REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

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

CRIMINAL APPEAL NO. 151 OF 2011

BETWEEN

SALIM ABDALLAH LETEIPA …….…… APPELLANT

AND

REPUBLIC ……..RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Wendoh & Ouko, JJ.) dated 14th February, 2014

in

H.C.CR.A No. 233 of 2009)

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JUDGMENT OF THE COURT

1. ***Salim Abdallah Leteipa,*** the appellant herein, was charged with the offence of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code*** at the Principal Magistrate's Court at Narok. The particulars of the offence were that on 5th February, 2008 at upper Majengo Estate in Narok District within the then Rift Valley Province, the appellant jointly with others not before the court, while armed with dangerous weapons namely Somali swords and rungus robbed Agnes Wangui Kenana of her radio make Sonitec, four Safaricom cards of Kshs. 50/= each, one Kitenge, one bag, a bunch of keys, National Identity Card, Equity ATM card, voters card, a black wallet, one Nokia charger, assorted salon make-ups and cash Kshs. 33,800/= all valued at Kshs. 37,000/=and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Agnes Wangui Kenana.
2. The appellant pleaded not guilty and the prosecution called a total of three witnesses in support of its case. It was the prosecution's case that on 5th February, 2008 at around 8:00 p.m. PW1,

Agnes Wambui Kenana (Agnes) was heading home from work in the company of PW2, Regina Muthoni Muiruri (Regina). Agnes was carrying a red handbag and a blue paper bag. Inside the handbag was a black wallet with Agnes's Identity Card, ATM card, Kshs. 33,800/= cash, Nivea powder, shop keys, four Safaricom cards of Kshs. 50/= and a finger ring. The paper bag had a Kitenge shirt, a Sonitex radio and a Nokia phone charger. While they were near Agnes's gate, they saw three men each covered with a Masaai *kikoi* approaching them; the three men split up, two of them went on each side of Agnes and Regina while the third one remained in front of them. The man on Agnes's side took hold of her handbag and paper bag and started pulling them. Thinking the man was drunk, Agnes asked him what he wanted with her but he continued pulling her bags. Agnes refused to let go of the bags and a scuffle ensued. During the scuffle, the Maasai *Kikoi* that covered the man's face fell to his shoulders and Agnes saw his face with the aid of the street lights. She testified that he had pierced both his ears and was wearing a reddish jacket and a pair of black trousers tucked into black boots.

3. Meanwhile, Regina noticed the scuffle and screamed for help. Immediately thereafter, the man who was struggling with Agnes brandished a Somali sword at Agnes. On seeing the Somali sword, members of the public who had gathered ran away and Agnes released the bags; the said man and his accomplices fled into an alley. Regina testified that with the aid of the security lights she was able to get an impression of the assailants' physical attributes. More so, she noticed that the assailant who had attacked Agnes was tall and had pierced ears. It was the prosecution's case that Agnes and Regina had given the description of the assailants to the members of public who had come to assist them.
4. The following day at around 10:00 a.m. Agnes received a phone call from a member of public informing her that a person matching the description she had given had been spotted at a nearby bar. Agnes in the company of PW3, Corporal Churchill Owili (Corporal Churchill) went to the bar where she identified the appellant as the assailant who had snatched her bag. Corporal Churchill testified that when the appellant was arrested he had a green paper bag. Upon searching the appellant, Corporal Churchill found Agnes's keys and her finger ring in his pocket. In the green paper bag was a reddish jacket, a pair of black trousers and black boots which Agnes identified as the clothes the appellant had worn during the incident. Regina subsequently identified the appellant as the man she saw struggling with Agnes on the material day. The appellant was subsequently charged.
5. In his defence the appellant gave a sworn statement. He testified that when he was arrested he was drunk; the police officer took him into a car where Agnes was and asked her if he was one of the assailants; that Agnes told the police officer that he was not one of the assailants. The police officer who was the investigating officer in another case involving the appellant handcuffed and shot him. The appellant denied committing the offence he was charged with and maintained that the Investigating Officer, Corporal Churchill had framed him.
6. Convinced that the prosecution had proved its case, the trial court convicted the appellant and sentenced him to death. Aggrieved by the trial court's decision, the appellant preferred an appeal in the High Court which was dismissed by a judgment dated 14th February, 2011. It is that decision that has provoked this second appeal before us.
7. Mr. Gai, learned counsel for the appellant, submitted that the appellant was not accorded a fair hearing. He argued that the appellant was unwell and the trial court ought to have established seriousness of his illness. The appellant was never provided with witnesses' statements hence he was not prepared during the trial. According to Mr. Gai, there was no independent evidence on the issue of the appellant's identification; the prosecution did not avail the witness who allegedly informed the complainant of the whereabouts of the appellant. He argued that the items found on the appellant belonged to another lady who did not give evidence. Mr. Gai submitted that the prosecution did not tender evidence on the intensity and position of the street lights which the complainant allegedly used to identify the appellant. He submitted that there were

contradictions in the prosecution's evidence. He urged us to allow the appeal.

8. Mr. Kibelion appeared on behalf of the state and opposed the appeal. He submitted that the High Court decision was correct; the appellant had raised new issues in this second appeal that were not considered in the lower courts. Mr. Kibelion submitted that when the appellant indicated that he was unwell, the trial court directed he be given medical attention; the appellant never sought an adjournment on account of illness; the appellant actively participated at the trial. Mr. Kibelion maintained that the appellant was given a fair hearing.
9. Mr. Kibelion argued that the prosecution had tendered evidence in respect of the intensity of the street lights; the witnesses testified that the street lights were extremely bright. According to him, the identification of the appellant was positive and free from error. The appellant was found in possession of the same clothing which the complainant had described as having been worn by one of the attackers. He further submitted that the appellant was found in possession of some of the stolen items and he was unable to explain possession of the same.
10. We have considered the record of appeal, the grounds of appeal, submissions by counsel and the law. This being a 2nd appeal and by dint of ***Section 361*** of the ***Criminal Procedure Code***, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it 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. See ***Mwita –vs- R (2004) 2 KLR 60***. In ***Kaingo -vs- R (1982) KLR 213*** at p. 219 this Court said:-

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact 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 C/O Karanja -vs- R (1956) 17 EACA 146)"

11. It was the appellant's contention that he was not afforded a fair hearing; he was ill during the trial and was not availed with witness statements. ***Section 77(1)*** of the former ***Constitution*** provided:-

"77(1) If a person is charged with a criminal offence, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Section 77(2) (c) further provided:-

"Every Person who is charged with a criminal offence:-

….

(c) shall be given adequate time and facilities for the preparation of his defence."

From the record we note that at no point did the appellant indicate to the court that he was unable to proceed with the trial due to illness or that he had not been provided with the witness statement. We also note that this ground was never raised at the High Court. From the record it is clear that the appellant did actively participate in the trial by cross examining the prosecution witnesses. We find that this ground has no merit and must fail.

12. On the issue of identification, the two lower courts made concurrent findings that the

identification of the appellant was proper and free from error. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In ***Kariuki Njiru & 7 others –vs- R- Criminal Appeal No. 6 of 2001***, this Court stated:-

"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error."

See also ***Wamunga -vs- Republic (1989) KLR 424.***

13. The evidence in respect of identification of the appellant was given by Agnes and Regina. They both testified that they were able to get an impression of the appellant's physical attributes with the aid of security lights that were bright. Agnes testified that she was able to see the appellant's face while they were struggling because the appellant was facing her. She testified that the appellant had pierced ears and was wearing a reddish jacket and a pair of black trousers. It was her evidence that she gave a description of the appellant to members of public who came to the scene. It was on the basis of the said description that the informant alerted Agnes of the whereabouts of the appellant. In ***Maitanyi -vs- R(1986) KLR 198*** this Court held,

"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid or to the police… If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description.

From the record, the said informant was not called to testify and no evidence was tendered as to the exact details of the description that the said informant relied on in identifying the appellant. It is therefore not clear what kind of description Agnes gave to the informant.

14. According to PW3, Corporal Churchill, Agnes identified the three assailants as, one being a tall man with a pierced left ear, another being short and stout while the third assailant was tall and huge and had pierced both ears. It was the prosecution's case that after receiving information from the informant, Agnes and Corporal Churchill went to the bar where the appellant had been spotted and Agnes identified the appellant. Further, after the appellant was arrested Regina was called by the police and she identified him as one of the assailants. It is not in dispute that the appellant was not known to Agnes and Regina prior to the incident. We cannot help but note that the identification of the appellant by Regina was not through an identification parade. The question that lingers in our minds is how did Regina identify the appellant" In ***James Tinega Omwenga –vs- R- Criminal Appeal No. 143 of 2011***, this Court expressed itself as follows:-

"The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless."

We find that the foregoing evidence by itself was not sufficient identification of the appellant and needed further corroboration. However, it was the prosecution's uncontroverted evidence that upon the arrest of the appellant he was found in possession of a green paper bag containing a reddish jacket, a pair of black trousers and boots which Agnes had described as having been worn by one of the assailants. This

in our view corroborates the identification evidence.

15. Corporal Churchill testified that upon searching the appellant he found a bunch of keys with a PNU key holder and a finger ring in his jacket; the items were positively identified by Agnes as some of the items which had been stolen. This Court has decided in several cases and outlined when the principles of recent possession may be applied to a case. In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic -Criminal Appeal No. 272 of 2005***, this Court held,

"….It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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, that 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."

16. In this case it is not in dispute that a bunch of keys and a finger ring were found in the possession of the appellant when he was arrested. Agnes identified the keys using the PNU key holder they were attached to. The said keys were her salon keys. She also identified the finger ring as hers by producing in court matching earrings that were in her possession. We find that Agnes positively identified the said items as hers which were stolen on the material day. We also note that the appellant was arrested a few hours after the robbery. In ***George Otieno Dida & Another -vs-Republic [2011] eKLR*** the appellant therein had been found in possession of the stolen goods less than five hours after the robbery and this Court held that:-

"There are concurrent findings of fact by both the trial and first appellate courts that indeed there were robberies, several items including the ones produced in court were stolen in the course of those robberies, and the appellants were found in possession of the same only five hours or less after the robberies.....In our view, the evidence against the appellants though circumstantial, raised a rebuttable presumption of fact under section 119 of the Evidence Act, Cap 80 Laws of Kenya, that they were either the thieves or guilty receivers. The evidence excludes the latter because they were found in possession only less than 5 hours after the theft and it is not reasonably possible that the goods would have within that short time have changed hands."

17. The appellant did not offer any explanation of how he came to be in possession of the stolen items. We find being in recent possession of the stolen items connected the appellant to the offence and corroborates the identification evidence. We find that the evidence points to the appellant's guilt.
18. The upshot of the foregoing is that we find that the appeal has no merit and is hereby dismissed.

Dated and delivered at Nakuru this 27th day of November, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

……

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