



**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 166 OF 2017**

**CORAM: D. S. MAJANJA J.**

**BETWEEN**

**MTSONGA NYUNDO MWADZOMBO ALIAS SOLDIER.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the original conviction and sentence of Hon.R. K. Ondieki, PM dated 6<sup>th</sup> October 2015 at Principal Magistrates Court at Kaloleni in Criminal Case No.133 of 2013)**

**JUDGMENT**

1. The appellant, **MTSONGA NYUNDO MWADZOMBO KAZUNGU alias SOLDIER** was charged and convicted of the offence of kidnapping in order to subject to grievous harm contrary to **section 260** of the *Penal Code (Chapter 63 of the laws of Kenya)*. The particulars were that on 19<sup>th</sup> April 2013 at Kaloleni Market, Kaloleni Location in Kaloleni District within Kilifi County with others not before court, the appellant kidnapped Bernard Kithome in order that the said Bernard Kithome may be subjected or disposed off as to be put in danger of being subjected to grievous harm knowing it to be likely that the said Bernard Kithome will be so subjected or disposed of.
2. The appellant also faced an additional count of handling stolen property contrary to **section 322(1)** of the *Penal Code* in that on 14<sup>th</sup> June 2013 at Chilulu Village, Jibana Location in Kaloleni District within Kilifi County, otherwise than in the course of stealing, arranged retention, removal, disposal of one mobile phone make Nokia 1280 Serial No. IMEI 355\*\*\*\*\* for his own benefit having reason to believe it was stolen.
3. The evidence before the trial court was that Bernard Kithome (“Kithome”) was last seen by his wife, Purity Mukeu Willy (PW 4) on 19<sup>th</sup> April 2013. He had left with his motor bike. When her husband did not return home, she informed Andrew Wambura Muli (PW 3) that her husband had been missing and they went to make a report to the police. After the report was made to the police, investigations commenced by tracing his mobile phone. The mobile phone was traced to Elvina Salama (PW 1) who told the court that the phone had been purchased for her by her husband Sudi Ali Mwaluva (PW 2). When PW 2 was arrested he led the police to the appellant. He testified that the appellant sold him the phone on 20<sup>th</sup> April 2013.
4. When the police officers, including PC Dickson Misati (PW 5) went to search the appellant’s house they found a side mirror with YYW written on it, which PW.4 identified as belonging to Kithome. She also identified the Nokia mobile phone as belonging to her husband as it had distinctive stripes across the screen.
5. In his unsworn statement, the appellant confirmed that PW 2 in the company of police officers went to his home on 14<sup>th</sup> June 2013 and after searching his house, they found a side mirror from a motorbike. He was arrested and was shown a mobile phone which he had sold to PW 2. He stated that he found the phone at a funeral at Kambe and took it.
6. The prosecution case was founded on the doctrine of recent possession. In the case of *Malingi v Republic [1989] KLR 225*, the Court of Appeal had this to say about the doctrine of recent possession:

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 has in his possession has been stolen; it has been stolen a short period prior to their 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 the 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 items. The doctrine being a rebuttable presumption of facts 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 or was a guilty receiver.

7. Having reviewed the evidence, I accept that the trial magistrate properly applied the doctrine of recent possession in that Kithome's property, that is the motorbike side mirror and the Nokia mobile phone, were found in the appellant's possession and the explanation given was wanting. While it is plausible that the appellant found the phone at a funeral, the fact that the motorbike side mirror belonging to the Kithome was found in his house displaces his otherwise innocent explanation in respect of possession of the phone.

8. But could this evidence support a case of kidnapping or abduction. At the time of the hearing, neither Kithome nor his body had been found. His motorbike had not been recovered. There was no evidence that he had been abducted or assaulted. What the appellant was found with was Kithome's property which had been stolen. The offence defined under **section 260** of the **Penal Code** requires intent or knowledge. Taking into account the time Kithome disappeared to the time the items were recovered together with the fact that there is no evidence that the appellant knew Kithome or was seen with him at any time, I find that the prosecution did not prove the offence.

9. It is clear that the mobile phone and side mirror belonged to Kithome. The appellant did not assert any ownership. In my view he ought to have been convicted of the second charge of handling stolen property contrary to **section 322 (1)** of the **Penal Code** as there was sufficient evidence to sustain it.

10. I therefore quash the conviction and sentence on the first count and in lieu thereof substitute a conviction for the offence of handling stolen property as set out in the second charge. I accordingly sentence the **seven (7) years** imprisonment to run from the date of conviction by the subordinate court.

**DATED and DELIVERED at MOMBASA on the 28<sup>th</sup> day of August 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Ogega, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.