



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL REVISION NO. 1 OF 2017

(From Original Conviction and sentence in Criminal Case No. 168 of 2014 of the Principal Magistrate's Court at Gichugu–Hon. A. N. MAKAU -SRM.

GIDEON GITAU MUTHUA 1ST APPLICANT

PETERSON MWENDIA NGARI2ND APPLICANT

NEWTON IRERI KANGETHE3RD APPLICANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The appellants Gideon Gitau Muthua (1st appellant), Peterson Mwendia Ngari (2nd Appellant), and Newton Ileri Kangethe (3rd Appellant) filed this appeals which were consolidated. When the matter came up for direction, the 2nd appellant Peterson Mwendia Ngari objected to the appeal proceeding before this court. He was directed to file a formal application. As of today the application has not been filed. In the circumstances this Judgment will relate to the appeals filed by 1st and 3rd appellants, that is Gideon Gitau Muthua and Newton Ileri Kangethe.

2. The appellants were convicted of the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** and were sentenced to death before the Senior Resident Magistrate at Gichugu.

3. The appellants were dissatisfied with both the conviction and sentence and filed the appeal. The 1st appellant Gideon Gitau Muthua filed Cr. Appeal No. 1/2017 and raised Eight grounds of appeal. The grounds are as follows:-

1. That the trial Magistrate erred in both law and facts by relying on shoddy investigations done by the prosecution side.

2. That the trial Magistrate erred in both law and facts by not considering that the testimonies tendered to establish the appellants mode of arrest was riddled with doubts and was not enough to sustain conviction.

3. That the trial Magistrate erred in both law and facts in retaining a finding of culpability on my side in a case wholly depended on circumstantial evidence without collaboration.

4. That the trial Magistrate erred in both law and facts by failing to appreciate that the prosecution had failed to prove its case to the standard required in law.

5. That the trial Magistrate erred in both law and facts in relying on insufficient and incredible evidence given by prosecution.

6. That the trial Magistrate erred in both law and facts by introducing matters not canvassed during trial

7. That the trial Magistrate erred in both law and facts by not considering that there was no communication data or any evidence that was produced in court to link me to the alleged robbery.

8. That the trial Magistrate erred in both law and facts by not putting into account my defence.

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

5. The 3rd appellant Newton Ileri Kangethe raised the following eight (8) grounds of appeal.

1. That the trial Magistrate erred in both law and facts by not considering I was not found in possession of the alleged stolen property.

2. That the trial Magistrate erred in both law and facts by not considering that I was not identified neither mentioned by the prosecution witnesses as one of the robbers who committed the offence.

3. That the trial Magistrate erred in both law and facts by not considering that I was arrested, apprehended at Gichugu Law court and I was acquitted under Section 87 (a) but later re-arrested and charged with the same offence and convicted.

4. That the trial Magistrate erred in both law and facts by not considering that my constitutional rights were violated by being kept in police cell for over 21 days without being produced in court.

5. That the trial Magistrate erred in both law and facts by not considering that the alleged phone that PW 13 alleged to have bought from me had no sale agreement neither a witness was produced in court to prove that PW-13- bought the phone from me.

6. That the trial Magistrate erred in both law and facts by not considering that it was PW-13- who was found in possession and usage of the alleged stolen phone.

7. That the trial Magistrate erred in both law and facts by not considering that there was no communication data or any evidence that was produced in court to link me to the alleged robbery.

8. That the trial Magistrate erred in both law and facts by not considering my defence without showing cogent reasons.

6. He prays that the appeal be allowed, the conviction be quashed, the sentence be set aside and he be set at liberty. The appeals were consolidated and directions were given that the appeal be canvassed by way of written submissions. The appellants filed their respective submissions. For the State submissions were filed by Geoffrey Obiri Assistant Director of Public Prosecutions.

7. I have considered the appeals. This being a first appeal, I am supposed to consider the evidence which

was tendered before the trial Magistrate, analysed it and evaluate if and come up with my own independent finding while bearing in mind that I had no chance to see the witnesses when they testified and leave room for that. This was the holding in **Okeno –v- R 1972 E.A 32** where it was stated:-

“An appellant on a first appeal is entitled to expect the evidence as a while to be submitted afresh and exhaustive examination. (see Padya –v- Republic (1957) EA 336) and to the appellate court own decision on the evidence.

The appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala –v- Republic, 1957 E.A 570) it is not the function of the 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and draw its own conclusion, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s finding should be supported. In doing so it must make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”(see peters –v- Sunday post (1958) E.A 424).

8. The facts of the case are that the appellants were charged with robbery with violence contrary to **Section 296 (2) of the Penal Code**. The offences were committed on the night of 25/2/2014 at Mukarara Sub-location Kabare Location in Kirinyaga County. On the material night Taercisius Mwaura Kanja (PW-1-) was in his house at about 9.00 Pm with his wife and child when they were attacked. The wife Grace Wandia who was killed by the robbers on that material night. As PW-1- and his family ate supper, some people knocked the door and entered. They claimed that they were sent to kill them. The men said they would spare them if they gave them what they wanted. They were armed with metal bars and sticks. There was hurricane lamp and PQ-1- could see the four men. The four intruders demanded money. They stole a mobile phone make Nokia and Motor cycle KMCS 180P. One person led the PW-1’s wife to the bedroom. He then returned with her to the sitting room.

9. One of the intruder ordered PW-1-, his wife and daughter to remove their clothes. PW-1- was hit on the head and lost consciousness. When he came to he realized he was bleeding heavily on the head. The wife was lying down on the floor with an injury on the head. PW-1- managed to call his neighbours with one of his phones which was not stolen. The neighbor found the door locked from outside. The neighbours took PW-1- to hospital. The wife had passed away. Police were informed.

10. Later on 23/3/14 PW-1- was told to go to Kianyaga Police Station as his phone had been recovered. PW-1- went to Kianyaga Police Station and was shown a mobile phone make Nokia. He identified it as his as he had a receipt for and the Serial number on the phone and the receipt were the same. He was also told to see if he could identify two suspects who police had arrested. He identified one of them from an identification parade who was the 1st appellant in this case. It transpired that a series of robberies were committed on that material night in three homesteads. The 1st robbery was committed in the homestead of Rosemary Wawira, between 7-8 Pm, 4th Count. They stole an axe, a slasher and a panga all valued at Kshs 1,000/-. They also robbed James Ileri Muchira, 3rd Count where they stole five mobile phones and cash Kshs 2,000/-.

11. In the course of investigations the police requested for data on the stole mobile phone. The 1st appellant Gideon Gitau Muthua had sold a mobile phone to Mary Wairimu Mageria (PW-5). The phone MFI-9 was stolen from the house of Ileri where Penina had taken it for charging by the 1st appellant had used the phone on 26/2/2014. This was captured on the mobile data, **Exhibit 35**. The 1st appellant was arrested. The phone was produced as **Exhibit -9-**. Police also recovered a mobile phone make Nokia N9. It was identified as one of the phones stolen from the house of Ileri, Exhibit 7a & b. It was identified by PW-3- (a) Eliud Bundi who had taken it for charging in the house of James Ileri. The phone MFI-9 and its case was identified by PW-5- Penina Muthoni Gichira who had taken it to the house of Ileri for charging.

12. The 3rd appellant Newton Ileri had sold a mobile phone to Joseph Njeru Gachanga (PW-12-) which was make Tecno, **Exhibit 4**. The phone was positively identified as the phone which was stolen from Grace Wandia – the wife of PW-1- who was killed during the robbery. The 3rd appellant was arrested.

Daniel Hamisi PW-17- who produced the mobile data confirmed that the phone belonged to the deceased Grace Wandia Mwaura and was later used by Joseph Njeru.

13. The appellants were then charged. Having considered the grounds of appeal, I find that the appellants raised similar grounds of appeal. I will therefore consider the grounds. As against the 1st appellant, he has stated that the evidence was riddled with doubts and the trial Magistrate relied on circumstantial evidence. These are captured in grounds 1-5. From the analysis of the evidence which was tendered before the trial Magistrate, the 1st appellant Gideon Mutua was convicted on sound evidence that he was in possession of a mobile phone which was stolen from the house of James Ileri Gichira, the complainant in the 3rd (iii) count. He had used this phone on 26/2/2014 which was later the following day after PW-1- was robbed and his wife killed. The testimony of PW-2- C.I.P Yegon demonstrated that the same people who robbed PW-1- had committed a series of robberies on the material night. The 1st appellant had two phones stolen from the home of James Ileri. Considering the evidence that 1st appellant had used the phone on 26/2/2014 so soon after the robbery, brings in the doctrine of recent possession. It is a doctrine which entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen properties in unexplained circumstances. This doctrine was summarized by the Court of Appeal in the case of **Eric Otieno Arum –v- Republic KSM C.A, Cr. Appeal No. 85/2005** where the court stated as follows:-

“In our view before the court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect. Secondly that the property is positively identified as the property of the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time as has been stated over and over again will depend on the easiness with which the stolen property can move from one person to the other.”

14. Where the prosecution has established the fact the person charged is expected, of course without shifting the burden of proof to offer an explanation on how he came to possess the good. However even without the accused offering an explanation when given an opportunity to do so, based on the facts of the case the court will draw an inference of guilt. The accused person bears evidential burden to offer a plausible and a reasonable explanation. This was stated by the Court of Appeal in **Paul Mwita Robi –v- Republic Kisumu Cr. Appeal 200/2008** where the court stated:-

“One an accused person is found in possession of a recently stolen property facts of how he came into possession of the recently stolen property is especially with in the knowledge of the accused and pursuant to the provision of Section 111 of the Evidence Act Cap 80, the accused has to discharge that burden.”

15. The inference of guilt from recent possession of stolen goods must be one based on the facts of the case.

16. I will now move to analyse the evidence which was tendered on the possession of the stolen goods(phones) by the 1st appellant. PW -20- P. C. Martin Mwalavu testified that on 3/4/2014 he recovered a mobile phone from Mary Warimu Mageria (PW-5-) belonging to one of the victims. It was Imei No. 862888-021633743. PW-5 led the Police (PW-20-) to arrest 1st appellant Gideon Gitau Muthua who had sold the phone to her. They also recovered another phone Nokia N9 with Imei No. 357053033063114 from 1st appellant. He PW-6- Mary Njoki Kuria also recovered from PW-6- Mary Njoki Kuria a phone make Nokia Imei- 356337052266091. This phone was given to PW-6- by PW-5-. PW-20- took the Identification Card of Mary Wairimu Mageria and that of 1st appellant. The evidence of PW-17- is important on recent possession. He is a Safaricom Law Enforcement and Liaison Officer with duties of processing call data records on request by law enforcement agencies undertaking investigations. PW-17 was requested vide a letter dated 27/2/2014 exhibit -16- to produce data for Imei: 356-337-052-26691(For Nokia for Penina Muthoni PW-10). PW-17- found that the initial number was 0706 – 511557 registered in the name of Penina Muthoni Gichira ID 4950332 which was in activation upto 25/2/2014 at

22.27 hours. The following day at around 08.55.07 there was activation by 0700-411-173 registered in the name of Gideon Muthua ID. No. 26089416 which made only two calls. This number registered in the name of the 1st appellant made two calls on the following day after it was robbed from James Ileri Gichira where it was taken by Penina (PW -10-) for charging. This is a clear indication that the 1st appellant had the stolen a few hours after it was stolen. Mary Wairimu Mageria testified that this phone was sold to him by the 1st appellant. PW-17- found that Mary Wairimu Mageria activated the mobile phone with number 0719-243-549 registered in the name of Mary Wairimu Mageria ID. No. 27651831 which was in activation until 26/2/2014. This is captured on **Exhibit 21** which shows clearly that the 1st appellant had the mobile phone on 26/2/14 which was so soon after it was stolen. To corroborate the fact that the 1st appellant participated in the robbery is that at the time of arrest 1st appellant had another phone, make N.9 which had been stolen from the home of James Ileri Gichira. This phone was positively identified by PW 3(a) Eliud Bundi Ngondi who testified that he had taken it to the home of James Ileri Gichira for charging **Exhibit 7(a) & (b)**. The 1st appellant signed an inventory **Exhibit 27** showing that the phone was recovered from him. The inventory shows that a sim card for Safaricom with line No. 0700-411-173 was recovered and was produced as **exhibit 36**. This Sim Card was used by the 1st appellant on 26/3/2014 to make two phones calls from the phone stolen from Penina (PW-10-) before it was sold to Mary Wairimu Mageria (PW-5-). PW-3- Eliud Bundi testified and identified the phone which was recovered from the 1st appellant as his.

17. The 1st appellant confirmed in his defence that his line was used in the phone of PW-1-, Page 169 Line 14-16. The defence is a mere denial and does not give a plausible explanation of how he came into the possession of the phone.

18. The trial Magistrate dismissed the defence of the 1st appellant, Page 202 Line 14-28.

19. I find that the conviction of the 1st appellant based on the possession of the stolen phone was proper. The trial Magistrate did find that Nokia N9 was recovered from 1st appellant but she seems to have ignored the evidence of PW-3- who testified that he had taken the phone to the house of James Ileri Gichira for charging.

20. There was sufficient evidence to convict the 1st appellant which the trial Magistrate relied on. There was data as testified by PW-17- to show that the 1st appellant was involved in the robbery. The trial Magistrate considered the defence of the 1st appellant. Grounds 7 & 8.

21. I have considered the submissions. I find that there was sufficient evidence upon which guilt of 1st appellant was inferred under the doctrine of recent possession. Contrary to the defence by the 1st appellant, the phone which he had sold to PW-5 was produced as **Exhibit -9-** and the call data showed that PW-10- had used it with its registered line upto the night of 25/2/14 when it was stolen. It was produced and positively identified as property of PW-10- which was stolen from the home of PW-4-. There was overwhelming evidence that the house of the complainant James Ileri Gichira (PW-4-) was attacked by the robbers on that material night.

22. I find that 1st appellant was properly convicted.

23. Coming to the 3rd appellant Nweton Ileri Kangethe raised Eight grounds. They are mainly raising issue on the fact that the conviction was not based on cogent evidence as he was not found with the stolen phone and there was no data that connected him to the stolen phone. The conviction of the 3rd appellant was based on the fact that he sold a phone which was stolen from Grace Wandia Mwaura who was killed during the robbery.

24. The issue I have to deal with here is that of possession. Possession is defined under **Section 4 of the Penal Code** and be actual physical possession as well as constructive possession. **Section 4 of the Penal Code** provides:-

“possession” –

(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; “

These are situations where one will be held to be in possession. There is no dispute that the 3rd appellant was not found with the stolen phone. The phone in question was recovered from PW-12- Joseph Njeru Gachaga Page 106 of the record. He testified that in the month of February 2014 while in Embu town the 3rd appellant Newton Ireri who told him he wanted to sell his phone as his wife was sick and needed money for her treatment. He bought it for Kshs 1,200/- put his line 0727-851-376 and started using it. He used it for about a month the police went and arrested him. He was asked where he got the phone and he informed them that it was sold to him by 3rd appellant.

