



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 99 OF 2016

MOSES WAFULA MULUNDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by Hon. E. A. Obina (SRM) in Kapsabet PMCR. No. 451 of 2014 on 18th August, 2016)

JUDGEMENT

1. The appellant was charged with two counts of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code and a third count of malicious damage to property contrary to section 339 (1) as read with section 339 (3) (b) of the Penal Code. The trial court acquitted the appellant of all the offences but under section 179 of the Criminal Procedure Code found him guilty of a minor offence of handling stolen property. He was then sentenced to serve seven (7) years imprisonment.
2. Aggrieved by the said conviction and sentence, the appellant lodged this appeal on grounds that can be summarized as; the trial court erred in convicting him for the offence of handling stolen property and that the same was not proved to the required standard.
3. This being a first appeal, this court has warned itself of its duties to reconsider and re-evaluate the evidence afresh so as to arrive at its own independent conclusion. Sachin Duilkumar Jakhariya (PW1) testified that he was on 20th January, 2014 at around 8.15 am preparing to go to work when he was called by the house-help to come out of the house. He found three middle aged men in the compound. The three told him that they were Kenya Power and Lighting officers and wanted to know the plot number. Suddenly one of the men pushed him inside the house and pulled out a pistol. One of the robbers went into the house to look for valuables and they demanded for money. They took his phone and KShs. 37,000/-. When Nicholas Kipruto who brings him milk came, he too was dragged into the house and his phone taken and thrown into water. The men came to the sitting room and one shot at the sofa to scare PW1. They then went back into the bedroom and came out with a bag. They removed Nicholas' phone and shot it. They then demanded for PW1's M-Pesa pin number and transferred KShs. 18,000/- from his phone. The men then locked them in and went away. PW1 used his mother's phone to inform his father of what had transpired and he advised them to report the incident to the police after 30 minutes. The police visited the scene and dusted and took an inventory. He stated that stolen things were KShs. 1,000,000/- in coins, KShs. 6,000/- from his wallet, his laptop worth KShs. 42,000/-, 500 USD, Indian currency Rupees which figure he could not tell and Panasonic camera. Later on 5th February, 2014 he received a call from Kakamega police station informing him that a phone which had his number and photographs had been recovered. He visited the police station and found that the phone was his. Other items that were recovered were Techno serial number 359005052473093 and Panasonic Camera serial number WHILC002207. He however stated that he was not shown the people from whom the items were recovered and that he had never seen the appellant before.
4. Nicholas Kipruto (PW2) recounted that while taking milk to PW1's residence on the material day found a motor cycle parked. He was grabbed by one person who had a long gun. That the house-help and the PW1's mother were seated on the sofa. He was pushed under a table and one of the men grabbed his Techno 736 phone and threw it in water. He heard a commotion in other rooms. The men asked whether there was alarm and PW1's mother answered in the negative. He then saw one person running out with a big bag. That the men demanded for pin number from PW1 which he gave them. He heard two gun shots and his phone was shot at and another bullet went through the sofa. The men left and locked the house from outside. He stated that the Techno serial number was 886673011079149.
5. Police Constable Aggrey Munyasia (PW3) stated that there was a robbery in Webuye on 29th January, 2014. That a man of Asian origin called Patel called informing the police that he was robbed of KShs. 200,000/- and two white phones whose serial numbers he gave. That they managed to track the phones to Eshisiru Centre. That the phone was used by a lady called Ann. She was arrested and interrogated. She led the police to his father who led them to Mr. Nandwa an advocate in Kakamega where a land agreement had been executed between Ann's father and the appellant. Ann's father stated that he had been given the phone by the appellant. The phone was found to have an ATM card at the back. Mr. Nandwa called the appellant who came in the morning of 4th February, 2016. He stated that the appellant led the police to his house in Shikhamba in Kakamega where the police found an AK 47 rifle and 30 rounds of ammunition 7.62mm 500m, a laptop and a black camera. An inventory of the items recovered was then made. The DCIO Kakamega then took over the matter. He stated that he did not know the owner of the items but that he was informed that there was another robbery in Kapsabet. On cross examination, PW3 stated that the appellant was found in possession of the phone in court.

6. Lawrence Ongoma Kuchio (PW4) who is a banker confirmed that the appellant opened an account with Co-operative Bank of Kenya account number 01109545524600 and that a debit card was issued to him for the said account. He stated that the account was active and there was a deposit of KShs. 240,000/- on 21st January, 2014.

7. Inspector Samwel Kimutai (PW5) was on 4th February, 2014 at 8.30 am called by Inspector Kyambi Ag. DCIO informing him that some suspects had been arrested at Shikamba area with fire arms. He proceeded to Shikamba in company of Ngeno the driver and PC Kurgat. On arrival they found Sergeant Mukenye Chief Inspector Ndumbi, PC Munyasia and other officers. The appellant was one of the suspects and was arrested. He stated that among the items recovered were Lumix camera and Tecno mobile phone. That the Tecno mobile phone had the appellant's ATM card.

8. Corporal George Oswe (PW6) stated that he received a report on 20th January, 2014 from PW1 that three young men had entered his house in the morning on pretense of being Kenya Power and Lighting officers who wanted to know the plot number and robbed him of KShs. 32,000/-, Tecno phone P5, Nokia mobile phone, N101 Panasonic Lumix Camera, Dell laptop, coins worth KShs. 100,000/- and 500 USD. That one of PW1's workers was forced into the house and his phone taken and dumped into water. One robber retrieved the said phone and shot it and the other robber shot at the sofa. He stated that the OCS visited the scene and a manhunt was lodged. That the mobile phone that was shot was recovered from the scene and a bullet stack at the sofa was recovered. That on 6th February, 2014, received a call from DCIO Kakamega informing him that some items had been recovered in connection with PW1's robbery case. He went to Kakamega police together with PC Maina and retrieved the exhibits. The same were Tecno Lumix phone and ATM card from Co-operative Bank in the name of the appellant for account number 0119545524600. That PW1 identified the items and the Bank Manager Co-operative Bank gave him a document in regard to the account holder and bank statement. That there was a deposit of KShs. 240,000/- on 21st January, 2014 just a day after the robbery. He stated that the appellant signed the inventory but declined to have his thumbprint in the inventory. That he went to Kakamega police station where his finger prints were taken and sent to Nairobi together with the inventory and the report came back positive. The finger print report was produced as P. Exhibit 10.

9. The appellant was found with a case to answer and was put on his defence. He stated that he is a business person. That in the year 2013 he bought land from one Omar Maloba and needed a title deed. That Omar had not informed his children of the sale and they differed and the chief sorted out the issue. That they agreed to finish at Nandwa advocates' office. That they agreed on a date and was called to go on 4th. He went but did not find Omar but found his daughter and the police and was questioned. That he had slept at a lodging because of the land issue. He took them to the lodging where the police conducted a search but did not find anything. He was informed to accompany the police where he met the DCIO who informed him that they were investigating a case against him. That he was linked together with another person and were charged at Kakamega. He was later taken to Kapsabet and charged with the case at hand. He stated that the phone and camera did not appear on the charge sheet and that he does not know anything about them. On cross examination, the appellant stated that he sells cereals in Kakamega town.

10. I have given due consideration to the appeal herein and the submissions tendered. The issues that fall for this court's determination are as follows:

a) Whether or not the prosecution proved the case beyond reasonable doubt.

b) Whether or not the trial court erred in convicting the appellant for the offence of handling stolen property and sentencing him to seven years imprisonment.

11. The two grounds shall be discussed together. For a conviction for the offence of robbery with violence to stand, the prosecution has to prove beyond reasonable doubt that the offender was armed with any dangerous or offensive weapon or instrument, that the offender was in company with one or more other person or persons or that at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person. It is further noteworthy that proof of any of one of the ingredients suffices to base a conviction under section 296 (2) of the Penal Code. I have analyzed the evidence on record and I am unable to find that the appellant was placed at the scene of crime. However, there was cogent evidence of possession of PW1's phone which was found to have an ATM card which was confirmed to be his by PW4.

12. The particulars of the 1st count of robbery with violence is that David Bulemi Sabulo and the appellant on the 20th January, 2014 at Kapsabet Town in Nandi County jointly with another not before court being armed with dangerous weapons namely firearms robbed one Sachin Anilkumar Jakhariya of his mobile phone make Techno P.5-IMEI No. 35900505243085/ 359005052473093 white in colour valued at KShs. 10,500/-, Nokia N101 grey in colour valued at KShs. 2,300/-, one digital camera make Panasonic Lumix model S.3 black in colour serial number WH1LC002207 valued at KShs. 7,800/-, laptop make Dell bluish/purple in colour valued at KShs. 42,000/-, US Dollar 500, cash KShs. 161,000 all valued at KShs. 270,600/- and at or immediately before or immediately after the time of such robbery used actual violence against the said Sachin Anilkumar Jakhariya. As a matter of fact although the appellant contended that the subject mobile phone does not appear on the charge sheet, the same appears. The said Techno phone was traced to the appellant and his ATM card recovered at the back of the phone. The appellant failed to explain how the phone got to him. The principles of law upon which the doctrine of recent possession is based were well laid out in **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v R Criminal Appeal No. 82 of 2004** that:

“... It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, 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. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view, any discredited evidence on the same cannot suffice no matter from how many witnesses.”

13. Further in **Malinga v R [1989] KLR 225** Bosire, J (as he then was) expressed himself thus at page 227:

“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 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 the fact 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 it or was a guilty receiver.”

14. Pursuant to the foregoing and the circumstances of the case coupled by the unexplained possession of the subject mobile phone, I find that the prosecution proved its case against the Appellant beyond any reasonable doubt for the alternative charge of handling stolen goods contrary to Section 322 (2) of the Penal Code. Even though the Appellant had not been charged with this alternative charge the trial court properly convicted him under the provisions of Section 179 of the Criminal Procedure Code since the offence proved was minor having been established from the evidence adduced before the trial court. The trial court was allowed by the above provision to convict the Appellant for the lesser charge of handling stolen goods as the same had been proved by the evidence.

15. As regards sentence, it is noted that the Appellant was sentenced to seven (7) years imprisonment. The maximum sentence provided under Section 322 (2) of the Penal Code is 14 years. The trial court did consider the Appellant's mitigation and arrived at seven (7) years imprisonment. I find the said sentence to be reasonable in the circumstances and I see no reason to interfere with the same.

16. In the result I find the Appellant's Appeal is devoid of merit. The same is dismissed. The conviction and sentence by the trial court is upheld.

Orders accordingly.

D. K. KEMEI

JUDGE

Delivered at Eldoret this 28th day of **November, 2018.**

HELLEN OMONDI

JUDGE