



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO.56 OF 2008

DISHON MWANGI MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment in the Chief Magistrate's Court at Nyeri in Criminal Case No.354 of 2007 by E.J. OSORO – SRM)

J U D G M E N T

On the 21/6/2006 at about 10.30pm, the complainant (PW1) left Ndimaini for home. Unfortunately, along the way he met people who flashed torches at him and immediately surrounded him. They assaulted him on the head, back and shoulder without talking to him until he fell down. They ransacked his pockets and robbed him of motorolla mobile phone which had purchased a day before the robbery and Kshs.60/=, and ran away leaving him on the ground where he lay for 30 minutes before going home.

In the morning he sent his daughter to pick his National Identity Card, note book and other documents at the scene of the robbery which she did and went to school. He went to Karatina hospital and later Karatina police station.

On 25/6/2006, he received information from the area chief to report to the police station which he did and was able to positively identify his mobile phone. He gave the police the mobile phone's serial number as 359194009039858 and a carbon copy of the receipt book that was availed to him by the person who sold him the mobile phone as the original was lost during the robbery.

The phone mentioned in the charge sheet was different from the one the complainant mentioned initially in his evidence in chief. The charge sheet indicates that the serial number of the phone recovered was 359194001966454. On realizing the anomaly the prosecution applied to amend the charge sheet however, the mistake was not in the charge sheet but was in the information availed by the complainant. On receiving information that the serial number in the charge sheet was correct the prosecution abandoned the intention to amend the charge sheet.

The complainant later gave the right serial number as 359194001966454 and its receipt number 1506 dated 20/6/2007. The mobile phone was Motorola C113. He did not know the appellant but the latter was shown to him by the police.

Monica Waruguru Muthiga was a business lady selling sim cards at Ndimaini market and also operating simu ya jamii and charging mobile phones. She gave evidence that she knew the appellant as he had been her customer and used to take mobile phones for charging since May 2006. On 23/6/2006, she was at her place of work when the appellant took there a mobile phone Nokia 2100 to charge and

before the appellant left, she requested him to allow her to use the phone to make a call which he agreed. When the mobile phone was fully charged, she sent a message using the same. The appellant went back with another mobile phone, a Motorola C113 and left it for charging and took away the Nokia 2100.

The police later visited her and inquired her use of the Nokia mobile phone to which she indicated that the same had been left for charging by the appellant. She showed them the motorolla phone the appellant had left behind and led them to the appellant's residence. He was arrested and charged.

Beatrice Wambui Muchemi was the 3rd witness who hails from Nanyuki town but works with Jumbo Telkom at Karatina town. She recalls that on 20/6/2006, a customer went to the shop and she sold him a motorolla C113 and issued him a receipt No.1506. After 6 days, the customer went back with bandages on his hand and forehead. He had been robbed of the phone and wanted the records of the phone. She gave him the records that indicated the phone's serial number as 359194001966454.

Mwangi Ndirangu was the clinical officer at Karatina District office. He examined the complainant who had a history of being attacked by kicks blows and unknown object and sustained injuries. He was in great pain at the time of explanation but was sober. He had a bruised forehead above the eyes, chest pains, fracture of the wrist pair, bruises between the knee and ankle. He concluded that the injury was inflicted by blunt and sharp objects.

Daniel Hamisi was a police constable at the CID offices in Nyeri. In his testimony he states that he was assigned duties of crime analysis and investigations on the 23/6/2006 in the company of IP Kilimi, PC Muchiri and PC Karani at around noon they proceeded to Mukurweini following an earlier reported case of robbery with violence committed on 20/12/2013 at Ichamara village when a lady was attacked by 4 men armed with rungun and robbed her of kshs.8,000 and a mobile phone model 2100, of serial number 352511007106292. The mobile phone was traced at Ndumaina market with a lady known as Monica Waruguru. She informed them that the phone had been left by the appellant. She led them to the appellant. Incidentally, she had another mobile phone left there by the appellant whose serial number was 359194001966454. The appellant was arrested and admitted ownership of the mobile phones. He admitted having robbed the complainant in the company of his co-accused.

Sgt. Jackson Musyoki was the investigating officer and recalled that on 23/6/2006 at 9pm while in the office, the appellant was brought in with two mobile phones. Nokia 2100 serial number 352511007106297 and motorolla C113 serial number 359194001966454 the latter being in respect of this appeal. He opened the files and arraigned the appellant at Karatina Law Courts. The magistrate heard one case and transferred the other to Nyeri Law Courts. This witness claims to have interrogated the appellant who allegedly admitted having robbed someone at Ndimaini market. The complainant went to the police station and produced documents of purchase of the phone. Since the receipt was lost during the robbery a whole receipt book was produced in court in which the duplicate receipt was contained showing that the phone was purchased at Jumbo Telcom on 20/6/2006. The complainant positively identified his phone.

The appellant in his defence gave an account of his activities on the day of his arrest. He was arrested and taken to Karatina. The police produced the mobile phones which he says he knew nothing about. The appellant and PW2 were locked up overnight and PW6 demanded Kshs.10,000 which he could not raise. A search done at his home did not reveal anything. He was charged and claims to have been framed up by the PW2. In cross-examination he states that he had no grudge with PW2 but she had a grudge with his wife and framed him so that his wife could suffer.

In his judgment, the trial magistrate found that there was no identification and the evidence adduced was circumstantial but there was conclusive evidence that PW1 was attacked and robbed of the mobile phone (Pexh.2). The mobile phone was found on PW2 who explained that it belonged to the appellant. The trial magistrate evaluated the defence of the appellant and found it a made up story and an afterthought.

The appellant's appeal is grounded on Section 198(1) CPC. He sates that the witnesses who gave

their evidence testified in English and DW3 gave his defence in Kikuyu. His language is Kiswahili as evidenced in his defence. No interpretation was made of the English and Kikuyu statements for his benefit.

The court finds that the fact that he cross-examined the witnesses at length meant that he understood the language that was used by the witnesses. Though DW3 gave his defence in Kikuyu language, his statement did not in any way prejudice the appellant.

In ground three the appellant argues that the evidence of a clinical officer ought not to have been admitted by the court. Moreover, that a P3 form can only be filled by a medical expert but not a clinical officer as the latter are unqualified persons. We have looked at the medical examination report produced in court by PW3. The same is signed by the medical officer Karatina District Hospital who is a medical practitioner. The same has the seal of the hospital and and therefore was prepared by a qualified person hence we do reject this ground of appeal.

On ground four of the appeal, it is the appellant's contention that when the trial magistrate PC Tororey, SRM as she then was disqualified herself the matter should have begun with the reading of charges and taking of plea. He argues that reading of the plea is part and parcel of the trial.

We do find this ground lacking basis as the duty of the magistrate who takes over such a matter is to act on the evidence recorded by that predecessor or re-summon the witnesses and recommence trial. In this case the magistrate decided to recommence trial by recalling the complainant. We do not find any legal basis in the argument that the charges should have been read and a plea taken afresh. Moreover, the appellant did not suffer any prejudice because the complainant had not completed his evidence in chief.

Ground five of the appeal in respect of the alleged confession is without merit as the trial magistrate did not consider the alleged confession in reaching his verdict but he relied on the doctrine of recent possession.

The court finds that ground six lacks factual basis as the serial number in the charge sheet is similar to the serial number in the receipt book and the same mobile phone was recovered from PW2 whom the appellant had given to charge. This ground is rejected as the errors referred to by the appellant are typographical errors that were later corrected.

The learned trial magistrate considered the defence of the appellant and rejected the same as it appeared cooked up. We agree with the trial magistrate as the appellant did not disclose the reason for the grudge between PW2 and his wife and never complained anywhere that pw6 had asked for a bribe of Kshs.10,000.

Lastly, ground nine of the appeal is rejected as the judgment clearly states that the appellant was convicted of the offence of robbery with violence and sentenced to the only known sentence for that offence. The argument by the appellant that the word supposed is not direct but a suggestion is an attempt to split hairs in respect of the word "supposed". We do find that the trial magistrate properly evaluated the evidence before him and came up with a finding that the mobile phone (Pex2) was found on the appellant but he had taken the same for charging and therefore the doctrine of recent possession was applicable as submitted by the learned state counsel Mrs Maundu.

The trial magistrate properly guided himself to reach a finding that the doctrine of recent possession was applicable. We uphold the finding of he trial magistrate and support the conviction and sentence.

The appeal is accordingly dismissed.

Dated, signed and delivered at Nyeri this 13th day of November 2013

J. WAIKAGA

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. WAIKAGA

JUDGE

A . OMBWAYO

JUDGE a