REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 79 OF 2014

DUNCAN KIPROP.....APPLELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence of Death for the offence of Robbery with Violence Contrary to Section 296(2) Penal Code by Hon. T. W. Cherere Chief Magistrate Nanyuki on 06/10/14 in Criminal Case No.527 of 2014.)

JUDGEMENT

1. Duncan Kiprop the appellant herein was charged and convicted of the ***offence of Robbery with Violence Contrary to section 296(2) of the Penal Code*** by the Chief Magistrate Nanyuki on 6th October 2014.

The particulars stated in the charge sheet were that the appellant on the 22nd day of May 2014 at Nturukuma Village in Laikipia County within the Republic of Kenya jointly being armed with a dangerous weapon namely a knife robbed STEPHEN KAGUNDA a mobile phone make techno valued at Kshs.3000/= and cash money Ksh.50 and at the time of such Robbery used personal violence against the said STEPHEN KAGUNDA.

2. Upon conviction he was sentenced to suffer death as provided for by the Law.

3. Being aggrieved by the conviction and sentence he filed this appeal raising the following grounds:-

i. ***That, the Learned Trial Magistrate erred in both law and fact while convicting him on reliance to the exhibited cell phone without considering that he had accounted for as to how the same came in his possession as evidenced by PW5.***

ii. ***That, the Learned Trial Magistrate erred in both law and fact while being impressed with his mode of arrest whilst nothing was found in his possession at the time of his arrest.***

iii. ***That, the Learned Trial Magistrate erred in both law and fact while convicting him on charges that weren't adequately proved to point to his guilt.***

iv. ***That, the Learned Trial Magistrate erred in both law and fact while convicting him on reliance to the advance evidence by the prosecution side witnesses which was flowed with lots of doubts and in consistencies thus contravening Section 163 (c) of the evidence act.***

5. ***That, the Learned Trial Magistrate erred in both law and fact while rejecting his defence that wasn't challenged by the prosecution side as per law requires in Section 169 (1) of the Criminal Procedure Code.***

4. The prosecution called a total of six (6) witnesses. A summary of their evidence is that **PW1 (Stephen Kagunda Gichimo)** walked from his house at Nturukuma Village on 22nd May 2014 at 5.55a.m to his place of work. He met two men, one of whom had a knife. He threatened to stab him. PW1 held the knife and it cut his palm and 3 fingers. The other man held his right hand and removed his phone (Techno make) plus Shs.50/=. The two men then ran away.

5. A report was made and the phone was tracked and traced to the Appellant who was found with it. The said phone was produced in Court as Exhibit B2. Its Serial No was shown as 343-869859011233003.

6. **PW5 PC Samuel Kabonde F/No.83963** a son of the complainant (PW1) is the one who actually tracked this phone. He produced in Court a Safaricom date (Exhibit 3) showing how the phone had been in use Vide Nos. 0725–153713 belonging to **John Kibet (PW6)** and Rosabella Kimutai the wife of the Appellant's Co-accused in the lower Court.

7. **PW1** (**Stephen Kagunda Gichimo)** & **PW2 (Erick Munene Jackson)** confirmed that they were not able to identify any of the robbers. It is therefore the evidence of recovery of the phone that is connecting the Appellant to this offence.

8. When the appeal came before us for hearing, the Appellant presented to us his written submissions. His main submission was that he was convicted on charges that were not adequately proved. Further that his defence was not considered by the trial Court.

9. In opposing the appeal Ms Maundu for the state submitted that the Appellant was convicted on the doctrine of recent possession, whose evidence was overwhelming. He had failed to explain his possession of the phone, she submitted.

10. As a first appeal Court we have a duty to re-evaluate and reconsider the evidence that was adduced in the Court below and arrive at our own conclusion. See **Okeno Vs. Republic 1972 EA 36** where the Court of Appeal stated as follows;

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., (1957) E.A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala V. 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 findings and conclusions; 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 V. Sunday Post, (1958) E.A 424".***

We are duly guided.

11. We have considered the evidence that was adduced together with the grounds of Appeal. We have equally considered the submissions by both the Appellant and the State.

12. It is clear from the evidence adduced that neither PW1 nor PW2 identified the people who had robbed the former on that morning of 22nd May 2014, 5.55a.m. The offence of robbery was sufficiently proved. The issue for determination is whether the doctrine of recent possession applied in this case.

13. In the case of **Arum Vs. Republic (2006)1 KLR 233** which the Learned Trial Magistrate referred to in her Judgment the Court of Appeal sitting in Kisumu found the said doctrine to apply where the court was satisfied of the following:-

1. (a) that the property was found with the suspect;

(b) that the property was positively the property of the complainant;

(c) that the property was stolen from the complainant;

(d) that the property was recently stolen from the complainant.

2. The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

3. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot be suffice, no matter from how many witnesses.

14. **Was the phone stolen from the complainant?**

PW3 confirmed that he was allocated this case to investigate on 22nd May 2014. The complaint was that PW1 had been robbed by two people and a phone stolen from him. The P3 (Exhibit 2) form also shows that the complaint was reported to the police on 22nd May 2014 which is the same date of complaint. PW2 also confirmed that indeed after the incident the complainant was at his neighbour's gate screaming and he was bleeding from his left hand. Our finding is that PW1 was attacked, injured and robbed of his phone.

15. **Was the phone positively identified as PW1's Property?**

This is all that PW1 the complainant told the Court about the phone at page 6 lines 18-19;

"The phone before Court is mine. Its Serial No – Tecno.343-869859011233003".

The Investigating Officer (PW3) could also not identify this phone. He states at page 9 lines 18-21;

*"**The phone I recovered from Accused 2 Pexhibit 1. Complainant did not give me a receipt for the phone. He said its screen was scratched. Its a Tecno phone".***

16. PW1's son who testified as PW5 told the Court that he had recorded in his note book PW1's IMEI phone number as 869859012333003 which he forwarded to Safaricom. There is no evidence to show if this notebook in which the IMEI number is said to have been written was availed to the Court, as evidence. Its also not shown from where PW1 and PW5 were quoting this IMEI number. The issue is, how PW1 identified the phone that was before the Court to the satisfaction of the said Court that indeed the phone was his.

17. From the list of exhibits produced in Court the list shows Exhibit 1 as Techno Serial No.3438398590/1233003 which we believe is a Techno phone. The Serial No's given by PW1, PW5 and what was produced in Court are all at variance. Apparently the **Investigating Officer (PW3)** did not even have the Serial No of the phone he produced in Court. That clearly explains why in the particulars of the Charge Sheet there is no mention of a serial number.

18. Was the screen of this phone scratched as was alleged by the Investigating Officer (PW3)?. There is nothing on record to prove that. Even PW1 does not say the screen to his phone had scratches and neither did he show any to the Court.

19. From the above we have come to the conclusion that the prosecution failed to prove that the phone Exhibit 1 was the phone that had been stolen from PW1. In other words ownership was not established.

20. **Was the phone found with the Appellant?**

PW3 (No.88180 PC James Kioko Mwendwa), PW5 (83963 PC Samuel Kabonde) and **PW6 (John Kibet)** testified that the stolen phone was found with the Appellant. PW6 confessed to having used his simcard in this phone on 25th May 2014. He called the Appellant and asked him to come with the phone on 31st May 2014 when police came knocking at his door. The Appellant obliged. PW5 a son of PW1 said he used the phone's Serial No. and Safaricom to track his father's phone. PW3, PW5 and PW6 explained what the Appellant told them after the recovery of the phone.

21. According to PW5 the Appellant told them that it was his co-accused in the lower Court one (Josephat Njagi Ndwiga) who had given it to him in lieu of Shs.100/= he borrowed. Further he told PW5 that one Rosebella Kimutai wife of his co-accused is the one who had given it to him. In his defence the Appellant denied having been found with any phone, let alone the phone before the Court.

22. A scrutiny of the Safaricom data that was produced before the Court as Exhibit 3 shows that one Rosebella Kimutai who was described as a wife of the Appellant's co- accused used this phone to send SMS twice on 26th May 2014 vide line No. 0708 – 373 169. Exhibit 3 also shows that the village elder (PW6) used this phone on 26th, 27th, & 28th May 2014 to make several calls and SMS vide line No. 0725-153713. This contradicts his evidence that he only used his simcard on this phone on 25th May 2014 to confirm that the phone was working. This phone was in his possession from 25th May 2014 – 28th May 2014. What was he doing with it we ask?

23. Surprisingly the Investigating Officer (PW3) said he found the phone sim card in the possession of the village elder (PW6). This is found at page 10 of the Record of Appeal. What was PW6 doing with the phone's sim card? Didn't it occur to him (PW3) that PW6 was a suspect and/or accomplice? Why was he not charged? Equally Rosebella Kimutai ought to have explained her use of the suspect phone. She was not arrested nor called as a witness.

24. Our finding is that though the Appellant may have been found with the phone the use of this very phone by PW6 and Rosebella Kimutai and the mention of the Appellant's co-accused ought to have been interrogated further as they were the first users after the robbery. PW3 who was supposed to have been the Investigating Officer appears not to have carried out any meaningful investigation. He abdicated his duty to his colleague (PW5) who is a son to the complainant.

25. The incident complained of is said to have occurred on 22nd May 2014. The phone (Exhibit 1) was according to PW5 & PW6 recovered on 31st May 2014. It was therefore recovered nine (9) days after the robbery. In the **ARUM Case (Supra)** the Court of Appeal stated that the proof time will depend on the easiness with which the stolen property can move from one person to another. In the present case the first known person to have used this phone after the Robbery was Rosebella Kimutai followed by John Kibet (PW6).

26. Rosebella should have been arrested to explain her possession. John Kibet had this phone in his possession for a clear 3 days. In his evidence he said he was brought the phone on 25th May 2014 for testing. The evidence from Safaricom Exhibit 3 shows he had it from 26th-28th May 2014, was he really testing the phone or he was the one in possession? A mobile phone is one of those items which changes hands very fast. It is always important that the prosecution links up its evidence well before the Court can rely on such evidence to convict an accused person.

27. We find that the circumstances of the recovery of this phone (Exhibit 1) are very suspect for a fast moving item like the phone in issue. Nine (9) days may not be a very short time after the theft or robbery when we consider the nature of movement of a stolen phone. Proper investigations ought to have been carried out to establish the truth.

28. The state submitted that the Appellant had failed to explain his possession of the phone. We find that the Appellant could only have been expected to explain possession if indeed the evidence adduced showed that he was in actual or constructive possession. The people who had handled this phone since its theft, and were known by PW3 ought to have been arrested and charged or called as witnesses. Our

finding is that the evidence of Possession was not water light.

29. Upon our own analysis of the evidence adduced we find a lacuna in the prosecution case from which the Appellant will benefit.

30. The end result is that the appeal is allowed and the conviction is quashed. The sentence is set aside. The Appellant to be released forthwith unless lawfully held under a separate warrant.

Signed, dated and delivered in open court this 15th day of December, 2015

Hedwig Imbosa Ong'udi Ngaah Jairus

JUDGE **JUDGE**