



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 213 OF 2011

DEREK GYIDEI. MANGO.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal from conviction and sentence Kakamega CMC Cr. Case No. 177 of 2010 dated 19.5.2011 by Hon. P.O. Ooko R.M.)

JUDGMENT

Introduction

1. The appellant Derek Gyidei Mango was charged with the offence of stealing contrary to section 275 of the Penal Code. The particulars of the offence were that on the 23rd day of December 2009 at GOLF HOTEL Kakamega in Kakamega Central District within the western province jointly with others not before court stole one mobile phone make blackberry S/No. 355507027874655 valued at Kshs.50,000/= the property of Hon. Manyala Keya
2. In the alternative count he was charged with the offence of handling stolen goods contrary to Section 322(1)(2) of the penal code. Particulars of the alternative charge were that on the 16th day of January, 2010 at Derik Mango and Co. Advocates office in Kakamega Township Kakamega Central District within the Western Province otherwise than in the course of stealing dishonestly retained one mobile phone make black berry S/No/ 355570274655 knowing or having reason to believe it to be stolen.
3. The trial court found him guilty on the main count and fined him Ksh.20,000/= in default to serve two(2) years imprisonment.

The Appeal

4. Being dissatisfied with the trial court's judgment the appellant filed this appeal on the following grounds;-
 - (1) The learned Magistrate erred infact and in law in recording a verdict of guilty in the absence of sufficient evidence to prove the prosecution case.
 - (2) The learned Magistrate erred in fact and in law in basing the conviction upon external evidence that was not tendered by the prosecution

(3) The learned Magistrate erred in fact and in law in failing to take into account the sworn testimony of the appellant.

(4) The learned Magistrate erred in fact and in law in misapplying the principle of Recent possession.

(5) The learned trial Magistrate erred in fact and in law in imposing a sentence that was manifestly excessive under the circumstances.

5. The appellant prays that the appeal allowed, conviction quashed and the sentence set aside.

SUBMISSIONS

6. The appellant through his advocates M/S Wafula Wawire & CO. Advocates filed written submissions dated 3rd December, 2015, together with the authorities cited.

7. Briefly the appellant submits that the charge of stealing was not proved to the required standard by the two prosecution witnesses. He contends that the trial Magistrate relied on other evidence to give life to the prosecution case by referring to his conduct when he recorded his statement at the police station. He adds that the trial court did not consider his testimony in full otherwise he would have arrived at a different conclusion.

8. Lastly the appellant submits that the trial Magistrate misapplied the doctrine of recent possession. Counsel concludes his submissions by stating that the appellant's conviction for the offence of stealing is unsafe.

9. On their part the ODPP through Mr. Ngetich the prosecution counsel relied on the evidence on record and the judgment of the trial court.

10. As this is a first appeal this court's duty is to re-evaluate the evidence on record afresh and come up with its own conclusions. As an appellate Court this court will be slow to interfere with the said evidence as recorded by the trial Magistrate during the proceedings because it was not party to the same. All it will do is look at the evidence again and analyse it and make its own findings bearing in mind and giving an allowance thereof for the fact that it did not observe the demeanor of the witnesses as they testified. See **David Njuguna Wairimu – Vrs – Republic** (2010) e KLR where the Court, relying on the holding of the Court of Appeal for Eastern Africa in **Okeno Vrs – Republic [1972] E.A 32** held as follows;- "The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of that decision."

The Prosecution Case

11. The prosecution called two witnesses in this case that is the complainant and the investigating officer. The complainant explained that he lost his phone on the 23.12.2009 at Golf Hotel, at Kakamega where he was initiating a fundraiser. The phone was a blackberry S/No355570274655 valued at Kshs.50,000/= though no receipt was produced to show the value or ownership. He reported the loss on the 28.12.2009 at the CID headquarter in Nairobi. The said phone was recovered on the 16.1.2010 while in possession of the appellant at Kakamega. Prior to the incident the complainant did not know the appellant.

12. On cross-examination by the appellant, the complainant reiterated his testimony that he reported that loss of the phone five days after the incident though he had no occurrence book number to confirm the report.

13. Pw2 No. 231518 Inspector Godfrey Nyongesa attached at the CID office headquarters in western province investigated this case. After receiving a call from one Corporal Chris from Nairobi CID headquarters informing him of a complaint by PW1 he started his investigations. He liaised with Safaricom Limited who supplied him with the location where the said cell phone was. On the 16.01.2010 he again enquired about the location of the cell phone which was S. No. 355507027874655 and he was directed that it was from KCB building within Kakamega Town. He made a call on the said hand set telephone No. [particulars withheld] and the appellant picked it. After PW2 disguised himself that he had a land transaction and he needed assistance, the appellant directed the witness to his offices at KCB Building room No. 6 1st floor. He went to the said offices and after identifying himself as a police officer he asked the appellant to surrender the said phone.

