



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO.22 OF 2015

(An Appeal arising out of the conviction and sentence of HON. J.N. ONYIEGO - CM

delivered on 29th January 2015 in Kiambu CM. CR. Case No.2785 of 2012)

ROBERT RAJAB WAMBUA MUTUKU *alias* WAMBU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Robert Rajab Wambua Mutuku *alias* Wambu was charged with two (2) counts of **robbery with violence** contrary to **Section 296(2)** of the **Criminal Code**, two (2) counts of **stealing** contrary to **Section 273** of the **Penal Code**, one (1) count of **stealing from a person** contrary to **Section 279(a)** of the **Penal Code**, one (1) count of **manufacturing a firearm** contrary to **Section 9(1)** as read with **Section 9(3)** of the **Firearms Act**, one (1) count of **being found in possession of a firearm** contrary to **Section 4(2)** as read with **Section 3** of the **Firearms Act** and one (1) count of **being found in possession of ammunition** contrary to **Section 4(2)** as read with **Section 3(a)** of the **Firearms Act**. In all these charges, the Appellant pleaded not guilty when he was arraigned before the trial magistrate's court. After full trial, he was acquitted of the five (5) other counts but was convicted on the 4th count, *i.e.* **stealing** contrary to **Section 275** of the **Penal Code** the particulars of which were that on 23rd September 2012 at Ruaka Estate in Kiambu County, jointly with others not before court, he stole one (1) mobile phone, Nokia valued at Kshs.6,499/- the property of Charles Otuke Moronge, the 6th count of **manufacturing a firearm** contrary to **Section 9(1)** of the **Firearms Act** in that on unknown dates and at unknown place within the Republic of Kenya, without authority undertook the manufacture of a firearm, the 7th count of **being found in possession of a firearm** contrary to **Section 4(2)** of the **Firearms Act** the particulars of which were that on 23rd September 2012 at Ruaka Estate within Kiambu County was found in possession of a firearm without a firearm certificate. The Appellant was sentenced to serve seven (7) years imprisonment in respect of the 4th count and one (1) year imprisonment each in respect of the 6th and 7th counts. The sentences were ordered to run concurrently. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of insufficient and contradictory evidence of prosecution witnesses. He took issue with the fact that he had been convicted in

circumstances where no exhibits were produced to establish his guilt. He faulted the trial magistrate for failing to take into consideration his defence before arriving at the decision to convict him. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentences that were imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He urged the court to allow his appeal as the evidence adduced against him did not establish his guilt to the required standard of proof. On her part, Ms. Aluda for the State submitted that the prosecution established the Appellant's guilt to the required standard of proof as he was literally arrested soon after he had committed the offence. She urged the court to disallow the appeal.

This court has carefully considered the rival submission made by the parties to this appeal. It has also benefited from perusing through the proceedings of the trial court. Being a first appellate court, this court is required to re-evaluate and to reconsider the evidence adduced before the trial magistrate's court before reaching its own independent determination whether or not to uphold the conviction of the Appellant always noting that it did not see nor hear the witnesses as they testified (See **Njoroge -vs- Republic [1987] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to support the conviction of the Appellant on the three (3) counts that he was convicted.

Before giving reasons for its determination, it is imperative that the court sets out the facts of the case, albeit briefly. PW1 Charles Otuke Moronge was at the material time a resident of Ruaka. He was employed as a security guard. He also had a retail shop at Ruaka. He testified that on 23rd September 2012 at about 7.00 p.m., while he was at his shop a man came and purchased airtime for Kshs.20/- and washing powder of Kshs.5/-. PW1 left his phone on the counter as he went to pick the merchandise from the shelves. When he returned to the counter, he noticed that his phone was missing. The customer had disappeared. He rushed out of his shop and inquired from his neighbours if they had seen a man walking out of his shop. He was told that the man had been seen running from the shop to a nearby storey building. PW1, with other members of the public, went to the building. They were able to ascertain the man occupied Room No.20. PW1 went and knocked at the door and found the man, whom he identified as the Appellant in this case, in the house with a lady.

PW1 made a report to the police based at Karuri. While waiting for the police to arrive, the Appellant got out of the house and made an attempt to escape. He was apprehended by members of the public. He was also beaten. The police arrived and rescued him. A search was conducted in the Appellant's house. The mobile phone that was stolen from PW1 was not recovered. Among the people who searched the Appellant's house was PW2 Leonard Kipkeech Misei. He testified that on the material evening, after PW1 had raised alarm, he went with the police to the Appellant's house where they recovered a black jacket. In the jacket, was one round of ammunition. There was a basin with dirty water inside the house. On searching the basin, an imitation firearm was recovered. It had been kept in a polythene paper. The imitation firearm was produced in evidence. The firearm was tested by PW4 CIP Florence Karimi, a ballistic expert. She formed the opinion that although the imitation firearm was made in such a manner as to resemble a real firearm, it could not chamber or fire ammunition. She however was of the view that the firearm was an imitation.

In his defence, the Appellant stated that he was a victim of mob injustice. He denied that he had stolen the mobile phone from PW1. It was his evidence that he was a victim of mistaken identity. He urged the court to evaluate the evidence adduced against him and make a finding of acquittal.

Upon re-evaluating the evidence adduced before the trial court and the grounds of appeal put forward by the Appellant, it was clear to this court that the prosecution established the 4th, 6th and 7th counts that were brought against the Appellant. It was clear from PW1's evidence that he saw and was able to identify the Appellant as the customer who purported to purchase airtime and washing powder from his shop. While waiting to be served, the Appellant took off with PW1's mobile phone which he had left on the counter. Immediately he realized that his phone had been stolen, PW1 went in hot pursuit of the Appellant and found him in his house in a nearby storey building. Upon being found in the house, the

Appellant made attempts to escape. He was apprehended by members of the public and handed over to the police. The Appellant claims that he was a victim of mistaken identity. This court does not agree with the Appellant. PW1 was in close contact with him at the time he was purchasing the two items from the shop. Immediately after the Appellant ran away from the shop, PW1 followed him to his house. He saw him in the house and positively identified him. This court is convinced that the time it took from the theft of the mobile phone to the Appellant's apprehension is such a short time that it cannot be said that PW1 was mistaken in his identification of the Appellant. Although the mobile phone that was stolen was not recovered, this court holds that the prosecution proved to the required standard of proof that indeed the Appellant was the one who stole the mobile phone from PW1's shop. His appeal against conviction in that regard lacks merit and is hereby dismissed.

Similarly too, his appeal against conviction on being found in possession of an imitation firearm lacks merit. The prosecution witnesses who testified in court were able to place the recovered imitation firearm in the house that the Appellant occupied. There was no evidence to suggest that no one else other than the Appellant was the person occupying the house. His appeal against conviction in that regard fails.

On sentence, in respect of the charge of stealing, the Appellant was sentenced to serve seven (7) years imprisonment. **Section 275** of the **Penal Code** provides the maximum sentence for a person convicted of stealing to be three (3) years imprisonment. It was clear to the court that the Appellant was sentenced to serve an illegal sentence. This court has also taken into consideration that the Appellant has been in remand custody since the time he was arrested in 2012. The Appellant's appeal on sentence therefore has merit. The custodial sentence imposed on the Appellant is commuted to the period served. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF APRIL 2016

L. KIMARU

JUDGE