



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 90 OF 2013

BETWEEN

FELLA OKELO OGUNDA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C.N. Sindani, PM dated 17th July 2013 at Principal Magistrate's Court at Winam in Criminal Case No. 1434 of 2012)

JUDGMENT

1. In the subordinate court, **FELLA OKELO OGUNDA**, the appellant, was charged with robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 13th November 2012, at the Kibos Sugar Agricultural Hostels in Kisumu District while being armed with dangerous weapons namely a knife, panga and steel cutter robbed **OHM BAHADUR** of one mobile phone make Nokia 8022 Model No. 2700-2C valued at Kshs. 6,000/- and at or immediately before or after the time of such robbery used actual violence on the said **OHM BAHADUR**. The appellant also faced an alternative charge of handling stolen goods contrary to **section 322(1)** as read with **section 322(2)** of the *Penal Code* whereby it was alleged that he, otherwise than in the course of stealing dishonestly retained a Nokia Phone Make 8022 Model 2700-2C knowing or having reasons to believe it was stolen.

2. The appellant was convicted and sentenced to death on the first count and now appeals against conviction and sentence. In support of his appeal, the appellant relied on the petition of appeal filed on 26th July 2013, additional grounds of appeal and detailed written submissions. The thrust of the appellant's case is the evidence of identification was wanting and the learned magistrate erred in relying on the doctrine of recent possession. On the other hand, learned counsel for the respondent collective testimony of the witnesses established that the appellant was the assailant and this fact was confirmed by the recovery of the exhibits in his possession.

3. In considering the issues raised by the appellants, I am enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether I should uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify (see *Okeno v Republic* [1972] EA 32). The prosecution case was as follows.

4. The prosecution case was as follows. The complainant, Ohm bahadur (PW 1) recalled that on 13th November 2012 at about midday, he at home relaxing when a man entered through the back door and struck him on the head using a pair of metal cutters (Exhibit No. 1) while brandishing a panga (Exhibit

No. 2) and cut him on the left side above the hip. He raised alarm and the assailant ran away with his phone, a Nokia 8022, Model 2700-2C (Exhibit No. 3). PW 1 recalled that the assailant was wearing a moroonish green shirt (Exhibit No. 7).

5. Samuel Ogendo (PW 2), the Security Manager, received information that PW 1 had been attacked by an unknown person at the Hostels. He reported the matter to the Police Station and together with Police Officers and company employees they mounted a search operation for the assailant. James Chacha (PW 3), a security officer at the Company, responded to PW 1's alarm and found he had been cut on the stomach. He told the court that he was with PW 2 when they saw an assailant, who was carrying a panga and a yellow bag, running toward the fence. They followed him but he disappeared. PW 3 stated that the assailant was wearing a striped shirt (Exhibit No. 4). Together with PW 2, they went back, helped PW 1 to go for treatment and went to report the matter at Mangeta Police Post.

6. PW 2 told the court that later that night when a search was mounted, they found the appellant asleep in a house without a door and recovered a yellow bag and panga, the metal cutter and the stripped shirt he was wearing when he was running away. They also recovered the PW 1's phone which was under the mattress.

7. The investigating officer, PC Kivuva (PW 4), recalled that on 13th November 2015, while he was at Kibos Police Post, he received a report from Security Officers at Kibos that a robbery had taken place and the hostel manager had been cut. He booked the report and proceeded to the hostel where he found that PW 1 had been taken to Jalaram Hospital. He issued a P3 form which was filled by George Mwita (PW 5), a clinical officer working at the hospital, who confirmed that PW 1 had been stabbed on the lower left side of the abdomen. He assessed the degree of injury as harm. PW 4 also told the court that he was with security officers from Kibos Factory when they went to search for the assailant and found him in his house there they recovered PW 1's mobile phone, a panga and steel cutter.

8. In his defence, the appellant gave an unsworn statement in which he told the court that he did not know the location where the Kibos factory was and that on the material night after selling onions, he went to drink in a certain house where police came and arrested people who they accused of drinking changaa.

9. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of ***Oluoch v Republic* [1985] KLR 549** where it was held:

Robbery with violence is committed in any of the following circumstances:

a. The offender is armed with any dangerous and offensive weapon or instrument; or

b. The offender is in company with one or more person or persons; or

c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person” [Emphasis mine]

10. The use of the word “or” in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under **section 296(2)** of the **Penal Code**. In this case PW 1 was attacked by an assailant he did not know and his Nokia phone stolen. The fact that he was attacked and injured is corroborated by the testimony of PW 2, PW 3 and PW 4 who responded to his call and confirmed that he had been injured. PW 1 told them that his phone had been stole. I therefore find that the prosecution established the key elements of the offence of robbery with violence.

11. The central issue in this appeal is whether the appellant perpetrated the offence. The prosecution and subsequent conviction was grounded mainly on the doctrine of recent possession. The Court of Appeal in ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic Criminal Appeal No. 272 of 2005* [2006]eKLR** distilled the ingredients of the doctrine of recent possession as follows;

It is trite that before a court of law can rely on the doctrine of recent possession as a basis for

conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

For the doctrine to stand, the evidence of recovery of the material property must be sufficient and credible. There must also be sufficient and credible evidence for positive identification of the property as belonging to the victim.

12. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. While the law is that in a criminal trial, the prosecution bears the burden of proving the case against the accused throughout the case, in a case where one is found in possession of recently stolen property like this case, the evidential burden shifts to the accused to explain his possession. That explanation need only be a plausible one but he needs to put it forward for the court's consideration (see ***Malingi v Republic [1988] KLR 225***). In ***Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008 [2010]eKLR***, the Court of Appeal observed that;

Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.

13. In this case the PW 1 testified that the assailant stole his phone which he identified as Exhibit No. 3. He told those who responded to his alarm that the assailant had stolen his phone. The same phone was recovered by PW 2, PW 3 and PW 4 in his possession as it was under his mattress where he was sleeping on the night the same day the robbery took place. In his submissions, the appellant contended that PW 1 did not prove that the phone belonged to him as he did not furnish receipts for purchase or identify the mobile phone company used by him. In my view, there was no reason to believe that PW 1, who had been injured, was lying when he stated that his phone was stolen. Moreover, it was not suggested in cross-examination of PW 1 that the phone did not belong to him or belonged to someone else. When placed on his defence, the appellant said nothing of the phone or lay claim to it. I therefore find that the prosecution established all the elements of the doctrine of recent possession hence the conviction was well founded.

14. While I agree with the submission of the appellant that he was not clearly identified by PW 2 as the assailant, the possession of PW 1's mobile phone was, in my view, sufficient to support the conviction.

15. The appellant also raised two procedural issues which merit consideration. The first issue was that he was not given witness statements. According to the record, the trial court directed on 15th November 2012, that the appellant be furnished with the charge sheet and witness statements at his cost. When the matter came up for mention on 11th January 2013, the accused stated, "I have no one to sent for copies." In response the prosecutor stated that, "I will have the file on 15th March 2013." The issue of statement was not raised again by the court, prosecutor or defence. In light of these proceedings, I would only fault the learned magistrate for ordering statements to be provided to the appellant at his own cost. It has been held that the obligation under **Article 50(j)** of the Constitution is on the State and the State must provide the statement free of charge (see ***Simon Githaka Malombe v Republic NYR CACRA No. 314 of 2010 [2015]eKLR***). In this case though, the appellant did not raise the issue further as he had done and proceeded with the hearing including cross-examination of the witnesses.

16. The second issue the appellant raised was that the proceedings were conducted in a language he did not understand as PW 1 testified in Hindi and there was no interpretation. From the record, when the matter first came up for hearing on 24th January 2013, the matter could not proceed as there was no Hindi interpreter. The learned magistrate adjourned the matter to 14th February 2013. The record shows that there were two court clerks Onyuka/Ricky and that PW 1 spoke in Hindi. When the accused was called

upon to cross-examine the witness, he did so. Neither the court nor the appellant raised any issue about the translator. Although the record insufficient in setting out the details of the translator, it is clear that the testimony of PW 1 was translated to enable the appellant understand and ask questions in cross-examination.

17. In light of what I have outlined above, the conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 28th day of July 2016.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Chelangat, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.