REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO 104 OF 2008

(LESIIT & KASANGO, J.J.)

BONIFACE MUGENDI KINYUA ……APPELLANT

VERSUS

REPUBLIC…….ACCUSED

(An appeal against the judgment of Hon. Mr. P. Ngare S.R.M. in Chuka Criminal Case No. 1891 of 2004 delivered on 2nd July 2008)

JUDGEMENT

The appellant was charged with one count of robbery with violence contrary to section 296(2) and one count of handling stolen goods contrary to section 322(2) of the Penal Code. After the trial Magistrate heard the case, she reduced the charge to simple robbery contrary to section 296(1), convicted him of the substituted charge and sentenced him to 12 years imprisonment.

When this Appeal came up for hearing the learned State Counsel put the Appellant on notice that if he opted to prosecute his appeal the State would ask for enhancement of the sentence to that of Capital Robbery. Despite the warning the appellant opted to proceed with his Appeal. He raised issue with the Judgment of the learned trial Magistrate for finding that he was found in possession of a phone arguing that the prosecution did not prove that the phone found in that house belonged to him. The appellant also raised issue with the identification of the money that was recovered from him urging that the denomination of the currency was not entered in the occurrence book.

Mr. Kimathi learned State Counsel opposed the appeal on the basis that the evidence against the appellant was overwhelming. Counsel urged that after his arrest the appellant led the Police Officers to his house which he opened with a key and from which a mobile phone identified by PW2 using the purchase receipt and the serial number of the phone. The serial number was also contained in the receipt. Counsel urged that part of the money stolen from the complainant was recovered from the appellant.

The brief facts of the case are that Judith PW1 and her husband Phanuel were sleeping in their house when they heard a bang on their door. When they woke up they discovered there was a man in the ceiling and two men inside their bedroom. These men demanded the money she had. Judith had Ksh.196,532/- which had been given to her by a membership of a merry go round in her church. That amount was confirmed by PW3 Lucy and PW7 Njariba both members of the group. That money was stolen together

with two mobile phones belonging to Phanuel.
The accused was arrested by PC Yusuf PW5 and others. The evidence in chief of PW5 is missing from both the original and typed proceedings. From the cross examination of this witness it transpired that the Appellant was arrested at 700 Club and Lodging. The date of arrest is not clear because of the missing evidence of PW5. From the evidence of PW5 some money was recovered from the Appellant at the time of arrest. That amount is not quoted in the evidence of PW5 but Judith PW1 told the court that police informed her later that they had recovered Ksh.162,000/-
Mugambi Eric PW6 testified that at 5 pm on the 18th of October the appellant went to him with a new bicycle and asked him to fix the chair. That bicycle was collected later by the appellant in company of Police Officers on the 25th of October 2004.
From the evidence of PW4 P.C. Musembi PW4 the appellant was removed from the police cells on the 20th of October 2004. The appellant took them to his house which he opened with his keys and under the bed the Police recovered one mobile phone Siemens, car battery and other items. That phone was later identified by PW2 as his property stolen two days earlier from his house.
The Appellant in his defence stated that on the day of his arrest he was woken up at his house by Police Officers who searched the house and demanded Ksh.50,000/- from him. He says that on the 21st of October he was taken to his house where a car battery was recovered. On 25th his bicycle was taken by police officer from Karandine Market where he had kept it. The appellant stated that the money the police took from him was earned after the sale of cereals maize and beans, which he had sold.
We have carefully considered the evidence which was adduced by the prosecution and the defence during the trial. We have subjected this evidence to a fresh evaluation and analysis as expected of a first Appellant court **Okeno vrs Republic 19(EA) 32.**
There are two issues for determination. After perusing from the learned trial Magistrate's judgment it is clear that the appellant was convicted on the basis that the money that was recovered from him was wrapped in paper bags just like the money stolen from the complainant. Secondly the learned trial Magistrate found that PW2 had proved beyond any doubt that the Siemens phone recovered from the appellant was the one that had been stolen from him during the robbery in question. The learned trial Magistrate in her own words found that the most critical recovery was the mobile phone belonging to PW2. The learned trial Magistrate concluded that the appellant had not proved that the money and the mobile phone were his and that therefore there was a presumption of guilt that he was the one who had stolen the property for lack of evidence from the Appellant to disprove the same.
The appellant was not identified by the complainant PW1 and her husband PW2. The two testified that they did not see any of the robbers because they were ordered to cover themselves and were also were also threatened with death. The evidence against the Appellant was that of possession of the mobile phone and the money. We have no doubt from our analysis of the evidence on record that the mobile phone which was recovered from the appellant belonged to PW2 and that it was recovered two days after the robbery.
The learned trial Magistrate clearly shifted the burden of proof against the Appellant and also came up with a "*presumption of guilt,*" a principal that does not exist in law. An accused person has no burden of proving his innocence and should be presumed innocent until proved guilty. The burden of proof in criminal cases always lies with the prosecution and can never be shifted to the accused except in special circumstances which are provided in the law. Regarding possession of recently stolen property, the only burden the law places upon an accused person is not to prove his innocence but to give a reasonable explanation of how he came by the stolen property.
We considered the evidence in support of the possession of the mobile phone and the recovered money. In regard to the mobile phone it was recovered from a house which the appellant opened with a key. In his defence the appellant admitted that a car battery was recovered from a house. Even though he denies that the mobile phone was recovered from him, we have no doubt that the mobile phone was recovered from his house to which he had control, bearing in mind that he had the key which he used to open the house with. We are therefore satisfied that the prosecution proved beyond any reasonable doubt that the Appellant was in possession of PW2's mobile phone.
The mobile phone was recovered two days after the robbery. The date of arrest is not clear but at the time of his arrest the appellant was also found with the Ksh. 162,000/- in his person. The appellant was found with the stolen phone two days after the robbery, and also was found in possession of a huge amount of money, slightly less than what had been stolen from the complainant PW1. We are aware that the Appellant in his defence tried to explain how he had raised the money he was found with. However from

the evidence adduced before the court the prosecution clearly demonstrated that the Appellant had gone on a shopping spree and had bought sports shoes Exhibit 4, rubber shoes Exhibit 5, four new shirts Exhibit 6, a leather belt Exhibit 7, a cap Exhibit 8, a white blouse Exhibit 9, a green jacket Exhibit 10 and a new bicycle Exhibit 11. The appellant was also found at 700 Club where he was busy buying drinks for people. The entire shoot of the money recovered from the appellant was in his possession at the bar where he was arrested.
We are satisfied after our evaluation of the evidence before the court that the money found with the Appellant, together with the mobile phone were all stolen two days earlier from PW1 and PW2. Considering the Appellant had very close to the amount that was stolen from PW1 we find that he was more the thief of the money and the phone than a handler of it. We also consider that possession of the money and the phone two days after they were stolen was recent possession of the stolen property.
The learned trial magistrate shifted the burden of proof against the appellant however, having analyzed and evaluated the evidence adduced before her we are satisfied that the evidence against the appellant was overwhelming. We find that had the learned trial magistrate correctly directed her mind as to the burden of proof, she could have come to the same conclusion. We find that the prosecution had proved its case against the accused on the required standards. We accordingly find no merit in the appellant's appeal.
The learned trial magistrate reduced the capital charge against the appellant from capital robbery to simple robbery, on the basis the prosecution did not prove that violence was used during this robbery. With due respect to the learned trial magistrate it is now well settled that the charge of robbery with violence is proved if the prosecution is able to prove either that the accused person was in company with others at the time of robbery or that he was armed with dangerous or offensive weapons or that he used or threatened to use force. Section 296(2) of the Penal Code is very clear on this point and provides as follows:
If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person,
he shall be sentenced to death.

This aspect was explained further in an obiter remand in the case of **Oluoch –vs-Republic 1985 KLR 549** as follows:
(**6***) (obiter) It is not thedegree of actual violence that differentiates the offence of robbery with and robbery with violence. Robbery with violence*
is committed in any of the following circumstances;
(a) The offender is armed with any dangerous and offensive weapon or instrument; or

(b) The offender is in company with one or more other person or persons; or

(c) at or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes, or uses other personal violence to any person. The ingredients of the offence of robbery under section 296(1) of the Penal Code are:
(i) stealing anything, and
(ii) at or immediately before or immediately after the time of stealing,
(iii) using or threatening to use actual violence to any persons or property in order to obtain or retain the thing stolen or to prevent or to overcome resistance to its being stolen or retained.

The evidence adduced by the prosecution is that the robbery was committed by at least four people one was in the ceiling of the house, two entered the bedroom, and one who spoke from outside the house. PW 2 also said that a knife was placed on his neck throughout the robbery and that they were threatened with death if they did not produce the money. The prosecution established the capital charge. The learned trial magistrate therefore erred when she reduced the charge from capital to simple robbery on the grounds that the prosecution did not prove violence.
The appellant was put on notice long before his appeal came up for hearing that the State will be asking for the enhancement of the conviction, and the sentence if the Appellant proceeded with his appeal. Despite that notice the Appellant opted to prosecute his appeal.

The conviction entered in this case must be interfered with because it was based on a wrong understating and interpretation of the law and of the ingredients of the offence of robbery with violence contrary to section 296(2) of the Penal Code. We are therefore mandated to interfere with that conviction which we hereby do we substitute the conviction entered against the appellant from simple robbery contrary to section 296(1) to that of robbery contrary to section 296(2) of the Penal Code. We also set aside the sentence of 12 years imprisonment imposed on the Appellant to that of death as provided by the law.

In the result the appellants appeal is hereby dismissed.

Dated, signed and delivered at Meru this 29th day of October 2010.

LESIIT,J
JUDGE

KASANGO, J
JUDGE