Case Number:	Criminal Appeal 58 of 2013
Date Delivered:	17 Dec 2015
Case Class:	Criminal
Court:	Court of Appeal at Nyeri
Case Action:	Judgment
Judge:	Roselyn Naliaka Nambuye, Fatuma sichale, Patrick Omwenga Kiage
Citation:	Michael Lozoru Lokut v Republic [2015] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	CR.A. No. 49 of 2011
Case Outcome:	Appeal dismissed
History County:	Meru
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: NAMBUYE, KIAGE & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 58 OF 2013

BETWEEN

MICHAEL LOZORU LOKUT…….. APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Meru (Lesiit, J.) dated 29th November, 2012

in

H.C. CR.A. No. 49 of 2011)

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JUDGMENT OF THE COURT

The appellant **MICHAEL LOZORU LOKUT** was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code. The particulars were that on 2nd day of March, 2011 at Maili Tano area of Isiolo County jointly with others not before the court while armed with dangerous weapons namely firearms he robbed Isaac Baariu of cash money Kshs. 500.00, one Blanket, 2 sufurias, maize 60kgs one pair of safari boots, a grey cap, 20kgs beans and assorted clothes, all valued at Kshs. 10,000.00 and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Isaac Baariu.

In the alternative, he was charged with handling stolen property contrary to section 322(2) of the Penal Code. The particulars of the alternative charge were: On the 2nd day of March, 2011 at Maili Tano area Burat Sub-location of Isiolo County, otherwise than robbery with violence, he dishonestly retained one blanket, a pair of safari boots, 30kg of maize, grey cap all valued at Kshs. 3,600/= the property of **ISAAC BAARIU**. In counts II and III the appellant was charged with being in possession of a firearm without a valid certificate contrary to section 4(1) as read with section 4(3) of the Firearms Act. The particulars of counts II & III were that on 2nd March, 2011 at Maili Tano area, Burat sub-location in Isiolo county he was found in possession of two firearms to wit a G3 rifle serial number A.3.6051915 and an A-M 16 rifle serial No. 5395646 and 11 rounds of 7.62mm and 7 rounds of 5.56 of ammunition without a firearm certificate.

The appellant pleaded not guilty to all the 3 counts and in the alternative charge thus paving way for the trial that proceeded before Maundu, Esq, the then Principal Magistrate Isiolo who recorded the evidence of **ISAAC BARIU (PW1), CPL OSMAN JATAN (PW2), ESOKON KERIO (PW3, EMAN MAKENDE**

(PW4), JOHNSTONE MUNYOKI MWONGELA (PW5), APC ZAKARIA KINYUA (PW6) and PC GEOFFREY MWITI (PW7). On 28th September, 2011 the trial court found the appellant had a case to answer. In his defence, the appellate elected to make an unsworn statement. He called no witness.

In a judgment delivered on 19th October, 2011, the learned Principal Magistrate found the appellant guilty of all the three counts. In count 1 he was sentenced to death as by law prescribed. The sentences in count II & III were, however suspended, although there were no sentences imposed in respect of count II & III.

The appellant was dissatisfied with the outcome of the trial and filed an appeal in the High Court. On 29th November, 2012 Lesiit and Makau, JJ. dismissed the appellant's appeal thus provoking this appeal.

This being a second appeal, and by dint of Section 361 (a) of the Criminal Procedure Code, our mandate is limited to matters of law only and not matters of fact which were considered by the trial court and re-evaluated by the first appellate court. See **Njoroge v Republic [1982] KLR 388**. Hence, as a 2nd appellate court we are bound by the concurrent findings of fact by the two lower courts, unless it can be shown that those findings were not backed by evidence, or are based on a misapprehension of the evidence, or the two courts below are shown to have demonstrably acted on wrong principles in arriving at those findings (See **Chemagong v Republic [1984] KLR 611.**

During the plenary hearing before us on 3rd November, 2015, Miss Nelima, learned counsel for the appellant contended that the Charge Sheet was defective as it indicated Maili Tano as the place where the incident took place yet in his testimony PW1 indicated that he lives at Kambi ya Juu; that out of the items recovered, a radio was not in the charge sheet; that only 30kg of maize was recovered yet PW'1s said the maize stolen from him was 60kg; that PW3 and PW4 testified that the only items recovered were the two guns. It was counsel's further submission that it was not established that the house where the items were allegedly recovered from belonged to the appellant; that there was contradiction as to whether the house was locked with a padlock or not; that the maize was not positively identified; that the footprints made by sandals was not conclusive evidence that the appellant was one of the robbers as many other persons wear similar sandals. Finally, she urged us to find that the report by the ballistic expert was tendered in evidence by a person who was not the maker.

In opposing the appeal, Mr. Mugo for the respondent submitted that the appellant was known to PW3, a member of the security committee as well as PW4 who is the appellant's village mate. Counsel submitted that the doctrine of recent possession was properly invoked as the appellant was found in possession of items which had recently been stolen and which were positively identified by PW1; that there is a typographical error as regards where the incident took place, namely, Kambi ya Juu and not Maili Tano. He further submitted that there was nothing wrong in PW5 producing a report prepared by a colleague he had worked with. It was his further contention that there was no doubt that the house where the items were recovered belonged to the appellant.

The issues raised by the appellant as to whether the maize was positively identified; that it was not established that the house where the items were recovered from belonged to the appellant; that there was contradiction as to whether the house where the items were removed from was locked with a padlock or not are all matters of fact which by dint of Section 361 of the Criminal Procedure Code fall outside our purview. As a second appellate court, we are bound by the concurrent findings of fact by the two courts below, unless it can be sworn that the findings were not backed by evidence or the findings are based on a misapprehension of the evidence or that the courts below acted on wrong principles. On our part we do not discern any such misdirections on the part of the two lower courts and hence shall not disturb their findings on matters of fact.

There are however, two issues which may be considered as matters of law. Firstly, it was contended that the charge sheet was defective as it gave the place of the commission of the offence as Maili Tano and not Kambi ya Juu. The learned state counsel contended that this was a typographical error. We do not think so as it appears from the record that Kambi ya Juu is within Maili Tano or vice versa. But whatever the case, we find that this irregularity is cured by Section 382 of Criminal Procedure Code which provides as follows:

"Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice."

The indication in the charge sheet that the offence was committed at Maili Tano as opposed to Kambi ya Juu as stated by the PW1, in our view was an error, if at all, that did not occasion a miscarriage of justice. We also find that the non-inclusion of the radio in the charge sheet as one of the items stolen, would still be covered by Section 382 of the Criminal Procedure Code and that this omission did not occasion a miscarriage of justice.

The other argument advanced by the appellant was that the medical report was produced by PW5 who was not its maker. In our view Section 77 of the Evidence Act permits the production of public documents by persons who are not necessarily the authors of such reports. The said section provides:

" (1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it."

It was the evidence of PW5, a ballistic expert that on 30th February, 2011 exhibits were received in their laboratory and **ALEX MWANDAWIRO** who worked under him and who had worked with him for over 10 years examined the exhibits and prepared the report. PW5 was well versed with the signature of **ALEX MWANDAWIRO**, having worked with him for over 10 years. In our view, it was perfectly in order for PW5 to produce the report prepared by his colleague.

We have therefore come to the inevitable conclusion that the conviction and the sentencing of the appellant by the trial court and the subsequent affirmation of the trial court's findings by the 1st appellate court were properly founded. We see no reason to disturb those findings.

It is however noted that the trial court did not impose sentences in respect to Count II and III but merely suspended the sentences. In our view this was a misdirection as the sentences ought to have been imposed before their suspension. Accordingly we impose a sentence of 7 years in respect of each count in counts II & III. The sentences are to run concurrently. Those sentences shall however remain suspended in view of the death sentence imposed in respect of count 1.

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed.

Dated and delivered at Meru this 17th day of December, 2015.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR