and PSV driving licence.

10. We concur with the High Court that as none of the members of the public who chased the robbers was called as a witness, there was a broken chain of the prosecution evidence of the chase and arrest. That notwithstanding, the Appellant was found with a wallet that had the complainant's ID card, driving licence, voting card and PSV driving licence. The complainant testified that at the time of searching the Appellant he had arrived at the spot of arrest and he saw the Appellant removing from his pocket and tried to drop his (complainant's) wallet with the said personal items. PW3 who had searched the Appellant confirmed in his testimony that the Appellant indeed had the complainant's wallet with those items.

11. Even if the complainant's identification of the Appellant as one of the people who robbed him was to be discarded on account of failure to state the intensity of the street lights that enabled him to see his attackers, we are nonetheless satisfied that the Appellant's conviction on the doctrine of recent possession was justified. The complainant and PW3 testified that the Appellant was found with items that had been stolen from the complainant a few minutes before. He offered no explanation, as the law obliges him to do, as to how he came to be in possession of those items.

12. Having read the High Court judgment, we find no merit in the Appellant's contention that that court failed to properly re-evaluate the evidence on record. The High Court considered the evidence of identification and found it wanting as there was a broken chain in the prosecution evidence of chase and arrest, none of the members of the public in the group that chased the appellant having been called to testify. It nonetheless found that the Appellant's conviction, based on the doctrine of recent possession, was safe. We agree.

13. The High Court also analysed the contradiction the Appellant alleged in the prosecution evidence of recovery of the stolen items. While the complainant claimed that the Appellant tried to throw away the wallet with the stolen items, PW3 did not allude to that attempt. We concur with the High Court that that was a minor discrepancy.

14. That those stolen items were not stated in the particulars of the charge does not in any way help the Appellant. In the recent case of **Isaac Nganga Kahiga v. Republic Criminal Appeal No. 272 of 2005 (CA Nyeri)**, this Court stated the conditions precedent for the application of the doctrine of recent possession in the following terms:-

> **"It is trite that before a court can rely on the doctrine of recent possession as a basis of a 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; and lastly, that the property was recently stolen from the complainant. In order to prove possession there must be acceptable evidence as to search for the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."**

In this case the complainant testified that the robbers had frisked him and taken his wallet which had the above stated personal items. PW3 also testified that those items were found with the Appellant a few minutes after the robbery. That, in our view, satisfied the major requirement of the doctrine of recent possession as stated in the above case irrespective of whether or not those items were included in the particulars of the charge as being among the stolen goods.

15. With respect, we cannot appreciate the Appellant's complaint that the stolen items were released to the Appellant, even before the trial was concluded. These were personal items some of which, like the ID card and driving licences, the complainant needed to use on a regular basis. The Appellant did not claim

their ownership. There was therefore no point of holding them until the appeal processes were completed as we were not told how, and we cannot ourselves see how, their retention would have aided the appellant in his defence. We therefore find that there was no irregularity in releasing them to the complainant after they had been produced in court.

16. For these reasons, we find no merit in this appeal and we accordingly dismiss it in its entirety.

DATED and delivered this 20th day of December, 2013.

P. KIHARA KARIUKI, PCA

……

JUDGE OF APPEAL

D.K. MARAGA

……..

JUDGE OF APPEAL

P.M. MWILU

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR