IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), KARANJA & ODEK, JJ.A)

CRIMINAL APPEAL NO. 116 OF 2004

BETWEEN

ALEXANDER TONNY LUSIMBA …….…….. APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Mbaluto & Kubo, JJ.) dated 7th October, 2003

in

H.C.CR.A No. 292 of 1998)

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JUDGMENT OF THE COURT

1. Before us is a second appeal against the High Court's judgment dated 7th October, 2003 wherein the appellant's conviction and sentence for the offence of robbery with violence were upheld. 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 thefindings leading to misjustice. See **MWITA-vs- R (2004) 2 KLR 60**. In **KARINGO -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)"

2. It is appropriate at this stage to set out a brief background in order to put the appeal herein in

context. On 23rd August, 1995 at around 8:00 p.m. ***F O*** (PW1) was entertaining three guests in her house while in the company of her four daughters and house help. Suddenly seven men armed with a pistol and a knife entered the sitting room from the dining room. They ordered everyone to lie down, produce all the money they had and tied them up. They then unleashed a vicious attack on F and her guests culminated in one of the guests by the name ***Phoebe Wanja*** collapsing dead on the ground. F saw and heard her watchman who was then in the house telling the intruders that they had killed the wrong lady and that she was the owner of the house. Immediately the intruders turned on F and demanded to know where her bedroom and safe was. She informed them that her bedroom was upstairs.

3. The intruders took her upstairs and asked her to show them the safe. She told them that she did not have a safe in the house. Not satisfied with her response, the appellant sat on a rocking chair which was in the room and placed her head in between his legs. He then cut her on her head with a knife and she begun bleeding. Meanwhile, one of the intruders who was ransacking her wardrobe found Kshs. 40,000/= which she had earlier withdrawn from the bank and he asked the appellant to leave F alone.

4. They took F back downstairs where they tied up everyone expect the youngest child who was then six years old. Some of the intruders begun picking one child after another and taking them to a different room where they beat them up asking them to disclose where F kept money while other intruders were taking assorted items from the house and ferrying them outside. They then asked for the car keys which F gave to them. When the intruders left the young child untied everyone and they raised an alarm.

5. F discovered that the intruders had made away with her motor vehicle registration number *[particulars withheld]* a Peugeot 504. She also learnt that the intruders had raped her daughters. Unfortunately, another guest succumbed and died from the injuries she sustained during the robbery.

6. Some of the intruders (robbers) were arrested, tried and convicted for the offence of robbery with violence. The appellant was not among the persons convicted for the offence as he had never been arrested. Unfortunately for the appellant, more than one year after the offence, on 12th September, 1996 following information from an informer ***CP Joshua Mbogoli*** (PW3) managed to arrest the appellant in his house in Kawangware wherein he recovered a briefcase and a pair of male shoes which were identified by F and her husband, ***A O*** (PW2), as some of the items which were stolen on the material night. Subsequently, on 21st September, 1996 F picked out the appellant from an identification parade as one of the intruders.

7. The appellant was then arraigned and charged in court with one count of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code*** and an alternative count of handling stolen goods contrary to ***Section 322*** of the **Penal Code**.

8. In his defence the appellant gave an unsworn statement denying the charges against him. He testified that on 12th September, 1996 at around 6:00 p.m. policemen came to his house, carried

out a search and found a brief case and a pair of shoes which he claimed to have bought at an auction. He maintained that the briefcase was his since his name was written on it.

Incidentally, the brief case also bore the name of the complainant PW2, ***A O***, inscribed on it.

9. Upon considering the evidence on record, the trial court convicted the appellant for the offence of robbery with violence and sentenced him to death. Aggrieved with that decision, the appellant preferred an appeal in the High Court which was dismissed. Unrelenting, the appellant has filed this second appeal predicated on the following grounds: -

- ***The learned Judges erred in law by upholding a conviction based on prosecution evidence which was inconsistent and contradictory;***
- ***The learned Judge erred in law by failing to exhaustively re-anaslyse and re-evaluate the trial court proceedings;***
- ***The learned Judge erred in law by convicting the appellant despite the weak and doubtful identification evidence;***
- ***The learned Judge erred in law by failing to consider that the appellant's original inquiry statement was forced and not voluntary;***
- ***The learned Judge erred in law by failing to find that the prosecution had failed to avail crucial witnesses and key exhibits;***
- ***The learned Judge erred in law by failing to consider the shoddy nature in which the investigations were conducted.***

10. Mr. K. A. Nyachoti, learned counsel for the appellant, submitted that this was a case of mistaken identity; that the prevailing circumstances during the robbery were not condusive to warrant positive identification; that there was extreme violence on the complainant and her guests leading to the death of one of the guests. Counsel argued that the appellant had given a reasonable explanation for his possession of the brief case and the pair of shoes recovered from him - that he had purchased both the brief case and pair of shoes at an auction. It was submitted that the brief case bore the appellant's name as proof of his ownership. Learned counsel for the appellant submitted that the prosecution ought to have called the appellant's landlady to give evidence in respect of his arrest and recovery of the alleged stolen items. He urged the Court to draw an adverse inference for failure by the prosecution to call the landlady. He also submitted that the alleged confession by the appellant should not have been relied upon since the appellant repudiated the same. He urged us to allow the appeal.

11. Mr. B. L. Kivihya, Assistant Director of Public Prosecutions, in opposing the appeal, submitted that the appeal rests on the identification evidence of PW1. In his view PW1 had a clear perception of the appellant during the robbery because the robbery took more than one hour; the scene was well lit and the intruders had not concealed their faces. He argued that the twocourts

below made concurrent findings that the identification of the appellant was safe and proper; that there is no reason for this Court to interfere with the concurrent findings of the two courts below. The State submitted that the appellant's confession was subjected to a trial within a trial and was properly admitted; that the briefcase and shoes recovered had peculiar features which were identified by PW2; that recovery of these items placed the appellant at the scene of the robbery. He further submitted that the appeal lacked merit and urged its dismissal.

