REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 124 OF 2010

PETER OTIENO ODERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 222 of 2010 of the Chief Magistrate's Court at Kisumu)

Coram

Nambuye, J

Aroni,J

Mr. Gumo for state

Court clerk Laban / Ochollah

Appellant in person

JUDGMENT

The appellant herein was charged jointly with another in the lower court with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code, in that **"on the 7th day of November 2009, at Mamboleo Estate in Kisumu East District within Nyanza province, jointly with others not before court while armed with dangerous weapons to wit, a pistol and crude weapons robbed TOM MABELE ODAK of two mobile phones make Nokia 2630, serial number 35418003070 5315, and serial number 354180030, 707121, cash Kshs. 45,500/= 230 US Dollars, one laptop make HP, one radio cassette and Safaricom modem make Huawei E 170 all valued at Kshs. 118,095.00 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said TOM MABELE ODAK".** There is an alternative count but the appellant was not charged with it.

The appellant was jointly with co-accused tried in the lower court. A total of four (4) witnesses testified. PW1 the complainant gave testimony of what was robbed from him and he said he did not identify any of the robbers.

PW2 on the other hand stated that accused 1 said that accused 2 sold him the phone. That the phone was recovered on accused 1 and continued that no recoveries were made upon search of the houses of the accused persons. PW2 also alleged that accused 2 accepted that he had sold the phone to accused 1 but changed the story when he went to an inspector.

PW3 recovered the phone from the 1st accused.

PW4 stated that the first accused told them that accused 2 had sold him the phone. The accused 1 called accused 2 on the phone and him accused 2 went where they were and they arrested him.

When put on to their defence, the first accused claimed the phone recovered from him had been pledged to him by the accused 2 for Kshs. 1,000/= but accused 2 did not specify when to refund back the Kshs. 1,000/= and that he never told the police that the phone was a pledge. And that accused 2 had told him that he had lost the receipt.

DW2 the witness for accused 1 stated that accused 2 pledged the phone to accused 1 for 1,000/= but had not witnessed the full transaction as he was called out but the wife of DW2 was in throughout. He did not volunteer any information to the police. Accused 2 who is the appellant denied the offence.

Against the afore set out back ground information the learned trial magistrate assessed the evidence at page 3 typed judgment and page 40 of the record line 8 from the bottom where the learned magistrate drew out issues for determination and then made conclusions on the same as here under:-

(i) Agreed that the charge as laid was defective by reason of inclusion of Section 295 of the Penal Code but on the strength of case law from the court of appeal, the learned trial magistrate noted that the defect had not caused any miscarriage of justice to the accused persons and for this reason the same is curable under Section 382 of the Criminal Procedure Code Cap 75 of Laws of Kenya as the accused person knew the offence they were facing was one of robbery with violence contrary to Section 296 (2) of the Penal Code .

(ii) Also on the basis of case law decided by the Court of Appeal and upon application of the

ingredients of the offence as identified by the Court of Appeal, and upon applying them to the facts before him, the learned trial magistrate was satisfied that indeed a robbery had been committed on the material date against the complainant .

(iii) After applying the criteria for identification, the learned trial magistrate agreed that identification did not obtain (there was no direct identification) in the case

(iv) At page 11 of the judgment line 10 from the bottom that:- "From the evidence, accuseds were allegedly found in possession of a phone belonging to the complainant. The phone was one of the items the complainant lost during the robbery. The doctrine of recent possession comes into play. The doctrine is simple. It stated that if one is found with recently stolen property and one does not explain his possession to be honest, the court trying him/her can safely presume if the things were stolen she /he is the thief. If the items were lost through robbery he / she is the robber. This fate be falls the accused. This explains why they were charged for the offence under Section 296 (2) of the Penal Code.

At page 12 of the judgment and 46 of the record, the learned trial magistrate after reviewing with approval case law on recent possession lifted out the applicable principles from the case of **MWANGI versus REPUBLIC [1989] 225** thus:-

(1) The doctrine of recent possession is one of fact and it arises under Section 119 of the evidence Act Cap 80.

(2) With respect to the offence of theft or handling, recent possession raises presumption of fact that the one in possession is either the thief or a guilty receiver.

(3) By application of the doctrine, the burden shifts from the prosecution to the accused to explain his possession of the items complained about.

(4) The accused can only be asked to explain his possession after the prosecution has proved the basic facts.

At page 12 line 3 from the bottom, the learned trial magistrate warned himself against the danger of relying on evidence of a single/accomplice to convict the accused given that it appears Accused 1 (Wasonga) was the key witness at this trial. At page 13 of the judgment and 42 of the record, that he was aware that the evidence of the police officer and that of the complainant offered corroboration in one way or another. Drawing inspiration with approval from the decision of **Maina & 3 others versus Republic [1986] KLR 30**, opined that the said court had rejected application of the doctrine over a period of 2 ½ months, then went ahead to opine that he was aware that no court can fix a specific period in which one can say there is recent possession. Each case must be determined on its own facts. Found as a fact at page 13 of the judgment that the robbery was in November 2009, the first accused took possession of the phone in December 2009, and he was found in possession of the same six months after the robbery. At page 14 of the judgment and 48 of the record line 4 from the top, the learned trial magistrate made note of the following observations:-

(i) There is evidence corroborated by both police officers that accused 1 (Wasonga) was found with the phone. There is also evidence that Accused 1 (Wasonga) called Accused 2 (Odera) who

went to the scene though he denies he knew accused 1 (Wasonga). Accused 2 (Odera) was the one who sold the phone to Accused 1 (Wasonga) or pledged it whatever the case. The circumstances under which Accused 1 (Wasonga) got the phone were suspect. He told the police he bought the phone but told the court backed by DW2 – Obote that he took the phone as security for a loan. Obote (DW2) did not witness the details of the transaction. Believed Accused 1(Wasonga) got the phone from Accused 2 (Odera) why?. He was consistent in that they changed the story he gave to police. Secondly, DW2's story alluded to that, thirdly the two police officers were present when the two men spoke after Accused 2 Odera was called by Accused 1 (Wasonga). Accused could not explain they honestly handled the phone. As for Accused 2 (Odera) he gave the phone to Accused 1 (Wasonga) a month after the robbery. The doctrine of recent possession applies though he was charged six (6) months down the line. He must be one of the robbers. As for Accused 1 (Wasonga) given the way he was changing his version of what occurred, he must have known or ought to have known the phone was stolen. No receipt was given to him . At page 15 of the judgment and page 49 of the record, the learned trial magistrate had this to say at line 3 from the top:-

"From my appreciation of the evidence I find Accused 2 (Odera) was one of the robbers who attacked PW1 – Odak though he identified (none) of the thugs. The Nokia phone (exhibit 1) provides that line. Accused 1 (Wasonga) is guilty of handling a stolen mobile phone". At page 16 of the judgment, and 50 of the record, and on the basis of the afore set out reasoning of the learned trial magistrate the accused persons were found guilty.

The appellant became aggrieved and appealed to this court, firstly on his own and then through counsel. In summary, the complaint is that the

"**learned trial magistrate failed to evaluate and analyse the evidence on record, thereby coming to a wrong conclusion on both facts and the law, the court went beyond evidence on the record to find a basis on which to convict and subsequently sentence the appellant, failed to safeguard the rights of the accused /appellant to secure fair trial, based its findings on wrong principles of law, failed to consider the defendants / appellants defence thereby shifting the evidential burden of proof and lastly that the sentence imposed by the court was excessive on the circumstance**".

Against the afore set out back ground information, findings of the learned trial magistrate, the state does not wish to support the conviction because of the following reasons:-

(a) The only reason given for convicting the appellant was that the learned trial magistrate invoked the doctrine of recent possession and yet the appellant only faced the offence of robbery with violence. It is the co-accused who faced the alternative charge of handling stolen property.

(b) The subject matter of the charge was Nokia phone recovered from the appellant's co-accused who alleged the appellant sold it to him

(c) PW3 and PW4 who are police officers also alleged that the appellant had admitted selling the Nokia phone but then he retracted the confession hence it was wrong for the court to base a conviction on the same. In his opinion, this was an anomaly on the face of the record. The learned trial magistrate should not have invoked the doctrine of recent possession against the appellant.

(d) Contends the appellant was convicted of the offence on the main charge without any evidence.
In concurrence counsel for the appellant urged the court to agree with the state's stand on the position of the appeal and then stressed the following:-

- **If the first accused had been consistent in his testimony then the issues of changing the story did not arise.**

- **Their stand is that the learned trial magistrate looked for evidence to convict the appellant despite the learned trial magistrate observing that the victim could not identify any one.**

- **The learned trial magistrate did not explain how he tied up the issue of recent possession to the main offence. The appellant was not charged with the offence in the alternative count.**

- **The court ignored the evidence of the appellant and acted on the evidence of the co-accused which it used to convict the appellant.**

We have given due consideration to the back ground information with regard to the evidence adduced before the learned trial magistrate, the observations and appreciation of the said evidence as made by the learned trial magistrate, and the concurrence of both the state counsel and the learned defence counsel that the appeal ought to be allowed and proceed to make the following findings on the same:-

(i) Not withstanding the concurrence of the state counsel as well as the defence counsel, that the appeal should be allowed, we are mindful of our duty as the first appellate court to re-evaluate the evidence that was adduced before the lower court, and arrive at our own conclusions on the same either agreeing or disagreeing with the concurrence and then give reason for the conclusion reached.

(ii) We would like to commend the learned trial magistrate for his effort and wisdom in seeking to be guided by principles of case law on the subject as decided by the court of appeal and dutifully followed by the superior courts and the subordinate courts of this jurisdiction. However we invite the learned trial magistrate to note that in as much as he is required to have a good grasp of these principles, and use them to sharpen his skills and or art of appreciation of the facts as well as the law in judicial decision making, he should also note that his pride should not lie in the mastery of these decisions quoted in the judgment, but on the correct application of these principles to the facts of the case before him in order to arrive at a fair and sound decision which can withstand the test of an appellate scrutiny and earn a pat on the head (that is where the decision making machine is located) by reason of the decision being fair, sound, justified and unassailable.

(iii) Herein we are afraid that despite being armed with correct principles of case law on:-

(a) Ingredients of the offence charged;

(b) In what circumstances a charge is fatal and not fatal;

(c) The point at which a court of law can apply the doctrine of recent possession;

(d) What amounts to corroboration and from what among others, we find there was misapplication of these principles to the facts before the learned trial magistrate. Our reasons for so finding are as follows:-

(i) The appellant herein mainly faced the main charge of robbery with violence. The key witness to this charge was the complainant who said that he could not identify any of the robbers a matter well appreciated by the learned trial magistrate

(ii) The position in number one above being the case it means that the court, had no direct evidence to the commission of the offence. The only other logical mode of linking the appellant to the commission of the offence would be through the doctrine of circumstantial evidence. We note this doctrine was not explored in so far as court went to ink the appellant to the commission of the main offence.

(iii) We are alive to the fact and have judicial notice of the fact that criminal jurisdiction in this country follows the common law system, where by an accused person is presumed innocent until proved guilty. By reason of this, it means that the court does not cook evidence. It has to accept what is plainly placed before it by the prosecution on the judicial plate. The court can only wander outside the judicial plate, if it believes that there is justification in hanging onto the drawing of inference thread with reasons of course.

(iv) Herein we note that the learned trial magistrate relied on the recovery of the mobile phone on the first accused, and the first accuseds' allegation that the appellant herein sold it to him but later changed to say it was pledged to him to provide a link between the appellant and the commission of the offence and in fact went ahead to use this alleged link as a basis of the conviction we are of the view that this was a wrong appreciation of facts as well as application of applicable principles of law because:-

(a) The moment PW3 and PW4 stated that appellant retracted his earlier acceptance of having sold the mobile phone to accused 1, that testimony became worthless and could not provide corroboration.

(b) The fact that appellant was called out on the phone by the first accused and he responded was no evidence of guilt conduct considering the abundance of evidence that both were residing in the neighbourhood

(c) The fact of the 1st Accused saying that he was sold the phone then changing to say he had pledged without documentary proof, and the fact that he took over four (4) months to demand back his money and also to return the phone, coupled with the fact that the witness fielded as the eye witness to the sale and or pledge transaction shifted that burden to his wife who was not called as a witness made the first accused and 1st accused's witness's evidence in so far as they purported to link appellant to the commission of the offence worthless and unreliable.

(d) It should have been borne in mind that the general as well as cardinal rule regarding evidence of a co- accused is that it is unreliable and it should not be relied upon to support a conviction of an accused in the absence of corroboration with some other independent evidence.

(e) A reading through the judgment tends to give a wrong impression that the learned trial magistrate had formed an opinion that the appellant was guilty of the offence charged hence efforts had to be made to piece the evidence together to satisfy a conviction we state this was a wrong approach. The correct approach should have been for the court to proceed on the premise that the appellant was not guilty, discount the evidence the prosecution had tendered in support of

his conviction and then draw out a whole sale conclusion as to why either a conviction or acquittal is the correct final order to be made and give reasons with the above, we have no alternative but concur with both counsel that the appeal is a proper candidate for allowance.

We hereby allow the appeal, quash the lower court's conviction and set it aside the judgment and order the appellant to be released forthwith in connection with the conviction which led to this appeal unless otherwise lawfully held.

Dated, signed and delivered at Kisumu this 22nd day of February 2011.

R. N. NAMBUYE

JUDGE

ALI-ARONI

JUDGE

RNN/aao