



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL CASE NO. 34 OF 2019

MUTUA MULI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from Original Conviction and Sentence in Criminal Case No. 52 of 2013

delivered on 20th June 2019, by Hon. J. Munguti-PM at Kitui CM's Court

J U D G E M E N T

1. Mutua Muli Alias Katoo the Appellant herein, was charged with two counts of robbery with violence Contrary to **Section 296(2) of the Penal Code** vide Kitui Chief Magistrate's Court Criminal Case Number 52 of 2013. The particulars were as follows: -

a) In Count I-The particulars were that on 29th November, 2012 at [particulars withheld] Market, Kitui Township, he jointly with others not before court while armed dangerous weapons namely pangas, rungas and axes, robbed EKM of cash Kshs. 1,000, one mobile phone make Samsung valued at Kshs. 3,500 and at or immediately after such robbery threatened to use actual violence to the said **EKM**.

b) In Count II- The particulars are that on the same date and place, he jointly with others not before court, while armed with dangerous weapon namely pangas, rungas and axes robbed Kyalo Kilonzi of Kshs. 3,000, one mobile phone make LG valued at Kshs, 3,000 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Kyalo Kilonzi.

2. He was in addition to the above counts charged with two counts of gang rape, Contrary to **Section 10 of the Sexual Offence Act Number 3 of 2006** with the particulars that he gang raped EKM during the same incident. He was however not found guilty and was acquitted for the offence of gang rape. He was found guilty in the first two counts and convicted. He was sentenced to serve 25 years on both counts but the sentence was ordered to run concurrently. He felt aggrieved and preferred this appeal raising 7 grounds.

3. Before I consider the grounds of appeal, this court will briefly highlight the evidence presented at the trial court and the nature of the Prosecution's Case.

4. The Prosecution's case against the Appellant is hinged on indirect evidence and the doctrine of recent possession. The robbery incident occurred on the night of 28th November, 2012 and it affected two victim EKM (Prosecution Witness 1) and Kyalo Kilonzi (Prosecution Witness 2). The two victims were the complainants in the trial and both were violently robbed at Kalundu area within Kitui Township.

5. Going by the evidence tendered by EKM in brief is that, she was asleep in her house when her door was violently knocked by someone demanding that she opens the door. According to her, when she opened, 4 men who balaclava over their faces forcefully entered and demanded money. They ransacked the house and took Kshs. 2,000, in cash and her hand bag inside of which were her two mobile phones of Nokia make besides, Samsung make valued at Kshs. 3,500 which also had Kshs. 11,000 in M-pesa deposit. The witness further told the trial court that the attackers threatened to harm her with a panga if she dared scream and that one of them forcefully held her hand and led her outside the perimeter wall where he raped her and left. She was not able to identify any of the attackers as they had concealed/covered their faces with balaclava.

6. Prosecution Witness 2 (Kyalo Kilonzi) who also lived next to Prosecution Witness 1 testified that he was also violently robbed of Kshs. 3,000 and an LG Phone valued at Kshs. 2,400. The witness further added that he could not recognize the assailants because they had concealed their faces but one was armed with an axe while the other had a bow and arrows.

7. The evidence that connected the Appellant with the crime is the evidence of Paul Mutune Masumba (Prosecution Witness 3) who stated that the Appellant whom he knew approached him in Kitui town where he is a vegetable vendor. He testified that the Appellant went to him in the month of November, 2012 (around the end of the month) and requested him to buy a mobile phone from him which was of LG make at Kshs. 1,200. He added that the Appellant appeared to be in financial difficulties and that he offered to buy the said phone at Kshs. 900, which he gladly accepted and that he paid him Kshs. 600 and he promised to pay balance of Kshs. 300 later. After purchasing the phone, Prosecution Witness 3 sent the phone to his wife who was arrested two months later. He testified that the Police arrested his wife who led them to him and that he explained to the Police on how he acquired the phone from the Appellant. He added that, when the Appellant sold the phone to him, he was accompanied by a co-accused person whom he was not familiar with. He added that the Appellant whom he knew as “**Katoo**” was later brought to the Police Station and he identified him as the one who had sold the phone to him. He knew him well as the husband of one Mwikali who was also involved in vegetable selling business.

8. Corporal Rachel Muinde (Prosecution Witness 4), the Investigation Officer in the case testified and brought the connection between the robbed Samsung belonging to Prosecution Witness 1 and the appellant’s co-accused. The LG phone belonging to the second complainant (Prosecution Witness 2) was connected with Appellant’s herein. The Investigations Officer testified that she got assistance from a mobile phone service provider (Safaricom) and was able to locate where and who had the respective mobile phones and the persons caught with the said phones in turn led them to the Appellant and co-accused respectively.

9. A Clinical Officer (Prosecution Witness 5) called to testify, corroborated the evidence of Prosecution Witness 1 that she had been raped in the process. The medical expert added that the 1st Complainant (Prosecution Witness 1) was raped and infected with a sexually transmitted disease.

10. When placed on his defence, the Appellant denied committing the offence and stated Prosecution Witness 3 (Mutune Masumba) was the one who should have been in the dock answering the charges. He maintained that he did not sell the phone to the said Paul Mutune (Prosecution Witness 3) arguing that, there was no agreement of sale to prove the transaction. He also faulted Prosecution Witness 2 for lying to court and that no identification parade was carried out to pick him out.

11. The trial court evaluated the evidence tendered and found that there was sufficient evidence tendered that proved the 1st count of robbery with violence and proceeded to convict the Appellant and his co-accused sentencing them to serve 25 years each in jail.

The 3rd count of gang rape was not proved according to the trial court and acquitted both the Appellant and his Co-accused.

12. Aggrieved by both conviction sentence, the Appellant filed this appeal and raised the following eight grounds namely: -

- (i) That the learned Magistrate erred in law and fact by finding that, the Prosecution proved its case beyond reasonable doubt.
- (ii) That the trial Magistrate erred by convicting the Appellant when there was no enough evidence to connect the Appellant with the commission of the offence.
- (iii) That the learned trial Magistrate erred by basing the reasons for conviction on inconsistent and unsubstantiated evidence of possession of stolen phone yet in his view, the recovery was not proved beyond reasonable doubt.
- (iv) That there was no identification parade conducted in accordance with the law to positively identify the Appellant.
- (v) That the trial court erred by convicting the Appellant on the wrong impression that he was known as “*Katoo*” without any evidence that he was known by that name.
- (vi) That the person who committed the offence was Katoo and not the Appellant.
- (vii) That the trial Magistrate erred by ignoring his defence.
- (viii) That the trial court erred by shifting the burden of proof to him.

13. In his written submissions filed on 2nd November, 2020, the Appellant submitted that the charge sheet was defective and at variance with the evidence tendered. This new ground is however incompetently raised without leave of this court as envisaged under **Section 350 (2) (b) (iv) of the Criminal Procedure Code**. Apart from want of leave, I would still have found no merit in this ground as the evidence tendered were in tandem with the charge sheet presented against the Appellant and his co-accused at the trial.

14. The Appellant further submits that, the evidence tendered against him were unsubstantiated and contends that conviction could not lie. He relies on the decision of **Ramadhan Ahmed versus Republic (1995) E.A.C.A** to support his contention. He avers that, there was no serial numbers or IMEI Numbers of the phones recovered. He contends that the phones produced in evidence had no mark to show that the phones are the same phones belonging to the complainants.

15. The Appellant submits that the Prosecution’s case was not proved and that the circumstantial evidence relied upon to convict, was contradictory.

16. On the other hand, the Respondent through the Office of Director of Public Prosecution, has opposed this appeal contending that its case against the Appellant was proved at the trial. It is the Respondents case that all the ingredients for the robbery with violence were proved.

17. The prosecutions further submit that the evidence adduced linked the Appellant to the offence under the doctrine of recent possession and rely on the case of **David Mugo Kimunge versus Republic (2015) eKLR**. In that case, the court of Appeal decided that a court can rely on the doctrine of recent possession as a basis for conviction so long as the possession is positively proved. The Respondent contends that it proved all the elements of the doctrine of recent possession, pointing out that the LG Mobile phone was found in the custody of Paul Mutune Musumba's wife who was able to link it to the Appellant.

It avers that, possession was linked to the Appellant and the same fitted the definition under **Section 4(a) of the Penal Code**.

18. The State further submits that, the trial court relied on the evidence of Prosecution Witness 2 who provided the Investigation Officer with IMEI number of his LG mobile phone and the Investigation Officer used the IMEI details to monitor and track the phone and later recovered it. The Respondent also points out that, the stolen phone had a unique feature that the owner used to positively identify it.

19. The state contends that there was no need for Identification Parade as the Complainants were not able to see their attackers.

20. It asserts, the Appellant was positively identified by Prosecution Witness 3 as Katoo and as the person who sold him the LG mobile phone. It faults the Appellant's contention that he is not Katoo stating that the same is an afterthought.

21. This court has considered this appeal and the opposition mounted by Office of the Director of Public Prosecution for the Respondent. The issues raised by this appeal can be collapsed into one which is whether the Prosecution's case at the trial was proved beyond doubt.

22. The Appellant's main argument in this appeal is that the prosecution did not prove its case beyond reasonable doubt as according to him the prosecution did not indicate the serial numbers of the stolen phones and that because Identification parade was not conducted, identification was not established. He also claims that the ingredients of the offence upon which he was convicted were not proved.

23. This court will begin with the ingredients of the offence. The provision of **Section 296 (2) of the Penal Code** lists the ingredients are as follows namely: -

a) The offender must be armed with any dangerous or offensive weapon or instrument; or

b) The offender must be in the company of one or more other person or persons or;

c) 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.

24. Looking at the facts as presented at the trial, as per the evidence of Prosecution Witness 1 (1st Complainant) and Prosecution Witness 2 (2nd Complainant), it is clear that all the above ingredients were established. The law requires any of the elements listed to be proved for conviction to lie. On the night of 29th November, 2012, at Kalundu within Kitui town, EKM (Prosecution Witness 1) was asleep when she was woken up by a gang who demanded that the door be opened.

As she opened, the four assailants forcefully entered and demanded money before proceeding to grab her handbag which had her 2 phones. One of the gang member dragged her outside and forcefully raped her after threatening her with dire consequences. Prosecution Witness 2 was also robbed almost at the same time by the same gang. The testimonies of Prosecution Witness 1 and Prosecution Witness 2 were clear and confirmed that the two were robbed of their mobile phones and money by a gang of 4, armed with pangas, bow, and arrows. Force and threats were used against both the complainants. Prosecution Witness 1 suffered more, she was raped by one of the robbers whom she unfortunately could not identify because all of them had concealed their faces by wearing balaclava over their heads.

25. It is the evidence of Prosecution Witness 3 that connected the Appellant to the offence of robbery with violence because the Appellant was well known to him as "Katoo". He offered an LG Phone, the same phone stolen from Prosecution Witness 2 during the robbery and Prosecution Witness 3 bought it at agreed price of Kshs. 1,200. He had paid Kshs. 600 to the Appellant by the time he was arrested. I am not persuaded by the Appellant insistence that because there was no written agreement, the issue of sale was not established. This court takes judicial notice of the fact that, in ordinary circumstances where a 2nd hand mobile is being sold, it is rare for a prospective buyer to demand for a written agreement of sale especially given the account given by Prosecution Witness 2 regarding how the Appellant approached him. The witness told the trial court that the Appellant explained to him that he was selling the phone for a dire need which was the need of some medication. The two haggled over the price and eventually reached at an agreed price of Kshs. 900 for the LG phone. The Appellant was paid Kshs. 600 and was to be paid the balance of Kshs. 300 later which of course never came to pass.

26. The LG phone was positively identified by Prosecution Witness 2 as he stated this in his evidence;

“..... was told a phone was found and that check if it was my phone. I saw the phone and it was my phone. I cannot recall IMEI number but my phone had a gadget at the back which I had stuck super glue and the super glue mark was clearly visible. I had also marked part of the battery with a red pen. This is the phone (Prosecution Exhibit 1).” The phone tendered in court had the said feature at the back.

27. This court finds that Prosecution Witness 2 positively identified his phone which was stolen from him during the robbery incident. Prosecution Witness 3 also identified the phone sold to him by the Appellant with the same special feature or identification mark which was

a scratch at to back of the phone. The “scratch” of course was the remains of super glue applied on it by the owner Prosecution Witness 2. This court finds that the evidence of Prosecution Witness 4 the Investigation Officer connected the stolen LG phone to the Appellant following the leads provided by Safaricom, and she was able to track the LG Phone to the wife of Prosecution Witness 3 who in turn implicated the Appellant.

28. The Samsung phone belonging to the Prosecution Witness 1 was also tracked and traced to the co accused of the Appellant. That co-accused was positively identified in court by Prosecution Witness 3 who stated that though he did not know his name he was the same person who was with the Appellant when the Appellant approached him with a view to selling him a LG phone. This court finds that the co-accused of the Appellant found to be serving other sentences related to other robberies committee elsewhere which really is a pointer to the kind of person he is.

29. This court finds that, the Appellant possessed the stolen phone LG make on a date stated to be end of November 2019 by Prosecution Witness 3. The robbery incident occurred on 29th November, 2012, which was actually end of November 2012. The doctrine of recent possession therefore applied in the circumstances because, the Appellant could not give a satisfactory account of how he came to possess the stolen phone and how comes that he was offering it for sale to Prosecution Witness 3. In the case of **David Mugo Koinange Versus Republic (2015) eKLR** the court of Appeal stated as follows: -

“Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.

Firstly, the trier of fact was positive that the property was in possession of the appellant. That included the property actually recovered from his house and the property he had admittedly given to Ann (PW7). Under the Penal code, ‘possession’ is defined as either actual or constructive, thus:

(a) “be in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them”

This court finds that the Appellant was positively identified as the person who was in possession of the stolen LG phone. Prosecution Witness 3 did not have any grudge with him so as to be motivated to lie against him. It is quite obvious that the said witness, Prosecution Witness 3 was so crucial to the Prosecution’s case that it is no wonder the Appellant has a bone to pick with him which he has expressed in his submissions by suggesting that he should be held responsible for the robbery incident.

30. I find that the ID parade was not necessary to be conducted as the said witness (Prosecution Witness 3) knew the Appellant well as “Kato” and a husband to his colleague who was also a vegetable vendor like him. He was well known to the witness albeit with alias name of “Kato” and the fact was well established and proved beyond reasonable doubt. I am also not persuaded that the defence was not considered. The trial court duly considered his defence but found the prosecution’s case overwhelming against him.

31. The only downside in the prosecution’s case is their failure to carry out comprehensive investigation in regard to gang rape. This was despite the fact that a pair of trousers and soiled pant containing a smear of sperms worn by the victim was recovered. The victim reported the incident immediately and was examined a few hours after the rape ordeal. It only required a diligent officer to carry out forensic (DNA) test that could certainly pin one of the suspect and enable the victim to get justice which unfortunately was not forthcoming due to bungled investigation. The Investigation Officer really should have done more but that notwithstanding this court finds that at least the count on robbery with violence was well investigated with the Investigation Officer was able to get print out from Safaricom and tracking which enabled her to arrest the Appellant and his co-accused. I am satisfied that the Prosecution’s case against the Appellant in respect to the robbery with violence (Count II) was proved to the required standard and it was safe for the trial court to convict the Appellant and his co-accused based on the strength of that evidence.

In the end, this court finds no merit in this appeal. The same is disallowed. Both the conviction & Sentence are upheld.

Dated, Signed and Delivered at Kitui this 4th day of May, 2021.

HON. JUSTICE R. K. LIMO

JUDGE