REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 84 OF 2015

DOMINIC NZANGI KIMEU .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the Sentence of Principal Magistrate's Court at Makindu delivered by ***Honourable D. M. MACHAGE, (Principal Magistrate)*** *on 18th May, 2015 in* ***MAKINDU P.M.CR. CASE NO. 1186 OF 2012)***

JUDGMENT OF THE COURT

1. **DOMINIC NZANGI KIMEU** the Appellant herein was charged in the Principal's Magistrate's Court at Makindu with one count of robbery with violence contrary to Section 296(2) of the Penal code and one alternative charge of handling stolen goods contrary to Section 322 of the Penal Code.

2. The particulars of the charge of robbery with violence were that on the 16th day of November, 2012 at Kyumani Market in Kibwezi District of Makueni County, jointly with others not before Court while armed with dangerous weapons namely Rungus and Pangas robbed **MARY MUBEA MUTUA** of cash Kshs.60,000/=, 3 mobile phones and Safaricom credit cards all valued at Kshs.103,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said **MARY MUBEA MUTUA.**

3. The particulars of the alternative charge were that on the 13th day of December, 2012 at Kyumani market in Kibwezi District of Makueni County, otherwise than in the course of stealing dishonestly received or retained one G – Tide Mobile phone S/No.911206907318985 knowing or having reasons to believe it to be stolen good/mobile phone.

4. The Appellant was tried, convicted and sentenced to death. Being aggrieved by the said conviction and sentence, the Appellant raised the following grounds of Appeal:

> ***(a) The trial Magistrate erred in law and fact by failing to consider that both the conviction and sentence is founded on fatal and incurably defective charge sheet.***
>
> ***(b) The trial Magistrate erred in law and fact by failing to consider that both the conviction and sentence is founded on evidence of a single identifying witness.***
>
> ***(c) The trial Magistrate erred in law and fact by failing to consider that the circumstances within which the Complainant made identification were stressful and the lighting prevailing were undisclosed in evidence.***

(d) The trial Magistrate erred in law and fact by failing to consider sharp contradictions specifically on the I.M.E.I number of the mobile phone which was the subject of the trial Court's enquiry.

(e) The trial Magistrate failed to consider the variance between the names of the person who testified as the Complainant in this case contrary to the names in the first report in OB No.13/16/11/2012 and in the P3 form on record.

(f) The trial Magistrate erred in law and fact by failing to consider that both the conviction and sentence is founded on uncorroborated evidence by the Prosecution which in itself requires corroboration so as to sustain the conviction recorded.

(g) The trial Magistrate erred in law and fact by shifting the burden of proof in the Appellant's alibi defence upon him to explain the circumstances in the defence.

5. As this is a first Appeal, it is the responsibility of this court to re-evaluate and examined the evidence adduced before the trial court and come to its own independent conclusion bearing in mind that this court neither saw or heard the witnesses testify and to make an allowance for that (see **OKENO =VS= REPUBLIC [1972] EA 32, PANDYA =VS= REPUBLIC [1957] 3361, PETER =VS= SUNDAY POST [1958] EA 424).**

6. **Summary of the Prosecution's Case:**

PW.1 MARY MUVEA MUTUA testified that on the material date namely 16/11/2012 she was asleep inside her shop when she heard a violent knock on her door and subsequently the strangers smashed the door with a stone and forced themselves into the room. One of the robbers hit her on the head and she fell down. The robbers then demanded for money and she handed over a sum of Kshs.60,000/= which she had. The robbers stole her mobile phone and two others as well as airtime scratch cards and left after closing the door from outside. The Complainant called for her son who took care of the shop as she went to Kibwezi Police Station to report. She was issued with a P.3 form which was later filled after receiving treatment. She was later called by the police who alerted her that one of the mobile phones make G – Tide had been recovered. She positively identified the same and handed the purchase receipt to the police as exhibit. She learnt that the mobile phone had been recovered from the appellant herein.

PW.2 PAUL MUTUKU testified that he received a report that his mother had been attacked by robbers and on reaching the scene, he found that his mother had indeed been injured on the head and robbed of Kshs.60,000/= and 3 mobile phones. He was later able to identify the recovered mobile phone make G-Tide.

PW.3 CPL. WILLIAM KANDIE testified that on 13/12/2012 he accompanied the investigating officer in the arrest of the Appellant who had been discovered to be using a mobile phone suspected to be stolen. They indeed arrested the Appellant and escorted him to Kibwezi police station for interrogation. During the arrest, he recovered one mobile phone make G – Tide.

PW. 4 CPL. PETER MWANGI testified that he was the investigating officer and that he recorded statements of witnesses regarding the incident of robbery with violence and received purchase receipt of one of the mobile phones stolen by the robbers. He conducted investigations and with the help of the mobile subscriber he was able to track the person who had been using the mobile phone handset and managed to arrest the Appellant herein and recovered the stolen mobile phone make G – Tide. He later charged him with the offence.

PW.5 Dr. Hannington Mibei testififed that he examined the Complainant and confirmed two cut wounds on the head and ear and assessed degree of injuries as harm. He produced the P.3 form.

7. **The Appellant's defence Case:**

The Appellant was put on his defence and he gave an unsworn statement. He stated that on 13/12/2012 he woke up and proceeded to his place of work but was advised by the site manager to come the following day as it was raining. He later decided to visit a certain bar for a drink only for the police to raid the premises and he and other patrons were arrested for drinking after hours. They were escorted to the police station and those who managed to pay a bribe of Kshs.500/= were promptly released. He remained in the cells as he had no money and was brought to court and later charged with the offence. He denied the same and maintained that the recovered mobile phone was his as he had a purchase receipt to that effect.

8. **Submissions:**

Parties filed submissions which I have carefully considered. I have also considered the evidence adduced before the trial court. It is not in dispute that indeed the Complainant was violently robbed on the material date and she sustained injuries. It is also not in dispute that the Complainant did not manage to recognize the robbers as it was at night. It is also not in dispute that one of the stolen mobile phones namely G –Tide was recovered about one month after the incident. It is also not in dispute that the Appellant has staked a claim to the said recovered phone as he claimed that he had purchased the same. The issues for determination are as follows:-

(1) ***Whether the Appellant was one of the robbers***.

(2) Whether the Appellant handled the recovered mobile phone make G – Tide in circumstances to suggest that he had knowledge that the same had been stolen or unlawfully obtained.

(3) Whether the Prosecution had proved its case beyond any reasonable doubt.

9. As regards the first issue, the trial Prosecutor was under a duty to first establish the essential ingredients of the offence of robbery with violence contrary to Section 296 (2) of the Penal code which are as follows:-

(i) The Offender is armed with any dangerous and offensive weapon or instrument.

(ii) The offender is in company with one or more person or persons.

(iii) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.

The Complainant stated that the robbers were two in number and one of them hit her on the head with a rungu and that the robbers stole her Kshs.60,000/= as well as three mobile phones and some airtime scratch cards. She later received treatment and was examined by PW.5 who confirmed the injuries and produced the P.3 form. This then clearly confirmed that indeed there was a robbery with violence incident at the Complainant's shop on the material date and that the above ingredients were fully met.

The next issue is on the identity of the robbers. The Complainant testified that she was not able to identify the attackers as it was at night around 3.00 a.m. The Police thereafter did not conduct an identification parade as the complainant told them she did not know or identify the robbers. The Appellant herein was arrested one month after the robbery incident through a mobile phone recovered from him and which was one for those that had been stolen from the Complainant. The Complainant positively identified the said mobile phone make G- Tide as the one stolen from her. She presented a purchase receipt which indicated the purchase of the mobile phone serial Number 911206907318985. The investigating officer (PW.4) stated that upon receiving the new sim card line being used on the stolen phone from the Safaricom, he called the said number and it was traced to the Appellant who was then within the vicinity. The Appellant upon being arrested claimed then that he had picked the mobile phone on a road and during his defence evidence produced a purchase receipt in which he claimed he had bought it. The Complainant and the police officers who testified had stated that the Appellant had been engaged in criminal activities in the area and that he had just recently been released from Manyani G. K.

Prison. From the evidence of the investigating and arresting officers, it appeared that upon receiving the robbery report they began looking for known criminal elements in the area and it seems the name of the Appellant came to mind. Even though the Appellant was found in possession of the alleged stolen mobile phone, the question as to whether he was one of the robbers appears to be put into some doubt due to the fact the Complainant did not identify him during the robbery and also to the fact that the Appellant in his defence evidence staked a claim to ownership of the recovered mobile phone by producing a purchase receipt and further the recovery of the mobile phone took place one month after the robbery incident. It would therefore be unsafe to conclude that the Appellant had been one of the robbers. The mere fact that the Appellant had been a jail bird is not sufficient to suppose that he was one of the robbers since suspicion is not sufficient to place the Appellant at the scene of the crime. The Appellant should be given the benefit of doubt and that he be deemed to have not been among the robbers.

10. As regards the second issue, it is not in doubt that one of the stolen mobile phone make G – Tide Serial Number 911206907318985 was recovered from the Appellant herein during his arrest. The mobile phone was positively identified by the Complainant as one of those that had been stolen by the robbers. The purchase receipt was produced by the investigating officer. The Court of Appeal in the case of **GIDEON MEITEKIN KOYIET =VS= REPUBLIC - KISUMU CRIMINAL APPEAL NO.297 OF 2012** held that the doctrine of recent possession is applicable where the court is satisfied that the prosecution have proved the following prerequisites:-

(a) The property must have been found with the suspect.

(b) The property must be positively identified as the property of the Complainant.

(c) The property must be proved to have been recently stolen from the Complainant.

The investigating officer stated that upon arresting the Appellant, he proceeded to interrogate him on how he came to be in possession of the stolen mobile phone. The investigating Officer stated that the Appellant claimed that he had got the mobile phone on the road. It was the investigating officer's further evidence that the Appellant could have taken the recovered item to the nearest police station but he did not. The Appellant in his defence evidence which was unsworn laid claim to the recovered mobile phone and maintained that he had purchased it and even went ahead to produce a receipt to that effect. It must be noted that from the outset and throughout the Prosecution's case, the Appellant did not raise with the witnesses his claim that he had indeed bought the mobile phone from a third party. The Appellant waited until the closure of the Prosecution case and then came up with a claim that he had bought the mobile phone. Even though the Appellant had his rights to elect to give an unsworn statement, the Prosecution was disadvantaged as it could not cross-examine him on the authenticity of the purchase receipt. It was improper for the trial court to have allowed the production of documents by the Appellant where unsworn statement had been opted by the defence. Even though the trial court allowed the production of the purchase receipt by the Appellant, I find the same was at odds with the Appellant's earlier response at the time of arrest that he had stumbled upon the said mobile phone on the road. If indeed the Appellant had gotten the stolen mobile phone on the road, then there was no point to later proceed to purchase it since even the identity of the seller was not disclosed. The conduct of the Appellant revealed that he had handled the mobile phone in circumstances to suggest that he had knowledge that the same had been stolen or unlawfully obtained. Upon getting the mobile phone on the road, he did not hand it over to the police or any authority so that the owner could be traced but he instead converted it to his own use for a whole month before he was busted. He waited until the Prosecution's case was closed then he made a move to cover up or sanitize his tracks by securing a purchase receipt claiming ownership of the stolen mobile phone. The Appellant's possessions of a purchase receipt of a stolen mobile phone did not legitimize his ownership of the same and did not afford him a claim of being an innocent purchaser without notice. I am satisfied that the Appellant did not give a proper account of how he came to be in possession of the stolen mobile phone and it is my view that the alleged seller did not exist and that the alleged purchase receipt by the Appellant was made up so as to buttress his belated claim to innocence.
I find the Appellant had dishonestly received and retained the G-Tide mobile phone serial No. 91120690731895 and had reason that the same had been stolen or unlawfully obtained. This being the position, I find the trial court ought to have convicted Appellant on the alternative charge but not the main

charge of robbery with violence. It was unsafe to convict Appellant on the main charge of robbery with violence.

11. As regards the last issue, the evidence presented before the trial Court and the above observations, I find the Prosecution had proved its case on the alternative charge of handling stolen goods contrary to Section 322 (2) of the Penal code which attracts a sentence of not exceeding 14 years imprisonment.

12. The upshot of the aforegoing is that the Appellant's appeal partly succeeds. The Conviction and sentence by the Lower court is hereby set aside and substituted with an order that the Appellant is convicted on the alternative charge of handling stolen goods contrary to Section 322 (2) of the Penal Code and sentenced to fourteen (14) years imprisonment from the 18th May 2015.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **31ST** day of **JULY**, **2017.**

D. K. KEMEI

JUDGE

In the presence of:-

Machogu for Respondent

Dominic Nzangi Kimeu – Appellant

C/A: Kituva