



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 59 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. E. JUMA – SPM

delivered on 3rd May 2017 in Kibera CMC. Cr. Case No.1504 of 2013)

EDWARD MUTUA NZUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Edward Mutua Nzuii was charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 2nd and 3rd August 2012 at African International University, Karen within Nairobi County, the Appellant, jointly with another, robbed Moses Douglas Caren of Kshs.37,000/-, electronic goods as listed in the charge sheet and four mobile phones (including a Samsung Galaxy mobile phone) together with assorted clothes all valued at Kshs.430,290/- and at the time of the robbery used actual violence to the said Moses Douglas Caren. The Appellant was alternatively charged with **handling stolen property** contrary to **Section 322(1) & (2)** of the **Penal Code**. The particulars of the offence were that on 8th May 2013 at Eastleigh in Nairobi County otherwise than in the course of stealing dishonestly retained one Samsung Galaxy mobile IMEI No.357649049641874 having reason to believe it to be stolen property. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to death. He was aggrieved by his conviction and sentence. He has filed an appeal against both conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he was convicted on the basis of contradictory and inconsistent testimony of prosecution witnesses that could not form a basis for a safe conviction. He faulted the trial magistrate for misapplying the doctrine of recent possession to convict him yet the evidence connecting him to the offence was not established to the required standard of proof beyond any reasonable doubt. The Appellant accused the trial magistrate for convicting him on the basis of hearsay and insufficient evidence that did not support the charge. He took issue with the fact that his defence was peremptorily dismissed without the trial court evaluating the same in light of the evidence that was adduced against him by the prosecution witnesses. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He told the court that the only evidence that connected him to the offence was a mobile phone that was recovered in his possession. He explained that the particular mobile phone was sold to him by an individual whom he identified to the police. It was his submission that despite the fact that he led the police to the person who sold him the mobile phone, he was surprised when he was charged with the offence yet the person who sold the mobile phone was left off the hook. He urged the court to re-evaluate the evidence and find that the prosecution had failed to establish its case to the required standard of proof.

On her part, Ms. Aluda for the State opposed the appeal. She submitted that the victim of the robbery's house was broken into and several items, including the mobile phone later found in possession of the Appellant. In the course of the robbery, the victim sustained injuries which later led to his death. While conceding that there was no direct evidence linking the Appellant to the crime, she submitted that the fact that the Appellant was found in possession of one of the stolen mobile phones so soon after the robbery was sufficient circumstantial evidence to sustain his conviction on the charge that was brought against him. The police tracked the particular mobile phone and found it with the Appellant six months after the robbery incident. In the premises therefore, she urged the court to find that the prosecution proved its case to the required standard of proof beyond any reasonable doubt. The appeal should therefore be dismissed. The conviction and sentence should be confirmed.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent

determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination is whether the prosecution established the charge brought against the Appellant of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the grounds of appeal and the submission made by the parties to this appeal. The court has also had the benefit of perusing the proceedings of the trial court. It was clear from the submission and the evidence adduced that the Appellant was convicted solely on the evidence of the recovery of one of the robbed items in his possession. According to the prosecution’s evidence, on the night of 2nd and 3rd August 2012, Moses Douglas Caren (Moses) was in his house at African International University, Karen. According to his wife who testified as PW1 (Aikulola Caren), while Moses was asleep in the house with their son, a gang of robbers broke into the house and stole several electronic items including computer monitors, television set, laptops and four mobile phones of the make Samsung and Nokia. The Samsung mobile phone was of the Galaxy model.

According to PW1, none of the stolen items were recovered save for the two mobile phones which were recovered after the police had tracked them in possession of the Appellant and the Appellant’s co-accused who was acquitted during trial. Moses did not testify in the case as he had died before the commencement of the trial. It is not disputed that the Samsung Galaxy mobile phone that was robbed from Moses was recovered in the Appellant’s possession on 8th May 2013. This was a period of eight months after the robbery. In her testimony, PW1 told the court that on several occasions from 4th of August 2012 to May 2013, she was able to track the mobile phone and the numbers that were being used in the particular mobile phone. She gave this information to the police. Police officers including PW4 CIP Frank Masaka testified that, using resources from Safaricom Limited, they were able to track the stolen mobile phone in the Appellant’s possession. They arrested the Appellant, and after the investigations, charged him with the offence for which he was convicted.

When he was put on his defence, the Appellant admitted that he was indeed found in possession of the particular mobile phone. He however, explained that he purchased the same from an individual whom he led the police to. According to the Appellant, the individual was arrested and taken to Pangani Police Station. He admitted that he had sold the particular mobile phone to the Appellant. The Appellant was however shocked when he was transferred to Karen Police Station and later charged with the current offence. He was surprised why the person whom he had pointed out to the police as having sold him the mobile phone was not similarly charged. He later learnt that the person had been released from police custody. In essence, the Appellant denied that he was found in possession of the particular mobile phone in circumstances that pointed to the fact that he was the one that robbed the deceased.

It was clear from the evidence adduced that the prosecution relied exclusively on the doctrine of recent possession to secure the conviction of the Appellant. There is no direct evidence linking the Appellant to the robbery. The only evidence that was adduced to connect the Appellant to the robbery was the recovery of one of the stolen mobile phones, specifically a Samsung Galaxy, in his possession. Before a court can convict on the application of the doctrine of recent possession, certain facts must be established to the required standard of proof beyond any reasonable doubt. In **Malingi –Vs- 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.”

It was essential that the prosecution established, first, that the property was stolen from the complainant, secondly, that the property was found in exclusive possession of the Appellant, thirdly, that the property was positively identified as the property of the complainant and finally, that the recovery of the stolen item was within the proximate time of the robbery. As to what constitutes proximate or recent, depends on the nature of the stolen item. An item such as a mobile phone can change hands within a short span of time as compared with, say, a motor vehicle which is unlikely to change hands even after the passage of several months. In the present appeal, the stolen item was a Samsung Galaxy mobile phone. The mobile phone was established to have been stolen from the deceased. It was positively identified to belong to the deceased. The mobile phone was found in exclusive possession of the Appellant.

The doctrine of recent possession is a rebuttable presumption. It is rebuttable if the person found in possession of the stolen item gives a reasonable explanation regarding the circumstances that he was found in possession of the stolen item. In the present appeal, the mobile phone was found in the Appellant’s possession eight months after the robbery incident. When he was arrested, he told the police that he had purchased the mobile phone from an individual. According to his evidence, he led the police to the individual who was arrested by the police. He was however later released under unclear circumstances.

On re-evaluation of the evidence adduced, it was clear to this court that the recovery of the mobile phone eight months after the robbery incident, and the explanation by the Appellant regarding the circumstances he was found in possession of the mobile phone, precludes this court from reaching a finding that the said possession irresistibly pointed to the Appellant as the person who robbed the complainant. This court has taken into consideration the fact that a mobile phone, by its very nature, can easily change hands and can pass from one person to another in rapid succession in a short time. This fact was exemplified by the various SIM cards that were used in the particular mobile phone. This court holds that the connection between the recovery of the mobile phone in the Appellant’s possession and the robbery is tenuous.

Reasonable doubt was raised by the Appellant's defence regarding the circumstance under which he obtained the mobile phone in his possession. He explained that he had purchased the same from an individual who was arrested but inexplicably later released.

This court therefore holds that the ingredients to establish the doctrine of recent possession were not established to the required standard of proof beyond any reasonable doubt. Since there was no other evidence to connect the Appellant with robbery, the Appellant's appeal has merit and is hereby allowed. The Appellant's conviction is quashed. The death sentence is set aside. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE