



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.241 OF 2010

CONSOLIDATED WITH CRIMINAL APPEAL NO 245 OF 2010

PETER NJOROGE MURIITHI.....1ST APPELLANT

GEORGE MATHU KURIA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment in The Chief Magistrate's Court at Nyeri in Criminal Case No.851 of 2009 by M. Nyakundi – SRM)

J U D G M E N T

Peter Njoroge Muriithi (*hereinafter referred to as the 1st appellant*) and George Mathu Kuria (*hereinafter referred to as the 2nd appellant*) and Joseph Kanyi Wairimu (*hereinafter referred to as deceased*) were charged with the offence of robbery with violence contrary to section 296(2) of the penal code. They were convicted and sentenced to death. The 1st appellant was charged with the alternative count of handling stolen property contrary to section 322 of the penal code. He was convicted on this charge but the sentencing was left in abeyance.

The prosecution called 5 witnesses three of whom were police officers thus *corporal John Sigei No.75881, Sergeant Jacob Mutiso, No.66334 and Mwandili John Kiriga*. The first two arrested the appellants and the deceased at the Nyeri Provincial General Hospital whilst the latter was in charge of the cells where the appellants were kept upon arrest. During the trial, *corporal John sigei* testified that they were called and informed of a robbery at Ruringu area at st. Jude Catholic Church.

He immediately moved at the scene in the company of another officer and found the victim lying down on a feeder road leading to the church. He was not dead but in great pain and was covered with blood. They searched the area and found foot steps showing that there had been many people around. The pocket for the mobile phone at the belt of the deceased person's trousers was open and the mobile phone missing.

They rushed the victim to hospital at Nyeri Provincial General Hospital but before reaching the hospital, they were called by an informer who told them that the victim was struggling with a gang and in the process the gang was Overpowered by the victim but managed to get reinforcement hence beat the victim with weapons which the informer could not identify and took their injured accomplice to hospital.

The police took the victim to the same hospital that the 2nd appellant who was suspected of being the accomplice had been taken to. At the gate of the hospital they found the 1st appellant who tried to

run away when he saw the police but they arrested him before he could escape. They interrogated him at length as a result of which he told them that he had gone to the hospital for VCT but later changed the story and told them that he had taken his friend to hospital after being beaten by unknown persons.

The officers entered the cash office at the hospital and met the 2nd accused in the lower court who is **now deceased** and another person. The other person was accompanied with a lady whilst the 2nd accused who was alone showed them his patient, thus the 2nd appellant who had already been admitted with bruises on the face and upon inquiry told the police that he was having a lot of pain. The 1st appellant was still being held in the patrol car. They did their preliminary investigation and arrested the 1st appellant and the 2nd accused (deceased).

The 1st appellant and the 2nd accused were escorted to the police station and a search was conducted on the 1st appellant by Sergeant Mutiso whereupon a mobile phone manufactured in China serial number 358663001278463 was recovered from the 1st appellant. The same was produced in court as an exhibit. The victim died 30 minutes after admission according to sigei. The mobile phone receipt that was produced indicated that the serial number of the phone the deceased had was 358663001278463. It was stated by the widow of the victim that the extra sim card recovered from the appellant belonged to her deceased husband.

It was alleged by the police that the second accused had informed them that the 2nd appellant had been attacked and injured by robbers and that is why he took him to hospital for treatment.

Constable Mwandili John Kiriga was manning the cells center on the 11/8/2009 at 10:57 pm when the duty officer **Sergeant Mutiso** in company of **P.C Onyango** escorted the 1st appellant and 2nd accused ;Joseph Kanyi (deceased) to the cells. They were searched and a mobile phone with an extra battery but without a sim card were found inside 1st appellant's socks.

Esther Ndunge Kiihu wife to the deceased victim testified that she received information while at Thika that her husband had been killed in Nyeri. She came to Nyeri and went to Provincial General Hospital and confirmed that he was dead. She was told that a mobile phone had been recovered from the 1st appellant. She brought receipts to the police officers that confirmed that the mobile phone belonged to the deceased. She gave testimony that the mobile phone had an extra battery and identified the same as the one that belonged to her husband.

Sergeant Jacob Mutiso testified that while at the hospital they helped the victim and when they asked him what had happened the said victim pointed at the 1st appellant and the 2nd accused who were in a police car and later the 2nd appellant who was on a stretcher at the casualty.

The Sergeant inquired from his colleagues what had happened and established that the victim had been struggling with the person on the stretcher (2nd appellant) and both got injured. The 2nd accused (deceased) had escorted the second appellant to hospital. The 2nd appellant was handed over to doctors whereas the others were taken to the cells.

Upon search on the 1st appellant, a mobile phone with an extra battery was recovered.

The victim died 3 days after admission according to sergeant mutiso and therefore contradicting corporal sigei however the contradiction is of no consequence as it is a common fact that the victim was violently robbed of his phone and was rushed to hospital unconscious and died thereafter. The 2nd appellant was discharged from hospital on 13/8/2009 and immediately arrested and taken to Nyeri police station. The wife of the deceased brought the receipt numbers for the mobile phone and the same indicated the serial number of the phone as 35886301278463.

On cross-examination by 1st appellant the investigating officer confirmed that there was an error in the serial number of the phone in the investigation diary and the serial number as per the receipt as one

digit was left out when recording the serial number.

On cross-examination by 2nd accused person (deceased) he stated that when the accused was asked what happened he pointed to the appellants and the police concluded that he meant that he had been attacked by the appellants. According to Dr. Keith Ndindi, the postmortem was conducted by Dr. Kariuki whose handwriting he is familiar with. He produced the P3 report which showed that the victim died due to severe injuries on the head.

The learned Magistrate heard the case and found that the evidence of the witnesses and the death of Joseph Kiihu Mutira who succumbed to the injuries of the attack is indeed in itself proof that a robbery with violence occurred. He further found that the recovery of the mobile phone from the 1st appellant socks directly points at the appellants as having been involved in crime. The evidence of PW2 and PW5 points to a fact that the appellants were together when the offence was committed. The learned magistrate further found that the deceased pointed at 2nd appellant who was on a stretcher at the hospital casualty as the person who was responsible for the offence. He found that the prosecution had proved its case beyond reasonable doubt against the appellants. In the amended grounds of appeal of the **1st appellant** contends that the learned trial magistrate gravely erred in both points of law and facts and or misdirected himself both in holding and acting on the purported recovery /possession which had no guarantee of accuracy as it was shaky and shoddy. **Moreover** that the learned trial magistrate gravely erred in both points of law and facts and or misdirected himself in not resolving the circumstances of arrest. **Lastly**, that the learned trial magistrate gravely erred in both points of law and facts and or misdirected himself in both in failing to consider and or to give his defence any preference or weighing it against the prosecutions case.

In the amended grounds of appeal of the **2nd appellant** he states that the learned trial magistrate gravely erred in both points of law and facts and or misdirected himself in acting and basing the conviction on the uncorroborated evidence of identification which had no guarantee of accuracy.

- Moreover, that the learned trial magistrate gravely erred in both points of law and facts and or misdirected himself in failing to put into account the fact that the arrest did not conclusively or at all point to his guilt.
- Lastly, that the learned trial magistrate gravely erred in both points of law and facts and or misdirected himself in failing to consider and or to give the defence raised its due considerations.

Both appellants filed written submission upon which they relied during the hearing of the appeal.

The court has considered the petitions of appeal by both appellants which raise 4 issues that this court ought to determine. The first issue is whether the deceased was capable of identifying the person who committed the offense. Secondly, whether the pointing of his finger at the accused persons as the persons who committed the offence was a dying declaration, whether recovery of the mobile phone with the 2nd appellant was sufficient evidence to convict the appellant and lastly whether the trial magistrate considered the appellants' defence.

On the 1st issue, the victim was found lying down and bleeding and in great pain as a result of deep cuts on the head. He was not talking at all but was moving his body. He was rushed to Nyeri Provincial General Hospital. According to PW1 and PW5 the victim was unconscious and therefore it is doubtful that there was proper communication between him and the investigating officer and the accused persons when he attempted to identify the accused persons as alleged. This court finds that it was not safe for the learned magistrate to rely on the evidence of the dying declaration for a conviction as the victim was unconscious at the time he was taken to hospital. It is not clear as to the period of time taken by the victim before he died after admission as PW1 says that he died after 30 minutes whilst PW5 testified that the victim died 3 days after admission. This court finds that it was not safe for the learned magistrate to rely on the alleged dying declaration of the deceased who was unconscious, to convict the appellants as the evidence on record suggests that the deceased was unconscious when brought to hospital

This court finds that there was evidence that the mobile phone was recovered on the 1st appellant

when being escorted to the cells. The same was identified by the deceased's wife as his mobile phone. The 1st appellant denied the allegation that the mobile phone was found in his possession as he states that nothing was found in his possession. This court finds that there is no doubt that the mobile phone recovered belonged to the deceased victim as it was identified by his wife. Moreover there was no time for the police to implicate the appellant with the deceased's phone as the same was recovered almost immediately. The discrepancy in the serial number of the mobile phone was explained as digit no 7 was inadvertently left out by pw5 who explained that there was an error in recording the serial number in the investigations diary. This court upholds the trial magistrate's finding that the deceased's mobile phone that was recovered from the 1st appellant's socks directly pointed at the 1st appellant being involved in the said crime and that the same satisfies the doctrine of recent possession. In WANDUE V REPUBLIC(2003) KLR PGS 25- 30 it was held that the doctrine of possession of recently stolen property cannot apply until possession by the appellant was satisfactorily proved. This court finds that the mobile phone was recovered from the 1st appellant by PW2 at 10.57 pm within two hours of the offense. The 1st appellant failed to give an explanation as to how he came into possession. The only inference that could be drawn from the very recent possession of the deceased's mobile phone is that the 1st appellant was one of the persons who had robbed the deceased. Moreover, the trial magistrates finding that the three accused persons were together during committal of the offense is sound as the 1st appellant was found at the gate of the hospital whilst the 2nd accused (deceased) took the 2nd appellant to hospital where they were all arrested by the police. The evidence adduced shows that the three were together on that night. The second appellant's ground of appeal that the trial magistrate did not consider his defense cannot stand as the proceedings indicate that the defense was analyzed and the court reached a finding that the appellants were together when the offense was omitted.

This court finds that the convictions of the two appellants sound and therefor their appeals are dismissed.

Dated, signed and delivered at Nyeri this 22nd day of November 2013

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE

Judgment is read in the presence of the appellant and Mr. Njue for the state. The appellant has right of appeal.

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE