



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA AT MILIMANI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 101 OF 2016

BETWEEN

DAVID KIREKI ANYIMU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 1689 of 2013 delivered by Hon. J Gandani (SPM) on 6th July 2016).

JUDGMENT

Background.

1. Appellant was charged alongside two others with five counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars were as follows:

i. In count 1: that on the 6th day of September, 2013 at about 7.30 pm at Spring Valley Estate within Nairobi County jointly with others not before court, while armed with dangerous weapons namely pistols robbed **Dhanbai Kanji Patel** of one mobile phone make Samsung duo sim, assorted jewelleries, two suitcases, two digital cameras and cash Kshs. 4,000,000/- (Four Million Kenya Shillings) all valued at Kshs. 8,050,000/- (Eight Million Fifty Thousand Shillings) and at or immediately before the time of such robbery threatened to use personal violence to he said **Dhanbai Kanji Patel**.

ii. In count II: that on the 6th day of September, 2013 at about 7.30 pm at Spring Valley Estate within Nairobi County jointly with others not before court, while armed with dangerous weapons namely pistols robbed **Deepak Kanji Patel** of one laptop Mac Book air, external CD drive, cisco wireless router, zuku decoder, Dstv, PVR Decoder, two DVD players, one mobile phone make I Phone 4S, Eight pairs of trousers, one wallet containing national identity card, driving license, one I&M debit card and cash Kshs. 15,000/- (Fifteen thousand shillings) all valued at Kshs. 285,000/- (Two hundred and eight five thousand shillings) and at or immediately before the time of such robbery threatened to use personal violence to he said **Deepak Kanji Patel**.

iii. In count III: that on the 6th day of September, 2013 at about 7.30 pm at Spring Valley Estate within Nairobi County jointly with others not before court, while armed with dangerous weapons namely pistols robbed **Anastacia Kidili Nyamai** of one mobile phone make Form valued at Kshs. 3,500/- (Three thousand five hundred Shillings) and at or immediately before the time of such robbery threatened to use personal violence to he said **Anastacia Kidili Nyamai**.

iv. In count IV: that on the 6th day of September, 2013 at about 7.30pm at Spring Valley Estate within Nairobi County jointly with others not before court, while armed with dangerous weapons namely pistols robbed **Emily Wauda Ngeti** of one mobile phone make Nokia 1661 valued at Kshs. 3,500/- (Three Thousand Five Hundred Shillings) and at or immediately before the time of such robbery threatened to use personal violence to he said **Emily Wauda Ngeti**.

v. In count V: that on the 6th day of September, 2013 at about 7.30pm at Spring Valley Estate within Nairobi County jointly with others not before court, while armed with dangerous weapons namely pistols robbed **Samuel Maleya** of one mobile phone make Samsung GTE 1085T valued at Kshs. 3,000/- (Three Thousand Shillings) and at or immediately before the time of such robbery threatened to use personal violence to he said **Samuel Malenya**.

2. The Appellant pleaded not guilty to all the five counts. Upon a full trial, he was convicted of counts II, III, IV and V. He was sentenced

to suffer death in count II whilst the sentences in counts III, IV and V were held in abeyance. He was dissatisfied with both his conviction and sentence against which he has preferred the present appeal.

3. He raised six (6) grounds of appeal in his Petition of Appeal filed on 28th July, 2016. The same can be summarized into the following three grounds: that the learned trial magistrate wrongfully convicted him on the basis of the doctrine of recent possession whereas the recovery of the exhibited goods was not proved beyond a reasonable doubt; that the prosecution case was riddled with a lot of contradictions and inconsistencies and that the learned trial magistrate rejected his alibi defence without giving cogent reason as stipulated under **Section 169(1)** of the **Criminal Procedure Code**.

Summary of Evidence

4. This being the first appellate court, its duty is to reconsider and re-evaluate the evidence adduced before the trial court and come up with its independent conclusions. In so doing, this court must take into account that it neither saw nor heard the witnesses and give due regard for that. (See: **Okeno v Republic (1972) EA 32**).

5. The Prosecution's case can be summarized as follows: On 6th September, 2013 at about 7.15 to 7.30 pm, the complainant's night watchman **PW5, Samuel Rogers Malenya** was attacked at the gate inside the compound by two people who were armed with a pistol. The attackers covered his face with a muffin cap then tied his hands on his back using a rope. They made him sit down, warned him not to scream and took away his mobile phone make Samsung IMEI 366830032477242. Thereafter, they opened the gate and let in two more people who remained guarding him as they proceeded to his employer's house.

6. The complainant's house maid **PW1, Emily Waunda Geti** who was leaving her place of work at the time stepped out of the door and found the two masked robbers hiding near a fire extinguisher. They pointed a gun at her and told her to go back to the house. **PW4, Anastacia Kidili**, a homemaker nurse at the complainant's home was taking supper at the outer corridor near the kitchen when the two robbers appeared together with PW1. One of them hit her (PW4) on the head with something that looked like a gun. She started screaming then fell down and hit her head on the floor. The robbers threw PW1 on top of her and beat them up.

7. The complainant, **PW2, Deepak Kanji Patel** was in the sitting room with his mother, wife and two children when they heard someone screaming outside their kitchen area. Before PW2 and his mother could rise up to go and see what was happening, one of the robbers walked in, pointed a gun at them and ordered them to sit down. The second robber came in pushing PW1 and PW4. The robbers switched off some of the lights, dimmed others while a few remained on. The robbers then asked everyone in the room to lie down and used the TV and CCTV cables to tie their hands on their backs then took away all their mobile phones.

8. The robbers demanded for money. One of them asked PW2's mother to take him to her room while the other one picked his Mac book laptop and two Canon cameras. When the said robber returned with his mother, he asked PW2's wife to show him her bedroom which she did. When they returned, he asked PW2 to show him his bedroom but PW2 told them that it was the same as that of his wife. The robbers took away all their jewelry as well as PW2's wallet which had his identity card and driving license. Thereafter, the robbers demanded to be shown where the safe was and threatened to kidnap one of PW2's daughters if they were not given more money. PW2's mother took one of the robbers to the safe and gave him the Kshs. 4,000,000/=.

9. Before PW2's mother returned from the safe, a third robber came in with the watchman, PW5. The robber pushed PW5 and ordered him to lie down then joined the one who had remained behind in ransacking the sitting room and collecting valuables. The robber who had gone to the safe with PW2's mother returned carrying a suitcase and a plastic paper bag. Thereafter, the robbers demanded for a CCTV recording but PW2 told them there was none. They however picked everything that looked like a recorder such as DVDs, DVD player, Routers, DSTV decoder and television then left after about fifteen minutes.

10. PW2's mother freed herself first then assisted the rest to untie the ropes. The incident was reported at Spring Valley Police Station on the same night. The complainants also discovered that the robbers had gained access to their home through a construction site that was next to their home.

11. On 16th October, 2013, the deputy Officer in Charge, Nairobi Area Flying Squad Unit Mr. Francis Wanjau instructed **PW7, CPI Rinos Musungu** to join a team that was headed to Kisii for investigation of this case. A source within their department had profiled the Appellant by tracking a phone that had been stolen in the subject robbery. PW7 and five other officers proceeded to Kisii where they managed to arrest the Appellant near his home in Kegogi area in Kisii with the help of an informer. They asked the Appellant to take them to his home where they found his mother. They searched the Appellant and recovered a Samsung mobile phone IMEI 356830103124772412. They also recovered a Forme mobile phone IMEI 351562055534360 from the Appellant's mother. She told them that the said phone had been given to her by the Appellant on 10th September, 2013. Further, they recovered Kshs. 5,000/= from the Appellant's house and Kshs. 3,000/= from his wallet but the money was returned to him.

