REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 125 OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case No.3465 of 2012 of the Chief Magistrate's Court at Naivasha before S. Mwinzi - SRM)

SAMMY MURUNGU WAIHARO…....APPELLANT

-VERSUS-

REPUBLIC……PROSECUTOR

J U D G M E N T

1. The Appellant herein was initially charged with four counts of Robbery with violence contrary to Section 296 (2) of the Penal Code. On 11/2/2014 the prosecution presented a charge sheet containing only 3 counts of Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars of the three counts are as follows:-

COUNT 1

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 295 AS READ WITH SECTION 296 (2) OF THE PENAL CODE.

Particulars

On the 11th day of October, 2012 at Karai in Naivasha District within Nakuru County, jointly with others not before court, and being armed with dangerous weapons (sic) namely AK 47 rifle the Accused persons robbed Catherine Tera of Kshs 3,500/= and during the time of such robbery threatened to use actual violence to the said Catherine Tera.

COUNT 2

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 295 AS READ WITH SECTION 296 (2) OF THE PENAL CODE.

Particulars

On the 11th day of October, 2012 at Karai in Naivasha District within Nakuru County, jointly with others not before court, and being armed with dangerous weapons (sic) namely AK 47 rifle the Accused persons robbed Samuel Mbuthia of his Epson photo printer valued at Kshs 25,000/= and during the time of such robbery threatened to use actual violence to the said Samuel Mbuthia.

COUNT 3

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 295 AS READ WITH SECTION 296 (2) OF THE PENAL CODE.

Particulars

On the 11th day of October, 2012 at Karai in Naivasha District within Nakuru County, jointly with others not before court, and being armed with dangerous weapons (sic) namely AK 47 rifle the Accused persons robbed Daniel Otieno Onyango of cash Kshs 11,000/= and a machine namely auto mobile car analysis machine valued at Kshs 1.4 million all totaling to KShs 1,411,000/= and during the time of such robbery threatened to use actual violence to the said Daniel Otieno Onyango.

In that charge sheet the Appellant was the 1st Accused, charged jointly with four others.

2. At the conclusion of the trial, the 1st Accused was convicted on the first count only in respect of the complaint by **Catherine Tera**. The complainant Daniel **Otieno Onyango** in Count 3 did not testify and all the Accused persons were acquitted in respect of the 3rd Count.

3. The charges against the 2nd Appellant therein had already been withdrawn. The trial court does not appear to have made any specific findings in respect of count 2 in which **Samuel Mbuthia Wangombe** (**PW3**) was the complainant therein. Consequent to his conviction, the Appellant was sentenced to death. He now appeal to this court against the conviction.

4. The Appellant attacks the conviction under four amended grounds, namely:

> **"1. THAT, the learned trial magistrate erred in law and facts by convicting the Appellant on a defective charge sheet.**
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> **2. THAT, the learned trial magistrate erred in law and facts by convicting me the Appellant on circumstantial evidence, that of records from Safaricom Limited and the documents retrieved from the National Registration Bureaus; the evidence was not of admissible nature and was not fairly presented. This prejudiced my right to a fair hearing stipulated under Article 50 (fair hearing) in the Kenyan Constitution.**
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> **3. THAT, the learned trial magistrate erred in law by shifting the burden of proof to the Appellant; this burden should always remain with the prosecution.**
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> **4. THAT, the learned trial magistrate erred in law and in fact by disregarding my truthful defense and erred when he failed to advance any reasons for disbelieving it." (sic)**

5. He argues in his written submissions in support of his grounds that the charge sheet was defective in that the particulars of the charge were inconsistent with evidence, particularly by **Catherine Tera** (**PW2**) regarding the loss of her phone and money via an Mpesa transaction in the course of the robbery. Regarding the Mpesa and identification evidence produced at the trial, he argues in support of the 2nd ground that the same were irregularly produced by **PW6,** contrary to provisions of Section 65 (6) and 33 of the Evidence Act. He relied on this court's decision in **Peter Mugo Mathu, More Ole Sarite and Musa Ikute Nkuruma –Vs- Republic [2015] eKLR**.

6. Under grounds 3 and 4 he highlights evidence by **PW2, 3, 6** and **7** and asserts that the prosecution did not discharge the onus of proof and that the court erred by disregarding his defence.

7. For the DPP, Miss Kavindu opposed the appeal. She reiterated the evidence on the circumstances of the robbery and identification. Further, she pointed to the identification parades and the Safaricom records (Mpesa data) which, she asserted, corroborated evidence of identification by witnesses. In her view the printout produced by PW6 and corresponding certificate were properly admitted, in absence of objection by the defence. She defended the charge sheet as presented and concluded that the prosecution evidence at the trial was overwhelming.

8. In **Pandya -Vs- Republic [1957] EA 336** the Court of Appeal for Eastern Africa set out the duty of the first appellate court as follows:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

9. The prosecution evidence against the Appellant was that on the night of 10/10/2012 several passengers, including **Nicholas Murimi Kingundu** (**PW1**), **Catherine Tera** (**PW2**) and **Samuel Mbuthia Wangombe** (**PW3**) were aboard a matatu travelling from Nairobi to Naivasha. When the vehicle reached Karai, Naivasha, a lady passenger who was jointly charged in the lower court with the Appellant asked to alight. The driver stopped the vehicle and went to the boot of the matatu to offload the lady's luggage as requested.

10. While at the boot, the driver was confronted by a gang of men armed with a firearm. They commandeered the matatu off the road at a high speed. The vehicle however got stuck for 30 minutes in a muddy patch. The robbers unsuccessfully tried to push it out, eventually ordering the male passenger to disembark and assist in dislodging the vehicle. That too proved unsuccessful and the victims were forced back into the vehicle. Presently all passengers were ordered to disembark with their cash and mobile phones at the ready.

11. As the victims alighted they were frisked individually and some of them like **PW2** were ordered by the Appellant to send money via Mpesa from her phone to his telephone number. The robbers also searched for and took the passengers' valuables from the matatu before leaving with some women passengers, including **PW2** who were later released at dawn break. Other victims who remained in the matatu called police who visited the scene and commenced investigations. The Appellant was arrested about a month later.

12. The Appellant gave an unsworn defence statement. To the effect that he was a resident of Mirera, Naivasha and was a *boda boda* operator. That on 11th October 2012 he was going about his work when he received some money via Mpesa from his mother also co-accused in the lower court, one **Milkah Chege**.

13. When the Appellant called, a lady known as Mama Boi picked his mother's phone and explained that his mother wanted to lend the money to her (Mama Boi). He withdrew and used the proceeds to make purchases before returning home. That is when the mother said she was not aware of the money transfer as she had left the phone charging presumably at Mama Boi's salon. A month later, his mother and himself were arrested and questioned on the transfer of funds.

14. Having considered the submissions on this appeal and the evidence, I do not find any merit in the Appellant's first ground to the effect that the charges were defective. The remainder of the grounds relate to the substance of the trial evidence and can be dealt with simultaneously.

15. In this case, the prosecution relied on two pieces of evidence. The first, direct piece was the purported identification of the Appellant at the scene of the offence amongst the robbers. The second was circumstantial and related to Mpesa transaction of funds transfer made to his phone on the material night or early on the next day.

16. The trial court correctly identified these strands of evidence and found, in the absence of identification parade identification in the dock was worthless (See **Gabriel Kamau Njoroge -Vs- Republic [1982 – 88] 1 KAR**). Be that as it may, I am of the view that the identification evidence relating to the 1st Appellant did not receive sufficient attention. Nor were any specific findings made thereto.

17. In this case none of witnesses **PW1**, **PW2** and **PW3** were familiar with the Appellant prior to the robbery. The offence occurred at night and in what were obvisously difficult circumstances. A group of men commandeered the vehicle suddenly and drove into a rough track. It was raining and the robbers got out of the vehicle to push it out of a muddy spot.

18. The Court of Appeal has always exhorted caution in dealing with identification in such circumstances. In the In **Wamunga -Vs- Republic, [1989] KLR 424** the predecessor of Court of Appeal exhorted that:-

> **"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that circumstances of identification were favourable and free from possibility of error before court can safely make it a basis of a conviction."**

19. Of the three victims of the robbery who gave evidence at the trial (**PW1**, **PW2** and **PW3**) the latter confessed that he confused the Appellant herein and another robber, 3rd Accused (in the lower court) but asserted at the trial that he recalled the Appellant clearly.

20. As for **PW1** and **PW2**, whereas they asserted that they saw the Appellant during the robbery and identified him in a subsequent parades, a perusal of the identification parade form Exhibit 2, reveals that these witnesses did not identify the Appellant. The parades were conducted about one month after the robbery.

21. The sole witness who identified the Appellant vide identification parade Exhibit 3, namely **Daniel Otieno Onyango** also complainant in count 3, did not testify as a witness in the trial. No explanation was given for the glaring omission.

22. That leaves the evidence produced by **PW6** in the form of Mpesa records (Exhibit 5, 6, 7). Regarding that evidence, the trial court observed at paragraph 40 of its judgment that:

> **"Finally, I have considered whether the Safaricom data supplied connects the 1st and 4th Accused persons to the offence. The statement produced in court as P. Exhibit 5 shows the registered holder of the Mpesa account for 0716260243 was Sammy Murungu Waiharo, the 1st Accused herein. The line received Kshs 3,000/= from Milka Chege, number 0724 123 110 on 10th November, 2012 at 0556hours. Milka Chege had received Kshs 3,500/= from Catherine Tera on number 0722 266 042 at 0112 hours. From the statements its clear that the money was sent from Catherin Tera to the 4th Accused. The 4th Accused later sent Kshs 3,000/= to the 1st Accused."**

23. Two challenges were raised in respect of this evidence in my opinion. First despite having tendering certificate required under Section 65 (8) of the Evidence Act, to the effect *interalia* that she extracted the information and prepared printouts **PW6** appeared to equivocate during cross-examination. Secondly, from the records the transfer of Shs 3,500/= from **PW2's** phone at 1.12am on 11/10/2012 was to **Milkah Chege** (fourth Accused in the trial). The transfer to the Appellant from **Milkah Chege**, which is admitted, was at 5.56am on the same night. The facts of this case therefore differ slightly from those in **Peter Mugo Mathu, More Ole Sarite and Musa Ikute Nkuruma** case.

24. Significantly, in this case, there is no dispute that **Milkah Chege** sent Shs 3,000/= out of a sum of Shs 3,500/= earlier received from **PW2**, to the Appellant. The question is whether this makes the Appellant complicit. The trial court after reviewing the defence of the 4th Accused accepted (**Milkah**) that her phone was with neigbour, she did not know her personal identification number; was seemingly barely literate and gave her the benefit of doubt.

25. Regarding the dubious transaction however with regard to the Appellant, a son of the said **Milkah Chege** the court stated in its judgment that:

> **"However it will appear like the 1st Accused knew there was money in the account and sent it to himself. In view of this evidence and the evidence by PW2 that she was forced by the 1st Accused to send money to a number during the robbery, I find it sufficient reason to accept the circumstantial evidence."**

26. The Appellant's defence in regard to the admitted transfer of cash to himself was that:-

> **"After about an hour (at work) I got a message on my phone that had been sent by my mother's phone. She is the 4th Accused herein (Milkah Chege, erroneously referred in the proceedings of defence to as Dorcas Wainaina Njuguna following withdrawal of charges against the 2nd Accused (Dorcas) at the trial). I called the number (mothers) and I confirmed money had been sent. When I called a neighbour Mama Boi picked the phone……..said my mother wanted to lend Mama Boi money as she had a salon. She said my mum had left phone charging. I withdrew the money and I went to buy items which I took home. Later my mum said she was not aware that money sent to me…….the phone had been at salon charging overnight……."**

27. For her part, **Milkah Chege** 4th Appellant identified the Appellant as her son. She claimed to be illiterate and suggested that one Mama Faith in whose custody her phone was on the material night may have effected transaction which **Milkah** was unaware about.

28. In my considered view, there is no reason to doubt evidence by **PW2** that the robbers forced her to send Shs 3,500/= from her phone to number 0722 […] on the night of 10/10/2012 via Mpesa to another number. Although she did not identify the particular robber during the identification parade subsequently, the admitted and unexplained receipt of the selfsame sum of Shs 3,500/= by the Appellant within hours of the robbery, and his confused explanation is telling.

29. Firstly, he said the money was intended as a loan to **Mama Boi**. However, on receiving the cash he withdrew it and used it on purchasing items. Both he and his mother (4th Accused) were keen to distance themselves from the actual source of the money while admitting the transfer from mother's phone to son's phone. Money does not grow on trees, nor is it often gratuitously gifted.

30. It is inconceivable that a payment for which no justification is evident was gratuitously sent to the Appellant who merely proceeded to encash and use as he deemed fit. As for the mother, her stated response to the son later in the day is a shrug of indifference. It is unbelievable that the mother though illiterate and holding an Mpesa account could have allowed a third party (**Mama Faith** or **Mama Boi**) to not only keep custody of her phone but also to have her personal identification number (PIN) enabling her effect transfers.

31. The mother's evidence did not quite demonstrate ignorance. She gave her phone number and personal identification number (PIN) when cross-examined by the prosecutor, and though the trial court gave her the benefit of doubt, I believe she and the Appellant gave evidence tailored to cover each other, while none of them claiming any right to the sum of Shs 3,500/=.

32. In the circumstances of this case, it may well be that the Appellant and not some neighbour had the mother's phone in question and hence his confidence in forcing **PW2** to send money thereto. Further, on all accounts it is the same Appellant who must have caused or transferred that money to himself and withdrawn it. **Mama Boi** is a fiction created by the Appellant to conceal this fact. In light of this Appellant's admitted receipt of the money, albeit allegedly from his mother **PW6's** apparent prevarication is of no consequence. Ditto the production of phone records.

33. This circumstantial evidence in the present case, given the timing of the robbery from **PW2** is despite, the challenge raised in respect of phone records Exhibit 6 – 8, strong enough to raise a presumption that the Appellant's receipt and possession of money, to which he had no claim, and transferred from **PW2's** phone in a robbery at night, demonstrates he was one of the robbers. This engages the doctrine of recent possession.

34. In the case of **Simon Kangethe -Vs- Republic [2014] eKLR** the Court of Appeal restated the applicable principles by stating:

> **"Section 111 of the Evidence Act provides that: existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him…**
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> **In Ogembo -Ver*sus*- *Republic, [2003]1 EA*, it was held that:**
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> **"For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen."**
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> **Recently, this Court in *Moses Maiku Wepukhulu & PAUL NAMBUYE NABWERA -Versus- Republic CR.A NO. 278 OF 2005* (Koome, Mwera & Otieno-Odek, JJ.A.) quoted with the approval what constitutes the doctrine of recent possession in the case of *Malingi -Versus- Republic, [1989] KLR 225*:**
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> **"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 has proved certain basic facts. That the item he has in his possession has been stolen; it has been stolen a short period prior to their 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; <u>that there are no co-existing circumstances which point to any other person as having been in possession of the items</u>." [Emphasis added]**
>
> **The doctrine is a rebuttable presumption of fact. Accordingly, 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 or was a guilty receiver."**

35. The Appellant is not required to prove his innocence once the presumption is raised but a reasonable explanation. As was aptly stated in

the case of ***Hassan -Vs- Republic, (2005) 2 KLR 151*****:**

> **"Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver."**

36. The Appellant's explanation to the trial court defies belief – people do not just receive money for no apparent cause or purpose, unless by error of the sender, in this case not pleaded. Neither do they proceed to withdraw it and use such money for their own purposes as its their own, unless they are thieves. The Appellant's explanation is not plausible.

37. I agree with conclusion of the trial court that the Appellant likely sent the money to himself. The circumstantial evidence is overwhelming. The Appellant was properly convicted. This appeal has no merit and is dismissed accordingly.

Delivered and signed at Naivasha, this 22nd day of September, 2017.

In the presence of:

Mr. Koima for the DPP

N/A for the Appellant

C/C - Barasa

Appellant – present

C. MEOLI

JUDGE