



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CRIMINAL APPEAL NO. 221 OF 2012

JOHN OYUGI MOMANYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence in Kisii SRM CR NO. 1623 of 2010) (Hon. K.T. Kimutai. SRM.)

JUDGMENT

1. **John Oyugi Momanyi** (herein, the appellant), together with three (3) others appeared before the Senior Resident Magistrate at Kisii charged with two counts of robbery with violence contrary to **Section 296(2)** of the penal code and in the alternative, handling stolen property contrary to **Section 322 (2)** of the penal code.

2. It was alleged that on the night of **19th September 2010**, at Ikuruma sub-location Ngenyi location Kisii county, the appellant and others while armed with dangerous weapons namely AK 47 rifles, robbed **Michael Nyakundi Onchonga** of one Nokia mobile phone 1800 valued at Kshs.4500/=, and unknown amount of money and immediately after such robbery shot dead the said **Michael Nyakundi Onchonga** (deceased). They also robbed **Sarah Motuka Nyakundi**, of one Nokia mobile phone 1100 valued Kshs.2500 and immediately before such robbery used actual violence on the said **Sarah Motuka Nyakundi**.

3. It was alternatively alleged that on the **28th September 2010**, at Kapkere within Kericho county, otherwise than in the course of stealing, the appellant dishonestly handed one Nokia mobile phone 1800 knowing or having reason to believe that it was stolen.

After a full trial, the appellant was convicted on two main counts of robbery with violence and sentenced to suffer death on both counts. The learned trial magistrate ordered that the sentences be executed concurrently instead of holding in abeyance the second death sentence respecting count two (see, **Boru & Another .vs. Republic {2005} KLR 649**).

4. Be that as it may, the appellant was aggrieved by the conviction and sentences. He therefore preferred the present appeal on the basis of the grounds contained in the petition of appeal filed herein on **26th September 2012**. Two of his co-accuseds were acquitted while one was convicted on the second alternative count of handling stolen property.

At the hearing of this appeal, the appellant appeared in person and presented written submissions in support of his grounds of appeal. He urged this court to allow the appeal and set him free.

5. The learned prosecution counsel, **Mr. Ochieng**, opposed the appeal on behalf of the state/respondent by submitting that the identification of the stolen phones was done in a proper manner and that the evidence in respect thereof was duly corroborated by that of pw1 and pw4 who had close contact with the phones. That, the phones were known and were identified by pw2. That, the appellant was found in possession of a stolen phone but did not give reasonable explanation of his possession thereof.

6. The learned prosecution counsel further submitted that the appellant's fingerprints were found at the scene of the crime by pw10, and pw8 alluded to a confession by the appellant after his arrest. That, the appellant did not offer any substantial defence other than merely denying the charge. That, the "alibi" defence was mentioned in passing and at a time which created no opportunity for the prosecution to carry all necessary investigation in respect thereof. The learned prosecution counsel urged this court to dismiss the appeal.

7. Upon due consideration of the rival submissions in the light of the grounds in support of and in opposition to the appeal, the duty of this court was to re-consider the evidence adduced at the trial court and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, the prosecution case was briefly that, on the material date at about 11.00p.m., the complainant, **Sarah Motuka Nyakundi Pw1**, was at home with her husband, **Michael Nyakundi** (now deceased), when they were attacked by a group of people armed with dangerous weapons including firearms who robbed them of their mobile phones and money and in the process assaulted and injured them. The complainant's husband suffered fatal injuries. Alarm was raised by the complainant after the offenders left the scene. Neighbours and others responded to the alarm and arrived at the scene.

8. **Josephat Omoi Mose (pw2)**, a herdsman cum cook employed by the deceased was at the servant quarters within the same compound. He was attracted by the sounds of breaking glass. He opened the door to his quarter and was immediately confronted by a person who reflected his torch on his (pw2's) face and ordered him back into the quarter with a warning not to make any noise. After a while he (pw2) heard the complainant (pw1) calling out for help. He proceeded into the main house and found the deceased on the floor of the bedroom. He saw a lot of blood on the floor and noted that the deceased was dead.

9. A son of the deceased, **Eliud Nyakundi (Pw3)**, was asleep at his home on the material night when he was informed on phone by a nephew in Nairobi that gangsters were at his parent's home. He reported the matter to the police at Nyamira and rushed to the scene only to find that his mother (pw1) had been injured and his father (deceased) shot dead and lying on his stomach on the floor. He took his mother to the hospital and was later on the **29th September 2010**, called by the police who showed him some mobile phones which he identified as belonging to his parents i.e two Nokia phones (p.ex1 & 2). His mother (pw1) also identified the phones and so did his sister, **Rose Kemunto Nyakundi (pw4)**.

10. One of the phones (p.ex1) was recovered by the police from **George Simbe** (the appellant's first co-accused) after they were led to his home by an assistant chief, **Philip Mong'are Nyamoko (pw5)**. George indicated that the phone had been obtained from his sister-in-law, **Susan Kerubo Ondieki** (the second co-accused). The fourth co-accused was **Alex Mokaya**, who was a motor cycle taxi (boda-boda) operator employed by **David Gikenyi Osoro (pw6)**, the owner of a motor cycle Registration No. KMCJ 585W (p.ex 7) which was handed over to the police by himself.

11. **I.P. Joseph Kyalo Mutungi (pw7)**, of Rioma Police Station was on the material night at his home when he received the necessary robbery report and proceeded to the scene at about 2.30a.m. He was accompanied by his colleagues and at the scene they found the body of the deceased lying on the floor with blood oozing from the chest. They secured the scene, and then removed the body of the deceased to a morgue. They also collected three (3) spent cartridges found at the scene and later handed over the matter to other officers for necessary investigations.

12. **Sgt. Adam Isaak [pw8]** was one of the initial investigations officer. He traced the phones stolen

from the complainant and her late husband with the help of information provided by telecom operators Safaricom and Zain (now Airtel) through **IP Momo Shamallah (pw13)** and **Weldon Siongok pw19**. He (pw8) acted on the information and proceeded to Kapkatet area in Kericho where one of the phones, a black Nokia, was recovered from the appellant after he was pointed out by the fourth co-accused (Alex). Both were arrested.

13. The appellant on being arrested indicated that the phone had been obtained from one "**Mwarabu**" who was never traced.

The second phone was traced to the first and second co-accused who were both arrested by **C.I.P. Ibrahim (pw9)**.

A fingerprints officer, **Julius Mutili Katua (pw10)**, examined the appellant's finger and palm prints and compared them with the prints lifted from the scene of crime and concluded that they were of the same person. He produced the necessary report (p.ex 15).

14. **CIP David Kibet (pw12)**, recorded a confession from the appellant but the same was found to be inadmissible after a trial within a trial.

Richard Nyakundi (pw14), an assistant chief, was on the material night at his home when he was called on phone by a neighbor and alerted about sounds of doors being broken emanating from the home of the deceased. He attempted to call the deceased on his phone but in vain. He then proceeded to the scene and found the body of the deceased on the floor with blood oozing from the chest region.

15. A daughter to the deceased, **Dorcas Kemunto Chenchu (pw15)**, identified the body of the deceased for purposes of a post mortem examination which was conducted by **Dr. Ezekiel Ogonda Zoga (pw17)**, who filled and signed the necessary post mortem form indicating that the cause of death was excessive bleeding and shattered heart due to gun shot wound.

Cpl. Morris Odawo (pw16), visited the scene of crime and took several photographs. He also lifted finger and palm prints found at the scene and took photographs of the body of the deceased at Hema Mortuary. He later prepared the necessary reports and produced them in court.

16. **Cpl. Lawrence Mwangela (pw18)**, was the key investigations officer. He visited the scene of the offence and obtained statements from the witnesses. He gathered that the appellant and two of his co-accused were linked to the offence by the recovery of the alleged stolen phones from them while one of the co-accused (Alex) was linked to the offence by a motorcycle allegedly under his control at the material time of the incident. He (pw18) charged the appellant and his co-accused on completion of the investigations.

17. The appellant's defence was a denial and a contention that he was charged together with strangers for an offence he knew nothing about. He said that he operated a "*changa*" (illicit liquor) den at Kericho and on the **29th September 2010** he was at the said place when police officers came calling and arrested him. He demanded to know the reason for the arrest but was informed that he would know "*ahead*." He was then taken to Kisii police station and later arraigned in court.

18. After consideration of the evidence in its totality, the learned trial magistrate concluded that the two counts of robbery with violence were proved against the appellant beyond any reasonable doubt. In so concluding, the learned trial magistrate relied heavily on evidence of recent possession by the appellant of a mobile phone allegedly stolen from the complainant and on finger prints evidence said to have been found at the scene of the offence.

19. In the opinion of this court, the entire evidence did not raise any dispute with regard to the commission of the two concurrent acts of robbery. Indeed, there was sufficient evidence from the complainant (pw1), the herds boy (pw2), the complainant's son (pw3) and other showing that the complainant, and her late husband were violently attacked by armed gangsters who ended up injuring the

complainant and killing her husband before fleeing from the scene with two mobile phones and unknown amount of money.

Suffice to hold that the necessary ingredients of the offence of robbery with violence contrary to **Section 296(2)** of the penal code were fully established by evidence from the prosecution.

20. The basic issue that presented itself for determination was whether the appellant was positively identified as having been among the group of people who committed the offence. His defence was a denial and an indication that he was arrested and charged without good cause. Nonetheless, there was no obligation on his part to prove his innocence

(see, **Mkendeshwa .vs. Republic {2002} 1 KLR 461**). The obligation to prove his guilt on the set standard lay with the prosecution.

21. Herein, there was no direct evidence against the appellant. None of the witnesses saw him at the scene committing the offence. Neither the complainant (pw1) nor her employee (pw2) both of whom were at the scene at the material time identified or recognized any of the offenders.

The complainant's son (pw3), I.P Joseph Mutungi (pw7), and the assistant chief (pw14) arrived at the scene after the offence had been committed and the offenders taken off.

22. In the absence of direct evidence, the prosecution put all the reliance on indirect or circumstantial evidence in an attempt to establish a link between the offence and the appellant. Such evidence was based on the doctrine of recent possession in relation to a mobile phone allegedly found in possession of the appellant a few days after it was stolen from the complainant. Further such evidence was in relation to finger prints evidence allegedly found at the scene of the offence and which implicated the appellant.

23. The principles upon which a court may convict a suspect on the basis of circumstantial evidence were set out in the old case of **Republic .vs. Kipkering Arap Koske & Another (1949) 16 EACA 135**. Thus, the inculcating facts would be incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

Circumstantial evidence can therefore be a basis of a conviction only if there are no other existing circumstances weakening the chain of circumstances relied upon.

24. In this case, it was alleged that the appellant was found in recent possession of a mobile phone belonging to and stolen from the complainant's late husband. The phone was recovered by **Sgt. Isaak (pw8)** at a place called Kapkatet in Kericho County while in the possession of the appellant who was traced with the help of his co-accused Alex. He (appellant) informed the police officer (pw8) that the phone had been obtained by him from one "Mwarabu".

25. The appellant thus threw the buck at the said "Mwarabu" who was never located and/or traced by the police thereby throwing the appellant's explanation of his possession thereof into disarray but nonetheless valid as it was not established that the said "Mwarabu" was a phantom.

In **Isaac Nanga Kahing'a alias Peter Kahig'a vs Republic Criminal Appeal No. 272 of 2005**, the Court of Appeal stated with regard to the doctrine of recent possession that:-

"It is Trite Law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof that, the property was found with the suspect and secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant....."

26. Herein, it was clearly evident that the material phone was found in possession of the appellant and recovered from him. However as to whether it was positively identified as belonging to the

complainant's late husband and thus stolen from him, the evidence was not credible and cogent in the absence of the necessary purchase receipt or any other document establishing ownership. It was not sufficient for the complainant (pw1), her son (pw3) and her daughter (pw4) to merely state that they knew the phone and that it had a cello tape at the back.

27. Consequently, the failure by the prosecution to establish ownership of the phone by the deceased meant that the doctrine of recent possession could not be applied adversely against the appellant in order to link him to the offence. In any event, his explanation that he obtained the phone from one "*Mwarabu*" assuming that it was stolen from the deceased was not disproved by the prosecution. Suffice to say that **Sgt. Isaak (pw8)**, never bothered to trace the said "*Mwarabu*" and was contended when he found the appellant with the phone.

The trial court therefore erred in convicting the appellant on circumstantial evidence based on the doctrine of recent possession especially when it was quite obvious that the manner of the recovery of the box in which the phone allegedly came with was suspect. The box allegedly contained the phone's identification reference i.e. IMEI number.

28. The recovery of that box was just as important as the recovery of the phone but it was not herein established by cogent evidence. There was no certainty as to where the box came from and why it was tied up to this matter. It would have been a different story if a purchase receipt containing the material IMEI number was tendered in evidence to establish ownership.

Clearly, the doctrine of recent possession could not apply in this case to found a conviction.

29. With regard to the finger prints evidence, the same was admissible under **Section 48** of the Evidence Act which provides for the opinion of experts in that when the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons especially skilled in such foreign law, science or art, or in questions as to identify or genuineness of handwriting or finger or other impressions.

30. Herein, the process of lifting and forwarding to the finger prints expert the finger and palm prints found at the scene of the offence was done by **Cpl. Odawo (pw16)**. The necessary analysis was done by a gazetted finger print expert, **Julius Katua (pw10)**.

Cpl. Odawo (pw16) indicated that the finger prints and palm prints were lifted from various locations in the house of the deceased. He forwarded the lifts to the expert (pw10) who separated those suitable for analysis and those unsuitable.

31. Lifts No. 1,2,3,4 & 5 were found to be suitable. According to **Cpl. Odawo (pw16)**, lifts No. 1&2 were palm prints and were found on the outer part of the door of the deceased's house while lifts No.3 & 4, also palm prints, were found on the window pane of the deceased's house. Lifts No.5 were finger prints found on the door of the deceased's bedroom. These were analyzed by the expert (pw10) in comparison with the finger and palm prints impressions obtained from the appellant and found to be similar thereby raising a strong inference that more likely than not the appellant was at the scene of the offence on the material night and not being a relative of the complainant or a regular visitor at the complainant's house he must have been there as one of those who committed the offences of robbery with violence. He never even attempted to give an explanation as to why his finger prints were at the complainant's homestead.

32. His contention that the failure by the police to forward finger and palm prints impression of his co-accused for necessary analysis was proof that he was maliciously implicated was farfetched and was in any event disproved by the very strong forensic evidence adduced against him.

Therefore, in so far as his conviction was based on that forensic evidence, this court has no reason to fault the learned trial magistrate in that regard.

Ultimately, the conviction was proper and lawful.

33. With regard to the sentence, it was proper and lawful even though the learned trial magistrate ought to have ordered that the sentence on the second count be held in abeyance.

In the end result, this appeal is dismissed but the death sentence in respect of the second count shall be held in abeyance.

Ordered accordingly.

J.R. KARANJAH

JUDGE

[Delivered and signed this 24th day of February 2016.]