



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 81 OF 2017

(ROBBERY WITH VIOLENCE)

(CORAM: J.A. MAKAU – J.)

POLYCARP ODHIAMBO OKUOGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the sentence and conviction dated 15.8.2017, in PMCRC

No. 162 of 2016 in Bondo By Hon. M.O. Obiero – P.M.)

JUDGMENT

1. The Appellant **POLYCAP ODHIAMBO OKUOGA**, and Another were charged with an offence of **Robbery with Violence contrary to section 296(2) of the Penal Code**. The Particulars of the offence are that on the 29th day of December 2015, at around 11.30 p.m. at Waseda Village, Nyaguda Sub-Location, in Bondo Sub-County within Siaya County, jointly with others not before Court, while armed with a dangerous weapon namely AK 47 Rifle and a pistol robbed off **LEONARD NGALA OJWANG** cash KShs.2,800/=, ATM card and a mobile phone make **ARCHAS ECOS** worth KShs.45,000/= and immediately before or immediately after the time of committing such Robbery used actual violence against the said **LEONARD NGALA OJWANG**. The Appellant's co-accused faced an alternative charge of **Handling stolen property contrary to Section 322 (2) of the Penal Code**. The particulars of the alternative charge are that on the 1st January, 2016 at Kisumu City, in Kisumu County, other than in the course of stealing dishonestly received a mobile phone make **ARCHAS ECOS-IMEI:359 623 05 8 188 880** knowingly or having reason to believe to be stolen good.

2. After full trial the Appellant's co-accused was acquitted of both the offence of Robbery with violence and Handling stolen property, however, the Appellant was found guilty of Robbery with Violence and sentenced to suffer death.

3. The conviction and sentence provoked the filing of this appeal. The Appellant set out the following principal grounds of appeal namely:

- (a) That the Learned trial magistrate erred in law by convicting the appellant, based on weak and inconsistent evidence.*
- (b) That the Learned trial magistrate misdirected himself in law by shifting the burden of proof of the accused person, contrary to well established principals of law.*
- (c) That the learned trial magistrate erred in law in his evaluation of the entire evidence, thereby making finding contrary to provision of the Evidence Act.*
- (d) The learned trial magistrate erred in law by failing to correctly apply the doctrine of recent possession.*
- (e) That the judgment delivered/written offends express provisions of Section 169(10) of the criminal procedure code.*
- (f) The sentence handed down was excessive in the circumstances of this case.*

4. The Prosecution's case is as per record of appeal and I need not reproduce the same save to summarize the same together with the Appellant's defence.

5. The Prosecution called four (4) prosecution witnesses none of whom saw or placed the Appellant at the scene of robbery. The only

evidence leading to the arrest and charging of the appellant was the recovery of the complainant's phones make Archias serial No. 35962 3058188880 after PW4 No. 236095 Ip. Abdirahim Mohamed submitted the phone number to Safaricom and upon receipt of report showing the mobile number using the phone as 0712***** registered in the name of the 1st Accused ID/No.[particulars withheld]. This led to the arrest of the 1st Accused who told Police she had been given the phone by the 2nd Accused, her husband.

6. The Appellant gave unsworn statement denying the offence stating that on 29th December, 2015 at 11.30 p.m. he was sleeping at his home. That on 31.12.2016 he went to a shopkeeper's shop, who needed some money and offering security pending repayment of the amount that would be advanced. That the shop keeper gave the Appellant the phone as a security for KShs.8,000/= part of which was given by the 1st Accused and balance by himself. The KShs.8000/= was payable in two days. That the Appellant went and gave the phone to his wife who decided to use the phone, however the shopkeeper did not honour his part of the agreement. That upon the 1st Accused being arrested, the Appellant went to inform the shopkeeper and then the Police. He went with the Police looking for the shopkeeper but they did not find him. The Appellant was subsequently arrested, gave his explanation to the Police and gave the name of the shopkeeper as one Erick Omondi, he was however charged with this offence and on release on bond, and he started looking for Erick Omondi, who was eventually arrested but was not charged. The Appellant went to Kisumu Police Station informed D.C.I.O. about the matter and after two months Erick Omondi was killed by Police Officers. The Appellant stated that when Erick Omondi gave him the phone he had not known it was a stolen property.

7. At the hearing of the Appeal Mr. Olel, Learned Advocate, appeared for the Appellant whereas Mr. Onada, Learned Prosecution Counsel, appeared for the State. Mr. Olel, Learned Advocate, combined all the grounds of the appeal and urged that the trial Court's judgment was solely based on the doctrine of recent possession, urging that the trial Court misapprehended the applicable principles, and erred in failing to note the Appellant gave plausible explanation on how he came to get the phone which he gave the 1st Accused, his wife, as a security having been given to him by shopkeeper one Erick Omondi who had offered it as a security for money given to him by the Appellant.

8. Mr. Onada, Learned Prosecution Counsel, appearing for the State concedes the appeal on the grounds that the explanation given by the Appellant was plausible and that the complaint testified that he did not see the Appellant at the scene of robbery.

9. In **Douglas Gitonga v. Republic CR.A No. 43 of 2016 (Nyeri) (2017) eKLR** the Court of Appeal addressed itself thus:-

“As for the doctrine of recent possession, the principles have been spelt out in numerous decisions of this Court. The Court must be satisfied that the prosecution has proved that:-

- (a) The property was found with the suspect;***
- (b) The property was positively identified by the complainant;***
- (c) The property was stolen from the complainant;***
- (d) The property was recently stolen from the complainant.***

See Erick Otieno Arum vs Republic [2006] eKLR, Stephen Njenga Mukiria & Another vs Republic, Criminal Appeal No. 175 of 2003 and Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic, Cr. Appl. No. 272 of 2005(UR).

10. In **David Mugo Kimunge v. Republic CR. A No. 4 of 2014 (Nyeri) (2015) eKLR** the Court of Appeal dealing with an issue of recent possession after having set out the ingredients stated as follows:-

“Upon proof of the unexplained possession of recently stolen property, the trier of fact may – but not must – draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.”

11. There is no doubt in this case the mobile phone in issue was identified in Court by PW1 as his. There is similarly no doubt that it was stolen from him and the stealing was recent. The only quarrel the Appellant has is the finding by the Trial Court that he was found in possession of the mobile phone and that his explanation was not sufficient.

12. PW4 in his evidence testified the mobile phone was found with the 1st Accused upon her being arrested and who stated the mobile phone was given to her by her husband, the Appellant. The 1st accused admitted having been found in possession of the phone and gave explanation that the phone had been given by a man to the Appellant as security for KShs.8000/= advanced to him. That she used the phone for a week as they awaited for the repayment of the sum advanced, before she was arrested and charged. The Appellant gave the same explanation to the Court and even gave the name of the shopkeeper, who had given him the phone as a security for KShs.8,000/= advanced to him. That the 1st Accused used the phone for a week as they awaited for the repayment of the sum advanced before he was arrested and charged. The Appellant stated the sum advanced to the shopkeeper was refundable within 2 days. He stated he assisted in having shopkeeper arrested.

13. The trial Court in its Judgment correctly found and held that the phone was found in possession of the 1st Accused, who had been given the same by the Appellant. The trial Court having correctly found that the 1st Accused had been given the phone by the Appellant and was in

possession proceeded to acquit the 1st Accused because she had been given the phone by the appellant; however the trial Court failed to sufficiently consider the explanation given by the Appellant as to how he came into possession of the phone. The Court found the phone was stolen and the stealing was recent. The Court in rejecting the Appellant's explanation noted the explanation contradicted the 1st Accused explanation in respect of the money which the Appellant gave the person, who gave the Appellant the phone and also considered the value of the phone as per charge sheet of KShs.45,000/= and sum given of KShs.8,000/= and urged the Appellant should have demanded documents of ownership from the shopkeeper.

14. The Court further in rejecting the Appellant's explanation, based its finding on the brand name, ARCHA ECOS terming it as unique phone and not common in Kenyan Market, urging, if it is true, as alleged by the Appellant that he was given the phone by the shopkeeper, that was enough or sufficient to raise suspicion in his mind.

15. In the instant case, the Prosecution did not prove that at the time of recovery of the phone, the same was in possession of the Appellant, however they proved the 1st Accused had received the phone barely 1 day from the date of the robbery from the Appellant. The Appellant gave explanation on how he came to be in possession of the phone before he gave it to the 1st Accused. The trial Court believed the same explanation given by the 1st Accused but not the one given by the Appellant as the trial Court based its findings on extraneous matters such as the value of the phone, which was not proved by way of receipt, country of origin, not bearing in mind, nowadays goods are readily available in local markets from all over the world, and on brand name, not bearing in mind such brand names are readily available in many open markets, and the amounts given as friendly loan for giving of the phone as security. The explanation given by both the Accused persons at the lower Court was the same. The explanation is plausible as the phone was not being sold but given as a security and as guarantee that the money would be repaid. It did not mean in default of repayment the Appellant would keep or own the phone. Where a plausible explanation is given, the doctrine of recent possession do not apply. I find in cases based on recent possession, once an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, this doctrine will not apply. 16.

16. Applying the above and considering the explanation given by the Appellant I find the explanation given by the Appellant reasonable and plausible. I find the doctrine of recent possession not applicable in this case and note the prosecution did not prove the charge of robbery against the Appellant beyond any reasonable doubt as required.

17. The State Counsel concedes this appeal and having considered the grounds for so doing and the grounds urged in appeal, I find the State correctly concedes the appeal.

18. The upshot is that the appeal succeeds. The conviction is quashed and sentence aside. The Appellant is set at Liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 12TH DAY OF APRIL 2018.

J. A. MAKAU

JUDGE

Delivered in Open Court

In the Presence of:

Mr. Olel for Prosecution:

Mr. Onada for State

Appellant: Present

Court Assistants:

1. Laban Odhiambo

2. Brenda Ochieng

J.A. MAKAU

JUDGE