REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. 1 OF 2018

MOSES SANKALE SIMPIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Hon W. Juma, Chief Magistrate delivered 10th January 2018,

in the Chief Magistrate's Court at Narok in Criminal Case No. Case No. 2005 of 2016,

R. –vs. Moses Sankale Simpiri)

J U D G M E N T

The appellant has appealed against his conviction and sentence of death in respect of the offence of robbery with violence contrary to section 296 (2) of the Penal Code (Cap 63) Laws of Kenya.

The state supported both the conviction and sentence.

In this court, the appellant has raised seven (7) grounds in his amended petition of appeal.

In ground 1 the appellant has faulted the trial court in convicting him for robbery on the evidence of handling stolen property and in failing to find that the charge of robbery was not proved.

Mr. Meing'ati, counsel for the appellant submitted that the prosecution failed to prove beyond reasonable doubt the offence of robbery. He further submitted that the prosecution failed to prove that the appellant was at scene of the robbery and that he was armed with a dangerous weapon. The evidence against the appellant is circumstantial in nature. Through the evidence of Amos Mutaka Ole Lepore (Pw 5), Paul Kuyoni (Pw 3) and Isaac Leina Shugu (Pw 4) the prosecution were able to trace the complainant's (Pw 2), Huawei mobile cell phone make 360 serial number 866838025473626 as having been in the possession of the appellant.

The evidence of Pw 5 is that sometimes in October 2016 the appellant who was his neighbour went to Nkareta Centre where they met. The appellant told Pw 5 that his (appellant's) mobile phone had run out of power. The appellant asked him (Pw 5) for his phone to use. Pw 5 gave the appellant his techno phone to use. The appellant then gave him (Pw 5) his Huawei mobile phone. The Huawei phone was produced as a prosecution exhibit 7. Pw 5 then charged exhibit 7 and continued to use it.

In November 2016 Pw 5 was rung by Narok police station. As a result, he went there. He was told that the Huawei phone was stolen property. It was also his evidence that before that he had given Isaac Leina Shugu (Pw 4), the Huawei phone to charge.

Furthermore, it was the evidence of Pw 5 that he went to Narok police station with Pw 4. And that as at that time Pw 4 was the one in possession of the Huawei phone. The police recovered that phone from Pw 4. The police then arrested Pw 4.

While under cross examination, Pw 5 testified that the appellant told him that he (appellant) had bought the Huawei phone from one Daudi Nakola**.** Pw 4 further told the court that both the appellant and Daudi Nakola sold milk. Pw 5 also told the court that he knew the said Daudi Napola and that he (Pw 5) knew that the appellant used to carry on the business of milk with Daudi Napola.

In re-examination Pw 5 testified that Daudi Nakola was to sell the Huawei phone to him (the appellant).

Isaac Leina Shugu (Pw 4), testified that on 5 /12/2016, he met pastor Amos Mutaka Ole Lepore (Pw 5), at home at about 11.00 am. Pw 5 asked him that they exchange their phones, which they did. Pw 5 gave Pw 4 the Huawei phone, while Pw 4 gave Pw 5 his Samsung phone, which Samsung phone was produced as prosecution exhibit 8. Pw 4 then proceeded to a youth seminar at Lortoto. While in training Pw 5 called Pw 4 and asked him as to where he (Pw 4) was. Pw 4 then told Pw 5 where he (Pw 4) was. Pw 5 went there and asked Pw 4 the whereabouts of the Huawei phone.

Furthermore, Pw 4 testified that he gave the Huawei phone to his friend namely Paul Kuyoni(Pw 3).Pw 4 told Pw 5 to call Pw 3, the latter worked at Simba Lodge Maua. Pw 4eventually accompanied Pw 5 to CID office Narok. Pw 4 had exchanged his phone with Pw 3. He finally testified that they went to the police, because they had exchanged phones. The appellant did not cross examine Pw 4.

The prosecution called PC Dennis Mugambi (Pw 6), who was the investigating officer. He testified that the complainant was robbed of his motor vehicle registration KCG 261G. Following his investigations, Pw 6 confirmed that the subject vehicle was the property of the complainant. After recording statements, Pw 6 established that Paul Kuyoni handled the subject phone innocently.

While under cross examination, Pw 6 testified that the appellant did not give him (Pw 6) the number of anybody as a person who gave him (the appellant) the Huawei phone. He also testified that the appellant did not give him the name of Daudi Nakola. Pw 6 also testified that the appellant never wanted to take him (Pw 6) to Daudi Nakola. The appellant was reluctant to give Pw 6that information.

Furthermore, Pw 6 testified that Amos Lepore claimed he received the Huawei phone from the appellant. He testified that the appellant was arrested after being trailed by police for two days and that the appellant did not surrender himself to the police.

Paul Kuyoni (Pw 3) supported the evidence of Pw 4.

PW 2 Joseph Githiga Kabue was the complainant. It was his evidence that on 1/10/2016 he carried four passengers from Narok to Olposimoru in his pro-box vehicle registration No KCG 261G. He dropped them during the mid-night of that date. Two of the passengers told Pw 2 that they were travelling back to Narok the following morning. They agreed to board the vehicle at 4.00 am during the morning at the stage at Olposumoru. The two passengers came in the morning as agreed at 4.00 am. They boarded the vehicle. He did not know these passengers and did not recognize. After travelling for one kilometer the two passengers told Pw 2 to stop and pick a third passenger.

Pw 2 stopped the vehicle. As soon as they alighted, they got hold of Pw 2 and pulled him out of his vehicle. They tied his hands and blinded him. They then took control of the vehicle and made Pw 2 to sit between them. They took him and abandoned him near Katakala from where he was rescued by members of the public. The robbers took his vehicle, valued at shs 800,000/=, national identity card, NHIF card, the Huawei phone, Barclays ATM card and a wallet valued at shs 500/=, among other items.

The complainant (Pw 2) was examined by Benjamin Tum (Pw 1) at Narok referral hospital on 2/10/2016. Upon examining Pw 2, Pw 1 found the following. Pw 2 was 63 years old. He was sober. He had not taken alcohol or drugs. He had an asthmatic attack. He complained of headache and had bruises on the forehead, which was swollen. The right shoulder was swollen upon touch. He also complained of chest ache and the back had scratches. His hands were also aching and they had scratch marks.

Furthermore, the right middle and left middle fingers were swollen. The injuries were inflicted by a blunt object. Pw 2 was treated with antibiotics and analgesics. Pw 1 completed the P3 form, which he produced as exhibit 1. Pw 1 also produced the treated notes as exhibit 2.

Pw 1 testified that Pw 2 told him that he did not know his assailants.

Upon being placed on his defence, the appellant testified on oath. The appellant testified that he is businessman supplying milk to Narok. He used a motor cycle to transport milk his milk to different destinations. He testified that on 27/10/2016, a competitor by the name Daudi Nakola went to his house at 8.00 am. Daudi Nakola had gone to seek assistance; since his motor cycle (of Daudi Nakola) had mechanical problems.

Daudi Nakola wanted the appellant to transport his milk. The appellant agreed to do so, on condition that he pays to him (the appellant) Kshs. 2,000/=, that he had owed to the appellant. Daudi Nakola did not have cash money. Daudi Nakola promised to pay the appellant after being paid for his milk deliveries.

The appellant continued to testify that Daudi Nakola then gave his Huawei phone to the appellant as security for the repayment of the shs 2,000/=. The appellant got information from his wife that his father was sick. The appellant then decided to make an urgent trip to Maua. And since his phone had a problem, the appellant decided to use the Huawei phone. The appellant then switched on the Huawei phone. Its battery was low**.** The appellant then approached his friend namely Amos Mutaka Ole Lepore (Pw 5). Pw 5 gave him his techno Y3 phone. He promised to return the Huawei phone to its owner (Pw 5) on 14/12/2016, when he was to return home from Maua. The appellant was then called by PC Dennis Mugambi of Narok police station.

The appellant then went to the police station and explained how he got the Huawei phone. PC Mugambi wanted shs. 50,000/= from the appellant so that he would forbear from charging him. He did not have that money. PC Dennis Mugambi then charged him.

While under cross examination, the appellant testified that he got the robbed Huawei phone from Daudi Nakola and that that same Daudi Nakola is not his witness because he escaped. That same phone was recovered from Paul Kuyoni. He admitted having given the Huawei phone to Amos Lepore PW 5, who also had given it to Isaac Leina Shugu (Pw 4). Daudi Nakola was using the subject phone before he took it. He also testified that PC Dennis Mugambi wanted shs. 50,000/= to fuel the car.

The appellant called his uncle namely Daniel Simpiri (Dw 2), as his witness. Dw 2 testified that on 27/10/2016 he went to the home of the

appellant. Dw 2 was seated with the father of the appellant. Daudi Nakola arrived in that home. David Nakola asked the appellant to charge his phone. While there, Moses asked Daudi about his money. Daudi told the appellant to charge the phone and retain it as he Daudi went to look for the money in the sum of shs. 2,000/=. It was the evidence of Dw 2 that police wanted Shs 50,000/= from the father of the appellant so as to forebear from charging the appellant.

The appellant also called his father namely John Papupunya Simpiri (Dw 3), as his second witness. Dw 3 supported the evidence of his son, the appellant.

The submissions of the appellant.

Mr. Meing'ati, counsel for the appellant cited *Johana Ndungu v Republic [1996] e-KLR*in which the court held that the essential ingredient of robbery under section 295 of the Penal Code (Cap 63) Laws of Kenya, is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. That court further stated that under section 296 (2) of the Penal Code any one of the three ingredients set out therein must also be proved.

Furthermore, counsel cited *Oketch Okale& others v R (1965) EA 555*, in which that court held that in every criminal trial a conviction can only be based on the weight of evidence and that it is dangerous and inadmissible for a trial court to put forward a theory not canvassed in evidence.

Counsel also cited *Paul Mwita Robi v Republic [2010] e-KLR*, in which the Court of Appeal stated that where an accused is found in possession of recently stolen property, the evidential burden shifts to him to explain his possession and that that explanation only needs to be a plausible one.

The submissions of the respondent

Ms.Torosi submitted that the offence of robbery was proved. She further submitted based on *Joseph Njuguna Mwaura& 2 Others v Republic [2013] e-KLR, that the death penalty is constitutional*

FINDINGS ON THE GROUNDS OF APPEAL

This is a first appeal. As a first appeal court I am required to re-assess the entire evidence and make my own independent findings. I have done so. I find that it is common ground that the appellant was in possession of a recently stolen Huawei phone make 360 serial number 866838025473626 of the complainant. The Huawei phone was among the properties of the complainant that were stolen on 1st October 2016.

I further find that the offence of robbery was proved. I also find that the ingredients of robbery as set out in *Johana Ndungu v Republic*, supra, were proved. The evidence of the complainant was that his hands were tied and he was also blinded with the inner lining of his coat. The medical evidence through Benjamin Tum (Pw 1) supports the evidence of the complainant. The clinician, Benjamin Tum found injuries in the forehead and the hands of the complainant. This clearly shows that the robbers violently robbed the complainant and inflicted bodily injuries.

The appellant admitted being in possession of the complainant's Huawei phone. According to *Paul MwitaRobi v Republic*, *supra*,the evidentially burden has shifted to the appellant to explain his possession. He did so by explaining that one DaudiNakola gave him (the appellant) his Huawei phoneas security for the repayment of the shs 2,000/=; which the said David Nakola owed the appellant. The appellant then continued to use the Huawei phone; which he temporarily gave to Amos Mutaka Ole Lepore (Pw 5).

The evidence of the prosecution through PC Dennis Mugambi (Pw 6), which I find credible is that the appellant did not tell him (Pw 6) that Daudi Nakola gave him the Huawei phone as security for the repayment of a debt of Shs 2,000/=. This evidence did not come out in the sworn testimony of the appellant for the first time during the defence hearing.

I find as credible the evidence of Pw 6 that the appellant did not give him (Pw 6) the number of anybody as a person who gave him (the appellant) the Huawei phone. I also find as credible the evidence of Pw 6 that the appellant did not give him the name of Daudi Nakola. Furthermore, I find as credible the evidence of Pw 6that the appellant never wanted to take him (Pw 6) to Daudi Nakola. The appellant was reluctant to give Pw 6any information concerning Daudi Nakola.

After re-assessing the entire evidence I find as credible and cogent the evidence of the prosecution. Furthermore, I find that there is no truth in the evidence of the defence, which I hereby reject for lacking a ring of truth.

Furthermore, I find that the defence evidence although not truthful is plausible for the following reasons. First, the practice of exchanging mobile cell phones as exemplified by the evidence of Pw 5, Pw 4 and Pw 3 seems to be acceptable among the cell phone users in that class of people. I find that during the same month of October 2016 the appellant exchanged the Huawei phone with the techno phone of Amos Mutaka Ole Lepore (Pw 5), who in turn exchanged the same Huawei phone with the samsung phone of Isaac Leina Shugu (Pw 4). Finally, Pw 4 in turn exchanged that Huawei phone with the SONU phone of Paul Kuyoni (Pw 3) on 9th December 2016**.** Within those three months the Huawei phone had passed through the hands of three persons namely Pw 5, Pw4 and Pw 3 respectively. It follows from this, that the evidence of the defence that one DaudiNakola is the one who gave the appellant the subject Huawei cell phone as security for the repayment of shs 2,000/=is plausible and is supported by the evidence of pastor Amos Mutaka Ole Lepore (Pw 5). I find as credible the evidence of Pw 5 that he knew that the appellant used to carry on the business of milk with Daudi Napola. I also find as credible the evidence of Pw 5 that Daudi Nakola was to sell the Huawei phone to him (the appellant).

Secondly, the prosecution did not rebut the evidence of the defence that DaudiNakola gave the appellant the subject Huawei cell phone as

security for the repayment of shs 2,000/=. This evidence of the appellant was supported by that of Pw 5. Since this evidencedid not come out for the first time during the defence hearing;the prosecution had no right to apply to call evidence in rebuttal under section 309 of the Criminal Procedure Code (Cap 75) Laws of Kenya. Section 309 aforesaid reads:

> *"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."*

It is clear from the evidence of Pw 5 that Daudi Nakola was a person, who was known and the prosecution had no reason to avoid calling him to confirm whether or not the said DaudiNakola gave the Huawei phone to the appellant.

Furthermore, the investigating officer (Pw 6) testified in his evidence chief as follows*: "I recorded statements from Isaac Leina, Paul Kuyoni and Amos Motaka. Amos said he had exchanged the stolen phone with a Samsung phone with Leina."* It is clear from this evidence that Pw 6 was aware of the existence of the evidence of Pw 5 that touched on said Daudi Nakola. In view of this evidence it was the duty of the prosecutor to have the said Daudi Nakola testify as a witness for the prosecutor. If the prosecutor took the view that the said Daudi Nakola was not an essential witness for the prosecution, he should have offered him to the defence. Alternatively, the prosecution should have drawn the attention of the appellant to the potential evidence of the said Daudi Nakola, if they did not intend to call him. The rationale for this is that it is the duty of the prosecution to place all the relevant evidence before the court including both the incriminating and exonerating evidence in respect of the accused. The role of the prosecutor is to use legitimate means to bring about a just conviction. *See Berger v. United States 295 US 78, 88 (1935).*The reason being that the anticipated evidence of the said DaudiNakola might have been favourable to the defence.

The prosecution was not diligent in the manner they handled the potential evidence of the said Daudi Nakola given that the appellant did not have a monopoly of the existence of Daidi Nakola.

The prosecution choose not to call Daudi Nakola as a prosecution witness to confirm whether or not the said Daudi Nakola gave the Huawei phone to the appellant for reasons known to itself. That left uncontroverted the defence evidence that Daudi Nakola gave the appellant Huawei cell phone as security for the repayment of Shs 2,000/=, which he owed the appellant.

I am therefore entitled to draw an adverse inference that had Daudi Nakola been called the truth could have been established. Additionally, it is the duty of the prosecution to call all witnesses to establish their case against the accused. See *Bukenya& Others v Uganda [1972] EA 549.*

It appears that the offence proved was handling stolen goods contrary to section 322 (1) and (2) of the Penal Code. In law I cannot substitute the offence of handling stolen goods in place of robbery with violence for the following reasons. First, the appellant was not charged with the offence of handling stolen goods. Secondly, this offence is not a minor and cognate offence in relation to the offence of robbery with violence.

It therefore follows that the offence of robbery contrary to section 296 (2) of the Penal Code was not proved with the result that the conviction and sentence are hereby set aside.

Furthermore, in view of the foregoing conclusive finding based on the overwhelming entire evidence in respect of ground 1, which I hereby uphold, it is moot (or academic) to consider the remaining grounds.

The appellant is hereby ordered set free unless he is held on other lawful warrants.

Judgment signed, dated and delivered at Narok this 16th day of June, 2020 through video link in the presence of Mr. Meingati for the appellant and Ms. Torosi for the respondent.

J. M. Bwonwong'a.

J U D G E

16th June, 2020.