14. He interrogated the appellant and the appellant told him that the said phone had been pledged by one Pamela who took from him Kshs.5,000/- as loan from the office though the appellant did not produce any document to prove his allegations. The phone was positively identified by the owner. He thereafter preferred those charges against the appellant. He produced the box that was said to have been the packing for the cell phone "PEX2" and the telephone hand set which was marked as "PEX1"

15. On cross examination PW2 stated that he did not take any statements from one Chris who he considered was not a crucial witness nor did he interview the person who purchased the said cell phone one Wycliffee Otieno. He maintained that his investigations centered around the Safaricom people as he is allowed to do as a Police Officer to make a request either verbally or in writing to access certain information from them. He added that Safaricom people only give sim numbers and not the names of the owners of the said sim numbers which they hold in confidence. He maintained that the number he was given belonged to the appellant that is [particulars withheld].

16. At the close of the prosecution case the trial court found that the appellant had a case to answer on the basis that the prosecution had established a prima facie against him.

Defence Case

17. The appellant in his sworn defence told the trial court that he met one Pamela on the 26.12.2009 at Golf Hotel in Kakamega. He again met her on the 13.1.2010 when she went to his office at KCB building. He testified that when Pamela visited him at office she requested for financial assistance and told him that she was willing to sell him the cell phone the subject matter in this case. He requested her to leave the phone with him to enable him study the same.

18. He asked her to come back the next day. He decided to put his sim card and started using the phone on the 14.01.2010. As soon as he started to use the said phone two police officers went to his office and told him that they were looking for a stolen cell phone which was with him. They took the said cell phone from him after removing his sim card. He accompanied the police officers to the police station and also tried to help them trace Pamela who had left the cell phone.

19. The appellant claimed that since the policemen were under pressure to charge somebody with theft of the said cell phone he was charged as they could not trace Pamela. He denied the charges of stealing and further stated that he was not at the Golf Hotel on the 23.12.2009 when the alleged offence occurred. He also denied the alternative charge and claimed that he had no knowledge that the cell phone was stolen.

20. On cross examination the appellant raised issue with the period between the time when the phone was allegedly stolen and when it was recovered from him.

21. He stated that the doctrine of recent possession could not be applied against him despite the cell phone having been recovered from him. He added that he did not know the value of the said phone nor did he negotiate the price of the said cell phone with Pamela. According to the appellant, Pamela was a call girl and he had known her since 2009. He maintained that at the time Pamela left the cell phone with him he did not know that the same had been stolen.

Determination

22. This court having heard the arguments by the parties in this case, submissions and having carefully considered the authorities relied upon by the rival parties, the following are the issues to be determined.

- (1) Whether the evidence was sufficient to convict the appellant
- (2) Whether the learned trial Magistrate correctly applied the doctrine of recent possession.
- (3) Whether the learned trial Magistrate imposed a sentence that was manifestly excessive in the circumstances.

23. On the first issue, the prosecution called two witnesses being the complainant. Atanas Manyala Keya who testified as PW1 and Number 231518 Inspector Godfrey Nyongesa who testified as PW2. The complainant (Atanas) testified that on the 23.12.2009 at about 8.00pm, he was at the Golf Hotel in Kakamega for a fund-raising event for hospice. That while he was at the said function his blackberry cellphone S/N 35507027874655, valued at Kshs.50,000/= mysteriously disappeared. He stated he made enquiries through the hotel officials to no avail. Then on 28.12.2009, he made a report to the police at the CID headquarters in Nairobi to one CPL Chris who undertook to carry out investigations. Atanas told the police he did not have a receipt for the phone but produced only the cell phone box which had the serial number of the phone (Supra). On 16.01.2010, Atanas received a report from CPL Chris that the phone had been found in the possession of the appellant herein.

24. PW2, Inspector Nyongesa testified that on 28.12.2009, he received a call from Cpl Chris about the complaint by Atanas. Thereafter, and following further investigations the appellant who was found in possession of the cell phone was arrested and charged with the offence of stealing.

25. From the above evidence, this court is not satisfied that there was sufficient evidence upon which the learned trial Magistrate could make a finding of guilty. Atanas did not call a member of the hotel staff to corroborate his allegation that after he discovered his cell phone was missing, he made an enquiry with the hotel. Further there was no documentary evidence to confirm that the cell phone allegedly stolen from Atanas was indeed the one he paid for as per PExhibit 2. In a nutshell, there was no sufficient proof that the cell phone belonged to Atanas. The law is clear that the burden of proof in criminal cases belongs to the prosecution who must prove their case beyond any reasonable doubt. That means that during investigations, no stone should be left unturned and that the evidence placed before the court must point to no one else but the accused as being the perpetrator of the offence.

