REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 127 OF 2018

BETWEEN

PETER MWENDA KITHURE..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Hon. G. Sogomo Senior Resident Magistrate dated 5th September 2018 in Tigania Criminal Case No. 413 of 2013)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein, PETER MWENDA KITHURE was arraigned before Tigania Principal Magistrate's court on two counts of ***robbery with violence contrary to section 296(2) of the Penal code.*** The particulars of the offence in Count I are that on the 21st day of August 2012 at Kirukire village Kianjai Location in Tigania West Sub-county within Meru county, jointly with others not before court [while] armed with unknown rifle robbed AGNES KENDI KILEMI of cash Kshs.78,000/-, Vero padlock and mobile phone Nokia 1600 all valued at Kshs.83,000/-and at the time of such robbery threatened to use actual violence to the said AGNES KENDI KILEMI.

2. The particulars of the offence in Count II are that on the 21st day of August 2012 at Kirukire village, Kianjai Location in Tigania West Sub-county within Meru county, jointly with others not before court [while] armed with unknown rifle robbed JANE NKATHA M'ATHIRA of cash Kshs.50,000/-, phone Samsung IMEI No. 358849046144950 metallic slim and a bag containing personal effects all valued at Kshs.57,000/- and at the time of such robbery threatened to use actual violence to the said JANE NKATHA M'ATHIRA.

3. In the alternative, the appellant was charged with the offence of ***handling stolen property contrary to section 322(1)(2) of the Penal code***, the particulars being that on the 22nd day of April at Tigania Police Station in Tigania West Sub-County within Meru County, otherwise than in the course of stealing dishonestly handled a mobile phone Samsung 53600 IMEI No. 358849046144950, having reason to believe it to be stolen property.

4. The appellant pleaded not guilty to both counts and to the alternative count. The prosecution called 3 witnesses in support of its case against the appellant. When put on his defence, the appellant testified under oath, but called no witnesses.

5. Upon careful consideration of the evidence on record, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant on both counts to the required standard of proof. The appellant was accordingly found guilty as charged, convicted on both counts and sentenced to suffer death as by law prescribed. The appellant was discharged of the alternative count.

The Appeal

6. The appellant felt aggrieved by the entire judgment of the learned trial magistrate. He accordingly instructed M/S Charles Omari Advocate who filed the Petition of Appeal on 21st September 2018. the Petition of appeal sets out the following grounds of appeal:-

i. THAT the learned trial magistrate erred in both law and facts by convicting the appellant purely on misapplication and/or using wrong principles of law: The principle of "recent possession".

ii. THAT the learned trial magistrate failed in law and fact by convicting the appellant even when it is clear that the circumstances/conditions do not favour such as the issue of identification and/or recognition was never established.

iii. THAT the learned trial magistrate erred in law and fact in convicting the appellant on charges which were levelled against him but not proved by the prosecution on laid-down standards of beyond any reasonable doubt as envisaged under Article 50 (1), 2(a), (b) and (c) of the Constitution of Kenya.

iv. THAT the learned trial magistrate erred in law and fact in not only admitting but overlying on the evidence of the complainants only which were contradictive and inconclusive.

v. THAT the learned trial magistrate erred in law and fact by convicting the appellant without any other and/or corroborative evidence.

vi. THAT the learned trial magistrate erred in law and fact by failing to consider the defence tendered by the appellant which was never in the circumstances to determine whether the principle of 'recent possession' should apply. (sic)

vii. THAT the judgment of the trial magistrate erred in law and fact in that the appellants defence dislodged the theory of evidence by the prosecution.

viii. THAT the judgment of the trial magistrate is against the sound set judicial principle and thus bad in law.

ix. THAT the sentence meted against the appellant is excessive in the circumstances owing to the mitigation factors and the generality of the case.

7. The appellant prays that the findings of the learned trial magistrate be set aside, appeal allowed, conviction quashed and the sentence of death set aside.

8. This being a first appeal this court is under a duty to re-analyze and and re-evaluate the evidence which was before the trial court with a view to coming to its own conclusions in the matter, only remembering and making an allowance for the fact that as an appellate court, it has no opportunity of seeing and hearing the witnesses. Generally see ***David Njuguna Wairimu versus Republic [2010]eKLR.***

The Prosecution Case

9. The prosecution case is brief. On 21st August 2012, Agnes Kendi Kilemi, a dealer in cereals who testified as PW1 was together with her sister Jane Nkatha PW2 and their house boy Erick in PW1`'s motor vehicle registration number KBW 778W. The three had just closed their business and were on their way home. The motor vehicle was being driven by driver Gideon Kimanthi. PW1 was carrying Kshs.78,000/- in a bag which was inside the car.

10. At about 7.30pm, on the material date, they got to PW1's gate. PW1 could see that another vehicle was trailing them. When PW1 got out of the car, 2 gun-totting men got out of the car that had been trailing them and accosted her. The gunmen entered the vehicle KBW 778W. The men took pw1's bag containing Kshs.78,000/- and her cellphone Nokia 110. They also took pw1's new padlock make Viro worth Kshs. 2,000/-. The gunmen put that bag containing Kshs.78,000/- into the boot of their own car, which looked like a Toyota Fielder, white in colour.

11. The gunmen returned to PW1's car and ordered Jane Nkatha M'Athira to give them all the money that she had, as they called her a fool. PW2 handed over her handbag which had the money Kshs.50,000/- plus coins. The thugs then ran away, but neither PW1 nor PW2 could identify the thugs. After the thugs left, PW1 and PW2 screamed, and police from Ngundune and Uuru Police Stations responded to the screams. PW1 suspected that her former driver whom she had fired could have been among the thugs since he was very conversant with the area and her operations.

12. Some eight months after the robbery, PW1's former driver was arrested in possession of PW2's cellphone, after the same had been tracked down by police to his PW1's former driver who is the appellant herein.

13. During cross examination, PW1 conceded that she did not identify any of the thugs during the robbery, but stated she was convinced that the appellant was among the robbers because of the way the trailing car had been parked.

14. PW2, Jane Nkatha M'Athira corroborated PW1's testimony. She testified that as soon as their car had stopped at the gate, two people came out of the trailing car, opened the passenger door of KBW 778W and demanded money. After getting the money bags from PW1 and PW2, the thugs put the loot in the boot of their car and escaped. PW1 and PW2 started screaming. PW2's cellphone was a Samsung, pink in colour. The following morning PW2 took her receipt and charger of the cellphone to Ngundune Police Station. Later PW2's cellphone was tracked to the appellant who was PW1's former driver.

15. When put under cross examination, PW2 stated that she was too shocked to recognize or identify any of the thugs, but stated that she gave the appellant's name to the police.

16. Number 88236 PC Moses Omondi Gangre was PW3. During the material time, he was stationed at Tigania Police Station. He recollected that on 21st August 2012 at about 8.30pm, he was at the police station when he heard screams from Kirukire Village which was about 500 metres away. Upon receiving instructions from the station commander IP Isaiah Langat, PW3 visited the village where the robbery in question had just taken place. Both PW1 and PW2 gave to PW3 an account of what had just befallen them and how they had lost Kshs.78,000/- and Kshs.50,000/- respectively together with their mobile phones, one of which was a Samsung Cellphone handset IMEI no. 358849046144950.

17. PW3 took PW1 and PW2 to the station where they recorded their statements and had their report booked. On 22nd April 2013, PW3 got information that a suspect the police had been trailing had been seen in his home. PW3 together with the OCPD went to the appellant's home and found a salon car belonging tot he appellant. PW3 telephoned the appellant using his (PW3's) own phone, but when the appellant did not come home, the police were forced to tow his car away with the intention of determining whether the said car was a stolen car.

18. The suspect went to the station to follow up on his car that the police had towed away. On searching

him the appellant was found in possession of a Samsung cellphone handset S3600 pinkish in colour with a flap. The appellant claimed to have bought the cellphone from elsewhere. PW2 was informed about the find. The receipt PW2 had availed to police showed that she had bought the phone for Kshs.7,000/- at Bright Furniture Mart, Meru on 13th June 2012.

19. As a result of the said discovery, PW3 and his colleagues were convicted that the appellant was one of the thugs who robbed PW1 and PW2 on the evening of 21st august 2012. the appellant was consequently apprehended and charged with the two counts of robbery with violence.

20. PW2's charger in box was produced as Pex 3. The IMEI number on the cash sale receipt tallied with that on on the recovered cellphone. PW3 also stated that between 20th April 2013 and 23rd April 2013, the appellant had been in constant communication using the cellphone. The Safaricom printout was marked PMFI – 4. In re-examination, PW3 testified that the appellant did not produce any receipt to show that he had bought the said cellphone for himself.

The Defence Case

21. The appellant gave sworn evidence. He conceded that he had previously worked for PW1 and PW2 for about 3 months before he left them for greener pastures in Nairobi. While he was in Nairobi, he learned that the complainants had been robbed. On one Friday when he was off duty and in Kianjai, a police officer summoned him through his (appellant's) cellphone, asking him to report to Tigania Police Station. On arrival at the police station, he was promptly arrested and placed in cells; the allegation being that he had participated in the robbery against PW1 and PW2. He further testified that he had bought the cellphone from a third party, but the police declined to be taken to that third party. He alleged that though he showed the police the agreement f sale, the police did not listen to him. He produced the said agreement as Dexhibit 1. he also testified that it was only after his arrest that he learnt the cellphone he had belonged to other people.

22. The agreement of sale dated 6th September 2012 shows that the appellant bought the Samsung S 36001 for Kshs.2,500/- from one Ismail Munene holder of ID number 2277886 and mobile phone number 0721 393 304. the alleged sale was witnessed by one Wilson Murungi Ngeera, holder of ID number 27158421. The appellant did not say that he tried to contact the said Ismail Munene through the given mobile number as he (appellant) tried to explain to he police how he had come by the suspected stolen mobile phone.

Issues for Determination

23. From the record, the prosecution case is anchored on circumstantial evidence since both PW1 and PW2 did not identify the robbers. According to their testimony they suspected that the appellant was among the robbers

i. because he knew their hours of work and

ii. because of the way the robbers car was packed that evening just before they were robbed.

24. Before discussing the question of circumstantial evidence, I must point out here that suspicion no matter how much strong can never form the basis of conviction. Every allegation of fact must be proved by cogent evidence, and in the case of circumstantial evidence, the evidence must be such that its totality points at no-one else but the accused as the person who committed the offence. The courts have said over and over again that the chain of circumstantial evidence must remain unbroken from beginning to end, if the court is to reach the conclusion that it was the appellant in this case who was either, the robber or the receiver of PW2's mobile phone which was traced to him.

Submissions

25. On the issue at hand as to whether the circumstantial evidence relied upon to convict the appellant was sufficient, Mr. Omari, counsel for the appellant submitted that because the prosecution relied on the doctrine of recent possession in piecing together its case against the appellant, the prosecution was under a duty to prove the following;-

i. That the stolen properly was found in the possession of the appellant.

ii. That the property was positively identified by the complainant as his/hers

iii. That the property was recently stolen from the complainant.

26. Counsel submitted that though PW2 purported to identify her stolen cellphone when the phone was produced in court, the recovery of the handset was made some 8 months after the alleged robbery. Counsel submitted further that since cellphones are fast moving items, it was not correct to treat 8 months as a period that can be considered as recent possession. In this regard therefore counsel urged this court to find and hold that the prosecution did not prove that PW2's cellphone was recently stolen from her.

27. Appellant's counsel also submitted that prosecution's failure to call PW1's houseboy by the name Erick and her driver by the name Gideon Kimathi was fatal to the prosecution's case, and the doubt created by their failure to testify should have been for the appellant's benefit. It is true from the record that the prosecution did not call both Erick and Gideon Kimathi as witnesses. This failure does not necessarily mean acquittal of the accused, especially if the witnesses called by the prosecution sufficiently prove the facts in issue.

28. The appeal was opposed on the ground that the doctrine of recent possession squarely pointed to the appellant either as the robber or the receiver of PW2's mobile cellphone handset. Mr. Gitonga, counsel for the respondent submitted that the appellant's explanation of how he came by PW2's cellphone handset was contradictory and that in any event, 8 months period could qualify under the doctrine of recent possession.

29. Regarding the appellant's defence of alibi prosecution counsel submitted that the same was of little help to the appellant because it was raised too late in the day, so that the prosecution had no chance of verifying the same.

30. On the issue of crucial witnesses not called by the prosecution, counsel placed reliance on section 143 of the Evidence Act and urged this court to find and hold that the appellant's complaint has no basis.

31. Finally, Mr. Gitonga urged the court to enhance the sentence meted upon the appellant on grounds that he learned trial court failed to mete out separate sentences for each of the two counts and also imposed an illegal sentence.

32. In reply, Mr. Omari, Counsel for the appellant submitted that the 8 month period does not meet the threshold of the doctrine of recent possession.

Analysis and Determination

33. I have now carefully reconsidered the entire evidence, the submissions and the law. The undisputed facts in this case are as follows: On 21st August 2012, both PW1 and PW2 were robbed of cash and other valuables just before they drove into the compound of the home where they lived. The assailants were more than one and they were armed. During the robbery, both PW1 and PW2 were threatened with use of actual violence. From the above, I am satisfied that the prosecution proved the commission of the offence of ***robbery with violence contrary to section 296(2) of the penal code.***

34. It is also not in dispute that neither PW1 nor PW2 was able to identify any of the robbers. It is also not in dispute that some 8 months after the said robbery, PW2's stolen phone was traced to the appellant. PW2 identified the cellphone when shown to her in court and also produced documentary evidence to

show that she was indeed the purchaser of the said cellphone which was stolen from her on 21st August 2012 by people she could not identify. The question that now arises is whether the learned trial magistrate rightly applied the doctrine of recent possession in finding the appellant guilty as charged.

35. In the case of ***Isaac Ndungu Kahiga alias Peter Nganga Kahiga versus Republic CRA no.. 272 of 2015 (UR***) (unreported) the Court of Appeal had this to say on the doctrine of recent possession.

> ***".....it is trite that before a court 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 properly was found with the suspect, secondly that the property is positively the properly of the complainant, thirdly, that the property was stolen from the complainant and lastly that 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,"***

36. In the instant case, the prosecution indeed proved that PW2's cellphone handset was found with the appellant. The prosecution also proved that the said mobile handset was positively identified by PW2 since the particulars on the undisputed documentary proof marched the particulars on the handset. I am also fully satisfied that the property found in the appellant's possession was indeed stolen from PW2 on 21st August 2012.

37. The only sticky issue is whether the 8 months period meets the threshold of recent possession.

38. Now considering the totality of the evidence on record, I am satisfied that the learned trial court properly applied the doctrine of recent possession in this case. The defence offered by the appellant namely the agreement, was a mere piece of paper which in my considered view was manufactured by the appellant solely to get him off the hook in this case. The other portion of his evidence was clearly hearsay and offered little challenge to the prosecution case. I am therefore satisfied that the appellant was either the robber or the receiver of PW2's mobile phone.

39. The conviction of the appellant on count II was thus safe. Since there was no evidence to connect the appellant to the offence in count I, his conviction of that count was not safe.

40. What about sentence? The appellant was sentenced to 20 years imprisonment based on the Supreme Court decision in ***Francis Karioko Muruatetu and another versus Republic [2017] eKLR.*** In my considered view, the trial court exercised its discretion properly in imposing that sentence. There is no reason to interfere with the same.

Conclusion

41. In light of the above, I make the following final orders:-

i. The appellant's appeal on conviction in respect of count I be and is hereby allowed.

ii. The appellant's appeal against conviction and sentence on count II be and is hereby dismissed.

iii. Right of appeal within 14 days from date of this judgment.

42. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Meru on this 31st day of July, 2019

F. GIKONYO

JUDGE

In the presence of

1. Omari for Appellant
2. Namiti for Respondent
3. Mwenda - Court Assistant