

mobile phone and that light from the mobile phone torch was insufficient for identification.

Having considered the oral submissions in the light of the relevant grounds of appeal, our duty was to re-consider the evidence and arrive at our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In summary, the case for the prosecution was that on the material date at about 11.00 p.m., the complainant **Amos Ochieng Akelo (PW1)**, was asleep at home outside his house when he was suddenly confronted by two people who were armed with a gun. They ordered him to kneel down and produce money but upon his request they allowed him to fetch the key to his house so that he could enter the house. They followed him into the house where they remained briefly before returning outside. He obtained Kshs.1,000/= from inside the house and handed it over to them.

The two people received the money and conversed in the Turkana language before asking for more money which the complainant did not have. Instead, they took his mobile phone after which they left and went away. He (complainant) called out for his neighbour Peter Lolelen at whose place he went and informed him of the incident. He slept at the neighbour's house and on the following day reported to the police at Lokori police station. Police Officers visited the scene at which time he gave a description of the offender who was in possession of a mobile phone and directed the police where they could find him. He later returned to the police station and identified the appellant as one of the culprits. He said that he knew the appellant as a person who used to work for a brother of his (complainant) boss called Zulu.

P.C Moses Nakaito Nakali (PW2), investigated the case and in the process proceeded to the scene where the complainant mentioned the appellant as a suspect. He (PW2) arrested the appellant and took him to Lokori police station where he was searched and found with the complainant's stolen mobile phone which was identified by the complainant by production of the relevant purchase receipt.

After investigations were complete, P.C Nakali (PW2) preferred the present charge against the appellant.

Ben Kemboi (PW3), a clinical officer at Lodwar District hospital examined the complainant and completed the necessary P3 form which showed that the complainant sustained injuries at the material time of the offence.

In his defence, the appellant denied the offence and indicated that he was at his place of work in a garage on the 4th April, 2013, when he was approached by two people who told him that they had a damaged motor cycle at the police station. He could not accompany them to the station as he was alone at his place of work. He however accompanied them after they persuaded him to do so. On arrival at the station, he was asked to enter a certain room where he was locked for a night. He remained there upto the 7th April, 2013, when he was taken to court and charged with the present offence. He contended that he was not found in possession of the mobile phone produced in court.

After examining the evidence in its totality, the Learned trial magistrate concluded that the case against the appellant had been proved beyond reasonable doubt.

On our part, we agree and uphold the trial court's finding to the effect that the offence of robbery with violence was indeed committed against the complainant (PW1). The necessary ingredients of the offence were duly established by the evidence availed by the prosecution through the complainant, the investigation officer (PW2) and the clinical officer (PW3).

However, with regard to the appellant's identification as being one of the offenders we remained unconvinced that the complainant was able to identify any of the offenders. This is because the offence occurred in the hours of darkness yet there was no indication that favourable conditions for identification existed at the time.

The Learned Prosecution Counsel indicated in her submissions that light emanated by a mobile phone enabled positive identification of the appellant. However, the complainant's evidence did not indicate as

much. It only indicated that the offender who did not have a gun had a mobile phone which he was flashing at the complainant and if that was the case, there was no possibility of the complainant identifying any of the offenders as the flashes from the mobile phone were not directed at any one of them.

In essence, the complainant did not demonstrate how he was able to pinpoint the appellant as one of the offenders in the hours of darkness. His evidence in that regard was insufficient and unreliable to have any probative value.

We therefore find that there was no direct evidence of identification against the appellant for a holding that he was positively identified as being part of the people who robbed the complainant. The main charge against him could not hold.

However, there was sufficient evidence from the investigations officer (PW2) establishing that the complainant's stolen mobile phone was found in the possession of the appellant.

There was also credible documentary evidence from the complainant establishing that the recovered mobile phone was his property.

The appellant denied possession of the phone but failed to offer any or satisfactory explanation of how he came by it. We therefore quash his conviction by the learned trial magistrate on the main count and substitute it with a conviction on the alternative count of handling stolen property contrary to section 322 (1) (2) of the penal code. In that regard, we set aside the sentence of life imprisonment imposed by the learned trial magistrate and substitute it with a sentence of five (5) years imprisonment with regard to the alternative count.

It is to that extent that the appeal is allowed.

Ordered accordingly.

J. R. KARANJA

K. KIMONDO

.....

.....

JUDGE

JUDGE

[Delivered & signed this 18th day of November, 2014]

[In the Presence of the Appellant and M/S Koga for the state]