



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 159 OF 2008

MOSES MUNENE MWANGI..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal against conviction and sentence in Nyeri CMCRC. No. 2708 of 2007 delivered on 27/08/2008 by Hon. E.J.Osoro SRM)

JUDGMENT

FACTS

1. The appellant, **Moses Munene Mwangi**, was charged with two counts of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code** and an alternative charge of Handling Stolen Goods contrary to **Section 322(2)** of the **Penal Code**.
2. The particulars of Count 1 was that on the 4th day of August, 2007 at Marua Trading Centre in Nyeri County jointly with others not before the court, whilst armed with a dangerous weapon namely an AK-47 rifle, the appellant robbed Martin Macharia Wambugu of his mobile phone Nokia 6080 valued at Kshs.8,000/-, cash in the sum of Kshs.200/-, a wallet, National ID and an ATM card; that immediately before or immediately after such robbery, wounded Martin Macharia;
3. On **Count II**, on the same date and place the appellant whilst armed with an AK-47 rifle the appellant robbed Benard Kahindi of one mobile Nokia phone valued at Kshs.8000/-; that immediately before or immediately after the time of such robbery wounded Benard Kahindi.
4. In the alternative charge, the appellant was charged with handling stolen goods and the particulars of the offence were that on diverse dates between the 4th August and 9th August, 2007 at Githurai in Nairobi otherwise than in the course of stealing dishonestly undertook the disposal of Nokia 3100 knowing or having reasons to believe it to be stolen goods.
5. *The appellant was tried and convicted on both Counts of Robbery with Violence but was sentenced only on Count I, to the mandatory death sentence; the sentence on Count II was held in abeyance.*
6. Being aggrieved by the conviction and sentence, the appellant filed HCRA No. 159 Of 2008 which appeal was heard by a two judge bench comprising of judges from the High Court and an Environment and Land Court; both judges upheld the trial court's decision; the appellant proceeded to file an appeal to the Court of Appeal and based on the decision in the Malindi case of **Karisa Chengo & 2 others vs Republic Cr.A 44,45 &46 of 2014**, the decision of the two judge bench was declared a nullity and the

case was remitted back to the High Court for fresh hearing and determination on the basis that judges of the specialized courts had no jurisdiction to hear matters that were in the domain of the High Court of Kenya;

7. The Grounds of Appeal as set out in the Amended Petition of Appeal are summarized hereunder:-

- (i) The learned magistrate erred in law and in fact when invoking the doctrine of recent possession;
- (ii) The learned magistrate erred in law and in fact when he relied on evidence of an accomplice that incriminated the appellant;
- (iii) That the prosecution failed to prove the charge of robbery with violence;
- (iv) That the learned magistrate shifted the burden of proof to the appellant; and rejected the appellants defence without cogent reasons due consideration.

8. At the hearing of the Appeal the 1st appellant was represented by learned counsel Miss Mwai and Mrs. Gicheha was the Prosecuting Counsel for the State; both counsels made oral submissions and hereunder is a summary of their presentations;

APPELLANTS SUBMISSIONS

9. Counsel submitted that the appellant was charged with others for the offence of robbery with violence; he was convicted on the evidence of a co-accused and on the doctrine of recent possession; the others were acquitted ; Counsel would make and limit the submissions to three main grounds of appeal notably;

- (i) on the invocation of the doctrine of recent possession;
- (ii) the conviction that was based on the evidence of a co-accused;
- (iii) the rejection of the appellants defence and the shifting of the burden of proof;

10. Doctrine of Recent Possession; the appellant was not seen at the scene of robbery; nothing was recovered from the person of the appellant; when the Investigating Officer (**PW9**) arrested the 3rd accused he was told that the appellant had given him the stolen mobile phone in exchange for a bicycle; but in his defence the 3rd accused stated that the appellant gave him the phone in exchange for a shaving machine; there was no written agreement to show that the phone originated from the appellant; at the time of the arrest the 3rd accused had already disposed of the phone to the 2nd accused; the 2nd accused disposed of the phone to the 4th accused; all this happened within a span of six days.

11. The court believed the co-accused and concluded that the phone had been traced to the appellant and invoked the doctrine of recent possession; and found that he was one of the robbers and convicted him accordingly;

12. The allegation that the appellant gave the 3rd accused the phone was introduced late in the proceedings; the 3rd accused was arrested first; the appellant was arrested for different reasons; they met at Ruiru police station; the 3rd accused did not mention that he was left with the phone; **Question** - if the appellant had left the phone with the 3rd accused it was not difficult for the 3rd accused to have said who left the phone with him so as to assist in the arrest of the appellant for robbery;

13. The investigating officer introduced this issue and the 3rd accused picked it up in his defence and the court believed the 3rd accused; that robbery is a serious offence and he should have stated that he knew the appellant and how the phone was left with him; there was an likelihood that the 3rd accused fabricated the story so as to get away; the trial court was persuaded by the investigating officer and was also influenced by the 3rd accused's disability as he was acquitted; the court was influenced by extraneous

matters as to ability and disability; the 3rd accused was a Hawker and was mobile;

14. The doctrine of recent possession varies from item to item and even one day can be too long; in less than 6 days the phone had moved; was the court correct in applying invoking the doctrine of recent possession;

15. Courts have stated that possession is circumstantial therefore there must be other evidence; and courts have to be cautious in invoking this doctrine as possession is not the principal offence; reference was made to the authority of **Daniel Muthomi vs Republic - Nyeri CA CR. Appeal No. 166 of 2011**; when an individual is found with a stolen article can an irresistible presumption be drawn based just on recent possession; there is need to look for further evidence; it is advisable to seek corroborative evidence;

16. Identification was non-existent and possession was based on circumstantial evidence; was the appellant a handler or a receiver of the phone; Counsel prayed that this court be guided by the above decision of the Court of Appeal; that mere possession needs other corroborative evidence; the phone was in the possession of the 3rd accused; there was no cogent evidence as to how the phone came to the 3rd accused; there was only constructive possession; there was no evidence of robbery; the only evidence then is handling;

17. Counsel urged this court to find that the doctrine of recent possession was wrongly applied; and prayed the appeal be allowed.

18. Evidence of a co-accused: the 3rd accused said he had received the stolen phone from the appellant in exchange of a shaving machine; when the appellant didn't redeem it he proceeded to sell the phone to another co-accused; who sold it to a watch man; the phone was recovered in the hands of a 3rd person from the victim; the evidence of the 3rd accused was that the other accused persons used the phone; there was no evidence that the appellant used the phone at all; the phone had changed hands 5 times if the victim is included;

19. The 3rd accused was arrested first; he did not mention the appellant and that he had received the phone from him; he only mentions it in his defence and after **PW9** had brought it up; he said that he knew the brothers and the other family members of the appellant; he should have said he could have pointed out the appellant; no weight should be placed on this evidence; it raises doubts that should be resolved in favour of the appellant;

20. The law is that the evidence of a co-accused is admissible; the sole evidence is not sufficient to found a conviction; reference was made to the case of **Karanja & Anor vs Republic (1990) KLR**; the holding there was corroboration was required for accomplice evidence so that it is reasonably safe to act upon; no additional corroborative evidence was adduced; there was only the evidence of the 3rd accused; no reason was given why it was introduced late; there was need for corroborative evidence that connected the appellant to the crime; refer to the case of **Polycarp Ochieng Obala vs Stephen Otieno Onyango Kisumu CA CR. Appeal No.57 of 2011**.

21. The appellant was wrongly convicted on charges that were not proved; Counsel urged the court to allow the appeal quash the conviction and set the appellant free.

RESPONDENTS SUBMISSIONS

22. In response Prosecuting Counsel for the State submitted as follows;

23. Ground 1- that the doctrine of recent possession was applicable; from the date the victim was robbed to the date when the phone was recovered in the hands of the appellant was within 6 days which is deemed as very recent; the phone changed hands on the sixth date; four persons were tried for handling the stolen phone; the 4th accused testified that he informed officers that he got the phone from 2nd accused; the 2nd accused said that the 3rd accused sold the phone to him; the appellant was brought into

the picture by the evidence of the 3rd accused who said he knew the appellant very well and also knew his brothers;

24. That on the material date the appellant approached him for assistance; the appellant offered the Nokia 3100 as security and promised to pay Kshs.700/- within 3 days; after the lapse of 3 days the 3rd accused went in search of the appellant but didn't find him; he needed the money for his business so he sold the phone to the 2nd accused; when he was arrested by officers from Ruiru there was evidence that he informed the officers that it was the appellant who had sold the phone to him; before his arrest he did not have the opportunity to point out the appellant; that he found the appellant in custody and the appellant told him to keep quiet about the stolen phone; he later told the officers the identity of the appellant; the appellant was then connected to the robbery at Marua.

25. The contention that the 3rd accused framed the appellant was evaluated by the lower court and found to have no merit; the appellants contention was that he had been wrongly picked; but the 3rd accused stated that he knew the appellant very well and also knew the appellant's brothers Ronnie and Kanyi; the appellant never denied his brothers; nor did he deny that he had a shaving business; the appellant stated that he didn't know the appellant and this raised doubts in his evidence;

26. The chain of movement of the Nokia 3100 was proved; it was proved to have been stolen; it was proved to have belonged to the complainant; an explanation given how it was in the appellants possession; the appellant categorically denied handling the phone and also denied knowing the 3rd accused instead of offering an explanation;

27. The lower court correctly invoked the doctrine of recent possession.

28. Ground 2; the lower court found that the 3rd accused was not an accomplice; the trial court nevertheless cautioned itself on the dangers of relying on the evidence of the 3rd accused; the 3rd accused was cleared from being an accomplice; he also explained how he handled the phone and how he got involved; the court believed his evidence; the 2 complainants testified that when being robbed they saw the robbers running away; that none of the robbers limped or used crutches;

29. The evidence of **PW9** was that 3rd accused may not have been involved as none of the robbers were seen limping; he could not have been at the scene of crime; the lower court looked at all the circumstances and exonerated the other accused persons; and that it had good reason to convict the appellant;

30. Counsel prayed that the conviction and sentence be upheld and that the appeal be dismissed;

REJOINDER

31. In response to the respondents submissions Counsel submitted that the 3rd accused implicated the appellant who was not able to exonerate himself; this is shifting of the burden of proof; refer to Section 111 of the Evidence Act; that the issue introduced in the 3rd accused defence was introduced late in the day and that the appellant was unable to rebut due to the late introduction;

32. There was need for corroboration of this evidence; there were no independent witnesses and that the appellant was not identified; the phone changed hands four times; that six days were too long for the court to make a presumption.

33. Counsel urged the court to find that the appeal had merit the same be allowed.

ISSUES FOR DETERMINATION

34. After taking into consideration the rival submissions made by the appellant and those of the Counsel

for the State, these are the issues framed for determination;

- (i) Whether the doctrine of recent possession was erroneously invoked by the trial court;
- (ii) Whether the trial court convicted the appellant on the basis of evidence of an accomplice;
- (iii) Whether the trial court gave good reasons for rejecting the appellants defence;

ANALYSIS

35. This being the first appellate court it is incumbent upon it to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA**.

Whether the doctrine of recent possession was wrongly invoked by the trial court;

36. Counsel for the appellant contended that the trial court wrongly invoked the doctrine of recent possession and erred in shifting the burden of proof to the appellant;

37. The record shows that in its judgment the trial court invoked the doctrine of recent possession and found the appellant to be the robber; the doctrine of recent possession is a presumption of fact provided under section 119 of the Evidence Act; and is applicable to the offence of robbery, theft and handling;

38. When applying this doctrine the burden of proof will shift from the prosecution and it is upon the appellant/accused to give a reasonable explanation as to how he came into possession of the stolen goods; and if he fails to do so then the trial court from the facts and circumstances can draw an inference that the accused was either the thief, robber or a mere receiver.

39. There are three pre-conditions that have to be first established by the prosecution before the accused is called upon to offer an explanation in rebuttal, these are in this instance; whether the mobile phone had been recently feloniously stolen; whether it was positively identified by the complainant (**PW7**) as belonging to him; and whether from the co-existing circumstances of the case the appellant could be said to have been in recent possession of the phone;

40. The evidence of **PW7** was that on the 4/08/2007 he was travelling to Nanyuki from Nairobi in the company of his friends in motor vehicle registration number KAP 859V; when reaching Marua they were flagged down by a person who appeared to be drunk; upon slowing down they were accosted and robbed at gun-point; in the course of the robbery he was seriously wounded and was robbed of his mobile phone make Nokia 3100; he identified the phone in court which had been introduced as an exhibit and marked as **Pex1**; he also produced a receipt that had been issued to him by Uniscan Communication, the seller, and the receipt bore the same serial number as that of the stolen phone being Serial Number 357051005992328;

41. The evidence of **PW6** the doctor who produced the P3 Form in respect of **PW7** corroborated the evidence of **PW7** on the gun shot injuries he sustained on both his thighs arising from the robbery;

42. The assault rifle, an AK47, that was used in the robbery together with the spent cartridges, the magazine and the ballistic experts' report were produced in court as evidence by **PW5** Alex Mwandawiro, a ballistic expert; the report (**Pex6**) confirmed that the spent cartridges found at the scene of crime were from this weapon;

43. From the forgoing evidence the trial court made the following finding;

“There is no dispute that PW4 and PW7 were robbed on 4/08/07 at Marua junction and that during the said robbery PW7 suffered gunshot wounds and injuries which were assessed at the degree of greivous harm.