12. Thereafter, the Appellant took them to his house in Kibera where they found his sister in law one Winfred Mwendu. On searching the house, they recovered a toy pistol under the cushion cover of his seats. They also recovered a mobile phone make Nokia 1551 IMEI No. 359328036154890 from his sister in law. She said it had been given to her by the Appellant. PW7 and his colleagues prepared two inventories dated 17th October, 2013 and 18th October, 2013 of the recovered items. The Appellant signed the inventories which was countersigned by PW7 and two of his colleagues. The Appellant was then escorted to the police station.

13. On 21st October, 2013, PW7 called the victims to the flying squad offices to identify the recovered items. PW1 identified the Nokia mobile phone recovered from the Appellant's sister in law as hers. PW4 identified the Forme mobile phone recovered from the Appellant's mother as hers and PW5 identified the Samsung phone which the Appellant was using at the time of his arrest as his. PW7 stated that PW4's phone was being used by cell phone number 072945-120 which was being tracked in Kisii area and was used four days after the robbery. PW7 thus preferred the present charges against the Appellant.

14. On 23rd October, 2013, CPL Gerald Onchiri from flying squad Nairobi presented the toy pistol for ballistic examination at the Firearms Laboratory at the CID Headquarters Nairobi. Vide the accompanying exhibit memo, he sought to know whether the exhibit was a firearm or had the features of one.

15. Upon examination, it was found that the exhibit was an electric motor device used for controlling the movement of motor vehicle window glass but had been modified to assume the shape of a firearm. It featured a barrel, muzzle, trigger and grip which gave it the feature of a gun. However, it had no provision for loading ammunition or firing. It was wrapped in black tape for purposes of concealment. It was concluded that the exhibit was not capable of firing but was an imitation of a firearm in terms of the Firearms Act, Cap 114, Laws of Kenya. **PW6, Superintendent Lawrence Nthiwa**, a firearms examiner from the Firearms Laboratory produced a report dated 23rd October, 2013 prepared in that regard by Inspector Hassan Maningo who had since left the police force.

16. PW7 testified that the Appellant's sister in law was not called as a witness because they were unable to trace her on the address which she gave them. PW7 further noted that when someone went to bond the Appellant's mother to testify, they found her very sick and she said that she was too afraid to testify against the Appellant since he was her only child. PW7 produced all the exhibits in this case.

17. Upon being placed on his defence, the Appellant elected to give a sworn testimony. He stated that on 17th October, 2013, he was at home in Kisii, Kegogi location. He was operating a motorcycle taxi at around noon when four people approached him and introduced themselves to him as police officers. They demanded that he takes them to his home which he did. They searched his mother's house without explaining the reason for the search and threatened to beat him up. They took his motorcycle, travelling bag, two phones and earnings which were returned to him. He was then taken to Kisii police station where he was booked. At 8.00 pm, they collected him and drove him to an unknown place. Later, they asked him to take them to his Nairobi house in Kibera Laini Saba. They searched the house but did not recover anything. He was taken to Pangani Police station and later charged in Court with offences which he denied. He also stated that he was a gospel musician and produced a newspaper article as well as a certificate in that respect.

18. In cross examination, the Appellant denied that a phone was recovered from his mother's house. He also stated that he had travelled to Kisii on 28th August, 2013 and by September he was still in Kisii although he did not have documents to prove that.

Analysis and determination

19. This appeal was canvassed by both oral and written submissions. The Appellant was represented by learned counsel, Mr. Lawi whilst learned State Counsel, Ms. Akunja acted for the Respondent. Oral submissions were made through Microsoft Teams video link. Thereafter, the Appellant filed written submissions on 5th May, 2020. Upon carefully reevaluating the evidence on record and considering the parties' respective submissions, I find that only two issues arise for determination namely; whether the prosecution proved its case beyond a reasonable doubt and whether the sentence imposed by the trial court was irregular.

a) Whether the prosecution proved its case beyond a reasonable doubt

20. The court will first consider whether the evidence on record established the offence of robbery with violence. Mr. Lawi counsel for the Appellant submitted that what was recovered from the Appellant was an electronic motor device used for controlling motor vehicle window glasses and not a pistol as alleged. He also argued that the death of the 2nd Accused and the acquittal of the 3rd Accused weakened the case and the ingredients of the offence of robbery with violence.

