



REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL 221 OF 2014

SIMON MAREIRO MOKAYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of D.G. Karani PM in Criminal [Case No. 452](#) of 2013 delivered on 5th November 2014 at the Principal Magistrate's Court at Kithimani)

JUDGMENT

The Appellant was charged in the trial Court with the offence of robbery with violence, contrary to section 295 as read with section 296(2) of the Penal Code. The particulars of the offence were that on the night of 16th and 17th day of March 2013 at Kyasioni village within Matuu location in Yatta District within Machakos County, the accused jointly with others robbed James Mutie Mutiso and his wife Mrs. Sarah Mutie Mutiso of two mobile phones make Tecno and Nokia1110 of IMEI No.s 863347015721765, 358074019811139 and 358074019833139 all valued at Kshs. 17,000/-, the property of James Mutie Mutiso and Sarah Mutie Mutiso, and immediately before the time of such robbery caused the death of James Mutie Mutiso.

The Appellant was also charged with an alternative offence of handling stolen goods, contrary to section 322(1) as read with section 322(2) of the Penal Code. The particulars were that on the 4th day of March 2013 at around 13.00 hours at Mathare No. 10 within Starehe Constituency of Nairobi County, otherwise than in the course of stealing, he dishonestly assisted in the disposal of one mobile phone make Nokia 1110 IMEI No. 358074019833139 valued at Kshs. 5,500/- the property of Mrs. Sarah Mutie Mutiso.

The Appellant was first arraigned in the trial court on 17th July 2013 as the 2nd Accused person in Criminal Case No 452 of 2013, and he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to death. The Appellant being aggrieved by the judgment of the trial magistrate, has preferred this appeal against the conviction and sentence.

The main grounds of appeal are that the conviction was based on circumstantial evidence; the prosecution was unable to establish the doctrine of common intention between the Appellant and his co-accused; the evidence did not prove the doctrine of recent possession for a fast moving item as the mobile phone; he was not informed of his right to cross-examine his co-accused contrary to section 208(3) of the Criminal Procedure Code; and that there was breach of section 169 of the Criminal Procedure Code.

The Appellant filed written submissions in Court dated 18th November 2015. He submitted that the trial Court found that he was in recent possession of PW2's phone, and that he gave the prosecution two phone numbers of the person who sold the said phone to him and led the police to his house, but that the police

did not follow up with their investigations on this lead. He relied on the principles governing the doctrine of recent possession and when it may apply given in the case of **Isaac Nganga Kahiga alais Peter Nganga Kahiga vs Republic, Criminal Appeal No. 272 of 2005.**

He also submitted that the prosecution relied on a printout of the call history of PW2's phone from Safaricom Ltd, which did not contain the certification required by section 65(8) of the Evidence Act. The decision in **Charles Matu Mburu vs Republic, Criminal Appeal No. 34 of 2014** was cited by the Appellant in this regard. Lastly, it was submitted by the Appellant that there was no identification evidence, and that the evidence relied upon was circumstantial which did not lead to the irresistible conclusion that he committed the crime he was charged with. He relied on the decision in **Sawe vs Republic, Criminal Appeal No. 2 of 2002** in this respect.

The Prosecution Counsel, Mr. Shijenje, conceded the appeal and made oral submissions in court during the hearing on 18th November 2015. The counsel submitted that at the end of the trial, the Appellant had explained that he had gotten the phone from one Mwangi Muikamba, and that this was doubted by the trial court. Further, that both the 1st and 2nd accused stated in the trial Court where they had gotten the phones, and it was not clear whether the police followed this lead.

It was also submitted by the State that the prosecution witnesses did not advance evidence as to seeing the Appellant at the scene of the crime, and that he was only linked by the phone which PW 9 testified he got from the Appellant. Further, that the Appellant had explained to the police the person from whom he got the phone, and took the police to the home and gave them his telephone number.

As this is a first appeal, we are required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that we never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The key evidence given at the trial is as follows. The prosecution called fifteen witnesses. PW1 was Dr. Peter Muriuki Ndegwa the pathologist in the case. He stated that on 21st March 2013 at about 2.00 p.m. at Kenyatta National Hospital Funeral Parlour in Nairobi, he performed a post-mortem examination on the body of Jones Mutie Mutiso. He testified that upon the examination he noted that both hands had defensive bruises and the cause of death was severe head injury due to blunt force trauma consistent with assault.

PW 2 was Sarah Mutie who testified that on 17th March 2013 at about 1.00 a.m., she was at home with her husband when they were woken up by a loud bang on the sitting room window. She testified that by the time her husband had woken up and dressed, the robbers had gained access to the house. She said that she heard her husband scream and fall.

PW2 stated that from the light of the torch she made out that there were 3 people in the house. She then ran to where her husband was lying, and one of the robbers hit her on the shoulder and demanded for money. They then forced her to the bedroom when she said she had no money. Further, that the robbers left after a short while and took two phones, a Nokia 1110 belonging to her and a Tecno belonging to her husband; a torch and a lamp.

PW2 further testified that when the robbers left she called for help, and her husband was taken to Matuu Hospital and later transferred to Aga Khan Hospital where he passed on after 3 days. She stated that the police later came to her home and she explained to them what had transpired. The police collected a metal rod from the scene which belonged to their neighbour one Muindi Nzau. She later learnt that their phones had been recovered in Nairobi Mlangu Kubwa. She also stated that she had recorded a statement with the police.

PW3 and PW4, Peter Koeka Mutie and PC Raphael Githinji, the son and son-in-law of the deceased respectively, stated that they had identified the body of Jones Mutie at Kenyatta Hospital. They confirmed that the deceased had died after sustaining injuries in a robbery.

PW 5 was Everline Kanini Ngei who stated that on 17th March 2013 at about 10.00am she had gone to buy vegetables at PW 6's shop when she met the 1st accused in the lower Court, who offered to sell her a mobile phone of a Techno make. She stated that she bought the phone at Kshs. 1000/= and paid in installments. Further, that on 23rd March 2013 she received a call from a police officer whom she led to the 1st accused, and that they were later arrested and escorted to Matuu police station. PW6, Nthambi Kingoo, confirmed that on 17th March 2013 she was at her place of work when PW5 went to buy vegetables. She confirmed that the 1st Accused sold a Tecno phone to PW5.

PW7 was Cpl. Alexander Makau who testified that on 17th March 2013, he was at home, when he received a call from his mother that the home of the deceased had been invaded by robbers. He called PW3 who confirmed the same, and that his father had been hospitalised at Aga Khan Hospital. Further, that he was informed by PW8 that two mobile phones had been stolen during the robbery. He testified that they were able to track the signal of the deceased's mobile phone through the Crime Intelligence Unit, using the IMEI number, and it was established to be in use within Eastleigh area.

PW7 further testified that on 23rd March 2013 they were able to track PW5 with the help of an informer, and PW5 then led them to PW6 and the 1st accused person from whom she had bought the phone. He stated that the phone was identified by PW3 and his brother as belonging to their deceased father.

Cpl Jacob Kathurima was PW8, and he stated that on 23rd March 2013 he received a call from PW7 requesting for reinforcement as he arrested a suspect with a stolen phone. He also stated that through PW5 and PW6, they were able to arrest the 1st accused who they took to Pangani Police station.

PW9, one Eliza Otieno Ondu on his part testified that he was sold a phone make Nokia 1110 by Jenniffer Oungo (PW10) in March 2013 for Kshs. 1000/=. That he was later arrested in Ngumba estate as he was receiving a call, and was told that the phone had been stolen, and he led the police to PW10 who was also arrested. On the way, he said, they met the Appellant who was arrested as he attempted to flee. He further stated the Appellant told them that he had been sold the phone by another person. They went to the house of the alleged seller but did not find him. He stated that they were then escorted to Matuu Police station where they recorded statements.

PW 10 who was Jennifer Achieng on her part testified that in March 2013 she learnt that PW9 had lost a phone, and she knew that the Appellant was selling a phone make Nokia 1110 at Kshs. 1000/=. She took the phone to PW9 who paid in installments. She stated that later PW9 called asking her whereabouts, and she was then arrested and asked where she had got the phone from. She stated that she pointed out the Appellant on her way to the police station and he was arrested.

Pw 11, Cpl. James Mwendeto, testified that on 10th March 2013 while on duty he received a call from IP Mutua to assist in arresting some people. He stated that they arrested the 3rd accused who was wanted in Matuu in relation to a criminal case. PW12, PC Musyimi Mwanzia on his part stated that on 20th March 2013 he was at the mortuary where a post mortem examination of the deceased's body was being conducted. The witness confirmed that the body was identified by Peter Mutie, the son to the deceased, and that the post mortem was done by PW1.

Sgt. Onesmus Masila was PW13, and he stated that on 17th March 2013 at 2.00 hours he was asleep in his house when he received a call from OCS C.I Nzuma to proceed to a scene of crime at Kiasisioni Village, where a robbery had been reported. He went to the deceased's home where PW2 pointed out the two steel doors and windows that had been broken, and the pool of blood near the bedroom door. Further, that she informed them that the deceased had been rushed to Matuu District Hospital.

