REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

CRIMINAL DIVISION- MILIMANI COURT

CRIMINAL APPEAL NO. 57 OF 2019

EVANS MASHETI ASUTSA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

(Being an appeal arising from the original conviction and sentence in Criminal Case No. 560 of 2015 at Chief Magistrates Court Kibera by Hon. Mutuku – SPM on 17/12/2018)

JUDGMENT

1. **Evans Masheti Asutsa**, the Appellant was charged with the offence of Robbery with Violence contrary to section 295 as read with section 296(2) of the Penal Code. Particulars of the offence being that on the 15th day of November, 2014 at Makadara Estate in Langata District within Nairobi County, jointly with others not before the court robbed Larry Mwita Chacha one mobile phone make Samsung Galaxy Trend Imei 353738061185409 valued at Ksh 12,949/= and at the time of the robbery used personal violence to the said Larrry Mwita Chacha (Deceased).

2. In the alternative he faced a charge of handling stolen property contrary to **Section 322(1) (2**) of the Penal Code. The particulars being that on diverse dates between 17th day of November, 2014 and 22nd day of December, 2014 at an unknown place in Nairobi within Nairobi County, otherwise other than in the course of stealing dishonestly retained one mobile phone Samsung Galaxy Trend Imei 353738061185409 knowing or having reasons to believe that the same was stolen property.

3. The case as presented by the prosecution was that **PW5 Elvis Namucole,** a student at Strathmore University, who lived at Kafoca Mukuru Stanville hostels with the deceased, went back to their room at the hostel from the University on the 14th day of November,2015 at 7.00pm and found the deceased therein. They had supper, and the deceased left carrying his phone, a Galaxy Samsung. On the 15th November, 2015**, PW4 Mary Wanja** the matron at Kafoca hostel was on duty when the gateman, Julius Rotich, brought in the deceased who was bleeding on the head and face. She notified his mother who advised them to take him to Nairobi hospital. With the assistance of the gateman and PW5 they took him to hospital.

4. **PW3 Simon Boniface Nakari**, an uncle of the deceased on being notified of the incident went to hospital to see him and communicated with **PW7 Enock Mwita** the father of the deceased, who travelled to Nairobi but upon arrival at Nairobi Hospital found him having died on the 17th day of November,2014.The matter was reported to the police whereby **PW6 No. 92161 P.C. Aron Koros** who had visited him in hospital and confirmed injuries sustained; and subsequent death, in company of PW3 and PW7 identified the body of the deceased to the Doctor who performed the postmortem. **PW8 No. 30534 Senior Sergeant Mulama** of scenes of crime, who was at the morgue took photographs of the deceased and made a report thereof.

5**. PW12 Dr Johansen Odour** a pathologist, performed the autopsy of the deceased and found him having sustained multiple bruises on the forehead, broken upper left incisor tooth, bruises on the upper and lower lip, a bruise on the left knee and a subcutaneous bruising on the left wrist. The head was injured with evident raised intracranial pressure, subdural hematoma and intra-cerebral hematoma. Following the examination, he concluded that the cause of death was head injury due to blunt force trauma.

6. **PW11 No.38755 Stephen Njagi** of DCI Langata upon receiving the report commenced investigations. He wrote to Safaricom to establish who could be in possession of the deceased's phone Serial Number 353738061185409. **PW9 Quinto Odeke No.73528** a CID officer attached to Safaricom generated data in respect of a handset S.R. 35373806-1155409.He established that the phone was used by Jared Chacha of ID No. xxx since 10th November 2014 and the line was 0712600xxx. It changed hands from 17th November 2014 to Evans Asutsa of ID No. xxx who used it until 21st December, 2014.**PW10 Jared Chacha Zachary a** cousin to the deceased testified that he bought

the line that was registered in his name in April, 2013 and gave it to the deceased who was in form four then, who was using it to communicate.

7. PW11 and his fellow investigators tracked the No. 0719300182 to Kawangware that was in use. They traced **PW2 Lydia Ipali Onjala** on the 22nd December, 2014 who had the Sumsang Galaxy who mentioned the Accused herein, her male friend as the person who gave her the phone. PW2 called the Accused who was arrested. It was established that the line No. 0719 300 182 was registered in the name of Evans Masheti Asutsa. **PW1 Elizabeth Samburu**, the mother of the deceased adduced in evidence a receipt she was issued with when she purchased for the deceased the phone, a Samsung Galaxy, IMEI No. 353738/06/1185409.Upon interrogation the Appellant failed to give a plausible explanation on how he came to posses the phone, hence charges that were preferred against him.

8. Upon being put on his defence, the Appellant testified to have lost his identification card on 15th September, 2013 and that he reported to Muthangari Police Station. That on the 4th February, 2015 he learnt of people having gone to his home looking for him. Consequently, he went to Langata Police Station where he was placed in custody without any explanation and the following day he was arraigned in court. On cross examination, the Appellant denied knowing PW2, but, admitted having owned line number 0719300xxx which was registered in his name, however, denied having inserted the sim card in the phone in question and having used it.

9. The trial court considered evidence adduced, and found the prosecution having proved the case to the required standard. It convicted the Appellant for the offence of robbery with violence and sentenced the him to life imprisonment.

10. Aggrieved, the Appellant appeals against both the conviction and sentence on the grounds that: The circumstances from which the conclusion of guilt was to be drawn was not fully established; the mobile phone that was alleged to have connected the accused with the robbery was marred with material contradiction as to who owned it and the doctrine of recent possession did not augur well with the evidence; the trial magistrate erred in law and in fact by being impressed by the mode of arrest which was not in tandem with the events at the scene of crime; the trial court erred in law and in fact when it failed to perceive that the standard of proof required to prove the case did not meet the threshold; the trial court contravened the appellant's right to fair trial by denying him the right to be heard and failure to observe Section 216 and 329 of the Criminal Procedure Code; and, that the trial court refused the defence statement and gave shaky points of determination.

11. The appeal was canvassed through written submissions. It was the Appellant's argument that he was not identified by any eye witness as having been involved in the commission of the offence and the victim did not identify his attacker before he passed on. That the only item linking the accused to the robbery was the mobile phone that was owned by PW1. That the phone was recovered from PW2 but the prosecution did not enquire how the accused bought the phone for his girlfriend, PW2 and the full particulars of purchase.

12. That the prosecution did not inquire into their relationship and whether they cohabited. That the prosecution had to determine whether it was a devised art since PW2 was the first suspect to be arrested and she later became a witness. He relied on the case of ***Mary Wanjiku Gichira V. Republic Criminal Appeal No. 17 of 1998*** where the court held that:

> ***"...suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence."***

13. He dismissed the allegation that the phone was used by PW2, and Jared Chacha but not the deceased for allegedly having not been eligible to get an identification card, yet, he was a student at Strathmore University, who considering his status, should have had a line registered in his name. On the allegation that the phone was bought by PW1, he questioned the validity of the receipt that enabled the police to file charges against him. That the trial court relied on the doctrine of recent possession without taking the correct considerations in regard to the circumstances of the matter. In that regard the appellant cited the case of ***Isaac Ngang'a Kihiga –Vs- R Criminal Appeal 272 of 2002*** where the Court of Appeal held that:

> ***"… 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. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses…"***

14. That the phone was not recovered from the Appellant, and, there was no evidence that the Appellant handled it first before PW2.That there was no proof that it was actually property of the complainant; as the phone was not bought by the deceased and was not registered in his name. That doubts highlighted show that the prosecution did not prove its case beyond reasonable doubt.

15. On the issue of arrest, the Appellant submitted that he was arrested almost two months after the robbery. That he was not pursued but was arrested on information that he had given his girlfriend the phone which was alleged to be stolen. That the investigating officers in this case were silent on the appellant's lost identification card and if that information was true, then somebody registered a line using his name having disguised himself as the Appellant.

16. Arguing that the prosecution needed more corroborative evidence to justify a conviction; and, having failed to carry out thorough investigations, the benefit should have been found in his favour. On the standard of proof, the Appellant submits that the fact that he was using an abstract as his form of identification was not disputed, that the chance of mistaking him was greater.

17. On mitigation, the Appellant submits that he was entitled to be heard on the same. He relied on the case of ***Francis Karioko Muruatetu - Vs- Republic (2015) eklr*** among other cases where the court advised on hearing on sentencing and discretion above the straight jacket

death sentence.

That he had 4 children and was a bread winner. That the prosecution was biased; there was conspiracy with the deceased family to bring a bias pre- sentencing report. That the court erred in finding that the charge had no other sentence except life imprisonment taking into account the circumstances how life was lost In the cruelest way.

18. The State/Respondent urged that the ingredients of the offence of robbery with violence were established. It cited the case of ***Oluoch vs Republic (1985) KLR*** where it was held:

> ***"… Robbery with violence is committed in any of the following circumstances:***
>
> ***(a) The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***(b) The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes, or uses other personal violence to any person. "***

19. That in the case of ***Juma Mohamed Ganzi & 3 Others Criminal App No. 275 of 02*** , the court held that the elements are distinctive and the prosecution needs to prove only one of the three to warrant a conviction.

20. That there was evidence that the deceased was attacked and robbed off his personal effects, he sustained injuries and succumbed; the assailants were not identified, but, there was circumstantial evidence that linked the appellant to the offence. That the Appellant did not dispute PW2's evidence that she was his girlfriend and /or question how she came to possess the phone. It was established that the line 0719 300xxx, registered in the name Evans Masheti Asutsa was inserted in the phone a day after the deceased was robbed. Since no other line was inserted in the phone after the robbery, it happened less than two days hence the doctrine of recent possession applied. The prosecution referred the court to the **Kahiga case (Supra)**

21. Further, it was urged that the defence put up was an afterthought as he never challenged PW2's evidence that he gave her the phone.

22. In rebuttal to the prosecutions submissions, the appellant contends that the ingredients of robbery with violence established by the prosecution are irrelevant since the appellant was not identified at the scene or thereafter, that only circumstantial evidence could be used to try to establish the culprit.

23. This being a first appeal, the court has jurisdiction to reassess the facts and evidence and come up with its own conclusions. The court must consider that it did not have the benefit of seeing the witnesses. *See the case of* ***Kariuki Karanja versus Republic [1986] KLR190*** *wherein it was held inter alia that:*

> ***"On a first appeal from a conviction by a Judge or a Magistrate, the appellant is entitled to have the Appellate Courts' own consideration and view of the evidence as a whole and its own decision thereon. The Court has a duty to re-hear the case and reconsider the materials before the Judge or Magistrate with such materials as it may have been decided to admit."***

24. In the case of ***Nelson Julius Irungu –vs- Republic- Criminal Appeal No. 24 of 2008,*** the Court of appeal held that:

> ***"As this Court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw an heard the witnesses."***

25. At the outset, it is important to appreciate that the Appellant does not dispute that the offence took place; his only contention is that there was no evidence that he committed the offence. It is however important to establish if indeed the offence of robbery with violence was committed. In this case, there were no eye witnesses to what transpired, but the deceased returned to the hostel with visible injuries and according to the postmortem report he succumbed to the injuries. He could walk but was not stable and according to PW5, he told him that he was attacked at 'Tangaza'. Of importance was that the blunt trauma he suffered must have been inflicted by a weapon/ instrument, which was evidence of violence having been used on his person and in the course of the incident, his cellphone must have been taken. In the case of Dima Denge Dima & Others vs. Republic Criminal Appeal No. 300 of 2007 it was stated thus:

> ***"The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."***

This was proof beyond reasonable doubt that the offence as envisaged in law was committed.

26. PW9 extracted call data for IMEI 353738061185400 with effect from 10th November, 2014 to 21st December, 2014. This was done pursuant to the provisions of section 65(8) as read with section 106 of the Evidence Act, therefore admissible in law. On the 15th November, 2014, at 0:44:42 the identification of the user of the phone was Jared Chacha Zachary holder of ID No.xxx the line in use was No. 0712600xxx.Two days later, on the 17th day of November, 2014, the User was Evans Asutsa holder of ID No.xxx and it was used until 21st December, 2014 when it was tracked and found in possession of PW2 who identified the Appellant as the person who gave her the cellphone.

27. PW1 identified the cellphone as the one she purchased for the deceased and PW10 confirmed having registered the subscriber identity

line in his name and having given it to the deceased, who became the special owner. In the circumstances, the deceased held and used the phone line with the consent of the actual owner.

28. The evidence of PW11 that they tracked the phone line and found the phone in possession of PW2 who called the Appellant, and he responded by going to where they were prior to being taken to Langata Police Station, is corroborated by that of PW2 who testified to the Appellant having been arrested at her house. According to PW2, the Appellant was in possession of the cellphone for weeks prior to giving her.

29. In his defence the Appellant denied knowing PW2 and claimed that he lost his identity card long before the offence was committed. When PW2 testified, the Appellant did not dispute the question of friendship between them or even how she came to possess the cellphone. Similarly, when PW11 testified, on cross-examination, he said that the Appellant alleged that he bought the phone. It was not suggested that he lost the cellphone and was in possession of a police abstract. He should have put up this defence, at an early stage in the case, so that it could be tested by the prosecution. The defence put up must therefore be rejected as an afterthought as it was not raised at the earliest opportunity.

30. As correctly found by the learned trial magistrate, the accused's line was inserted into the phone two (2) days after the robbery. Further details in the evidence confirm that the first person to use the phone as per the Safaricom data was the accused, vide sim card no. 0719300xxx. PW2's unchallenged evidence was that she did not use it until when the appellant gave it to her.

31. The trial court is faulted for falling into error when it relied on the doctrine of recent possession. ***In the case of Malingi –Vs- Republic, [1989] KLR 225***, the Court of Appeal said this about the doctrine of recent possession:

> ***"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver."***

32. In the case of *Eric* ***Otieno Arum v Republic (2006) eKLR***, the court stated as follows:

> ***"In our view, 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 the 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…"***

33. In this case, there was electronic evidence from Safaricom that the appellant was in possession, and use of the phone two (2) days after the robbery. Evidence adduced by the prosecution was that the cellphone belonged to the deceased. The Appellant, however, contends that the phone did not belong to the deceased. It was explained that PW1 bought the phone and gave it to the deceased who was her son. PW 10 also testified that he gave his line to the deceased who was his cousin. The deceased had just completed form four, by the time he started using the sim card and the phone he did not have an identification number that could enable him obtain and /or register ownership of a phone line. Therefore, the Appellant's contention that the deceased was an adult and could own a phone line was displaced by PW10's evidence that the deceased used his line from 2013 when he did not have an identification card until 2014 during the attack when he was a student at Strathmore University. Further still, possession is not limited to mere ownership but extends to a person who is in control or use of something.PW1 and PW10 testified that they had given the property to the accused. At the time of the offence, the deceased was in use and control of the phone and Safaricom line, hence, the phone that was stolen was positively identified as his.

34. By the time the Appellant was called to rebut the presumption, the prosecution had established that the appellant had used the phone and line immediately after the offence prior to passing it to PW2; that, amounted to recent possession. In the premises, the doctrine of recent possession was properly invoked by the trial court.

35. On allegations of the Appellant's rights having been contravened in as far as mitigation is concerned; **Section 216** of the **Criminal Procedure Code (CPC)** provides that:

> ***The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.***

Section 329 CPC provides that:

> ***The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.***

36. The Appellant who was represented by counsel was granted the opportunity of addressing the court in mitigation. It was stated that he was a father of four (4) children who solely depended on him. A pre-sentence report was also presented that the court considered.

37. The upshot of the above is that this appeal has no merit and the same is accordingly dismissed in its entirety.

38. It is so ordered.

Dated, Signed and Delivered Virtually, this 28th day

of July, 2021.

L. N. MUTENDE

JUDGE