REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 240 of 2006

(Form the original conviction and sentence in Molo S.R.M.CR.C.No.2589/05 by The Hon. R. K. Kirui, Ag. Principal Magistrate)

PETER KARIUKI MWANGI……...……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The appellant in this appeal was charged together with one Jackson Maina Ben with the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code. He also faced an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars of the robbery charge were that on 30th October, 2005 at Kirwara farm Elburgon in Nakuru District, jointly with his co-accused and another not before court, robbed David Korir Kibet of a mobile phone valued at Kshs.4,400/= and used actual violence to the said David Korir Kibet in the course of the robbery. The particulars of the charge under Section 322(2) were that on 3rd November, 2005 at Elburgon in Nakuru District otherwise than in the course of stealing, dishonestly detained one mobile phone knowing or having reasons to believe the same to have been stolen. He was tried and convicted on the main charge of robbery with violence and sentenced to death. His co-accused was acquitted under Section 210 of the Criminal Procedure Code. Being aggrieved by the decision of the trial court, the appellant now appeals against both the conviction and sentence on the grounds that the same were improperly arrived at, having been based on the evidence of a single identification witness, who was not the complainant, and in the absence of any independent evidence to support the same. Also that the property alleged to have been robbed from the complainant was not found in the appellant's possession and no direct evidence was adduced as to link him to the offence with which he was charged. The appellant also contends that the charge was not proved beyond reasonable doubt and that the learned trial magistrate was wrong in rejecting his defence which the appellant believes was strong enough to earn him an acquittal. Only three witnesses were called to testify. P.W.1 (Francis Omune) testified that on 4th November, 2005, the appellant gave him a Sagem mobile phone as security for a loan of K.Shs.1,500/= which the appellant borrowed from him. That he had prior knowledge of a mobile phone reportedly stolen from one of his customers called David. P.W.1 further testified that he called the said customer, who came with documents which, checked against the particulars inscribed on the mobile phone, confirmed the same to be the one that the customer had lost during the robbery. The complainant (David Kibet Korir) testified as P.W.2. He told the court that he was robbed by three people on his way home from Elburgon on 30th October, 2005 at around 7.00p.m. That he did not see their faces which were covered. He only noticed that the three of them were short. He testified that one of his attackers held his arm and throat while another searched his pocket and took his mobile phone. The following day, i.e. on 31st October 2005, he reported the incident at Elburgon police station. Sometimes later, P.W.1, who P.W.2 said used to charge the mobile phone for him, called him and showed him a mobile phone said to have been sold to him by a person called Mwangi, who P.W.1 said had sold the phone to him for K.Shs. 1,500. The complainant examined the phone against the particulars appearing on the receipt of purchase and found that the serial numbers (given as 350 732352805077) were the identical. On 1.12.05, P.W.1 took him to Mwangi's house, where the two were informed that Mwangi had been arrested and was being held at the Elburgon

Police Station. Accompanied by P.W.1, they went to Elburgon Police Station on 8th December, 2005 and they were shown the person known as Mwangi, who was then in remand and who the witness identified as the 1st accused at the trial. P.W.2 said he did not know the appellant before and did not see him at the time of the robbery. He also said he did not know the appellant's co-accused.

P.C. Dadus Okumu of Elburgon police station testified as P.W.3 and stated that the complainant P.W.2 had reported a robbery on the 30th October, 2005 in which he was robbed of his mobile phone - a Sagem MW2030. That the people who robbed him were three in number, short in stature and had their faces covered with Mervins. That on 1st December, 2005 P.W.3 arrested the appellant in connection with a burglary and theft which had occurred at Kasarani, Elburgon. That on 8th December, 2005, the complainant came to the police station with P.W.1 and produced a Sagem mobile phone which P.W.1 said had been sold to him by the appellant and which P.W.2 had confirmed to have been the one that was robbed of him earlier on.

After stating the facts of the case and concluding that the only issue for determination was whether or not the appellant, jointly with others not before court robbed the complainant of his mobile phone and used actual violence against him, the learned trial magistrate proceeded to convict the appellant based on the evidence as adduced before him. The learned trial magistrate noted that the complainant did not identify his attackers but, surprisingly, proceeded to find that there was "*sufficient circumstantial evidence implicating the 1st accused (appellant) in the commission of the robbery*". He based his findings on the doctrine of recent possession stating that the appellant having failed to explain how he come into possession of P.W.2's phone the only explanation was that he was involved in the robbery. The learned trial magistrate found, as a fact, that the appellant was with two others and used violence against the complainant thus proving an offence under section 296(2) of the Penal Code.

The appellant in his sworn evidence denied having robbed the complainant. He admitted that he knew P.W.1 but denied having given him the mobile phone as alleged. He claimed that P.W.2 held a grudge against him, owing to a debt of Kshs.260/= that the appellant owed the witness. Although the State opposes the appeal arguing that the same was based on the doctrine of recent possession, we are of the view that the evidence adduced before the trial court fell far below the acceptable legal standard. The complainant did not identify his attackers and no evidence was adduced to suggest that the appellant was one of them.

There is no doubt that a relationship did exist between the appellant and P.W.1 and that the former owed the latter some money. In his judgement, the learned trial magistrate did not give any reasons why he chose to believe P.W.1's version of the story against that of the appellant. It is not clear why the complainant, having been told of the finding of the phone on 1.12.05 did not promptly report the same to the police, choosing instead to do his own investigations and reporting the same on 8.12.05. P.W.1 himself did not explain why, he stayed with the phone from the 4.11.05 until 1.12.05 when he told the complainant of its being in his possession. We are surprised that, although, as was testified by P.W.3, the informer was initially locked up, which we believe was done due to his being a suspect, he was released without being charged, at least with the offence of handling stolen property.

From our exhaustive review of the evidence adduced at the trial, we do not see any circumstantial evidence against the appellant as would warrant a presumption of the doctrine of recent possession as was stated in the Court of Appeal decision of RUHI Vs. REPUBLIC [1985] 373. We find no evidence at all to connect the appellant with the robbery charge herein which in our considered view was not proved at all. We find, therefore, the conviction was not warranted and the same is hereby quashed. The death sentence is also set aside with the result that the appellant is hereby set free. He is to be released from jail forthwith unless he be otherwise lawfully held.

SIGNED, DATED and DELIVERED at Nakuru this 12th day of February, 2009.

M. KOOME **M. G. MUGO**

JUDGE **JUDGE**