



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 47 OF 2010

MARTIN NYONGESA MATUFARI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. D. M. Ochenja - PM, in Kitale Chief Magistrate's Court in Criminal Case No. 3249 of 2007)

J U D G M E N T

The Appellant, **Martin Nyongesa Matufari**, appeared before the Principal Magistrate at Kitale charged with robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the night of the 15th July 2007 at Kabretwa Farm Trans-Nzoia District, jointly with others and while armed with dangerous weapons namely a firearm AK 47 rifle and pangas robbed Elizabeth Nafula Wasike of a mobile phone make Motorola C117 valued at Kshs. 2,000 and immediately after the time of such robbery killed the said Elizabeth Nafula Wasike.

After pleading not guilty to the charge, the Appellant and the co-accused were tried. The co-accused was acquitted while the Appellant was convicted and sentenced to suffer death as prescribed by law.

Being dissatisfied with the conviction and sentence, the Appellant filed this appeal on the basis of the grounds in his petition of appeal filed herein on 27th April 2010 in which he raises issues with the Prosecution evidence relied upon by the Trial Court to convict him. He contends that the said evidence was insufficient, contradictory and inconsistent. He also contends that his defence was overlooked by the Trial Court without good reasons.

At the hearing of the appeal, the Appellant appeared in person and relied on his written submissions while the State/Respondent, was represented by the Learned Prosecution Counsel, **Mr. Kimanzi**, who submitted that the ingredients of the charge were established. That, Pw 1 and Pw 3 identified the stolen mobile phone which was traced by Pw 5 and found with the Appellant. That, the Appellant failed to give an account of how he came into possession of the phone and that his defence was an afterthought as he did not say in the trial that the phone was “planted” on him by the Police.

The Learned Prosecution Counsel, contended that the Appellant's conviction on the basis of the doctrine

of recent possession was proper. He therefore asked this Court to dismiss the appeal.

Having considered the submissions by both sides, our duty as the first appellate Court is to re-visit the evidence and arrive at our own conclusions bearing in mind that the Trial Court had the advantage of seeing and hearing the witnesses.

Accordingly, the Prosecution case was briefly that on the material night of the offence, at about 8.00pm, **Stephen Wasike Simiyu (Pw 1)**, was away from his home when he was called on phone and informed that all was not well at his home. He was further informed that his house was on fire and that his wife, the late victim of the offence, Elizabeth Nafula Wasike, had been killed. He proceeded to his home and confirmed the information. Police Officers arrived at the scene and removed the dead body of his wife to the mortuary but before that, his neighbour called Munabi received a telephone call made from his (Pw 1) late wife's mobile phone No. [particulars withheld] The caller threatened the said neighbour. The same mobile phone was also at a later stage used to call and threaten Simiyu (Pw 1). He passed the necessary information to the Police and after a while he was informed by the Police that the phone was recovered. He saw the phone at Kitale Police Station and identified it as that belonging to his late wife.

Martin Wanjala Wamalwa (Pw 2), a neighbour to Simiyu (Pw 1) was at his home on the material night at about 8.15 pm when he heard a woman scream and thereafter a big bang. He then noticed that there was fire in the house of Simiyu. He became terrified and dashed to the homes of other neighbours to alert them. They all went to the house of Simiyu and found that his wife had been killed. The Police arrived at the scene after being notified.

Edward Musombi Munabi (Pw 3), also a neighbour to the said Simiyu (Pw 1) was also at his home on the material date and time when he heard gunshots and was later informed by the Area Chief that Simiyu's wife had been murdered. He (Pw 3) proceeded to the scene and confirmed the information. He noted that Simiyu's house was on fire. Police Officers arrived and removed the body of Simiyu's late wife to the mortuary. In the process, he (Pw 3) received a phone call made from the deceased's mobile phone. The caller threatened him and alleged that he (caller) was a member of Sabaot Land Defence. He (Pw 3) continued to receive several such calls from the same caller. At a later stage, he was called to Kitale Police Station where he identified the recovered phone of the deceased wife of Simiyu. He was told that the phone was recovered from the Appellant who lived in the neighbourhood.

Gilbert Mulenda (Pw 4), a Medical Officer of Health at Kitale District Hospital conducted a post mortem on the body of the deceased and concluded that the cause of death was severe bleeding caused by a sharp bladed object.

Cpl. Hassan Arasi (Pw 5), of C. I. D. Kitale, investigated the case and in the process visited the scene and recorded statements from witnesses. He learnt that threatening calls made from the deceased's mobile phone were directed at some of the witnesses. The phone was believed to have been stolen from the deceased.

Cpl. Arasi (Pw 5) arrested four suspects but released them for lack of evidence. However, on the 29th October 2007, together with his superior Officers from Nairobi, he traced the deceased's mobile phone and found it in the possession of the Appellant who led him to the person who had sold it to him (Appellant). The said person was arrested and was charged together with the Appellant with the present charge.

The Appellant denied the charge and stated in his defence in Court that he was a carpenter and on 29th October 2007 he was on duty at Lukhome Centre when he was confronted and questioned by a group of Police Officers. He was thereafter arrested for lack of a national identity card. He was taken to Kitale Police Station and on the following day was subjected to interrogation which continued for a few days. He was questioned about a mobile phone which had not been shown to him. He demanded to be given back his own mobile phone but in vain. He denied having previously known his co-accused but the two were later charged in Court with the present offence.

The Appellant contended that he did not commit the offence and knew nothing about the mobile phone produced in Court. He also contended that his mobile phone was never returned to him and remained at the Police Station.

After due consideration of all the foregoing evidence, we are of the view that the ingredients of the offence of robbery were established even through none of the witnesses were present during the offence. The only person who appears to have been present was the deceased wife of the owner of the home which was invaded by a criminal gang (i.e. Pw 1).

The fact that a mobile phone allegedly belonging to the deceased was used by strangers to threaten Simiyu (Pw 1) and his neighbour (Pw 3) was a clear indication that the phone was stolen from the deceased and in the process fatal violence was meted out against her.

In any event, there was no particular dispute with regard to the occurrence of the offence. The only dispute was whether the Appellant was positively identified as having been involved in the robbery.

As observed hereinabove, none of the Prosecution witnesses was present at the scene of the offence when it occurred. Therefore, the Prosecution did not avail any direct evidence of identification against the Appellant. The circumstantial evidence adduced against him was based on the recovery of a mobile phone said to belong to the victim of the robbery.

Indeed, the recovery of the phone was capable of providing circumstantial evidence of the alleged involvement of the Appellant in the offence.

The Learned Trial Magistrate realized as much and convicted the Appellant on the basis of the doctrine of recent possession. However, the evidence by the Prosecution witnesses and in particular Simiyu (Pw 1), Munabi (Pw 3) and the Investigating Officer (Pw 5) did not meet the parameters for the application of the doctrine of recent possession in this case. This is because there was insufficient evidence by the Investigating Officer (Pw 5) of the recovery of the phone from the Appellant and hence his possession thereof. There was also insufficient evidence from Pw 1 and Pw 3 establishing the deceased's ownership of the phone.

Indeed, it was not made clear by the Investigating Officer (Pw 5) how the phone was recovered and from whom and how it was linked to the deceased.

Therefore, in our view, the Prosecution did not establish proper basis of the application of the doctrine of recent possession against the Appellant. His conviction by the Learned Trial Magistrate was thus improper and unsafe.

Consequently, this appeal is allowed to the extent that the Appellant's conviction by the Learned Trial Magistrate is hereby quashed and the sentence imposed upon him set aside.

The Appellant will be released forthwith unless otherwise lawfully held.

Ordered accordingly

(Delivered and signed this19th..... day of ...November..., 2013)

J. R. KARANJA

JUDGE

E. OBAGA

JUDGE

In the presence of:

Appellant:

Respondent:

Court Clerk: