



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 285 of 2006

SIMON MAINA KARIUKI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Nakuru C.M.CR.C.NO.1489/2005

by Hon. M. W. Onditi, Senior Resident Magistrate)

Coram:

Hon. M. Koome, Judge

Hon. M. G. Mugo, Judge

Mr. Njogu for State

Court clerks –Kosgei/Lydia

Appellant present

JUDGMENT

The appellant in this appeal, Simon Maina Kariuki, was charged with the offence of robbery with violence Contrary to Section 296(2) of the Penal Code. He faced an alternative charge of handling stolen property contrary to section 322(2) of the Penal code.

After a full trial before the Hon. Mrs. M.W. Onditi, Senior Resident Magistrate, Nakuru, wherein the prosecution called three witnesses and the appellant alone testified in his own defence, the appellant was convicted on the main charge and sentenced to suffer death.

Aggrieved by the verdict of the lower court, the appellant filed this appeal, challenging both the conviction and sentence on the grounds that:

1. The learned trial magistrate erred in law and fact in convicting the appellant based on the doctrine of recent possession.
2. The evidence of a vital witness was not adduced thereby puncturing a hole in the prosecution's evidence.
3. The recovered exhibit was not properly identified.

4. The evidence adduced by the prosecution did not meet the legal standard necessary to sustain a conviction.

5. His sworn defence as not considered.

The appeal is opposed on the grounds that the appellant was properly identified as having been among the robbers who attacked the complainant and robbed him of a motor vehicle and a mobile phone, which phone was later found in the appellants' possession.

The particulars of the robbery charge were that, on the 18th day of May, 2005 at Nakuru Township within Nakuru District of the Rift Valley Province, the appellant, jointly with others not before court and while armed with pistols, robbed George Warari Salim of a motor vehicle registration No.KZG 661, Nissan Sunny Saloon, a Sagem 3020 mobile phone, Kshs.1,500/= in cash, a car radio and a speaker, all valued at kshs.210,000/= and threatened to use actual violence to the said George Warari Salim in the course of the robbery.

Submitting at the hearing of the appeal, the appellant pointed out a material discrepancy between the evidence of two key witnesses P.W.2, (the informer) and P.W.3, the arresting officer wherein the former testified that he gave the stolen mobile phone to the police while P.W.3 testified that P.W.2 did not take anything to the police station when he went to report the recovery but that P.W.3 found the appellant in possession of the same at the time of his arrest.

The appellant also faulted the evidence of P.W.1, the complainant, which was to the effect that he (P.W.1) bought the mobile phone in question on 24th May, 2005, yet he was robbed on 18th May, 2005 and the appellant arrested on 19th May, 2005. He asked us to find that the evidence of the complainant, which is crucial to the prosecution's case, did not support the charge.

We have, as is required of us, studied the entire record of the lower court, considered the proceedings and judgment and evaluated the evidence adduced at the trial. We have then made our own independent conclusions.

The complainant, P.W.1, testified that he was approached by two men outside Stagematt (Supermarket) in Nakuru town where he operated his taxi business. The two requested him to take them to Kabachia Estate at an agreed fare of Kshs.200/=. One of the passengers sat at the front passenger seat and the other at the back. Along the way the one who sat in the front ordered the appellant to let go of the steering wheel and took over the driving. The one at the back, who was brandishing a pistol, forced the appellant to move to the back seat of the vehicle. At some point, he said two other assailants joined in. The appellant was forced to lie at the back seat and could not therefore, tell where the vehicle was driven to. He managed to jump off from the boot of the vehicle at some point and discovered himself in Bondeni area. He reported the incident at Bondeni Police Station. In his testimony the complainant told the trial court he had reported to the police that he could identify (recognize) the people who had robbed him of his vehicle since he had marked their physical appearance after having seen them clearly with the help of the electricity lighting at Stage Mattresses (Stagematt) and from on coming vehicles. The complainant testified further that in addition to the motor vehicle, which was recovered on the same night, he lost Kshs.1,500/= and a Sagem mobile phone which he said he had bought for Kshs.5000/= on 24th May, 2005.

P.W.1 testified further that he was able to identify the appellant at an identification parade (organized for the purpose) as the person who had taken over the driving of his taxi on the material night. In cross-examination by the appellant, the complainant testified that he did not know how the phone ("Ex.1") was recovered but that he had been told that the appellant had attempted to sell it.

P.W. 2, Thomas Njuguna Kimingiri, testified that he was the brother of P.W.1 (the complainant) and a taxi driver. He told the trial court that on 19th May, 2005, he was approached by one Dan Warukanga, a broker, who offered to sell him a Sagem 3020 mobile phone on behalf of a person called Simon. He was

aware that his brother (P.W.1) had been robbed of a similar phone. He took the phone and opened it, inspected it and noticed that the phone was the one he had used previously before giving it to P.W.1. The broker then telephoned one Simon Maina, who P.W.2 says was the vendor of the phone and the price for the phone was agreed at Kshs.2000/= . Instead of going to meet the vendor, straight away, P.W.2 testified that he rushed to Bondeni Police Station and reported that he had found his brother's phone, which he showed to the Police. Accompanied by two police officers P.W.2 went to where Simon Macharia was and the latter was arrested. P.W.2 testified further that he left the phone with the police and P.W.1 later identified it as his.

P.W. 3, a police officer by the name Jackson Ngugi, of Bondeni Police Station, testified that on 18th May, 2005 P.W.2 reported to him that P.W.1 had been robbed of money and a mobile phone the previous night while operating his taxi at Section 58, Nakuru Town. It was P.W.3's testimony that the appellant **"approached (P.W.2) Thomas Kimunjiri Njuguna with a request that Thomas Kimunjiri do buy a Sagem phone...."** and that P.W.3 (with another or others) arrested the appellant **"with that Sagem phone 3020."**

In cross examination, P.W.3 repeatedly told the court that he recovered the exhibit from the appellant. He testified that he knew nothing of the Dan Warugumo whom P.W.2 had stated to have been the broker used by the appellant to sell the phone. He also testified that P.W.2 had nothing in his possession when he reported the recovery of the stolen phone at the police station. P.W.3 said only that P.W.2 told him that the appellant had wanted to sell the phone to him.

In his defence, the appellant testified on oath that on 19th May, 2005 while he was attending to his business at Kanu Street, Nakuru, P.W.2 came with police officers, who arrested him and escorted him to Bondeni Police Station. No reasons were given for his arrest. At the police Station he demanded to know why he had been arrested. He was told that he had given one Dan a phone to sell to P.W.2. The appellant insisted that the said Dan be brought to explain the allegation but that was not arranged. Thereafter, still at the Station, P.W.2 threatened him, telling him that he would **"meet problems"** if he did not surrender his stall. The appellant was later paraded for identification and was surprised to see P.W.2 and another person, who had accompanied P.W.2 at the Police Station on 19th May, 2005, attend the parade and purport to identify the appellant at the parade. The appellant was later, to his surprise, arraigned in court in June, 2005 and charged with robbery. He denied the charge and maintains his innocence, insisting that the charge, conviction and sentence were erroneous in that the finding of guilt was, to a great extent, based on the evidence of P.W.2 and not that of the complainant. The appellant has submitted that, had his defence been properly considered, the learned trial magistrate would have found that the only reason P.W.2 implicated the appellant in the commission of the offence was the grudge that P.W.2 held towards him in regard to a market stall he had refused to surrender to him.

Although we have observed that the learned trial magistrate's exposition of the law and the doctrine of recent possession was correct, we are not satisfied that the circumstantial evidence herein was strong enough to support the robbery with violence charge.

It is clear to us that P.W.1 was the only eye witness to the robbery incident herein. Although he testified that he described his assailants' features and/or physical appearance when he made his first report to the police, no independent evidence was led to support that allegation. The arresting officer, P.W.3, testified that it was P.W.2 who, on 18th May, 2005, reported a robbery committed against his brother P.W.1 on the 17th May, 2005. Also that the appellant had tried to sell P.W.2 the mobile phone that his brother had lost during the robbery. P.W.2's testimony as regards the alleged recovery of the mobile phone was at complete variance with what P.W.3 said to have been reported to him. Whereas P.W.2 testified that the phone was shown to him by a broker and that P.W.2 himself surrendered the same to the police, P.W.3's testimony was that he found the appellant in possession of the phone and that P.W.2 had nothing with him when he reported the robbery that he himself had not witnessed.

P.W.1 was nowhere in sight as the appellant was being arrested. He also claimed to have bought the mobile phone himself while his brother P.W.2 testified that he was the one who had given it to him. In

his defence, the appellant stated that while at the police station he was told by those who arrested him and whom we assume to have included P.W.3, that it was a certain Dan who had told the police that the stolen phone belonged to the appellant. The officers declined the appellant's request that the stranger be called to explain further. P.W.3 denied any knowledge of such person.

We are unable to understand how, in the presence of such glaring material discrepancies and inconsistencies, the learned trial magistrate so quickly arrived at a finding that the appellant was among the four men who carjacked and robbed the complainant. The appellant denied any knowledge of the allegations made against him. Given the contradictions in P.W.2 and 3's testimonies and P.W.2's apparent enthusiasm to have the appellant arrested and charged, we are of the view that the learned trial magistrate ought to have found the appellant's defence credible and that the offence had not been proved beyond doubt.

Considering the above, the appellant's conviction and sentence were not warranted. Consequently, we allow the appeal, quash the conviction and set aside the death sentence. The appellant is to be set free forthwith unless he is otherwise lawfully held.

DATED, SIGNED and DELIVERED at NAKURU this 21st day of May, 2009.

M. KOOME

M. G. MUGO

JUDGE

JUDGE