REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 130 OF 2018

(CORAM: F. GIKONYO J.)

FREDRICK KINOTI MUNGATHIA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An appeal from the Judgement of Sogomo G (SRM) in Tigania criminal case No. 38 of 2016 delivered on 07/09/2018)

JUDGMENT

[1] The appellant, FREDRICK KINOTI MUNGATHIA, was charged with two counts of the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**.

[2] Count I: The particulars of the offence are that on the 1st day of December 2015 at Kaliati village, Kimerei Sub – Location of Mbeu Location of Tigania West Sub – County within Meru County, jointly with others not before court and while being armed with dangerous/ offensive weapons namely G.3 riffles, an axe, knife and a *rungu* robbed STEPHEN KANGIRIA MIRITI of his mobile phone make ITEL it2520 and cash Kshs. 1,250/- all valued at Kshs. 2,750/- and during the time of such robbery wounded the said STEPHEN KANGIRIA MIRITI.

[3] Count II: The particulars of the offence are that on the 1st day of December 2015 at Kaliati village, Kimerei Sub – Location of Mbeu Location of Tigania West Sub – County within Meru County, jointly with others not before court and while being armed with dangerous/ offensive weapons namely G.3 riffles, an axe, knife and a *rungu* robbed JUSTUS MENJA SILAS of his mobile phone make Nokia 1110, a torch and cash Kshs. 2,430/- all valued at Kshs. 4,880/- and during the time of such robbery wounded the said JUSTUS MENJA SILAS.

[4] The alternative charge was handling stolen property contrary to **Section 322 (1) (2) of the Penal Code**. The particulars of the offence are that on the 17th day of December 2015 at Kairakai village, Mumai Location of Tigania East Sub – County within Meru County otherwise than in the course of stealing dishonestly retained one mobile phone make ITEL it2720 knowing or having reason to believe it to be a stolen property.

[5] The trial court convicted the appellant for the two counts and discharged him in the alternative count. He was sentenced to twenty (20) years imprisonment. The appellant was aggrieved by the conviction and sentence which lead to this appeal citing seven (7) grounds which may be collapsed into three (3): ***that the learned trial magistrate erred in law and fact in evaluating and analyzing of the evidence, convicting and sentencing of the appellant*** and ***concluding that the case was proved beyond reasonable doubt.***

Submissions

[6] The appeal was canvassed by way of written submissions. The appellant submitted that the appeal has merit for the prosecution failed to prove their case beyond reasonable doubt. According to the Appellant, the complainants did not identify him as the perpetrator. He urged that he was arrested through phone tracking however experts who conducted the tracking were not called as witnesses, thus, making the evidence adduced by **PW4** to be hearsay. He added; that the phones listed on the charge sheet do not feature in the prosecution's evidence, instead, other numbers were introduced. To him, the prosecution's case was based on circumstantial evidence on recovery of the stolen phone and doctrine of recent possession applied; none was proved. He relied on **Criminal Appeal No. 279 of 2005 Norman Ambich Miero & another v Republic**, **Criminal Appeal No. 24 of 2000 Paul Etole & another v Republic** and **Criminal Appeal No. 18 of 2002 James Otieno Juma & Another v Republic** to support his appeal.

[7] The respondent submitted that they proved the ingredients of robbery with violence. The complainants identified the weapons carried and proved that they were beaten up and injured. Based on the doctrine of recent possession the appellant was found in possession of **PW2's** phone of which he did not give a clear explanation as to how he came into possession of it. The circumstantial evidence herein formed a

chain which was complete such that the appellant could not escape from the conclusion that the he was amongst the perpetrators'. They relied on **David Mugo Kimunge v Republic [2015] eKLR** and **Abduba Guyo Wada v Republic [2018] eKLR** to support their case.

ANALYSIS AND DETERMINATION

[8] This being first appellate court it is obligated to revisit and re-evaluate the evidence before the trial court a fresh, and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Okeno vs. Republic [1972] E.A 32**

[9] The prosecution called four (4) witnesses to support their case. **PW1 Justus Menja** testified that on 1/12/2015 at around 9.00PM he was heading home from Kaganya while riding his bicycle holding a spotlight when he came across three (3) people. One of them pointed a gun at him and demanded that he stops. When he stopped and had alighted from the bicycle, one of the other persons hit him with a club on the face causing him to fall down. They began to beat him and the third attacker armed with a knife demanded that he raises his hands as they were policemen. The gunman poked the gun on his chest and demanded that he surrenders all his valuables. They frisked him and took from him a sum of Kshs. 2,430/- in cash, his torch and cell phone Nokia 1110 but returned his SIM card. They grabbed him by the pants and frog-marched him and led him along the road. By then his face was covered with blood from the open wound on the head. They met a motorcyclist whom they made to squat beside the road as they attacked him. He took advantage of this and escaped. The following morning, he went to Nchiru Police Station and reported the incident. He was issued with a P3 form that was completed at Miathene Hospital.

[10] **PW2 Stephen Kangiria Miriti**, motorcycle taxi operator, told the court that on the night of 1/12/2015 he met three people two of whom were walking ahead of the third one. When he was stopped by the two to stop. The third person pointed a gun at him but when he tried to evade him, he poked him with the gun barrel on the chest resulting into his falling off the motorcycle. They ordered him to stand and one of them hit him on the head with a club. They then demanded that he transports them to wherever they wanted. Two of them boarded the motor cycle. At the time, he saw the gunman talk to another man they had attacked. He then boarded and he took them to Kamaruru but the motor cycle had no power to go up the hill due to the combined heavy weight. They took his ITEL cell phone but returned his SIM card and Kshs. 1,250/- in cash. They ordered him to leave and they walked off on foot. He went to Kagaene Administration Police camp where he was advised to seek treatment for his leg. The following morning, he went to Nchiru Police Station and reported the incident. He was issued with a P3 form that was completed at Miathene Hospital. A month later he went to the police station where he identified his cell phone which had three (3) cracks on its edge and it had a silver pace and light blue back. He identified it to be the one in court.

[11] **PW3 Geoffrey Muthoni Murithi** clinician at Miathene Sub – County Hospital produced the P3 forms and treatment notes for **PW1** and **PW2**. He stated that **PW2** had healed bruises on the scalp and chest which was also tender. There was tenderness of the left shoulder with healed wounds and the left ankle joint had a huge lacerated wound. The injuries were four (4) months old occasioned by a blunt object. The patient was put on antibiotics and the degree of injury was classified as harm. **PW1** had blood stained clothing and healed bruised on the face. A blunt object was used to inflict the injury. The patient was put on analgesics' and the degree of injury was classified as harm.

[12] **PW4 No. 77558 Corpl. David Njue** of Nchiru Police Station stated that on 2/12/2015 a report was made by **PW1** who stated that Kshs. 2,430/-, a cell phone, make Nokia and a torch had been stolen from him during the robbery. They issued him with a P3 form as he had a visible swollen forehead and took details of his stolen cell phone. **PW1** also stated that **PW2** had also been robbed at the same place and time by the same assailants. On 12/12/2015 **PW2** came and reported that he had sustained injuries from a robbery that occurred on 1/12/2015 who robbed him of Kshs. 1,250/-. He told them that **PW1** who he met being robbed managed to escape. He ferried the robbers on his motor cycle towards Uringu area but his motor cycle was unable to climb Uringu hill resulting in the thugs chasing him away. **PW2** complained of chest pains and had a leg injury when he saw him.

[13] They engaged the services of crime units by giving them the cell phone numbers of the stolen cell phones. On 16/12/2015 CIP Peter Kilemi in charge of criminal intelligence unit managed to arrest the accused after he tracked him down and found him with cell phone make ITEL IMEI NO. xxxx. The cell phone was initially using Safaricom line No. xxxx registered in the name of **PW2;** Safaricom confirmed that **PW2** used the cell phone on 1/12/12015 at 10.20 PM.

[14] The same cell phone was found with SIM card No. xxxx which according to Safaricom was registered to the appellant and which came into use on 2/12/2015 at 8.33 AM. The accused was arrested and was first booked at Isiolo before being transferred to their station where he recovered the cell phone and SIM card from him. Upon interviewing the accused, he told him that he had purchased the cell phone and that it got lost on the night of 1/12/2015. According to PW4 this explanation made no sense because the Safaricom records showed that the accused used the phone the following day at 8.33 AM. Also, the accused said that he purchased the cell phone at Ruiri on 9/12/2015 from someone he did not know. Due to these contradictory statements PW4 formed the opinion that the suspect was involved in the incident.

[15] At the close of the prosecution's case the accused gave a sworn testimony and called one witness. **DW1 Kinoti Mungathia,** the accused, stated that when the incident occurred he was at his place of work in Wajir. That he returned home on 9/12/2015 after he received a call that his child was ill. On 16/12/2015 his assistant chief came looking for and arrested him. It was at Nchiru Police Station that he learnt that he was being charged with this criminal case.

[16] **DW2 Francis Ng'olua** stated that on 9/12/2015 at around 11.30AM he was with nine (9) other masons including the accused in Wajir at a construction site building a house for Sheilk Omar. The accused told him that he had received a phone call that his child was ill and sought permission from the foreman to leave. The accused left at around 2.00PM after he gave him some money. On 16/12/2015 the accused's wife informed him that the accused had been arrested.

[17] The issues for determination are:

a) **Whether the offence of robbery with violence contrary to Section 296 (2) of the Penal Code was proved beyond reasonable doubt**

b) **Whether the appellant was properly identified**.

c) **Whether doctrine of recent possession was proved**.

[18] According to **Section 296 (2) of the Penal Code**:

> **"(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

The Court of Appeal in **Johanna Ndung'u vs Republic - Criminal Appeal No. 116 of 2005, [unreported]**, considered the above provision and stated that an offence of robbery with violence is committed:

> **a) If the offender was armed with any dangerous or offensive weapon or instrument; or**
>
> **b) If he is in the company with one or more other person or persons; or**
>
> **c) If at or immediately after the time of the robbery wounds, beats, strikes or uses ant other violence to any person.**

[19] What story is told by the evidence adduced? On 1/12/2015 **PW1** who was on his bicycle was stopped by three (3) men who were armed with a gun, club and knife. They hit him with a club on the face causing him to fall down and then proceeded to beat him. One of the attackers poked the gun on his chest and demanded that he surrenders all his valuables. They took Kshs. 2,430/- in cash and his cell phone Nokia 1110. They then grabbed him by the pants and frog marched him along the road. When they met a motorcyclist, **PW2,** they him stopped and attacked him. In the process **PW1** was able to escape. **PW4** produced **PW1's** P3 form and treatment notes which indicate that he has blood stained clothes and face bruises.

[20] According to **PW2,** he narrated that one of attackers poked him with the gun barrel on the chest causing him to fall of his motorcycle. They ordered him to stand and one of them hit him on the head with a club before demanding that he transports them to where they tell him. They then took his ITEL cell phone and Kshs. 1,250 in cash. **PW4** produced his P3 form and treatment notes. They indicate that upon examination is that he had healed bruises on the scalp and chest which was also tender. There was tenderness of the left shoulder with healed wounds. The left ankle joint had a huge lacerated wound. Accordingly, the prosecution proved the two were robbed and the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code** was committed.

[21] Two most important questions arise out of the circumstances of this case to wit; (1) whether the appellant was properly identified to be one of the perpetrators; or (2) whether he was found in possession of a recently stolen property as to connect him to the robbery.

[22] **PW1** and **PW2** stated that they did not see the perpetrators. It was at night. Therefore, positive identification was not done of the appellant as one of the perpetrators of the offence. However, the appellant is said to have been found in possession of **PW2's** phone. The elements that need to be proven in the doctrine of recent possession as a basis for conviction of a principle offence were outlined in the case of **Isaac Ng'ang'a Kahiga & another v Republic [2006] eKLR where** the Court of Appeal held:

> **"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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; that property is positively the property of the complainant; thirdly, that the property was stolen from 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."**

See also the case of **Erick Otieno Arum vs. Republic [2006] eKLR** where the Court of Appeal held that:

> **"In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version. That duty as has been said is wholly on the trial court and on the first appellate court. This court has no such duty on hearing a second appeal such as before us but if it be satisfied that that duty has not been fully discharged by the first appellate court then it will take the line that had it been done either or both courts would have arrived at a different conclusion."**

[23] As a matter of law, the first thing that needs to be positively proved is possession. According to **PW4**, CIP Peter Kilemi who is in charge of the criminal intelligence unit managed to arrest the accused after he tracked him down and found the accused in possession of the cell phone ITEL IMEI No. xxx. The said officer being the one who did the tracking and who found the appellant in possession of the said phone was summoned several times but never came to court. During cross examination **PW4** stated that it was Chief Inspector Kirimi and his party from the Criminal Intelligence Unit who arrested the appellant.

[24] The question on the effect of failure by the prosecution to call an investigating officer has been raised in this appeal. The issue was discussed and elaborated in the case of **Kiriungi –vs- Republic [2009] KLR 638** where the Court of Appeal stated as follows:

> ***"We think that in all cases, it would be good practice which prosecuting authorities ought to comply with, but the mere failure to***

comply with it i.e. calling an Investigating officer cannot automatically result in an acquittal. Each case would have to be considered on its own circumstances in order to determine the effect of such failure on the entire case for the prosecutor"

[25] More judicial material in the subject is found in the decision by the Court of Appeal in the case of **Reuben Gitonga Nderitu v Republic[2009] eKLR** where it held as follows:

"Secondly, with regard to the complaint that the investigating officer was not called to testify is also neither here nor there. It is not mandatory that he be called, unless there is an allegation that he would have said something adverse to the prosecution case."

[26] I am also persuaded to cite the decision by Korir J in **S C v Republic [2018] eKLR that**:

> **"However, failure to call the investigating officer is not fatal to the prosecution case in all situations. In cases where the evidence of the investigating officer is key in linking the accused to the crime, failure to call the investigating officer will cause irreparable damage to the prosecution's case.** [Emphasis added]. **However, where evidence of other witnesses is sufficient to secure a conviction, failure to avail the investigating officer will do no harm to the prosecution case. It is however important that the prosecution avails investigating officers during trials. An investigating officer is the person who forms an opinion that a crime has been committed. He is the person to interlink the evidence of the witnesses and explain why the defence offered by an accused is not plausible. The role of the investigating officer in a criminal trial is crucial and the prosecution should always ensure that the investigating officer testifies. Having said so, I however do not think that the evidence of the investigating officer could have made any difference in this matter."**

[27] Based on the foregoing, failure to call an investigating officer or police officer involved in the investigation is not fatal to the prosecution's case unless the officer; (1) is key in linking the accused to the crime without whose evidence the case is irreparably compromised; or (2) his evidence was adverse to the prosecution case. In this case the prosecution bases its case primarily on the doctrine of recent possession. The officer who conducted the tracking and recovery of the cell phone is relevant in establishing the critical link among the accused, the phone and the robbery in question. Although the appellant denied having been in possession of the said phone, the evidence of PW4 which narrated the sequence of investigations as recorded in the investigation file showed that CI Kirimi and his party from the Criminal Intelligence Unit tracked the phone, found it in possession of, and arrested the appellant. The fact that the accused was arrested after being tracked through the phone herein was not discredited. In light thereof, failure to call the officer who tracked the phone as witness does not dent the prosecution's case in so far as it is based on recent possession.

[28] **PW4** also produced Safaricom records as P Ex. 7- the records was not obtained by him but by the Criminal Intelligence Unit. I do not see anything objectionable in the manner the record was obtained and produced in court. The record is part of the record. According to the record, mobile phone number xxx is indicated to belong to **PW2** as his name is indicated under the heading ID. The records also show that mobile number xxxx was used on 2/12/2015 the day after the incident. **PW4** stated that the said number belongs to the appellant and through whose tracking led to the arrest of the appellant. The records do not state the name under the heading ID. Nonetheless, the evidence available show that the tracking of this number led to the arrest of the appellant on 16th December 2015. Evidence also show that the appellant was found in possession of this phone and number. Notably, technology is able to triangulate all sim cards used in same gadget and the period when they are so used. Therefore, a subtle connection among the original number belonging to PW2, the other number through which the appellant was tracked and traced and the phone itself was clearly established by the prosecution.

[29] In sum, the evidence by Prosecution witness especially PW2 and PW4 established that: -

1. **The** cell phone ITEL IMEI No. xxx **was found with the appellant;**
2. **The said phone is positively the property of the PW2;**
3. **The phone was stolen from PW2 on the night of 1st December 2015; and**
4. **Lastly; the phone was recently stolen from PW2 having been stolen from him in the night of 1st December 2015. Mobile Phones move with easiness from one person to the other.**

[30] But before I close, I note that accused raised a defence of alibi- which the prosecution bore the burden of disproving. The Court of Appeal in the case of **Victor Mwendwa Mulinge v Republic [2014] eKLR** held as follows:

> **"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; ... In KARANJA v REPUBLIC (Supra), this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."**

[31] From his defence, the appellant denied being in possession of the mobile phone. He told the court that he was at his work place in Wajir when the incident occurred and only returned home on 9/12/2015. This was corroborated by **DW2**. However, **PW4** told the court that the appellant was arrested on 16th December 2015 after being tracked through the stolen phone. He was found in possession of the said phone. This evidence was quite robust and uncontroverted. The proof of recent possession unravels the alibi.

[32] In light of the foregoing and the constraints in law, I will not assign much weight to the statement made by the appellant at Nchiru Police Station on 18/12/2015 in an unrelated case stated that the cell phone was his having purchased it from an unknown person at Ruiri on

9/12/2015. This statement was produced in court as *P Ex. 8*.

[33] From the foregoing, I find that the prosecution proved its case beyond any reasonable doubt. Accordingly, I find this appeal has no merits and is dismissed.

Dated, signed and Delivered at Milimani Nairobi this 21st day of APRIL 2020

F. GIKONYO

JUDGE

Representation:

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Meru

Respondent – Prosecution

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