



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CRIMINAL APPEAL NO. 38 OF 2013**

**BETWEEN**

**JOHN NGARI NJIRU.....APPELLANT**

**AND**

**REPUBLIC OF KENYA ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 1862 of 2010 at Chief Magistrate's Court at Embu, Hon. Paul Biwott SPM delivered on 2<sup>nd</sup> July, 2013)***

**JUDGMENT**

1. The appellant, **JOHN NGARE NJIRU**, together with three others, was charged with two counts of the offence of robbery with violence contrary to **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)*** and an alternative charge of handling stolen goods contrary to **section 322(1) and (2)** of the ***Penal Code***.
2. The particulars of the first count were that on 27<sup>th</sup> August 2010 at Kwa Maram area, Mbeti North Location within Embu County, he and three others jointly armed with dangerous weapons namely rifles and an axe robbed DMN of Kshs 459,328 and at or immediately before or immediately after the time of robbery threatened to kill the said DMN. The second count alleged that the appellant with the three accused on the same date and place robbed CNM Kshs 1,900 and a mobile phone make Nokia 1680 valued at Kshs 3,000 and at or immediately before or after the time of robbery threatened to kill CNM. The appellant was also accused of handling stolen goods in that on 29<sup>th</sup> August at Itugururu Village, Itugururu Sub-location, Ishiara Location within Mbeere County otherwise than in the course of stealing dishonestly received or retained a mobile phone make Nokia 1680 valued at Kshs 3,000 the property of CNM knowing or having reason to believe it to be stolen.
3. The prosecution called eight witnesses. PW1, PW2, PW3 and PW4 testified that on the material day at about 4.45 pm while they were on their way to Embu from Siakago aboard motor vehicle registration number KBK 286 Q Isuzu canter owned by Jatomy Supermarket, they were accosted by about four robbers who were armed with a gun and an axe. The robbers shot in the air and ordered them to get out of the vehicle and their items stolen. PW1's wallet was stolen, PW2 lost Kshs 6000/- which he had in his pocket, PW3's lost a Nokia 1680 phone worth Kshs 3000/- and Kshs 1,900/- was stolen from his pocket while PW4's wallet was taken but he recovered it in the vicinity. They also testified that the vehicle was carrying a safe which was stolen by the robbers. PW2 and PW3 testified that the safe contained Kshs. 459,389/=. They reported the matter to Itabua Police Station and recorded statements. They all testified that there were four men who

robbed them but they did not identify any of them.

4. PW5, a duly gazetted scene of crime officer, gave an account of how he took photographs of a motor cycle registration number KMCF 402J and motor vehicle registration number KZA 917 Toyota Corolla. He also produced photographs of motor vehicle registration number KBK 286Q and which were taken by another officer but produced under **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*.
5. PW6, the owner of motor vehicle registration number KZA 917 recalled that in February 2010 that he gave his brother JN the vehicle, which had mechanical problems, to take to the garage. It was repaired and returned the same day. After a week or so he received a call from Itabua Police Station that the vehicle had been used in a robbery. He was bonded as the police sought for his brother Njiru. He stated that Njiru was later killed at Kivue in another robbery. He indicated that the accused persons were unknown to him.
6. PW7, a police officer stationed at Itabua Police Station at the material time, testified that on 27<sup>th</sup> August 2010, while investigating another robbery in Ishiara, he received information that a suspect was at Itugururu area, he went there in company of other officers. They found the appellants wife, MM, and stated that they wanted to conduct a search. They were accordingly invited into the house and conducted the search. They recovered four Nokia phones; two Nokia 1680 and two Nokia 1202, a receipt and original logbook for motor cycle KMCF 402J and two *mpesa* registration forms filled by the appellant and his wife. MM signed the search certificate. One of the phones was later returned to the appellant. The police retained three phones. They arrested MM for interrogation. In the meantime they called victims to come and identify the phones.
7. PW7 further testified that PW3 responded to the call and identified the Nokia 1680 as his. Another woman, connected to the Ishiara robbery, identified one of the Nokia 1202 phone as belonging to her. In the course of investigations the 4<sup>th</sup> accused was arrested. He led the police to Nkubu where he alleged that the appellant was staying but they found the 1<sup>st</sup> accused. The 1<sup>st</sup> accused knew the appellant and he stated that he had re-located to Mitunguu. An informer also informed them of this fact. At Mitunguu they spotted the motor cycle KMCF 402J being driven by a man who informed them that the appellant was drinking in a bar. They lured the appellant by asking the man to call the appellant whereupon he was arrested. The appellant took them to his house where they recovered other items. While in Embu, the appellant also directed them to the house of the 3<sup>rd</sup> accused where other items were recovered.
8. PW8, a police officer carrying out crime duties at Itabua Police Station, testified that he received a report of the robbery on 27<sup>th</sup> August 2010. He and fellow police officers went to the scene where they found motor vehicle registration number KBK 286 Q and PW 1, 2, 3 and 4 with a crowd. They recovered two spent cartridges of an AK 47 and an axe which he was informed had been used to break the safe. Some members of the crowd informed him that a motor vehicle registration number KZA 917 and two motor cycles; one with number KMCF 402J and another without registration. They said that there had been about seven robbers. He recounted how CID officers recovered some things from the appellant including motor cycle KMCF 402J and items from the appellant's wife including the original logbook and cash sale receipt, a Nokia phone 1680C and 1202, two *mpesa* registration forms, photographs and assorted documents.
9. PW 8 further testified that when PW3 came to see if his phone was found, he identified it as a Nokia 1680C which had a broken screen. He recalled that PW3 informed him that the phone activation message was "*major inspector cosy*" and the screen saver was "*Chelsea*," a football club. The phone gallery contained his photographs. PW 8 was permitted by the court to activate the phone and the court observed the features and photographs taken of a young man taken on 18<sup>th</sup> July 2010 which was earlier than the date of the robbery. PW8 also confirmed that motor vehicle KZA 917 has been recovered.

10. At the close of the prosecution case, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused were acquitted under **section 210** of the **Civil Procedure Code (Chapter 75 of the Laws of Kenya)** as the court found no evidence connecting them to the offence while the appellant was put on his defence.
11. When put on his defence, the appellant gave a sworn statement in which he denied committing the offence and raised the defence of alibi. He stated that on the material day, 27<sup>th</sup> August 2010, he was attending to his second hand clothes business at Mitunguu market, Tharaka County all day. On that day he stated that he was in the company of Kiogora and Mwetii having drinks at Silent Bar until 9.00pm. He met his 'boda boda' rider at around 9.00 pm and retired to bed.
12. The appellant further testified he had since separated from his wife for three years before the robbery and that his wife who lived in Ithungururu village about 200 km away from where he worked. He explained that his wife had the logbook to the motor cycle following an agreement that she retains it to bar him from selling the motor cycle which they bought jointly. He testified that the *mpesa* registration forms were left with his wife since he did not need them. The appellant contended that his wife ought to have been charged and brought to court as a witness since she was the one found in possession of the allegedly stolen phones. He also denied that his motor cycle operated in Embu where the robbery took place
13. The learned magistrate concluded that the appellant was connected to the robbery as he was in possession of the phone. He discounted the appellants defence and consequently convicted him on both counts of robbery with violence. He was sentenced to death in respect of the 1<sup>st</sup> count while the sentence in respect of the 2<sup>nd</sup> Count was left in abeyance.
14. The appellant has appealed against the conviction and sentence. At the hearing of the appeal he appeared in person while Mr Wanyonyi appeared for the State.
15. The appellant relied on written submissions and urged this court to quash the conviction. His grounds of appeal may be summarized as follows:
  - a. The trial magistrate relied on proceedings which were recorded by his predecessor but were not proof read and certified by the predecessor.
  - b. That the prosecution evidence was uncorroborated.
  - c. That the doctrine of recent possession was not applied as required in law.
  - d. That a material witness was not called by the prosecution.
16. The appellant contended that the evidence of PW7 and PW8 relied on by the trial court was hearsay from his wife and an informer who were not brought to court as witnesses. Relying on the case of **Patrick Kabui Maina and Another v Republic [1986] KLR 889**, the appellant argued that the evidence of PW7 and PW8 should have been disregarded. The appellant submitted that the evidence of PW 7 and PW 8 did not meet the conditions necessary to convict him based on circumstantial evidence. The appellant relied the dictum in **Teper v R (1952) AC 400 at 489** where it was stated that, "*It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.*" He submitted that his wife and the informer ought to have been brought as witnesses.
17. The appellant contended that the doctrine of recent possession was not properly applied by the trial court as he was not found in possession of PW3's phone, that the PW3 had not lost any phone and that the phone was not found in his house. He relied on **Arum v Republic [2006] EA 10** to support his argument.
18. Mr Wanyonyi opposed the appeal submitted that the trial court complied with **section 200** of the **Criminal Procedure Code** when it ordered that the typed proceedings be typed and furnished to the petitioner. He submitted that the prosecution witnesses gave consistent testimony that PW 1, PW 2, PW 3 and PW 4 were robbed by four men. That a stolen phone and documents relating to

motor cycle KMCF 402J which linked the appellant to the offence were recovered from the appellant's wife and that the doctrine of recent possession was properly dealt with. He added that the appellant's act of abandoning his wife's house which he admitted in his defence to be his house was suggestive of his running away from the offence he had committed. Counsel further submitted that the omission of the letter 'C' by PW3 while giving the model of his mobile phone does not negate the evidence. He stated that under **section 127** of the *Evidence Act*, a wife is not a competent and compellable witness and could not be called. He argued that the circumstantial evidence was consistent with the robbery. On this point, counsel relied on *Martin Kirimi Mugambi and Another v Republic CA Nyeri Criminal Appeal No. 334 of 2013 [2013]eKLR*. He submitted that the appellant had direct control over his wife's house and was therefore in possession of the phone. Counsel urged this court to uphold the conviction and sentence of the trial court.

19. This being the first appeal, it is our duty to re-evaluate the evidence presented before the trial court in order to arrive at our own independent conclusion. While doing this, we bear in mind the fact that only the trial court saw and heard the witnesses (see *Okeno v Republic (1972) EA 32*).
20. One of the issues raised by the appellant is that the trial magistrate relied on proceedings which were recorded by his predecessor but were not proof read and certified by the predecessor. We have had studied the proceedings of the trial court and note that before acting on the evidence of his predecessor, the learned magistrate ordered the proof reading and certification of the proceedings. On our part, we are satisfied that the typed proceedings reflect the court record and as such we find no merit in the argument that **section 200** of the *Criminal Procedure Code* was not complied with.
21. The appellant argues that the prosecution evidence lacked corroboration. He specifically argues that the evidence of PW 7 and PW 8 relied on by the trial court was hearsay from his wife and an informer who were not brought to court as witnesses and in line with *Patrick Kabui Maina and Another v Republic (Supra)* the evidence of PW7 and PW8 should have been disregarded.
22. We must first dispose of the issue that the prosecution ought to have called the informer and the appellant's wife. **Section 143** of the *Evidence Act* is clear on the fact that no specific number of witnesses is necessary to prove a fact. Each case is to be considered on its own circumstances in order to determine the effect of failure to avail a witness on the entire prosecution case. The court is entitled to draw an inference that the evidence of a witness if called would be adverse to the prosecution case in instances where barely adequate evidence is called (see *Bukenya v Uganda [1972] EA 549*). Further and as correctly submitted by the Mr. Wanyonyi, under **section 127** of the *Evidence Act*, the appellant's wife was not compellable witness. The question for the Court is whether there was sufficient evidence to support the conviction.
23. We are aware of and appreciate the decision in *Patrick Kabui Case (supra)* where it held that "... if any accused is arrested on the strength of any information given by an informer and he is not put in the witness box in chief or be examined, such evidence should be disregarded..." We are of the view that basing a conviction on an informer's evidence is dangerous because it is hearsay unless supported by other independent evidence. An informer's evidence is easily abused and the court has to exercise great caution in relying on it hence the need for corroborating evidence. In *Joseph Otieno Juma v Republic CA Kisumu Crim. App. No. 214 of 2009 [2011]eKLR*, the Court of Appeal, after reviewing decision from other jurisdiction on the evidence of informers, held that, "To sum up and in the context of the circumstances before us the only exceptions we can think of where the informer's lid can be lifted, are where failure to do so would undermine the concept of a fair trial and where it would have a bearing on the innocence of an accused person."
24. In this case we understand the "hearsay evidence" complained of is the fact that an informer at the incident scene identified the motor cycle that led to the arrest of the appellant. In our view, the evidence of the informers which pointed to the motor cycle does not form part of the essential element of proof of the charges against the appellant. The information is what led to the arrest of

the appellant. PW 7 and PW 8 testified as to the fact of the arrest of the appellant.

25. From the evidence on record, no witness identified the appellant as one of the robbers. The appellant was convicted on the basis of circumstantial evidence that PW3's phone was retrieved in his wife's house. We are therefore called upon to examine the evidence in light of well-established principles. In **Andrea Obonyo and other v Republic [1962] EA 542**, it was stated that, "(i) where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt and if a finding that he stole the article depends on the presumption arising from his recent possession of the stolen articles, such a finding would not be justified unless the possibility that he received the article has been excluded..." In **Malingi v Republic (1989) KLR 225** the Court of Appeal while dealing with recent possession stated that "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 has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their 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 the 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 items. The doctrine 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 or was a guilty receiver."
26. Our examination of the evidence shows that the informer merely gave the description of the motor cycle that was used in the robbery but upon further investigation, it turned out to be the appellant's. Further, upon conducting a search at the appellant's wife's house, the motor cycle's logbook and stolen items were recovered including PW3's phone so soon after the robbery incident. PW 7 and PW 8 stated that the appellant's wife indicated that the items were her husband's. In his sworn testimony the appellant confirmed that the motor cycle KMCF 402J was bought jointly by them on 16<sup>th</sup> November 2009. It was agreed between them that she would keep the logbook and he would keep the motor cycle.
27. As regards the Nokia phone belonging to PW3, the issue whether the phone was a Nokia 1680 or 1680 C as stated in the charge sheet is in our view not a material fact. PW3 testified that the phone was a Nokia, it had a broken screen and had his photos in it. Upon recovery of the phone, the serial number of the phone was recorded and the search certificate signed by the appellant's wife. Upon its recovery, PW3 was called to identify it and he did so and it is the same phone that was produced in evidence and identified by PW3. Furthermore, PW 8 demonstrated in court that the phone had unique features like the screen saver, opening message and photos of PW3 that predated the robbery. These facts we find, point to the uniqueness of the phone and the fact that it was in the possession of the appellant's wife.
28. Since the mobile phone was found in possession of the appellant's wife, there was a possibility that she was involved in the robbery. In other words she could have been an accomplice. PW7 stated in cross-examination that she was a suspect and was held in custody for a period of 6 days during which time she implicated the appellant. We are thus called upon to treat her statement to PW7 with great caution. Did she implicate the appellant to gain her freedom? This aspect of the evidence called for caution on the part of the learned magistrate and he did not direct his mind to the possibility that the appellant's wife was an accomplice rendering her evidence unreliable.
29. Under **section 141** of the **Evidence Act**, "An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice." It is however, a rule of practice that it is the duty of the judge or magistrate to warn himself of the danger of convicting on the uncorroborated evidence of an accomplice before basing a conviction on such evidence (see **Ayor & Another v Uganda [1968] EA 303, 305** and **Karanja & Another v Republic [1990] KLR 589**). In

appropriate circumstances the court may convict on the uncorroborated evidence of an accomplice if it is satisfied that the accomplice witness is telling the truth (see *Kinyua v Republic* [2002]1 KLR 256,267).

30.As is our duty to review the evidence afresh, we find that there is no other evidence pointing to the appellant apart from his wife's evidence pointing to him. The wife was not called as a witness. There is no independent evidence to corroborate the fact that she received the phone from appellant. The fact that she was in custody for a period that is longer than that required to hold a suspect under out leaves doubt in our minds that the conviction is free from error.

31.In the circumstances, we are constrained to allow the appeal and set aside the conviction and sentence. The appellant is set free unless otherwise lawfully held in custody.

**SIGNED at EMBU this 29<sup>th</sup> day of MAY 2014**

**D.S. MAJANJA**

**H.I. ONG'UDI**

**JUDGE**

**JUDGE**

**DATED and DELIVERED at EMBU this 29<sup>th</sup> May 2014.**

**H.I. ONG'UDI**

**JUDGE**