



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO.159 OF 2008

MOSES MUNENE MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against both conviction and sentence in the Chief Magistrate's Court at Nyeri in Criminal Case No.2708 of 2007 by E.J. OSORO – SRM)

J U D G M E N T

The appellant with others were charged with two counts of Robbery with Violence contrary to Section 296(2) of the Penal Code.

The particulars of the first count were that on the 4th day of August 2007 at Marwa trading center in Nyeri District of the Central Province, jointly with others not before court while armed with a dangerous weapon namely an AK 47 assault rifle, robbed **Martin Macharia Wambugu** of a mobile phone make Nokia 6080 valued at Kshs.8000/=, cash Kshs.200/=, a wallet containing a National Identity Card, ATM card and I & M bank ATM card and at or immediately before or immediately after the time of such robbery wounded the said **Martin Macharia Wambugu**.

The particulars of the second count were that on the 4th day of August 2007 at Marwa trading center in Nyeri District of the Central Province, jointly with others not before court while armed with a dangerous weapon namely an AK 47 assault rifle, robbed **Benson Kahindi Kanyi** of one mobile phone make Nokia valued at Kshs.8000/= and at or immediately before or immediately after the time of such robbery wounded the said **Benson Kahindi Kanyi**.

The alternative charge was handling stolen goods contrary to Section 322(2) of the penal code.

The 1st prosecution witness was **Sergent Ngare Kibanya** of CID Ruiru. He received a report at the office that mobile phone No.0722962884 had been used in Ruaraka in a phone that had been robbed from a person at Nyeri . The make of the phone was described as Nokia 3100. He proceeded to Rauraka with fellow police officers and telephoned the number and the user responded and gave his name as Juma Sangeti a watchman at Hacco Industries Ruaraka.

They proceeded to Hacco Industries and met Juma Sangeti Meng'oreti who was the second accused before the trial court, at his place of work. However, the 2nd accused had a different handset as he had

sold the Nokia to his friend Luning'o. He called Luning'o and led the police to the said Luning'o who produced the mobile phone Nokia 3100 serial numbers 357051005992328. He arrested both the 2nd and 4th accused and the latter claimed that he bought the phone from one Kamande. He telephoned officers from Nyeri who went to Ruiru and picked the accused persons. He produced the receipts serial No.7191 dated 31/8/05 for the mobile phone Nokia 3100 in the name of one Kahindi who bought the handset at Kshs.7,200 whose serial number was 357051008992328.

The second witness was **PC William Kangongo** based at Ruiru CID office and previously at Karatina. He recalled that on 26/8/2007 while at Ruiru CID offices he was investigating three robbery cases involving mobile phones and had arrested over 5 suspects. On 28/8/2007 one of the suspect called Vincent Opindi led him to the arrest of Moses Munene Mwangi the appellant herein. On 27/8/2007 Sangeti the 2nd accused led P.C William Kangongo to Githurai 44 where Mr. Kamande the 3rd accused was arrested.

PC No.219941 **IP Simon Ndonge** who was O.C.S Kiganjo police station recalled that he received a report from his officer James Kinyua on 4/8/2007, 3 minutes before midnight of a robbery at Marua along Nyeri – Karatina road.

He went at the scene the following day at 10am. He recovered 7 spent cartridges of AK 47, 7.6mm and 7 spent cartridges identified specifically. He went to Mathari hospital to see the complainant but found that he had been taken to Agha Khan hospital in Nairobi.

Martin Wambugu Macharia an employee of I & M Bank in Nairobi recalled that at 8.30 pm while traveling from Nairobi to Nanyuki with Benson Kahindi and his girlfriend Karen in motor vehicle No.KAP 859V a Toyota chaser belonging to Karen and being driven by Mr. Kahindi and after passing Karatina town and while joining the main junction to the road heading to Kiganjo a man appeared holding a gun and flagged them to stop and just then he heard several gun shots. Benson Kahindi who was driving the vehicle was injured and stopped. Two people appeared. One went to the side of Kahindi and the other went to his side and robbed them of valuables and money. Benson Kahindi was robbed off Kshs.1500 and also his phone Nokia. Immediately after the robbery the two men disappeared. Benson was treated at Mathari hospital and transferred to Agha Khan. The robbery happened so fast and he was unable to identify the suspects.

PW5, **Alex Mwandawiru** was the ballistic expert attached to CID headquarters at Nairobi having worked as such for 6 years on a full time basis. He was sent on behalf of Emanuel Langat to produce the two ballistic reports as the latter was not readily available. The appellant did not object to the production of the report. Mr. Mwandawiru produced the report that showed that MF13 and MF17 all had the same ejector markings and from the findings his colleague concluded that MF13 was capable of being fired and it was a firearm as defined by the firearm Act under Cap 114 of the laws of Kenya and also came up with the opinion that MF13 collectively was fired from MF13 being serial NO.48006106. The report was produced as Pex.6.

During cross-examination, he stated that he did not know how MFI3 was recovered and from whom it was recovered.

Dr. Keith Ndindi was a doctor attached to the Provincial General Hospital Nyeri. He produced the P3 filled by his colleague in respect of Benson Kahigu. He also produced the treatment notes. The P3 was based on the medical report from Agha Khan University Hospital. Mr. Kahindi had suffered the thigh and comminuted fracture of the left femur.

PW7 WAS Benson Kanyi Kahindi an I.T expert employed by Way Africa as the network engineer.

On 4/8/2007 he left Nairobi with friends and dropped one Karen at Karatina. He proceeded to Nanyuki in the company of Martin Macharia Wambugu aboard motor vehicle registration No.KAP 859V. When they reached Marua, he saw a person who appeared drunk who flagged them down. He slowed down and heard gunshots. He checked and saw the mirror shattered but another round of gunshot

rang out and he was shot in the leg. He stopped the vehicle and a man approached with a gun that looked like MFI15. The person holding MFI15 went to his side and two other went to the side of Martin (PW4). The person who came to his side took his wallet, Kshs.1500, ATM card and other documents. He surrendered his phone Nokia 3100. They disappeared after the incidence. He was taken to Mathari hospital and later transferred to Agha Khan Hospital where he was admitted upto 5/9/2007.

While at the hospital, he received a telephone call from the police informing him that his mobile phone had been identified. He gave a receipt issued to him by Uniscan communication at KTDA building in respect of the phone to the police. The receipt was for handset serial number 357051005992328. He identified the mobile phone as the one he lost during the attack.

He did not have evidence against the appellant and the other accused persons. He was told by police officers that his phone was recovered but he was not told where. People were arrested but he could not identify them. Nothing was recovered except the phone.

PW8, No.80205, **PC Evans Aguba Wagude** recalled on the 8/8/2007, he got a tip off that robbers had attacked Kenblest vehicle at Wariruta Trading Center along Nyeri – Karatina road.

He left the office with his colleagues and proceeded to Ngari village to the home of Gerald Gitugi Kamau alias Francis. When they reached the home he got out armed with an AK 47 and challenged them. They fired at him and disarmed him and recovered riffle serial No.48006106, MFI5 but he died on the spot. Four people were arrested in the house and were taken to the police station and the gun taken to a ballistic expert.

On cross-examination he said that he did not see the appellant running away.

PW9 Sgt. James Ouma was the investigating officer. He recalled that on the 10/9/2007 he was assigned to investigate this case by P.C.I.O Mukeku and was instructed to go to Ruiru police station to get suspects. The suspects were found with the mobile phone Nokia 3100 that had been stolen during the robbery. The serial number was ascertained to be 357051005992328 and the phone belonged to the complainant, as he produced the receipts to prove ownership. He also recovered 7 spent cartridges from the scene. He received one AK 47 serial No.48006100 recovered by the flying squad and believed to have been used during the robbery.

The evidence of the recovery of the mobile phone Nokia 3100 led the police to arrest the appellant amongst other persons. The appellant was arrested and charged because he was named by the 3rd accused person.

In his defence the appellant stated that he was arrested while at his house in Githurai 44 in Nairobi. He was charged in Thika law courts and denied the charges. During the hearing of the case he was told that he sold the phone to the 3rd accused. He claims that he never knew the accused and never sold him a mobile phone. He knew the 3rd accused in the cells and never sold him a phone in the cells.

The trial court found the appellant guilty of the two counts of robbery and sentenced him to suffer death as by law prescribed.

In the amended memorandum of appeal the appellant argues that:

1. ***The trial magistrate erred in both law and fact while basing his conviction on circumstantial evidence which was the weakest kind of evidence to had been relied upon as the basis of his conviction.***
2. ***The trial magistrate erred in both law and fact in being impressed with his mode of arrest by PW2 which was the weakest too to had been relied upon to link him to the crimes at hand.***
3. ***The trial magistrate erred in both law and fact while convicting him on charges that weren't***

proved per required standard on charges of that magnitude.

4. *The trial magistrate erred in both law and fact while not according him plea of the changes on 7/11/2007 which contravened Section 201 of the CPC.*
5. *The trial magistrate erred in both law and fact while convicting him on his co-accused defence statements which was rebutted by plea taken by them on 12/9/07 and by PW1's evidence.*
6. *The trial magistrate erred in both law in rejecting his sworn defence that remained to be challenged by the prosecution side as per law requires in Section 212 of the CPC.*

When the matter came up for hearing, Mr. Karweru for the appellant summarized the appeal in threefold.

1. *The value of the co-accused testimony.*
2. *Whether it is allowable under the CPC for the shifting of the burden of proof.*
3. *Doctrine of recent possession.*

He stated that the only evidence available against the appellant was fact that the third accused indicated that the mobile phone PEX1 was sold to him by the appellant. There was no eye witness in the robbery hence the evidence available before the trial court was that of the accused persons against each other. He submitted that the burden of proof lay with the prosecution and not with the appellant to prove that the appellant had committed the robbery. He stated that the evidence of the co-accused is not supportive and not the core evidence.

This court is satisfied with the evidence of the accused No.3 that he acquired the mobile phone from the appellant as security for the money he lent the latter thus Kshs.700. There was no evidence of grudge between the two. They knew each other very well and that there was no reason for the accused No.3 to implicate the appellant. By relying on the evidence of the co-accused, the court did not shift the burden of proof from the prosecution to the appellant as the appellant was found to have been the first person in possession of the mobile phone after the robbery and it was incumbent upon him to explain how he came to possess the same. We do not agree that the trial court shifted the burden of proof to the appellant. It is trite law that once a person is found in possession of stolen property he has a duty to explain how he came into possession.

In PETER KARIUKI KIBUE -VS- REPUBLIC CRIMINAL APPEAL NO.221 OF 2001 AT NAIROBI.

The Court of Appeal stated that;

“The appellant has in law duty bound to offer an explanation as to how he came into possession of the items, otherwise than as the thief or guilty receiver. This is a rebuttable presumption of law based on the previous of section 119 of the Evidence Act.”

On the issue of the value of the evidence of co-accused the court finds the same credible as the accused No.3 knew the appellant very well and explained how the appellant approached him with the mobile phone as security for a loan and after receiving the loan, disappeared until he was arrested. It is true that the only evidence against the appellant was the evidence of the 3 accused who was an accomplice.

In the case of R V Ndera S/O Kariuki & 6 others it was held that the first duty of the court is to decide whether the accomplice is a credible witness. This court finds that the trial magistrate warned herself on the danger of convicting on the evidence of an accomplice and found that the evidence of the

accomplice was credible. Moreover, he carefully considered the evidence before reaching a conviction.

The upshot of the foregoing is that the appeal is dismissed, conviction upheld and the sentence confirmed. Orders accordingly.

Dated, signed and delivered at Nyeri this 30th day of January 2014

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE

Judgment is read in the presence of the appellant and Mr. Njue for the state. The appellant has right of appeal.

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE