



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.58 OF 2019

(An Appeal arising out of the conviction and sentence of Hon. Boke (SPM) delivered on 18th December 2018 in Kibera Criminal Case No.2249 of 2015)

PAUL MUYEKHO WALIMBWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Paul Muyekho Walimbwa, 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 4th June 2015 at Karen within Nairobi County, the Appellant, jointly, with others not before court while armed with dangerous weapons namely pistols robbed Bernard Martins of a laptop make Dell and a briefcase all valued at Ksh.60,000/- and at the time of the robbery killed the said Bernard Martins (the deceased). The Appellant was charged in count 2 with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 4th June 2015 at Karen within Nairobi County, the Appellant, jointly with others not before court, while armed with dangerous weapons namely pistols robbed Somo Ade Guyo, a phone make Tecno T506 IMEI No.869858016675143 valued at Ksh.2,500/- and cash Ksh.1,000/- and at the time of such robbery threatened to use actual violence on the said Somo Ade Guyo. In the alternative, the Appellant was charged with the offence of handling stolen goods **contrary to Section 322(1) & (2) of the Penal Code**. The particulars of the offence were that on 6th June 2015 at Ngong Area, otherwise than in the course of stealing, knowingly dishonestly received a mobile phone make Tecno T506 IMEI No.869858016675143 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 charges. After full trial, he was convicted as charged in count 1, and in the main charge in count 2, and sentenced to serve thirty (30) years imprisonment for each count. The sentences were to run concurrently. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for finding that the doctrine of recent possession was applicable in the present case. He was of the view that prosecution failed to establish its case against him to the required standard of proof beyond any reasonable doubt. He took issue with the fact that the trial court, in convicting him, relied on inconsistent and contradictory evidence by the prosecution. He was aggrieved that the trial magistrate violated provisions of Section 169 of the Criminal Procedure Code by failing to state the section of the law that the Appellant was convicted of. He faulted the trial court for failing to properly evaluate his defence before arriving at its decision. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged this court to allow his appeal. In addition, this court heard oral submissions from Ms. Akunja for the State, who opposed the Appellant's appeal. Ms. Akunja made oral submission to the effect that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. She submitted that the Appellant was convicted on the basis of circumstantial evidence and application of the doctrine of recent possession. She stated that PW1, who was employed by the deceased as a night guard narrated to the court how the robbery occurred. The deceased was accosted by robbers as he arrived at his residence. They robbed and shot him dead. The robbers also took PW2's phone. The said phone was recovered from PW4, who stated that he was given the same by the Appellant. Learned State Counsel averred that the Appellant was not able to give an explanation of how he came to be in possession of the stolen phone. She asserted that the ingredients of the offence of robbery with violence were established. She was of the view that the sentence passed by the trial court was appropriate since a life was lost. She therefore urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Jirba Godena Molu and PW2, Somo Guyo were employed as night

guards at the deceased's residence in Karen. On the material day of 4th June 2015, they reported to work at about 6.00 p.m. The deceased, Bernard Martin, arrived home at about 8.00 p.m. He was driving. PW2 opened the gate. The deceased entered his house. Suddenly, before they could close the gate, four men entered the compound. One of the assailants ordered PW2 who was at the gate to lie down. He remained with PW2 at the gate as the three remaining assailants entered the compound. One of the assailants approached PW1 and ordered him to lie down. The other two assailants entered the house. PW1 and PW2 heard the assailants arguing with the deceased inside the house.

Shortly after, the assailants brought the deceased outside. He was carrying a briefcase and a laptop. One of the assailants shot the deceased on the leg and he fell down next to where PW1 was lying. The housekeeper by the name Lucy (PW6) arrived and saw them lying on the ground. She started screaming. The assailant who was standing next to PW1 shot her on her shoulder. The assailants left carrying the deceased's briefcase and laptop. The assailant who was left with PW2 at the gate stole his phone and cash Ksh.1,000/-. When they left, PW1 pressed the security alarm. The officers from the security company arrived shortly thereafter accompanied by police officers from Karen Police Station. The deceased died on the spot. Lucy was rushed to Karen Hospital. PW1 and PW2 told the court that they were not able to identify any of the assailants as they had hidden their faces. On 7th June 2015, PW2 was asked to go to Langata Police Station to identify a phone that had been recovered by the police. He was able to identify the said phone as the phone that was stolen from him by the assailants.

PW4, Kevin S. Ngoma, worked with the Appellant at a construction site in Kibiko, Ngong Area. He stated that on 5th June 2015, the Appellant came to work at about 8.00 a.m. He had with him a cellphone, make Tecno, which he claimed to have found in a vehicle he used that morning. The phone did not have a battery. It had two sim cards, a YU line and a Safaricom line. The Appellant asked PW4 to insert his battery to test whether the phone was operational. PW4 inserted his battery and sim card and switched the phone on. The Appellant told him that he could use the phone and return it to him the following day. PW4 was arrested by police officers the next day. They asked him where he got the phone from. He told them that the Appellant had given him the said phone the previous day. He took the police officers to the construction site where the Appellant was arrested. They were both taken to Langata Police Station and charges were preferred against them. He was later released as the charges against him were dropped.

PW6, Lucy Kanini, was employed as a domestic worker at the deceased's residence. She lived at the servant's quarters at the residence. PW1 called her at about 7.30 p.m. and informed her that the deceased had arrived. As she was leaving her house, she had a loud bang. When she arrived at the main house, she found the deceased, PW1, PW2 and her daughter (PW7) lying on the ground. The deceased had been shot. There was an alarm button located near the garage. As she was running to press the alarm, one of the assailants shot her on her shoulder. She fell down and started screaming. The assailants left after a short while. They tried to seek help so that they could rush the deceased to hospital. He however died on the scene. She was taken to Karen Hospital.

PW7, Sylvia Kinya is PW6's daughter. She lived with her mother at the deceased's residence. She was employed by the deceased at his company on a part-time basis. On the material day, she left the office with the deceased at about 7.00 p.m. He was driving. She was seated on the front passenger seat. When they arrived, PW2 opened the gate. They entered the compound. The deceased left the car and went inside the house to switch on the security lights. Suddenly, three men walked into the compound. One of them came to the car and asked her to open the door. He entered the car using the door at the driver's seat. She was carrying the deceased's laptop. He ordered her to put the laptop down and come out of the vehicle. She was ordered to lie down next to PW1. She heard the assailants arguing with the deceased inside the house. She afterwards heard gunshots. The assailants left shortly after. The deceased had been shot. He was lying on the ground bleeding. He died on the scene. After some time, police officers and officers from the security company arrived at the residence. PW7 stated that the assailant who accosted her was wearing a face mask.

PW8, Spt. Robinson Cherenge investigated this case. On 4th June 2015, at about 8.30 p.m., he received a call from OCS Karen Police Station who informed him of the robbery. He rushed to the scene of crime where he found the OCS and several police officers from Karen Police Station, as well as the deceased's staff. The deceased was lying outside the house in a pool of blood. He had been shot on his left leg. PW8 interrogated the witnesses and recorded their statements. The witnesses informed him that they could not identify the assailants as they were wearing face masks. The assailants stole a briefcase and laptop belonging to the deceased, and a phone and cash Ksh.1,000/- belonging to PW2. He forwarded PW2's phone number to the DCI headquarters. They were able to locate PW2's phone in Ngong. They arrested PW4 who was in possession of the said phone.

PW4 informed him that he was given the phone by the Appellant, who was his colleague. PW4 took them to where the Appellant was. PW8 arrested the Appellant. The Appellant told him that he had picked the phone from a vehicle which he travelled in from Dandora to Kibiko. He travelled in the said vehicle on his way to work. PW8 arrested PW4 and the Appellant and took them to Langata Police Station. He preferred charges against both of them since they were found in possession of the phone so soon after the robbery had occurred. He afterwards withdrew the charges against PW4 since the Appellant admitted to have given the phone to him. The other stolen items were not recovered.

PW3, Reuben Zimangui worked as a gardener at the deceased's residence. On the material day at about 7.00 p.m., he left the residence to go to buy food. He heard gunshots. He later came back and was told that there had been robbery at the residence. He did not witness the robbery. PW6, Sabina Martins is the deceased's daughter. She was not in the country when the robbery occurred. She received a call on 4th June 2015 informing her that her father had been shot dead by robbers at their residence. She did not witness the robbery. PW9, Dr. Dorothy Njeru was a Government Pathologist. She conducted a post mortem on the deceased's body on 5th June 2015. The deceased had a gunshot on his upper left leg. After her examination, she concluded that the deceased's cause of death was severe blood loss due to a gunshot injury on his leg. She produced the post mortem report in evidence.

When the Appellant was put on his defence, he testified that he worked at a construction site at Kibiko in Ngong. He was at work on 6th June 2015 when police officers came to the site. They asked him if he knew PW4. He told them that PW4 was his colleague. The officers asked him to accompany them to Karen Police Station to record a statement. They later took him to Langata Police Station where he was detained. The following morning, he was taken to an office where he was forced to sign a statement. He was presented before the trial court the next day. He denied the charges against him.

This being a first appeal, this Court is mandated to re-evaluate the evidence presented before the trial court afresh. The Court of Appeal in the

case of Gabriel Kamau Njoroge –vs- Republic [1987] eKLR stated this on the duty of the first Appellate court:

“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”

In the present appeal, the issue for determination is whether the prosecution established the charge 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 re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. It was evident from the facts of the case that the prosecution relied exclusively on the application of the doctrine of recent possession to secure the conviction of the Appellant. None of the prosecution witnesses was able to identify the assailants since they wore disguises during the robbery. The only evidence connecting the Appellant to the robbery was that he was in possession of PW2’s phone a day after the robbery had occurred.

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) 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 has 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.”

The prosecution is required to establish, firstly, 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.

PW2 testified that one of the assailants took his phone which was make Tecno, during the robbery. The investigating officer (PW8) stated that with help from Criminal Intelligence Unit, he was able to track PW2’s phone to Ngong. PW8 arrested PW4 who was found in possession of the said phone on 6th June 2015. PW4 told him that he was given the phone from the Appellant the previous day. They worked together at a construction site at Kibiko. The Appellant told PW4 that he picked up the phone from a vehicle he used to travel to work. PW4 took them to the construction site where they arrested the Appellant. The Appellant told PW8 that he picked the phone from a vehicle he travelled to work that morning.

This court is of the view that the prosecution failed to establish to the required standard of proof beyond any reasonable doubt that the phone produced in court belonged to the complainant and that the same was found in possession of the Appellant after the robbery. The evidence by prosecution witnesses regarding the said phone was inconsistent. It was PW2’s testimony that his phone was make Tecno and was black and red in colour. PW4 on the other hand stated that the phone that was given to him by the Appellant was make Tecno and was black and white in colour. The contradictory descriptions of the phone raise doubt as to whether the phone produced before court was the same phone stolen from the complainant during the robbery. PW2 did not produce any proof of ownership before the trial court which would have cleared the discrepancies.

Additionally, PW4 stated that when the Appellant gave him the phone, he removed the sim card that was inside the phone and inserted his sim card which was a Safaricom line number 0702830013. However, the number that reflects on the phone records produced in evidence by the prosecution (PEX4) is 0751955768. The Safaricom line 0702830013 claimed to have been used by PW4 on the recovered phone does not feature anywhere on the said phone records. The evidence on record failed to establish that PW4’s sim card was actually used in the recovered phone alleged to belong to PW2. The investigating officer (PW8) did not inform this court whose line number 0751955768 belonged to. Another discrepancy noted by this court is that the IMEI number (869858016675143) of the phone alleged to have stolen from PW2 featured on the charge sheet as well as PW8’s evidence was different from the IMEI number (869858016675140) that featured on the phone records (PEX4) produced in evidence. These discrepancies in the prosecution’s case raise doubt as to whether the mobile phone produced in court was the same phone stolen from the complainant and whether the said phone was given to PW4 by the Appellant. The Appellant in his defence denied giving the phone to PW4. This court is of the view that the prosecution’s evidence failed to meet the conditions for the application of the doctrine of recent possession as laid out in the case of Malingi –Vs- Republic (supra).

Further, it was clear from the evidence adduced that the explanation given by the Appellant upon giving the mobile phone to PW4 to the effect that he got the phone in a public transport vehicle while travelling from his home to his place of work is credible. PW4 testified that the Appellant told him that he got the mobile phone in a matatu. The Appellant requested PW4 to put a battery into the phone to see if it was working. It was at that point that the police traced the mobile phone with PW4. On re-evaluation of the evidence adduced, it was clear to this court that the Appellant explanation in regard to how he got the mobile phone had a ring of truth. Further, none of the more valuable items were recovered in his possession. The only inference that can be drawn is that other persons were involved in the robbery.

The upshot of the above reasons is that material doubt was raised by the Appellant with regard to the prosecution’s case against him, which ought to be resolved in the Appellant’s favour. 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 was adduced to connect the Appellant with robbery, the Appellant’s appeal has merit and is hereby allowed. The Appellant’s conviction is quashed. The sentence meted by the trial court 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 18TH DAY OF DECEMBER 2019

L. KIMARU

JUDGE