IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJA.)

CRIMINAL APPEAL NO. 180 OF 2014

BETWEEN

DOUGLAS MOKAYA ISANDA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Kisii ***(Sitati & Mureithi JJ.)*** *dated 24th July, 2014*

in CRIMINAL APPEAL NO. 28 OF 2011)

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JUDGMENT OF THE COURT

[1] On 15th May 2010, at about 6.00p.m., **Dennis Oyaro (Dennis)** was riding a motorcycle owned by **Evans Nyagota Nyakundi.** The motorcycle was being used as a *bodaboda*. Dennis had gone to fuel the motorcycle when someone who requested to be taken to a place called Metamaywa stopped him. The passenger boarded the motorcycle and Dennis rode the motorcycle to Metamaywa. On arrival the passenger paid the fare of Kenya Shillings One Hundred (Kshs.100/=) and alighted. However, as Dennis turned the motorcycle to go back to Keroka, he was suddenly hit twice on the head with a panga and he fell to the ground, he was then held by the throat and hit on the head.

[2] One **Peter Omari Mokaya(Omari)** whose home was in the vicinity, and who was at the material time outside his house, heard some sounds and upon checking found Dennis lying on the ground bleeding from the head. Omari raised an alarm and upon Dennis explaining that he had just been robbed of a motorcycle, quickly went and reported the matter to police officers who were manning a roadblock nearby. Dennis was taken to the hospital and the owner of the motorcycle informed of what had transpired.

[3] On 10th September 2010, **APC Dalmas** and **APC Mohammed Abdir,** officers from Kaptembwa District Commissioner's Office, were on patrol when they found **Douglas Mokaya Isanda** (appellant), riding a motorcycle, which did not have registration number plate. The officers detained the motorcycle and asked the appellant to bring documents for the motorcycle.

[4] On 20th September 2010, **PC Vincent Njoroge** of Keroka Police Station interrogated the appellant who had been arrested at Kegati. The appellant took the officer to Kaptembwa District Commissioner's Office where they recovered the motorcycle. Dennis and Omari identified the motorcycle as the one that Dennis had been robbed of. Dennis also identified the appellant as the

passenger whom he had dropped just before he was attacked. The appellant was therefore charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

[5] When put to his defence, the appellant denied having stolen the motorcycle or having hired Dennis to carry him to Metemaywa. He further denied having taken police officers to Kaptembwa where the motorcycle was allegedly recovered. The Senior Resident Magistrate, Keroka, who heard the case against the appellant, was not impressed with the appellant's defence. He found the prosecution case proved, convicted the appellant and sentenced him to death.

[6] Being dissatisfied with the judgment of the trial court, the appellant appealed to the High Court contending that the case against him was not proved; that the magistrate erred in convicting him on contradictory and doubtful evidence; and that the magistrate misdirected himself and failed to warn himself that the evidence of key witnesses was based on personal opinion.

[7] During the hearing of the appeal in the High Court, the appellant was represented by Mr. Bigogo who reiterated that the prosecution did not prove all the ingredients of the offence of robbery; that the identification of the appellant was only dock identification which was not of any evidential value; that the doctrine of recent possession was not applicable because the evidence of possession came up four months after the alleged robbery; that ownership of the motorcycle was not proved; finally the High Court was urged that the trial court did not sufficiently address the appellant's defence of alibi.

[8] On his part, **Mr. Imbali** who appeared for the State urged the High Court that there was sufficient evidence to establish the offence against the appellant; that there was evidence that was sufficient to prove ownership of the motorcycle; and that the identification of the appellant by Dennis was supported by the fact that the appellant was found riding the motorcycle which was impounded, and that the appellant later led officers from the station where the robbery was reported, to Kaptembwa where the motorcycle was detained.

[9] In their judgments, the learned judges of the High Court, (**Sitati** and **Mureithi JJ**) dismissed the appellant's appeal against both conviction and sentence, finding, *inter alia*, that the appellant was found in possession of the motorcycle of which Dennis had been robbed four months earlier; that there was sufficient evidence of the appellant being in possession of recently stolen property; and that this was sufficient evidence to lead to the conclusion that the appellant participated in the robbery.

[10] The appellant is now before us in this second appeal where Mr. Onsongo represents him**.** He has raised five grounds in his memorandum of appeal, contending that the High Court failed to exercise its duty as a first appellate court of re-evaluating and analyzing the evidence on record so as to arrive at its own findings; that the entire trial was a nullity as the charge sheet set out the punitive sections of the law without setting out the section which creates or provides for the offence; that the evidence was not sufficient for the application of the doctrine of recent possession; that the circumstantial evidence relied on by the prosecution fell far below the legal threshold for such evidence to be the basis of sound conviction; and that the High Court erred in failing to find that the entire trial was a travesty of the appellant's right to a fair hearing.

[11] Both the advocate for the appellant and the prosecuting counsel filed written submissions each urging the Court to find in their favour.

[12] For the appellant, it was submitted that had the learned judges of the High Court re-evaluated and re-analyzed the evidence on record, they would have noted that the appellant raised a defence of alibi which the learned judges of the High Court did not properly consider but merely glossed over. Counsel submitted that no proper evidence was adduced regarding who arrested the accused at Kegati, and why he was arrested. Nor was there any proper evidence regarding the person who was stopped and arrested while riding the motorcycle at Kaptembwa in Nandi Hills. Relying on **Bukenya vs Uganda [1972] EA 549**, counsel submitted that failure to call crucial witnesses by the prosecution entitled the court to draw an adverse inference.

[13] In regard to the doctrine of recent possession, counsel submitted that the motorcycle was found in the custody of Kaptembwa Administration Police Officers, four months after the alleged theft, and that it was established that the person from whom the motorcycle was recovered was the appellant. It was argued that the evidence availed in proof of ownership of the motorcycle was not adequate as the motorcycle did not have any registration numbers so that identification of the motorcycle was not established. Further it was submitted that information obtained from the appellant through interrogation which led to the recovery of the motorcycle in question, was inadmissible, so was evidence of admission or confession relating to possession or the whereabouts of the motorcycle.

[14] In addition, it was submitted that the trial proceeded without the prosecution providing the appellant with statements of witnesses and therefore the trial was conducted in breach of the appellant's rights under **Article 50(2)** of the **Constitution**. Finally, in regard to sentence, counsel for the appellant submitted that the sentence imposed on the appellant was cruel, inhuman, manifestly harsh and excessive, in the circumstances of the case.

[15] In his submission, **Mr. Victor Mule**, Senior Assistant Director of Public Prosecutions maintained that the first appellate court properly re-evaluated and analyzed the evidence that was adduced in the trial court and came to their own findings and conclusions; that the evidence established the essential ingredients of the offence of robbery with violence. **Mr. Mule** drew the Court's attention to the findings of the High Court that Dennis's evidence fell short in identifying the appellant as the person who hit him on the head with a panga; but that this notwithstanding, the High Court came to the conclusion that there was other evidence in support of the identification; that the High Court re-evaluated the evidence concerning recent possession and satisfied itself that there was sufficient evidence implicating the appellant.

[16] In regard to the failure by the prosecution to furnish the appellant with witness statements, it was pointed out that the record indicates that the court ordered the prosecution to supply the statements; that subsequently, on two occasions, the appellant informed the court that he had not received the documents; that when the matter came up again on the 8th December 2010, the appellant indicated that he was ready to proceed with the hearing and did not raise any issue concerning the statements; that during the trial, the appellant cross-examined the prosecution witnesses, and this was an indication that he was fully aware of the case against him; that the appellant did not raise this issue during his first appeal in the High Court; and that this was an indication that he had either received the statements or that he was not prejudiced during the trial. The court was therefore urged to dismiss this ground.

[17] In regard to the sentence, Mr. Mule noted that in **Muruatetu versus R. [2017] eKLR**, the Supreme Court directed the Attorney General, the Kenya Law Reform Commission, and the Speakers of the National Assembly and the Senate to give effect to that judgment on the mandatory nature of death sentence, and therefore the appellant's ground of appeal on sentence based on the Muruatetu decision was premature.

[18] We have carefully considered this appeal, the record of appeal, the submissions made by counsel and the authorities cited. This being a second appeal, it is limited under section 361 of the Criminal Procedure Code to matters of law only. Secondly, this Court has to defer to the concurrent findings of the two lower courts, unless there are errors of law established.

[19] In regard to the charge sheet, the particulars of the charge against the appellant were stated as follows:

Robbery with violence contrary to section 296(2) of the Penal Code

Douglas Mokaya Isanda on the 15th day of May, 2010, at Buchuria Sub-location in Masaba District within Nyanza Province robbed Dennis Oyaro one Motorbike make TVS red in colour valued at Kshs 82,000 and at or immediately after the time of such robbery used actual violence to the said Dennis Oyaro.

[20] In the case of **Johana Ndungu versus Republic [1996] eKLR**, the predecessor of this Court analyzed the ingredients of the offence of robbery with violence contrary to section 296(2) as follows:

"In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. ***If the offender is armed with any dangerous or offensive weapon or instrument, or***

2. ***If he is in company with one or more other person or persons, or***

3. ***If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.***

Analysing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in S.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly.

[21] In this case, there was clear evidence that Dennis was attacked and violently robbed of the motorcycle. There was evidence that he was seriously wounded during the robbery. It is clear therefore that the offence of robbery with violence was established by the mere fact that the motorcycle was stolen from Dennis and that Dennis was wounded in the process.

[22] The next issue that we wish to address is the alleged violation of the appellant's right to fair trial, first by producing him in court four months after he was arrested, and by the failure to avail the witness statement to him. In regard to the delay in bringing the appellant to court, this is an issue that ought to have been raised in the trial court. It does not appear to have been raised. At this stage, it is not possible for this Court to interrogate what might have occurred. Suffice to note that the applicant does not appear to have suffered any prejudice, in any case, that is a matter for which he can seek damages under the Constitution.

[23] From the record of the lower court, the court made an order on 28th of September 2010 for the prosecution to supply the appellant with copies of witness statements before the hearing. On 22nd December, 2010 when the hearing commenced, the appellant did not complain about not having any witness statements. Nor did the appellant complain about the statement at any other time during the proceedings or even during the hearing of the first appeal even though the appellant was represented by counsel. We find that as submitted by Mr. Mule, the appellant must have received the witness statements hence his failure to raise the issue. We therefore reject the appellant's contention that his right to a fair trial was violated.

[24] It is clear from the evidence that the main evidence implicating the appellant with this offence is the fact that he was identified by Dennis as the person who robbed him, and that, in addition, he was able to lead the police to the recovery of the motorcycle. As regards the appellant's identification by Dennis, Dennis met the passenger at about 6.00 p.m. They talked before Dennis agreed to take the passenger to his destination. Therefore Dennis had ample time and opportunity to see the passenger well. Nevertheless, for a person that he had not known before, identification after 4 months would have been more certain if an identification parade was carried out. However, any doubt regarding the identification was resolved by the evidence of recovery of the motorcycle.

[25] As regards the recovery of the motorcycle, no clear evidence was adduced regarding why the appellant was arrested. Although P.W.5 testified that the appellant was arrested at Keratin AP camp, there was no officer from that camp whom came to explain why he was arrested. Be that as it may, the appellant does not deny the fact that he was arrested.

[26] P.W.5 explained that he collected the appellant from Kegati AP camp, and took him to Keroka police station, and that upon interrogation the appellant led the officers to Kaptembwa AP camp where the motorcycle was recovered. This evidence ties up with the evidence of APC Dalmas who explained that the motorcycle was found in the possession of the appellant, and was detained because the appellant did not have any documents to prove ownership. APC Dalmas also confirmed that the motorcycle was handed over to police officers from Keroka police station, who went to the camp accompanied by the appellant. What comes out is that it is the appellant who was found in possession of the motorcycle and the appellant who led the police to where the motorcycle was. This motorcycle is what provided the nexus linking the appellant to the robbery. Therefore the appellant's defence denying having been in possession of the motorcycle, or having been in the area where Dennis was robbed was properly rejected.

[27] Under the doctrine of recent possession, where an accused person is found in possession of recently stolen property, and is unable to provide a reasonable explanation for his possession, a presumption arises that he is either the thief or the receiver **(Hassan**

vs Republic [2005] 2 KLR 151). In the case of the appellant, the motorcycle was recovered four months after the robbery. The possibility of the appellant having been a receiver rather than the robber was negated by the identification of the appellant by Dennis. In the circumstances we come to the conclusion that the appellant was properly convicted.

[28] As regards the sentence, it was contended that the sentence of death imposed upon the appellant was cruel, inhuman, harsh and excessive. However, the law legally provides that sentence. Be that as it may, although the appellant was given an opportunity to mitigate, the trial magistrate fettered his discretion in sentencing by noting that there was only one sentence provided by law. As recently stated by the Supreme Court in **Francis Karioko Muruatetu & Another vs republic vs Republic [2017] eKLR**, the mandatory nature of the death penalty is unconstitutional. Had the trial magistrate had the benefit of this judgment, we have no doubt that he might have considered a different sentence. For this reason, we allow the appeal in regard to sentence.

[29] The upshot of the above is that the appellant's appeal against conviction is dismissed. The appeal against sentence is allowed and the sentence of death is set aside and substituted with a sentence of 20 years imprisonment effective from the date of the judgment of the trial court.

Those shall be the orders of the Court.

DATED and delivered at Kisumu this 7th day of December, 2018.

E. M. GITHINJI

JUDGE OF APPEAL

HANNAH OKWENGU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that the above is a true copy of the original.

DEPUTY REGISTRAR