IN THE COURT OF APPEAL

AT ELDORET

(CORAM: KARANJA, MARAGA & MWILU, JJ.A)

CRIMINAL APPEAL NO. 276 OF 2009

BETWEEN

KENNEDY WESONGA KWOBA……………………………….APPELLANT

AND

REPUBLIC………………………………….……………...RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Bungoma

(Mbogholimsagha&Ochieng, JJ.) dated 30th day of July, 2009

In

H.C.CR.A NO. 151 OF 2003)

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JUDGMENT OF THE COURT

1. **Kennedy WesongaKwoba**, the appellant, was, in count one, charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. He was in the alternative charged with handling stolen property contrary to **Section 322(2)** of the **Penal Code**. In count two, he was charged with failing to apply for registration contrary to **Section 14(1)** of the **Registration of Persons Act Cap 107** of the **Laws of Kenya**. He pleaded not guilty to all those offences but after trial before the Senior Resident Magistrate's court at Busia, he was convicted of the main charge of capital robbery and sentenced to death. His appeal to the High Court having been dismissed, he has come to this court on a second appeal.

2. The prosecution case in a nutshell was that the complainant, Godfrey TabuKombo, PW1, owned a shop at Koyonzo Market where he sold, inter alia, TVs and video decks. During the night of 16th/17th July 2002 he left two young men, CliydeJumaKhaseaand Victor JumaKhasea, in the shop. As the two slept in that shop, the same was broken into and some goods stolen one of which was a video deck Serial No. 40019725008972. About five days later, the appellant was arrested at Koyonzo Market as he tried to sell that video deck. The two young men positively identified the appellant as one of the people who robbed them.

3. In his defence, the appellant stated that he is a barber. On 22nd July 2002, he went to Koyonzo

Market to look for additional premises for his business. While there he saw the complainant with three other people, two of whom were in police uniform. They suddenly pounced on him and handcuffed him. Without giving him any reason for his arrest, they took him to Nambale Police Station and later he was charged with offences he knew nothing about.

4. In his four grounds of appeal, the appellant has raised three main points: identification; reliance on the doctrine of recent possession and the High Court's poor re-evaluation of the evidence on record.

5. On identification the appellant averred in his memorandum of appeal that the learned Judges of the High Court erred in upholding his conviction based on the contradictory evidence of two eye witnesses who had also failed to describe him or give his name to the first person (PW4) or the police who arrested him. In his submissions on this ground, Mr. Mutai, learned counsel for the appellant, argued that the appellant was not positively identified as one of the people who robbed Victor JumaKhasea and CliydeJumaKhasea of a TV and Video deck. He contended that the evidence of the appellant's identification and/or recognition by those two young men was contradictory. While Victor Juma, PW2, claimed that the light was switched off after the appellant had been identified, Cliyde, PW7, said that at the material time, only the TV was on and it was the light from it that enabled him to identify the appellant.In support of these submissions, counsel cited this court's recent decision in **Kelvin KimathiNyaga& Others v. Republic, Nyeri Court of Appeal Criminal Appeal Nos. 109 & 116 of 2012 (Consolidated) (unreported)** where it was reiterated that the evidence of visual identification, if not carefully tested, can cause a miscarriage of justice.

6. Counsel further submitted that although PW2 and PW7 claimed that they recognized the appellant because they had known him before, they failed to give his description or name to the police when they reported the robbery on 17th July 2002. The appellant's identity was given on 27th July 2002. On recent possession, counsel submitted that the two courts below failed to properly evaluate the evidence in that regard. With those submissions he urged us to allow this appeal.

7. Opposing the appeal, Mr. Mutuku, Senior Assistant DPP, dismissed the submissions by counsel for the appellant that the appellant was not positively identified as there was no proper light in the complainant's shop at the time of robbery. He submitted that there was electric light which enabled both PW2 and PW7 to properly identify and recognize the appellant before his confederates stormed into the shop and switched it off.

8. On recent possession, Mr. Mutuku, submitted that when the appellant saw the police as he was selling PW1's video deck to a radio repairer in the presence of PW3, he ran away but he was arrested after a chase. He said that that is not the conduct of an innocent man. When arrested, the appellant did not lay any claim of ownership to the video deck. Instead it is PW1 who produced a receipt for it thus proving his ownership of it. With those submissions, counsel urged us to dismiss this appeal in its entirety.