The robberies took place at night and suddenly as such the two complainants who were the only eyewitnesses did not identify the attackers.

There is no doubt at all that Pex1 was the mobile phone robbed from PW7 in the said robbery.”

44. This court is satisfied that the trial court found the pre- conditions had been established by the prosecution; that **PW7** had been feloniously robbed of his phone; and that the phone belonged to him;

45. **On recovery and possession;** the evidence of Sgt. Ngare Kibaya (**PW1**) a CID officer based in Ruiru who recovered the stolen phone was that he got information that the mobile phone number was being utilized in the Ruaraka area; that he called the number and it was answered by the 2nd accused who was a watchman at Haco Industries; they agreed on where to meet; he mobilized other officers and proceeded to the meeting place and he arrested the 2nd accused who was using the number but on another handset; the 2nd accused led them to the 4th accused from whom they recovered the stolen handset;

46. The 2nd accused told them that he had bought the phone from the 3rd accused and had then sold it to the 4th accused; the 2nd accused then led the police officers to the 3rd accused; after arresting these three accused persons **PW1** called police officers from Nyeri to pick them up, at that point in time they were suspects.

47. In his testimony **PW9** who was the investigating officer confirmed that on the 10/08/2007 he received instructions to pick the suspects from Ruiru Police Station; the appellant was not among them; the 3rd accused then led him to the appellant.

48. In its judgment the trial court when invoking the doctrine of recent possession stated that;

“Pex1 was robbed from PW7 on 4/08/07. On 10/08/07 it is said that the 1st accused gave it to the 3rd accused.

.....As already observed the court believes that the 1st accused was positively seen by accused 3 in possession of Pex1 on the 10/08/07 a mere six days after it was robbed from PW7. The 1st accused did not tender any explanation on how he came into possession which leads me to the inescapable conclusion that the 1st accused was the robber.”

49. The trial court saw and heard all the witnesses testify; it found as a fact that the appellant and the other accused had the phone that **PW7** identified as his stolen phone; the trial court heard the defences of all the accused persons and preferred the story and the explanation of the 3rd accused person; this finding was based on the credibility of the 3rd accused who knew the appellant very well and was found not to have been an accomplice.

50. The possession was found to have been 6 days from the date of the robbery; it was therefore incumbent upon the appellant to offer a reasonable explanation to rebut the presumption of fact raised by the possession that he was either the robber or a mere receiver; the other accused offered reasonable explanations and were found to be candid whereas the appellant was found not to be candid and merely denied knowing the 3rd accused, he denied ever selling the phone to the 3rd accused and claimed that he was framed by the 3rd accused.

51. The evidence on the circumstances of possession is clear and this court finds no reason to interfere with the trial courts invocation of the doctrine of recent possession.

52. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether the trial court convicted the appellant on the basis of evidence of an accomplice:

53. The trial court recorded the evidence of **PW9** who was the investigating officer attached to Nyeri CID and it came to the conclusion that the 3rd accused was not the appellant's accomplice, as follows:

"I was assigned to investigate a case of robbery with violence at Marua. I was assigned by PCIO Mr. Mukeku to go to Ruiru police station to get suspects. When I arrived at Ruiru police station I met 4 suspects therein. The suspects have been found with a mobile phone Nokia 1110 which had been robbed during the Marua robbery. I took three suspects.

The suspects I bought from Ruiru police station are accused 2, 3 and 4. I was also given a mobile phone MF11 in court identified.

....Accused 3 sold the phone to accused 2 and accused 2 sold it to accused 4.

54. When cross-examined by Counsel for the appellant at the trial **PW9** went on to add that;

"The 3rd accused led me to the 1st accused. The 3rd accused has physical disability and I doubted his being involved in the robbery.

The 3rd accused gave me the name of the 1st accused whom he told me that he was charged with an offence at Thika. I applied for a production order and I charged the accused with the offence herein. I have relied on what accused 3 told me.

When I went to Thika I applied for a production of accused 1.

Accused one was held at Ruiru for an offence which I was not aware in maybe I can from his diary.

From the Ruiru diary the accused was arrested with another Nokia 2300.

When I interrogated the 1st accused he denied giving accused 3 any phone. There was no sale agreement between the accused persons.

The accused 3 and 1 exchanged mobile phone for a bicycle after the 1st accused failed to return the bicycle.

