



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 382 OF 2001

**SOLOMON LOKWAYI LOBUIN ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT OF THE COURT**

The appellant, **Solomon Lokwayi Lobuin** was charged before the Chief Magistrate's court at Nakuru with the offence of **robbery with violence contrary to Section 296(2) of the Penal Code**. The appellant also faced an alternative charge of **handling stolen property contrary to Section 322(2) of the Penal Code**.

The particulars of the offence were that on the night of 13<sup>th</sup> and 14<sup>th</sup> day of January 2001 at Rumwe Farm, Njoro in Nakuru District, of the Rift Valley Province jointly with others not before court being armed with dangerous weapons namely; rungus, pangas, and iron bars, robbed **James Ndungu Karanja** of a mobile telephone M.E No.33203936208787998 make Alcatel and one National Radio cassette model RX300 all valued at Kshs.9,100/- and at or immediately before or immediately after the time of such robbery used actual violence to the said James Ndungu Karanja.

The particulars of the alternative charge were that on the 30<sup>th</sup> day of May 2001 at Industrial estate Njoro in Nakuru District of the Rift Valley Province otherwise than in the course of stealing dishonestly retained one mobile telephone M.E No.33203936208787998 knowing or having reasons to believe them to be stolen goods.

The appellant pleaded not guilty to those charges and after a full trial, the learned Senior Principal Magistrate found the appellant guilty on the main count, convicted and sentenced him to the mandatory death sentence.

The appellant being dissatisfied with the conviction and sentence has appealed to this court and relied on three principle grounds of appeal.

Ø *Firstly, the appellants complained that the trial Magistrate erred by relying on uncorroborated and contradictory evidence to wit the description of the mobile telephone number.*

Ø *The prosecution failed to produce a vital witness linking the robbery of the mobile telephone which was allegedly discovered several months after the robbery with the appellant.*

Ø *He complained that there was no evidence to prove the ownership of the mobile telephone nor was there an inventory to show that the mobile telephone was recovered in his house.*

During the hearing of this appeal, Mr. Koech the learned Senior State Counsel, conceded to the appeal. He submitted that there was insufficient evidence to link the appellant with the offence of robbery with violence. However, he urged the court to find that there was sufficient evidence to support the alternative count of handling stolen property. He contended that the mobile telephone was recovered in the house of the appellant, and there was enough evidence by James Ndungu Karanja, PW 1 who produced a payment receipt for the purchase of the subject mobile telephone. According to Mr. Koech, the evidence of PW 1 was corroborated by that of P.C Joseph Ndwiga PW2 who testified of how he recovered the mobile telephone in the house of the appellant.

The summary of the evidence that led to the conviction of the appellant can be stated as follows: -

On the 14th January 2001, at about 12.15 a.m., it was the prosecution's case that PW 1 who lives at Njoro in Nakuru was a victim of robbery. While he was in his house with his wife, a group of about ten people violently broke into his house while armed with crude weapons and stole a National radio and a mobile telephone. PW 1 screamed and neighbors came to his rescue but the robbers managed to escape. He reported the matter to the Njoro police station. He was called several months later and informed that the mobile telephone which had been robbed from him had been recovered.

PW 2, who received the report from PW 1, told the court that in the course of investigation of another robbery on the night 29<sup>th</sup> May 2001, he received information about a gang of robbers residing in the area who were terrorizing residents. Armed with that information, he visited the house of the appellant in the Industrial area in company of four other police officers and arrested the appellant together with three other persons who were charged with the appellant before the Lower Court but were acquitted. He searched the appellant's house and recovered the mobile telephone whose number was the same as one of the items that were recorded as stolen by PW 1. He therefore called the PW 1 in the station who identified the mobile telephone to be his. It is on this basis he charged the appellant who was arraigned before the trial court.

The evidence of P.C John Orina, PW 3 is similar in all material aspects with that of PW 2. That is the evidence that led to the conviction and sentence of the appellant.

We have evaluated and reconsidered the evidence as we should be the first appellate court and we are in agreement with the submission by the learned State Counsel that there was no evidence to link the appellant with the offence of robbery with violence which occurred more than four months prior to the arrest of the appellant and recovery of the item stolen during the robbery. We are of the view that since there was no evidence of identification by the complainant the doctrine of recent possession cannot be applied in the circumstances of the present case to connect the appellant to the robbery. Taking into consideration the totality of the facts and all the circumstances under which the said mobile telephone was recovered by PW 2 and PW 3 and the evidence presented to the trial court, we are satisfied that there is no evidence in our view to sustain a conviction of the appellant on the charge of robbery with violence.

Accordingly we quash the conviction and set aside the sentence imposed in respect of the first count.

On the issue of whether this court should consider substituting the conviction with that of handling stolen property, we are satisfied that there is sufficient evidence to support the conviction of the alternative count. We are of the view that the circumstances under which the mobile phone was found in the possession of the appellant suggests that he was aware that he was handling stolen property. The explanation given by the appellant of how he came to be in possession of the said mobile phone was not satisfactory. We therefore convict the appellant on the alternative charge of handling stolen property contrary to **Section 322(2) of the Penal Code**.

On sentence, we have put into consideration that the fact that the appellant has been in lawful custody since the 11<sup>th</sup> of June 2001 when he was first arrested and arraigned before the trial Magistrate's court. We are of the view that the period that he has been in lawful custody is sufficient punishment for him. His sentence is therefore commuted to the period already served. He is ordered set at liberty and released from prison unless otherwise lawfully held.

**Judgment and signed on 23<sup>rd</sup> March 2006.**

**MARTHA KOOME**

**JUDGE**

**L. KIMARU**

**JUDGE**