9. We have considered these rival submissions and carefully read the record of appeal. On identification, this court has reiterated umpteen times that unless the evidence of visual identification is handled with care, it can cause a miscarriage of justice. See the **NyagaCase**above. This Court has also stated that giving the name or description of the perpetrators of crime to the police or any other person in authority at the time of lodging the crime report is of crucial importance. It confirms the witness' consistency in his testimony later at the trial. The predecessor of this Court stated this principle in the case of **Tekerali& Others Vs Republic, (1952) 19 EACA 259** at **p. 260** thus:

> **"Evidence of the first complaint made to a person in authority has to be adduced…. Such statements… often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishments or the deliberately made up case."**

In the case of **David Masinde& Another vs Republic, Criminal Appeals Nos. 33 &34 of 2004 (consolidated)** this Court added that:-

> **"In every case in which there is a question as to the identity of the accused, the fact of there being a description given and the terms of that description are matters of highest importance of which evidence ought always to be given first of all by [the] person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given. See** *R v Kabogo s/oWagunyu 23 (1) KLR 50.*
>
> **The omission on the part of the complainants to mention their attackers to police goes to show that the complainants where not sure of their attackers' identity."**

10.In this case upon perusal of the record, although we agree with counsel for the appellant that both PW2 and PW7, who identified the complainant as one of the robbers,are not said to have given his description or name to the police or anyone else, we are nonetheless satisfied that they gave his name to the complainant, PW1. This is because at the time of arrest, the complainant and the police appear to have been looking for a known suspect. Moreover, the eye witnesses, PW2 and PW7,testified that they had known the appellant before and were categorical that they were able to identify and recognize him before the electric light in the shop was switched off. We are satisfied that the two witnesses positively identified the appellant.

11.Besides identification, the appellant's conviction was also based on the doctrine of recent possession. In the recent case of **Isaac NgangaKahigaVs 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; thirdly, the property was stolen from the complainant; and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. 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."**

12.We are satisfied that the above requirents of recent possession were satisfied in this case. Rashid Omito, PW3, testified that at about noon on 22nd July 2002, the appellant went to his shopat Koyonzo Market and offered to sell a video deck to him. As he was not interested in buying it, he took him to a radio repairer whom he thought would be interested. The radio repairer asked for the receipt for the video deck. Before the Appellant could produce it or say anything, he saw PW1 with police officers and started running away. He was chased and arrested. The complainant positively identified the video deck and later produced a receipt for it.Moreover, the appellant's conduct of running away on seeing police officers approach was not that of an innocent man. It was further evidence from which his guilt can be inferred. The old US case of **Alberty v. US, 162 US 499 (1896)** succinctly expressed this point thus:

> **"It is a principle of human nature…that if …[a man] does an act which he is conscious is wrong, his conduct will be along a certain line. He will pursue a certain course not in harmony with the conduct of a man who is conscious that he has done an act which is innocent, right, and proper. … it is therefore a proposition of the law that, when a man flees, the fact that he does so may be taken against him, provided he does not explain it away upon some other theory than that of his flight because of his**

guilt.

'A man accused of crime hides himself, and then absconds. From this fact of absconding, we may infer the fact of guilt. This is a presumption of fact, or an argument of a fact from a fact.'

'Flight by a defendant is always relevant evidence when offered by the prosecution, and that it is a silent admission by the defendant that he is unwilling or unable to face the case against him.**"**

And in the English case of **Quinlan v. R [2006] NWSCCA 284**, the court held thus:

" the most form of consciousness of guilt evidence includes flight or hiding to avoid arrest or apprehension by police."

13.**Section8(2)** of the **Evidence Act**also alludes to this point. It provides that:

"The conduct of any person an offence against whom is subject of any proceeding, is relevant if such conduct influences or is influenced by any fact in issue or relevant fact and whether it was previous or subsequent."

14.The upshot is that although we have discounted the evidence of identification, we find that the appellant's conviction based on the doctrine of recent possession was sound. We also find that the death sentence, which we are told has since been commuted, was lawful. In the circumstances we find no merit in this appeal and we dismiss it in its entirety.

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

W. KARANJA

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR