REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL 103 OF 2006

SALIM MOHAMED OYUGA……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Appeal from conviction of Criminal Case of the P.M'S Court at Kisumu dated 9-6-2006 by Mr. Abdul El Kindy Esq. Cr Case no. 628 of 2005)

Coram

Mwera, Karanja –JJ

Mr. Odeny for Appellant

Mr. Musau for state

Court clerk George/Laban

Interpretation – Luo/English/Kiswahili

JUDGMENT

This appeal arises from the conviction and sentence of the appellant, **Salim Mohamed Oyuga** by the Principal Magistrate at Kisumu for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars of the charge were that on the night of 2nd and 3rd August 2005 at Kamakowa sub-location in Kisumu District Nyanza Province, jointly with others not before the court while armed with a knife, the appellant robbed **Hellen Akinyi** of a mobile phone make Sagem 3020, a briefcase with assorted clothes and Kshs. 900/= cash all valued at Kshs. 13,000/= and at or immediately before or immediately after the time of such robbery used or intended to use actual violence to the said Hellen Akinyi.

The appellant entered a plea of not guilty and after trial was convicted and sentenced to suffer death as by law established. Being dissatisfied with the conviction and sentence. The appellant has preferred six grounds of appeal contained in the amended petition of appeal filed herein on the 3rd March 2009.

The grounds are the following:-

(i) The appellant was tried and convicted for an offence that was not conducted in a language that he understood.

(ii) That the trial magistrate erred by relying on the evidence of circumstance made by PW 4 without observing that the same was not corroborated by any evidence.

(iii) That the trial magistrate erred in both law and fact by failing to find that the case was primarily based on circumstantial evidence.

(iv) That the trial magistrate erred in both law and fact by failing to find that the case was not investigated.

(v) The judgment was against the weight of the evidence on record.

(vi) The trial magistrate erred in law and fact in failing to consider the evidence of the complainant as it emanated from the cross examination of the prosecution witness.

Mr. Odeny, learned Counsel, argued the grounds on behalf of the appellant while Mr. Musau, learned Senior Principal State Counsel opposed the appeal and the grounds on behalf of the respondent.

Having considered the grounds and the rival arguments for and against, we are obliged to reconsider the evidence afresh and make our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. **(see Okeno –VS- Republic [1972] EA 32.**

The prosecution case was founded on facts that follow:-

The complainant **Hellen Akinyi (PW 1)** a salonist at Obunga Estate had arrived from Eldoret at about 1.30 a.m. in the company of her mother.

They did not find any taxi and decided to walk to their home at Obunga.

They were carrying luggage. The complainant had assorted clothes, a cell phone and cash Kshs. 900/= all valued at Kshs. 13,000/=. They met three persons on the way who introduced themselves as police officers. They (police officers) asked for the complainant's identification card. They spoke with the complainant for about two minutes but she noted that they were in black coats and armed with a panga (machete) and knife. She was struck on the head and back with the flat side of the panga and was robbed of her property including the cell phone and some money. Her briefcase being carried by a younger sister was also stolen. She reported the incident at the Obunga Police Post.

On the following morning, the complainant saw a person carrying her stolen cell phone. She questioned the person who said that the phone had been sold to him. He was taken to the police station.

Some of the complainant's stolen clothes were found by some people in a toilet at a place called Matoi.

The complainant ended by saying that the appellant was later arrested but she had not been able to identify him during the robbery.

John Ken Otieno (PW 2) a resident of Obunga and a teacher at Chuo Christian Academy was also involved in community policing. On a date that he did not state, he was from the Winam court accompanied by police **Cpl. Richard Oyugi**. They passed through Kondele and at a place known as Nyawita water joint they noticed a person staggering and arrested him. He (PW 2) recognized him as "Sanjay" a person wanted for an offence of robbery with violence. He identified him by the name of Salim Mohamed Oyuga.

