No. 2811

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 3 OF 2011

JUSTUS KONDO OMARI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an Appeal from the original conviction of sentence of the Senior Resident Magistrate's Court at Keroka Hon. J. Were in Criminal Case No. 1170 of 2010 delivered on 21st December, 2010)

"***The appellant***", **Justus Kondo Omari**, and one, **Denis Bonyi Muracha** were jointly charged before the Senior Resident's Court at Keroka with the offence of Robbery with violence contrary to Section 296(2) of the **Penal Code**. They were alleged to have been armed with pangas and knives when they attacked and robbed one **Rebecca Nyaboke Kenyanya** of a mobile phone on 28th August, 2010 at Harambee village, Manga/Raitogo sub location of Borabu District of Nyanza Province. The appellant too faced an alternative charge of handling stolen property contrary to section 322 of the **Penal Code**. He also faced a second count of being in possession of Cannabis Sativa contrary to section 4(1) of the **Psychotropic Substances Control Act**. It was claimed that on 28th August, 2010 at Harambee village in Borabu District within Nyanza Province he was found in possession of 60 grammes of cannabis sativa. The appellant and his co-accused denied the charges.

PW1, **Rebecca Nyaboke** testified that on the material day she was at home at about 7.30p.m reading her Bible. She was alone in the house and was using a lamp. The appellant's co-accused then allegedly burst into the house. He was a person well known to her. He held her by the neck and hit her on the chest as he

demanded for cash. Soon thereafter, the appellant joined the fray and proceeded to take PW1's phone and left with it. They didn't take anything else. She screamed for help and neigbours came to her rescue. She gave out the names of the appellant and co-accused and they were arrested at 9p.m and 1a.m respectively from their homes. The two were then taken to Manga police station while she went for treatment at Kijauri. A P3 form was issued to her. It was her evidence that there was sufficient light in the house that enabled her to recognize the 2 attackers. **Bonyi Moracha**, hereinafter ***"Dennis"*** was someone known to her very well.

PW2 **David Ogega** is a son of PW1. He was called by a neighbour and informed of the attack on his mother by 2 people known to her. He left immediately in search for the attackers whose names he had been given. Together with neighbours they went to their houses but only found the appellant. He had PW1's phone in his pocket. They also recovered bhang in the house. He was then escorted to Manga police station.

The group then went back to wait for the appellant's co-accused who arrived at about midnight. He was also arrested and taken to Manga police station. The appellant and his co-accused were then handed over to PW3, -**SGT Herbert Mudibo** of Manga Police Station, on the allegation that the two had attacked PW1 and stolen her mobile phone. The same had been recovered from the appellant alongside bhang. He accordingly booked them in the cells and later had them charged with the offences.

PW4 – **Joel Ongaro** a Clinical Officer examined PW1 and filled in the P3 form. He noted that PW1 was bruised on the right side of the head. He classified the injuries sustained as harm and probable weapon used as blunt.

In his defence, the appellant stated that he worked the whole day on his farm and after taking supper, he retired to sleep. At about 8.30 p.m a group of people woke him up, assaulted him and took him to Manga police station. They alleged that he had stolen a phone. He was later charged with these offences. He denied that he committed the offences as alleged. He also denied being found with bhang as claimed.

The learned Magistrate having carefully evaluated the evidence adduced by both the prosecution as well as the defence was convinced that the prosecution had proved its case as against the appellant. He proceeded to convict the appellant on counts I and II respectively. However, he acquitted the appellant's co-accused of the 1st count. Upon conviction, the appellant was sentenced to the mandatory death sentence on 1st count but the trial magistrate kept quiet with regard to sentence in respect of count II. That conviction and sentence triggered this appeal in which the appellant faulted the learned Magistrate for convicting him when the prosecution had not proved its case beyond reasonable doubt, his defence was not given due consideration and that the sentence imposed was overly harsh and excessive.

When the appeal came up for hearing before us on 30th March, 2011, the appellant elected to canvass the same by way of written submissions. We have since read and considered them very carefully.

The appeal was opposed. **Mr. Mutuku**, learned Senior Principal State Counsel in opposing the appeal submitted that the complainant recognized the appellant. When PW2 came to the scene, she gave him the name of the appellant and co-accused and they went to their houses and arrested them. Upon search, the complainant's phone was found in the appellant's pocket. He was also found in possession of bhang. During the trial, the complainant positively identified the phone. Identification was therefore not a problem as the appellant resided hardly 100 metres away. There was light which enabled her to recognize the appellant. This was a case for the application of the doctrine of recent possession since the mobile phone was recovered from the person of the appellant, a few minutes after the robbery.

This being a first appeal to this court, it is the duty of the court to re-examine and re-evaluate the recorded evidence and reach its own conclusions on that evidence on whether it (the court) thinks that the conviction was right or otherwise. In doing so, the court has to bear in mind that it neither saw nor heard the witnesses and the appellants testify; that privilege is reserved for the trial court and on an appeal, the

court must give due allowance for that factor.

In the course of his judgment, the learned Magistrate commented: ***"…I am however puzzled as to how the 2nd accused could outwit 70 people and ran away. Further being certain that PW1 knew him well having worked for her previously, would the 2nd accused in the immediate aftermath of the incident again dare to venture into the home of PW1? I am doubtful about that. I do not deem that any right thinking person would attempt that knowing well the possible consequences. I am doubtful of the 2nd accused's involvement…".***

From the evidence of the complainant, she was categorical that it was indeed the appellant's co-accused who first burst into her house and went for her neck. He was a person she knew very well. Later on the appellant joined the fray. She alleged that it was at this juncture that the appellant picked her phone and the two left. Now, if with this direct evidence the learned Magistrate still entertained doubts as to the co-accused's role and culpability in the crime, why could he not extend the same doubt to the appellant? If he doubted as to how the co-accused could have outwitted 70 people and ran off, the same doubt should have been extended to the appellant too since according to the complainant, the two acted in concert and she was emphatic that she clearly saw them. The learned Magistrate's further doubt was on the basis that, the co-accused knew that the complainant knew him very well as he had worked for her previously, would he in those circumstances dare to venture into her house in order to rob her? The same logic applies to the appellant. His home is hardly 100 metres away from the complainant's. He was very well known to the complainant. That being the case would he also be daring enough to stage on the complainant a robbery knowing very well that he was likely to be easily recognized? We entertain grave doubts on the issue. One would expect that if they were to undertake such a mission, they would at least take steps to disguise themselves. However, this was not the case here. **Lyon J.** was spot on when he stated thus in the case of **R V Eria Sebwato (1960) E.A 174.** ***"…That this accused, well known to the complainant, should go with seven other men to commit an organized robbery in a house where he was well known seems to me to be inexplicable. He must have known he was bound to be recognized, and that, in my view, casts doubt on the evidence of the complainant and his wife…".*** These words ring true today as when they were uttered and in particular having regard to the circumstances of this case.

Of course the conviction of the appellant also turned on the application of the doctrine of recent possession. ***"…This doctrine holds that possession by an accused person of property proved to have been recently stolen has been held not only to support a presumption of burglary or breaking and entering but of murder as well, and if all the circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge, however penal***…". According to the learned Magistrate, the appellant was found in possession of the complainant's phone so soon after the incident. He was not able to give a proper explanation of his possession. This is all fine. However, where was there evidence of search and recovery of the phone? That evidence was allegedly given by PW2, a son of the complainant. Apparently, whilst in his house, he received a call from a neighbour who told him that his mother had been attacked. He immediately rushed home and his mother told him that she had been attacked by the appellant and co-accused. He knew them well as they stayed about 100 metres away. With neighbours, they proceeded to their house. They found the appellant but not the co – accused. ***"…They conducted a search in the house and got the mobile phone in his pocket…".*** From the foregoing it is not clear, who searched the appellant and allegedly recovered the mobile phone if at all. PW2 does not say he did so. If someone else did it and is highly probable, then such person should have testified to the event. In the absence of such evidence, the evidence of PW2 on the same issue was worthless. We wonder why any of the neighbours who allegedly participated in the search and recovery were not called to testify. We doubt that appellant knowing that he had committed such a serious crime would simply retire to his house and wait to be arrested. There is also no evidence as to how they knew that the pocket in which they allegedly found the mobile phone belonged to the appellant. There is also no evidence that only the appellant and the co-accused resided in the house. On the whole, the evidence of recovery of the mobile phone is doubtful.

It is for all the foregoing reasons that we allow this appeal, quash the conviction and set aside the sentence imposed. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

Judgment dated, signed and **delivered** at Kisii this 20th day of May, 2011.

ASIKE-MAKHANDIA **RUTH NEKOYE SITATI**

JUDGE **JUDGE**