25. The 3rd appellant was arrested and confessed that he had sold the phone to him.

26. In his defence the 3rd appellant denied that he sold the phone to Joseph Njeru Gichaga. PW-17- Police Constable Martin Mwalavu testified that as they investigated they arrested PW-12- Joseph Njeru Gachaga who informed them that the phone was sold to him by the 3rd appellant. PW-17- who produced the mobile data testified that the phone make Tecno, was in use by Grace Wandia, deceased in Count -2- with line 0723-286-678 upto 25/2/2014. From 1/3/2014 it was activated by a second No. 0724-650-140 registered in the name of Saiton Ere Tikam and remained in use upto 2/3/2014. A 3rd number 0722-790-434 under name Mary Wanjiru Njeri used the phone upto 3/5/2014. On the same day there was an activation by 0715-758-955 by one Meshack Magondu. On the same day 3/5/14 there was activation by line 0727-857-376 name Joseph Njeru and remained in activation upto 11/5/2016.

27. The trial Magistrate at Page 203 of the record from line 8-10 & 11 stated that all evidence against 3rd appellant confirms that he was not a stranger to PW-3- and his explanation denying knowing PW-13- is dismissed --- Line 15-16, she stated that her defence was just a mere denial.

28. I have considered the evidence. I find that the issue of the possession of the phone was only the word of the PW-12- against that of the 3rd appellant. Both gave evidence on oath. The trial Magistrate ought to have treated the testimony of PW-12- with caution as it is evidence which was evidence of an accomplice. The PW-12- was the one who was arrested with the phone and was placed in the cell. He was a suspect and therefore an accomplice. His evidence was therefore of the weakest kind. This has been held in various decisions of this court and the Court of Appeal. In **Anyangu & Others –v- Republic (1968) E. A 239 the Court of Appeal for E. A** held as follows at Page 240:-

“A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused, it may in a joint trial be taken into consideration against that co-accused, it is however not only accomplice evidence but evidence of a weakest kind (Anyona s/o Omollo & Another R(1953) 20 E.A.C.A 318) A statement ----“.

29. The fact that the PW-12- was arrested with the phone and placed in the cell, made him an accomplice and his evidence was of weakest kind.

30. There was therefore need for his testimony to be corroborated. It is not too much to ask that his testimony be corroborated because he said that there was a witness, one name Kahiga. He could have been called to confirm his testimony.

31. Secondly, PW-12- categorically stated that the phone was sold to him by the 3rd appellant in February 2013, Page 106 of the record line 26. Embu is a big town and is a County. PW-12- did not specify the place where he met the 3rd appellant. He casually said it was in Embu. So if I take it that he had the phone from the month of February, he was bound to explain the persons who used the phone between February and May 2014 as testified by PW-17- as analysed above, Page 119 Line 22-25 to Page 120 line 1-12. If indeed PW-12- had the phone from February and he stated that upon buying it he used his line, he was duty bound to explain who these three people whose line were used in the phone before he started using his line as from 11/5/2014. No explanation was offered and this clearly shows that PW-12- was not reliable and his testimony could not be relied on to convict without corroboration.

32. There was also a piece of evidence which cast doubt on the testimony by the prosecution, this was during cross-examination of PW-20- at Page 141 of the record from line 20 where he admitted that he had recorded a statement and at Page 2 line 1-2 **“I said that you told us the phone was sold to you by one Kamuri.”** PW-20- had also stated that 3rd appellant had mentioned one Kiara. It shows that there were many people who were mentioned.

33. The law is very clear that an accused person is presumed innocent until proven guilty. It is a principle of fair trial. The right to fair trial is one of the rights which cannot be limited. **Article 25(c) of the Constitution** provides:-

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(c) the right to a fair trial; and”

Article 50(2)(a) provides:-

“(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;”

34. In criminal cases, guilt of an accused person must be proved beyond any reasonable doubts. The witness PW-12- gave evidence on oath while 3rd appellant gave his defence on oath and offered himself for cross-examination. It was the prosecution who had the burden to prove that it is the 3rd appellant who sold the phone to PW-12-. They ought to have called Kahiga as a witness to confirm the truth or otherwise of the testimony of PW-12-. Though I am aware of the provisions of **Section 143 of the Evidence Act**, the law is now well settled by various precedents that where a witness is not called, the court will draw an inference that had the witness been called, he would have given adverse evidence to the party who was supposed to call him. In circumstances of this case I will draw that inference that had the said Kahiga been called, he would have given evidence which was adverse to the prosecution case. I believe I have said enough of the testimony of PW-12- and in conclusion I hold that the trial Magistrate erred by not treating the testimony of PW-12- with caution when it was not corroborated and shifted the burden to the 3rd appellant to prove his innocence. I find that the evidence of PW-12- was insufficient and unreliable for trial Magistrate to base a conviction on it. It did not prove the charge against the 3rd appellant beyond any reasonable doubts and he was therefore entitled to an acquittal.

35. The 3rd appellant had raised an issue of violation of his rights. This could not bar his being prosecuted for the offences charged. That is matter which he could pursue in another forum for violation of his rights and a claim for compensation.

36. The 3rd appellant was not found in actual possession of the phone. The prosecution failed to prove that he was in constructive possession. I don't agree with the submission by the State that the 3rd appellant did not give sufficient explanation as to how he came into the possession of the phone as they failed to prove beyond any reasonable doubts that he was in possession of the phone in the 1st place. In

his defence 3rd appellant said it was sold to him.

37. I will now turn to the submission by the 1st appellant Gideon Gitau Muthua that the Supreme Court has declared that the death penalty is unconstitutional in the case of **Francis Kioko Muruatetu & Another –v- R.** That was not the decision. What the Supreme Court held is that the mandatory death sentence is unconstitutional. The trial Magistrate stated that her hands were tied by the law and she could not impose any other sentence other than what the law provides, Page 205 Line 4-6. The trial Magistrate passed the mandatory death penalty which the Supreme Court said was unconstitutional. I find that the court would have reason to interfere with the sentence.

38. I have analysed the evidence and evaluated it as I was required to do and have come to the conclusion that –

1) As against the 1st appellant Gideon Gitau Muthua, the conviction was proper and was based on cogent evidence. I find that his appeal is without merits and is dismissed.

2) With regard to the sentence, I find that though the trial Magistrate passed a mandatory death sentence, the sentence provided for the offence of robbery with violence under Section 296 (2) was death penalty.

William Okungu Kittiny –v- R C. A(2018) eKLR. The Court of Appeal held:-

“From the foregoing we hold the findings and holding of the Supreme Court particularly in Para 69 applies Mutatus Mutandis to Section 296(2) and 297(2) of the penal Code. Thus, the sentence of death in Section 296(2) and 297(2) of the Penal Code is a discretionary maximum sentence.”

39. What the court was saying is that the death sentence is not unconstitutional. What was declared unconstitutional is the mandatory nature of the death sentence which deprives the court the Judicial discretion. A provision of law is that is not inconsistent with the constitution is a lawful provision. So I am certain, without any fear of contradiction that Sections of law which provide for a death sentence are not inconsistent nor are they in contravention of the constitution and in particular **Articles 25, 26 and 29 of the Constitution.**

40. This is what the Supreme Court stated in Muruatetu’s case. I find that in the circumstances of this case where an innocent woman who was un armed and had not resisted the robbery was killed in cold blood in the presence of her child who will be traumatized for life and brutally injured her husband, the death penalty was deserved. I will therefore interfere with the sentence against the 1st appellant.

3. As against the 3rd appellant Newton Ireri Kangethe alias Gacicio, the conviction is quashed, the sentence is set aside. He is set at liberty unless otherwise lawfully held.

Dated at Kerugoya tis 13th Day of February 2020.

L. W. GITARI

JUDGE