REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 199 OF 2009

JAMES MWENDA NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From: Original SPM Criminal case No. 214 of 2009 at Chuka; P. Ngare-SRM Esq.)

JUDGMENT

The appellant JAMES MWENDA NJERU was charged with one count of robbery with violence contrary to section 296 (2) of the Penal Code. He also faced an alternative count of handling stolen goods contrary to section 322 (2) of the Penal Code. He was found guilty of the main count and sentenced to death.

The appellant was aggrieved by the conviction and sentence and therefore filed this appeal. He has raised three grounds of appeal that the prosecution did not prove that he had possession of the complainant's mobile phone; that the prosecution did not prove their case as the required standard and that his defence was disregarded without cogent reasons.

The appeal is opposed. The learned complainant for the state, Mr. Musau, urged that the phone stolen from the counsel in this case was recovered from the appellant within hours of the robbery. Musau urged that after the robbery, there was shooting by the police against the robbers. That soon after the shooting, the appellant was found with gunshot wounds for much he did not give a plausible explanation.

The facts of the prosecution case are that the complainant, PW1 and his wife, PW3 went out of the house to answer a call of nature at about 2 a.m. on the material night. When they returned to their house, they found five men inside who robbed them of money and mobile phones. They then left. Both PW1 and PW3 could not identify the robbers.

One hour after the robbery CPL Kamanza, pw2 was on patrol duties in the area with other police officers when they saw five men walking. That when they disobeyed an order to stop, CPI Kamanza was led by members of public to three houses. In one of the houses, he found the appellant holding a baby. He was

alone. He was bleeding from gunshot would on his thigh. In his house CPL Kamanza recovered 2 mobile phones. One of the phones was identified by PW1 as his.

The appellant gave an unsworn defence. In his statement he said that he disagreed with his wife on the night in question. That he went out to look for her and on returning realized he had been hit by a bullet. He said he was arrested on that ground and latter charged.
We have subjected the evidence adduced by both the prosecution and the accused to fresh analyzes and evaluation as expected of us as a first appellant court. We were guided by the case of **OKENO V. REPUBLIC [1972] EA 32**, where the role of a first appellate Court is given as follows:

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336**] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

For the charge against the appellant to hold, the prosecution needed to establish by cogent evidence two very important factors. The just and most important is that the mobile phone identified by PW1, Exhbit 1 in the case, was the property of the complainant. The second and equally important is that the said mobile phone was found in the possession of the appellant. Both factors must be proved beyond any reasonable do not for the conviction to stand.

In regard to the identification of the mobile phone as the property of the complainant, the complainant has this to say

"At 6 pm the Deputy OCS Chuka Police Station came and told us that police officers has shot a suspect and removed mobile phones. They took me to the station and I was shown two mobile phones and was able to identify one of them. I later recorded my statement with the police…
The two phones I was shown are before court today and one of them Motorolla C118 is mine. C118 Motorolla MFI 1 S/NOPI 57768699"

We have considered the evidence of PW1 in which he identified the mobile phone Exh 1 as his and are not satisfied that proper identification was made. The complainant did not disclose on what basis he was identifying the phone as his merely saying the phone was his by identifying its model is insufficient proof of ownership as there must be thousand others of the same type.

Proper identification could have been on basis of the serial number with proof for instance that the complainant has a receipt for the phone bearing that number. It could also may have been acceptable proof of ownership of the complainant demonstrated he had the pin number for the phone which could be used to operate it or by other proof showing some unique identifying feature to distinguish the phone as the complainant's property. No such cogent proof of identification was given in the circumstances the identification fell short of the required proof.

In regard to possession 54 of the Penal Code defines possession as follows:……..

The prosecution had to prove that the appellant either has actual possession of the mobile phone in his

possession or had custody of the mobile phone in the place he was found for his use; or benefit, or that he has knowledge that the mobile phone was in the house and had consented to it being in that house.

PW2 was the officer who recovered the mobile phone. His evidence was that

"**In the third house James Mwenda opened. He was carrying a child. He was wearing a sport short. We ordered him to enter his house and we recovered mobile phones."**

There is no evidence of the actual place where the mobile phones were recovered. There is no evidence whether appellant lived in the house alone but there was evidence he had family since he was found holding a child. The question is whether the prosecution proved beyond any reasonable doubt that it was the appellant and no one else who could have had possession, knowledge a custody of the phone.

I think that the prosecution did not prove this sufficiently in view of the missing information as explained above. Furthermore the appellant was not identified by the complainants in this case as the one of those who stormed into their house.

As for the gunshot, it was capable of innocent explanation. The appellant may have gone out to look for his wife when he was shot as he claims. That explanation was plausible in view of the fact that he was not identified as one of the robbers and in view of the lace of cogent proof that the mobile phone exhibited in court belonged to the complainant.

For the reasons we have given we find that the appellant's appeal has merit. We find the conviction entered against the appellant was unsafe in the circumstances and ought not be allowed to stand.

In the result we allow the appellant's appeal, quash the conviction and set aside the sentence. We order that the appellant should be set at liberty unless he is otherwise lawfully held.

Dated, Signed and Delivered this 31st day of March 2011.

DATED SIGNED AND DELIVERED AT MERU THIS 31ST DAY OF MARCH 2011.

LESIIT, J

JUDGE

KASANGO J.

JUDGE