REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 121 OF 2013 CONSOLIDATED WITH NO. 122 OF 2013

DENNIS KARANI NJERU ……...1ST APPELLANT

TWAHA MUCHIRI ITA …….2ND APPELLANT

VERSUS

REPUBLIC……....……..RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 1243 of 2012 in the Principal Magistrate's court at Gichugu HON. T.M. Mwangi (PM)

JUDGMENT

DENNIS KARANI AND TWAHA MUCHIRI the appellants herein were charged before the principal magistrate's court at Gichugu criminal case NO. 1243 of 2012 with four counts , two of which were robbery with violence contrary to **Section 296(2) of the Penal Code** , the third count being handling stolen goods contrary to **Section 322(1) and (2)** of the **Penal Code** and in addition count four in respect of 1st appellant, being in possession of canabis sativa(bhang) contrary to **Section 2(a)** of the **Narcotic Drugs** and **Psychotropic Substances Control Act NO. 4 of 1994.** After trial, the trial court acquitted the appellants on the first two counts of robbery with violence but found both of them guilty of count 3 and sentenced them to serve 5 years imprisonment each while the first appellant herein **DENNIS KARANI NJERU** was found guilty of the 4th count and convicted to serve 1 ½ years imprisonment thereof.

Both the appellants were dissatisfied with both the conviction and the sentence meted out against them and filed separate appeals which were consolidated and heard on the same day. The appellants however filed separate submissions in support of their respective petition of appeal.

Dennis Karani Njeru 1st appellant listed the following grounds of appeal in his petition.

1. The he pleaded not guilty to the charge.
2. That the trial magistrate erred in law and fact by failing to consider that the case was not proven beyond any reasonable doubt.
3. That the Learned trial magistrate erred in law and in fact by failing to consider that the prosecution's witnesses gave incoherent and uncorraborative evidence .
4. That the Learned magistrate erred in law and facts when he convicted and sentenced the appellants while relying on contradicting and inconsistent evidence.
5. That the Learned trial magistrate erred in law and fact when he convicted and sentenced the appellant on handling charges despite the fact that he was not found in possession of the phone at the time of arrest.

6. That the Learned trial magistrate erred in law and in fact when he failed to consider that the said bhang was in question on how he arresting officer differed in its amount and the circumstances of its possession in the appellants clothing .
7. That the Learned trial magistrate erred in law and fact when he failed to consider the 1st appellant's defence .

It is on the basis of the above grounds that the 1st appellant asked this court to quash his conviction and set aside sentences meted out against him.

The 2nd appellant **Twaha Muchiri** on the other hand has listed five grounds on his petition . They are as follows:

1. The he pleaded not guilty .
2. That the trial magistrate erred in law and fact by convicting the appellant on a defective charge sheet.
3. That the trial magistrate erred in law and in fact y passing a conviction on prosecution evidence that was brought with contradictions and inconsistence.
4. That the Learned magistrate erred in law and fact handing him a harsh sentence.
5. That the mitigation was not considered.

The 2nd appellant on these grounds urged this court to quash the conviction and set aside the sentence.

The state through Mr Omayo opposed this appeal. He gave a chronology of events during and after the robbery that took place on 25th November 2012 at night where the complainants were violently robbed of the following items;

1. H.P. Monitor
2. A Sony DVD machine .
3. Two mobile phones of make Alcatel and Nokia .
4. Cash of kshs 1200/-.

Mr Omayo urged this court to find that the appeal lacked merit since the evidence adduced at the trial court was overwhelming and contrary to submissions of the appellants there were no contradictions

A brief background of the case shows that the complainant PW1 **(PATRICK KAMAU KARUMBU)** and his wife **PW2 (MARY WANJIKU KAMAU)** were woken up by armed robbers at 2.30 am on the night of 25th November 2012. They were molested and the above stated items were stolen. Later a phone make Nokia NO. IMEI NO. 359359031648550 belonging to PW2 was recovered from 2nd appellant who led the police to the 1st appellant.

I have considered the grounds of appeal and the opposition by State and this court being an appellate court is obligated by law to relook at the evidence tendered at the trial court afresh and re-evaluate the same in order to find if the same was sufficient to sustain the conviction or not . I am cognizant that I did see the witness first hand in order to make observations on their demeanor .

I have looked at both sets of grounds and I shall combine them and synthesize the same into two for ease of determination.

a. Whether or not the prosecution discharged its burden of proving their case beyond reasonable doubt.
b. If the case was proved whether the sentence were fair and correct in law.

a. **Whether he case was proved beyond reasonable doubt in the subordinate court .**

The appellants have pointed out that the case against them was not well established and that the trial

court relied on oral evidence of investigating officer which evidence had been countered by the denials put forward . According to the appellant the issue of recent possession of the stolen items was not well corroborated. The 1st appellant alleges that he had no prior knowledge of the 2nd appellant and only came to know him at the police station when they were arrested. The 2nd appellant stated likewise . The 1st appellant **DENNIS KARANI NJERU** stated in his submissions that he was not even found in actual possession of the stolen phone and that the bhang allegedly found on him was planted by the police.

The 2nd appellant told the same thing to the trial court but did not and has not given reasons as why the police would be interested in framing him.

Now turning to the evidence tendered by the prosecution at the trial court, the prosecution called a total of seven witnesses. It is not disputed from the evidence tendered that PW1 and PW2 were violently robbed by armed robbers on the night of 25th November,2012 and that a number of goods were stolen among them a Nokia phone belonging to PW2 the complainant in count 3 in the charge that faced the appellant at the trial court.

I have looked at the evidence of PW1 and PW2 and I find the evidence consistent with the evidence of PW3 and PW4 in so far as the robbery is concerned. The phone belonging to PW1 has never been found and the phone that was recovered is the one that belonged to the PW2 NOKIA 2330 IMEI NO.359359031648530. PW5 one of the investigating officers ,testified before the trial court and gave a chronology of events from the time they received the report on the said robbery to the time they arrested the appellants in this case after investigations which he carried out together with PW7 one CPL **Ezra Serem**. I find that the evidence of PW and PW7 was central and key to the prosecution case. PW7 told the court how he wrote to Safaricom giving them the IMEI NOS of the phones belonging to PW1 and PW2 and that he received a positive response from Safaricom that the phone belonging to PW2 NOKIA NO. 359359031648550 was active and it was being used by several numbers among them SIM card of mobile NO. 0729699939 which was mobile number registered in the name of the 1st appellant herein **DENNIS KARANI NJERU.** He was found to have used the stolen phone on 1st December,2012 at 19.20 hours. The identity of the Safaricom subscriber given was NO. 27800557. At the same time PW7 was also able to establish with the help of Safaricom that another mobile card NO. 0710857365 also used in the same stolen phone on 1st December 2012 at 21.33 hours. The mobile number was registered in the name of 2nd appellant herein and his identity was given as NO. 24439693. This evidence was well corroborated by production of P exhibit 7, 7a and 7b. PW 5 and PW7 armed with these crucial information told the court how they managed to arrest the 2nd appellant and later the 1st appellant . The 2nd appellant was caught when using the stolen handset and this was the key part of the investigation and the subsequent prosecution of the appellants herein. The evidence adduced by the witnesses were consistent and I find no contradictions. The appellants at the trial court never gave any plausible explanation on how they came to possess and use the stolen phone. The Learned magistrate properly directed himself in law by making a presumption he made in his judgment that the appellants were either thieves or receivers of stolen phone in line with the legal authority he quoted in the case of **ANDREA OBONYO –VS- REPUBLIC (1962) EA 542** where it was held that the application of doctrine (of recent possession) normally shifts the burden from the prosecution to the accused once it is established that an accused had in his/her possession stolen item/goods . The court held that accused in such situations has to explain to the satisfaction of the court how he came into possession of stolen item. The explanation given by the appellants herein when they were put on their defence do not hold any water. The 2nd appellant admitted that mobile phone NO. 0710857365 was his. The explanation given that he had borrowed handsets when his was under repair was not convincing particularly when he told the court that he did not know his co-accused (1st appellant herein). If they did not know each other as they claim, how then could they have borrowed each other a phone? One is unlikely to borrow a phone from a total stranger. This is because the evidence of PW7 shows that the two appellants used the stolen phone same day within an hour apart. The print out of the data manifest from safaricom showed the lines that had been used on the stolen phone before and after the incident . The same was produced at the trial court by PW7 as P exhibit 7. The data shows clearly

that apart from other mobile lines that were used in the stolen phone were that 2nd appellant(**Twaha Muchiri)** (0710857365) and 1st appellant **Dennis Karani Njeru**-0729699939.

The evidence adduced by PW5 and PW7 in my view was overwhelming . The evidence of consistent with the evidence of PW1, PW2 and PW3 I have found no contradictions. I also find that the investigation carried out was sufficient and commendable. PW7 told the trial court that when they arrested the 2nd appellant they prepared an inventory of what was found in his possession which were

a. Identity card bearing the name Twaha Muchiri Ita ID NO. 24439693.
b. Voters card in the name of Twaha Muchiri.
c. One nokia make 2330 of IMEI NO. 353559031648550.
d. Sim card for mobile line NO. 0710857365.

The inventory was produced as P exhibit 12 signed by PW7, two other police officers and the 2nd appellant to confirm the contents. The 2nd appellant appended his signature and thumb printed it as seen in the exhibit produced. The 2nd appellant has not contested this. The same thing was done in respect to the 1st appellant where the following items were in his possession.

1. Identity card NO.27800557 bearing the name Dennis Karani Njeru.
2. Voters card bearing the same name.
3. Two stones of bhang with 56 ½ a number of rolls .
4. One yu sim card with serial NO.8925405001162754851.
5. One safaricom sim card NO. 0729-699939.

The inventory was duly signed by the investigating officers and the 1st appellant who signed and thumb printed it. The 1st appellant similarly has not contested the same. The items recorded in the inventories were all produced as exhibits at the trial court . The trial court properly directed itself in law in evaluating the evidence. The only minor issue noted is where the trial court faulted the investigating officer for not producing documents from safaricom showing that the 2nd appellant was the registered line holder of mobile NO. 0710857365 while the 1st appellant was the registered holder of mobile NO. 0729699939. In my view however, there was no need for the same as the appellants admitted that the respective mobile lines belonged to them. The respective sim cards were found with them and they admitted to the police and also on oath in court that the lines were indeed theirs. The said mobile lines were used on the stolen mobile phone almost five days after the complainants were violently robbed of their valuables including the mobile phone recovered . Both the appellants did not stake any claim on the ownership of the mobile phone. The 2nd appellant in his defence at first maintained that the stolen phone was his but midstream in his evidence he changed course and said that he infact had taken his phone for repair and if he had used the stolen handset then he may have borrowed it . He however did not say the person he had borrowed from. The 1st appellant could not also identify the person he had borrowed the phone from . It is clear therefore why the trial court made the right conclusion that the appellants knew that the said handset was stolen. I have considered the defence put forward and though the appellants claims that the same was not considered , the trial court considered it. I do find appellants defence to be mere denials, diversionary and lacking in critical parts which was to provide a reasonable explanation on how the stolen handset came to their possession. Infact I find that the appellants were lucky that the prosecution could not find any other link to connect them with the robbery with violence . In the case of **SOLOMON LOKWAI LOBUIN –VS- REPUBLIC(2006) e KLR** the court made the following relevant observation;

" ……there was no evidence to link the appellant with the robbery with violence which occurred more than 4 months prior to the arrest of the appellants and recovery of stolen items during the robbery. We are of the view that since there was no evidence of identification by the complainant the doctrine of recent possession cannot be applied in the circumstances of the present case to connect the appellant to the robbery……. We are of the view that the

circumstances under which the mobile was found in the possession of the appellant suggests that he was aware that he was handling stolen property . The explanation given by the appellant on how he came to be in possession of the said mobile was not satisfactory". The circumstances obtaining in the above case is almost similar to the present case .

The trial magistrate acquitted the appellants herein on the charge of robbery with violence owing to the lack of sufficient evidence. There was evidence that the stolen handset was used a day after the robbery by a person who is still at large. Perhaps had that person been apprehended he could have provided a link which would have assisted the court in administering justice. In that regard the Learned magistrate was correct in acquitting the appellants on the count of robbery with violence and convicting them on the 3rd count of handling stolen goods contrary to **Section 322(1) and (2)** of the **Criminal Procedure Code**. I find that the evidence adduced against the 1st appellant in regard to being in possession of canabis sativa was sufficient to sustain the charge. The 1st appellant was unable to demonstrate that there was bad blood between him and the police officers as to make them plant bhang on him or frame him for the charges that faced him. I find the said allegations unfounded and diversionary.

In conclusion I find that the evidence adduced by the prosecution at the trial court was sufficient to sustain the conviction that the trial court found against the appellants. On the issue of sentence I find that the sentence prescribed under **Section 322(2)** of the **Penal Code** is imprisonment with hard labour for a term not exceeding 14 years. The provisions of **(Section 354(3) Criminal Procedure Code** allows this court to either increase or reduce the sentence on appeal depending on the circumstances . In the case of **FRANCIS ODINGI –VS- REPUBLIC (2011) e KLR** the court of appeal held as follows:

" the charge facing the appellant was tried by the Senior Resident Magistrate. The sentence provided for the offence is 14 years but the Learned magistrate sentenced the appellant to 6 years imprisonment. He was aware and recorded that the appellant was a first offender and other mitigating circumstances and this is why he handed down 6 years imprisonment . This was a discretionary function and it is our view that since the Attorney General had not applied for enhancement of the sentence, there was no compelling reasons for the Learned Judge to enhance it as he did".

The 4th count facing the 1st appellant carries a sentence of 10 years . He was sentenced to 1 ½ years by the trial court.

The state through Mr Omayo did contend that the sentence was very lenient but did not ask me to enhance it which I could have considered . However having failed to ask for enhancement I do not find the sentence to be manifestly inadequate to attract my intervention. I find that the trial magistrate must have considered mitigating circumstances contrary to what the appellants contend.

From the foregoing I find the appeal before me to be devoid of merit . It is dismissed. The conviction and the sentence is upheld for the reasons advanced.

R.K. LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 11TH DAY OF DECEMBER 2014 in the presence of

The 1st appellant

The 2nd appellant

Mr Sitati for state

Mbogo Court Clerk