REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CR.A. No.80 OF 2014

HUDSON MWEREMI ……APPELLANT

AND

REPUBLIC……RESPONDENT

(Being an appeal arising from the judgment of the Chief Magistrate Hon. S.M. Shitubi at Kakamega dated 03/07/2014 in Kakamega CMC Criminal Case No.85 of 2013)

J U D G M E N T

Introduction

1. The appellant herein Hudson Mweremi was arraigned before the Chief Magistrate's Court here at Kakamega in Criminal Case Number 85 of 2013 on one count of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the night of the 1st day of June 2012 at Mwaka village, Ilesi location in Kakamega East District within Western province, jointly with others not before Court while armed with crude weapons namely pangas, iron bars and sticks robbed BENARD MALESI of a motor vehicle, Toyota Premio Registration Number KAR 002A valued at kshs.400,000/=, a mobile phone make Nokia 2220 IMEI 355371044853618 valued at kshs.5000/=, six pairs of shoes, two laptops make HP, a DVD player make Sanyo, three shirts, cooking fat, 1kg of Omo all valued at kshs.650,000/= and immediately before the time of such robbery threatened to use actual violence to the said BENARD MALESI.

2. The appellant appeared for plea on 11/01/2013 and pleaded not guilty to the charge. However, after a full trial during which the Prosecution called six (6) witnesses, the trial Court found the appellant guilty as charged, convicted him and sentenced him to suffer death as by law prescribed. The appellant was informed of his right of appeal which he duly exercised hence this appeal.

The Appeal

3. The appellant being aggrieved by both conviction and sentence petitioned this Honourable Court against the whole of the trial Court judgment on the following grounds:-

1. The trial Magistrate erred in law in finding that there was corroboration of the evidence of the complainant.
2. The learned trial Magistrate misapprehended the legal meaning of corroboration.
3. The trial Magistrate failed to analyze and evaluate the whole evidence on record hence arriving at a wrong decision.
4. There was no evidence linking the appellant with the offence.
5. The trial Magistrate shifted the burden of proof.

The appellant's plea to this Court is that his appeal be allowed, conviction quashed and sentence set aside so that he may be set at liberty.

4. This is a first appeal and in this regard this Court is expected to rehear the appellant's case by reconsidering and evaluating the evidence afresh with a view to reaching its own conclusions in the matter. As was held in the case of **Mwangi –vs- Republic [2004] 2KLR 28**, "it is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses." A similar position was held in the earlier case of **Ngui –vs- Republic [1984] KLR 729** when the Court of Appeal expressed itself thus: "the first appellate Court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice. It is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial Court's findings and conclusions."

5. In the case of **Patrick & another –vs- Republic [2005] 2KLR 162**, the Court of appeal again highlighted the duty of a first appellate Court in the following words: "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusion." And in the case of **Koech & another –vs- Republic [2004] 2KLR 322**, the High Court as the first appellate Court persuasively stated that, "As this was a first appeal the High Court was mandated to look at the evidence adduced before the trial Court afresh, re-evaluate it and re-assess it and reach its own independent decision on whether or not to uphold the conviction of the appellants. The Court had to bear in mind the fact that it did not see the witnesses as they testified and therefore it could not be expected to make any findings as to the demeanor of the witnesses. The Court is further mandated to consider the grounds of appeal put forward by the appellant."

6. As the first appellate Court in this matter, we fully appreciate our duty and the limitations imposed upon us by the fact that we neither saw nor heard the witnesses who narrated the Prosecution case to the trial Court. That means that we shall exercise great circumspection as we consider whether or not to overturn the judgment of the learned trial Court. We now proceed to set out the evidence on record.

The Prosecution Case

7. At about 1.30a.m. on the night of 01/06/2012 at Muraka village both Benard Malesi (PW1) and Nahashon Gulenywa (PW4) were asleep in different houses in the home of Benard Malesi (Benard) when a gang of people armed with pangas, rungus and iron bars attacked them by breaking into their houses. The robbers first broke down the door to the house where PW4 (Nahashon) was sleeping alone and entered the room. On waking up, Nahashon was ordered to get under the bed as the people also asked him how much money he had. Though he told them he had no money, the robbers robbed him of kshs.100/= the only money he had on him. The robbers also took his Nokia phone which was produced in Court as PExhibit 3. The people shone their bright torches at Nahashon and when he tried to look at them closely, he was beaten with pangas and canes. The robbers also took Nahashon's copy of his identity card, his voter's card and his mothers identity card. Nahashon was also injured on the pointing finger and lost a nail.

8. As the robbers hit the door to Nahashon's house, Benard who was in his bedroom with his 4 year old child heard the noise and woke up. He did not wait to be found in the bedroom so he sneaked out of the house through a side door and entered the boot of his car registration number KAR 002A and hid there until the robbers entered the garage and forced him out of the boot to help them start the car which they could not start. When he told them that the car had a mechanical problem, they pushed him back into the car boot and pushed the car until the engine started. They then drove with him in the boot until the bumps at Masinde Muliro University within Kakamega town. At the bumps, Benard risked everything and

jumped out of the boot. He got injured but never went to hospital for treatment. Before the robbers drove off from Benard's home, they had taken Benard's and Nahashon's Nokia Phones plus the other items enumerated in the charge sheet. Neither Benard nor Nahashon could identify any of the robbers but they were able to identify the stolen phones which they were shown at the Police Station.

9. PW2, Mary Kavigi Manani told the Court that she was a business lady at Mudete market and that in June 2012 when she went to Sabatia Eye Hospital she met Judith Monyani, PW3 who worked at the Sabatia Eye Hospital as a cateress. PW3 (Judith) asked PW2 (Mary) whether she, Mary, could find a second hand phone for her. They made a deal in which Mary would supply a phone to Judith at kshs.1000/=. Judith paid the agreed sum of kshs.1000/= to Mary on a date in June 2012 and Mary was able to obtain a phone from Khagi (who was identified in Court as the appellant). Some months after Mary delivered the phone to Judith, Judith telephoned Mary to find out from whom Mary had obtained the phone. Later Mary identified the appellant to the Police who arrested him and charged him with the present offence. Mary also told the Court that the appellant threatened her with dire consequences for reporting him to the Police. Mary also stated that she gave out the kshs.1000/= as follows:- to the appellant – kshs.600/= and kshs.400/= to another boy who had been sent to her by the appellant.

10. Judith stated that after she received the phone from Mary, she used it for about six (6) months before the Police traced her in connection with the loss of the phone during the robbery at Benard's home on the night of 01/06/2012. The phone in question was GTC 30105 make Samsung IEMEI 353376036922620.

11. PW5 was Stanford Mutema, Bandi a driver at the Provincial Commissioner's office in Kakamega. He recalled that on 02/01/2013 at about 12 noon, the Police called him in connection with a mobile phone he had. When PW5 eventually met with the Police, they went with him to Judith who had given him the phone after she had bought the phone from Mary.

12. The Investigating officer Number 66661 Police Constable David Kurgat testified as PW6. He told the Court that at about 7.00a.m. on 01/06/2012 he was instructed by the DCIO of Kakamega Mr. Wambugu to go to Benard's home for investigations after the robbery had taken place there during the wee hours of that day. He testified that at the scene, he established that the thugs had gained entry into Benard's house by cutting the window grills. PW6 in the company of other officers also went to the scene where Benard's motor vehicle was found abandoned within Shinyalu area. PW6 also recovered the phone which was in the possession of PW5. pw6 also stated that he had made an inventory of all the items that were recovered after the robbery. The recovered items were all produced as exhibits in the case. The phone recovered from Judith was produced as PExhibit 3. The box for that phone as PExhibit 2, the box for Nokia 2220 as PExhibit 1, the Samsung phone as PExhibit 6 and the motor vehicle as PExhibit 7.

The Defence Case

13. At the close of the Prosecution case, the appellant was put on his defence after the trial Court ruled that the Prosecution had established a prima facie case requiring the appellant to be put on his defence. The appellant elected to give sworn evidence and called no witnesses.

14. Briefly, the appellant testified that he was 32 years old and was a businessman at Mudete market. He stated further that on 01/06/2012, he was asleep at his Mudete home and only woke up at 3.00am for purposes of making mandazi deliveries. Then on 10/01/2013 Police officers from Kakamega Police Station went to his work place and informed him that he was under arrest. The appellant denied that he committed the offence. He also denied selling any phone to Judith through Mary. He also testified that none of the stolen items were recovered from him. it was thus the appellant's contention that the case against him was made up especially by Mary who he said had a grudge with him.

Issues for Determination

15. After considering and evaluating the evidence afresh, we find that the case against the appellant is premised on the doctrine of recent possession and we are under a duty to establish whether from all the surrounding circumstances, the trial Court was right in basing her conviction of the appellant on the fact

that he sold a phone to Judith through Mary. Evidence of recent possession is circumstantial evidence and therefore the principles of circumstantial evidence is what we shall apply in this case.

16. In the case of **Ndurya –vs- Republic [2008] KLR 135**, the Court of Appeal held, inter alia that "circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination is capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary before drawing the inference of the accused person's guilt from circumstantial evidence to be sure that there were no other co-existing circumstances which would weaken or destroy the inference." In other words, the circumstantial evidence must dislodge a lingering possibility that the offence may have been committed by a person other than the appellant. In **Mwathi –vs- Republic [2008] KLR 135**, it was held that "in the absence of eye witnesses the Court must consider whether or not the inclupatory facts put forward by the Prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other hypothesis than that inference of guilt." Also see **Rex –vs- Kipkering Arap Koske 16 EACA 135** and **Teper –vs- R [1952] AC 480.**

17. It therefore follows that in dealing with and before accepting circumstantial evidence, the chain upon which the guilt of the appellant is premised must never be broken. It is also to be emphasized that the burden of proving the unbroken chain always remains on the Prosecution and never shifts to the defence. In other words, the Prosecution is always under a duty to prove that:-

i) the circumstances from which an inference of guilt is sought to be drawn are cogently and firmly established;

ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and

iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else." See the case of **Solomon Karimi –vs- Republic [2014] e KLR** for the above propositions.

Analysis and Findings

18. The complainant Benard and his workman, Nahashon were attacked by a group of people at about 1.30 am on the night of 01/06/2012. Because of the conditions during the robbery and the manner in which the gangsters treated and handled their victims neither Benard nor Nahashon recognized any of the assailants.

19. During the robbery a motor vehicle make Toyota Premio registration number KAR 002A valued at kshs.400,000/= was stolen and later found abandoned in Shinyalu area. Other items stolen were a mobile phone Nokia 2220 IMEI; 355371044853618 valued at kshs.5000/-, six pairs of shoes two laptops make HP, a DVD player make Sanyo, three shirts, cooking fat 1kg of Omo all valued at kshs.650,000/=. The phone Nokia S/No.358253042856206 – PExhibit 3 was recovered. According to Mary, on some date in June 2012, Judith asked her to find a phone for her. On that same day Mary told Judith that the appellant who operated from Mudete market and whom Mary knew very well, could get a phone for Judith. According to Mary the appellant was her former employee at her hotel at Mudete and she even knew his home and assured Judith that the appellant could be trusted to avail a phone for sale to Judith. On the same day in the month of June 2012, the appellant availed a phone to Mary and on that same day Judith was notified of the availability of the phone, saw it liked it and bought it.

20. Judith told the Court that sometime in June 2012 she bought a phone PExhibit 3 for kshs.1000/= from Mary but after six months, Judith was informed that the phone she had bought from Mary, whom we note was an agent of the appellant was a stolen phone. The very phone, PExhibit 3 was found in the possession of PW5 who is the husband to Judith and to whom Judith had given the phone.

21. It is our considered view that from the available evidence the phone which the appellant sold to Mary in the month of June 2012 was one of the items stolen from Benard during the robbery on the night of 01/06/2012. We are therefore satisfied that the appellant was either the robber or one of the robbers who attacked Benard on the fateful night of 01/06/2012. In his defence, the appellant stated during cross examination that Mary framed him because of an unnamed grudge she had against him. We humbly think that the appellant's contention that Mary had a grudge against him was a mere afterthought devoid of any basis. We are also satisfied that though the phone was recovered some six months later it had been handled by the appellant within days of the robbery in which the phone was stolen. In fact, we also find that the phone was found in the possession of a person who was directly linked to Judith who bought the phone from Mary within a day after the appellant had given the phone to Mary to sell to Judith.

22. In view of the above, we have reached the irresistible conclusion that it is the appellant and no one else who, in the month of June 2012 had in his possession the phone which had been stolen from the complainant, Benard.

23. We are also satisfied that the offence of robbery with violence was proved by the Prosecution because the robbers were more than two according to both Benard and Nahashon; they were armed with pangas, iron rods and other crude weapons when they robbed Benard and thirdly Nahashon was slapped with pangas when he tried to look at the robbers in the eye.

24. In view of the above, we find and hold that the appellant's grounds of appeal have no merit. As far as first ground of appeal is concerned the evidence is clear that the appellant acted through Mary to sell the phone which had been stolen from the complainant during the robbery. Ground 2 of the appeal also fails because we are satisfied that Mary, Judith PW5 and PW6 also confirmed that the phone which the appellant passed on for sale to Judith through Mary was stolen from the complainant during the robbery.

25. As regards ground 3 of the appeal we are satisfied that the learned trial Magistrate properly analyzed the evidence before reaching her conclusions in the matter. On page 27 of the proceedings, the learned trial Magistrate stated:

> "After a careful analysis of all evidence adduced it comes out clearly that-
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> Indeed on that night the complainant was attacked by a gang of robbers who entered his house, switched off lights, took away the things on the charge sheet and drove away with him in his car boot. He only managed to escape by jumping off at the bumps whereby he sustained injuries. He did not go for treatment though."

26. After the above remarks the trial Court proceeded to analyze the rest of the evidence and contended that the Prosecution had proved its case against the appellant beyond reasonable doubt based on the doctrine of recent possession. Ground 3 of the appeal therefore fails. Regarding ground 4 of the appeal, the evidence of the appellant having in his possession a recently stolen phone which he sold to Judith through Mary was sufficient evidence linking the appellant to the commission of the robbery since he was deemed to be the thief or the robber. In our considered view, ground 5 of the appeal has no merit as the entire record does not show that the learned trial Magistrate shifted the burden of proof from the Prosecution to the appellant.

Conclusion

27. For the above reasons, we find that the appellant's appeal does not have merit and the same be and is hereby dismissed in its entirety. The appellant still has a right of appeal to the Court of appeal within 14 days from the date of this judgment.

28. It is so ordered.

Judgment delivered, dated and signed in open Court at Kakamega this 28th day of January 2016.

RUTH N. SITATI **NJOKI MWANGI**

J U D G E **J U D G E**

In the presence of:

Mr. Anziya for Appellant

Mr. Omwenga for Respondent

Mr. Anunda - Court Assistant