26. In the instant case, there are gaps in the prosecution case, and since an accused person is under no obligation whatsoever to prove his innocence, the gaps in the prosecution case go to the benefit of the appellant. In the case of Bhatt – vs – R [1957] EA 322 at page 334, the Court of Appeal for Eastern Africa settled the law on the subject of burden of proof when it said.

“... Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt.”

27. Further and it is the considered view of this honourable court that the investigations in this case did not go full length. PW2, Inspector Nyongesa did not make any effort to visit the Golf Hotel in Kakamega to establish or to confirm that indeed Atanas was at the said hotel on 23.12.2009 for a fund raiser. Nor did PW2 did seek to establish whether Atanas had made a complaint to the hotel management as alleged and whether the same was done verbally or in writing.

28. In the circumstances, I have reached the irresistible conclusion that PW2 did not exercise due diligence as an investigator and simply rushed into charging the appellant because he was under pressure to do so. In my considered view therefore, and though the appellant was found with the phone, the possibility that he received the phone under the circumstance described in his defence is not remote. A conviction based on the evidence of the two prosecution witnesses was thus not safe.

29. The second issue is on the doctrine of recent possession. It has been held that the doctrine of recent possession, if properly applied, can prove a crime with the accuracy of mathematics. I must now look at the events leading to the arrest and subsequent conviction of the appellant with a view to determining whether the doctrine was properly applied. In the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a kahiga – vs – Republic Cr A No. 272 of 2005 (UR)(Unreported)**, the court held;-

“.....It is trite that before a court 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 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 has to time as been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

30. What is stated above means that each and every ingredient must be proved before a conviction based on recent possession can stand. In the instant case, it is clear that not all the factors that make up recent possession were proved. Although the cell phone was found in the possession of the appellant, it is not clear from the evidence that the said cell phone belonged to Atanas, nor is there evidence to show that the same was stolen from him. There is the likelihood that Atanas gave the phone to Pamela, for whatever reason, and if that is so then it cannot be said that the cell phone was stolen from him. It is not for the appellant to disprove the allegation that the cell phone was stolen from Atanas. It was for the prosecution to prove beyond reasonable doubt that the cell phone was stolen from Atanas. Flowing from the above, it follows that the prosecution did not prove that the cell phone was recently stolen from Atanas.

31. In the case of Maina – vs – Republic [1986] KLR 301 wherein the Court of Appeal relying on what was stated in the English case R- Vs _ Loughlin [35] Cr. Appeal R. 69 cited the words of the Hon. Chief Justice of England who stated thus;

“ If it is proved that premises have been broken into and certain property has been stolen from the premises and that very shortly afterwards a man is found in possession of that property that is certainly evidence from which the jury can infer that he is the house breaker.”

32. The above inference can be rebutted if there is a reasonable explanation from the person. In the instant case the appellant explained that Pamela who is said to have been in the company of Atanas on 23.12.2009 stated Atanas had given her the phone. The appellant also stated that the said Pamela left the phone with him to consider buying it because she was in need of money. The appellant stated that he knew Pamela as a call girl. It is my considered view that the appellant's explanation sufficiently rebuts the inference that he stole the cell phone.

33. The last issue for determination is on sentence, and whether the sentence imposed by the learned trial Magistrate was harsh and excessive in the circumstances, and whether this honourable court should interfere with the same.

34. The law is that an appellate court will not ordinarily interfere with the discretion of a trial court which has passed a sentence upon hearing the whole of the evidence and in most cases, upon mitigation. In the case of **Omuse – vs – Republic [2009] KLR 214**, the court held, inter alia, That

“The court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors.”

I wholly agree with the above holding by the court of Appeal. In the instant case, the appellant was fined kshs.20,000/= (twenty Thousand) in default to serve two years imprisonment. The appellant was said to be a first offender.

35. A conviction under section 275 of the Penal Code attracts a penalty of three (3) years imprisonment. In this case, the appellant was a first offender, and the alleged value of the cell phone was 50,000/=. I am of the considered view that considering the value of the cell phone and the fact that the appellant was a first offender, the sentence was excessive in the circumstances and I would have had a reason to interfere with it if the conviction had been found to be safe.

36. In the **Omuse case** (above) the Court of Appeal held that “The sentence imposed upon an accused must be commensurable to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence.” The learned trial Magistrate erred in the present case for failing to adequately consider the moral blameworthiness of the appellant.

Conclusion

37. For all the above reasons, I am satisfied that the appellant’s appeal on both conviction and sentence has merit. The appeal is allowed conviction quashed and sentence set aside. Should the appellant be in custody, he is to be released therefrom forthwith. If the fine of Kshs.20,000/= was paid by or on behalf of the appellant, the same shall be released to the depositor.

It is so ordered

Judgment delivered, dated and signed in open court at Kakamega this 20th day of June 2017

RUTH N. SITATI

JUDGE

In the presence of:-

Mr. Imbenzi for Nandwa (Present) For Appellant

Mr. Juma (present) for Respondent

Polycap...Court Assistant.