



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 31 OF 2012

BETWEEN

STEPHEN OMONDI OCHIENG.....1ST APPELLANT

ERICK ONYANGO.....2ND APPELLANT

ERICK ONYANGO OTIENO.....3RD APPELLANT

BENARD ODHIAMBO.....4TH APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.P.C. Biwott , PM dated 28th February 2012 at Principal Magistrate's Court at Winam in Criminal Case No. 1865 of 2010)

JUDGMENT

1. The appellants, **STEPHEN OMONDI OCHIENG (A1)**, **ERICK ONYANGO (A2)**, **ERICK ONYANGO OTIENO (A3)** and **BERNARD ODHIAMBO (A4)** were among 8 accused persons charged with the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. Each of them was charged with an alternative count of handling stolen goods contrary to **section 322(2)** of the *Penal Code*. The appellants were convicted and sentenced to death on the principal charge while the rest of the co-accused were acquitted. They have now lodged this appeal.

2. It was alleged in the principal charge were that on 27th November 2010 at Arya Primary School in Kisumu District within Nyanza Province at 4.50am, jointly with other not before the court while armed with pangas robbed **WALTER ARTHUR NONDI** of 3 I-phones, Nokia phone 1201, one bag with assorted clothes all valued at Kshs. 50,000/- and at or immediately before or after such robber wounded the said **WALTER ARTHUR NONDI**.

3. As this is a first appeal, the duty of the court is to subject the evidence on record to a fresh review and scrutiny and come to its own conclusion while bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic [1972] E.A 32*). The prosecution called a total of 8 witnesses while the appellants testified but did not call any witnesses. The evidence that emerged before the trial court was as follows.

4. Walter Arthur Nondi (PW 1) recalled that when he arrived home from a shopping trip to Dubai he took the night bus to Kisumu and arrived on 27th November 2010 at about 4.00am. After alighting, he decided

to walk home and as he reached Arya Nursery School, he was attacked by a group of panga wielding boys. He was robbed of 3 I-phones, a Nokia 1201 and his bag with clothes and personal items. He was injured on the left hand, knee shoulder. PW 1 managed to reach his home where his brother, Erastus Okeyo Tito (PW 6), an administration police officer, woke up after hearing his calls for help. PW 6 narrated to him his ordeal and with the assistance of a neighbour's vehicle, they went with to Kisumu Central Police Station and reported the incident at about 6.45am. While going back home, PW 1 spotted some of the suspects but could not catch up with them, so he proceeded to report the matter at Railways Police Station who took over the matter.

5. After receiving a report of the incident, PC Paul Tirop (PW 3) of Railways Police Station, started conducting investigations. Together with PC Matina Wanyonyi (PW 2) and PW 6, they proceeded to Lwangni area where an informer had told them some of the suspects were. The officers managed to arrest 3 suspects among them **A2** was caught trying to hide a mobile phone in his underwear while attempting to flee. In the afternoon, the officers were joined by SSGT Joans Akeyo Agoge (PW 4). At 3.30pm, they arrested other suspects including **A4** but nothing was recovered from them. While in custody, **A4** told the police that he sold one of the phones to a woman by the name Mary. Mary was arrested and recorded a statement in which she stated that she bought the Nokia 1201 from **A4**.

6. Later that night, the officers received information from informers that there was a suspect at the bus stage. PW 1 and other officers proceeded there and the informer directed them to **A3** who had in his possession of a mobile phone which PW 1 identified as his. They also received a report from an informer that there was suspect lived at Railways. When they went there at night, they found **A1**, who produced a phone which PW 1 identified as his.

7. The appellants were put on their defence. In his sworn defence, **A1** denied that he robbed the complainant or that he was found his possession of PW 1's mobile phone. **A2** also denied that he robbed the complainant as alleged or that he was found with PW 1's mobile phone in his possession. **A3** also denied that he was involved in the robbery or that he was found with the PW 1's mobile phone as alleged. **A4** elected to give an unsworn statement in which he denied the was involved in the robbery and stated that he was arrested while going about his normal work.

8. I find and hold that the prosecution proved the essential elements of robbery with violence under **section 296(2)** of the *Penal Code*. The prosecution proved that the assailants were either more than one in number or that they were armed with offensive weapons or inflicted violence on the complainant while stealing from him. PW 1 gave a clear account on how a gang of boys armed with pangas attacked and injured him and stole his mobile phones and other personal belongings. The fact of robbery is corroborated by the testimony of PW 6 who saw him immediately after the incident and the police officers who set in motion recovery of the stolen items and arrest of suspects on the very same day. George Mwita (PW 7), a clinical officer, examined PW 1 on 1st December 2012 and confirmed that he had sustained bruises on the lower and upper arms, right hand fingers and right upper shoulder and left knee joint. He opined that the injuries were inflicted by a sharp object. I therefore find and hold that the prosecution proved the ingredients of robbery with violence under **section 296(2)** of the *Penal Code*.

9. The main issue raised by the appellants in their respective petitions of appeal is whether they were identified as the assailants or whether they were found with PW 1's stolen mobile phones leading to the irresistible inference that they were involved in the robbery. The learned trial magistrate did not rely on evidence of identification to convict the appellants, he relied on the doctrine of evidence of recent possession of stolen goods. In their written submissions, the appellant contended that the evidence against them was contradictory, did not establish the elements upon which doctrine of recent possession could be applied and could not sustain a conviction. They also submitted that the learned trial magistrate shifted the burden of proof to them. Ms Osoro, learned counsel for the respondents, supported the conviction on the basis that each appellant was properly convicted.

10. The doctrine of recent possession is supported by **section 119** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* which states;

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Thus, when an accused who is found in possession of suspected stolen items, he is presumed either to be the robber or a guilty receiver, unless he offers a reasonable explanation as to his possession of suspected stolen items. In **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic** NYR CA Criminal Appeal No. 272 of 2005, the Court of Appeal summarised the application 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.

11. Regarding the evidential burden on the accused, the Court of Appeal in **Francis Kariuki Thuku & 2 others v Republic** NKU CA Criminal Appeal No. 136 of 2006[2010] eKLR explained that:-

*Concerning the application of the doctrine of recent possession to the facts in the case, we are of the view that the appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of **R v Loughin 35 Cr. Appl. 269** by the Lord Chief Justice of England and this Court's own decision of **Samuel Munene Matu v R Criminal Appeal No. 108 of 2003 at Nyeri** demonstrates that the doctrine was properly applied. The recovery of the items in the case before us was within 7 days whereas in the **Matu Case (supra)** a period of 20 days was held to be recent. We accordingly uphold the superior court's view of the law on the point. In this regard we would re-echo the decision of this Court in the case of **Hassan v Republic [2005] 2 KLR 11** where as regards recently stolen goods it delivered itself thus:-*

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)

12. I now turn to consider the evidence against each appellant with the principles I have outlined in mind. **A1** was implicated by an informer who directed the police officers to his house at Railways and recovered a black I-phone. PW 2, PW 3, PW 4 and PW 6 were present when the phone was recovered in his house at about midnight on 27th November 2016. PW 1 identified the black I-phone serial No. 355139904037006/356835003937009 as his. I am satisfied that the collective testimony of the witnesses established the fact the black I-phone was found in **A1**'s possession within a day of the robbery and that it was proved to belong to PW 1. **A1**'s did not lay claim to the phone in his defence or give an account of how it came into possession. I therefore find the conviction of **A1** sound.

13. The evidence against **A2** is that when the PW 2, PW 3 and PW 6 were led to Lwangni beach to effect arrest of suspects on the direction of an informer, **A2** was caught as he was trying to hide a black I-phone in his underwear. The I-phone serial No. 355139904037139/356835003937132 was produced by PW 8 and identified by PW 1 as his. **A2** did not lay claim to the phone nor explain why he had it. It was recovered on the very day of the robbery. I therefore find the conviction of **A2** on this basis sound.

14. The evidence against **A3** is that on the night of 27th November 2010, he was found by PW 2, PW 3, PW 4 and PW 6 who were directed by informers. He was found with a I-phone, red in colour, which was in his pocket together with a roll of bhang. The phone, serial no. 357110001702964/357110001702972 was identified by PW 1 as belonging to him. **A3** did not claim it or give an explanation why he had it. I therefore find the conviction of **A3** on this evidence sound.

15. PW 2, PW 3, PW 4 and PW 6 all confirmed that when **A4** was arrested he was not found with anything belonging to PW 1. PW 3 told the court the while he was in custody he said that he sold the phone he had to one Mary Aoko, who was traced and indeed confirmed that **A4** had sold to her the Nokia 1201 belonging to PW 1 for 1000/-. Mary Aoko did not testify. In convicting him, the trial magistrate held that **A4** is the one who led PW 2, PW 3, PW 4 and PW 6 to recover 2 pangas which must have been used to rob PW 1. He stated, “A4 (A6) conduct and revelation showed that he was part of the gang that robbed the complainant. The fact that Mary did not attend court can’t be a leeway for him to face the consequences of his act.”

16. The finding against **A4** was based on a total misdirection as whatever A4 said in police custody was a confession and could not be admitted. What A4 said in police custody is a confession as it amounts to words and conduct from which an inference may reasonably be drawn that the person making it committed an offence as is provided under **section 25** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which states;

A confession comprises words, or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

17. The conditions under which a confession is admissible are set out in **section 25A(1)** of the **Evidence Act** which states as follows:

25A(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police and a third party of the persons choice. (Emphasis mine)

18. Flowing from the provisions of **section 25A (1)** of the **Act**, the statements of A4 made in police custody are inadmissible and cannot be proved against him **unless** they were made before a judge, a magistrate or before a police officer (other than the investigating officer) being an officer not below the rank of Chief Inspector and a third party of the accused person`s choice. Without more, I quash the conviction and sentence of **A4**.

19. In addition to the findings I have made, I would like to address some issues that have been raised by the appellants. They complained that the charge of robbery with violence against them was defective in it failed to indicate the serial numbers of each phone that was stolen and valuation of each phone. It is important to recall that the purpose of the charge is to give the accused notice of the case that they are facing. **Section 134** of the **Criminal Procedure Code (Chapter 75 of the Criminal Procedure Code)** states the following about charges:

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. [emphasis mine].

20. The charge as drawn contains a statement of a specific offence, namely robbery with violence, and such information that is necessary for giving reasonable information as to the nature of the offence charged. The only deficiency is the identity of each mobile phone stolen and the value thereof. I would point out though, that each appellant faced an alternative charge of handling stolen goods and in that charge the particulars of the phone each appellant was found with was set out with specific details including the make, colour and the serial number. I therefore find that the appellants knew the nature of the offence they were facing and were able to defend themselves. If any there was any defect in the charge, then it was curable under **section 382** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** as there was no failure or miscarriage of justice in the circumstances.

21. The appellants also complained that PW 1 did not prove ownership of the phones by producing receipts, or identifying any special marks or features on the phones to substantiate ownership. Proof of ownership is a question of fact. It is not in every case that the complainant must produce receipts to show that he purchased the items or owns them. PW 1 testified that he had purchased the phones in Dubai and it is reasonable to expect that any ownership documents he may have had were stolen when he was robbed. Moreover, there is no hint or suggestion that PW 1 was lying when he reported that his mobile phones were stolen on the very morning he was robbed. Thus there was credible and acceptable evidence to conclude that the phone belonged to PW 1.

22. One issue that has caused me anxiety is that two pages of the trial magistrate's notes were missing from the record. Neither the judge who admitted the appeal for hearing nor the parties raised the issue of incomplete or lost proceedings. The proceedings relate to part of the testimony by the Investigating officer, CPL Rashid Juma (PW 8) and part of the appellant's cross-examination. In a situation like this the Court of Appeal has made it very clear that the loss of the record does not automatically entitle the appellant to an acquittal or a retrial, each case must be considered on its own merits (see **John Ooko Otieno v Republic KSM CA Criminal Appeal No. 137 of 2002 [2008]eKLR**). After reflection, I did not think his evidence, being that the investigating officer, was crucial considering there was direct testimony of PW 1, PW 2, PW 3, PW 4 and PW 6 which implicated the appellants directly. I therefore find that the appellants are not prejudiced in this regard.

23. The trial magistrate did not pass sentence on **A3** despite having convicted of being in possession of one (1) roll of cannabis sativa on 27th November 2010 at Fanana Bar within Kisumu District contrary to **section 3(1)** as read with **section 3(2)** of the **Narcotic Drugs and Psychotropic Substances Control Act, 1994**. Probably the learned trial magistrate had in mind the principle summarized in **Hamisi Mungale Burehe v Republic MSA CA Criminal Appeal No. 37 of 2013 [2015]eKLR** that;

The norm and practice is that where an accused person is convicted and sentenced on both capital and non-capital offences, the latter sentences are supposed to be held in abeyance pending the execution of the capital sentence.

24. I therefore sentence **A3** to 6 months' imprisonment by the sentence is held in abeyance in view of conviction and sentence on the principal charge of robbery with violence.

25. The net result of my findings is that the prosecution proved that **A1, A2** and **A3** were in possession of PW 1's mobile phones within a day of the robbery. They did not lay claim to the mobile phones or give a reasonable explanation as to why they had them. I therefore affirm the convictions and sentences imposed on **STEPHEN OMONDI OCHIENG (A1), ERICK ONYANGO (A2)** and **ERICK ONYANGO OTIENO (A3)**. Their appeals are dismissed.

26. The appeal by **BERNARD ODHIAMBO (A4)** is allowed. The conviction and sentence against him is quashed. He set free unless otherwise lawfully held on a separate warrant.

DATED and DELIVERED at KISUMU this 30th day of November 2016.

D.S. MAJANJA

JUDGE

Appellants in person.

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