21. The offence of robbery with violence is established where the prosecution proves any of the three elements prescribed under **Section 296 (2) of the Penal Code**. These are that:

a) The offender is armed with a dangerous or offensive weapon or instrument; or

b) The offender is in the company of one or more person or persons; or

c) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.

22. From the evidence on record, the complainant's residence was raided by a gang of four people. One of the robbers was armed with a dangerous weapon namely a toy pistol. It suffices to point out that it does not matter that the said pistol was just a toy since the victims were not in a position to know whether it was real or not at the time of the attack. The gang robbed them of various valuables, *inter alia*, money, mobile phones, jewelry, cash and electronics. In the course of the robbery, the attackers used personal violence on them by hitting PW4's head with the toy pistol and also tying up the victims with ropes. In the circumstances, it is clear that the evidence on record sufficiently established the offence of robbery with violence.

23. As regards the death of the 2nd Accused and the acquittal of the 3rd Accused, is not an issue that turns on the guilt or otherwise of the Appellant. The ingredients of the offence charged are in clear terms that a proof of any one of them can sufficiently establish the offence. As explained above, there is no doubt that the prosecution discharged its burden.

24. The next issue that this court has to grapple with is whether it was proved that the Appellant took part in the said robbery; that to say whether he was positively identified. Mr. Lawi submitted that the Appellant was not properly identified because the circumstances prevailing at the time of the incident were not favourable for a positive identification. He stated that the prosecution witnesses confirmed that there was insufficient light at the scene and that the robbers, who were not known to the victims, had concealed their faces with masks. He urged the court to interrogate the circumstances of identification by each of the prosecution witnesses in light of the principles set out in the cases of ***R v Turnbull & Another (1976) All ER*** and ***Wamunga v Republic [1989] KLR, 424***. Mr. Lawi also cited the case of ***Maitanyi v Republic***

[1976] KLR 198 to buttress the argument that an inquiry as to the intensity of light informs the court as to whether there was a positive identification.

25. It is true that the circumstances of identification did not commend themselves to a positive identification. However, the Appellant was linked to the robbery by the recovery of three mobile phones allegedly stolen in the robbery. The trial court thus invoked the doctrine of recent possession to convict him for the offences in question.

26. Mr. Lawi however faulted the trial court for wrongfully relying on the said doctrine, arguing that the mobile phones were not recovered in the direct possession of the Appellant. He cited the case of Eric Otieno Arum v Republic [2006] eKLR to support the position that possession must be positively proved before a person can be convicted on the basis of the doctrine of recent possession. Counsel submitted that the persons who should have been charged were the Appellant's mother and sister in law who were found in possession of the stolen mobile phones. Counsel held the view that at best, the Appellant should have been charged with handling stolen property. Further, counsel argued that at the time the Appellant was arrested, there was no economic life changing issue or event to indicate that he was culpable.

27. In response, Ms. Akunja submitted that the doctrine of recent possession was properly applied because the phones that had recently been stolen from the victims were both connected to the Appellant as they were recovered from his mother and sister in law.

28. The applicability of the doctrine of recent possession was set out by the Court of Appeal in Isaac Nganga Kahinga alias Peter Nganga Kahinga v Republic [2006] eKLR as follows:-

“It is trite that before a court of Law can rely on the doctrine of recent possession as a basis for 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.”

29. In Malingi v Republic [1989] KLR 225 Bosire, J (as he then was) at Page 227 held thus:

“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 have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the 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 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 item. The doctrine being a presumption of fact 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 it or was a guilty receiver.”

30. It is evident the Appellant was found in direct possession of a Samsung mobile phone belonging to PW5 less than two weeks after the robbery incident. PW7 further testified that he recovered a Forme phone belonging to PW4 from the Appellant's mother and a Nokia phone belonging to PW1 from the Appellant's sister in law. Both women told PW7 and his investigating team that the phones had been given to them by the Appellant. Inventories for the recovered items were prepared and the Appellant and his said relatives willingly signed them. This means that although the Appellant was not found in the direct possession of the two other mobile phones stolen from PW1 and PW4, it is clear that one of the mobile phones belonging to PW5 was identified as such and was stolen during the robbery. This sufficiently directly linked him to the robbery.

31. I am alive to the fact that a mobile phone is a fluid good that can move from one hand to another easily. Nevertheless, it could not have been a coincidence that apart from PW5's mobile phone, two other phones that were stolen in the robbery were found in possession of the Appellant's close relatives less than two weeks after the robbery. This leads to only one conclusion; that they were gifted to them immediately after the robbery. No wonder as PW7 testified, the Appellant's mother was unwilling to testify against him. In the circumstances, I find no reason to fault the learned trial magistrate for applying the doctrine of recent possession.

32. Further, *the doctrine of recent possession being a presumption of fact is a rebuttable presumption. This implies that if a person is found in possession of a stolen good, the burden of proof shifts to him to explain how he came into possession of that good in rebuttal. Failure to do so leads to an inference that he either stole it or was a guilty receiver. (See Malingi v R [1989] KLR 221).*

33. *In the instant case, the Appellant did not tender any logical explanation as to how he came into possession of the mobile phones stolen in the robbery. In the absence of any such explanation, I find that the prosecution established that he took part in the robbery.*

34. Mr. Lawi further faulted the prosecution for failing to call the Appellant's mother and sister in law as witnesses. He claimed that they were crucial witnesses that should have been called to corroborate PW7's testimony. He argued that the failure to do so showed that the case was cooked up. The law is well settled that the prosecution has no obligation to call a superfluity of witnesses in order to prove a fact. (See: **Section 143 of the Evidence Act, Cap 80, Laws of Kenya** and Bukenya & Others V Uganda (1972) EA 549). All the same, PW7 explained why the said persons were not called to testify. I cannot therefore draw an adverse inference from the prosecution's failure to call the two as witnesses.

35. Further, according to counsel for the Appellant, it appeared that PW3 wanted to disclose to the court, albeit inadvertently, how they gave evidence under duress but to avert the situation, the prosecution quickly stood her down despite the objection by the defence. Counsel further claimed that the case was initially investigated by a Chief Inspector after which it was handed over which was a pointer that the Appellant was fixed. On this, I agree with the learned state counsel that these sentiments are mere speculations without any factual basis. Furthermore, PW7 had no reason to frame up the Appellant since he did not know him before and there was no evidence of any grudge between them.

36. In view of the foregoing, I find that the prosecution proved the case against the Appellant to the required standard which is beyond any reasonable doubt. The Appellant's conviction was therefore safe.

b. Whether the sentence imposed was irregular.

37. Mr. Lawi submitted that the death sentence imposed on the Appellant was irregular and harsh. He argued that nobody was harmed and nothing material was traced directly to the Appellant. He urged the court to consider the seven years that the Appellant has been in custody as sufficient punishment whilst applying the principles set out in the Supreme Court decision of *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*. Learned State Counsel, Ms Akunja had no objection to this submission.

38. Let me point out that the sentence imposed upon the Appellant was not irregular give as at 6th July, 2016 when the Appellant was sentenced, the only prescribed penalty for the offence of robbery with violence was death which could be commuted to a life sentence. It is not until the emergence of the *Muruatetu Decision [supra]* that the mandatory nature of the death sentence was declared unconstitutional as it interferes with the trial court's discretion to impose an appropriate sentence premised on the circumstances of each case.

39. At the trial, the Appellant did not have any record of previous convictions a testament that he was first offender. He stated that he had a family and a sick mother who depended on him. He also stated that he was a law abiding citizen and wished to contribute to national development. However, he and his accomplices stole valuable things from the victims most of which were never recovered. No injuries were experienced as well, which calls for a lesser sentence.

40. In the end, I uphold the conviction. I set aside the death sentence and substituted it with fifteen years imprisonment to commence from the date of the Appellant's arrest, 17th October, 2020. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH JUNE, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Appellant in person.*
2. *Ms. Kimaru for the Respondent.*