IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GATEMBU, SICHALE, KANTAI JJ.A)

CRIMINAL APPEAL NO. 112 OF 2013 (R)

BETWEEN

RICHARD LENGURO RAMACHA.....1ST APPELLANT

LONKIYA LELIKAT.....2ND APPELLANT

JACOB LELEMEUWA.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(*Appeal from the judgment of the High Court of Kenya at Nakuru (Wendoh & Emukule, JJ)*

dated and delivered on 31st May, 2013

In

H.C.CR.A No. 30 of 2011)

****

JUDGMENT OF THE COURT

This is a second appeal emanating from the judgment of **Wendoh & Emukule, JJ** delivered on **31st May, 2013** in High Court Criminal Appeal No. 30 of 2011. The High Court upheld the convictions and sentences imposed by the trial court of 7 years imprisonment on the 3 appellants, namely **Lonkiyia Lelikat**, **Jacob Lelemeua** and **Richard Lenguro Ramacha** who had been charged in Maralal Senior Resident Magistrate's Court in Criminal Case No. 68 of 2009. Although the appellants faced five counts of robbery with violence contrary to section 296(2) of the Penal Code, they were acquitted of the five counts of capital robbery. The appellants were however found guilty of handling stolen goods contrary to Section 322 (2) of the Penal Code and sentenced to serve seven (7) years imprisonment as stated above.

In this second appeal, the appellants have raised three (3) grounds contained in their supplementary grounds of appeal. They faulted the High Court for:

(i) failing to analyse the evidence on record;

(ii) applying the doctrine of recent possession; and

(iii) convicting the appellants on charges which were not proved beyond reasonable doubt.

On **18th March, 2019**, the appeal came before us for plenary hearing. Learned counsel, **Mr. Bichanga** for the appellants faulted the High Court for failing to analyse the evidence on record. It was his view that there were contradictions in the prosecution witnesses' evidence setting out the sequence of events surrounding the appellants' arrest. Counsel submitted that there was only general evidence given against the appellants. Moreover, that none of the complainants was able to identify the robbers who attacked them.

Mr. Baraka, the learned State Counsel opposed the appeal. He supported the findings of the High Court, correctly so, in our view, in not applying the doctrine of recent possession to the charge of robbery with violence as the stolen items from the robbery that occurred on **31st January, 2009** were recovered about two months down the line and it was possible that the items could have changed hands. It was his view that the stolen items, recovered from the 1st appellant's house, were thereafter positively identified by the complainants. According to him, the conviction on the alternative charge of handling stolen property was safe. Counsel therefore urged the court to dismiss the appeal.

Our mandate in a second appeal is as stipulated in Section 361(I)(a) of the Criminal Procedure Code. It provides:

" 361 (I) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

In so far as case law is concerned, the decision of **David Njoroge Macharia vs.**

Republic [2011] eKLR sums up the said mandate. In the said decision, it was stated:

"Only matters of law fall for consideration and the court 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 also* ***Chemagong vs. Republic [1984] KLR 213)."***

Similarly, in ***Kaingo versus Republic [1982] KLR 213*** it was held as follows:

"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 Karoti S/O Karanja versus Republic [1956 17 EALA 146]."

In light of our above mandate, it becomes necessary to subject the entire evidence adduced at the trial court and re-analysed by the 1st appellate court to an exhaustive review so as to determine whether each of the courts below exercised its mandate as stipulated by law.

The evidence shows that on the night of **31st January 2009**, **Monicah Lolochum**, **Joel Maina Gitonga, Wilson Wango'ombe** and **Josphat Lenanyukie** were travelling in a lorry, registration number KAU 682L, heading to Maralal. Approximately 3 to 5 km from Suguta, they were waylaid by a pair of armed robbers. This vulnerable group was robbed of all their valuables: money, mobile phones and different pieces of clothing.

Luckily, despite being armed with a G3 rifle and an AK-47 rifle which they used to physically beat up the men in the vehicle, the robbers left their victims alive.

The victims continued on with their journey to Maralal and reported the robbery to the police. Unfortunately, as the assailants were prudent enough to cover their faces during the robbery, the complainants were unable to give a proper description of their attackers. In fact, the complainants were unable to give any sort of identification including even dock identification when the suspects were arraigned before court.

During the robbery, Monica (P.W.1) lost a handbag and a suit which on **27th March, 2009**, she found at Maralal Police Station. She however did not know who was found with her items. **Josphat Lenanyukie**, P.W.2, **Wilson Wang'ombe Kungu**, P.W.3 and **Godfrey Gachoka**, P.W.4, all lost phones, a jacket and cash. These were however not recovered.

Following a tip off, CPL **Samuel Chacha Okongo** (P.W.5) went to the 1st appellant's home on **26th March, 2009.** According to him, they recovered several items including a handbag and a lady's suit which were identified by P.W.1 as hers. It was his evidence that they also arrested the 3rd appellant from this house. The 2nd appellant, according to P.W.5 fled from the scene and he was arrested later. P.W. 5 told the trial court that he did "***… not know how or where the 2nd accused was arrested".***

In their unsworn statements of defence, all the three appellants denied the commission of the offence.

In the judgment dated **24th January, 2011**, the three were found guilty by the trial court of the alternative charge of handling stolen goods with the knowledge that the goods were unlawfully obtained. Each was sentenced to serve seven (7) years imprisonment. The appellants' appeal to the 1st appellate court was dismissed, hence this second appeal.

In the re-evaluation of the evidence, the 1st appellate court found that the 1st appellant was in possession of the stolen items because they were found in his house and hence the stolen items were in his possession and control. We agree. However, as regards the 2nd appellant, P.W. 5 told the trial court that upon

seeing them, the 2nd appellant fled from the house of the 1st appellant and that the 3rd appellant was found hiding in the 1st appellant's house. The 1st appellate court found that by their conduct, it can be inferred that the 2nd and 3rd appellants knew that the items in the 1st appellant's house had been stolen and had consented to these items being in the 1st appellant's house. It is for these reasons that the 1st appellate court found that although none of the stolen items were found on the persons of the 2nd and 3rd appellants during the arrest, they were each in possession.

In our view, although both the trial court and the 1st appellate court found the 2nd appellant guilty, the only evidence against him was that of P.W.5 who stated that he saw him running out of the 1st appellant's house. It was P.W.5's further evidence that he did not know the 1st appellant before and he did not know how and where the 2nd appellant was subsequently arrested from. He alleged that at the time of fleeing, the 2nd appellant had 'rasta' unlike when he saw him clean shaven in court. No identification parade was conducted for P.W.5 to identify the person he saw running from the 1st appellant's house on **26th March, 2009** and given the fact that he did not know him, we think the evidence was insufficient for purposes of proof beyond reasonable doubt, more so given the fact that the time and place of arrest of the 2nd appellant were not explained.

As regards the 3rd appellant, it was the prosecution's case that he was found in the house of the 1st appellant. If this be so, is it that he was in this house from the date of the commission of the offence (**31st January, 2009**) until when he was found on **26th March, 2009**" Was he in this house for this long" Can it be said that he was in possession if the house was not his" Again, we do not think so. Even if the 3rd appellant was in the 1st appellant's house for the duration of time between **31st January, 2009** upto **26th March, 2009,** there was no evidence that he had knowledge of the items unlawfully found in the 1st appellant's house. Section 4 (a) & (b) of the Penal Code defines possession as follows:

" S.4 (a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them."

It is on account of lack of proof of knowledge on the part of the 3rd appellant that we find that the conviction was unsafe.

The upshot of the above is that we find that the trial court and the 1st appellate court erred in the evaluation and re-evaluation of the evidence. Had they done so, they would have found that the charge of handling stolen property was not established as against the 2nd and 3rd appellants, unlike the 1st appellant whom the stolen items were found in his house. It is in view of the above, that we affirm the conviction and sentence of the 1st appellant whose appeal is dismissed. The 2nd and 3rd appellants' conviction and sentence are however quashed and set aside. The two are to be forthwith released unless otherwise lawfully held. It is so ordered.

Dated and delivered at Nakuru this 21st day of November, 2019.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR