



**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 10 OF 2013**

ISAACK FUNDI KIURA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**From original conviction and sentence in Cr. Case No. 381 of 2012 at the Chief Magistrate's Court at Embu by HON. MRS WACHIRA – CM on 1<sup>ST</sup> MARCH 2013**

**J U D G M E N T**

1. **ISAACK FUNDI KIURA** had been charged with four (4) counts of Robbery with Violence contrary to section 296(2) Penal Code of which he was acquitted under section 215 Criminal Procedure Code. He was however convicted of handling a mobile phone make Nokia C-3 (EXB1) the property of **CYNTHIA WAWIRA NJOKA** the complainant in count 1 who testified as PW1. He was sentenced to serve five (5) years imprisonment.
2. He filed this appeal challenging the conviction and sentence. The grounds he raised were as follows;
  - i. The trial Magistrate erred in law and fact when she convicted the Appellant relying on prosecution evidence which was inconsistent and uncorroborated.
  - ii. The trial Magistrate erred in law and fact when she based the conviction on an exhibit which had no complainant and was not produced before the trial court.
  - iii. The trial Magistrate erred in law and fact when she based the conviction on a non-existence charge in the initial charges.
  - iv. The trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant and relied on the police prisoners register for property which was produced upon the request of the Appellant, failing to consider the fact that the phone which was mentioned therein not indicated anywhere on the initial charge sheet nor anywhere in the recorded statements.
3. The prosecution's case is premised on the evidence of ten (10) witnesses. PW1, PW2, PW5, PW6 alleged to have identified the Appellant during the robbery on 2<sup>nd</sup> March 2012 but this evidence was not supported by any evidence. In her evidence PW1 said she lost a C3 Nokia phone (EXB1) during the incident. She produced the purchase receipt for the phone dated 2<sup>nd</sup> September 2012 as EXB2. She later received a call from Kagio Police Station informing her of the recovery of her missing phone.
4. PW 7 P.C. Esther Chebus testified that she reported on duty on 12<sup>th</sup> March 2012 at 4pm when two phones (Nokia C3 and Nokia 1209) were handed to her. The Nokia 1209 was new and she was surprised that the owner (Appellant) had said it was not working. She went for the Appellant in the cells and after interrogating him found that the phone was working. She was able to trace the

- son of the owner of the phone.
5. PW8 - Senior Sgt. Nicholas Wambua confirmed that the Appellant was arrested on 10<sup>th</sup> March 2012 at 10.30pm and booked at Kagio Police Station. He produced Occurrence Book NO.42/08 on 10<sup>th</sup> March (EXB5). He learnt that the Appellant had surrendered shs.900/= and a mobile phone as Prisoner's property (EXB1). He signed the inventory on 12<sup>th</sup> March 2012 at 6pm (EXB15, 16 and 17). PW9 (Chief Inspector Hato Luta) and PW10 (No.62946 PC Robert Kering) are police officers who investigated the case of the Appellant having assaulted and having left some dangerous weapons in a bar.
  6. The Appellant in his sworn defence denied the charges. He said he had been arrested on 10<sup>th</sup> March 2012 for consuming alcohol after hours. He was not able to bribe police officers hence his incarceration. He was forced to sign some documents.
  7. When the appeal came up for hearing the Appellant presented the court with written submissions on which he relied. In his submissions he cites contradictions in the evidence of the prosecution witnesses. He further says there was no proof that he was found with the phone in question. Secondly he says he was denied the right to be represented by an advocate at the expense of the State.
  8. Mr. Miiri the learned State Counsel opposed the appeal saying the Appellant had been properly convicted as he was found with the stolen mobile phone ten days of the alleged robbery.
  9. This is a first appeal and this court has a duty to reconsider and reevaluate the evidence and arrive at its own conclusion. It should also remember that unlike the trial court it did not have the benefit of seeing and/or hearing the witnesses. See *OKENO –V- REPUBLIC [1972] EA 32 and SIMIYU & ANOTHER –V- REPUBLIC [2005]1 KLR 192*.
  10. Having considered the submissions by both the State and the Appellant, the grounds of appeal, the findings by the trial court and the evidence on record, I have decided to condense all the grounds of appeal and deal with one issue. The issue is whether the Appellant was found in possession of the phone belonging to *CYNTHIA WAWIRA NJOKA*. And if so whether he had knowledge or reason to believe that the phone was stolen.
  11. PW8 - Senior Sgt. Nicholas Wambua is one of the officers who arrested the Appellant on 10<sup>th</sup> March 2012 at 10.30pm from Destiny bar Kagio town on allegations of assault. They took him to Kagio Police Station and he was charged after being booked in occurrence book No.42 of 10<sup>th</sup> March 2012 at 23 hours. He produced the occurrence book as EXB5.
  12. The occurrence book (EXB5) confirms that the Appellant was taken to the station for an offence of assault and he was appearing drunk. This witness (PW8) testified that while at the Police station the Appellant handed over shs.900/= plus a mobile phone as Prisoner's property. It is common knowledge that once a Prisoner surrenders any property at the report office it is recorded and signed for. Is this what happened in this case?
  13. No inventory for 10<sup>th</sup> March 2012 and signed by the Appellant was produced before the court. What was produced before the court as EXB17 is so suspect. Infact the writings on EXB 17 are on a Government motor vehicle's work ticket. It is a photocopy with word's "**PRISONERS PROPERTY**" printed in biro at the bottom. These confirms that the words "**PRISONERS PROPERTY**" were not on the original document. How did the learned trial Magistrate satisfy herself that indeed EXB17 was a true copy of the original?
  14. The writings in respect of the document produced herein as EXB17 were made on 11<sup>th</sup> March 2012. If the Appellant was arrested on 10<sup>th</sup> March 2012 and the property surrendered on the same day before he was placed in cells why is this document dated 11<sup>th</sup> March 2012 and not 10<sup>th</sup> March 2012? The said notes do not even bear the signature of the Appellant nor the officer who allegedly received these items. I find EXB17 to be a fake document which has o evidential value.
  15. Going back to the evidence of PW7 - NO.92720 PC Esther Chebus, she testified that she reported to the station for duty on 12<sup>th</sup> March 2012, and was handed over two mobile phones namely Nokia C3 and Nokia 1209. The phone which attracted her attention was **Nokia 1209** said to belong to the Appellant. And that is the phone she dealt with and interrogated the Appellant over. The phone that was produced before the trial court was not **Nokia 1209** but **Nokia C3** (EXB 1).
  16. PW7 was the witness that was relied on by PW8, PW9 and PW10 to have the Appellant charged with handling. Which phone did he handle? Nokia 1209 as stated by PW7 or Nokia C3 as

assumed by PW8 – PW10? At first I thought there was a typing error in the proceedings and I consulted the original record. It clearly shows that the new phone which PW7 dealt with was **Nokia 1209.**

17. It is also clear that no phone was found in the Appellant's bag that was collected from Destiny bar on 12<sup>th</sup> March 2012. It follows that it's the officers at Kagio Police Station who know the origin of the Nokia C3 phone that was produced in court as EXB1 – Nokia 1209 was never produced in court.

18. The Appellant in his defence explained the circumstances of his arrest. He denied having committed the offence. The anomalies above having been pointed out, I do find that the prosecution completely failed to link the Appellant with the phone produced herein as EXB1.

19. The upshot is that the appeal has merit and I allow it. The conviction is quashed and the sentence set aside. The Appellant to be released forthwith unless otherwise lawfully held under a separate warrant.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 31<sup>ST</sup> DAY OF JULY 2014.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Mr. Miiri for State**

**Appellant**

**Njue/Kirong – C/c**