Accused 3 is a cripple, one of his leg is amputated hence from the way which the robbery occurred it is probable that he was not involved in the robbery but he handled unlawfully stolen property."

55. The 3rd accused told the trial court that;

"I wish to tell the court that on 10/08/07 Moses Munene the 1st accused in the dock identified came to my place of work. I know the 1st accused. I had known the 1st accused for about 2 years. He is a friend. I know well his elder brother.

..... The 1st accused had a Nokia 3100 Pex1 in court specifically identified. The 1st accused wanted to sell Pex1 in order to purchase shaving machine. I told accused 1 that I only had Ksh.700 he asked me to lend him the money so that he could repair his machines after which he will refund me the money. I refused to lend him the money, the accused told me to take Pex1 as a security then he will bring the money after 2- 3 days.

I decided to help him as I knew his barber business hence I gave him Kshs.700 he left I kept Pex1 as security for my money. After 3 days without the 1st accused coming I went to his shop but I found it closed. I waited for him for 1 week in vain. My business is small hence after 7 days I decided to look for a buyer for Pex1 to recover my money."

56. The trial court recited all these facts in its judgment; and is found to have properly directed its mind to the issue of accomplice evidence; it stated that;

“The 3rd accused explained that the 1st accused gave him Pex1 on 10/08/07 as a security however this was denied by the 1st accused.

The investigating officer ruled out the involvement of accused in the robbery since he has physical disability and the robbers described by PW4 and 7, fired various shots robbed them and ran away.

....On the 2nd issue of accomplice evidence in Appea No.58 of 1981 Obiri-vs- Republic KLR 1981 493. The judges of appeal the Madan, Miller and Potter gave a definition of an accomplice.

The JJA held that an accused person who was at the crime scene but found not to have been involved in the crime is not an accomplice and his evidence is not accomplice evidence.

From the evidence on record explanation given by the 3rd accused is believable, PW9 doubted his involvement in the robbery.

The 3rd accused gave evidence which was sufficiently detailed, he had no grudge against the 1st accused. He had no reason to pick the 1st accused among the 8 other people held in the Ruiru police cells with him.

The definition given by the Court of Appeal in Obiri vs Republic (supra) is that a person found not to have been involved in the crime is not an accomplice.

I chose to be guided by the said authority of the court of appeal....”

57. The trial court found the explanation of the 3rd accused to be more candid than that of the appellant; the trial court also found that the 3rd accused was well known to the appellant and had no reason to frame him; nevertheless the court proceeded to caution itself on the dangers of relying on this evidence;

58. This court is satisfied with the findings of the trial court that the 3rd accused was not an accomplice; his evidence was found to be credible and reliable and a sound basis for the conviction;

59. This court finds no reason to interfere with the conviction on both counts; the convictions are found to be safe; this ground of appeal is found to be lacking in merit and is disallowed.

Whether the trial court gave good reasons for rejecting the appellants defence;

60. The trial court having weighed the appellants defence as against the prosecutions was satisfied that it did not displace the prosecution’s case; it found that the evidence of the 3rd accused was not that of an accomplice and was satisfied with the explanation given that the phone had been deposited as security by the appellant; he was found to bear no grudge towards the appellant and that the appellant was a person well known to him; all in all his evidence was found to be cogent and credible;

61. The phone was recovered six days after the robbery and the appellant was found to be the first person in possession of the phone after the robbery; that this circumstantial evidence was corroborated by the direct evidence of the 3rd accused that linked the appellant to the stolen phone; having been found to be in constructive possession it was incumbent upon the appellant to offer a reasonable explanation as to how he came into possession of the mobile phone; the trial court found that the appellant did not tender any explanation as to how he came into possession of the stolen phone and from the facts and circumstances of the case reached an **“inescapable conclusion”** that the appellant was **‘the robber’**; this court is

satisfied that the trial court drew the correct inference and arrived at a correct conclusion;

62. The trial court is found to have considered the appellants defence and given good reasons for rejecting it; this ground of appeal is found lacking in merit and it is hereby disallowed.

FINDINGS

63. In the light of the forgoing this court makes the following findings;

(i) The trial court correctly invoked the doctrine of recent possession;

(ii) This court finds that the trial court carefully evaluated the evidence of the co-accused and found him not to have been an accomplice; the convictions based on this evidence are found to be safe.

(iii) The trial court is found to have properly rejected the appellants defence and to have given good reasons for rejecting it.

DETERMINATION

64. The appeal is found lacking in merit and is hereby dismissed.

65. The convictions and sentences are hereby upheld.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 25th day of May, 2017.

HON. A. MSHILA

JUDGE