



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. 316 OF 2009

ORIGINAL CRIMINAL CASE NO. 271 OF 2009 - KIAMBU

CHARLES MULANGU KITAKA ::: APPELLANT

- VERSUS -

REPUBLIC ::: RESPONDENT

Appeal against both conviction and sentence in Criminal case Number 271/2009 at the Chief Magistrates Court

at Kiambu by Senior Principal Magistrate - A. Ongeru) (Judgement delivered on 20/07/2009).

J U D G E M E N T

1. The Appellant filed a **Memorandum of Appeal** on **29th July 2009** where he appealed against both the conviction and sentence on the charge of robbery with violence contrary to Section 296 (2) of the Penal Code.
2. The facts leading to the appeal are that on 17th December 2008 at Kikuyu Township in Kiambu West District, the accused jointly with another not before court while armed with crude weapons namely metal bar, knife and *rungus*, robbed Keziah Muthoni Kariuki of cash Kshs.56,000/= and one mobile phone make Sony Erickson T105 worth Kshs.4,000/= all valued at Kshs.60,000/= and immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Keziah Muthoni Kariuki.
3. The Appellant also faced an alternative charge of handling stolen property contrary to Section 322 (2) of the Penal Code in that on 17th December 2008 at Kikuyu Township in Kiambu West District, the Accused person other than in the course of stealing, dishonestly received and retained cash Kshs.8,500/= and one mobile phone make Sony Erickson T105 valued at Kshs.4,000/= all valued at kshs.12,500/= knowingly or having reason to believe it to be stolen goods.

The Accused pleaded not guilty to the charges.

4. The Prosecution called (5) Witnesses as follows:-

P.W. 1 – Keziah Muthoni Kariuki who testified that she was at her shop at Kikuyu Township where she is employed as a Manager distributing Zain Cards and Mobiles. She was with Titus Karoki in the shop when two men entered carrying bags. She did not know the men. However, one of them is the Appellant herein. The Appellant inquired from her about the Zain lines she was

selling while the other man put his hand through the grill and pulled her ordering her to open the door. They opened the door and entered. One of them lifted an iron bar and ordered P.W. 1 with her colleague to lie down. The two men took money from the shop and also P.W. 1's mobile phone and left. One had a knife and a club and the other had an iron bar. They screamed and the two men were chased by some people. The mobile phone and some money were recovered from the Appellant. Her sim card was still in her phone when it was recovered from the Appellant. The money recovered from the Appellant was still arranged in the same way it was in the shop. There were notes of different denominations which were kept separately e.g. 50/= shillings note and 100/= shillings notes mixed with 200/= shillings notes.

P.W. 2 – Serah Nyawira Wangu testified that she was working with P.W.1 at the same shop and at the material time she had gone out to exchange coins and when she returned to the shop she saw two men running out of the shop. She heard her colleague shouting “*thief*” and she also started shouting. There was a man standing outside the shop called Kiarie. P.W. 2 started running after the two men with Kiarie and other members of the public. The Appellant was arrested at a shop called Satellite and beaten up by members of the public and he was later taken to the police station. P.W. 2 said the person who was with the accused person managed to escape.

P.W. 3 – Eliud Kiarie Karugi testified that at the material time he was standing outside his plot at Kikuyu Township when he heard screams from the complainant's shop. He saw two men coming out of the Zain shop running away. He started chasing the men but one of the men jumped over a fence at Kikuyu Garden while the other man ran on a straight path. He chased the one who was on a straight path and caught up with him at a shop called Satellite where he was assisted by members of the public to arrest the Appellant. He took about 5 minutes to reach him and returned the Appellant to the shop where he had seen him coming from. He was found with a mobile phone which the complainant – Keziah Muthoni, identified as hers. The Appellant was then taken to the police station.

P.W. 4 – No. 88456 P.C. Livingstone Katama is the arresting officer who received the Appellant at the police station and recovered the money and mobile phone. He testified that on that material day he was at the report office at the Kikuyu police station when 10 members of the public brought the Appellant. He identified the Appellant as the person who was brought in by the members of public who said he was found stealing from a shop. P.W. 4 kept the Appellant in the cells and removed Kshs.8,500/= which he had stuck in his boots. He also removed a mobile phone Sony Erickson from the Appellant's back pocket trouser. P.W. 4 said one of the witnesses identified the telephone as hers. He identified the money and phone recovered from the complainant as the items in court and produced them as exhibits. He then handed the case to the investigating officer for trial.

P.W. 5 – No. 89109 P.C. Pius Kamende the investigating officer testified that upon completing the investigations he charged the Appellant with the offences of robbery with violence contrary to Section 296 (2) of the Penal Code and handling of stolen property contrary to Section 322 (2) of the Penal Code.

5. In his defence the Appellant gave unsworn testimony and called no witnesses. He testified that he was arrested while touting at Makutano stage. On the particular day he had left his house and went touting which he did till 1.00 p.m. and returned home for lunch. He was arrested soon after his lunch on grounds that he had stolen, but according to him the person who had stolen had gone to Nairobi. He was allegedly beaten and then arrested. He was taken to the police station where the police found a mobile phone on him. He testified that he was innocent.
6. On 20th July 2009 the trial court delivered its Judgement and found the Appellant guilty as charged and sentenced him to suffer death as is by law provided. The court found that the Appellant's defence was a sham and that the ingredients of the charge were proved. The accused was found guilty of the main charge and so the court suspended the sentence on the alternative charge.

7. Being dissatisfied with the trial court's Judgement the Appellant filed this appeal dated 29th July 2009 based on the six grounds of appeal namely:-

1. *That the learned trial magistrate erred in law and fact to accept the evidence of P.W. 1 which was not proved by her description given to the members of the public who made the arrest.*
2. *That the pundit magistrate gravely erred in law and facts to accept the evidence of the prosecution without putting into consideration that the members of public who made the arrester never testified to give the reason why they arrested him.*
3. *That the learned trial magistrate erred in law and facts to base his conviction while relying on the evidence of the recovered exhibit mobile phone without inventory from Section 19 Police Act, Section 18 the Criminal Procedure Code was contravened.*
4. *That the learned trial erred in law and fact, to base his conviction without putting into consideration that the charge sheet was defective in one way or another.*
 - i. *The charge states that while armed with metal bars, knife and rungus.*
 - ii. *While the complainant states that robbers were armed with bars only.*
5. *That the learned trial erred in law and fact when she concluded that the prosecution had proved their case before any reasonable doubt where she failed to consider the same under Section 169 (1) of the Criminal Procedure Code and also contravened Section 212 of the Criminal Procedure Code.*
8. The Appellant also filed Amended Supplementary Grounds of Appeal namely:-
 - a. *That the entire trial was a nullity as the trial proceeded on a defective charge sheet in that there was variance of evidence as the particulars of the charge sheet indicated that the complainant was robbed of one mobile phone make Sony Erickson T105 whereas in her evidence in chief claimed to have been robbed one phone by make Erickson T15, hence the provisions of Section 214 (1) of the Criminal Procedure Code was not adhered to.*
 - b. *That the case of the prosecution was not proved beyond reasonable doubt as required in law in that:-*
 - i. *The complainant's stolen phone is not the one the Appellant is charged with stealing.*
 - ii. *The person who robbed P.W. 1 was armed with a knife and a club yet the Appellant was not arrested in possession of such items inspite of the prosecution's claim that it was a chase and arrest.*
 - iii. *No concrete*
 - c. *That the evidence of the alleged chase and arrest was quite unsatisfactory.*
9. The Appellant also filed written submissions which we have carefully considered. During the hearing of this appeal, the State represented by M/s Ngalyuaka opposed the appeal mainly on the following grounds:-
 - The conviction was based on the phone T.105 which was recovered in possession of the Appellant.
 - The appellant was arrested after a chase by P.W. 2 who never lost sight of the Appellant.
 - The chase took only five minutes and the Appellant was apprehended.
 - P.W. 2 conducted a search and found the phone in the Appellant's pocket together with Kshs.8,500/= . This amount was part of the Kshs.56,000/= . The rest was not recovered but was believed to have been with the other assailant who was not arrested.

- The doctrine of recent possession and the Appellant could not explain how he came into the possession of the said mobile phone and money.

10. The Appellant on his part maintained at the hearing of this appeal that the charge sheet was defective and that he was detained for 68 days before he was charged in court.

11. We have considered the evidence in this appeal, the trial court proceedings, the grounds of appeal filed herein and the opposition to the same. We have considered the grounds of appeal. They are all covered by the three issues we raised herein in order to determine this appeal:-

- a. Whether the charge was defective as alleged by the Appellant;
- b. Whether the Appellant was positively identified;
- c. Whether there was sufficient evidence on which to convict the appellant; and
- d. Whether the prosecution proved its case beyond reasonable doubt.

12. *Was the charge defective?* The Appellant has alleged that the charge was defective in that there was variance of evidence as the particulars of the charge sheet indicated that the complainant was robbed of one mobile phone make Sony Erickson T105 whereas in his evidence in chief the complainant claimed to have been robbed of one phone make Erickson T15 and that the provisions of Section 214 of Criminal Procedure Code was not adhered to.

Section 214 of the Criminal Procedure Code requires evidence to suit the charge. However under Subsection 2 thereof the variance between the charge and evidence adduced in support thereof is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

13. It is true that the charge sheet refers to phone Erickson T105, while the P.W. 1 evidence refers to it as Erickson T15. However, at page 22 of the Judgement the trial court refers to it as Erickson T105. After very careful consideration of the issue we believe that the mix-up in serial number is typographical and does not go to the substance of the issue. It is imperative to note that the phone, regardless of its serial number, was properly identified by the owner P.W. 1 after it was recovered from the pocket of the Appellant. At the time of recovery, the complainant's sim card was still inside. In our view, the phone was properly identified and any mis-description as stated above is typographical and excusable.

In any event, the alleged defect in the charge sheet is curable under Section 382 of the Criminal Procedure Code which cures any such defect in a charge sheet unless the alleged defect or irregularity has occasioned a failure of justice. In our view, the alleged defect in the charge sheet has not occasioned a failure of justice and we dismiss that allegation.

14. We have reconsidered the evidence from the time the Appellant allegedly entered the phone shop in the company of another man to the time he was arrested. We are satisfied that the evidence provided by the prosecution witnesses have not left a gap to cause us to doubt that the Appellant was the one who had attacked P.W. 1. He was arrested merely five minutes after the said attack. More importantly, the said phone and Kshs.8,500/= was found in the Appellant's possession. The Appellant did not make any attempt at all in his defence to explain why he had the said phone and money in his possession. Further, it is noted that the Appellant in his defence stated that he was a tout. It was incumbent upon him to explain how he had Kshs.8,500/=. It was upon him under Section 111 of Evidence Act to show, for example, that the money belonged to his employer and was part of the collected fare or give any other plausible explanation. He did not do that. More importantly, what was he doing with the complainant's phone.

The doctrine of recent possession demands that we find that the Appellant was positively identified, and the stolen property found in his possession was adequate corroboration.

15. **Was there enough evidence on which to convict the Appellant?** Arising from the above positive identification coupled with the doctrine of recent possession, and considering evidence by all the prosecution witnesses, we cannot but agree with the trial court that the conviction of the

Appellant on the said charges was safe as each element was proved as required by the law.

16. Accordingly, and to answer our issue number four, we find that the prosecution had discharged its evidential burden and proved their case beyond reasonable doubt. We dismiss the Appellant's appeal and uphold the conviction and sentence by the trial court.

DATED, READ AND DELIVERED AT NAIROBI THIS 12TH DAY OF NOVEMBER 2013

E. K. O. OGOLA

JUDGE

J. KAMAU

JUDGE

PRESENT:

..... **for the Appellant**

..... **for the State**

Teresia & Kipkurui - Court Clerks