



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 98 OF 2015

SALVA LUVUSI KIFUNWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case 4385 of 2013 delivered by Hon. B.M. Ochoi, Spm on 9th June, 2015).

JUDGMENT

Background

1. Salva Luvusi Kifunwa, hereafter the Appellant, was charged of committing the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the offence were that on 8th November, 2013 at Hills View Estate Ngong Township within Kajicho County, jointly with others not before court, while armed with an offensive weapon namely AK47 rifle robbed Kemusa Zuhura of his motor vehicle Reg. No. KAU 586E make Toyota Calmly, one mobile phone make LG, purse, chain and cash Kshs. 550/- all valued at Kshs. 874,550/- and immediately before the time of the robbery threatened to use actual violence to the said Kemusa Zuhura.

2. The Appellant was arraigned in court and at the conclusion of the trial found guilty of the offence. He was sentenced to suffer death. He was dissatisfied with the conviction and sentence against which he preferred the present appeal. His grounds of appeal filed on 29th October, 2018 are that the charge sheet was defective for being duplex, that the prosecution evidence was unreliable and inconsistent, that crucial witnesses were not called, that the case was not proved beyond a reasonable doubt and that sentence was improper.

Evidence.

3. **PW1**, Kemusa Zuhura, recalled that on 8th November, 2013 at around 1.00 to 1:30 a.m. she was alongside her sister driving home when they noticed a man outside the gate to their house. The man approached the vehicle and she realized he wielded a firearm. The man was wearing a mask and asked her to move to the back seat as was her sister was ordered by another man who appeared on the passenger's side. The robbers stole her ring, chain, mobile phone, Kshs. 3,000/- in cash and also took her motor vehicle registration number KAU 586E. She was later informed by officers that a chain had been recovered with two pendants. She went and identified one of the pendants from her chain as did her sister. She could not identify the Appellant.

4. Her sister **PW2**, Zainabu Athman Raja, corroborated her evidence and testified that she later identified the stolen chain. She recalled that the chain had been cut and repaired with a metal bar. She also identified a pendant of the map of Africa that was on the chain. In cross examination, she stated that the chain was not unique to any other but simply identified it through the place it was repaired.

5. **PW3**, James Gitau Wanjiku was on 18th November, while on duty in Ngong when he was arrested by police who questioned him about a chain he was wearing. He informed them that the chain belonged to a friend, one Timpango, and he had gotten it from him on 15th November, 2013 at the Brenk Posh club. He led the officers to the Club where Timpango was arrested. Nelson Timpango Teeli testified as **PW4**. His evidence was that he bought the chain from the Appellant on 8th November, 2013 for Ksh. 1500/-. He confirmed that PW3 got the chain from him on 15th November, 2013. **PW5**, the investigating officer visited the scene on 8th November, 2013 and later on 18th November, 2013. He testified that the Appellant was taken to the police station by flying squad officers after being identified by the complainants. He thereafter charged him. He produced the chain in evidence. In cross examination he denied owning a wines and spirits shop near the Appellant's shop. He also stated that the complainant and her sister identified the Appellant at the scene.

6. In his sworn defence, the Appellant testified that on 18th November he was at his shop when he was informed that he was wanted at the

police station. He went to the police station where he was handed over to the investigating officer who showed him a silver chain and asked him where he had gotten it from. He did not explain where the chain had come from. He was stabbed with a pin and on the following day charged with the present offence. In cross examination, he disowned a statement he allegedly recorded indicating that he had found the chain on the road side and sold it.

Determination.

7. The Appellant relied on written submissions filed 29th October, 2018. Ms. Sigei acted for the Respondent made oral submissions. I have demarcated the issues for determination as follows;

- i. Whether the Appellant's right to a fair trial was violated
- ii. Whether the offence was proved beyond a reasonable doubt

(i) Whether the Appellant's right to a fair trial was violated

8. The Appellant submitted that his right to a fair trial was violated by the prosecution's failure to supply him with witness statements as required by Article 50(2)(j) of the Constitution. Further, that the trial magistrate made an order for the trial to proceed notwithstanding his protestations. The first time the issue of statements came up was on 9th June, 2014 when the Appellant informed the court that he was not ready to proceed as he had not been supplied with witness statements. The court made an order for him to be supplied in court with the witness statements and for the matter to proceed at 12.00 p.m., giving the Appellant three hours to prepare.

9. The second time was on 4th February, 2015. On this day the prosecution indicated that it was not ready to proceed as the investigating officer was not in court. In reply, the Appellant sought to have the case begin afresh as he was not supplied with the statement of one of the witnesses on 19th January, 2013. The prosecutor then informed the court that the investigating officer had just walked in court and they were ready to proceed. The court then ordered that the Appellant had not given the court a reason for the matter to proceed afresh. He ordered that the case proceeds and indicated that the record was clear that the Appellant had been supplied with statements and was previously ready to proceed and had never previously raised any issues about the statements.

10. Article 50(2)(j) states:

“(2) Every accused person has the right to a fair trial, which includes the right—

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”

11. In the present case, when the matter initially came for hearing the trial court gave the Appellant three hours to familiarize himself with the statements of the witnesses before proceeding to hear the witness who was in court. While the Appellant should have been given more time to prepare, I do not think it prejudiced him as the matter was not adjourned at the instance of the complainant. The second instance, it is clear that the Appellant did not raise his lack of statements before the investigating officer came in to testify. The application was made too late in the day, yet the order for the supply of the statements was made on 9th June, 2014. On subsequent dates, the trial proceeded unhindered until the investigating officer was in court. The Appellant must have realized that the trial was at sunset days and he must have made the application to derail the hearing. In the circumstances, I find his assertion without merit and I dismiss it in its entirety.

(ii) Whether the offence was proved beyond a reasonable doubt

12. The basis on which the Appellant was convicted was because he sold the stolen chain to PW4. The trial in its judgement held that the robbery occurred at 1.30 a.m. on 8th November, 2013. PW4 on the other hand went to the Appellant's shop at 11.00 am on the same day when they negotiated the sale. Effectively the Appellant was convicted based on the doctrine of recent possession. Suffice it to state, the person who was in actual possession of the chain was PW3.

13. PW3 testified that on 15th November, 2013 he was in a club with PW4 and PW4 got drunk and he (PW3) had to secure his wallet, mobile phone and chain. In cross examination, he stated that he returned the phone and the wallet to PW4 but requested to wear the chain for some days.

In the mind of this court, the doctrine of recent possession would apply conditional to satisfying the test set out in the case of **Malingi v Republic (1989) KLR, 225**, it 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 have 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 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 item. The doctrine being a presumption of fact is a rebuttable presumption. That is what 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.”

14. In the present case, there is no doubt that a robbery took place because both PW1 and 2 reported the incident to the police. Amongst the goods stolen was the chain but which belonged to PW2 who was accompanying PW1. I have no doubt that the chain having been linked to the robbery only hours after the incident meets the threshold of a recently stolen good.

15. The next test is whether the ownership of the chain was established. PW1 testified that herself and PW2 wore a chain at the time of the robbery and both chains were stolen. She went on to state that the recovered chain was that belonging to PW1 and it was recovered with two pendants. She claimed that one pendant was hers and the other for her sister. She stated that her pendant had the shape of a gun and her sister's the shape of the map of Africa. PW2 confirmed this description of the pendants. PW2 identified the chain and the pendant with the map of Africa in court. She was able to recall and identify a repair mark on the chain. PW1 equally identified the chain and the two pendants in court.

16. Just as PW2 testified the chain and the pendants were not unique to any other found in the market. And so, what would link the Appellant to the robbery was evidence that led to the arrest of PW3 who was found in possession of the chain. I say so because none of the witnesses including the investigating officer, PW5, alluded to what led to the arrest of PW3. This evidence was very crucial in shedding light that some information had been given that the stolen chain was with him. In my mind, this gap would only be filled by the arresting officer. Unfortunately, he never was called as a prosecution witness, thereby leaving a gaping hole that disconnected the Appellant to the offence. This is more buttressed by the fact that similar chains and pendants as those that were recovered would be found in the market.

17. In a nutshell, the threshold of the application of the doctrine of recent possession was not met. It could not found a basis for the conviction of the Appellant.

18. In the result, I find that the prosecution did not prove their case beyond a reasonable doubt to the test enunciated by Lord Denning in the case of **Miller v. Minister of Pensions[1947] 2 All ER 372, thus;**

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

19. In the upshot, I allow the appeal. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 29th day of NOVEMBER, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant present in person.

2. Mr. Momanyi for the Respondent