REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.62 OF 2017

FROM ORIGINAL CRIMINAL CASE NO.824 OF 2016 AT OGEMBO

BENJAMIN ONTWEKA MAKORI………………………………….APPELLANT

-VERSUS-

REPUBLIC OF KENYA……………………………………………RESPONDENT

(Appeal from the original conviction and sentence of Hon N. W. Wairimu Principal Magistrate's Court at Ogembo in Robbery with Violence Case No. 824 of 2016).

JUDGMENT

1. The appellant, BENJAMIN ONTWEKA MAKORI, was charged and convicted of the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on the 15th day of April 2016 at Tabaka Mission Hospital compound in Bombure sub location within Tabaka Division in Kisii County being armed with an offensive weapon namely a knife robbed VIOLA STEFANIZZ of 1 (one) IPAD make INTEL and Kshs.3000/- all valued at Kshs.11, 000/- and immediately at the time of the said robbery wounded the said VIOLA STEFANIZZ.

2. The appellant was convicted and sentenced to death. He now appeals against the conviction and sentence. In his petition he contends that his conviction was based on dock identification given that alleged crime was allegedly committed at night. That the conviction was also based on an exhibit which was not found in his possession and that his defense was not considered. He also contends that he was sentenced to suffer death contrary to the Constitution.

3. As this is a first appeal, I am required to review the evidence before the trial court to come to a conclusion on whether or not I should uphold the conviction and sentence, keeping in mind that I did not hear or see the witnesses testify**(Okeno vs. Republic [1972] E.A 32.**

4. Pw1 Viola Stefannzi the complainant testified that; on the 15.4.2016 she was at Tabaka Mission Hospital at 10pm. She left the priest's house to go to her room. On the way she used her phone to find her way. She entered her room and switched the lights and put her bag on the table and turned round to close her door. Then she saw a boy in front of her holding a knife. She put her phone in her trouser at the back. The boy asked her to give him money. She gave him 3000/- from her bag and the phone that was table. The phone was a Mediacom grey and white. The phone serial number was MP17839X1511003520. She had bought it for 8000/- euros. The boy asked her to remove her trouser, she did so and shielded herself and screamed for help he cut her on both hands with the knife. The boy ran off with the money and phone. She ran back to the priest's house she was taken to hospital and stitched six times on the right hand.She reported the incident to the police the next day and she was given a P3 form. She saw the appellant at the police station in May when he was arrested. During cross examination she testified that she saw the appellant at the police station and probably in her room. That she told the police that she was almost 90% sure that he was the boy who was in her room. That the person who attacked her had short hair and beard around his mouth. That she only saw him at the police station that there was no identification parade. That the description she gave fits the boy she saw in her room and that the boy was about the appellant's height, that she remembers the face. That she was told by the police that he had her phone and that is how they arrested him.

5. Pw2 a medical doctor from Tabaka Mission hospital testified that on the 15.4.2016 he attended to the complainant at 10.15pm. She had sustained injuries on both hands. The cuts were deep and were bleeding. He stitched the wounds and gave her medication. He filled her P3 form on the 16.4. 2016. He assessed the injuries as grievous harm.

6. Pw3 was No.78257 a scenes of crime officer. He testified that on the 21.6.2016 at 1.20pm while at CID Gucha office he was asked by P C Olouch to take a photo of a phone makeIntel which was to be used as an exhibit in court. He took 3 photos of the said phone he produced the said photos as exhibits in court.

7. Pw4 Chief Inspector Kenneth Kirwa recalled that on the 16.4.2016 he received a complaint of robbery from the complainant. The complainant told him that she was robbed soon after entering her house by someone who had threatened her with a knife. The person asked

for her phone and she gave him her IPad and Kenya shilling worth 30 euros. He asked her to take her IMEI NO. She also told him that the assailant was a young dark man about her height with a beard and short hair and was wearing a t-shirt. She gave him the IMEI NO and they did their investigations. He traced the phone through a cell number 0717234xx. This number made frequent calls to cell number 07273640xx both numbers were around Machoge hills. He took time to locate the number at night to be sure of the residence of the person who owned the phone. On the 4.5.2016 they called no.07273640xx and met the owner of the number. They retrieved the photo of the person who using the stolen phone checking on whatsapp and when they showed him the phone the person told him the person was a lorry loader at Ikoba. At 5pm the lorry came and the appellant was on it. The bodaboda person confirmed the appellant was the one. They took the appellant to his house searched the house but they did not find the phone. They asked him for the phone he was using from the 15.4.2016 and he said he sold it to a fellow bodaboda operator they traced it and found it was a normal phone not an iPad. They took both suspects to the police station and the following day the appellant's mother went to visit him at the police station and he sent her to bring the phone which she did. He interviewed the appellant who informed him that he had sold the iPad to one Ombasa whom they tried to trace but they could not. He took the phone and looked at the phone record and found that the phone was stolen on 15.4.2016 at 10pm. The appellant's sim card was inserted in the phone on 16.4.2016 at 17.22hours. He was not satisfied with the explanation given by the appellant so he charged him with the offence of robbery with violence.

8. The appellant gave a sworn statement in his defense. He testified that he comes from Ikoba and is employed as a loader. On the 4.5.2016 he woke up as usual and worked up to 5.30pm and went to Ikoba. He was arrested and on asking why he being arrested he was told he would know later. He was taken to Ikoba police station and later to Nyamarambe police post he was not informed why he had been arrested. The next day he was taken to crime office where he was told that he had been arrested with a stolen phone. The officer told him that he had received information that he had the stolen phone. At 9am he was taken back to the cells and at 2pm he was taken to the crime office again and asked if he knew anything about the phone. As they were talking the officer called someone and someone brought the phone. He asked if he knows the phone and he told him he did not. Thereafter he was brought to court and charged. He informed the court that he was HIV positive and needed to go live with his people and that maybe the people from his home who said he had the phone but he did not have it.

9. Mr.Nyantika for the appellant submitted that the prosecution case was not was proved beyond reasonable doubt as required by law, on 2 limps one that the appellant was not positively or properly identified as the one who committed the offence. 2ndly that the circumstances evidence relied on by the trial magistrate pertaining to the mobile found allegedly found in his possession was improper and all insufficient to mount a conviction of the appellant.That PW1 told court she was not 100% sure that it was the appellant who was found in her room on the material. She was 90% sure but not 100% this creates room for doubt. That the trial court did not address this that she was 90% sure and not 100% sure. 2ndly that PW1 testified that she saw the appellant on the material day of the alleged offence on the 15/4/2016 for the first time and for a minute. That one minute is not sufficient time to identify a person to identify him as a culprit unless a parade was done. That under the circumstances an identification parade should have been conducted as she had not seen him before. It was submitted further that the offence is alleged to have been committed at night visual identification at night is difficult even under light given that it was for about one minute. Further that PW1 told court she was going to her room where there was no light. She used a mobile phone to trace her room. If there was no light in the premises why were there lights only in the room. Why was she using her mobile? It was also submitted that there was contradiction on the identification of the physical features relied on by the court to identify the appellant as the one who committed. That Pw1 testified that the one who attacked her had a short hair a beard around his mouth. Yet PW4 the investigating officer testified that the assailant had the same height as the complainant was dark and aged between 21 and 25 years features which Pw1 did not mention. That even if these were the appellant's features the same are not foolproof as many persons can fit the same features and not necessary the appellant. It was submitted that PW1 said her attacker came in through the door and that she saw him as he tried to close the door yet during cross – examination she stated that's she didn't know who locked the appellant inher room, that it is not clear if he was in the room or she saw him enter the room. On issue of the mobile phone it was submitted that the trial court relied hearsay evidence. That mobile phone allegedly stolen from Pw1 was not found in possession of the appellant. It was brought to the station by a woman who was not called to state how she got the phone. That the reason given by the investigating officer that she couldn't testify is not convincing. That there was no evidence that the sim card replaced in the phone allegedly stolen by the appellant was done by the appellant hence there was no water tight evidence connecting him to the said phone. The court's finding on the doctrine of recent possession was erroneous for the reason that the phone was not recovered in his possession. That given the severity of the sentence the case should have been proved beyond reasonable doubt. The appellant should have been acquitted.

10. Mr**. Otieno** conceded to the appeal stating that the conviction was not safe. It was submitted that the victim conceded that she was not absolutely sure it was the appellant who robbed her and the identification of the appellant was done at the police station. There was no identification parade. That Pw1 only identified the appellant after being informed he had the phone. The doctrine of recent possession was wrongly applied as there no connection between the recovery of the phone and the appellant. That the phone was not recovered in his possession. He has no connection with the sim card nor the call records.

11. Having reviewed the evidence, the submission and bearing in mind that the prosecution has to prove it case beyond reasonable doubt I find as follows; The complainant in her evidence testified that the incident happened in a minute and that she saw the person who attacked her, that she was almost 90% sure. This is an incident that happened in a minute at night. Under the circumstances could she have identified her assailant? The complainant was called when the accused was already at the police station. It's noteworthy that upon arresting the appellant no identification was held. This was improper on the part of the police. It was necessary to hold an identification parade for the complainant to identify her assailant. Failure to do so creates a loop hole in the prosecution case.

12. The trial magistrate found that the doctrine of recent possession was proved. As per the evidence the appellant was not found in possession of the phone. In Criminal Appeal No. 4 Of 2014 David Mugo Kimunge And Republic the Court of Appeal set out what needs to be considered when a court is basing their conviction on the doctrine of recent possession as follows;

> ***"It is trite that before a court of law 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:***
>
> > ***i) that the property was found with the suspect;***

ii) that the property is positively the property of the complainant;

iii) that the property was stolen from the complainant;

iv) that the property was recently stolen from the complainant.

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."

The exhibit produced in court was identified by the complainant as her stolen phone. However the person who was arrested with the phone was not called to testify nor the person who brought the phone to the police station. They were important witnesses to link the appellant to the phone. The appellant was traced though phone calls according to the investigating officer yet the phone records that is said to have led the police to the appellant were not produced to clearly link him to the stolen phone. Pw4 the officer handling this matter should have adduced this evidence in court to prove the connection the appellant had with the phone and to establish the doctrine of recent possession. The appellant was not found in possession of the phone. The appellant was charged with Robbery with Violence which carries a death sentence. The prosecution should have adduced evidence to prove beyond reasonable doubt that it is the appellant who robbed the complainant. In my view the conviction on the evidence adduced is unsafe. The prosecution case was not proved beyond reasonable doubt. I therefore set aside the conviction and sentence. The appellant is at liberty to go unless lawfully held.

Dated signed and delivered this 18th day of October 2018

R.E OUGO

JUDGE

In the presence of;

Mr. Nyantika **For the Appellant**

Appellant **Present**

Mr. Otieno **For the State**

Court Clerk **M/s Rael**