REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO 56 OF 2016

SIMON WATHUO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence of death for the

offence of robbery with violence contrary to section 296(2)

of the Penal code of Hon B.M EKHUBI SRM in Othaya

Criminal Case no. 434 of 2012)

JUDGMENT

The appellant herein was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code and in the alternative, the offence of handling stolen goods c/s 322(2) of the same code.

It was alleged that on the 25th Day of September 2012 at Mucharage village Nyeri County, while armed with an offensive weapon namely an iron bar he robbed DAVID MWANIKI GITHINJI of a mobile phone make Motorola flap valued at Ksh 2000 and cash Ksh 2000 all valued at Ksh 4000, and immediately before or immediately after the time of such robbery used personal violence to the said DAVID MWANIKI GITHINJI.

In the alternative it was alleged that on the same date, time and place, otherwise than in the course of stealing, he dishonestly undertook the retention of mobile phone make Motorola flap valued at Ksh 2000 having reason to believe it to be stolen goods or unlawfully obtained.

Plea was taken on the 9th October 2012 and the appellant pleaded not guilty.

Trial commenced on the 8th March 2016 as the appellant had at some time disappeared from the jurisdiction of the court leading to the imprisonment of his surety.

The complainant testified that on the material date at 9:00pm he was walking home to Mucharage village from Memorial shopping Centre along Mucharage, Othaya Highway. There was moonlight. About 100m from the shopping Centre, he saw someone whom he recognised as "Sammy' emerging from some bushes. The appellant invited that Sammy to join him so they would walk home together. However, for no apparent reason, Sammy drew a metal bar from underneath his left arm and began to attack him. He ducked the first throw and began to run with the Sammy pursuing him. After some time, he decided to stop. Sammy was right behind him and when he turned, he hit him with the metal bar on the forehead, right and left side of his face. Before he hit him he observed him for 10 minutes. After he was hit he fell down. He lost consciousness but he could feel his pockets being searched. He was down for about 45 minutes and when he came to, his phone, torch and money were missing.

He got up and went home. The following day he went to the appellant's home. The appellant was not at home but his father was. He reported to the incident to the appellant's father.

He then went to Memorial shopping Centre where he met the appellant and demanded an explanation for assaulting him. He said that the appellant dismissed him and that is when he decided to report to the police at Kariko Police Post. They took his blood stained jacket and shirt. He was referred to Kariko Health Centre and later to Gichiche.

On 1st October 2012, he was issued with a P3 which was duly filled at Gichiche Health Centre.

On the 2nd October 2012 while walking to Kariko police post he met one MICHAEL WANJOHI who told him that he had his mobile phone, which had been given to him by the appellant, who had wanted to sell it to him. He identified it as his as it bore the mark 'MD' at the back. They walked up to the police post where they recorded statements.

On the 8th October 2012 the appellant was arrested. The OCS Chinga Police station summoned him to the police station and he found the appellant's father who wanted him to settle the matter but the appellant refused to do so.

On cross examination he told the court that on the material day he was ta Muju/Memorial area just seated. He had seen the appellant in a red jacket. He recognised him when he emerged from the bushes because there was bright moonlight, and even called his name.

MICHAEL WANJOHI was PW2 who in the year 2012, was operating a bar at Memorial in Mucharage. He testified that on the 25th September 2012, the complainant was drinking in his bar.

On 26th September 2012, about 8:00am he heard a commotion outside his bar. He went outside and heard the appellant and the complainant quarrelling with the complainant demanding to know why he had assaulted him and stolen his property.

On 28th September 2015 appellant went to the bar and told him was selling a mobile phone make Motorola. On giving him the phone he immediately identified it as the one belonging to the complainant as it had the mark "MD' and he sued to charge it for him. To buy time he asked the appellant to return at 11:00am. He rang CPL Kitili and notified him.

On 2nd October 2012 he decided to go to the police station. On the way he met the complainant and they went together. He handed the mobile phone to CPL Kitili.

On cross examination he told the court that the appellant took the mobile phone to him of the 28th September 2012. He told him to return at 11:00am but the appellant never returned. That he took the handset to the police on 2nd October 2012. He also said that on the night of 25th September 2012, both the appellant and the complainant were drinking in his bar. That the appellant was the 1st to leave but the complainant left earlier.

PW3 was the appellant's father CLOUD MWINGA THUO. He confirmed that on 26th September 2012, the complainant showed up at his door with injuries on his face saying that it was the appellant who had assaulted him. He advised the accused to report to the police.

On cross examination he told the court that he only saw injuries on the complainant's face.

PW4 was no. 42761 CPL JOSEPH KITILI testified that he received the complainant's report on the 26th September 2012 at 9:47am that he was going home at night from a bar when he was attacked by a person who waylaid him on the way. He reported that he had been drinking with this person. He was hit, he fell down and the person whom he said was the accused stole his mobile phone and cash. He said that at the time of the report the complainant was bleeding from his head and his shirt was blood soaked. He advised him to go for treatment.

He visited the scene on 26th but did not recover the weapon.

On the 28th September 2012 he received another report from PW2 that the appellant wanted to sell him a mobile phone similar to the one belonging to the complainant. He told him that the appellant had left him with the phone to charge for him. He asked PW2 to take the phone to him on the 2nd October 2012. The complainant was able to identify his phone as he had inscribed the distinctive mark 'MD' at the back. He said the complainant told him that the phone was a gift from his sister.

On cross examination he told the court the complainant was bleeding from the head when he reported and his clothes were blood soaked. He said when he visited the scene, it was on the roadside. It was dark because it was not lit. There were no houses nearby. Though there were blood stains at the scene he did not record it in his statement.

He also said that the appellant had been drinking with the complainant prior to the attack and knew that the complainant had money. That PW2 told him he offered the appellant a drink for the money as he did not have money to buy the phone. The appellant then left him with it to charge. He did not fill a recovery form for the phone, it was irrelevant, that neither were any finger prints lifted from it. That the appellant attacked the complainant with a metal bar and he fell down unconscious.

PW5 PETER MAINA MUREITHI was the clinical officer in charge of Gichiche Health Centre at the material time. He produced the complainant's P3 which had been completed by his colleague Ms. JOSEPHINE MUITA, who had been transferred from the facility. He said that the complainant had deep cut on the forehead, mild bruises on side of face and left shoulder and wore a blood stained shirt. The C.O indicated that the probable type of weapon was a metal bar, the degree of injury was harm.

PW1 was recalled on 6th June 2016 to identify the blood stained shirt.

PW4 was recalled to produce the blood stained shirt. His explanation was that he had been transferred out of the station and there was confusion at the time he testified. He was not certain whether he was both the arresting and investigating officer in the case, neither could he recall the serial no. for the phone. He said that the appellant was well known as Sammy in the village.

The prosecution closed its case and the appellant was placed on his defence.

He told the court on oath that he was previously as Administration officer but was at the material time engaged in sheep and cattle trade as a broker.

That on the 6th October 2012 he went to drink in Munju Bar and was later joined by two AP officers who informed him that they had been sent by the OCS Chinga police station to escort him to the station. He finished his drink and went with them. He was locked up till the following day when the OCS asked him whether he knew one Sammy Wathuo. He said no. He was Simon. On the 8th he was arraigned in court on allegations of having committed a robbery on the 25th September 2012.On that day he said he was with his friend one Elias Faranya and they even spent the night in his home in Kirinyaga Kutus. The following day he left for Nyeri at 8:00am. That evening he also went to Munju Bar. He denied he was not Sammy Wathuo and produced his national ID to demonstrate that.

In cross examination he testified that he frequented Munju Bar. That he had recorded a statement with the police that on 25th September 2012 he was in the bar with David Mwaniki and the latter had sustained injuries after being hit with a beer bottle.

The appellant called on Elias Faranya a fellow remandee who confirmed that in 2012 he knew the appellant and that they were together on the 25th September 2012, including the night and the appellant left his home the following day in the morning.

In his judgment the trial magistrate determined that the case for the prosecution was proved on two grounds.

1. Identification- that the appellant was properly recognized by the complainant with whom they had been drinking the same night at Munju Bar.

2. Recent possession – that there was evidence presented that the appellant was found with the mobile phone handset belonging to the complainant bearing the distinctive mark 'MD' two days after the alleged robbery.

He relied on the of identification or recognition set down in the Turnbull guidelines as laid down in **Archibold Criminal Proceedings, Evidence and Practice 1998 Chapter 14, page 1163, the case of Cleophas Otieno Wamungu vs Republic Criminal Appeal no. 20 of 1989, Karani vs. R 1985 KLR 290, Peter Kimaru Maina vs. R C.A 11 of 2003 (Nyeri) and R vs. Eria Sebwato 1960 E.A 174.**

He was not persuaded by the complainant's testimony that there was sufficient moon light under which had observed the appellant for 10 minutes, was water tight evidence to support the fact of identification by recognition. In fact, he faulted this testimony as the complainant failed to elucidate clearly the intensity of light.

He was persuaded by the evidence of PW2 with regard to recent possession of the complainant's phone. Relying on the cases of **Eric Oherio Arum vs. R Criminal Appeal no 85 of 2005, Matu vs R 2004 (1) KLR, George Otieno Dida alias Stevo &Another vs. R** he formed the opinion that recent possession had been proved.

He proceeded to dismiss the appellant's alibi on the guidance **of Kiarie vs. R (1984) KLR 739, Wang'ombe vs. R (1976-1981) 1 KLR 1683, and Uganda vs. Sebyala &Others (1969) EA 204** having found that the alibi was brought at the tail end of the case, and the defence was untruthful, filled with tissues of lies, an afterthought, and could not stand up against the case for the prosecution. In any event there were no grudges between the two as the complainant had bought the appellant a beer just before the robbery.

He found the appellant guilty of the offence of robbery with violence and convicted him and accordingly sentencing him to death.

The appellant was dissatisfied with the judgment of the trial magistrate and through his lawyer S.K Njuguna he filed an amended petition of appeal, and written submissions setting down the grounds of Appeal viz;

1. THAT the learned trial magistrate erred in law when he failed to consider that the charge sheet was defective by its failure to particularize the identity of the mobile phone.

2.THAT the identity of the mobile phone as belonging to the complainant was not satisfactory proved beyond all reasonable doubt.

3. THAT the learned trial magistrate erred in failing to consider that on the evidence on record, the case of robbery with violence was not proved beyond all reasonable doubt.

4. THAT there were findings in the judgment of the lower court which were not supported by evidence and which findings were prejudicial to the appellant.

Mr. Njuguna highlighted his submissions and the State through Ms. Jebet responded to the same.

The role of the first appellate court is stated in many authorities, for instance in **Kiilu and another vs. R (2005) 1 KLR 174** where the court held;

"an Appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

The prosecution was expected to call evidence to prove the charge of robbery with violence c/s 296(2) of the Penal Code or in the alternative the charge of handling stolen goods c/s 322(2) of the same Code.

The offence of robbery with violence will be proved if there will be evidence that something was stolen from the complainant while armed with a dangerous or offensive weapon, or was in the company of another(s) of just before of just after the robbery assaulted him.

Was anything stolen from the complainant?

If so was it the appellant?

I have carefully considered the evidence on record, submissions by counsel and the state.

The complainant alleged he was robbed of a mobile phone. What evidence is there that he had a mobile phone on the material night or that the mobile phone produced in court belonged to him? It was submitted by the appellant's counsel the proper identification of the phone would have been by its serial no. and that it was necessary that the person alleged to have given the phone to the appellant testify to that fact. He pointed out that the charge sheet was silent on that. The state's view was that the phone was identified by the 'MD' mark inscribed by the complainant and identified by the PW2 who recognized the phone as that of the complainant.

What was so distinctive about the 'MD' mark? How would anyone know when it was inscribed on the phone when the same phone remained in the custody of the PW2 from 28th September to 2nd October? The integrity of this piece of evidence was compromised by the police officer not immediately collecting it from the witness.

Secondly the testimony of PW2 with regard to the recovery of the phone is incredible. That the appellant would want to sell him a phone whose owner he knew and for five days he never told the complainant, that the appellant had attempted to sell his stolen phone? The same complainant he had heard the accuse the appellant of stealing his property? It is also unbelievable that the complainant only came to know of recovery of his allegedly stolen phone on the 2nd October 2012.

It is also incredible that the appellant whom he claims was well known to him would take the phone to him for sale and then abandon it to him just like that, after telling him to charge it for him. If it is a phone he used to charge for the complainant the natural thing would have been for him to tell him first that his phone had been found even before he called the police officer. In fact, he gives no explanation as to why he called the officer first before informing the appellant.

The upshot of this is that there is insufficient evidence to show that the complainant was robbed of a mobile phone.

Was he attacked by the appellant on the night of 25th September 2012?

It is his testimony that the attacker emerged from the bushes. It was at night. The investigating officer visited the scene the following day and testified it was a dark place as there are no street lights, no home around there. If there was bright moon light on the 25th the Investigation Officer ought to have found the same on 26th.

The complainant called his attacker by the name 'Sammy'. There was testimony of PW2 and PW3 that he had been drinking with him the that night. However, he himself never said that in his testimony. In fact, the trial magistrate clearly misapprehended the evidence when he found as a fact that the complainant had bought the appellant alcohol the night of the attack. There was no such evidence. In fact, the closest the complainant placed himself near the appellant is when he said he had seen him from a distance while at 'Memorial'. he also said that as soon as the said 'Sammy' emerged from the bushes he attacked him with the metal bar and when he ran, he chased him for while while wielding the metal bar. That before the attack he had observed him for 10 minutes. Nowhere in his testimony does he say when he observed him, what he was doing for the 10 minutes, and where he did this observation. How could he observe when he was being chased from behind at night in the dark? How would he have observed when he says as soon as he stopped his attacker hit him on the forehead with the metal bar? What did he see during that observation? Again this evidence only goes to demonstrate how possible it was for the complainant to have mistaken the identity of his attacker, and how difficult it would have been for him to identify or recognize the attacker in those circumstances, and especially because the whole time there was no point when he came face to face with the attacker. The trial magistrate did recognize the fact that circumstances of the attack were not conducive to support a recognition. While he applied the correct principles on the evidence of identification/recognition, it is clear that had he properly analysed the evidence he would have arrived at a different conclusion

The complainant's conduct after the alleged robbery is questionable; he said he lay unconscious for 45 minutes then went home. The following day he went to look for the appellant, reported him to his father, and confronted him about the assault and only after he was dismissed by the appellant did he report to the police, and after appellant refused to settle out of court did he press charges. The appellant's father said he saw injuries on his face, PW2 did not notice anything serious, the police officer said he was bleeding profusely, strange as the complainant met the other two before going to the police station.

The prosecution relied on the doctrine of recent possession. As clearly indicated above the appellant was not found in possession of the mobile phone or anything belonging to the complainant. There was no evidence to connect the mobile phone that was produced in court with the appellant.:

Hence on the main charge the prosecution did not establish that the complainant was robbed of his mobile phone, or that the appellant was

the one who attacked him.

With regard to the alternative charge it is clear that the same was not proved. The appellant was not found in possession of the phone and there was no evidence to support the charge as framed under s. 322(1) **Handling stolen goods;**

> *A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly **receives** or **retains** the goods, or dishonestly **undertakes**, **or assists in**, their **retention**, **removal**, **disposal** or **realization** by or **for the benefit of another person**, or if he arranges to do so.*

It is the case for the prosecution that the appellant **undertook the retention of the stolen phone** knowing or having reason to believe it was stolen or unlawfully obtained. Except for alleging that the appellant attempted to sell the phone to PW2 there is no evidence that the appellant undertook the retention of the phone. If anything it is PW2 and Cpl Kitili who needed to explain why they retained the mobile phone for 5 days without informing the owner of its recovery yet he was known.

There is no evidence that the appellant did anything with the phone for the benefit of another or arranged for the retention of the same by PW2

I do agree with the trial court that the appellant's defence was a sham and he was right in rejecting it. However, it was the sole onus of the prosecution to prove the charge beyond a reasonable doubt as was well put in the case of **RAMANLAL TRAMBAKLAL BHATT -VS- REPUBLIC (1957) E.A. 332** as follows: -

> *"**(i)The onus is on the prosecution to prove its case beyond reasonable doubt** and a prima facie case is not made out if at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.*

It was never for the defence to fill in any gaps.

The complainant had injuries on the morning of 26th September 2012. That is evidenced by the testimony of even the father of appellant. However, the evidence on record does

In the upshot I do find that the prosecution, at the initial stage did not even found a prima facie case, and ultimately fell short of the standard of proof required in criminal cases. The conviction is unsafe. Appeal allowed. Conviction quashed. Sentence set aside.

Appellant is at liberty unless otherwise legally held.

Dated, delivered and signed at Nyeri this 30th Day of May 2018.

Mumbua T. Matheka

Judge

Mr. Magoma for state

Mr. S.K Njuguna for appellant

Appellant present