



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 44 OF 2013

WILLIAM KARABU KADI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 832 of the Principal Magistrate's Court at Kilifi – A.M. Obura, PM)

JUDGEMENT

The appellant was charged with offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that the appellant and three others, on the 19th September, 2010 at Matsangoni Village in Kilifi within Coast Province being armed with dangerous weapons namely a gun and swords robbed JOHN KATANA two mobile phones Nokia 220 serial number 3526942199236 worth Kshs.8,000/=, Nokia 6300 serial number 353215031628651 worth Kshs.1,600/=, cash Kshs.27,000/= all valued at Kshs.51,000/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence on the said JOHN KATANA.

The appellant and his co-accused faced a second count of robbery with violence but they were all acquitted in that count. The appellant's co-accused were acquitted in count as well as and the other counts they were facing separately. The trial court only convicted the appellant and sentenced him to suffer death. The grounds of appeal by the appellant are that the charge sheet was defective, that the burden of proof was shifted to the appellant, that the prosecution did not prove its case beyond reasonable doubt and that the appellant's defence was not considered.

Mr. Katete, counsel for the appellant, submitted that the appellant was charged with three other co-accused. The lower court correctly acquitted all the other accused as it found that their identification was not proper. The identification of the appellant was also faulted by the trial court. The appellant was convicted on the allegation that he was found in possession of a mobile phone. The evidence to that effect was adduced by PW9 who is a police officer who came from Nairobi CID office. The offence occurred on the 19th September, 2010 while the appellant was arrested six days later on the 25th September, 2010. PW9 alleged that he relied on classified information to arrest the appellant. PW9 informed the court that they had a list of suspects from Nairobi and the appellant was in the list. PW9 did not reveal the source of the list. The trial ended without the court knowing how the police officers made the appellant to be a suspect. The appellant was called on his phone and when he picked he was arrested.

Mr. Katete further submitted that the serial number of the phone is missing in the judgment. The phone was referred to be Nokia 1600 or 63. The appellant in his defence denied having that phone as he only saw it at the CID office in Mombasa. The trial magistrate purported to compare the appellant's signatures yet she was not a document examiner. The conviction is based on the doctrine of recent possession yet what was involved is a phone which is a fast moving item. The alledged recovery of the phone cannot be proof that the appellant was one of the robbers.

The state opposed the appeal. Mr. Fedha, prosecution counsel, submitted that the appellant was identified and was placed at the scene of crime. Evidence of PW1 was corroborated by PW2 and PW3. The police officers receive information from several sources and at times the information is classified. The investigating officer produced all the exhibits including the stolen phone. The appellant was arrested in Miritini and he is the one who directed the investigator to the other co-accused.

The record of the trial court show that thirteen witnesses testified for the prosecution. PW1 JOHN KALAMA was the complainant in count one which led to the conviction of the appellant. On the 16th September, 2010 at about 11.30 pm he was asleep in his house at Matsangoni. Robbers broke into his house and demanded money. They asked for foreign currency. They were armed with an axe, iron bar, a sword and a pistol. He was with his family. The robbers demanded to be given all the mobile phones. They took three Nokia phones make 6300, 2220 and 3310. He also gave them gold and Kshs.27,000/=. One of the robbers punched him on the mouth and then kicked him. He fell down. The robbers left and the matter was reported at the Matsangoni AP Camp and later Kilifi police station. PW1 later got information from the police after one week that one of the mobile phones Nokia 6300 had been recovered. He was called to an identification parade and was able to identify the appellant.

PW2 ALICE MWAKA is the wife of PW1. On the 19th September, 2010 at about 11.30 pm they were asleep when six robbers broke into their house. She switched on the tube lights and was able to see the robbers armed with a gun, a Somali sword and an axe. They took Kshs.2,000/= from her handbag and her husband gave them more money. A Nokia phone make 6300 which was hers was taken. The robbers threatened to rape to her, her sister-in law and her maid. In total the robbers took Kshs.27,000/=.

Later she was called to the CID office and she identified her Nokia phone 6300 serial number 353215031628651. The phone was purchased in Nairobi on 1st April, 2009 by her husband PW1. PW2 was not able to identify any of the robbers.

PW3 DANIEL NGELA FUKO was asleep on the 19th September, 2010 at about 11.00 pm. The robbers broke into the house at Matsangoni and they took his mobile phone Nokia 6070 and Kshs.550/=. After the robbers left they reported the matter at the Matsangoni AP Camp. PW4 MARGARET SADA was asleep on the 23rd September, 2010 at about 11.00 am. Robbers went to their house and shot her son Amani Calvin who died. She was pushed on the ground and the robbers were armed. PW5 PENDO MUSUNGU resides at Matsangoni. On the 19th September, 2010 at about 11.00 pm two people broke into her room while armed with crude weapons. They demanded to be given foreign currencies. They took her laptop. She was able to identify the second accused before the trial court during an identification parade. PW6 MARGARET NYAMVULA was also asleep on the 16th September, 2010 at Matsangoni when two people entered her room and demanded money and mobile phones. She later attended an identification parade and was able to identify the second accused before the trial court who was acquitted.

PW7 MWAMUYE JILANI was asleep on the 23rd September, 2010 when he heard gun shots from his neighbors' house. He went there and found that Calvin Jilani had been shot dead. The AP officers went to the scene. PW8 Chief Inspector of Police, EMMANUEL LANGATI was based at the CID Headquarters, Ballistic Section. He is a ballistic expert. He analysed three spent cartridges and prepared his report.

PW9 PC JOSIAH MARITINI was based at the CID Headquarters Nairobi, special crime prevention unit. On the 23rd September, 2010 they were called to travel to Kilifi and Mombasa following several cases of

robbery with violence. He went with three other colleagues and arrived on the same day at 3.00pm. They had a list of suspects and the appellant was in the list. This was classified information that had been obtained from leads to the crimes. On the 25th September, 2010 they arrested the appellant at Miritini. They recovered three mobile phones from him including Nokia 6300 serial number 353215031628651. The mobile phone was identified by one of the witnesses. The appellant called the second accused before the trial court and he was also arrested. PW10 Inspector DONALD KIMANZI was at the Kilifi police station on the 27th September, 2010 at about 3.30 pm. Together with other officers they were instructed to go to the house of the second accused Stanslaus Okoth Ogal and conduct a search. They went to the house and recovered one pair of Navy uniform. PW11 Inspector NEWTON MJOMBA was stationed at the Kilifi police station. He was requested by the investigating officer, PW12, to conduct several identification parades. He conducted a parade for the appellant who was identified by PW1.

PW12 Corporal JERALD KAMWARO investigated the case. He was based at Flying squad office in Nairobi. He visited the crime scene involving the killing of Calvin Jilani who was a councilor. He produced all the recovered items involving all the accused as well as the list of inventories. The appellant was handed over to him by his colleagues. It is his evidence that the appellant was found with the mobile phone Nokia 6300. The appellant was arrested on 25th September, 2010. PW13 Dr. FARAJ TAHER was based at Kilifi District hospital. He produced the post mortem report for Calvin Mwamuye.

In his unsworn defence, the appellant testified that he is a business man and resides at Jomvu, Miritini. On the 19th September, 2010 he was heading to his place of work. While at the stage in the morning he received a call from a strange number. Before he could answer he heard people saying 'ndio huyu'. Police officers emerged and arrested him. He was taken to Mombasa Central police station. The police told him that they were looking for him. On 28th September, 2010 he was taken to Kilifi and was detained at the Kilifi police station pending investigations. On the 1st October, 2010 he was told to attend an identification parade and one of the complainants whom he had seen before identified him. On the 7th October, 2010 he was arraigned in court. It is his evidence that he was found with two Nokia phones make 1200 and 6101.

The trial court held that the evidence on identification was not convincing. The trial court noted that the victims of the robberies did not give the description of the attackers immediately they reported to the police. The court convicted the appellant on the count of robbery with violence on the basis of the doctrine of recent possession. The trial court elide on the case of **MALINGI V REPUBLIC (1989) KLR 225** where the court itemized the elements of the doctrine of recent possession.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. Counsel for the appellant contends that the alledged phone was not properly described. According to PW1, the robbers took three phones. One of the phone was Nokia 6300. PW1 testified that the phone belonged to his wife and the serial number was on the box. PW2, ALICE MWAKA testified that she identified the phone using its serial number. The phone's serial number was 353215031628651. It is PW2's evidence that the phone was purchased on 1st April, 2009 in Nairobi. PW2 produced the official receipt for the purchase being receipt number 1546.

PW9, P.C. JOSIA MARITINI informed the court that they recovered three mobile phones from the appellant. The phones are given as Nokia 1200, Nokia 6101 and Nokia 6300. The Nokia 6300 was serial number 353215031628651.

PW12, the investigating officer testified that inventories of the recovered items were taken. In relation to the appellant, there is an inventory that was produced as Exhibit number 17 for the prosecution. The inventory include the Nokia phone 6300 and the same serial number is given.

The appellant's evidence was that he was not aware of the recovered Nokia phone. From the evidence on record, it is established that the appellant was found in possession of the recently stolen phone. PW9 and his colleagues called the appellant on his phone and when he picked, they arrested him. There is no requirement that the police had to reveal as to how the appellant was in the list of suspects. The police do

carry out their investigations and it is not a requirement of the law that they reveal the source of their information. What is important is the evidence the prosecution brings before the court and the manner in which such evidence was obtained. Internal leads or tip offs are part of the investigation process and need not be revealed to the court. At times the investigators get information from informers. Names of informers need not be revealed to the court. The prosecution did prove that the appellant was in possession of the Nokia 6300 phone. The phone was properly described as 6300 contrary to Mr. Katete's submissions that it was not described properly. I am satisfied that indeed the appellant was found with the Nokia mobile phone 6300 serial number 353215031628651.

The next issue is the applicability of the doctrine of recent possession. The doctrine simply put states that if one is found with an item that has been recently stolen, then in the absence of any proper explanation as to how that person came into possession of the item, the conclusion can be made that the person found in possession is either the thief or receiver. In the case of **ANDREA OBONYO V R. (1962) E.A 542**, the Court of Appeal held as follows: -

“(ii) where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt; and if a finding that he stolen the articles depends on the presumption arising from his recent possession of the stolen articles, such a finding would not be justified unless the possibility that he received the articles has been excluded.”

The court in the same case went on to state the following: -

“Whenever the circumstances are such as to render it more likely that the party found in possession did not steal it, the presumption is that he received it. Everything must depend on the circumstances of each case. Factors such as the nature of the property stolen, whether it be of a kind that readily passes from hand to hand, and the trade or occupation to which the accused person belongs can all be taken into account. A shopkeeper dealing in second-hand goods of the kind involved would naturally suggest receiving rather than stealing. In the present case the stolen property was a wrist watch of some value, easily identifiable, and therefore an article which a thief might experience some difficulty in disposing of by sale. There was nothing to suggest that he was the receiver of the kind of person who might be accustomed to receive stolen property.”

The offence took place on 19th September, 2010. The appellant was arrested six (6) days later on 25th September 2010. The trial court correctly held that the appellant was not positively identified by the victims of the robbery with violence. That does not rule out the fact that the appellant could have been one of the robbers if other circumstances other than identification prove that he was one of them. Such other circumstances include being found in possession of the stolen items or being the person who sold the items to the person found in possession. As indicated in the case of **ANDREA OBONYO V REPUBLIC** (supra), the court has to consider other factors such as the nature of the stolen property such as one that can pass from one hand to another.

In the current case, the property found in possession of the appellant is a mobile phone. It is clear that the appellant did not provide any explanation as to how he came into possession of the mobile phone. He admitted having been found with two phones namely Nokia 1200 and Nokia 6101. He does not know anything about the other phone. The court has to consider the nature of the stolen item irrespective of the absence of a reasonable explanation. The stolen item is a mobile phone which can pass from one hand to the other. It took six (6) days for the appellant to be arrested. The appellant was arrested while heading to his place of work. It can be concluded that the appellant was a receiver of the stolen item as opposed to being the one who robbed the owner of the phone.

In view of the nature of the stolen item, I do find that the prosecution did not prove the offence of robbery with violence against the appellant. However, the prosecution did prove that the appellant was in possession of a recently stolen mobile phone Nokia 6300. Section 179 (2) of the Criminal Procedure Code allows the court to convict an accused person where the facts prove a lesser offence.

In the end, I do find that the appellant was not one of the robbers who robbed the complainant of the phone. The conviction on the charge of robbery with violence is set aside. The appellant is found guilty of handling stolen property contrary to section 322 (1) of the Penal Code and is convicted accordingly. The maximum sentence is fourteen (14) years imprisonment. The appellant was sentenced on 9th May, 2013. He is hereby sentenced to serve four (4) years imprisonment from the date of conviction.

In the end, the appeal partly succeeds. The death sentence is hereby set aside. The appellant is sentenced to serve four (4) years imprisonment on the lesser charge of handling stolen property.

Dated and delivered in Malindi this 19th day of September, 2016.

S.J. CHITEMBWE

JUDGE