



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 156 OF 2007

HESBON KAMAU CHEGE.....1ST APPELLANT

LUKA EKUPE LEKHOSI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being a consolidation of Criminal Appeals Nos. 156 and 165 of 2007 against conviction and sentence from Nyeri C.M.CR.C. No. 4097 of 2006 delivered on 04/6/2007 by Hon. E.J.Osoro Senior Resident Magistrate.)

JUDGMENT

HESBON KAMAU CHEGE and **LUKA EKUPE LEKHOSI** being the 1st and 2nd appellants respectively, were together with **Peter Mwangi Maina** and **James Kamau Macharia** hereinafter, referred to as the co-accuseds jointly tried on a charge of four counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The quartet also faced two alternative counts of handling stolen goods contrary to **Section 322 (2)** of the **Penal Code**. The appellants' co-accuseds were acquitted at the stage of no case to answer. The appellants were convicted in counts 1,2 and 3. They were each sentenced to suffer death. Being aggrieved, the appellants each filed an appeal which appeals were ordered consolidated.

On appeal, the appellants each put forward separate grounds of appeal.

The 1st appellant put forward the following grounds:

- 1. That the learned Chief Magistrate erred in law and facts in convicting the appellant to a sentence that is totally inconsistent with the current constitution.**
- 2. That he erred in law and facts in putting reliance upon inconsistent and contradicted prosecution evidence and unidentified exhibits.**
- 3. That he erred in law and facts in not finding that the prosecution's case was tailored to meet the specifications required.**
- 4. That he erred in law and facts in involving the doctrine of recent possession without finding that there was no prove of possession.**

5. That he erred in law and facts in disregarding the fact that there were no investigations conducted in respect of these charges.

6. That he erred in law and facts in not finding that the medical evidence adduced by PW7 were produced in contravention of Section 35 Evidence Act.

The 2nd appellant listed the following grounds:

1. That the learned trial Magistrate erred in both law and fact and or misdirected himself by convicting the appellant in the absence of proof of ownership of mobile phone 1600-Nokia (MFI -1) by PW1.

2. That the learned trial Magistrate erred in law and fact by convicting the appellant in the absence of any proper identification of mobile phone 1600 Nokia by PW1 N.B due to (1) above and 2, doctrine of recent possession of stolen property is unsafe.”Further, reviewing evidence is contradictory.”

3. That the learned trial Magistrate erred in law by failing to make a restitution order of property (MFI-1) hence in the absence of such an order available in the entire proceedings, the appellant's conviction and sentence on the same is manifestly unsafe and unjustified N.B. I contend this is not a procedural irregularity curable under Section 382 of the C.P.C.

4. That the learned trial magistrate erred in both law and fact by passing a sentence of death on the appellant not supported by appropriate legal findings on the evidence tendered before court.

5. That my arrest was unsatisfactory nor does not prove to my participation into the commission of the offences charged and the entire case for the prosecution was not proved beyond doubts.

We wish at this juncture to set out the case that was before the trial court before considering the merits or demerits of the appeal. The prosecution summoned seven witnesses to testify in support of its case. It is the prosecution's case that on 27th August 2006 at Travellers' Shopping Centre at Wakarol Bar in Nyeri District, the appellants while armed with dangerous weapons to wit pangas, rungs and a toy pistol robbed the complainants namely **Gladys Waruguru Kinyua, Christopher Maina Magina** and **Patrick Mwangi Wachira** of the following items and goods:

- **Cell phone Nokia 1600**
- **Motor vehicle battery**
- **Kshs. 3,000**
- **Nokia 3310**
- **Kshs. 900**
- **shoes**
- **Kshs.600**

At the time of executing the robbery it is said that the appellants threatened to use actual violence to the complainant's herein. It is the evidence of **Gladys Waruguru** (P.W.1) that on 22/08/2006 at about 10.00pm, six people entered the pub she was operating at Ndathi and ordered everybody to lie down. Shortly, two people entered to join the six and begun ransacking the pockets of the patrons taking away cash and mobile phones. P.W.1 alleged she was robbed of her Nokia 1600 and Kshs. 3,000. P.W.1 said the gang went round robbing and assaulting customers. She further stated that she was able to recognize the assailants with assistance of lights emanating from a hurricane lamp. P.W.1 was able to identify one of the mobile phones recovered from the 2nd appellant to be hers which was stolen on 27/08/2006. **Christopher Magima** (P.W.2) stated he was on the material date at Wakarol bar in company of **Francis Gathungu** (P.W.5) when at 10.00pm three people entered and started assaulting him using a stick and in the process he was injured on the eye and lost his mobile phone make Nokia 3310 and Kshs.900. P.W.2

stated that the robbers had covered their faces. P.W.2 left the pub for his house and reported to the police the next day prompting them to commence investigations leading to the arrest of some suspects. A mobile phone belonging to P.W.2 was recovered. The other witness who was at the same pub is **Patrick Mwangi Wachira** (P.W.3) who said he witnessed two people enter the bar at 9.00pm and ordered everyone to lie down. P.W.3 was robbed of his shoes and cash. P.W.1 managed to raise the alarm which attracted the attention of the neighbours. P.W.3 claimed that though they had been ordered to lie down he was able to identify the physical features of the 1st appellant. **Isaac Maina** (P.W.4), a mobile technician at Ndathi area stated that on 28/8/2006, the 1st appellant visited his repair shop and sought for the cover of his light blue mobile phone to be changed. P.W.4 said he obliged. P.W.4 also sold to the 1st appellant a new sim card and the 1st appellant left the premises thereafter. Later in the day, information reached him that the pub was raided and customers robbed of their cash and mobile phones. Upon receipt of that information P.W.4 sent someone to ask the 1st appellant to return the old sim card. P.W.4 checked the pin to be that of Kathuri. The 1st appellant was re-arrested and at that time the place was surrounded by members of the public. The 1st appellant was taken and held at the Chief's Camp. As they walked to the office the 1st appellant in the process dropped a wallet containing an ID card, and ATM card for one Henry W. Kiragu. On being interrogated it is said, the 1st appellant mentioned the name of the 2nd appellant. **Francis Gachih Gathunga** (P.W.5) and **A.P.C John Rono** (P.W.6) searched the 2nd appellant and found Nokia 1600 which had been robbed from P.W.1. The 2nd appellant was arrested and handed over to the police station. When the appellants were placed on their defence they each testified denying the offence. The 1st appellant claimed that on 28/08/06 when the area chief accompanied by administration police officers came and ordered him to sell to them cigarettes. Those people entered the shop and conducted a search. Prior to their arrival, the 2nd appellant said, there were people who had entered the shop to supply milk. He said the administration police officer took away from Kshs. 1,700 which money was meant to pay for the milk. The officer is said to have wanted the money as an inducement to release him. He was arrested and kept in custody at the A.P cells and thereafter he was taken to Ndathi Police Post and Kiganyi Police Station.

The learned trial Chief Magistrate considered the evidence presented by both sides and came to the conclusion that the 1st appellant was found in possession of the mobile phone belonging to Christopher Magima (P.W.2) which was stolen when he was robbed at Wakarol Bar on 28/08/06. The learned Chief Magistrate also came to the conclusion that the 1st appellant gave us satisfactory explanation as to how he came into possession of the mobile phone. In respect of the 2nd appellant, the learned Chief Magistrate concluded that the mobile phone belonging to Gladys Waruguru Kinyua (P.W.1) was found in his possession. It is said the 2nd appellant did not give any convincing explanation as to how he came into possession of that phone. The learned Chief Magistrate applied the doctrine of recent possession to convict the appellants.

Having outlined in brief the case that was before the trial court we now wish to examine the substance of the appeal. The appellants each filed written submissions while Mr. Kaigai, learned Principal State Counsel presented oral submissions to oppose the appeal. The 1st appellant complained that he was sentenced to suffer death contrary to the provisions of the constitution. Mr. Kaigai opposed this ground stating that the death sentence was retained by the constitution. With respect, we agree with the submissions of the learned Principal State Counsel that under **Article 26(3)** of the Constitution the death sentence was retained hence we see no merit in this ground of appeal. It is the submission of both appellants that they were convicted on inconsistent and contradictory evidence. They argued that the exhibits which were recovered from them were not properly identified. The appellants further argued that the doctrine of recent possession improperly applied to convict them. Mr. Kaigai on the other hand urged this court to dismiss this ground on the basis that the appellants had failed to satisfactorily explain how they came into possession of the mobile phones they were found in their possession as required by **Section 111** of the **Evidence Act**. We are alive of the fact that this is the first appellate court, hence the appellants are entitled to a re-evaluation of the evidence. We now critically re-examine the evidence which was relied by the prosecution to link the appellants to the offence. It is clear in our minds that the doctrine of recent possession was applied to convict the appellants. It is clear from the evidence on record that in the night of 27/08/06, P.W.1, P.W.2 and P.W.3 were in Wakarol bar in Ndathi area of Nyeri district. We are also satisfied that between 9.00pm and 10.00pm the aforesaid pub was attacked by a gang of about four men. The patrons were assaulted and their properties to wit mobile phones and cash

stolen by the robbers. We are also convinced that the appellants were both arrested on 218/08/08. We now wish to examine how each of the appellants were linked to the offence. It is the evidence of Christopher Maina Magima (P.W.2.) that during the robbery, he lost his mobile phone make Nokia 3310 and Kshs.900. He was hit by the robber and fell down. The robbers had their faces hooded hence P.W.2 could not recognize them. Isaac Mwangi Maina (P.W.4) a mobile phone technician based at Kimahuria Market told the trial court that on 28/08/06 at about 8.00am he was at his mobile phone clinic shop when a customer wanting to change the outer cover of his mobile phone make Nokia 3310. P.W.4 said he sold the cover to the customer who immediately left without issuing a receipt. He further stated that the customer told him that the sim card inside the mobile phone was not his hence the customer bought a new sim card from P.W.4. The customer took with him both sim cards. P.W.4 said that the son of Wakarol was present when he was attending to that particular customer. He informed P.W.4 that Wakarol bar was attacked the previous night and patrons were robbed of their mobile phones and money. P.W.4 stated that he was told that amongst those robbed was his customer known as Kathuri. He suspected the phone he had just changed the cover could have been for Kathuri since he had previously repaired the same and had the ring tone of the song Kirutha. P.W.4 stated that he sent the son of Wakarol to retrieve the old sim card from that customer who had purchased a new one. Wakarol is said to have successfully obtained that old sim card. P.W.4 looked for Mr. Kathuri (P.W.3). He gave P.W.4 his pin code. P.W.3 confirmed the evidence of P.W.4. He stated that the son of P.W.1 came and looked for him and requested him to visit the mobile phone clinic of P.W.4. He averred that he went there and he was shown the phone and asked to give his pin code which opened the phone. He saw a suspect who had already been arrested and handcuffed by police. The suspect was identified as the 1st appellant herein. P.W.3 said he confirmed the phone to be his and that it was black in colour. He produced a receipt he was issued when he purchased the same. The receipt had the serial number of the phone which tallied with that of the phone. P.W.3 stated that they looked for the suspect all over town. Members of the public eventually managed to arrest the 1st appellant. The evidence of P.W.4 appears to link the 1st appellant as the person who possessed P.W.2's mobile phone. The question which we must grapple with is who recovered the phone from the 1st appellant? It is expressly stated by P.W.4 that the son of Wakarol (P.W.1) retrieved P.W.2's sim card from the 1st appellant. He was not summoned to confirm P.W.4's evidence. He was a very important witness and we cannot comprehend how he was left out by the prosecution. It is also the evidence of P.W.4 that the 1st appellant was arrested by members of the public. Upon his arrest, P.W.4 said, the 1st appellant told them that he had been sent by the 2nd appellant to purchase the aforesaid phone. That is how the 2nd appellant was tracked down and arrested. It is puzzling to us that none of the members of the public who participated in the arrest of the 1st appellant was called upon to testify. There is also no clear evidence as to who recovered the phone from the 1st appellant. A.P.C John Rono (P.W.6) stated that he re-arrested the 1st appellant having been apprehended by members of the public. P.W.6 stated in cross-examination that the 1st appellant was brought with the mobile phone but upon searching a wallet was recovered from his pocket. It is obvious that the person who recovered the mobile phone from the 1st appellant was not summoned to testify. That is a serious error which is fatal to this case. We have also examined the evidence of identification of the mobile phone. According to the evidence of P.W.2, his mobile phone was black in colour. In cross-examination, P.W.2 stated that his phone was grayish in colour. Isaack Mwangi Maina (P.W.4), the mobile phone technician stated that the phone he received from the 1st appellant for repair was blue in colour. We are surprised by the apparent contradiction. Could the witnesses be talking of different mobile phones. We are convinced that there was no credible evidence showing that the 1st appellant was found in possession of P.W.2's mobile phone.

