REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 16 OF 2015

(CONSOLIDATED WITH HCCRA NO. 86 OF 2015)

(CORAM: J. A. MAKAU – J.)

SAMWEL ODHIAMBO ANYASI …..... 1ST APPELLANT

JULIUS MUSUNGU IMBOYOKA …..... 2ND APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

***(Being an appeal against both the conviction and the sentence on 3rd March 2015, in Criminal Case No. 337 of 2013 in Ukwala Law Court before Hon. R.M. Oanda – (*Ag. P.M.)**

JUDGMENT

1. The two Appellants, **Samuel Odhiambo Anyasi** and **Julias Musungu Imboyoka,** the 1st and the 2nd Appellants respectively were the 1st and the 3rd accused respectively in the trial before the lower court. They are charged with five (5) others with two counts of **Robbery with Violence Contrary to Section 296 (2) of the Penal Code.** The Particulars of Count I are that on the 16th day of July 2013 at Got-Nanga Market in Ugenya District within Siaya County the appellants jointly, while armed with crude weapons namely pangas and rungus, robbed MAURICE OWUOR ONYOR of unknown amount of money, mobile phone make Nokia Asha 205 Serial Number 355081051528611/16, mobile phone make Nokia 1200 S/No.35365001945426/8, Sony Music System and LG DVD all valued at KShs.200,000/= and immediately at the time of such robbery fatally wounded the said MAURICE OWUOR ONYOR. The particulars of Count II are that on the on the 16th day of July 2013 at Got-Nanga Market in Ugenya District within Siaya County jointly, while armed with crude weapons namely pangas and rungus robbed JAMILLA ABDALLA of mobile phone make H72 s/no. 357072121505760, a bag and clothes all valued at Kshs.6,900/= and immediately at the time of such robbery used actual violence to the said JAMILLA ABDALLA. After full trial the appellants were found guilty, convicted and sentenced to suffer death's in Count I and sentence on Count II was held in abeyance.

2. Both Appellants were aggrieved by the conviction and sentence. They each filed separate petition of appeal which can be summarized as follows:-

(a)That the conditions at the time of commission of the offence were not conducive to favourable positive identification.

(b) That the prosecution case was contradictory and full of inconsistencies and could not justify

a conviction of the Appellant.

(c) That the identification parade was not properly conducted and it was flawed.

(d) That the investigation was poor and shoddy to justify any conviction.

(e) That the Appellant's defence was not considered.

(f) That the sentence was harsh and excessive.

(g) That the prosecution failed to avail essential witnesses to prove their case to the required standards.

3. The Appellants appeared in person whereas the State was represented by Mr. Elphas Ombati Learned Prosecution Counsel.

4. At the hearing the Appellants filed their written submissions. The 1st appellant added that he was not identified and that the person who lead to his arrest was unknown to him. He stated that he did not give any phone to the same person, that the Safaricom data was not confirmed to be correct by the Safaricom Company, nor was the phone number identified as owned by who, that the phone was not identified and no receipt was produced and that there was no evidence that the 1st Appellant used the line of PW1 and PW2 as claimed by the investigating officer. The second Appellant produced written submissions and added that no identification parade was conducted after his arrest, that PW1 and PW2 testified that they did not see the 2nd Appellant at the scene nor did they know him, that the phone and receipt of the phone was not produced as exhibit before court and that the Safaricom Data was not confirmed to be genuine nor did it connect the 2nd Appellant with the commission of the offence.

5. Mr. E. Ombati learned Prosecution Counsel opposed the appeal and urged that the 1st Appellant was positively identified by PW2, that parade identification was conducted and the 1st Appellant was identified by PW2, that the Safaricom Data produced by PW4, was released by Safaricom and was used as evidence as there was no objection though produced by investigating officer and not by officer from Safaricom Company, that no evidence on ownership was produced though phones belonged to PW1 and PW2, that as per Safaricom data the Phones in issue were used a few hours after robbery by the 1st Appellant proving that the 1st Appellant was in possession of the stolen phone just few hours after robbery took place, hence the court invoked the doctrine of recent possession. He referred to the case of Erick Arum V R (2006) KLR 33.

6. I have very carefully considered the Appellants appeals. I have considered the written submissions by both Appellants, their oral submissions and that of the prosecution Counsel.

7. I am the first appellate court and as expected of me I have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **ISSAC NG'ANGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:-

"in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and s o the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first

appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)"

8. The facts of the prosecution case form part of the record of appeal and as they are easily accessible I need not reproduce the same, I shall however make a brief summary of the prosecution case and the defence.

9. The facts of the prosecution's case are that PW1, Jamila Abdalla and PW2 Brian Odour Owuor, were at Camp David Bar at Got Nanga on 16.7.2013 at around 9.30 p.m. PW1 was with her boss late Maurice and his son PW2, who was at the counter. That PW1 went out of the bar to prepare a meal, when she met two people wearing a jacket and a cap, armed with a rungu and panga, who ordered her to go inside the kitchen. She obliged and one of them remained with her while the other went for her phone. There was light in the kitchen and one of the assailants slapped PW1 and told her to go. PW1 proceeded to the Bar with the assailants and found PW2 and his father watching TV. One of the assailants got hold of Brian, PW2, started beating him up as they went for PW2's father as they used the rungu. PW2 managed to escape to M-pesa shop and locked himself there as the attacker rose to four (4) in number. PW1 rushed to the hotel and locked herself inside from where she could hear the assailant's ordering the PW2's father to call them. He obliged but PW1 managed to open the door and escaped to the road. The assailant followed PW1 but she hid in the maize farm. That after a while PW1 returned, found the door wide open, as the TV was still on. She closed the doors and heard PW2, Brian talk. She found him and the two locked themselves in the hotel. They later looked for PW2's father and on failing to trace him, PW2, Brian proceeded to his uncle's home, with whom he went to report to Ligega AP Camp. That they found PW2's father had been killed outside the Bar next to the maize plantation where PW1 had hidden, they noticed the deceased had one shoe, PW1's bag was missing together with her clothes and shoes, Radio System (Sony) missing, DVD player LG and several bottles broken. The Police later visited the scene and the deceased body taken to Inuka. PW1 lost her phone, clothes, bags and shoes. That on 15.8.2013 PW1 and PW2 attended identification parade at Ukwala Police Station. PW2 identified his father's phone Nokia 1200 – MFI. P2. PW1 identified her phone Nokia H72 – MFI P1. PW1 identified the person who had slapped her and took her phone as the 1st accused in the dock. PW2 identified the 2nd accused. PW2 also identified his phone Nokia Asha 205 – MFI P3.

10. The first issue that comes out for consideration in this appeal is whether the conditions on the fateful night were conducive for favourable identification of the assailants? According to PW1 and PW2 the incident took place at 9.30 p.m. at Camp David Bar at Got Nanga. That when the attack took place PW1 had gone out of the bar to the kitchen whereby she met two people wearing jackets and a cap armed with a rungu and a panga. They ordered PW1 to go to the kitchen whereby she was robbed of her phone, and at the same time she was slapped by one of them. That at the bar one of the attackers got hold of Brian (PW2) and started beating him while the other was beating PW2's father. PW2 managed to escaped into an M-pesa shop and locked himself there. That the attackers increased to four. PW1 then opened the door and escaped to maize plantation where she hid. PW2 testified that he saw the people following PW1. Armed with rungu. PW2 struggled with one of the assailants and he managed to overpower him and ran and locked himself in an M-pesa shop.

11. Regarding identification I am guided by the case of **Paul Etole and Another V Republic CR A 24 of 2000 (UR) page 2 & 3** where the court stated thus:

"The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution, before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each

witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

12. I have very carefully examined the evidence of identification adduced by both complainants. According to PW1 she was able to identify the Appellant very well during the incident and was categorical that it was the 1st Appellant who robbed her. PW2 also identified two people thus the 1st Appellant and the 2nd appellant. He stated that the lights were on and as such he was able to identify the assailants, PW1 also stated that there was light in the kitchen.

13. PW3, uncle to PW2 who received first report from PW1 and PW2 did not mention any of the complainants giving him the description or names of the assailants. Similarly PW4 who proceeded to the scene of incident and met PW1 and PW2, was not given the description of the assailants. He was not given any names of the assailants implicating the two appellants.

14. The evidence of PW1, PW2 and PW3 brings to the fore the issue of the first Report and the importance of that Report when it comes to considering the ability of complainants to identify the people who robbed them or who committed an offence.

15. PW1 in her evidence said there was light at the kitchen and even in the bar however her evidence is so scanty on the intensity of light, its position, and the position of the assailants. She did not in her evidence state whether she was able to see and identify the assailants by their appearance or faces. She did not give the description of the assailants to the police. In her evidence in chief she did not state she was able to identify the first Appellant very well but stated so during cross-examination. She did not give details of what made her identify the 1st Appellant. She did not state that she was able to see his face. PW2 on the other hand stated that he did not know the names of the accused person. He stated the 1st Appellant was in Marvin and long sleeved shirt and that he identified him in the parade.

16. In the case of **Kioko Kilonzo and Others Vs. R. CRA 82 – 88 of 2011 the Court of Appeal** considered the importance of first Report, when it relied on the decision of **Terekali and Others Vs. R (1952) EACA** where the Court said:-

"Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguards against late embellishment on made up case. Truth will always come out from a statement taken from a witness at the time when recollections is very fresh and there has been no time for consultation with others ….."

17. In the instant case robbery had taken place at around 9.30 p.m. and report was made to PW3 and police in less than two hours when the matter was fresh in the minds of PW1 and PW2, they did not give the names nor the description of the attackers, the incident of robbery was quick, violent and indeed must have caused a lot of fear and confusion to PW1 and PW2, and as such they were unable to clearly observe the attackers. I am therefore of the view that PW1 and PW2 in such a situation were unable to identify the assailants as the conditions were not conducive to positive and favourable identification of the assailants and it is not far-fetched to say that the chance of mistaken identity was not remote in this case. I therefore hold that PW1 and PW2 did not identify their assailants.

18. Whether PW1 and PW2 were able to correctly identify the 1st Appellant in the identification parade? Any meaningful identification parade is organized and conducted based on the description of the assailants as given by the complainants, hence the importance of the first report. In the instant case PW1 and PW2 never gave description of their attackers, however PW4 proceeded to organize an identification parade in which the 1st Appellant was identified by both PW1 and PW2. One would ask on what basis did PW4 organize an identification parade and called PW1 and PW2 to identify their attackers without having given description of their attackers. I have perused the evidence given by PW1 and PW2 and I

have found nowhere, where any of them gave the description of their attackers. In identification parade forms, none of them has indicated the position of the suspect in the parade nor did they include the suspect in the list of members of parade. The identification parade was flawed and served no purpose for which it was intended by the prosecution. I find and hold the identification parade was an exercise in futility and if allowed to stand would occasion injustice and prejudice to the 1st Appellant.

19. I now turn to circumstantial evidence based on evidence as to whether the trial court was correct in basing its judgment on data obtained from Safaricom print out? PW4 in his evidence testified that he took mobile numbers of the occupants who were at the bar, thus 0712 320 480, then used by the deceased, 0726 512 106 then used by PW1 and 0704 008 273 then used by PW2 and send the serial numbers to Safaricom. He followed who were using the mobile phones, thus the deceased mobile phone was serial No. 353650019484268. He traced the phone and it led him to the 2nd accused, who was using the deceased number, and that he subsequently found him, who told him the 1st appellant had sold it to him. That from the data it showed the phone was on 17.7.2013 at 7.58 a.m. used by the 1st Appellant. PW4 then arrested the 1st Appellant and recovered his phone number 0716 041 280. That the second mobile number for PW1 led him to arrest the 4th accused, who on arrest gave PW4 the phone number of the 1st Appellant and discovered the phone was used on 17.7.2013 at 12.33 hours by 1st appellant. That the last mobile number of PW2, led PW4 to the 7th accused and he discovered it had been used by the 4th and the 6th accused and that he discovered it had just been used on 17.7.2013 at 8.11 hours by the 2nd Appellant. PW4 produced the three mobile phones – H 72 – as exhibit P1, Nokia 1200 exhibit P2 and Nokia Asha 205 as – exhibit P3. He produced Nokia 1200 for the 1st Appellant as exhibit P5 and a letter dated 21.7.2013 as exhibit P5. and data from Safaricom for Nokia 1200 exhibit P7, Report from Brian Owino's phone Nokia Asha 205 serial number 355 081051528611/16 as exhibit P8, phone for PW1, IMEI number 357072-1215057 as exhibit P9.

20. In the modern society, technology has been helpful in providing more reliable identification of a suspect by use of modern technology such as photographic evidence, video tape evidence, audio tapes, fingerprint and DNA amongst others. Under **Section 78 (1) of the Evidence Act**, photographic evidence is admissible subject to some conditions similarly **Section 106 A of the Evidence Act** electronic records may be produced. **Section 106 A of the Evidence Act** provides:

> ***"106A. The contents of electronic records may be proved in of accordance with the provisions of section 106B.***

21**. Section 106 B (1) of the Evidence Act** provides:-

> ***"106 B(1) Notwithstanding anything contained in this Act, any***
>
> ***information contained in an electronic record which is printed on a***
>
> ***paper, stored, recorded or copied on optical or electro-***
>
> ***magnetic media produced by a computer (herein referred to as computer output)***
>
> ***shall be deemed to be also a document, if the conditions mentioned in this***
>
> ***section are satisfied in relation to the information and computer in question***
>
> ***and shall be admissible in any proceedings, without further proof or***
>
> ***production of the original, as evidence of any contents of the original or***
>
> ***of any fact stated therein where direct evidence would be admissible."***

22. In the instant case I find that the data from **Safaricom for Nokia 1200** (52 pages) as produced by PW4 as exhibit 7, of Nokia 1200 for the 1st Appellant as exhibit as P5, is an electronic record in term of

Section 106 B (1) of the Evidence Act. The same is a document and is admissible subject to satisfying the conditions under the above mentioned Section with further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct Evidence would be admissible. PW4 in his evidence satisfied the conditions set out under **Section 106 B (1) of the Evidence Act**. I note the prosecutions produced a letter as exhibit dated 21.7.2013 exhibit P6 which in my view is equivalent to certificate by service provider as there is no specific requirement on to the nature or the form of the certificate. I therefore find that the requirements as set out for consideration of electronic records has been proved to the required standard.

23. Whether doctrine of recent possession can be invoked in this case? As earlier on pointed out PW1 and PW2 were not able to identify any of the assailants because the crime took place too fast and the complainants had no sufficient time to observe and identify the Assailants. I note the trial court invoked the doctrine of recent possession. In the case of **Erick Arum Vs. R CRA 85 of 2000,** the court said:

> ***"To invoke the doctrine of recent possession the prosecution must prove beyond reasonable doubt each of the following:-***
>
> ***1. That the property was stolen.***
>
> ***2. That the stolen property was found in the exclusive possession of the accused,***
>
> ***3. That the property was positively identified as the property of the complainant and***
>
> ***4. The possession was recent after robbery."***

24. What constitutes recent possession is a question of fact that depends on the circumstances of each case including the kind of property, the amount or value of the stolen property, the ease or difficulty with which the said property may be assimilated into legitimate trade channels and the character of the property.

25. In the instant case the data from Safaricom print out revealed that the 1st Appellant used the deceased mobile phone serial No.3536500194842618 on 17.7.2013, the day of robbery at 7.58 a.m. a short while after robbery, the 2nd accused revealed that the 1st Appellant had sold this phone to him. PW4 received the 1st Appellant's phone No. 0716 041 280, the said phone No. 0726 512 106 of PW1 led PW4 to the 4th accused who gave PW4 the phone of the 1st Appellant and he discovered PW1's phone had been used at 12.33 hours by the 1st Appellant barely after 2 hours after robbery. The third phone was 0704 008 273 of PW2 led him to the 7th accused, and he discovered it had been used by the 5th and the 6th accused but it had first been used on 17.7.2013 at 08.11 hours by the 2nd Appellant. I find the data print out placed the first Appellant at the scene of the crime since he immediately used the two complainants phones as well as the one of the deceased after a short time after the robbery. The 2nd accused, and the 4th Accused connected the 1st Appellant to the offence of robbery in that they claimed the Appellant had sold the phones to them. The 2nd Accused in his sworn evidence he testified the 1st Appellant sold the phone in question to him. The 1st Appellant in his evidence did not challenge or deny that he sold the phone to the 1st and 4th accused person. In the instant case the prosecution proved that there was robbery with violence and the phones of PW1, PW2 and the deceased were stolen, the stolen property was proved that it was in the exclusive possession and use of the 1st Appellant within few hours after robbery and the property were positively proved and identified as belonging to the complainants and the deceased through exhibits produced by PW4. The phone and the making of calls were similarly proved to have been made by the 1st Appellant. His mobile phone number was given as 0716041280 which is clearly registered in the Safaricom print out.

26. In the case of **Paul Mwita Robi Vs. R CRA 200 of 2008**, the Court of Appeal said:

> ***"Thus, while the law is that generally in criminal trials the prosecution has the burden of proving the case against the accused throughout and that burden does not shift to the accused, he nevertheless in a case where case is found on possession of a recently stolen property like in***

this case, the evidential burden shifts to him to explain his possession, that explanation only needs to be plausible one but he needs to put it forward for the court's consideration."

27. In this case, the 1st Appellant having been found in possession or having used and even sold the phones immediately after the robbery thus the phones of PW1, PW2 and the deceased, the 1st Appellant had a duty to give a reasonable explanation as to how he came by the complainants phones and the deceased's phone. The phones have been identified and confirmed even by service provider and PW4 to belong to the complainants and the deceased. I have at the end of evaluation and analysis of the evidence no doubt that the 1st appellant was in possession and use of complainants and deceased phones and even sold the stolen phones within hours after robbery. It was incumbent upon the 1st Appellant to give plausible explanation as to how he came to be in possession of the stolen phones which he failed to do. In his defence he did not state anything concerning the fateful date of robbery with violence but opted to talk about his arrest. He did not challenge the evidence relating to his possession and use of the phones of the complainants. I find his defence to be a bare denial and does not dislodge the prosecution testimony.

28. As regards the 2nd Appellant, the evidence connecting him with the phone is according to PW4 that PW2's phone was found with the 7th accused. PW4 discovered that the same phone had been used by the 5th and the 6th accused after it had been used first on 17.7.2010 at 8.11 hours by the 2nd Appellant. PW4 did not lay basis for his allegation that the 2nd Appellant had used PW2's phone at 8.11 hours. PW4 did not give any evidence as regards which mobile number is or was of the 2nd Appellant. PW4 on being cross-examined by the 2nd Appellant testified that he did not record that the 2nd Appellant used the phone. In view of the above there is doubt as to whether the 2nd Appellant used the phone of PW2 immediately after robbery or thereafter and he should be accorded the benefit of doubt.

29. The upshot is that the Appeal by the 1st Appellant is without merits, the same is dismissed, conviction upheld and sentence confirmed. As regards the 2nd Appellant the appeal is allowed, conviction quashed and sentence set aside. The 2nd Appellant is set at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 29TH DAY OF SEPTEMBER, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 29TH DAY OF SEPTEMBER, 2016.

IN THE PRESENCE OF:

Appellants Appears in Person

Mr. Ombati for the State

CC – Kevin Odhiambo

CC – Mohammed Akideh

J. A. MAKAU

JUDGE