IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 36 OF 2012

BETWEEN

LOYALE PENYI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nakuru (Emukule & Omondi, JJ.)

delivered on 10th February, 2012 in H.C.CR.APP. No. 107 of 2009)

JUDGEMENT OF THE COURT

1. The appellant, Loyale Penyi, was charged with three counts of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on 15th July 2007 at Kenrac Petrol Station, Gilgil within the then Naivasha District of Rift Valley Province jointly with others not before the court being armed with dangerous weapons robbed Joseph Irungu Thongoro of Kshs.5,000.00 and one mobile phone; Dorcas Wangui Mwangi of Kshs.25,000.00 and one mobile phone; and Samuel Maina of one Nokia 2310 mobile phone, and at or immediately before or after the said robberies used actual violence. He was tried before the Senior Resident Magistrate at Naivasha and found guilty on the three counts and convicted in a judgement delivered on 31st March 2009. He was sentenced to death.

2. He challenged the convictions in an appeal to the High Court on grounds that the prosecution evidence was insufficient to sustain the convictions; that he was not positively identified; and that no identification parade was conducted. Satisfied that he was positively identified and that the doctrine of recent possession was aptly applied by the trial court, the High Court rejected the appeal on conviction in a judgment on 10th February 2012. However, the High Court substituted the death sentence with a custodial sentence of 15 years commencing from the time of conviction.

3. In the second appeal, which under Section 361 of the Criminal Procedure must be confined to matters of law, the appellant has faulted the judgments of the two courts below on grounds that he was not positively identified; that his defence was not considered; and that it was not established that he was in possession of the stolen property on the basis of which the doctrine of recent possession was invoked.

4. Based on the evidence presented by the prosecution before the trial court, the facts are that on 15th July 2007, at about 8.30 p.m. Joseph Irungu Kagoro (PW1), a pump attendant at Kenrac Petrol Station (the *locus in quo*) was going about his business when two men, posing as customers intending to buy paraffin, sought his assistance in procuring a jerrican. He showed them the canteen

where they could buy one but it was locked. He left the two gentlemen at the paraffin pump to fuel a matatu that pulled up at the diesel pump. PW1 then returned to the location of the paraffin pump and sat down whereupon one of the two gentlemen demanded from him "*all the money*" he had for the days' takings. He was struck with a piece of timber, fell and screamed whereupon the second assailant drew a brand new panga from under his coat and threatened to kill PW1 if he did not keep quite. Three other men, who had been hiding, emerged from behind a nearby shed wielding new pangas. PW1 was ransacked. He had Kshs.15, 000.00 and a cell phone, Motorola C115, which the assailants took.

5. Thereafter, the assailants ordered PW1 to escort them to "*Mama Mokorino's*" house. Mama Mokorino or Dorcas Wangui Mwangi (PW2), a colleague of PW1 was also a pump attendant at Kenrac Petrol Station and resided in a room within the petrol station compound. PW1 led the assailants to PW2's house, ordered PW1 to knock on the door, and on entering the house ordered PW2 to surrender all the money she had. She gave them Kshs.25, 000.00 being the days' proceeds of fuel sales she had made. They also took her cell phone Motorola T288. The assailants then locked both PW1 and PW2 in the house and left.

6. Corporal Samuel Manina (PW 3) of 20 Parachute Battalion, Gilgil, testified that on 15th July 2007 (wrongly indicated in the record as 25th July 2007) was on his way back to Kenyatta Barracks, when, at Kenrac Petrol Station he met five men armed with pangas, and as he was talking on his cell phone, the men snatched it; that one of the assailants attempted to cut him with a panga, he tried to block the blow and was hit on the left hand and cut slightly on his face. He fled to the Barracks where he reported to the duty officer. The following day he made a report to Gilgil Police Station. He learnt that someone had been arrested with two mobile phones, one of which was his Nokia 2310 that had been snatched the previous evening at the petrol station. He identified it by his service number which he had inscribed on the back cover of the phone. He also produced a receipt for the same.

7. Police constable Elkan Wetachu, (PW4), of Gilgil Police Station was on duty on 15th July 2007 when a report of a robbery at Kenrac Petrol Station was made; accompanied by the officer commanding station and another officer he proceeded to the petrol station and interviewed PW1 and PW2 both of whom claimed that they would be able to identify the attackers, who they said, were Turkana tribesmen; that a search ensued and a gang of five men was spotted in town; that one of the gang members who had a panga lynched by members of the public; that he found a mob baying for the appellant's blood at Mugoiri Bar and Restaurant where the appellant had taken lodging; that the appellant was removed and on being searched was found in possession of two mobile phones one of which is the one identified by PW3 as his; that he arrested him and took him to the police station, where PW1 who was at the station immediately recognized him as one of the assailants who had attacked him at the petrol station.

8. Both PW1 and PW3 were examined by Dr. Marion Mukira (PW5) at Gilgil District Hospital. She examined PW1 on 23rd July 2007 and confirmed he had sustained injuries on his hand and back and opined that a blunt object was used to inflict the same. PW3 was examined on 6th August 2007 and injuries to his forehead, cut wound on the left hand confirmed. P3 forms were produced in respect of both PW1 and PW3.

9. In his defence, the appellant stated that he travelled on 14th July 2007 from Baragoi *en route* to Naivasha and got to Gilgil on 15th July 2007 in the evening and the matatu crew in which he was traveling refused to proceed to Naivasha; that he decided to sleep in Gilgil and got a lodging and entered his room at about 9.00p.m; that at about 11.00 p.m., he heard a knock at the door and found it was the police who interrogated him, searched him and arrested him; that he had in his possession Kshs.8,900.00; a Nokia 3100 cell phone, and his transport receipt as well as the receipt for the lodging; that he was later taken to the Crime Office where he was beaten before being charged with offences he knew nothing about.

10. After reviewing the evidence, the learned trial magistrate was satisfied that the appellant was positively identified by PW1 and that the appellant was found in possession of PW3's cell phone a few hours after it had been robbed from him and the doctrine of recent possession was applicable. The High Court in its judgement affirmed the trial magistrate's findings.

11. Appearing for the appellant during the hearing of the appeal, learned counsel ***Mr. Lawrence Karanja*** submitted that the two courts did not carefully consider the issue of identification; that the incident occurred at 8:30 PM at the petrol station and the courts did not enquire into the intensity and source of light and none of the witnesses testified on the same; that beyond stating that the lights in PW2's house were not switched off, there was no mention of where the assailants stood in relation to the light; that in the circumstances it was unsafe to rely on the identification by PW1 and the question remains whether the appellant was amongst the assailants who attacked PW1, 2 and 3.

12. It was submitted that bearing in mind that evidence of visual identification in criminal cases can bring about miscarriage of

justice, the conviction in this case was not safe. In that regard counsel cited the decision of the Court in ***Maitanyi vs. Republic [1986] KLR 198*** and ***Victor Mwendwa vs. Republic [2014] eKLR*** among other decisions.

13. With regard to the application of the doctrine of recent possession, it was submitted that the court failed to consider that the appellant in his defence denied being in possession of the stolen cell phone; that none of the members of the public who suspected the appellant and called police to arrest him were called to testify; and that no evidence of possession of the cell phone by the appellant was led.

14. Citing the decision of this Court in ***Anthony Juma Osundwa & another vs. Republic [2013] eKLR,*** counsel submitted that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, in the sense that there must be positive proof the property was found with the suspect.

15. Opposing the appeal, ***Mr. Kelvin Gitonga,*** learned Prosecution Counsel, submitted that the appellant was positively identified; that the petrol station was well lit and PW1 was able to clearly see the attackers; that besides interacting with the attackers at the petrol station, PW1 escorted them to the house of PW2; that same night PW1 saw the appellant at the petrol station and readily recognized him.

16. On application of the doctrine of recent possession, it was submitted that it was established that the stolen cell phone was recovered from the appellant and it was established beyond doubt that it belonged to PW3.

17. It was submitted that in the light of the overwhelming evidence placing the appellant at the scene coupled with the recovery of PW3's cell phone from the appellant, his defence was thereby displaced. Counsel urged that the appeal should be dismissed.

18. We have considered the appeal and the submissions by counsel. As already noted, this is a second appeal in which only matters of law can be entertained. There are two issues. The first is whether the two courts below erred in convicting the appellant on the basis of identification by PW1. The second issue is whether the doctrine of recent possession was properly invoked.

19. Beginning with the question of identification, it is, as submitted, an established legal principle that whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should exercise caution before convicting the accused person on such evidence. See in ***Maitanyi vs. Republic*** (above) and ***Victor Mwendwa vs. Republic*** (above) and ***Cleophas Otieno Wamunga vs. Republic, Criminal Appeal No. 20 of 1982.*** In that regard, the trial court upon considering the evidence of identification by PW1 expressed that:

"PW1 (John) was confronted by accused and others at a place which was well lit. He had time to canvass (sic) with the accused who was in the original group of two in a fairly free atmosphere. He would ordinarily be able to have his face indelibly marked in his mind.

He also had another golden opportunity while inside the room of PW2 (Dorcas). It is my view that this witness (PW1) was capable of identifying the accused and had the least of tasks in identifying him later at the police station."

20. Equally, the high court on the first appeal observed that the witness, PW1, spent a considerable time with the attackers who were not at all disguised and further stated that though the nature of the light was not described, there was reference made by PW1 that lights were not switched off at PW2's house, a "*one-roomed*" house and the same was illuminated.

21. We are respectfully in agreement with the concurrent conclusion reached by the two courts on identification. PW1 interacted at length with the attackers at the petrol station from the time they posed as customers seeking help with a jerrican to the time he escorted them to PW2's house. Later the same night, he was easily able to recognize the appellant when he was taken to the police station.

22. If any collaboration was required, the recovery of PW3's phone from the appellant provided the same and the doctrine of recent possession was properly applied. As held by this Court in ***Isaac Wanga Kahiga alias Peter NgangaKahiga vs. Republic, Criminal Appeal No. 272 of 2005,*** the doctrine of recent possession that the alleged possession must be positively proved by demonstrating that the stolen property was found with a suspect and that it was positively identified by the complainant and was recently stolen

from him. PW3 had inscribed his service number at the back of his phone and there was therefore no question that it belonged to him. PW4 recovered it from the appellant the same night it was snatched from PW3. We are unable to fault the lower courts for invoking the doctrine of recent possession. It was aptly applied.

23. All in all, and for the foregoing reasons, there is no merit in this appeal. It is accordingly dismissed.

Dated and delivered at Nakuru this 4th day of October, 2019.

D. K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU (FCIArb)

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR