



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 119 OF 2013

JUDY WANGUTHIE KINYUAAPPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

*(An appeal from the conviction and sentence of the Senior Principal Magistrate's Court (S. N. Ndegwa)
at Kerugoya, Criminal Case No. 126 of 2011 delivered on 14th June, 2012)*

JUDGMENT

1. **JUDY WANGUTHIE KINYUA**, the appellant herein was charged together with co-accused before Senior Principal Magistrate's Court at Kerugoya vide Criminal Case NO. 126 of 2011 with two counts namely:

- i. Robbery with violence contrary to **Section 296 (2)** of the **Penal Code**;
- ii. Handling stolen goods contrary to **Section 322 (2)** of the **Penal Code**.

Particulars of Count I were that on the night of 8th and 9th August, 2010 the appellant in the company of Eliud Njiraini Njeru a co-accused at the trial, at Ndimi Sub location, Kirinyaga County jointly with others not before court while armed with offensive weapons namely pangas robbed Patrick Mwai Karani of Samsung Cell phone make SGB 130 Imei No. 35564202163, one gas cylinder from Total, three blankets, nineteen mirror (glass) plates and nine cups all valued at Kshs.22,000/= and immediately before or immediately after the time of such robbery, killed the said Patrick Mwai Karani.

The particulars in the 2nd count were in respect to only the appellant herein and were that on the 8th day of February, 2011 at Kutus Town in Kirinyaga County, otherwise than in the course of stealing dishonestly undertook the retention of a Samsung Mobile Serial No. 130 Imei No. 35564102163 knowing or having reason to believe to be stolen.

2. The appellant and her co-accused had denied the charges but after trial, the trial court acquitted her of the 1st count together with her co-accused but convicted her on the alternative 2nd count and sentenced her to serve 7 years imprisonment.

The brief summary of the case at the subordinate court indicates that on the night between 8th August, 2010 and 9th August, 2010, armed robbers broke into the house of one PATRICK MWAI KARANJA (deceased) and robbed him of the above listed valuables and in the process killed the said Patrick Mwai Karanja who was alone in the house at the time as the wife, Mercy Wainoi Ndege (P.W. 2) was away at her parents' home at Gatuto. There was no eye witness to the incident as all the

prosecution witnesses called to testify only discovered about the robbery and the murder of the victim of the robbery the following day after the incident. P.W. 1, Josphat Mugo Munene, the Assistant Chief of Ndumi Sub location, where the incident took place informed the trial court that he was notified about the robbery by one James Macharia Ngari who informed him that the unknown people had killed Patrick Mwangi Karani (deceased) and killed him in his house. The said James Macharia Ngari was not summoned to testify but the Assistant Chief told the trial court how he found the deceased murdered and lying on his bed. P.W. 2 wife to the victim also gave the same version only giving details of what was stolen during the robbery. She listed among the items stolen as a mobile phone Samsung B 1307. She told the trial court that she could not establish the motive of the robbery. She added that the body of her husband was removed and taken to Kerugoya District Hospital and that on 12th August, 2010 she attended a postmortem examination at Kibugi Funeral Home. She further told the trial court that on the 9th February, 2011 she got a call from Kerugoya Police Station informing her that her late husband's phone had been recovered and 2 suspects including the appellant had been arrested. She went to the Police Station with the carton bearing the serial number and the Imei number corresponded with the recovered phone.

3. The investigating officer in the case at the trial, **Harriet Kinyua** (P.W. 6) told the trial about how he found the deceased at the scene and how he found everything in disarray with clothes and documents scattered all over the house. He further told the trial court that later in February, 2011 two suspects including the appellant herein were arrested and brought to him with a phone that was said to belong to the deceased. The phone was later confirmed by the wife (P.W. 2) to belong to the deceased. The investigating officer however, did not say who and how the 2 suspects were arrested.
4. When the appellant and her co-accused were placed on their defence, they denied the offence. The appellant told the trial court that she was an employee of a salon where the phone recovered had been taken for charging. She however, could not tell which customer had taken the phone for charging. The investigating officer told the trial court that he was informed by the arresting officer that the appellant led them to the co-accused stating that she had bought the phone from him.
5. The trial court found that the prosecution had not proved their case in regard to count I and acquitted both the accused persons but found the appellant guilty of the alternative charge of handling stolen goods and convicted her to serve 7 years imprisonment. Aggrieved by both conviction and sentence she preferred this appeal and cited the following grounds:-
 - i. *That the learned trial magistrate erred in law and fact by convicting the appellant with the offence of handling stolen goods.*
 - ii. *That the learned trial magistrate erred in law and fact by failing to find that the prosecution failed to produce weapons used during the robbery as evidence.*
 - iii. *That the learned trial magistrate erred in law and fact by failing to note that no receipt to proof ownership of the stolen phone was produced.*
 - iv. *That the learned magistrate erred in law and fact in not finding that the deceased and his wife had a family dispute.*
 - v. *That the learned magistrate erred by failing to appreciate the reasons behind the wife of the deceased spending the night away at her parents home during the material time.*
 - vi. *That the investigation was not properly done to establish that the appellant was not the owner of the salon and that actual owner of the salon should have been arrested.*
6. At the hearing of this appeal, the appellant just relied on the above grounds which I must point out were poorly drafted but what comes out of the grounds is whether the evidence adduced at the hearing was sufficient to convict the appellant for the offences for which she was charged with.
7. The respondent through **Mr. Sitati** conceded to this appeal stating that the evidence presented to the trial court did not meet the required standard in law. I have considered this appeal and I must agree with the appellant that the investigation of the case left a lot to be desired. The investigating officer should have done a better job by gathering evidence from mobile phone provider that could have connected the appellant or any other suspect with the use of the stolen mobile phone. I also find that the evidence given by the investigating officer in regard to the 2nd count to have been

hearsay and should not have formed the basis of conviction of the appellant. The investigating officer told the trial court that the appellant was arrested in possession of the stolen phone and stated that she led the arresting officer to the co-accused saying she had bought the stolen phone from him. The arresting officers were not called to testify to confirm the evidence adduced by the investigating officer. The trial court fell into error by admitting the said evidence and relying on the same contrary to the provisions of **Section 63** of the **Evidence Act** which requires such evidence (oral) to be direct to be admissible in law. It is not surprising that Mr. Sitati learned counsel for the Respondent, conceded that the arresting officer should have been summoned to give direct evidence and shed light on how the stolen phone was recovered. The question that lingers in my mind is whether it is true that the stolen phone was found being charged in the salon where the appellant was working or whether it was found in her handbag. These are doubts that the trial court ought to have entertained given that the evidence adduced is unclear.

8. This Court finds that the trial court fell into error by misdirecting itself on the evidence adduced by the said investigating officer. I have re-evaluated the evidence adduced by the prosecution in totality and find that there were many doubts in the prosecution's case at the trial whose benefit should have gone to the appellant. Although the learned trial magistrate found that the defence was not plausible it was not enough to find her guilty of the offence as the evidence linking her to the offence was wanting as pointed out above. The burden of proof is always on the prosecution and does not shift to an accused person. To hold otherwise is erroneous and the trial court was erroneous to shift the burden to the appellant.

In the premises I find merit in this appeal. I allow it. The conviction is quashed and the sentence is set aside and the appellant shall be set free forthwith unless lawfully held. It is so ordered.

Dated and delivered at Kerugoya this 28th day of June, 2016.

R. K. LIMO

JUDGE

28.6.2016

Before Hon. Justice R. K. Limo, Judge

State Counsel Omayo

Court Assistant Willy Mwangi

Appellant present

Interpretation English-Kiswahili

Judy Kinyua appellant present

COURT: Judgement dated, signed and delivered in the open court in the presence of the appellant in person and Omayo for State.

R. K. LIMO

JUDGE

28.6.2016