REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO 93 OF 2018

(From original conviction and Sentence in Criminal case No. 1772 of 2018 of the Chief Magistrate's Court at Kitale delivered by P.C. Biwott –SPM)

JOSEPH IJKAA NAIBEI.....-APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, **Joseph Ijkaa Naibei** was charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 5th February 2018 at Kiminini area within Trans Nzoia County, jointly with others not before court, the Appellant robbed Erick Wanjala Wakhuyi of Kshs 4,500/= and a mobile phone make Infinix X 5010 valued that Kshs 8,800/= and at the time of the robbery used actual violence to the said Erick Wanjala Wakhuyi (herein after referred to as the complainant). When the Appellant was arraigned before this court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve twenty (20) years imprisonment.

Aggrieved by his conviction and sentence, the Appellant filed an appeal to this court. The Appellant in his petition of appeal, faulted the trial court for relying on the evidence of identification to convict him yet such identification was not free from the possibility of error. He took issue with the shoddy manner in which the police conducted investigations. In particular, he was irked that the investigating officer had not visited the scene of crime before charging him. He was of the view that crucial witnesses who could have exonerated him from the crime were deliberately not called by the prosecution to testify before court. He urged the court to take into consideration the fact that no identification parade was conducted before the evidence of identification was upheld by the trial court. He was aggrieved that the trial court had relied on uncorroborated and incredible evidence of the prosecution witnesses, who produced no exhibits, to convict him. He faulted the trial court for not taking into consideration his defence before reaching the impugned decision. In particular, he was annoyed that the trial court had not taken into account the fact that there existed a grudge between him and the complainant's brother. He observed that the judgment of the court reflected that the burden of proof had been shifted from the prosecution to the defence. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant made oral submission urging the court to allow his appeal. He explained that the Mobile phone that was allegedly found in possession was infact found in possession of other persons who framed him with the alleged possession. He denied that he had robbed the said mobile phone from the complainant. He further denied that he was identified at the scene of crime by the complainant because the alleged robbery incident took place at night when the conditions favouring positive identification were absent. As regards sentence, he submitted that the sentence of twenty years imprisonment that was meted on him was harsh and excessive and should accordingly be reviewed. He reiterated that the entire charge against him was fabricated to connect him to the robbery. He urged the court to allow the appeal.

Mr Omooria for the State opposed the appeal. He submitted that the prosecution had adduced sufficient culpatory evidence which connected the appellant to the crime. He explained that the complainant was robbed of his mobile phone and in the course of the robbery, he was injured. He was attended to at the hospital, treated and discharged. The complainant identified the Appellant in a gang of four robbers that confronted and robbed him. Although the robbery took place at night, there was sufficient light that enabled the complainant identify the appellant. The appellant was known to the complainant prior to the robbery incident. The mobile phone which was robbed from the complainant, was recovered from a prosecution witness, after being tracked by the police, who was able to explain how he got the phone. The witness told the police that the same has been sold to him by the Appellant. Mr. Omooria submitted that this was clear evidence that connected the Appellant to the robbery. He urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trail court so as to arrive at its independent decision whether or not to uphold the conviction. In doing so, the court is required to be mindful of the fact that it never saw nor heard the witnesses as they testified. (**See Njoroge Vs Republic 1986 KLR 19).** In the present appeal, the issue for determination by this court is whether the prosecution established to the required standard of proof the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** brought against the Appellant.

In the present appeal, the prosecution relied on two pieces of evidence to secure the Appellant's conviction. The first piece of evidence is that of identification. According to the complainant, on the material day of 5th February 2008 while he was walking from Kiminini towards his home, at about 8.00 pm, he was confronted by a gang of four men who robbed and assaulted him. He was robbed off his Infinix mobile phone and Kshs 4,500 in cash. He was injured on his left hand, right leg and neck. He screamed. The robbers ran away. He ran after them. He saw the Appellant whom he was able to identify as he had previously seen him at the local market. He thereafter went to hospital, was treated and discharged. According to the P3 Form which was produced by PW5, by Dr. Faustina Shitote, based at Kitale Referral Hospital, the complainant had bruises and lacerations on his left hand, his leg and his neck. The injuries were caused by a blunt object. The P3 form was produced as a prosecution's exhibit.

The complainant's evidence of identification was not corroborated by any other witness. The complainant's testimony was of a single identifying witness made in difficult circumstances. That being the case, this court warns itself of the danger of convicting the appellant based on such evidence without corroboration or other evidence. As was held by the Court of Appeal in **Maitanyi Vs Republic 1986 KLR 198 at Pg 200:**

> **" Although the lower courts did not refer to the well known authorities Abdulla Bin Wendo & Another Vs Rep (1953) 20 EACA 166 followed in Roria VS Republic [1967] EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-**
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> **" Subject to well-known exceptions it is the 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 a 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."**

In the present appeal, other than the evidence of identification, the prosecution relied on the evidence of the recovery of the robbed mobile phone while in constructive possession of the Appellant. According to PW2, Andrew Wekesa and PW3 Kelvin Simiyu, on 19th February 2018, the Appellant, who was well known to him at the time went to his studio at Kiminini trading centre and offered to sell him an Infinix Mobile phone. A deal was struck whereby the Appellant agreed to take PW2's mobile phone and was given Kshs 500 in addition thereto. PW2 gave the mobile phone to PW3. On 19th April 2018, the police were able to track the mobile phone a day after it had been activated. PW2 and PW3 were called to the police station where they explained how they got to be in possession of the mobile phone. They explained to the police the circumstances in which they got the mobile phone. The Appellant as traced and arrested. According to the prosecution, this evidence attracts the application of the doctrine of recent possession. It therefore connects the appellant to the robbery.

For the doctrine of recent possession to apply to secure a conviction, the Court of Appeal in **Simon Kanui Mwendwa Vs Republic [2020] eKLR** held thus:

> **" 11. As was correctly stated in Isaac Ng'ang'a Kahiga & Another V republic , Criminal Appeal No. 272 of 2005:**
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> **" it is trite 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 other words, there must be positive proof, first, that the property was found with the suspect, secondly that; that 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."**

On re-evaluation of the evidence, it was clear to this court that the prosecution established to the required standard of proof that indeed the Appellant was found in constructive possession of the mobile phone. PW2 testified that the appellant sold to him the phone on 19th February 2018 which was fourteen days after the complainant had been robbed of it. Although the Appellant denied selling the mobile phone to PW2, this court's assessment of PW2's evidence, leads it to the conclusion that the said witness was telling the truth. There was no reason why PW2 would implicated the Appellant if indeed he was not the one who sold him the mobile phone. There existed no grudge between the two. There was no evidence of bad blood existing between the two.

The Complainant was able to produce receipts in court which established his ownership of the phone. This court therefore holds that the doctrine of recent possession indeed applies in the case of the Appellant. The Appellant's defence and submission in this appeal is clearly self-serving and does not dent the otherwise strong culpatory prosecution evidence that connected him with the crime. The appeal against conviction lacks merit and is hereby dismissed.

On sentence, it was evident to this court that the sentence of twenty (20) years imprisonment that was meted on the Appellant did not meet the ends of justice taking into consideration the circumstances in which the robbery took place and the value of the stolen item. This court will revise the sentence. The sentence of twenty (20) years imprisonment is therefore set aside and substituted with a sentence of **ten (10) years** imprisonment which shall take effect from 24th October 2018 when the appellant was convicted by the trial court. It is so ordered.

DATED AT KITALE THIS 23RD DAY OF FEBRUARY 2022.

L. KIMARU

JUDGE