C.I Henry Nzuma was PW 14, and he testified that the 1st accused had been arrested in Nairobi with a phone belonging to the deceased. He stated that on 24th March 2013 he recorded the statement under inquiry that was presented in court as an exhibit.

The last prosecution witness was Cpl. Stephen Mutai, who testified that a case of robbery was reported on 17th March 2013. He stated that that mobile phones being a Tecno and Nokia 1110 were tracked, and led to the arrest of the 1st and 2nd accused. He said that the persons who were initially arrested with the phones being PW9 and PW10 were treated as prosecution witnesses, on the advice of the Office of the Directorate of Prosecution. He stated that the 3rd accused was arrested pursuant to a court order after the 1st accused had said that he had been sold the phone by him. He produced the said court order and the Nokia 1110 as exhibits.

After the close of the prosecution case, the Appellant was put on his defence. The Appellant gave sworn evidence and did not call any witnesses. He stated that on 5th May 2013 at about 2.00 p.m. he saw five people approach him two of whom were Elisha Otieno and Jennifer to whom he had sold a mobile phone make Nokia 1110. He stated that he had been sold the phone by Mwangi Mukaba and he had directed the police to his house but they did not get him. In his defence he stated that the police did not follow up on the lead he had given them.

We have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the three issues raised in this appeal are firstly, whether the doctrine of recent possession was applicable to the Appellant, secondly, whether the Appellant's conviction for the offence of robbery with violence was based on sufficient evidence; and lastly, whether there was compliance with sections 169 and 208(3) of the Criminal Procedure Code.

On the first issue, the doctrine of recent possession is stated in the case of **Malingi vs Republic (1989) KLR 227** as follows:

“The doctrine in one of fact. It is a presumption of fact arising under section 119 of the Evidence Act, Cap 80 Laws of Kenya which provides:

“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.”

So as applies to the offence of theft or handling, recent possession raises a presumption of fact that the one in possession is either the thief or guilty receiver (R – v – Hassan s/o Mohamed (1948) 25 EACA 121). The trial court has the duty to decide whether from the facts and circumstances of the particular case under consideration the accused person either stole the item or was a guilty or innocent receiver. By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.”

The Appellant in the present appeal does not deny that the Nokia 1110 Phone was at one point in his possession, and that he sold it to PW10 who in turn gave it to PW9 for purposes of the sale. What is not established by the evidence is the date when this possession happened. PW9 and PW10 testified that it was sometime in March 2013. PW9, PW10 and the Appellant however also testified that they were arrested in May 2013, which is when the telephone was found in the actual possession of PW9. This is also the time PW15 testified that the phone was traced to PW9. There is therefore doubt raised as to whether the said possession was recent, as a period of two months had lapsed since the robbery that took place on 17th March 2013 when the said phone was alleged to have been stolen from PW2, and the date

when PW9 was found in possession of the same in May 2015. It is possible that the stolen phone could have changed hands variously during that period, and it is thus our finding that the application of the doctrine of recent possession was erroneously applied to the Appellant.

In addition, and more fundamentally, the Appellant did give an explanation of how he came to be in possession of the said phone, by explaining that he had bought it from a named person, whose telephone numbers he gave to the police and led the police to the person's house. A perusal of the court record shows that this information was given to the Court before the trial commenced on 10th October 2013, and the Appellant further requested that the person who sold him the phone be arrested.

This explanation was confirmed by PW10 and PW15, who upon cross-examination stated that the Appellant did lead the police to the house of the person who sold him the phone and he was not there, and that he did give them his number. This position was reiterated by the Appellant in his defence on 4th September 2014 that he was sold the phone by one Mwangi Mukaba and that he led the police to his house. The burden of proof therefore shifted back to the prosecution to disprove the Appellant's explanations which they failed to do. We cannot in the circumstances draw an inference of guilty receiver on the part of the Appellant, as he gave an explanation which the prosecution did not bring any evidence to controvert.

On the second issue for determination, the Appellant was charged with and convicted of robbery with violence under section 296 (2) of the Penal Code which reads thus:

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”

We are in this respect guided by the decision in **Johanna Ndungu vs Republic, Cr. App No. 116 of 2005 (unreported)** which sets out what constitutes robbery with violence under section 296(2) of the Penal Code as follows:

“In order to appreciate properly as to what acts constitute an offence under Section (296) (2), one must consider the sub-section in conjunction with section 295 of the Penal Code.

The essential ingredients of robbery under Section 295 are use of or threat to use actual violence against any person or property and at or immediately before or immediately after to further in any manner the act of stealing. Therefore the existence of the aforescribed ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in Section 296(2) which we give below and any one of which if proved will constitute the offence under the sub-section.

- 1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
- 2. If he is in the company with one or more other person or persons, or**
- 3. If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.”**

We are also alive to the requirement that proof of any one of the above ingredients of robbery with violence is enough to base a conviction under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549.**

The Appellant argued that the entire evidence linking him to the robbery was circumstantial evidence, namely that he was in possession of a phone that was stolen during the robbery. We are in this regard guided by the principles that apply before a court can rely on circumstantial evidence as was stated by the Court of Appeal in **Erick Odhiambo Okumu vs Republic (2015) eKLR (Mombasa Criminal Appeal No. 84 of 2012)** as follows:

“It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in MUSILI TULO V. REPUBLIC (*supra*),:

“[C]ircumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”

But for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In ABANGA ALIAS ONYANGO V. REPUBLIC, CR. APP. NO 32 OF 1990 this Court tabulated the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

(See also SAWE V. REPUBLIC [2003] KLR 364 and GMI V. REPUBLIC, CR. APP. NO. 308 OF 2011 (NYERI)).

Before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt. (See TEPER V. R. [1952] All ER 480 and MUSOKE V. R [1958] EA 715). In DHALAY SINGH V. REPUBLIC, CR. APP. NO. 10 of 1997 this Court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”

Applying these principles, we note that in the instant appeal PW2 testified that there were 3 people in their house during the robbery, however she did not identify the said persons. None of the prosecution witnesses placed the Appellant at the scene of the crime, and he was arrested after he sold one of the phones stolen from PW2 to PW10. He has challenged the application of the doctrine of recent possession, which we have found was not applicable in this case. No evidence was also brought of the Appellant being armed with a dangerous or offensive weapon, of using or violence or being in the company of other persons at the time of the alleged offence.

Lastly, there was an intervening period between the alleged time of the offence on 17th March 2013 and the time the stolen phone was found in the possession of PW10 in May 2015, that serves to weaken the inference of guilt, as it is not clear what happened to the said phone during the intervening period. It is thus our finding that the prosecution evidence did not firmly establish the guilt of the Appellant with respect to the charge of robbery with violence.

As to whether there is consistent and sufficient evidence to convict the Appellant, for the alternative offence of handling stolen property, in Tembere vs. Republic [1990] KLR 353, Githinji J. (as he then was) held as follows as regards the elements of the offence of handling stolen property:

“One of the important elements of the charge of handling stolen property is that the accused must know or have reason to believe that the goods were stolen, another vital element is that

the accused must dishonestly receive or retain the goods.”

In addition, in **Malingi vs. Republic (1989) KLR 225** the Court emphasised the need to prove not just possession of an item but that the item was stolen. There was no proof as shown in the foregoing that placed the Appellant at the scene of the robbery, or any any knowledge of the same, and he severally tried to explained that he purchased the phone from a third party, which explanation was not followed up by the prosecution to prove otherwise. We accordingly find that there was insufficient evidence to convict the Appellant on the alternative charge of handling stolen property.

Lastly, it was also argued by the Appellant that sections 169 and 208(3) of the Criminal Procedure Code were not complied with. Section 169 provides as follows

“(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.”

We have examined the trial magistrate’s judgment and note that the reasoning given for finding the Appellant guilty was that the he could not tell whether the Appellant’s explanation about the person who sold him the phone was credible or was a creation of the Appellant. Notwithstanding that this reasoning has been found to have been erroneous, we find that to the extent that it was given, then there was compliance with section 169 of the Criminal Procedure Code.

Section 208 of the Criminal Procedure Code on the other hand provides for the procedure to be followed upon a plea of not guilty and states as follows:

(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).

(2) The accused person or his advocate may put questions to each witness produced against him.

(3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.”

A perusal of the trial Court record shows that this section was complied with, as the Appellant was given the opportunity to cross-examine each prosecution witnesses. No such obligation however exists in relation to a co-accused person as argued by the Appellant, unless that co-accused was giving evidence against him, which was not the case in this appeal.

We accordingly quash the conviction of the Appellant for the charge of robbery with violence contrary to Section 296(2) of the Penal Code, and set aside the sentence imposed upon him for this conviction. We also order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 8TH DAY OF DECEMBER 2015.

P. NYAMWEYA

JUDGE

E. MURIITHI

JUDGE