



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL CASE NO. 552 OF 2007

JOHNSTONE MUTULILI MATHUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 2310 of 2005 of the Chief Magistrate's Court at Makadara by Miss Karani – Senior Resident Magistrate)

JUDGMENT

The appellant, **JOHNSTONE MUTULILI MATHUKU**, was convicted on three counts of robbery with violence contrary to **section 296 (2) of the Penal Code**. Thereafter, the learned trial magistrate sentenced him to suffer death as by law prescribed.

The trial court expressly ordered that the appellant be sentenced;

“to Death on Count I, II & III of the Penal Code, concurrently.”

To our minds, that would mean that in respect of each count, the appellant would be hanged by the neck until he was dead. However, unless the appellant was akin to the proverbial cat, who has nine (9) lives, he would be dead as soon as the sentence was carried out on a single count. Even if the hangman purported to execute the other death sentence, it would be impossible to do so, because there would be no more life in the body. It is for that reason that the Court of Appeal has often made it clear that if an accused person is sentenced to death on any one count, the trial court should suspend the sentences in respect to any other offences for which the said accused had been convicted.

Therefore, we do now set aside the sentences on Counts 2 and 3.

Reverting to the substance of the appeal, we note that the appellant raised the following issues;

(a) An Identification parade should have been conducted, as he was not arrested at the scene of crime;

(b) The mobile phone, make Nokia 3310, which was recovered from him, was actually his own property.

(c) The arrest of the appellant was not connected to the offence he had allegedly committed;

(d) The trial court erred when it rejected a plausible defence; and

(e) In sentencing the appellant to death, the trial court did not adhere to sections 217 and 304 (1) of the Criminal Procedure Code.

It was the appellant's submission that he was a victim of mistaken identity. He was in the vicinity, on the innocent task of fetching water from the communal water-point, in Kayaba, an informal settlement.

The police officer who arrested him did so only because the appellant was allegedly a middle-aged man. Yet, there were many other middle-aged men within the Kayaba slums.

Because the complainants were not present at the time of his arrest, the appellant insists that the proper procedure should have been, to conduct an Identification parade, at which the complainants could have been invited to pick him out.

In any event, the arresting officer had arrested him with a Nokia 3310, which was his; and not the Nokia 3210, which was said to have been stolen from **PW 3**.

The appellant also pointed out that there were contradictions regarding the exact place where the phone was recovered. One witness said it was in the pocket of the appellant, whilst the other witnesses, who allegedly witnessed the recovery, said that the phone was around the neck of the appellant.

It was the submission of the appellant that slum areas are normally congested, and that therefore, **PW 6** may have arrested the wrong person. The only sure way of confirming that the appellant was the villain who had robbed the complainants, would have been through the testimony of PC Otieno, who is said to have been with **PW 6**, at the time the appellant was arrested: that is what the appellant told this court. But PC Otieno did not testify at the trial.

The appellant therefore invites us to hold that if PC Otieno had testified, he would have given evidence that was prejudicial to the prosecution's case.

Finally, the appellant submitted that the doctrine of recent possession had no application to this case.

In answer, Mr. Mulati, learned state counsel submitted that the appellant was arrested when running away from the scene of crime, whilst in possession of **PW 3's** phone. The said phone is said to have had distinctive features, which enabled **PW 3** to identify it positively.

Furthermore, **PW 3** gave out his phone number to the police who had arrested the appellant. When the said number was dialed,

the mobile phone which was in the appellant's possession rung.

Thereafter, the appellant identified the said handset as his phone, which he had just been robbed of, earlier that day.

In determining this appeal, we have re-evaluated all the evidence on record, and have thereafter drawn our own conclusions. We have also given due consideration to the submissions made by the parties.

PW 1, JUSTUS GITOBU WAMBUTIRA, is a businessman. On the material day, he went to purchase pipes at **AGURA AGENCIES**, which is located off-Enterprise Road, Industrial Area Nairobi.

He was accompanied by his driver, who remained inside the pick-up vehicle they had used. As **PW 1** was leaving the shop where he had purchased pipes, he noted one youth standing near the pick-up.

The said youth was wearing **PW 1's** coat. He was also holding a gun.

PW 1 also saw another youth robbing an Asian man, who had just parked his vehicle.

PW 1 returned into the shop and alerted them that there was a robbery in progress outside. After the doors to the shop were closed, **PW 1** phoned the Deputy PPO, Garissa, and informed him of the robbery. The PPO promised to relay the message to the Operations Officers, in Nairobi.

When the robbers left, **PW 1** got into his pick-up and they drove off, towards Embakasi. When they came across a police Land-Rover, they alerted the officers in it, about what had happened. The police immediately drove towards the Mukuru slums, where **PW 1** had seen the robbers go.

PW 1 then returned to Agura Agencies, where the police found him, after about 15 to 30 minutes.

PW 1 testified that when the phone number given by one of the victims of the robbery was dialed, the phone which was in the appellant's possession rung.

During cross-examination, **PW 1** said that he did provide the police officers who were with the Land-Rover, with the descriptions of the robbers. He said that his description included the sizes of the robbers and the clothes they wore.

PW 2, VINOD PATEL, was robbed of his ID; Hospital Card; Nakumatt Card; KWS card; an Alcatel mobile phone; and a gold ring.

He testified having seen the appellant next to the driver's side of the car. The said driver was **PW 3**.

It was **PW 2's** evidence that **PW 3** lost his mobile phone to the robbers.

After the appellant was arrested by the police, **PW 2** was present when **PW 3** identified the phone which was recovered from the appellant, as his.

PW 3, PAUL WAMBUA, was with **PW 2** at Agura Agencies, on the material day. He lost his Driving Licence; wallet, KShs.1,000/-; mobile phone, make Nokia 3210; a watch and his National ID.

PW 3 identified the appellant as the person who robbed him. He did so as the appellant was searching him, removing the various items, and putting the same into his pockets. That exercise is said to have lasted about 15 minutes.

After another 15 minutes, the police arrived with the appellant, whom they had arrested. **PW 3** saw his phone around the appellant's neck.

When **PW 3** gave out his phone number and it was dialed, the phone around the appellant's neck rung.

PW 3 also testified that his said phone had an Arsenal chain and also that his name was written on the battery.

During cross-examination, **PW 3** explained that a Nokia 3310 was just slightly shorter than a Nokia 3210.

PW 4, FRANCIS ISAU, was the driver of **PW 1**. He was in the vehicle when **PW 1** went into the shop at Agura Agencies. It is then that robbers confronted him, demanding money and a phone. He had neither.

The robbers then took away **PW 1's** coat, which had been left inside the vehicle.

Later, when the appellant was arrested by the police and taken back to Agura Agencies, **PW 4** witnessed the recovery of **PW 3's** mobile phone. According to him, the phone was recovered from the appellant's pocket.

PW 5, ABDI IBRAHIM, worked as a guard at Agura Agencies. He witnessed the recovery of **PW 3's** phone, from the neck of the appellant. He also heard the said phone ring when **PW 3** had given out his number, which was then dialed.

During cross-examination by the appellant, **PW 5** said that he would not have recognized the appellant had it not been that the appellant was found in possession of **PW 3's** mobile phone.

The learned trial magistrate made a note on the record that **PW 5** was honest and forthright.

PW 6, PC LAWRENCE CHIRCHIR testified that it is he who chased after the appellant and arrested him. He said that at the time of arrest, the appellant had a Nokia phone. The phone had an Arsenal strap, and it had been tacked into the appellant's jacket.

During cross-examination, **PW 6** said that he had been given the appellant's description.

However, when **PW 6's** statement was read out, it showed that the phone he recovered was a Nokia 3310, not a Nokia 3210.

He then explained that although he had recorded in his statement that the phone was a Nokia 3310, he later learnt that it was actually a Nokia 3210. He also said that the particulars of the phone were not written on the face of the phone.

PW 7, HASSAN ADAM PUBU, worked as a guard at Agura Agencies. He confirmed that some robberies took place on the material day.

However, the trial court noted that **PW 7** was somewhat confused about the details of the incident.

PW 8, PC BERNARD WEKESA was only involved in the arrest of the appellant's co-accused. He said that the appellant was arrested by **PW 6** and PC Otieno.

PW 9 STEPHEN KIMEU was the officer who arrested the appellant's co-accused. The team in which **PW 9** was, at the time of arrest, was only given the description of the appellant's co-accused.

PW 10, ALEX MADINDI MWANDAWIRO examined an exhibit which resembled a revolver. However, he found that it was not a firearm.

PW 11, CPL. LAWRENCE MEGERA, was one of the officers who arrested the appellant's co-accused.

However, he was present when **PW 3** identified the mobile phone which was received in the appellant's possession.

PW 11 described the phone as being unique, as it had a cover that looked like formica, whilst the strap bore the insignia of Arsenal.

PW 12, SGT, DAVID RINGERA was the Investigating Officer. He verified that **PW 3's** mobile phone was a Nokia 3210, which was recovered from the appellant.

As the complainants identified the appellant at Agura Agencies, **PW 12** found it unnecessary to hold Identification Parades.

Later, when the appellant was put to his defence, he said that he was arrested at Kayaba Slums, as he was waiting to fetch water at the communal water tap.

He was searched and his mobile phone, Nokia 3310, was taken away. He was then taken to Agura Agencies, where the police told those present that he was one of the robbers.

Having re-evaluated the evidence on record, we note that it was only in his defence that the appellant said, for the first time, that the police took away his mobile phone, and also that it is the police who told those people at Agura Agencies that he was one of the robbers. At no time during cross-examination of all the prosecution witnesses, did the appellant suggest that the phone recovered from him was his own, or that it was the police who told the witnesses who they found at Agura Agencies that he was one of the robbers.

We have also taken into account the explanation of **PW 6** who said that the particulars of the mobile phone are not shown on the face of the phone. He therefore thought that the phone recovered from the appellant was a 3310.

Meanwhile, **PW 3** explained that a Nokia 3310 was only slightly shorter than a Nokia 3210.

We find the explanations tendered by both **PW 3** and **PW 6** to be reasonable and plausible.

And whereas there might be some doubts about the positive identification of the appellant, during the robbery, we nonetheless find that he was arrested whilst in possession of **PW 3**'s mobile phone. The recovery was made barely 30 minutes after the robbery.

And when the phone number was dialed, the phone found on the appellant rang. Therefore, it is obvious that the phone recovered from the appellant belonged to **PW 3**. There was no way that the appellant's own phone would have rung if the number that was dialed belonged to **PW 3**. In effect, the defence was completely displaced by the evidence tendered by the prosecution.

As regards the need for an Identification Parade, it is true that when a suspect is arrested away from the scene of crime, and in the absence of the complainant, it would be ideal to conduct a parade, so as to ascertain whether or not the complainant had positively identified the suspect. However, in this case, the suspect was first taken, immediately after his arrest, to the scene of crime. It is there that the complainant identified the appellant.

Had the alleged identification been the only thing that connected the appellant to the crime, we would not have hesitated to find it unsatisfactory. But in this instance, a phone was recovered from the appellant, and he concedes as much. He only asserted that the phone belonged to him.

As we have already said, the phone cannot have belonged to the appellant. The complainant positively demonstrated that the phone belonged to him.

Accordingly, we find that the conclusion arrived at by the trial court was accurate. The conviction was founded on sound evidence. We therefore have no option but to uphold it.

Finally, as regards the sentence, we note that the trial court did provide the appellant with an opportunity to mitigate. It is only after the said mitigation that the court handed down the death penalty.

Save for what we stated at the outset of this Judgment, the sentence is also upheld.

The appeal is dismissed.

Dated, Signed and Delivered at Nairobi, this 19th day of May, 2011

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F.A. OCHIENG
JUDGE

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MOHAMED WARSAME
JUDGE