The other piece of evidence which appeared to link the 1st appellant to the offence is that of Patrick Mwangi Wachira (P.W.3) who stated that on 27/08/2006 he was at Wakarol bar from 7.00pm to 9.00pm when five people arrived and ordered them to lie down. He stated that the hurricane lamp was on hence he was able to clearly see those people. P.W.3 claimed he saw the face of 1st appellant at the pub as amongst those people who attacked the bar. He described the 1st appellant as medium size and slim. He stated that he managed to identify him at Ndathi Police Post. We have compared the evidence of P.W.3 with that of P.W.2 and we think there is a big contradiction. According to P.W.2, the robbers had covered their faces. If that was true, then there is no way P.W.3 could have recognized 1st appellant's face. In sum, we are convinced that there is no credible evidence connecting the 1st appellant with the offence. We shall give him the benefit of doubt.

We now turn our attention to the evidence linking the 2nd appellant to the offence. In this respect, the evidence of P.W.4 is critical. He stated that when the 1st appellant was arrested he claimed the 1st appellant said he had been sent by the 2nd appellant to purchase the mobile phone cover. That is how the 2nd appellant was tracked down and arrested. Francis Gachihi Gathungu (P.W.5) stated that when the 1st appellant mentioned the name of the 2nd appellant he realized he was a person well known to him. He made arrangements and visited the 2nd appellant's house and had him arrested. P.W.5 admitted in cross-examination that no stolen property was found inside the house of the 2nd appellant. The 2nd appellant was taken to the chief's camp. P.W.5 said he was told at the chief's camp that the 2nd appellant had a mobile phone. APC John Rono (P.W.6) stated that on 28/08/06 he was part of the security personnel who visited the 2nd appellant's house where he participated in his arrest. P.W.6 further stated that they encountered members of the public who were ready to lynch the 2nd appellant. In the process it is said a mobile phone make Nokia 1600 fell from his pocket. The 2nd appellant was attacked and he fell unconscious. In cross-examination P.W.6 said that the mobile phone was inside the 2nd appellant's trouser. P.W.6 stated that he was in company of the area chief (P.W.5) when the phone was recovered. P.W.6 was categorical that he personally picked the mobile phone while in company of the chief. Francis Gachihi Gathungu (P.W.5) stated that he was the Chief Kabaruru Location. He expressly stated that he visited the house of the 2nd appellant in company of administration police officers. He was clear in his evidence that he was told at the chief's camp that the 2nd appellant had a mobile phone. It is clear in our minds that P.W.5 and P.W.6 were not reading from the same script. The contradiction is there is no material to this case that we have entertained serious doubt as to whether mobile phone make Nokia 1600 was recovered from the 2nd appellant or was it recovered at the scene where the 2nd appellant was being beaten by members of the public. Again, we shall give the benefit of doubt in favour of the 2nd appellant.

In the final analysis, we allow the appeal. The order of conviction is quashed and the sentence of death is set aside. The appellants namely: **Hesbon Kamau Chege** (1st appellant) and **Luka Ekupe Lekhosi** (2nd appellant) are hereby ordered set free forthwith unless lawfully held.

Dated, signed and delivered this 20th day of February 2014.

.....

J.K.SERGON

JUDGE

.....

J. WAKIAGA

JUDGE