



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 156 OF 2015

MARTIN KITHINJI APPELLANT

Versus

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in

Nanyuki Chief Magistrate's Court Criminal Case No. 229 of 2014

by Hon. T. W. CHERERE Chief Magistrate on

8th September 2014).

JUDGMENT

1. **MARTIN KITHINJI** faced a charge of **housebreaking contrary to section 304(1)(b) and to a charge of stealing contrary to section 279(b) of the Penal Code**. He appeared before the Nanyuki Chief Magistrate's Court in respect of those charges where he had three other co-accused. He was the only accused person who was convicted of that charge and was sentenced in respect of the **1st limb** to serve **24 months imprisonment** and in respect of the **2nd limb** to serve **12 months imprisonment**. Those sentences were to run concurrently.

2. He was aggrieved by his conviction and sentence and has accordingly filed this present appeal whereby he was ably represented by learned counsel Mr. Abwuor. This court therefore is the first appellant court. The duty of this court as such is to analyse and evaluate the evidence tendered before the trial court. In doing so this court should reach its own conclusion on that evidence. In reaching that conclusion this court should bear in mind that it did not have the opportunity to see or hear the witnesses who testified before the trial court. See the case of **DAVID NJUGUNA WAIRIMU vs REPUBLIC (2010) eKLR**.

3. The appellant has provided some 12 grounds of appeal. Those grounds however can be summarised into one, that is, that the prosecution failed to establish a case beyond reasonable doubt against the appellant.

4. The evidence tendered by the prosecution was to the effect that **Stephen Kingori Nderitu PW 1** and **Mercy Wanjiru PW 2** left their home in Mungetho area on 7th March 2014 at 8.30 a.m. They are a husband and wife. PW 2 was the first to arrive back at home on that day at 6.30 p.m. On opening the front door of their home she noticed that the home had been ransacked and that several items belonging to them were missing. She informed her husband PW 1. Her husband made a report to the police of the items that had been lost through the theft. In particular PW 1 said that he informed the police that one of

the items he had lost was a nokia phone serial number **356998/04/627629/6**. That phone was eventually recovered from the appellant's co-accused namely Stephen Kanyeki who was acquitted by the trial court. The prosecution also called the **investigating officer** namely **PC WilsonRono**. He began his investigations on 8th March 2014 at 8.00a.m. He was able to confirm that he noted the breaking in of the complainant's home. Due to the information given to the investigating officer by the complainant (PW 1) he said that he began to trace the usage of the complainant's nokia phone and as result of that tracing he arrested the appellant and his co-accused. He was able to confirm that the mobile phone recovered from Stephen Kanyeki the 4th accused was the phone that was reported as lost in the theft by PW 1.

5.The appellant in his defence gave a sworn evidence. He stated that he ordinarily sold miraa at Nanyuki town. On the 7th of March 2014 while he was at his place of work at about 10.00 a.m. his co-accused by the name of Simon Ekru the first accused came to him and wanted to sell to him a mobile phone. Since he did not have the money to buy the phone he said that he referred him to a person called Samwel Ndirangu. Samwel Ndirangu ordinarily purchased second hand phones. On the following day his co-accused StephenKanyeki told him that he was looking for a second hand mobile phone. It was then he said that he directed him to the shop of Samwel Ndirangu. It was thereafter that he was arrested by the police and was implicated in the theft of the phone of PW 1 amongst other things. He denied having broken into the home of the complainant or having stolen his property therein.

6. The learned trial magistrate in her considered judgment convicted the appellant of the charges he face. In so doing the learned magistrate considered the doctrine of recent possession as being applicable to the case at hand. The learned trial magistrate further warned herself of reliance of the evidence of accomplices. In so doing the learned magistrate referred to the case **REPUBLIC vs NDARA S/OKARIUKI & 6 OTHERS 1945(12)EACA 84**.The trial court found that the evidence tendered by Simon Ekru the first accused and by Stephen Kanyeki the fourth accused was credible and could be relied upon. Having relied on that evidence the court proceeded to convicted the appellant.

7.I have reconsidered the evidence tendered at the trial court. The evidence that the trial court relied upon in respect of Simon Ekru (1st accused) was to the effect that he did not have any knowledge about the subject mobile phone. The learned trial court found his evidence more credible than the evidence of the appellant. The trial court magistrate rejected appellant's evidence whereby the he stated that it was the first accused Ekru who wanted to sell to him the subject phone. The trial court also accepted the evidence of the 4th accused Stephen Kanyeki who stated that he needed a phone and approached the appellant in that regard. Kanyeki stated that he purchased the subject phone from the appellant at Kshs.750. He placed his SIM card in the phone and proceeded to use it.

8.The court of appeal in the case of **HASSAN vs REPUBLIC (2005)2KLR 11** in discussing the doctrine of recent possession had this to say:-

"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver."(Emphasis supplied)

9. As it can be seen from the above quoted case for an accused person to be presumed to be implicated in a theft of an item the item must firstly be found in his possession and must be proved to have recently been stolen. In considering those requirements of that doctrine I am inclined to accept the submission made on behalf of the appellant that the prosecution failed to prove its case beyond reasonable doubt. Indeed I would further state that the prosecution failed to prove a rebuttable presumption as required under **section 119** of the **Evidence Act**.

10.PW 1 the complainant in is evidence stated that he had lost amongst other items a nokia phone. He then proceeded to inform the trial court that that was the phone which was before the court. Although he gave the phones serial number there was no evidence recorded by the trial court that the serial number he gave correspondent to the one in the phone before the court. In deed the prosecution treated that information which is very vital to its case very casually. The complainant did not even tender evidence

specifying any identifiable mark on the phone which led him to conclude that the phone recovered by the police and which was before the court was his phone. The court of appeal had similar facts to this appeal in the case of **ABDI YUSSUF MAALIM VS REPUBLIC (2015)eKLR**. The court of appeal stated thus in that case:-

"We have, on our part, looked at the record most carefully and must agree with Mr. Ngumbau learned counsel for the appellant that the elements pre-condition to proof of recent possession were not satisfied. That is so because none of the two courts below endeavoured to have the phone positively identified as the one stolen from the complainant. No identifying mark on the phone or even the serial number allegedly on a receipt was shown to the trial court as proof of identity of the stolen phone. That receipt allegedly given to the complainant when he bought the phone was never mentioned by the complainant in his evidence. Its production by the investigating officer without concretely relating it to the serial numbers on the phone was evidence of no probative evidence value. It is our finding in these circumstances therefore, that the phone not having been positively identified to be that recently stolen from the complainant, the doctrine of recent possession could not safely be relied upon to form the basis of a conviction."

11. Bearing the above case in mind and the fact that PW 1 and his wife PW 2 failed to identify the phone before the court as that one which belonged to PW 1 and which was stolen, the appellant could not have been required to rebut any presumption that he was the thief.

12. Similarly the prosecution's case fails because of contradiction to the evidence adduced by PW 1 when being examined in chief. That evidence was to the effect that:-

"The accused 1 was arrested after accused 3 said that he is the one that sold my phone to him. Accused 2 was arrested because accused 1 said that it was him that gave him my phone. Accused 3 was identified by Samwel Wanjau and John Kibuthu who said that it was him that gave them my phone".

13. A simple analysis of that evidence indicate that the prosecution's case was to the effect that Simon Ekrui was arrested because the appellant said that it was Ekrui who sold him the phone. Further that Jeremiah Muriithi the second accused was arrested because Ekrui said that it was him that gave Ekrui the phone. Further that the appellant was identified by Samwel Wanjau and John Kibuthu as the one who gave them the phone.

14. The prosecution having introduced that very muddled evidence need to clarify what its case was. Reading that testimony one is left with doubt as to who originally had the subject phone. It would seem that the appellant was arrested and on being arrested informed the police that he had been given the phone by Ekrui. It would also seem that Jeremiah Muriithi was arrested because Ekrui said he had given Ekrui the phone.

15. The prosecution's evidence because of that confusion failed to meet the required standard of proof. Although the decision in the case **MILLER VS MINISTER OF PENSIONS (1947)** stated that the standard of beyond reasonable doubt did not necessarily have to reach a state of certainty but must carry a high degree of probability, I do find that in this case in respect of the appellant the prosecution failed to meet the bare minimum of that standard.

16. It is because of that finding I find that the appellant's appeal does succeed. Accordingly I hereby **quash the conviction of Martin Kithinji of the offence of housebreaking and stealing. I hereby set aside the trial court's sentence and order the appellant to be set free unless otherwise lawfully held.**

DATED AND DELIVERED THIS 27TH DAY OF JULY 2016.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue

Appellant: Martin Kithinji

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE