



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 219 of 2010

NICHOLAS MUTWIRI..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the judgment/Conviction and sentence of Mr. J. Ndubi, Senior Resident Magistrate in Isiolo Criminal Case No.258 of 2009)

J U D G M E N T

The appellant was jointly charged with another with one count of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence are that on the 15th day of February, 2009, at Kiiroa market, Kiiroa sub location jointly with others not before court robbed FRANCIS MURIUNGI, of a mobile phone make Samsung, ID Card, wallet, and cash Kshs.6,000/= all valued at Kshs.9300/= and immediately before or the time of such robbery beat the said FRANCIS MURIUNGI.

The appellant in Count II was charged with an offence of escape from lawful custody, contrary to Section 123 of the Penal Code. The particulars are that on 20th day of February, 2009 at Kiiroa police station being in lawful custody at Kiiroa Police Station after arrest for the offence of robbery with violence escaped for such lawful custody. The appellant also faced alternative charge of handling stolen property contrary to Section 322(2) of the Penal Code.

The particulars are that on 16th day of February, 2009 at Kiiroa market, Kiiroa sub-location otherwise than in the course of stealing, dishonestly received or retained one mobile phone Samsung C140 knowing or having reason to believe it to be stolen property.

After full trial the appellant was convicted of Count 1 and sentenced to death. Being aggrieved by the conviction and sentence he preferred this appeal setting down the following grounds of appeal:-

- 1. That the learned trial Magistrate erred in law and facts in failing to observe that the alleged identification/recognition was not free from possibility of error.***
- 2. That the learned trial Magistrate erred in law and facts in failing to observe that the representation of the exhibited items fell short of the required standard in law.***
- 3. That the learned trial Magistrate erred in law and facts in failing to note that the prosecution failed to sermon vital witnesses for a just decision to be reached.***
- 4. That the learned trial Magistrate erred in law and facts in dismissing the provisions of***

section 150 C.P.C Cap.75 Laws of Kenya.

5. *That the trial suffered some procedural irregularities.*

6. *That the trial Magistrate flaunted provisions of section 169 (1) CPC in not giving sufficient reasons while rejecting the defense.*

The facts of the case were that the complainant PW1 and PW3 were on 15/2/2009 at 9.00p.m walking to their homes, when on the way they met 5 people coming from the opposite direction. That lights were from the security lamps. PW1 was able to see 2 accused person because he used to meet them. Appellant ordered complainant(PW1) to stop. 2nd accused held complainant by neck and threw him down. Appellant then removed complainant's Samsung mobile, Safaricom wallet with Kshs.6000/= from complainant's right hand pocket. Appellant ordered complainant to remove his sweater and he did so. The assailants then left and complainant went home arriving at 12.30 a.m. The complainant stated that the assailants were armed with crude weapons. The complainant stated that the following day he recovered his mobile phone Samsung C140 serial No.3544801842047101 from the appellant. The complainant produced receipt in support of ownership of the phone.

The appellant on being put on his defence opted to say nothing. Miss Nelima, learned Advocate for the appellant urged that the offence took place at night and the appellant was not identified. PW2 was able to identify accused NO.2 but not the appellant. She urged further the conditions were not conducive for positive identification or recognition of the appellant by PW1 and that the evidence of PW1 and PW3 was contradictory in that PW3 stated he used light from garage whereas PW1 talked of security lamps from a nearby petrol station to identify both accused No.2 and the appellant. She urged that the strength of the light was not established and as such there was no proper identification of the appellant. She urged that ID parade ought to have been carried out in respect of the appellant as he was not known to the complainant.

Miss Nelima, the learned Advocate for the appellant submitted that PW1 on being cross-examined by the appellant admitted that Thurairara was the one who gave him the description of the appellant which led to appellant's arrest yet he was not called as a witness. She submitted he was a crucial witness and excluding his testimony without an explanation, the court ought to have made an adverse inference that his evidence would have been unfavourable to the prosecution.

Miss Nelima, learned Counsel for the appellant, submitted that the trial court erred in relying on doctrine of recent possession on basis of mobile found with the appellant as the mobile phone was not properly identified. That the receipt No.Serial No.35744801842047101 did not tally with mobile serial No.357448018420471. The receipt had two extra digits. Counsel on issue of possession urged that neither PW1 nor PW2 were present at the time of recovery and none were able to say with certainty where the mobile phone was found whether next to appellant or in his pocket.

The learned counsel submitted that at the time of trial the appellant was 16years. Counsel exhibited a birth certificate showing that the appellant was born on 11th August, 1994. Counsel urged that in view of the age of the appellant he ought not to have been sentenced to death.

Mr. Mungai, learned State Counsel represented the State in this appeal. Mr. Mungai conceded the appeal on the basis the recovered mobile phone had a serial number which was not the same one in the receipt produced by the complainant.

We are the first appellate court. As a first appellate court we have subjected the evidence adduced before the trial court to fresh evaluation and analysis and have come to our own conclusions while bearing in mind our limitations since we neither saw nor heard the witnesses and have given due allowance. We are guided by the case of **ODHIAMBO –V- REPUBLIC(2005) KLR PAGE 565** in which Court of Appeal stated:-

“On a first appeal, the Court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it

did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor.

The Court is not under any obligation to allow an appeal simply because the State is not opposed to the appeal. The Court has a duty to ensure that it subjects the entire evidence tendered before the trial court to a close and fresh scrutiny and reassess it and reach its own determination based on evidence.”

The evidence against the appellant was that of recognition by PW1 and PW3. Regarding evidence of PW1 he said they met 5 people and that he was able to see the 2 accused because he used to meet them and of the five he was able to see the 2 accused in the dock. That the appellant ordered him to stop. PW1 said he had known appellant for a short while. PW1 said it was the appellant who removed his mobile phone from his pocket. He said he was able to see the appellant through use of security lamp.

PW3 stated that on the way home they met 5 people near garage. He stated that he had seen Nicholas and Kinoti accused NO.1 and 2 as there was light from the garage before he escaped and ran into a maize plantation. PW3 testified that he recorded his statement long before the material date i.e. on 19/1/2009.

We have considered the evidence of PW1 and PW2, who claimed to have known the appellant before the incident. In their evidence they gave first names of the two attackers they claim to have seen. They did not in their report to police give the names of the attackers but they told PW2 that they had identified one of the attackers and did not bother to give the name of the alleged attacker. It is of great significant to note that none of the witnesses gave any physical description of the persons they saw. In their statements before court they gave only one name for each of the assailants Nicholas and Kinoti. These names are without any description of the assailants and are of no evidential value as there are many Nicholas and kinoti's in the area of Kiirua where the offence is said to have taken place. The Nicholas and Kinoti could be any one bearing that name in Kiirua area.

Where the witness claim that they know an accused person and yet they give only one name they ascribe to that person the court must treat such evidence with caution. In such a situation there should be a description of the person by a witness as such description goes to the substance of the case against such an accused person.

The evidence of identification was that of PW1 and PW2 made at night. The court while considering the evidence of identification must consider the nature of light that enabled recognition or identification to be made.

It must consider the source of light and the distance at which the identification or recognition was made and whether there was any impediment affecting identification or recognition.

In case of **PAUL ETOLE & ANO –V-REPUBLIC CA.NO.24 of 2000(UR)** the court stated as follows:-

“The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.”

The learned trial Magistrate in his judgment stated as follows:-

“On the other hand accused No.1 was at the scene of the robbery. The testimony of PW4 squarely corroborated that of PW1. Both the witnesses saw and recognized accused No.1 at the scene of the robbery. They said, there was some security light from a nearby garage which aided them in seeing and recognizing the 1st accused persons. It is my view that given the accused 1 was already well known to both PW1 and PW4, nothing could have been easier than for them seeing and recognizing accused 1 with the help of such light. That bit of evidence by both PW1 and PW4 was never challenged and or controverted by accused No.1.”

We have quoted from the learned trial Magistrate what he considered regarding the evidence of recognition of appellant by PW1 and PW4.

The learned trial Magistrate we note did not give a careful and cautious consideration of the evidence of recognition or identification. He did not give consideration to the source of light, how far it was from the scene of crime nor did he consider the intensity of the light which aided the recognition. There was inconsistency from evidence of PW1 and PW3 as to whether the light was from petrol station or garage. It was not clear whether the garage and petrol station were same and one place and how far the same were to the scene of the incident.

We are not satisfied that the circumstances of recognition were clear and whether the conditions of light at the scene of incident were conducive for correct recognition.

Regarding recovery and identification of the mobile phone the trial Magistrate found:-

“There is then the issue of the recoveries made from accused No.1 a few hours after the robbery i.e. on the day following the robbery. PW2 who arrested accused 1 told me that upon arresting accused 1 and conducting a quick search on him(in a club within Kiirua market) he (PW2) recovered a mobile phone from accused No.1. That phone was positively identified by PW1 as his and as the one that had been robbed from him among other things. Infact, PW1 even produced a receipt of the said phone to show that he is the one that had bought it.”

PW1 stated that the appellant removed from his pocket, his mobile phone Samsung C140 serial No.3544881842047101 and had a receipt bearing the said serial number. PW2 in his evidence stated that they recovered mobile No.Samsung 35744801842047, from the appellant and the receipt given by the complainant indicated mobile serial No.to be 35744801842047101. We have perused the evidence and do find that the complainant’s mobile No.was different from the phone recovered from the appellant. The appellant was therefore not found with the complainant’s mobile phone.

We find the trial court was in error in finding that the appellant was found with the mobile phone belonging to complainant and that the complainant positively identified the phone as his own.

The trial court applied the doctrine of recent possession in this matter. We find that doctrine of recent possession could not apply in this case. We are guided by the case of **WANDU –V-REPUBLIC(2003) KLR 26** in which Court of Appeal stated as follows:-

“The doctrine of possession of recently stolen property could not apply until possession by appellant was satisfactorily proved.”

In the instant case we find the prosecution failed to prove possession of complainant’s mobile by the appellant and as such the doctrine of possession of recently stolen property could not apply against the appellant.

The learned trial Magistrate as regards the appellant’s defence stated as follows:-

“I have already said the accused No.1 refused to give evidence.....

I will keep repeating that the 1st accused person refused to give evidence during defence. It follows

that he therefore did not see the need of challenging or contravening the otherwise watertight and consistent evidence against him by the prosecution witnesses.”

The appellant opted not to give any evidence after he was put on his defence. The trial court took that to mean the appellant did not see the need of challenging or controverting what the court referred to as watertight and consistent evidence. The trial court was with all due respect wrong.

We think and believe rightly so that it is settled law that an accused person bears no burden of proving his defence is true or of proving his innocence. The accused has right to give statement in defence or keep quiet and that should not be a basis of comment in the judgment of accused’s innocence or guilt. The trial court is supposed to evaluate and analyze the prosecution case without being influenced by the fact that an accused person has declined to make a statement in defence.

Having carefully considered this appeal we have come to the conclusion that the evidence adduced against the appellant fell far too short of proof to the required standard in criminal cases. We find that the conviction against the appellant was unsafe and should not be allowed to stand.

Accordingly we quash the conviction and set aside the sentence. We order the appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 29th DAY OF NOVEMBER, 2012.

J. LESIIT

J. MAKAU

JUDGE

JUDGE

Delivered in open court in presence of:

Mr. Mungai State Counsel – For State

Appellant in person – present

J. LESIIT

J. MAKAU

JUDGE

JUDGE