



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL CASE NO. 42 OF 2009

DANIEL MUTHOMI M'ARIMI APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the judgment of Hon. Mr. S.M. Githinji SPM in Nkubu Criminal Case No. 2759 of 2006 delivered on 24th February 2009)

JUDGMENT

The appellant was charged before SPM Court Nkubu with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were as follows:-

“DANIEL MUTHOMI M'ARIMI: On the 30th day of November 2006 at Kanyakine Village, Kanyankine Location in Meru Central District within the Eastern Province, jointly with another not before court being armed with dangerous weapons namely pangas and runigus robbed Isaack Kirimi Mukindia one mobile phone make Sendo, and cash 700/= all valued at Kshs. 5,200/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Isaack Kirimi Mukindia.”

He was convicted as charged and now appeals against that conviction and the sentence of death. In deciding this appeal, we are guided in the principles set out in the Court of Appeal case **Gabriel Njoroge vs Republic** [1982 – 88] 1 KAR 1134 where the Court of Appeal stated:-

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appellant as the court cannot excuse itself from the task of weighing

conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya vs. Republic [1957] E.A. 336, Ruwala vs. Republic [1957] E.A. 570.)

PW1 Isaack Kirimi a retired teacher was on 30th November 2006 at 11pm on his way home from Kanyakine market. He was on foot. He met two young men one was tall and the other one was short. There was moonlight that night but he was unable to identify them. The short one hit him with a hard object which he suspected was a piece of metal. He began to bleed. He pleaded with them not to kill him. The two ransacked his pockets and stole from him Kshs. 700 and his cell phone. The make of the cell phone was Sendo. The following day he reported the matter at Nkubu Police Station. He also sent young men to places where liquor is consumed to inquire whether the phone was being sold there. His son Gitobu told him that the phone was being sold in their locality across the valley. The following day he was informed by Nicholas Karani, PW2, that a person had taken his cell phone to his place of business for charging. PW1 said that Karani offers the services of charging mobile phones. He said that Karani knew his phone. Karani told him that the person who had left it for charging would collect it at 3pm. PW1 confirmed that the phone was his and he informed the administration police. He was informed later that someone had been arrested. PW1 after being handed the phone in court said:-

“This is my phone. It has my name here at the back.”

He showed the court where his name was inscribed on the phone. On being cross examined by the appellant, PW1 said that the appellant wrongly implicated his son Gitobu which led to the arrest of Gitobu. Gitobu however was released later. PW2 stated that on 3rd December 2006 at 2pm, while at his place of work the appellant took to him a mobile phone for charging. PW2 said that he knew that phone because the owner used to take it to his place for charging. It was a Sendo make. He knew its owner had been attacked and that his phone had been stolen. When the appellant left the phone for charging, PW2 called its owner PW1. When PW1 saw the phone, he reported the matter to the police. PW2 identified that phone as the one before court. PW2 on being cross examined said that he knew the appellant before that incident. He identified to the court the marking on that phone, which was the name of PW1. On being cross examined further, he denied that he had at anytime worked with the appellant. PW3 Cpl. Nicholas Koome said that while working at the DO's office Kanyakine he got a report that a stolen phone, Sendo make, was at a shop in Kanyakine being charged. He said that he was informed that the phone had been stolen from its owner in November 2006. PW3 was amongst those who lay an ambush where the phone was being charged. He was at the shop of PW2 when the appellant collected the phone. He proceeded to arrest the appellant. He recovered the phone from the appellant. On being cross examined, he stated that the appellant was not arrested until he had paid the charging fee. On 30th November 2006 PC James Miano whilst on duty at Nkubu Police Station, received a report of the robbery against PW1. On 3rd December 2006 Administration Police from Kanyakine took the appellant to Nkubu police station. The stolen Sendo phone was also taken to the police station. Also brought to the police station was PW1's son who, after being interrogated, was found not to be implicated in the robbery. The appellant in unsworn statement in his defence stated that on 3rd December 2006 he was at Kanyakine Market where khat is sold. He was arrested by police officers and taken to PW2's barber shop. It was alleged that he had taken there a mobile phone for charging. PW2 handed that phone to the police. It was thereafter that he was arrested together with PW1's son called Gitobu. Four days later, Gitobu was released but he himself remained in custody. He denied that he committed the offence. He said that PW2 was his employer at that barber shop. They had agreed that out of his monthly salary of Kshs. 1,500/= PW2 would pay him Kshs. 500/= and would save for him Kshs. 1,000/= per month. One time when the appellant's wife fell sick he requested PW2 to give him his money to take her to hospital. PW2 refused. The appellant reported to the chief that PW2 had refused to give him his money. He then alleged that PW2 said to him:-

“He (PW2) said he won't pay me and my wife will suffer. He is the one who fixed me to avoid paying

me. He has my Kshs. 8,000/=.”

The trial magistrate found that the prosecution had proved its case on the required standard and that the doctrine of recent possession applied. The Court of Appeal in the case **Wycliff Abuya Ouma vs. Republic** Criminal Appeal case No. 631 of 2003, set the test to be applied to determine if the doctrine of recent possession applied. They stated thus:-

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction, the possession must be positively proved, first, that the property was found with the accused, secondly, that the property is positively identified as the property of the complainant, thirdly, that the property was stolen from the complainant, and lastly, that the property was recently stolen from the complainant. In order to prove possession there must be acceptable evidence as to the search for the suspect and recovery of the alleged stolen property. In our view, any discredited evidence on the same cannot suffice no matter from how many witnesses.”

The application of that doctrine does not mean that the court shifts the burden of proof against the accused. This was well stated in the case **Bernard Maina Mwaniki Vs. Republic** Criminal Appeal No. 234 of 2008 where the Court of Appeal stated thus:-

“In that case the court was dealing with the burden of proof by the prosecution and not the burden of proof by an accused and to that extent Gichina’s case is distinguishable from this case. With the greatest respect to the superior court, it shifted the heavy burden of proof beyond reasonable doubt imposed on the prosecution to the appellant where the law did not impose any burden on the appellant.

The superior court appreciated that the prosecution case was dependent on circumstantial evidence – specifically the doctrine of recent possession of a cap and wallet belonging to the complainant. However, the doctrine could be invoked but the prosecution had to first prove beyond all reasonable doubt that both the cap and the wallet belonged to the complainant. It is clear from the evidence of the complainant that the cap and wallet did not have distinctive marks personal to the complainant and that the complainant identified them merely by their colour and trade mark “NIKE” and “REEBOK” respectively. Indeed superior court agreed with the appellant’s submission that the items were of common usage which were generally available everywhere and which could change hand very first.”

In our case, possession of the stolen phone by the appellant was confirmed by PW2 and 3. PW2 received the phone from the appellant for the purpose of charging it. He knew the phone before because he used to charge it for its owner, PW1. Possession was therefore positively proved. The phone was positively identified by PW1 as the one that was stolen from him. He even showed the court the inscription of his name on it. That name was confirmed by PW2 to be on that phone. The phone was stolen on 30th November 2006 at 11pm. It was recovered on 3rd December 2006 at 3pm. The trial magistrate had this to say which we wholly agree with:-

“The phone had inscribed name of the complainant behind, and there’s (sic) no dispute in the case that it is his. It was recovered two days after the said robbery. A cell phone is not something likely to change hands very fast, especially when it’s an old one or its second hand. The accused (appellant) in defence did not give a reasonable account on how he had come into possession. Instead he denied that he had it.”

The appellant’s defence that it was the attempt by PW2 to forcibly implicate him with the robbery case because of the money he owed him, in the light of the prosecution’s evidence, cannot be upheld. PW3 the

police officer was not an interested party in this matter. He was an independent witness. He said that he waited until the appellant paid the charging fee and received the phone from PW2 before he arrested him. In view of that evidence, the allegation of a grudge against the appellant by PW2 is rejected. The prosecution proved its case beyond reasonable doubt. We therefore hereby dismiss the appellant's appeal. We accordingly uphold the conviction and confirm the sentence.

Dated, signed and delivered at Meru this 31st day of March 2011.

LESIIT, J.
JUDGE

KASANGO, M.
JUDGE

Read, signed and delivered at Meru this 31st day of March 2011.

In The Presence Of:

Kirimi/Mwonjaru Court Clerks

Appellant Present

Mr. Kimathi For the State

LESIIT, J.
JUDGE

KASANGO, M.
JUDGE