REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NUMBER 185 OF 2010

BETWEEN

MAXWELL ODHIAMBO OKEYO …………………………………………………………………… APPELLANT

AND

THE REPUBLIC OF KENYA………………………………………………………………………..RESPONDENT

[An Appeal from the Judgment of the Learned Chief Magistrate Mrs. U. P. Kidula dated 22nd March 2010, in the Chief Magistrate's Court at Kibera Criminal Case Number 2275 of 2009]

Appeal before Justices Monica Mbaru and James Rika

Mr. Oonge Advocate, appearing for the Appellant

Mr. O'mirera Senior Assistant Deputy Public Prosecutor appearing with Ms.Nyauncho Prosecution Counsel for the Respondent

---

JUDGMENT

1. The Appellant was charged with offence of robbery with violence contrary to Section 296 [2] of the Penal Code, and the alternative charge of handling stolen goods contrary to Section 322 [1] of the Penal Code. He was convicted, and sentenced to hang on the offence of robbery with violence, while the Trial Court opted to make no findings on the offence of handling, having convicted the Appellant on the main offence. The details of the two offences were as follows-:

ROBBERY WITH VIOLENCE C/S 296 [2] OF THE PENAL CODE

On the 20th day of January 2009 at Westlands Sports Road in Kileleshwa within Nairobi Area, jointly with others not before Court, while armed with dangerous weapons namely pistols, robbed Aziz Mohammed of seven mobile phones make Nokia E 65-1 Serial Number 353263019170296, Nokia 660 Serial Number 356442013853597, Nokia 6600 Serial Number 356383021759196, one Television make LG, one Micro Wave, three Laptops make Dell, Acer, HP, two Sony Camera, One Motor Vehicle, registration number KAY 168 D make Vitz – all

valued at Kshs. 3,000,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the Aziz Mohammed.

HANDLING STOLEN GOODS CONTRARY TO SECTION 322 [1] OF THE PENAL CODE

On the 20th day of May 2009 at Kariobangi within the Nairob Area otherwise than in the course of stealing dishonestly received or retained two mobile phones make Nokia N 6600 Serial Number 3563833021759196 and Nokia N 6600 Serial Number 356383021759121.

2. Four witnesses testified for the prosecution, and produced twelve pieces of exhibits. The Appellant gave a sworn statement and called no witness.

3. PW1 Mohammed Aziz testified he ran a fast food chain outlet in Nairobi, under the name Mac Fry's. He resided at Sports Road in Westlands. He left work at around 1.30 a.m. for home on 20th January 2009. He resided within a gated community. The guard opened for him the main gate. He drove to his maisonnette Number 3. He was driving his pick up registration KBB 111F. As he came out he noticed four people hiding behind another of his cars, Toyota Vitz KAY 168 D. PW1 walked to his house and while opening the door, two men accosted him. One had a small gun. They ordered him to stay quiet and lead them into his house. They also asked PW1 to advise his wife inside not to make any noise. All the robbers got into the house. They tied PW1's hands behind him. The lights on the staircase, the dinning place and the bedroom were on. They pushed the complainant onto the floor where he lay facing the wall.

4. The robbers emptied his pockets, asked his wife for money and gold, and went around the house looking for properties. They left PW1 in his bedroom with his son who was in tears, and locked the door. After sometime his wife untied his hands, he jumped out of the bedroom through a small window to the small sitting room and walked out of his house to his neighbour's. He informed his neighbour he had been robbed and requested the neighbour to press the alarm. Securex Guards came in answer to the alarm followed by Police Officers. He went through the house with the Police Officers and found the following items stolen-:

a. L.G. Television set.

b. Home Theatre L.G.

c. Mobile Phones.

d. His Wife's mobile phone.

e. Five other phones from the bedroom.

f. Three Laptops

g. Micro-waves.

h. Two Sony Cameras.

i. A pick up car.

j. A Toyota Vitz car.

5. PW1 gave to the Police Officers packaging cartons in which some of the stolen mobile phone had been packaged on purchase. The cartons had the following details-:

a. Nokia 6600 IMEI 356383021759196 [MFI1]

b. Nokia 6600 IMEI 356383021759121 [MFI2]

c. Nokia [no make] IMEI 355034005182464 [MFI3]

d. Nokia N81 IMEI 356442013853597 [MFI4]

e. Nokia E 65 IMEI 356961012545607 [MFI5]

PW1 had purchase receipts for MF1 and MF2. The first was dated 4th December 2008 [MFI 6 [a]. The second dated 2nd February 2008 marked MFI 6[b]. The receipt for the T.V. and the Home Theatre was dated 6th August 2008, marked as MFI 7. PW1 availed receipts for two HP Laptops and one Dell. The first HP Laptop receipt was dated 4th September 2007 and marked MFI 8[b], second HP Laptop receipt dated 22nd March 2007 was marked MF1 8 [c], while the Dell Laptop receipt dated 14th February 2008 was dated MFI 8 [a]. PW1 was not able to get receipts for the other items. The robbers ferried the items in his car. The pick-up car was recovered the following morning near Kibera, while the vitz was recovered at Kariobangi after three weeks. The robbers spent about three hours in PW1's house. They were dressed casually. The complainant could not see their faces. About three months from the date of the incident, he was called by the Police at Kilimani Police Station to identity certain mobile phones. He was shown one phone. He went and checked the IMEI numbers on the packaging cartons and was able to match two of the phones as having IMEI in MFI 1 and the other IMEI in MFI 2.The mobile phones were marked as MFI 1 [a] and MFI 2 [b] respectively. He did not know where the items were recovered. He and his family were not injured during the robbery.

6. PW2 Prity Vadgama informed the Court she lived at Sports Road Westlands with her husband PW1. She was woken up at around 1.30 a.m. by her husband on the 20th January 2009. He was in the company of two men, one of whom had a gun and wore a mask. The couple's hands were bound with ropes. She was ordered to sit on the bed, while her husband was ordered to lie on the floor face down. The masked robber demanded for money and jewellery. She directed one of the robbers to a small room where the jewellery was. They threatened to take away her husband never to return him, if the couple did not co-operate. They stole jewellery, mobile phones, camera and laptops. They ransacked the entire house. They took the keys for all the five cars belonging to the family and loaded the items there. They locked the family in the bedroom, and after almost three hours, left. PW2 untied her husband's hands. Her husband sought the neighbour's help and when the alarm button at the neighbour's was pressed, Securex Officers followed by Police Officers arrived. Two cars were stolen and recovered later. She did not see the Appellant during the robbery

7. PW3 Paul Irungu Mwangi told the Court he worked as a public service vehicle driver, operating the Kariobangi- City Centre route. On a certain date in February, at Hilton Bus Stage in Kariobangi, he was approached by a man called 'Othis.' PW3 did not know if the person was named Odhiambo or Ochieng'. He knew Othis as a driver plying the same route. He drove a mini bus. He informed PW3 his wife was unwell and sought from PW3 money to take his wife to hospital. PW3 said he needed security for the money. The Appellant told him he had two Nokia Phones for sale. PW3 testified he saw the two phones, which he confirmed to be MF1 1 [b] and [2] [b]. The Appellant agreed to sell one phone for Kshs. 6,500. He alleged the receipts on purchase were lost, and should any person ever enquire from PW3 about the phone, he should refer such person to the Appellant. PW3 paid the full sum and took possession of the phone and started using it. After four or five months, he was called by a Police Officer through his number and told the Officer had a vehicle which he wanted the Appellant to drive. They met at a Kariakor Garage, where PW3 was arrested.

8. PW3 confirmed the number the Police Officers contacted him through was his. He was booked in at Kilimani Police Station. He identified the phone he was arrested while using to be MFI 2[b]. He told the Police about the person who sold him the phone- Othis. He was locked for two days, during which he sent friends to look for Othis. Othis was arrested same day at Kariobangi. PW3

stayed in custody for another three days and was released. He had known Othis for three years. The two had driven Matatus during those years. PW3 Identified Othis as the person in the dock at the trial. When PW3 bought the phone, he did not know it was stolen and was assured by Othis he never dealt in stolen items. In cross-examination, PW3 stated he was in custody for seven days before being released. The phone he was arrested using was MFI.1 [b]. The serial number ended with 120. The serial number he gave to the Police was 38021759120. This is the phone PW3 had.

9. PW4 PC George Wamai took over the investigation from Inspector Langat who was interdicted. He took over the file on 15th October 2009, and received the following exhibits from Langat:

a] Two mobile phones MFI 1 [b] and MFI 2 [b]

b] Packages for the phones being MFI. 1. [a], MFI 2 [a], MFI.5, MFI4, MFI3

c] He was also handed over MFI 8 [a], [b], 8[c], MFI 7 and MFI 6 [a].

10. PW4 was involved in the initial investigation. He testified that *'' we had arrested a person, who led us to the person who sold him a phone, then led us to the accused at Kariobangi.''* The suspect was arrested in the presence of Officers from Kariobangi Police Station. He identified the accused person in the dock. The complainant was Aziz Mohammed of Mac Fry's. PW1 reported to the police that he was attacked as he entered his compound. He was taken into his house. The phones were recovered from a person who implicated accused person, who was found with a similar phone. PW4 produced the exhibits that had been mentioned for identification.

11. In his sworn evidence, the Appellant confirmed he was a matatu driver. He was informed the Police Officers were looking for him. They arrested him and beat him up. They placed him in police custody. They alleged he had their phones. After ten days he was brought to Court and charged with the offence of handling stolen goods. On cross-examination, he testified he knew PW3 as fellow matatu driver. PW3 had a grudge against the Appellant. The Appellant had been employed before PW1 to drive a certain matatu. The Appellant did not sell PW3 the phone. PW3 had threatened to harm the Appellant. The Appellant had no grudge against the Officers who arrested him. On arrest, the Appellant testified he only had one phone Nokia 110. He gave this phone to be taken home after his arrest. He denied that he had a Nokia N 6600. He gave one Kevin his phone to take for him home when arrested. He never sold any phone to PW3.

12. The Lower Court was satisfied that a robbery took place in PW1's house at Westlands on 20th January 2009. The robbers were armed with pistols. Only one was masked. PW1 and PW2 were not able to identify the robbers; they were however able to identify their two phones which were exhibited in Court. These were among the seven phones stolen from their residence. PW3 was found with one of the phones. PW4 said the Appellant had one of the two phones while arrested. The two phones were identified beyond reasonable doubt to belong to PW1 and PW2. The Appellant and PW3 were found in recent possession of two phones robbed from PW1 and PW2. They would have to explain how they came to be in possession of these phones. The Trial Court concluded it was the Appellant who sold the phone to PW3. There was no ill motive alluded to, or any grudge between the Appellant and PW3. The Court believed the evidence of PW3 and found that the Appellant had failed to explain how he came into possession of stolen property. Although PW1 and PW2 did not identify the Appellant as one of their attackers, the Court was satisfied under the doctrine of recent possession; the Appellant was one of the robbers. The Court convicted the Appellant to suffer death, but made no findings on the alternative count of handling stolen goods.

13. The Appellant filed the following grounds in Appeal-:

a] The Learned Trial Magistrate erred in failure to consider that conditions prevailing during the robbery were not conducive to positive identification;

b] The Trial Magistrate erred by convicting the Appellant on non-existent evidence and mis-

applied the doctrine of recent possession; and

c] The Trial Court failed to adequately consider the defence of the Appellant

14. The Appeal was heard on 15th October 2013 and 17th October 2013. Mr. Oonge for the Appellant invited the Court to re-evaluate the charge sheet and the evidence adduced in support of the details given in the charge sheet. The charge sheet gave the stolen phones as follows-:

a. Nokia E65 Serial Number 353263019170296;

b. Nokia 660 Serial Number 356442013853597;

c. Nokia 6600 Serial Number 356383021759196;

According to the Appellant, PW1 stated the following five phones were stolen, whose numbers he gave to the Court to be-:

I. Nokia 6600 IMEI 356383021759196;

II. Nokia 6600 IMEI 356383021759121

III. Nokia [no make] IMEI 355034005182464;

IV. Nokia N81 IMEI 35644201385359

V. Nokia E65 IMEI 356961012545607

15. PW3 gave to the police the phone he was allegedly sold by the Appellant to have been Serial Number 38021759120. This Serial Number is not in the charge sheet. PW4 was unable to confirm which phone was found on the Appellant. There was no evidence any phone was found on the Appellant. The doctrine of recent possession was neither here nor there. None of the two phones were found on the Appellant. PW1 and PW2 could not place the Appellant at the scene of the crime. Without placing the Appellant at the scene, the Trial Court made an error by convicting him based on inferences. The Appellant also submitted that PW1 and PW2 testified they were not assaulted and no personal violence used against them. No violence or injury was inflicted. The gun allegedly used during the violence was no recovered and there was no use of dangerous weapons to necessitate use of Section 296 [2] of the Penal Code.

16. The State submitted the Appellant was lawfully convicted, and his Appeal has no merit. Section 296 [2] of the Penal Code has three independent ingredients. When one ingredient is shown to be present through the evidence of the prosecution, there is no requirement that other ingredients be shown to exist concurrently. A dangerous weapon need not be in use. It is the presence of actual violence, threat of violence and infliction of fear or injury that counts. The Serial Numbers given by PW1 at page 9 of the proceedings corresponded with what was in the charge sheet. The exhibits before the Court tallied with what was in the charge sheet. PW1 proved ownership of the phones by production of receipts. The Appellant was in possession of one phone, and had sold off another. PW3 led the police in arresting the Appellant. The Appellant did not explain how he came across the phones.

17. The role of the High Court as the first Court, to which the Appeal has been submitted, goes beyond the mere scrutinizing of evidence given in the Trial Court to find out if there was some evidence to support the Lower Court's findings and conclusions. We have an obligation to re-evaluate evidence fully, reach our own findings, and draw our own conclusions [see ***Okena v. the Republic [1972] E.A. and Shantilal M. Ruwala v. the Republic [1975] E.A. 570].*** Such re-evaluation however should be exercised with restraint; as observed in ***Peters v. Sunday Post [1958]***

E.A. 424, we must caution ourselves that the Trial Court had the advantage of seeing and hearing witnesses.

18. The argument by the Appellant that there was no violence used against the complainants, and that Section 296[2] of the Penal Code was improperly invoked in charging and convicting the Appellant, is in our view not correct. Robbery with violence, or aggravated robbery as known in some jurisdictions, involves the imposition of the will of the offender by force or the threat of force, on the rights and ability of the victim to go about his own affairs in his own way. The actions on the part of the offender that establish the presence of the offence of robbery with violence, include being in company, being armed with dangerous weapons or instruments, and the infliction of fear or actual bodily harm. We agree with the position adopted by the State that the prosecution did not have to establish all the elements cumulatively, or show that the attackers inflicted bodily harm, for the offence of robbery to be present. This is a case where in any event, the complainants testified that one of their attackers had a small gun. The victims were bound with ropes. PW1 according to PW2 was told to show the robbers where the money was, or lest the robbers would go away with PW1 and never return him to his family. PW2 told the robbers to take whatever they found, and not take her husband away. There was actual physical violence and psychological violence inflicted upon the victims by gun wielding thugs. Actual properties were forcibly taken away from PW1 and PW2 by armed men acting in combination. The elements of robbery with violence under Section 296 [2] were established by the evidence brought before the Trial Court by the prosecution.

19. We do not think this was a case where the evidence of identification could have been said to have played any role in the conviction of the Appellant. Both complainants testified they did not identify the Appellant as being part of the gang which robbed them. The Trial Court observed at page 45 of the proceedings that, ‘’ … *inspite of the two eyewitnesses having failed to identify any of the robbers, the fact that the accused had in his possession property that was stolen leads to only one conclusion that he was one of the robbers.’’* The Appellant was linked to the offence, not by eyewitness evidence, but by the doctrine of recent possession. The suggestion by the Appellant in his hand- written grounds of appeal, that he was convicted on eyewitness evidence that was not free from error has no basis. There are two substantive grounds raised in this Appeal: that the charge sheet was not supported by the evidence; and that the Trial Court adopted the doctrine of recent possession improperly. Tied to the issue of recent possession is the last ground-whether the defence by the Appellant in his unsworn statement was given adequate consideration.

20. We have carefully and with a lot of anxiety examined the contents of the charge sheet, against the evidence that was presented by the prosecution. There were defects, the only question to our mind being whether these defects can be regarded as material and whether such defects occasioned the Appellant failure of justice. The charge sheet states seven mobile phones were stolen from PW1 and PW2. Only three mobile phones are named in the main offence- Nokia E65 -1 Serial Number 353263019170296; Nokia 660 Serial Number 356442013853597; and Nokia 6600 Serial Number 356383021759. The phones named in the alternative charge of handling stolen goods are two. These are Nokia N 6600 Serial Number 356383021759196 and Nokia N 6600 Serial Number 356383021759121. The last of the two phones in the alternative charge, is not part of the main charge of robbery with violence. There were no seven mobile phones shown to have been stolen in the evidence of the complainants. Only three phones are stated in the main charge, and the details of the phones in the alternative charge of handling, do not match details of the offence of robbery. One would expect that what was dishonestly retained of handled, would flow from what was stolen.

21. Out of the five phones whose Serial Numbers were given by PW1 at page 9 of the proceedings, there is no Nokia E 65-1 Serial Number 353263019170296; and no Nokia 660 Serial Number 356442013853597. Only one Nokia 6600 IMEI 3563830217559196 given in the evidence of PW1, is among the three phones named in the main charge.

22. PW1 told the Court at page 11 of the proceedings line 9, ‘’*I went. I was shown one phone. This was the first phone. These are the two phones.’’* He was not clear how many phones he found at the Kilimani Police Station. The two phones were introduced by PW1 as MFI 1 [a] and MFI.2. [b].

Seen against the Serial Numbers given by PW1 at page 9 of the proceedings, MFI.1 [a] is Nokia 6600 IMEI 356383021759196 and MFI. 2 [b] is Nokia 6600 IMEI 356383021759121. The latter as seen above, is not included in the main charge.

23. PW3 Paul Irungu who alleged to have bought one of the stolen Nokia 6600, gave the Serial Number of the phone he bough to be 38021759120. Re-examined, this witness stated the Officer who recorded his Statement made an error, and the correct serial number should have been 356383021759120/1. These two numbers are not in the charge sheet and in the evidence of PW1. PW4 PC George Wamai took over investigation from Inspector Langat on 15th October 2009, while the Appellant was arraigned in Court on 2nd June 2009. Although PW4 claimed to have carried out the initial investigation with Inspector Langat, his evidence did nothing to explain the defects in the charge sheet and the glaring mismatch between the details given by the prosecution witnesses and those stated in the charge sheet. These defects went to the root of the case against the Appellant and occasioned an obvious miscarriage of justice to the Appellant.

24. The doctrine of recent possession consequently had no place in determining the Appellant's culpability. It is hard to say if the Police gave the wrong details in the charges sheets, or were themselves the recipients of the wrong details from the witnesses. The Court of Appeal in the case of ***Issac Nanga Kahiga alias Peter Kahiga v. the Republic [Number 272 of 2005] UR,*** restated that for the doctrine to be adopted, the prosecution must positively prove property was found with the accused person; property shown to belong to the complainant; and recently stolen. We do not think without getting the correct details establishing the existence of these mobile phones, the prosecution could move on, to logically establish ownership and unlawful dispossession.

25. The submission by the Appellant that his defence was not given weight resonates. The Trial Court concluded at page 44 that '' *there was no ill motive alluded to, or any grudge between accused and PW3.''* But the Appellant had testified on oath that there was a grudge between PW3 and the Appellant, the Appellant having been employed before PW3 to drive a certain Matatu. He testified PW3 had threatened to harm him. How was it then, that he Court concluded there was no grudge? This failure to give adequate consideration to the defence given by the Appellant was a material failure, given the background of PW3 as an accomplice or accessory in the robbery. He in his own words was a suspect and was in Police Custody for seven days. His evidence should have been weighed carefully and corroboration sought. As stated in ***Court of Appeal case of Rashid Thomas v. the Republic [2008] e-KLR***, the evidence of an accomplice requires corroboration. Such evidence can only be relied upon the Court being convinced an accomplice is telling the truth, and upon the Court warning itself of the danger of accepting such evidence. When a man is cornered as PW3 was, using a stolen mobile phone, and is placed in police custody for seven days, he would do anything to purchase his immunity. The evidence of PW3 was unreliable and unsupported by the other witnesses. He was not consistent, even in the simple task of stating the Serial Number of the phone he purchased from the Appellant. There was considerable reason to doubt the evidence of PW3. The Investigating Officer suggests at page 28 line 20-23 that there was a second person, beside PW3 who led Police to the Appellant. The evidence in this passage was that, ''*we arrested a person, who led to the person who sold to him a phone, then led us to the accused in Kariobangi.''* This was the evidence of the Investigating Officer and highlights the need to carefully evaluate the evidence of an accomplice, before convicting. The evidence relied upon to convict an accused person must be of high quality, credible and beyond reasonable doubt., as stated in the ***Court of Appeal Criminal Appeal Number 51 of 2004 between Elizabeth Gitiri Gachanja and 7 Others v. the Republic [2011] e-KLR.***

[a] We allow the Appeal, quash the conviction and set aside the sentence.

[b] The Appellant shall forthwith be set at liberty unless otherwise lawfully held

Dated and delivered at Nairobi this 20th day of November 2013

--- ________________________________

Monica Mbaru James Rika

Judge Judge