



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 100 OF 2014**  
**BETWEEN**  
**DANIEL AMBEYI MALIKA .....APPELLANT**  
**AND**  
**REPUBLIC.....RESPONDENT**

**(Being an appeal from Original conviction and sentence dated 18<sup>th</sup> July, 2014 by Hon. E. S Olwande, AG Principal Magistrate in Butere PMC Criminal Case No. 97 of 2014)**

**J U D G M E N T**

**Introduction**

1. The appellant herein was arraigned before the Principal Magistrate's Court at Butere charged with the offence of robbery contrary to Section 295 as read with Section 296(1) of the Penal Code, the particulars being that on the 10<sup>th</sup> day of March, 2014 at Ebukhamali Village Shivotsa Sub-Location in Butere District within Kakamega County robbed MILLICENT AKOTH of mobile phone make forme valued at Kshs.2,500/= and during the time of such robbery threatened to use actual violence against the said MILLICENT AKOTH.

2. In the alternative, the appellant was charged with handling stolen goods contrary to Section 322(1) of the Penal Code, the particulars thereof being that on the 11<sup>th</sup> day of March, 2014 at Ebukhamari Village Shivotsa sub-location, Butere District within Kakamega County otherwise in the course of stealing dishonestly retained one mobile phone make forme valued at kshs.2500/- knowing or having reasons to believe them to be stolen goods the property of Millicent Akoth.

3. The appellant denied the charges and the case went to trial during which the prosecution called 5 witnesses. At the close of the prosecution case, the appellant was placed on his defence. He elected to give sworn testimony and denied committing the offence. He did not call any witnesses.

**Judgment of the learned trial Magistrate**

4. At the conclusion of the hearing and upon careful consideration of the evidence on record, the learned trial magistrate was satisfied that the appellant was seen and properly identified at the scene during the robbery and that later he was found in possession of the complainant's phone which was stolen during the robbery. The appellant was accordingly found guilty and convicted on the principal charge and sentenced

to imprisonment for seven (7) years.

### **The Appeal.**

5. Being dissatisfied with both conviction and sentence, the appellant filed his petition of appeal, seeking to have the conviction quashed and sentence set aside on grounds that he did not plead guilty to the charge and that the sentence imposed upon him by the learned trial court was harsh and excessive in the circumstances particularly considering the fact that he was first offender.

### **The duty of this Court**

6. As a first appellate court this court is under a duty to reconsider and evaluate the entire evidence afresh with the view of reaching its own conclusions in the matter, only remembering however that it has no opportunity of seeing and hearing the witnesses who testified before the trial court. In the case of *Pandya – vs - R*[1957] I EA 336(CAD) the first appellate court was faulted for not having “treated the evidence as a whole to that fresh and exhaustive scrutiny, and as a result of its error, affirmed a conviction resting on evidence which had it been duly reviewed must have been seen to be so defective as to render the conviction unsafe.”

7. It is therefore imperative from the above holding that as a first appellate court I must carefully reconsider and evaluate the whole of the evidence in this case, with the aim of satisfying myself that the findings of the learned trial Magistrate are well founded, and until that is done, it is not possible either to confirm or reverse the findings of the learned trial Magistrate.

8. I now proceed to set out and reconsider and evaluate a fresh the evidence on record.

### **The Prosecution Case**

9. From the evidence of the 5 prosecution witnesses, the prosecution case is as follows;- On 4<sup>th</sup> March, 2014 at about 4:40am Millicent Akoth who testified as PW1 (Millicent) was asleep in their house. In the same house was Millicent’s sister Agnes Mapesa (Agnes) who testified as PW2. At the material time, Agnes woke up from her sleep when she needed to go out and answer a call of nature. On waking up, and to her surprise, Agnes found the tin lamp burning. This surprised her because she remembered that the lamp had been put off before she and Millicent retired to bed. When Agnes sought to know from Millicent who had lit the tin lamp, Millicent stated that she was not the one.

10. Just then, Agnes saw the appellant kneeling beside her bed. When Agnes spoke to Millicent, the appellant got up and put off the tin lamp where upon Millicent took her phone and switched on the phone’s torch. The appellant immediately got hold of Millicent’s neck and demanded to be given the phone. The appellant managed to wrestle the phone from Millicent and ran out of the house. Millicent ran after the appellant as she screamed. Millicent could not tell the identity of the assailant.

11. After the assailant disappeared, Millicent’s brother Amos Mukolwe Amunga (Amos) PW3 who had heard his sister’s screams went to where both Millicent and Agnes were and on arrival at the room where Millicent and Agnes used to sleep, he was informed that a young man had entered the house and stolen Millicent’s phone. Though Millicent did not know the assailant Agnes told Amos that the person who had entered the room was known as Ambayi, the appellant. Agnes described the assailant’s clothing thus:- “.....the man was short and was wearing jeans and a T- Shirt that had white, blue and grey stripes across.” The court noted during the trial that those were the same clothes the appellant was wearing during the trial.

12. Thereafter Amos went and reported the matter to the police after he had recovered a hoe in the room. It appeared that the assailant had used the hoe to gain access to the room.

13. The report to the police was received by number 53012 Police Constable Jackson Wanyama (PC Wanyama), PW5. After booking the report, PC Wanyama interrogated Millicent, Agnes before recording

their statements. After investigations, PC Wanyama arrested the appellant on 11<sup>th</sup> March, 2014. Upon arrest, the appellant was escorted to his house for a search, which led to the recovery of Millicent's phone hidden in a white socks. The suitcase in which the white sock was found holding Millicent's phone were all produced as PExhibits 1,2 and 3 respectively, the appellant was subsequently charged and arraigned before Court.

### **The Defence Case**

14. The appellant gave unsworn evidence in which he narrated how on 11<sup>th</sup> March, 2014, he was arrested while he made his way to work. He was locked up in cells at Butere police Station where his fingerprints were taken. The appellant did not make any response to the allegations made against him. The appellant did not call any witnesses.

### **Issues for Determination.**

15. The appellant relied on his written submissions and urged the court to reduce the sentence imposed upon him. Just like his grounds of appeal. The appellant's submissions centered on his sentence only.

16. In response, Mr. Juma Ochieng, learned prosecution counsel urged the court to find and to hold that one, the prosecution proved its case against the appellant beyond any reasonable doubt, and two that the sentence imposed upon the appellant was below the minimum sentence of 14 years. Counsel urged this court to find and to hold that the 7 years imprisonment imposed upon the appellant was reasonable.

### **Analysis and Determination**

17. From an analysis of the evidence on record, the issue that arises for determination is whether the doctrine of recent possession applied by the learned trial court in this case was properly applied. the court have held and stated very clearly that for the doctrine of recent possession to apply, the prosecution must prove that;-

- the stolen property was found with the suspect
- the property was properly identified by the complainant
- the property was recently stolen from the complainant

18. In the instant case, the prosecution proved beyond doubt that Millicent's phone was found with the appellant. That Millicent property identified the phone which had been recently stolen from her. There is therefore no doubt in the mind of this court that the doctrine of recent possession was properly applied by the learned trial court. In my considered view therefore, the appellant's conviction was both safe and sound.

19. With regard to the sentence, and whether this court should interfere with the same, the appellant principles are clear that an appellate court can only interfere with the discretion of a trial court if it becomes clear to the appellate court that the sentence is manifestly excessive or is the wrong sentence or that the learned trial court applied the wrong principles. In the case of *Kizito – vs – Uganda* [2002]2EA 424(SCU), it was held, with alia, that “in exercising its jurisdiction to review sentences, an appellate court does alter a sentence on the mere ground that if the members of the appellate court had been trying the appellant. they might have passed a somewhat different sentence, and that an appellate court will not ordinarily interfere with the discretion exercised by the trial judge unless it is evident that the judge has acted upon some wrong principle or overlooked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case.” Also see **Ogalo – vs – Republic [1954] 24 EACA 270 and James – vs- Republic [1950]18 EACA 147.**

20. In the instant case, the learned trial court imposed, a sentence that was less than the minimum, but since the learned prosecutor did not apply for enhancement of the same. I find no reason to warrant interference with same.

**Conclusion**

21. Having made the above findings. I am satisfied that the findings of the learned trial Magistrate were sound and that the sentence of 7 years imprisonment was neither excessive in the circumstances nor based on wrong principles.

22. In the result, the appellant's appeal on both conviction and sentence lacks merit. It is accordingly dismissed in its entirety. The appellant has a right of appeal to the Court of Appeal within 14 days from the date of this judgment.

It is so ordered

Judgment delivered, dated and signed in open court at Kakamega this 20<sup>th</sup> day of September, 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

.....Present in person.....for Appellant

.....Mr. Juma Ochieng.....for Respondent

.....Polycap.....Court Assistant