Josinta Juma (PW 3) was in the company of the complainant on the material night. She said that they met three men in the dark and were asked to stop. The three men introduced themselves as police officers and asked for "Chai ya Wazee" and identification cards. The three men then beat her (PW 3) and the complainant and stole their property including bags containing cloths, handbag, mobile phone and cash Kshs. 900/=.

Later, some clothes were recovered and a suspect was arrested.

George Ouma (PW 4), a milk vendor at Kamakowa – Kondele was sometime in the month of August 2005 in the course of his chore when a person he had previously known approached and offered to sell to him a mobile phone. The person was his neighbour whom he knew as "Sanjay" and who told him that his wife had a problem and had to be taken to hospital. Sanjay then borrowed Kshs. 1000/= from him and left his phone behind as security.

On the same day, he (PW 4) met the complainant who claimed that the mobile phone belonged to her. They both went to police station. He recorded his statement and gave necessary information. Later he was informed by the police that Sanjay had been arrested. He identified him as the appellant and the person who gave him the stolen phone.

Cpl. Richard (PW5) of Obunga Police Post was with Otieno (PW 2) when he was alerted of the presence of a robbery suspect. He acted quickly and arrested the suspect who was the appellant. A stolen mobile phone allegedly sold by the appellant was later recovered including some clothes found in a latrine. The appellant was subsequently charged with the present offence.

Pursuant to the foregoing evidence by the prosecution, the appellant was placed on his defence. He elected to give an unsworn statement without calling any witness.

He said that he was an artisan and on the 10th August 2005 at around 2.30 p.m was arrested by two police officers while drunk. He was later taken to Central Police Station where he stayed for two days before being taken to court. He denied the charge and contended that he did not commit the alleged robbery.

The learned trial magistrate considered the defence and the prosecution case and concluded that:-

"**The robbery occurred during the night of 2nd and 3rd August 2005.**

The cell phone was received on the 4-8-2005 from PW 4. It was PW 4's unbreakable (sic) evidence that the phone was given to him by the accused.

The accused in his defence has not been able to discredit or rebut any of the prosecution evidence. The prosecution evidence is candid and strongly implicates the accused to the said offence.

I am convinced and satisfied the case has been proved beyond reasonable doubt. I find the accused liable as charged and shall convict him accordingly".

Grounds two (2) to six (6) of the amended petition of appeal are an attack on the findings of the learned trial magistrate.

Mr. Odeny, contended that the trial magistrate relied on circumstantial evidence as there was no evidence of identification by the complainant. However, the stolen phone was in possession of PW 4 who was arrested and released. Mr. Odeny stated that the appellant was not known to PW 1 and PW 5 and that PW 2 saw somebody staggering and recognized him as Sanjay, a person wanted for robbery. He (PW 2) did not link the appellant to the offence.

Mr. Odeny further stated that the trial magistrate said that the evidence of PW 4 was "unbreakable" yet did not consider that he (PW 4) had been arrested for the offence.

Mr. Odeny submitted that the person who allegedly left the phone as security did not testify and that PW 4 ought to have been charged but instead gave an innocent person away such that his evidence was unsafe to act upon in the absence of independent corroboration.

Mr. Odeny contended that the charge should not have been preferred against the appellant and that the doctrine of recent possession did not attach to him. He also contended that the investigating officer did not testify and that there was no proof by way of a P3 form that PW1 and PW 3 were assaulted. He beseeched this court to allow the appeal.

On his part, the learned Senior Principal State Counsel contended that the appellant was convicted on the basis of the doctrine of recent possession and that PW 4 gave an explanation of how he came by the phone and this led to the arrest of the appellant.

The learned State Counsel further contended that the evidence of PW 4 remained "unbreakable" in cross-examination and that the conviction of the appellant was not unsafe.

Having considered the foregoing arguments and contentions in the light of the evidence adduced in the trial court, we are satisfied that the offence of robbery with violence was committed against the complainant on that material night. The necessary ingredients of the charge were well laid by the prosecution in terms of the decision in the case of **Johana Ndungu –VS- Republic Criminal Appeal No. 116 of 1995 (unreported).**

The offenders were in a group of three people and were armed with offensive weapons. This was sufficient evidence, with or without proof of assault, to establish an offence of robbery with violence.

In any event, the complainant (PW 1) and her mother (PW 3) clearly stated that they were beaten up by the offenders prior to being robbed of their property.

As to the identification of the appellant being one of the robbers, the learned trial magistrate correctly observed that there was no evidence of identification at the scene. Both the complainant and her mother who were the victims of the offence were unable to identify any of the offenders due to the existing unfavourable conditions. It was dark at the time.

The learned trial magistrate relied on the evidence of the milk vendor (PW 4) to convict the appellant on the strength of circumstantial evidence based on the doctrine of recent possession.

The learned trial magistrate believed the evidence of PW 4 as compared to that by the appellant and held that it was "unbreakable". We cannot purport to doubt the findings of the learned trial magistrate on credibility knowing that he had the opportunity to see and hear the witnesses.

Consequently, we would also hold that the complainant's stolen phone was found with PW 4 a day after the robbery. He gave an explanation to the police of how he came by the same. He showed that the phone came into his possession in one way or the other through the appellant whom he had previously know by his nickname "Sanjay" who had been his neighbour.

The appellant was therefore in recent possession of the stolen phone a few hours after it had been stolen from the complainant and before he handed it over to PW 4.

There was no indication as implied by the appellant's learned counsel that the phone as was left with any other person other than PW 4.

The identification of the phone belonging to the complainant was not disputed.

The appellant merely denied the offence and made no attempt whatsoever to give a reasonable explanation of how he came into possession of a stolen phone.

This was unlike PW 4 who gave a solid explanation which led to the arrest of the appellant. PW 4 could not in our view be treated as an accomplice even if he was arrested and released by the police.

It is common knowledge that in the course of investigations the police may at times arrest innocent persons and treat them as suspects unless otherwise.

The evidence by **Cpl. Richard (PW 5)** clearly implied that he was both the arresting and investigating officer in this case.

We are satisfied that the appellant was convicted on sound evidence based on the doctrine of recent possession which linked him to the offence.

Grounds two (2) to six (6) of the grounds of appeal are unmerited and unsustainable.

Ground one is based on alleged violation of appellant's constitutional rights in that the trial was conducted in a language not understood by the appellant.

Mr. Odeny contended that although the plea was read in the "dholuo" language, the record of the trial court does not show the language which was used thereafter and although the appellant participated in the trial he was not accorded a fair hearing as he could not comprehend the entire trial.

The learned State Counsel conceded that the trial magistrate did not indicate the language used during the trial but there was an interpreter whose duty was to interpret for the benefit of the appellant.

The learned State Counsel further contended that there is no demonstration of the fact that the appellant did not understand the proceedings and that he clearly participated in the proceedings such that there was no miscarriage of justice.

We agree that the record of the trial court shows that the plea was taken in the "dholuo" language but there is no indication of the language used during the trial.

It is true that throughout the trial there was always a court clerk to interpret the proceedings in a language understood by the accused. We do not want to believe that the court clerk was there like a statue and functionless. He had a job to do and we believe that he/she performed his job otherwise the trial would not have reached the stage where the appellant was put on his defence and informed of his rights thereby electing to make an unsworn statement in his defence.

We are of the view that the appellant understood the proceedings and participated in them readily and willingly. It cannot therefore be said that he did not comprehend the entire trial so as to occasion a miscarriage of justice.

Ground one of the appeal is also unmerited and unsustainable.

In the end result, the appeal must and is hereby dismissed.

[Delivered and Signed at Kisumu this 21st day of July 2009].

J.W. Mwera **J.R. Karanja**

JUDGE **JUDGE**

J.R.K/va