



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 36 OF 2016

MORIS KIRUI NDIWA.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. H. Barasa – PM dated 23rd February 2014 in the original Eldoret Chief Magistrate’s Court Criminal Case No. 4179 of 2013}

JUDGEMENT

The appellant was the 1st accused in a case where he and his co-accused were charged on the main charge with robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge were that on 27th August 2013 at Kimumu within Uasin Gishu County jointly with others not before court while armed with pangas, rungu and iron bars robbed Maureen Stella Olunga of two mobile phones make Nokia C2 and Huawei Ascend W1, 6kg K-gas cylinder, a pair of spectacles, cash Kshs. 54000/=, 2 bunches of keys and personal documents all valued at Kshs. 54,899/= and immediately before the time of such robbery used actual violence to the said Maureen Stella Olunga.

The appellant faced a separate alternative charge of handling stolen property contrary to Section 322 (2) of the Penal Code whose particulars were that on 13th September 2013 at Kisumu Ndogo – Langas within Uasin Gishu County, otherwise than in the course of stealing he dishonestly retained one mobile phone Nokia C2 knowing or having reason to believe it to be stolen.

The appellant pleaded not guilty to both charges but upon hearing the case the trial Magistrate found him guilty on the main charge based on the doctrine of recent possession, convicted him and sentenced him to death and being aggrieved by that conviction and the sentence he preferred this appeal.

The appeal is premised on the three grounds set out in the amended grounds of appeal as follows: -

- “1. THAT, the trial Magistrate erred in both law and facts by convicting me while relying on doctrine of recent possession not proved beyond reasonable doubt and does not meet the threshold.**
- 2. THAT, the trial Magistrate erred in both law and facts by convicting me without considering that proof of ownership of the alleged property was not established.**
- 3. THAT, may the Honourable court observe that death penalty was declared unconstitutional by Supreme Court.”**

By the appeal he prays that the conviction be quashed, the sentence be set aside and he be set at liberty.

Briefly the facts of this case were that on 27th August 2013 shortly after 11pm the complainant Maureen Stella Olunga (Pw1), was asleep in her house at Kimumu when she heard a bang on the door. She started screaming but was warned not to do so by a male voice whereupon three men who were at the door broke it and entered the house. One of the men had a mask on his face but the others did not. As the electric lights in the house were on, she could see the men were armed with iron bars and a rungu. After ransacking the house they ordered her to get into bed and left with the items listed in the charge sheet. Ten days later on 12th September 2013 police officer Samuel Mutua (Pw2) acting on a tip off proceeded to the house of the appellant and allegedly recovered a Nokia C2 phone which he had been tipped the appellant was selling. The appellant also allegedly led them to a certain house where a K-gas cylinder also stolen from the complainant’s house was recovered and then to his co-accused’s house (now deceased) where another of the stolen items a Huawei phone was recovered. The two phones are said to have been positively identified by the complainant during the trial and the relevant documents of ownership produced in evidence. The rest of the items stolen during the incident were however not recovered.

In his defence the appellant testified that on 12th September 2013 he was picked up at a drinking den by four police officers along with another man and a woman and taken to Langas Police Station. At around 2am he was called and put in a police vehicle and taken to Kapsoya Police Station. He stated that later the people he had been arrested with and those he found at the station were released. He was asked if he had a cash bail of 20,000/= and when he protested the investigating officer said he was strong headed and he would not assist him. on 16th September 2013 he was arraigned in court. He stated that he was shocked and he did not understand what was going on. He contended that the person who admitted in a statement to have been found with the phone did not go to court to testify and the investigating officer alleged the man had shifted and changed his phone number while the man found with the gas cylinder was said to have been threatened and so did not attend court. He contended that he could not have threatened the witness as having been in remand he had no access to a phone. He contended that the investigating officer simply refused to call the witnesses.

The appellant canvassed the appeal through written submissions in which he argued each ground while Ms. Busienei Learned Prosecution Counsel who vehemently opposed the appeal submitted orally and relied on the Court of Appeal decision in the case of **David Mugo Kimunge v Republic [2015] eKLR**.

I have considered the submissions by both sides carefully and also as is my duty reconsidered and evaluated the evidence in the trial court so as to arrive at my own independent conclusion. I have done so bearing in mind that I did not personally see or hear the witnesses – see **Okeno v Republic [1972] EA 32**.

From the evidence there is no doubt a robbery occurred in the house of the complainant on the material night. Three men who were armed with offensive weapons namely iron bars and a panga broke into her house while she was sleeping and threatened her with violence if she continued screaming. They then ransacked her house and took her two mobile phones, spectacles, a gas cylinder and handbag which contained Kshs. 4,000/= and personal documents. The fact that the attackers were more than one, that they were armed and that during the incident they threatened her with actual violence is more than sufficient to prove the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

The appellant vehemently denied being involved in the robbery. It is my finding that there was indeed no direct evidence to connect him to the robbery. The complainant testified twice in the matter and it is apparent she was not certain that the appellant was one of the attackers. When she testified before Hon. Njagi on 14th October 2014 she identified the appellant as the attacker who was of medium height and was sure that she saw him during the attack. However, when she testified again before Hon. Barasa on 31st August 2015 her evidence was that the appellant **“looks like one of the men I saw at my house on that day. He looks like the man who took my spectacles.”** The words **“looks like”** connotes doubt. Indeed, Sgt. Phillip Etyang (Pw3), the investigating officer, candidly told the trial court that the complainant told him that she did not identify her attackers. Be that as it may, I am satisfied that the recovery of the two phones stolen from the complainant during the robbery connects the appellant to the offence. I find it a fact from the evidence that the Nokia C2 phone was recovered from the person of the appellant and the Huawei phone from his accomplice now deceased with his collaboration. Evidence of their recovery was given by Pw4 whose evidence was corroborated in all material particulars by Pw5 who was present. The two officers did not know the appellant before and therefore had no reason to lie against him. I believed them and found their evidence credible and not shaken at all by the testimony of the appellant. The phones were positively identified by the complainant. She produced the boxes in which she had bought the phones and when the IME numbers on the boxes and the phones were compared they matched. The fact that the appellant was found in possession of one of the phones and also led to the recovery of the second phone barely two weeks after the robbery and failed to give a plausible explanation at all of how he came by the phones is proof of recent possession. The evidence in this case falls within the elements of the doctrine of recent possession as restated by the Court of Appeal in the case of **David Mugo Kimunge v Republic [2015] eKLR** and points to the guilt of the appellant beyond reasonable doubt. I am therefore satisfied that he was properly convicted and that his appeal on conviction has no merit.

On the sentence the appellant’s contention that the Supreme Court rendered the death penalty unconstitutional is misconceived. In the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** what the Supreme Court declared unconstitutional was the mandatory nature of the death sentence in murder cases. That decision has however been cascaded to other offences where the death sentence is mandatory and indeed where minimum sentences are prescribed by the law such as in sexual offences. The courts are now left to determine the appropriate sentence depending on inter alia the nature, gravity, circumstances of the case and the antecedents of the offender.

In this case, the attackers did not use actual violence although they were armed and it is apparent that the appellant had no antecedents and given that he too is entitled to equal benefit of the law as laid in the **Francis Karioko Muruatetu & another v Republic (supra)** case, I do consider that the death sentence was excessive. Accordingly, **I hereby allow the appeal on the sentence and set aside the sentence of death and in its place substitute it with a sentence of imprisonment for fifteen (15) years from the date he was sentenced by the trial court.** In arriving at the sentence of fifteen (15) years, I have taken into account the period spent in remand custody. The conviction is otherwise upheld. It is so ordered.

Signed and dated this 15th day of January 2020.

E. N. MAINA

JUDGE

Dated and delivered in Eldoret this 21st day of January 2020.

H. A. OMONDI

JUDGE