



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 92 OF 2014

JOSEPH KIMWILU KIEMA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(From the conviction and sentence in Mwingi Criminal Case No. 199 of 2014 – H.M. Nyberi Ag. SPM)

JUDGMENT

The appellant was charged in the subordinate court with robbery contrary to Section 296(1) of the Penal Code. The particulars of the offence were that on the 25th March 2014 at Mutiathau Village Ukasi Sublocation Ukasi Location in Mwingi East District of Kitui County robbed Kutana Musilu several of items listed at the back of the charge sheet and at or immediately before or immediately after such robbery threatened to use actual violence to the said Kutana Musilu. He denied the charge. After a full trial he was convicted of the offence and sentenced to serve 7 years imprisonment.

Aggrieved by the decision of the trial court, the appellant filed this whose grounds of appeal are:-

1. That the magistrate erred in law and fact by admitting prosecution evidence which was contradictory thus violating the Provisions of Section 163 of the Evidence Act Cap 80 Laws of Kenya.
2. The learned trial magistrate erred in law and fact by convicting and sentencing him without considering that the prosecution did not put him in an identification parade to be identified by the complainant.
3. The learned magistrate erred in law and fact when he convicted and sentenced him when the prosecution relied on second and third person's evidence to conclude the matter.
4. The learned trial magistrate erred in law and fact for convicting and sentencing him very severely without considering that the crime had no exhibit as required by the law.
5. The learned trial magistrate erred in law and facts for convicting and sentencing him without considering that the sim card produced as exhibit was not recovered from him but was produced by one of the prosecution witnesses.
6. The learned trial magistrate erred in law and fact by convicting and sentencing him very severely without considering that he was a first offender and that the honourable court should have shown leniency.
7. The trial magistrate erred both in law and fact by convicting and sentencing him without considering his defence.

On the 11th of August 2015, the appellant filed a document which he said was a petition and grounds of appeal. However what is contained therein appears to be written submissions. I have considered the contents therein.

At the hearing of the appeal, the appellant also made oral submissions. He stated that on 27th March 2014 while at home at 8.00 Pm, he saw Muliso and John Ngundu who asked if he was Kimwilu. When he said he was the one, they ordered him to go to the police station and see an arrested person. They then locked him in a house for two days and thereafter took him to the police station. He submitted that the two did not show him the person whom they alleged had been arrested earlier, but instead alleged that he had stolen and that they had been given such information by Musyoka Kithuku.

He submitted also that on 31st March 2014 he was taken to court and the complainant said that he did not know him but that Musyoka Kithuku pointed at him as a result of which the area chief said that he was a criminal but did not come to court to testify. He submitted that he did not steal and he was thus wrongly convicted.

Learned Prosecuting counsel Mr. Wanyonyi, submitted that the appellant was charged with robbery and denied the charge before the trial court. The prosecution called several witnesses and the appellant gave his unsworn defence.

According to counsel, the court considered the issues and found that the prosecution had proved its case against the appellant to the required standard. Counsel submitted that the court considered the appellants mitigation before sentencing.

Counsel submitted further that the complainant PW1 gave a clear account of what happened and that she informed members of the public about the description of the culprit, including PW2 who was a member of the public and participated in the search for the robbed items. In addition PW3, the husband of the complainant joined the search and the appellant was arrested. Counsel submitted that on arrest the appellant admitted selling the mobile phone of the complainant (PW1) and retaining the telephone line. The appellant also took the police to the person to whom he had sold the mobile telephone for Kshs 500/=. Counsel submitted that all this evidence of the prosecution was not challenged in the cross examination.

Counsel submitted also that the description given of the appellant was fitting. In addition, PW6 confirmed that the appellant was his grandson and was present during his arrest. Counsel submitted that the prosecution evidence did not have any contradictions.

On Musilu not being called as a witness, counsel submitted that Musilu did not proceed with the others to the place of the appellant arrest. The Chief was also not present during arrest. Counsel submitted that from the evidence on record, the appellant was not arrested at his house but at the house of his grandmother. Counsel urged this court to dismiss the appeal.

In response to the prosecuting counsel submissions, the appellant maintained that he was not arrested at his grandmother's house. He stated that he was not found in possession of a sim card. According to him, he saw the sim card for the time first at the police station. He stated that Musilu told him at the police station that he wanted to frame him for rape.

During the trial the prosecution called 6 witnesses. PW1 was the complainant Kuutana Musilu of Mwingi East District. It was her evidence that on 25th March 2014 at 8.45 am as she walked alone towards Ukasi market, she suddenly heard the sound of someone walking behind her. She turned and saw a tall dark bearded man wearing a dark Tshirt 5 metres behind her. As she walked, suddenly the man held her by the neck from behind, told her to keep quiet and dragged her into the bush for about 20 metres. Shortly, she heard the sound of a motor cycle passing and tried to scream, however the man slapped her three times and ordered her to keep quiet. He then grabbed her handbag containing her Identification Card, Kshs 10,000/- and an ATM Card from Equity Bank, and an ATM from Cooperative Bank as well as a mobile phone 1280 which had a line 0711234451 and took them away.

The complainant then proceeded to Ukasi and, on the way, met Syombua Muthangia and explained to her what had happened. Both went to Muthiathau and met Job Ngundu Musomba and other people and explained to them what happened. The complainant and Syombua then proceeded to the scene with about

8 people who tried to trace the culprit. At about 10.00 am some of the people came to the complainant with her Identification Card and two ATM Cards and a handbag but the purse and money were missing. The complainant then reported the incident to Ukasi Police station who issued her a document for treatment at Ukasi dispensary.

It was her evidence that on 26th March 2014 her purse was brought to her by Job Ngundu who said that they found it in the bush. On 27th March 2014 the husband of the complainant Musili Syengo came from Garissa and together with Job Ngundu and together with other members of the public looked for the suspect and arrested him. The complainant later found the suspect having been tied with a rope and she confirmed that he was the culprit.

She testified that when the suspect was interrogated by the members of public, he admitted committing the offence. She stated that those who arrested suspect said they found him with a sim card which she was shown at the police station. She inserted it in the phone of her husband and activated it using Pin No. 1920 and it started working.

A day afterwards, a police officer called and said that the mobile phone had also been recovered from the person who had bought it. She stated that she bought the mobile phone at Garissa for Kshs 1,600/-. She identified the handbag, the purse, National Identification Card, Cooperative Bank and Equity Bank ATM cards bearing her names, and the phone sim card. She also identified the mobile phone through the receipts for its purchase. She stated that though the suspect had beards during the incident, during the trial he had shaved his beards.

In cross examination, she stated that she was alone during the robbery incident and that she did not know the appellant before. She said she found the sim card at the police station.

PW2 was Job Masomba Ngundu a farmer. It was his evidence that on 25th March 2014 at 9.00 am while at Mutiathau market he saw a woman Katona Musilu approaching while crying. The woman was accompanied by another woman Syombu. The crying woman claimed to have been robbed off her handbag 1 Km from the market and said the handbag contained Kshs 10,000/-, a mobile phone, and bank documents. The woman described the culprit as a tall black man with beards and said that she was able to identify him if she saw him again.

The complainant then led 8 people including this witness, to the scene. Some of the people were Musee Muthangia and Mwathia Musyoka. According to this witness, the scene of crime was about 30 Metre from the road and appeared to be disturbed.

They followed shoe marks for about 100 metre and found a handbag with the complainant's bank documents. They then advised the complainant to report the incident at Ukasi Police Station. They then followed the shoe marks further for about 1 Km and found Musyoka Ithuku and explained to him that they were following shoe marks of a suspect. The said Musyoka Ithuku told them that he had seen Kimwulu Kiema Alias Kithuia pass there. They followed the shoe mark but lost them and returned to Ukasi market. On the following day at 1.00 Pm, he revisited the scene of crime and continued tracking the shoe mark when he came across an empty wallet which he took to the complainant.

It was his further evidence that on 27th March 2014, while in the company of the complainant's husband together with Baru Kimanzi, they visited the office of the Ass. Chief Yatwa Sublocation, and gave him the name of the suspect. The Assistant Chief said he knew him and that there were several cases reported against him.

The Assistant. Chief then mobilized community the policing and the suspect was found at Ngangani at 8.00 Pm in a certain home. On interrogation the suspect admitted that he had stolen from the complainant who had a bag and that he had spent the money and stole the mobile phone but retained the telephone line. When the husband of the complainant activated the line, it responded. The suspect also said that he sold the phone. They then took the suspect to Ukasi police station and on 30th March 2014 the suspect led them with police officers and the husband of the complainant, to the home of the person from whom the

telephone was recovered. He identified the suspect as the appellant and said that he had shaved the hair and beards. He did not know the appellant before. He identified black handbag with brown stripes, a black purse and ATM cards. He stated that the suspect removed a wallet from which the sim card was retrieved. He identified the said brown wallet in court.

In cross examination he stated that they arrested the appellant from the home of Mutua Ngundu. He denied detaining the appellant in his house for two days. He stated that the wallet contained Kshs 100/= and a sim card. He stated also that they handed over the wallet, money, and the sim card to the police.

PW3 was Stephen Musilu Syengo a mason at Garissa. He was the husband of the complainant.

It was his evidence that on 25th March 2014 at about 10.00 am while at Garissa, he received a phone call from his wife informing him that she had been robbed by a dark tall man with beards. She stated that she had been robbed of Kshs 10,000/=, a mobile phone and ATM cards. The complainant said that she had no prior knowledge of the man. He advised her to make a report at Ukasi market.

On the following day, he travelled home from Garissa and at 7.00 Pm one Musyoka Kituku called him on phone and informed him that on 25th March 2014 he met a dark tall man with beards whom he knew as Kimwilu Kiema. On the following day he called the Assistant Chief who confirmed that Kimwilu Kiema came from his area.

The following day he visited the Assistant Chief in his office who mobilized village vigilante and on 27th March 2014 they found the suspect near Mutwa Ngombe. Though the suspect tried to run away he was arrested. According to him, the suspect admitted that he attacked and robbed the complainant. The suspect also said that he sold the mobile phone to Ndila Mulambi but retained the sim card. When they activated the sim card it opened. They then took him to Cheramoko and when the complainant came she confirmed that he was the robber.

He testified also that on 30th March 2014, the suspect led the police to the home of Mulyungi Mulandi where he had sold the phone and the telephone was recovered and was taken away by the police. He stated that Mulandi said he bought at Kshs 500/= whereas the suspect said that he sold it for Kshs 400/- . According to him, the phone was found to be in working condition when the sim card was inserted. He stated that when he went back home, he found that the handbag and ATM cards had already been recovered. According to him, the purse was brought later. He identified the handbag, purse, mobile phone and receipts for the mobile phone which were produced as exhibits.

In cross examination, he stated that they arrested the appellant at around 10.00 Pm. He denied that they took him to Job Ngundu. He also denied that they removed a sim card from a wallet and put it in the appellant's wallet. He denied conspiring with Job Ngundu to frame the appellant.

In reexamination, he stated that they arrived at Cheremoko at about 4.00 am and that they did not pass at any homestead.

PW5 was Mulyungi Mulandi a farmer. It was his evidence that on 26th March 2014 at one Pm while at home, Joseph Kiema who is the appellant came and told him that he had a mobile phone for sale for Kshs 500/-. It was a Nokia phone. He gave the appellant Kshs 400/- and promised to pay the balance later. He stated that the appellant stayed with him till the following day.

It was his evidence also that on Sunday 30th March 2014 at around 10.00 am, two police officers came in the company of the appellant and told him to surrender the phone sold to him by the appellant and he surrendered the same. According to him the appellant confirmed that he sold the phone to him. He identified the mobile phone and said he had not bought a telephone line. He stated that the appellant was his uncle and had big hair and a beard.

In cross examination he stated that they did not sign a sale agreement with the appellant.

PW5 was PC Abdi Wali Ali of Ukasi Police Station. It was his evidence that on 28th April 2014 at 12.00 Pm, while at the police station report office members of the public brought the appellant alleging that he had robbed the complainant and that a report had already been booked. He conducted a search and recovered a Safaricom sim card from the appellants long trousers. He placed the appellant in police cells and handed the sim card to PC Gathure who was the Investigating Officer. He did not test the sim card. He identified the serial number of the sim card and the wallet in which it was found in court. He stated that the appellant had long hair.

In cross examination, he maintained that the sim card was in the wallet.

PW6 was Kalika Ndada a farmer. He stated that the appellant was his grandson, and that on 27th March 2014 at about 7.00 Pm while at his house, the appellant went and asked for food and he served him with githeri. Thereafter unknown people came and arrested him without disclosing the reason of arrest.

In cross examination he stated that the appellant was arrested while eating githeri.

PW7 was PC John Gatheru of Ukasi Police Station and the Investigating Officer. It was his evidence that on 25th March 2014 at 11.00 am he received a report at the station from the complainant that she had been robbed at 9.00 am while proceeding to Ukasi Market. The complainant described how she was robbed after being dragged into the bush. She was robbed off her handbag containing Kshs 10,000/-, Nokia mobile phone with its line, Equity ATM card, ATM Card for Haba na Haba, Identification Card, and a purse. She stated that after the robbery she went to Mtwangombe market and explained the incident to members of the public who went to the scene and started following shoe marks.

The report was that, later some people came with handbag, Equity ATM Card and Haba na Haba ATM Card, and National Identity Card which she handed over to him as exhibits. It was his evidence that the complainant had bruises around her neck and that he referred her to Ukasi Health Centre for treatment. It was his further evidence that on 28th March 2014 appellant was brought to the Police Station by members of public. He had a Safaricom line 0711234451 which was found in his wallet.

It was his further evidence that on 29th March 2014, he interrogated the appellant who admitted selling the mobile phone at Yatwa village to an uncle named Mulandi. Thus on 30th March 2014 the appellant led him and others to Yatwa Village where they recovered the phone from Mulandi who stated that he bought the phone from the appellant at Kshs 400/-. According to him, the appellant claimed ownership of the mobile phone but did not explain how he obtained the line. He confirmed that at that time, the appellant had long hair and beard. He identified all exhibit produced as exhibits 1 to 8. He did not know the appellant before.

In cross examination, he stated that he did not know the appellant before.

When put on his defence, the appellant gave unsworn testimony. He said that he was a herdsman and that on 27th March 2014 at 8.00 am, he took his livestock to the grazing field and at 1.00 Pm he took the livestock to the river for water. He then took the livestock home at 4.00 Pm and proceeded to Kawala Shopping Centre and stayed there till 1.00 Pm, after which he passed through the home of Kalika Ndada PW6. There he met 5 people who included Mutinda, the appellant's brother Kasenia Kathinge, Mwenga Mulandi, Muli Kiema and another he could not remember. After about 20 minutes Job Ngodu and Musilu arrived and said they were looking for him alleging that a person had been robbed at Charemoko in Ukasi and that one person was in police custody.

They then took him to Charemoko arriving at 10.00 Pm, and Job Ngodu locked him in his house till 5.00 am when they took him to Ukasi Police Station and was placed in the cells. He said that he did not see the alleged complainant. It was also his defence that on 30th March 2014, Job Ngodu brought a sim card, a purse, ATM and Identification Card and claimed that the same had been stolen from the complainant. He stated that he had Kshs 200/- in his pockets which was taken from him.

From the above evidence, the trial court found that the prosecution had proved its case against the

appellant beyond any reasonable doubt. The court thus convicted and sentenced the appellant. Therefrom arose this appeal.

I have to start by reminding myself that this is a first appeal. As a first appellate, court I am required to evaluate the evidence on record afresh and come to my own conclusions and inferences, bearing in mind that I did not have the opportunity to see witnesses testify to determine their demeanor and give due allowance to that fact – see the case of *Okeno –vs- Republic (1972)EA 32*.

I have reevaluated the evidence on record. I have considered the grounds of appeal. I have also considered the submissions on both sides.

The burden is always on the prosecution to prove a criminal case against an accused person beyond reasonable doubts. The accused does not have a burden to prove his innocence- see the case of *WOOLMINGTON –vs- DPP (1932) AC 462*.

The appellant has complained that the prosecution evidence was contradictory. My perusal of the evidence does not show any contradictions of a serious nature. All the people who participated in the recovery of the items and the arrest of the appellant, gave testimony in court. The only point of detail that could be slightly unclear is a police story about how the items were recovered. However from the evidence on record, the police did not recover anything from the appellant except the sim card that was in a purse. That was recovered according to the police at the police station. According to the other prosecution witnesses the sim card was recovered at the point of arrest. In either way the sim card was recovered from a purse belonging to the appellant and he never denied ownership of the purse. In my view therefore that small contradiction was not fatal to the conviction. It might have been a lapse of memory.

The appellant has complained that an identification parade was not held. Indeed no identification parade was held. An identification parade would have assisted if the complainant did not see the appellant before his being handed over to the police at the police station. In the present case however it was not practicable to hold an identification parade because the appellant was arrested by civilians at a far distance and in the process of taking the appellant to the police station, they met with the complainant. The complainant therefore saw the appellant after arrest and before he was handed over to the police. As such an identification parade held by the police would be of no evidential value.

The appellant has complained that the trial court relied on secondary evidence and that the prosecution did not prove its case beyond reasonable doubts.

My evaluation of the evidence was that the complainant did not know the appellant before. However the incident occurred in broad daylight in the morning hours. The complainant vividly described the appearance of the appellant. All the witnesses who knew the appellant before described him in the same manner. It was that appearance which led to his arrest.

The police officers who received the appellant after his arrest also confirmed that he was a person with long hair and a beard. That was the description given by the complainant. The description is so clear that in my view there was no possibility of mistaken identity.

To add to this, a relative of the appellant PW5 Mulandi testified that the appellant sold to him one of the stolen items ie a mobile phone for Kshs 400/-. The mobile phone was proved to belong to the complainant and to be one of the stolen items. That mobile phone was sold by the appellant shortly after the theft incident.

In my view, the learned magistrate was correct in saying that the doctrine of recent possession applied in the present case. In my view the prosecution evidence proved the identity of the appellant and also that he was the one who sold the mobile phone belonging to the complainant to his relative. Since the appellant did not explain how he came into the possession of that mobile phone, he was by law became the thief.

The appellant has complained that crucial witnesses were not called to testify in court. These were the person who said he saw him on the date of the incident when his footprints were being traced by members of the public, and the chief who assisted in arresting him. I am mindful of what was stated in the case of **Bukenya -vs- Uganda** (1972) EA 549 that where the prosecution fails to call crucial witnesses, and the case is a weak one, then the court is entitled to make an inference that the evidence of those crucial witness will tend to be adverse to the prosecution case.

In the present case, the person who said that he saw the appellant when his footprints were being traced, did not say that the appellant was carrying anything that connected him to the offence. The evidence of the Assistant Chief who organized for the arrest would not add anything on the strength of the prosecution case because, that Assistant Chief merely used his authority to get his vigilante people to look for the appellant. Those who actually looked for the appellant testified. The Assistant Chief was thus not a crucial witness. I dismiss that ground.

On the totality of evidence, I find that the prosecution herein proved its case against the appellant beyond any reasonable doubt. I will uphold the conviction.

With regard to sentence, the appellant was sentenced to serve 7 years imprisonment. During his mitigation he stated that he was not found with any of the items and asked for a release. He was a first offender.

Before sentencing, the magistrate did considered that the appellant was a first offender and that the offence was serious. Indeed the offence is serious as the sentence provided by law is a maximum of 14 years imprisonment. In my view, with the facts and mitigation factors availed before the trial court, the sentence pronounced was neither harsh nor excessive. I will uphold the sentence of the trial court.

In conclusion, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and the sentence of the trial court.

Dated and delivered at Garissa this 22nd day of April 2016.

GEORGE DULU

JUDGE