REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL CASE NO. 631 OF 2010

(Appeal from the judgment of K.A. BIDALI (Mr.) Senior Resident Magistrate, Nairobi)

MICHAEL WAMWONGO KARONGO.....……...….APPELLANT

VERSUS

REPUBLIC …….....……..RESPONDENT

JUDGMENT

The appellant was convicted by Nairobi Senior Resident Magistrate of three counts. Count I was the offence of **robbery** with **violence** contrary to **Section 296(2)** of the **Penal Code** where the appellant was sentenced to suffer death. Count II was of stealing contrary to **Section 275** of the **Penal Code**. Count III was the offence of giving false information to an officer employed in the public service contrary to **Section 129(a)** of the **Penal Code**. The trial court did not impose any sentences on Counts II and III although said that the sentences shall be held in abeyance.

His appeal against the judgment was based on the Amended Petition filed by his counsel Ronald Rogo dated 29th December 2010.

Firstly, the appellant through his counsel Mr. Kironji argues that he was not accorded a fair trial in that the court relied on extraneous matters which tilted the judgment in favour of the prosecution and thereby relieved them of their burden of proving the case beyond reasonable doubt resulting into violation of the Constitutional rights of the appellant. Secondly, that the conviction was based heavily on circumstantial evidence and suspicion in regard to the charge of robbery with violence and that of stealing. The charge of giving false information was based on insufficient evidence.

Thirdly, that the ownership of the Nokia phone 1112 was not established and that there was no complainant about on the charge of stealing the phone. Lastly, that the magistrate failed to evaluate the evidence and to investigate the vote of the appellant in the incident and reached the wrong finding.

The brief facts of the case are that the deceased and complainant in Count I was a resident of Gachie village in Nairobi Area. He lived in the home with his wife and children including the caretaker PW1. The accused was employed as a watchman and normally opened the gate for his employer as he came in and went out of the compound. PW1 was the caretaker of the residence and also lived in the home of deceased in the worker's house. On the material evening 17th April 2009, the deceased came home driving his vehicle. The appellant opened the gate for the deceased. He was confronted and attacked by a gang of three men who were armed with guns. PW1 had also walked towards the gate. One ordered PW1 and the appellant to lie down and surrender their mobile phones and cash. PW1 could hear the deceased being ordered by another member of the gang to produce the money he had. The deceased was fatally wounded by a gunshot during the incident. Subsequently, three suspects including the appellant were

arrested and charged with the offence. The appellant who was the first accused was convicted of Counts I, II and III while the 2nd and 3rd accused were acquitted.

The State conceded to the appeal in respect to all the three counts. Mrs. Mwaniki submitted that the convictions were unsafe for they were not supported by cogent evident. There was evidence from the family of the deceased that the phone which was the subject matter of Count II was given to the appellant by his employer. It was therefore incorrect to convict him of stealing his own phone. The prosecution's evidence was that the appellant just like PW1, was a victim of the robbery. The key witness PW1 never at any one time pointed at the appellant as a suspect.

Mr. Kironji conceded to the State's submission that the convictions were unsafe. He submitted that the trial magistrate's finding was based on an assumption that the appellant got his phone from the robbers. The court also assumed that the phone belonged to the deceased which was wrong. The appellant never gave the police any false information because the phone belonged to him.

The evidence of PW1 was that the gate of the deceased's home was about 200 metres from the house. When PW1 went towards the gate on 17th April 2009 around 7.30 p.m., he found the gate open. It was raining and there was security lights at the gate. He was confronted by a man armed with a gun who demanded his phone. He gave out his Sony Ericsson phone before lying down in front of deceased's vehicle. The appellant went to the scene and was also ordered to lie down. Two men were demanding for money from the boss before they shot him fatally wounding him. They then left the scene. The deceased was to die as he was being taken to hospital. PW1's phone was recovered by police and he identified it with help of a scratch on the screen. PW1 says that although he saw the gunmen and could describe the body structure, dress and complexion of one of them, he did not identify any of the suspects in the parade.

PW2 is the son of the deceased who testified that he lived with his parents at Gachie. The family owns two vehicles registration number KBD 841Q and KAB 769W. His father used the second car KAB 769W which he was driving on the material day. It was his evidence that he was walking from his parents house to go to his own house in the compound when he heard gunshots at the gate. He could see headlights of a vehicle. He rushed there. He met with PW1 and the watchman (appellant) running from the gate towards the home. PW1 informed him his father had been shot by thugs. PW2 and his brother rushed their father to hospital. He had gunshots in the chest and stomach. He said that the appellant was the night watchman who had been supplied with a mobile phone (Nokia). At the material time he saw the appellant running towards the house but did not have a gun.

PW3 is the son of deceased who arrived at the scene after his brother PW2. They found the car off the road with his father leaning on the drivers seat with gunshot wounds. PW3 accompanied his brother to take their father to hospital but was pronounced dead on arrival. It is PW3's Nokia phone which the deceased gave to the appellant for use in the course of his work. He identified it in court. The appellant had told PW3 that the phone was stolen during the attack.

PW4 was the wife of the deceased. She testified that she heard the appellant scream that there were gunmen. She learnt her husband had been shot. He died on arrival at the hospital. The appellant had worked for PW4 and her family for about ten (10) years. The family had given her a phone to use in his work.

PW5 testified that the 3rd accused was his cousin whom he had given Nokia mobile phone. Later PW5, was told by 3rd accused that his brother one Tim had exchanged for him the Nokia phone with a Sony Ericsson. PW5 was given the phone Sony Ericsson by 3rd accused on 13th September 2009. When the 3rd accused was arrested by police on 24th November 2009, he took them to PW5's house where they picked the phone.

PW6 Dr. Jane Wasike performed postmortem on the body of the deceased. She found gunshots. One on the right lateral forearm with an exit below the armpit. There was a re-entry wound in the chest with bullet head lodged in the upper arm. Another wound in the left arm region into the chest wall which

exited on the right lateral chest wall.

PW7 was a police officer from Gigiri police station was on patrol with one PC Kilel Wekesa and one PC Mayako along Kihara area. He heard gunshots from Gachie side and proceeded to the home of deceased. He was briefed about the incident by the appellant. The witness called OCPD Gigiri who rushed to the scene. Two spent catridges of 7.62 mm were collected from the scene. There was also blood at the scene of the shooting.

PW8 the Deputy OCS Gigiri also visited the scene after PW7 informed him of what had happened there. He found PW1 and the appellant who told him what had happened. They had been robbed of their phones and their employer the deceased had been shot by the gang who subsequently escaped using a footpath from the gate of the deceased's home. He took the two spent catridges but did not recover the weapon or make any arrests. He handed over the case to another officer for investigation.

PW9 a police officer visited the scene after PW7 and PW8. He also sent the spent catridges to the ballistic expert. PW1 told him that his phone and that of the appellant had been stolen during the incident. He also witnessed the postmortem of the deceased's body which had gunshot wounds.

The report of the ballistic expert PW10 was to the effect that the bullets were fired from an AK 47 rifle. PW12 testified that she was the officer who recorded a confession from the 3rd accused person who said that his father (the appellant) had given him a mobile phone Nokia 1112 which he said that his employer had given him. The 2nd accused exchanged his phone with that of his father. The covers of the phones black and blue were also exchanged.

PW13 recorded a statement from the appellant who stated that one day after the robbery he recovered his phone in the bush at the scene of the robbery. He then gave the phone to his son 2nd accused. The 2nd accused was later arrested and charged jointly with the appellant for the offence of robbery.

The investigating officer PW14 said he wrote to Safaricom to investigate a Sony Ericsson mobile phone and a Sim card no. 0720264051. He was given the serial numbers of the stolen phones. Using the serial numbers the Sony Ericsson phone was recovered at Rongai from PW5. A Nokia phone 1112 was recovered from accused 2. He said that on interrogating the appellant, he told him that the phone was not stolen but that he had hidden it in the bush. PW14 said that the appellant gave false information that he was a victim of the robbery but later, it turned out that he was a suspect.

PW15 arrested accused 3 and recovered the Nokia phone the accused had given to on Dan Mbiti.

PW16 accompanied other officers to visit the scene after the robbery. PW17 was the scene of crime officer who took photographs of the car and the body of deceased. He produced the photographs in evidence.

In his sworn defence, the appellant said he was an employee of the deceased as a watchman while PW1 was the caretaker of the premises for about ten (10) years. On the material day, he was on duty from 6.00 p.m. Around 7.30 p.m. he was in the guard house when he saw PW1 running from the compound towards the gate. On reaching the gate PW1 stopped and raised his hands in surrender. The appellant walked to the gate to find out what was happening and he then saw a man with a big gun. He ordered the appellant to lie down on the ground face downwards. At that time PW1 was also lying down. The appellant then saw the car of the deceased at the gate with headlights on. There were two men at the car window demanding money. The appellant saw deceased give out his phone and money through the car window and one of the gunmen immediately respondent that the cash was not enough. The two men called the gunman guarding PW1 and the appellant and told him to shoot the deceased. The appellant heard the first shot and he ran towards the home of the deceased whereas he met with PW1 and informed him there were gangsters shooting the deceased. He then raised alarm. He informed PW3 what had

happened. Police came about ten minutes later. The deceased had been rushed to hospital his sons PW2 and PW3. The appellant said that during the raid, he threw his phone in the bush near the scene. The phone was recovered 3 days after the incident and did not have a battery and a Sim card. By that time, the wife of deceased (PW4) had given the appellant another phone. He then gave the old phone to his son Joshua who was the 3rd accused in the trial before the Senior Resident Magistrate.

The 3rd accused was arrested on 23rd November 2009. He went to check on him and he was also arrested. The Nokia phone in question belonged to PW3 the son of deceased and it was given to the appellant 4 years before the incident. The appellant used to receive phone credit from the deceased's family. The appellant's explanation was that he assumed the gunmen had taken the phone he threw during the raid. He did not think it was important to report the recovery to the police. He therefore informed police the phone was stolen until three days when he recovered. He said the black cover on the phone was put by the 3rd accused. The appellant denied the offence.

In convicting the appellant in the charge of robbery with violence the magistrate said:

"From the evidence of PW1, the said robbers took away his phone together with that of the 1st accused (appellant). Indeed PW7 stated that upon visiting the scene a few minutes after the incident the 1st accused told him that the robbers had stolen his phone. If that was the case it therefore follows that whoever had the phone after the 17th April 2009 must have been the robber or in the alternative must have got it from the robber. Immediately after the incident a huge team of police officers visited the scene and camped the area searching for spent catridges and other exhibits. Indeed they recovered spent catridges. None of them ever saw a phone in the vicinity. It is admitted that 3 days after the incident the 1st accused had the mobile phone. According to him he recovered it from a bush at the scene."

The magistrate disbelieved the accused's defence that he recovered it from a bush near the scene three days after the robbery. He concluded that the appellant got the phone from the robbers. He was therefore ***"an accomplice or a principal offender."***

It is not disputed that there was no evidence of identification of the appellant by any witness in order to establish the ingredients of the offence of robbery under **Section 296(2)** of the **Penal Code**. For this reason, the court relied on the doctrine of recent possession that the accused came into possession of the phone only three (3) days after the robbery.

It was held in the case of **Arum vs. Republic Kisumu Court of Appeal Criminal Appeal no. 85 of 2005 KLR** that where the court relies on the doctrine of recount possession, the following must be established.

a) that the accused was found in possession of the property;

b) that the property was positively identified by the complainant;

c. ***that the property was recently stolen;***

d) that the property was stolen from the complainant.

The phone Sony Ericson was not recovered in possession of the appellant. It was the evidence of PW14 and PW15 that the phone was recovered from the 3rd accused. The 3rd accused explained in his defence how he had taken possession of the phone in a club from a stranger who took the phone 3rd accused had by tricking him. PW5 testified that his motorolla phone was taken from the 3rd accused by stranger to use temporarily and who had disappeared with phone later. The 3rd accused was a college student at the material time. The trial court was satisfied with the explanation given by the 3rd accused and it acquitted him. There was no evidence to connect the appellant with the Sony Ericson phone stolen from PW1 the key witness in this case. PW1 did not connect the appellant with the robbery at all. He testified that the appellant was a victim like he was.

The phone was recovered on 24th November 2009 which was seven months after the robbery. It has been held in several cases that for the doctrine of recent possession to be correctly invoked, the property must have been recently stolen. In the case of **David Langat Kipkoech vs. Republic Nakuru High Court Criminal Appeal no. 177 of 2000**, it was held that a period of over one month since the goods were stolen did not amount to recent possession.

In the case of **Maina & 3 Others vs. Republic (1986) KLR 305**, the appellant was found with a pistol 2½ months after the robbery. The court held:

> ***"The time lag between the date of the theft and the discovery of the pistol was so much that it would be unreasonable to hold that the mere possession of the pistol on this date is sufficient to find a conclusion that the appellant participated in the robbery."***

In the case before us, the appellant was not found in possession of the phone of PW1 and even if it had been recovered in his possession, the time lapse of seven (7) months after the robbery would not amount to recent possession.

The property in issue must be placed in the ownership of the complainant. PW1 only identified the phone by showing a scratch on the screen. He did not produce a receipt or even test the phone as to the contents of its directory or other features specifically developed by him during the time he used the phone. In our view, the scratch alone was not sufficient proof of ownership given the fact that there were many phones of the same make and model as the one recovered.

In the case of **Malingi vs. Republic, 1989 KLR 275** at page 227 Bosire, J in explaining the circumstances under which the said doctrine would apply stated:

> ***"By the application of the doctrine, the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

In our view, the rial court relied on extraneous matters and used erroneous reasoning contrary to the laid down principles thus arriving at the wrong conclusion. We find that the offence of robbery with violence was not proved on part of the appellant to the standards required.

The trial court had no doubt in its mind that the Nokia Phone 1112 which he was appellant of stealing was given to him by the deceased for use in his work as a watchman and that phone credit was provided to him. It was also established in the evidence that the appellant had used the phone for four (4) years before the incident. The court had no doubt that the appellant had exclusive use and possession of the phone at the time of the incident. And finally, that there was no complainant in respect of the phone in question.

In the first place, the deceased was named as the complainant in respect of the said phone which he had given to the appellant four (4) years back. The family members of deceased PW1, PW2 and PW3 confirmed that the phone was given to the appellant. PW3 said the phone originally belonged to him. The reason for convicting the appellant on the charge of stealing was because he failed to give a satisfactory explanation on how the phone was recovered in addition to fact that his son changed the blue cover to black. The court acknowledged that PW1 testified that he saw the robbers take his phone and that of the appellant.

In a charge of stealing, the prosecution requires to prove that the accused took the item alleged to be stolen with a view of permanently depriving the owner of it.

In the case before us, the phone in question for all intents and purposes belonged to the appellant. The deceased had no intention of taking it back from the appellant. The testimonies of his wife (PW4) and sons PW2 and PW3 was very clear in that regard. None of the family members suspect the appellant as having taken part or aided in the robbery. Indeed, PW4 gave the appellant another phone a short while after the robbery. The only mistake the appellant did which caused his troubles is that he did not report the recovery of the phone three (3) days after the robbery. The reasoning of the court in that if the deceased's family knew the appellant had recovered his phone, they would not have given him another one was not relevant to the charge of stealing or giving false information to the police. That second phone was not in issue. The dishonesty of the appellant to fail to disclose he had recovered the phone does not make him a thief.

It is our considered opinion that the appellant had proprietary rights over the phone he had used for four years. There was no way that the exclusive possession and use of the phone would revert to the deceased or to any member of his family. It was wrong for the police to charge the appellant with stealing his own phone. We find that the charge of stealing under **Section 275** of the **Penal Code** was not proved.

The appellant reported to police that his phone had been robbed of him about ten (10) minutes after the incident. Police who were on patrol and heard gunshots came to the scene almost immediately after the robbers had left. There was no evidence that this report by the appellant to P. C. Joseph Ndung'u Force no. 70711. The reason for conviction was because the appellant did not report the recovery of the phone when it happened a few days later. The appellant gave an explanation in his defence that he did not think it was important to make such a report. The defence of the appellant was that the report he made to the police was true and that he honestly believed the robbers had gone with his phone. Three (3) days later he found the phone in a bush near the scene without a Sim card and the battery. PW1 testified that he saw the robbers take away his phone and that of the appellant.

In the case of **Mbogo Samuel Mungai vs. Republic Nakuru High Court Criminal Appeal no. 57 of 2004** it was held:

> ***"To constitute an offence of giving false information as defined in Section 129 of the Penal Code, the giver of that information must personally be knowing or having reason to believe that what he is reporting is false. If he is convinced that the information is true and after investigations it is found that the information is factually incorrect, the charge of giving false information cannot be sustained."***

Ten minutes after the incident which is quite shocking in itself was a short period for the appellant to have recovered from the trauma and confusion. In the circumstances he may not have been able to recall and recount what exactly happened as regards his phone. It is likely that the robbers took the phone and threw it in the bush or that the appellant did it himself with a view of saving it when he heard the robbers demanding phones and money from the deceased and PW1.

At the time the appellant made the report to the police, he honestly believed it to be true as he said in his defence. The prosecution did not adduce any evidence e to the contrary. In a charge of this nature, what matters is what the reportee believes at the time of making the report. What police may find to be the correct position in the course of their investigations is immaterial.

It is our considered view that the charge of giving false information was not proved and that the magistrate erred in convicting the appellant without sufficient evidence.

We therefore agree wholly with the State counsel Mrs. Mwaniki that the convictions were not supported by cogent evidence capable of sustaining them.

The magistrate sentenced the appellant to death on count I which is the lawful sentence provided by the law. There were no sentences imposed on counts II and III. The court stated that the sentences in the two counts were held in abeyance. This was erroneous. On conviction, the magistrate ought to have sentenced the appellant and then ordered that the sentences be held in abeyance due to the fact that count I carried a death sentence. In view of our findings on the convictions in this appeal, we leave the matter as it is.

Consequently, we find that the convictions in count I, II and III were unsafe and we quash them accordingly and set aside the sentence in count I. The appellant is set at liberty unless otherwise lawfully held.

F. N. MUCHEMI **G. ODUNGA**

JUDGE **JUDGE**

Judgment dated and delivered on the **10th** day of **December 2013** in the presence of the appellant, the State counsel Ms. Mwaniki and Ms. Kimani for Mr. Kironji for accused.

F. N. MUCHEMI

JUDGE