REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 3 of 2012

ABDIRASHID ADAN HUSSEIN……..……..……..APPELLANT

-VERSUS -

REPUBLIC…….....STATE COUNSEL (RESPONDENT)

JUDGEMENT

The applicant Abdirashid Adan Hussein was charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The Mandera Principal Magistrate found the appellant guilty of a lesser charge, that of handling stolen goods contrary to **Section 322(1)** of the **Penal Code** and sentenced him to ten (10) years imprisonment.

In this appeal, the appellant was represented by Mr. C. P. Onono who advanced and argued the following grounds before this court:

a) That the stolen property was not properly identified;
b) That crucial witnesses were not called to testify;

c) That the trial magistrate introduced extraneous matters and failed to address crucial gaps in the evidence;

d) **That the conviction was against the weight of the evidence.**

The facts leading to this appeal were that the complainant PW1 was walking home on 05/08/11 around 9.45 p.m. when he was attacked by two men who robbed him of his phone make G-tide and cash Shs.2450/= and his national identity card. The complainant also sustained injuries as a result of the violence meted against him. He reported the incident to Mandera police station the following day. Assisted by PW2, the complainant alerted various mobile phone repair shops in the town to be on the look out for his phone whose description he gave on the conviction that someone may take the phone for unlocking of the security code which was in use. The owner of one of the shop called PW2 a short while after the alert informing him that someone had come to the shop with a phone fitting the description given by PW1 seeking for services of unlocking the security code. PW2 informed PW1 and the two witnesses proceeded to the shop and found the appellant with the phone which PW1 identified as his property. The appellant was immediately arrested, the phone recovered and later charged with the offence.

On the issue of identification of the phone, Mr. Onono argued that the phone was not clearly described on the first hearing date and that it was not in court with the prosecution giving no explanation. When the phone was produced in court on the second hearing date, PW1 described the phone in a detailed manner. It was contended that the court failed to test the phone using the security code and the scrolling button which test would have cleared any doubts as to the identification of the phone. The

scrolling button ought to have been produced in court. The counsel submitted that in the absence of the test and production of the scrolling button, the identity of the stolen phone was riddled with doubt.

Mr. Onono challenged the prosecution for failing to call the owner of Brother's shop where the phone was recovered. The defence submitted that the trial magistrate introduced extraneous matters in the judgment of the court which related to the value of the phone and the duration from the time of the incident to that of the recovery.

Mr. Mulama for the State was of the conviction that the description of the phone given by the complainant was adequate and that failure to call the owner of the shop did not affect the prosecution's case. He submitted that the trial court was wrong in finding that the offence of robbery with violence was not proved while it was very clear that recent possession of property was proved with the appellant failing to give a reasonable explanation as to how he came into possession of the phone. The State urged the court to set aside the conviction of handling stolen property and substitute it with one of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

The evidence of PW1 was that he was robbed of his phone, cash Kshs.2450/= and identity card by two armed men who injured him. He was treated for the injuries at Mandera District Hospital. The P3 form was produced in evidence by PW4. The description of the phone in the charge sheet was make G-tide valued at Shs.4,000/=. In the testimony given on 16/09/11 by PW1, he described the phone stolen from him as *"make G-tide which had been locked with a security code … and was generally black."*

It is not in dispute that the phone was not in court on that day. On 05/10/11 the phone was in court and PW1 was recalled to produce it. He identified the phone as the one robbed from him and said it was *"multi-coloured; black down; white up and slightly red down and that its keys for making calls were fading."* It is true that the first description was general while the second one was more descriptive.

We agree with the defence that the prosecution ought to have explained where the exhibit was on the first date of hearing and gone further to ask for adjournment so that PW1 could testify when the exhibit was in court. However, the failure to explain the whereabouts of the phone did not cause any prejudice on the part of the appellant. The phone was produced in court the next hearing date. Any property recovered by the police in the course of investigations in a criminal case, remains in their custody until it is produced in court. A witness would definitely describe an exhibit better when looking at it rather than when he is struggling to remember hos it looked like.

The issue which arises is from the argument of the defence whether the phone was satisfactorily identified. In his judgment, the trial magistrate was satisfied as to the identification. There was no possibility of any mistake as to the phone robbed of the complainant. Neither was there any contradiction in the two descriptions given by PW1. The only difference was that the second one was more detailed than the first one. The accused in his defence did not raise any doubts on identification of the exhibit. Neither did he raise the issue during cross-examination. It is important to note that the appellant did not claim any legitimate ownership of the phone apart from saying that someone sold it to him. The phone was recovered in the presence of the complainant who identified it in the presence of PW2 and the police. We find that the learned magistrate was right in finding that the phone was properly identified by the complainant.

The owner of the Brother's shop where the phone was recovered would have been a key witness in this case. The prosecution did not tell the court why the witness was not called to testify. The owner of the shop would have told the court how PW1 alerted him about his stolen phone early in the morning and how the phone was brought to the shop a short while later for unlocking the security code. Further, that the complainant was called to the shop and he identified the phone as his stolen property. The evidence of PW1 and PW2 was very clear as it covered all these issues. There is no requirement that all eye witnesses be called to testify. A fact can be proved even by the evidence of one witness. It was held in Criminal Appeal No. 27 and 28 of 2004 Court of Appeal Eldoret **Lazarus Wanjala & Another vs. Republic** that the contention that failure to call a certain witness did not affect the prosecution's case unless it was shown that such evidence would have been adverse. In the case before us, it was not shown that the

evidence of the owner of the shop would have been adverse in any way to the prosecution's case. The court convicted the appellant on the evidence of the four prosecution witnesses which it found cogent. The failure to call the witness did not in any way occasion miscarriage of justice. The trial court convicted the appellant on the evidence of the witnesses who testified which it found cogent. The failure to call the witness did not occasion any miscarriage of justice in our considered opinion. The accused and the recovered phone were properly identified by PW1, PW2 and PW3.

In his judgment the trial magistrate made an observation that the appellant said he bought the phone at Shs.1,000/= while its value was Shs.4,000/=. It was argued that the observation amounted to extraneous matters. The charge sheet gives the value of the phone as Shs.4,000/= which figure the police may have obtained from the complainant. The appellant in his defence said he bought the phone at Shs.1,000/=. The observations were drawn from the evidence before the court and did not amount to extraneous matters. The observation on the value and the cost was crucial for the court as it moved towards the finding that the appellant was in possession of stolen property.

The magistrate further observed that it was incredible that the appellant would have bought the phone stolen only the night before *"early"* that morning. Where did the magistrate get the term *"early hour"*? Was it drawn from the evidence on record?

PW2 testified that he met with PW1 around 6.00 a.m. at Digo stage the day after the robbery. Both went to six different mobile repair shops to alert them on the stolen phone. PW2 left his mobile number in each of the shops. He says that 40 minutes after leaving the shops, he was telephoned by one shop owner to go and identify a mobile phone fitting the description given. It proved to be the one robbed of the complainant. The time between day break (6.00 a.m.) and the recovery of the phone was very short. PW1 refers to the duration as "after a short while". PW3 P.C Maurice Situma testified that he was telephoned by the officer-in-charge of police station and informed of the report of robbery by PW1 and recovery of the phone around 8.00 a.m. This confirms that the phone was recovered very early in the morning before 8.00 a.m. The term *"early hour"* used by the trial magistrate was based on the evidence of PW1, PW2 and PW3. It was therefore, not an extraneous matter.

The evidence of the prosecution established that PW1 was robbed of his phone, cash and identity card by two persons he did not identify. One of the two persons was armed with a knife which is a dangerous weapon, they used violence on him immediately before robbing him which was demonstrated by the injury he sustained on his left arm.

The defence of the appellant was that the phone was sold to him by some men who came to his vehicle the morning he was arrested. He then went to have it repaired because it had a faulty keypad. The date and time of buying the phone was not given. The phone was recovered less than twelve hours after the robbery. When asked to show where the seller could be found, the appellant took PW1, PW2 and PW3 to various locations in Mandera town and did not show them the person who sold it to him. The magistrate correctly observed that the conduct of the appellant showed that there was no such "seller" as he claimed.

The appellant admitted possession of the phone which was identified as having been stolen from the complainant. He was found in possession of the stolen item less than twelve hours after the robbery. This was indeed recent possession. The trial magistrate in his judgment evaluated this evidence and concluded: However, he proceeded to: "…..it is clear that I cannot find the accused person guilty of robbing the complainant. However, I do come to a finding that his possession of the complainant's phone on 06/08/11 was with the knowledge that the phone was not honestly obtained."

The magistrate then convicted the appellant of a lesser charge of handling stolen property contrary to **Section 322 (a)** of the **Penal Code**. I believe the magistrate meant **Section 322(1)** of the **Penal Code**.

The issue for determination in this regard is whether the trial magistrate reached the correct finding. We rely on the case of **Arum vs. Republic Court of Appeal at Kisumu Criminal Appeal No. 85 of 2005** where it was held that the doctrine of recent possession is applicable where the court is satified that the prosecution have proved the following:

a) that the property was found with the suspect;

b) that the property was positively identified by the complainant;

c) that the property was stolen from the complainant;

d) that the property was recently stolen from the complainant.

The court in that case upheld the conviction of the appellant based on recent possession as opposed to identification by the complainant. In the case of **George Otieno Dida alias Stevo & Another vs. Republic**, the appellants were found in possession of the stolen property about four (4) hours after the robbery. There was no identification by the complainant of his assailants. The Court of Appeal upheld the conviction based on recent possession on grounds that it was founded on sound legal principles.

In the case of **Republic vs. Oyier (1985) KLR 353**, the court held that a finding by a court of law must be based on evidence and correct legal principles. If the trial court had no legal basis for such a finding, the appeal court is entitled to interfere with the finding.

The explanation given by the appellant on how he came into possession of the phone was not credible as the magistrate observed in his judgment. The explanation was completely dislodged by the prosecution's evidence. The burden of proof as to possession was not effectively discharged by the appellant when he failed to show or identify the seller and to give the date and the time he bought the phone taking into account that the robbery had taken place less than twelve hours earlier.

It is our finding that the conviction on the charge of handling stolen goods was not supported by evidence and was a misdirection in law and fact on part of the magistrate. The trial magistrate in his judgment departed from the principles governing the application of the doctrine of recent possession and proceeded to apply the wrong principles, thus arriving at an incorrect decision. The prosecution had proved beyond reasonable doubt that the appellant was one of the two people who robbed the complainant. The appellant ought to have been convicted of the offence charged.

We set the conviction of handling stolen goods aside as well as the sentence imposed. It is substituted with that of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The appellant is hereby sentenced to death in the manner authorized by the law.

The appeal is hereby dismissed save to the substitution of the conviction and the death sentence.

F. N. MUCHEMI **S. N. MUTUKU**

JUDGE **JUDGE**

Judgment dated and delivered in open court on the 29th day of January , **2013** in the presence of the appellant, the State Counsel Mr. …… and Mr. ……for the appellant.

S. N. MUTUKU
JUDGE