12. We have considered the record of appeal, submissions by counsel and the law. Cognizant of our duty as the second appellate court, we note that the crux of this appeal is whether the appellant was properly convicted as having been indentified and placed at the scene of crime as one of the persons who robbed the complainants.

13. On the repudiated confession, ***Inspector Christopher Kiplimo*** (PW5) testified that he cautioned the appellant before he made his confession. He maintained that the said confession of how the appellant and his accomplices took part in the robbery was given voluntarily by the appellant. The appellant did not deny executing the statement of inquiry recorded by Inspector Christopher. During the trial within a trial, the appellant said he made the statement after being beaten and forced to do so. In **TUWAMOI - vs- UGANDA (1976) EA 84** at page 588, the predecessor of this Court held,

"...a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to retract, take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that statement was not a voluntary one."

Further in the above mentioned case, the predecessor of this Court at page 91 held as follows:-

"We would summarize the position thus- a trial court should accept any confession which has been retracted or repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true." See also **MUNYAO -vs- R (2002) 2 KLR 504** and **KOMORA -vs- R (1983) 583**.

14. The trial court in admitting the repudiated confession correctly observed that the same required corroboration. In **M'RIUNGU -vs- R (1983) KLR 455**, this Court held at page 463:-

"As was stated in R-vs- Baskerville (1916) 2 KB 658 that corroboration need not be direct

evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime, and we agree that it must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him-that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.."

15. We have re-examined the record and pose the question, if the confession statement were to be ignored, is there other relevant and material evidence corroborating the identification of the appellant and placing him at the scene of crime" We find that the other relevant and corroborative evidence against the appellant is the identification testimony by the complainant F O (PW1) and the testimony of A O (PW2) on recent possession positively identifying the recovered brief case and pair of shoes.

16. In her testimony identifying the appellant, PW1 testified and stated:

"I cannot forget that person in my life wherever I see him and he is that accused seated in a black jacket. It is this accused who was told by his colleagues that he knows the work well and he pulled me and placed me between his legs and cut me before they later took me back down the stairs. He was to me like the in-charge of the operation. That incident took over one hour. The lights were on and nobody covered the face of anybody. We could see each other very well. When we went to the bedroom, he sat on the rocking chair first even before I was later handed over to him to do his work. Nobody stopped me that I should not look at them. My house has several lights on the roof, on the walls."

17. In this case, the evidence on visual identification of the appellant is by a single witness PW1. Visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In **ABDALLA BIN WENDO - vs- R 20 E.A.C.A 166** at page 168 it was held,

"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

18. In the case of **Ndungu Kimanyi -vs- Republic, (1979) KLR 282;** the minimum standards of a single witness upon whose evidence the court can rely upon to enter a conviction was laid down as follows:-

"We lay down the minimum standard as follow;- The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence."

Once the court is certain in its mind that the witness is honest, the court must proceed to consider whether the circumstances prevailing at the time and place of the incident favoured proper identification. The matters to be considered are matters such as the time when the offences took place, i.e. whether it was at night or in broad daylight."

19. It was F's uncontroverted evidence that she was able to get a strong impression of the appellant with the aid of electricity lights which were on during the robbery which took one hour; none of the intruders had concealed their faces. Based on the impression she got, F was able to pick out the appellant in an identification parade as one of the intruders. The two courts below found that F was a credible witness and that the identification was free from error. We see no reason to interfere with these findings.

20. In respect of recent possession, it was the prosecution's case that the appellant was found in possession of a brief case and a pair of dark brown shoes which were stolen on the material night. In identifying the brief case and pair of shoes, PW2 testified as follows:

"This is my briefcase which I bought in 1985 from card centre to carry things for 2 days safari in Mombasa and that inside I had written this name O which I identified. They are my shoes although they look like somebody put them on a number of times. I placed this sole which I am in the habit of including the shoes that I have now."

21. 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- R 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."

22. As regards the recovery of the items, the appellant contends that the prosecution ought to have called his landlady who was present to shed light on the same. The appellant did not deny that the briefcase and shoes were found and recovered in his house and we fail to understand what the landlady's input on the recovery would be. Further, this Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires. See ***Section 143*** of the

Evidence Act.

23. PW2 identified the briefcase by his name which was inscribed therein; he also identified the

recovered pair of shoes by the sole he had added to them. Consequently, the burden shifted to the appellant to offer a reasonable explanation for the said possession. In **Malingi -vs- R (1988) KLR 225**, this Court expressed itself as herein under:-

"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case recent…"

24. The appellant contended he purchased the recovered items from an auction. The trial court considered his evidence and found that his explanation was not satisfactory. There is a presumption in law that a person found in possession of recently stolen items is either the thief or the receiver. The testimony of PW1 places the appellant at the scene of crime and an active participant in the robbery. The role played by the appellant in the robbery is aptly narrated by PW1. The identification and placement of the appellant at the scene of crime rules out any possibility that the appellant was merely a receiver or handler of recently stolen goods. By actively participating in the crime, the appellant was not a receiver but one of the robbers. The appellant's contention that the recovered items were purchased in an auction cannot stand in the face of the identification testimony of PW1. We are satisfied that the appellant was positively identified and placed at the scene of crime by PW1 as one of the robbers. We concur with the trial court and find that the appellant's confession was corroborated with the evidence of identification and recent possession of the stolen items.

25. Having expressed ourselves as herein above, we find that the appeal lacks merit and is hereby dismissed.

Dated and delivered at Nairobi this 11th day of March, 2016.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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