



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.59 OF 2013**

*(An Appeal arising out of the conviction and sentence of Hon. E. Nduva – (Mrs.) SRM delivered on 5<sup>th</sup> April 2013 in Nairobi CM. CR. Case No.1716 of 2011)*

STEPHEN MUREITHI MANGU.....1<sup>ST</sup> APPELLANT

PHILIP ANYANGA.....2<sup>ND</sup> APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

**JUDGMENT**

Stephen Mureithi Mangu (1<sup>st</sup> Appellant) and Philip Anyanga Ochee (2<sup>nd</sup> Appellant) were charged in the first count with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 19<sup>th</sup> December 2011 at Romak Kisauni road Mpesa in Langata, within Nairobi County, jointly with others not before court, the Appellants, while armed with dangerous weapons namely pistols and two toy pistols robbed Joyce Wangari Wanjiru of three mobile phones, one make Samsung valued at Ksh.7,000/-, one make Nokia 1208 valued at Ksh.2,500/-, one make Safaricom Vodaphone valued at Ksh.2,000/-, safaricom scratch cards worth Ksh.4,950/- and cash Ksh.5,050/-, all valued at Ksh.16,450/-, and at or immediately before or immediately after such robbery threatened to use actual violence against the said Joyce Wangari Wanjiru.

The Appellants were charged in the second count with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 19<sup>th</sup> December 2011 at Romak Kisauni road Mpesa in Langata, within Nairobi County, jointly with others not before court, the Appellants, while armed with dangerous weapons namely pistols and two toy pistols robbed Janet Wanja Njaria of one Nokia 2310 mobile phone valued at Ksh.5,000/-, and immediately before or immediately after such robbery threatened to use actual violence against the said Janet Wanja Njaria.

The Appellants were charged in the third count with the **offence of robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 26<sup>th</sup> November 2011 at Morning Star Estate in Langata within Nairobi County, jointly with others not before court, the Appellants, while armed with dangerous weapons namely one pistol and two toy pistols robbed Benard Mutuma of one mobile phone, make Nokia E-71 valued at Ksh.15,000/-, one wallet and cash Ksh.2000/- all valued at Ksh.17,000/- and immediately before or immediately after such robbery threatened to use actual violence against the said Benard Mutuma.

When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to all the charges. After full trial, they were both convicted as charged on the first and second counts, and sentenced to life imprisonment. They were however acquitted of the third count. The Appellants were aggrieved by their conviction and sentences and have each filed a separate appeal to this court.

In their petitions of Appeal the Appellants raised more or less similar grounds of appeal challenging their conviction and sentences. They were aggrieved that the trial magistrate conducted the trial in a manner that violated their constitutional rights to a fair hearing. They complained that their conviction was based on charges that were bad in law for duplicity. They faulted the trial magistrate for relying on the doctrine of recent possession when the evidence adduced did not support the same. They took issue with the trial magistrate's decision to convict them yet the evidence of identification was not watertight. They were aggrieved that the trial court failed to consider their respective defence statements in making its decision. Finally, they were of the view that the sentences imposed by the trial court were illegal. In the premises, the Appellants urged this court to allow their respective appeals.

The two separate appeals were consolidated and heard together as one for the purpose of the hearing of this appeal. During the hearing of the appeal, both Appellants presented to court written submissions in support of their appeals. They urged the court to allow their appeals. Ms. Akunja for the State opposed the appeals. She made oral submissions to the effect that the prosecution had established its case on the charges

brought against the Appellants to the required standard of proof beyond any reasonable doubt. She submitted that the complainants narrated to court how the Appellants robbed them. PW3 who was a security guard at the premises witnessed the robbery from the first floor. He met the Appellants as they were running out of the shop. He alerted members of the public who apprehended the Appellants. PW3, PW4 and PW5 were present when the Appellants were arrested. The items were recovered in the Appellants' possession. The robbery took place in broad daylight. Learned State Counsel asserted there was no room for mistaken identity. She averred that all witnesses' statements were provided to the Appellants, except that of the investigating officer. It was her view that the error in the charge sheet was curable under the **Criminal Procedure Code**. She therefore urged the court to dismiss the Appellants' appeals.

The facts of the case according to the prosecution are as follows: PW1, Joyce Wangari Wanjiru stated that she was an Mpesa shop attendant employed by Joyce Wanjiku. The business was located at Nairobi West estate. There was a salon inside the Mpesa shop. She recalled that on 19<sup>th</sup> December 2011, she left the shop and went out for a few minutes. She did not lock the shop since the ladies working at the salon were present. She left money and four mobile phones in the shop. The four phones were of makes Nokia 1208, Samsung and Safaricom Kabambe respectively. As she was returning back to the shop, she saw two young men running out from the shop. She saw the guard running after them. She went to the shop. The ladies at the salon informed her that the two men robbed them at gun point. She noticed that the men had taken her phones and money from the shop. She decided to follow the crowd that was chasing down the robbers. She located them at some G4S offices. When she got there, the robbers were lying on the ground. They are the Appellants. There were police officers on the scene. The police officers recovered the stolen items and two pistols. PW1 identified the four phones, Safaricom scratch cards, cash Ksh.5,050/- and receipts that had been stolen from the shop.

PW2, Ochieng Okeyo was a security guard stationed at the building hosting the shop that was allegedly robbed by the Appellants. He was on duty on the material day. He stated that from where he was standing, he could clearly see all activities that were going on inside the shop. There were two salon attendants and one customer in the shop. He saw the Mpesa attendant walk out of the shop. At about 10.00am, two men walked into the shop. One of the men was armed with a pistol. He ordered the three people inside the shop to lie down while pointing the gun at them. PW2 rushed and pressed the alarm button along the corridor. He saw the two men running out of the shop. They were carrying items in a white polythene bag. He raised an alarm. Together with other members of the public they chased down the two men. Guards and police officers at G4S offices managed to apprehend the two men. They recovered the polythene bag and two toy pistols from the two men.

PW3, Janet Wanja was one of the ladies who were at the salon on the material day. She was with her colleague Mary, and a client. Two men came in. One of them commanded her at gun point to lie down. He then ordered her to surrender her phone and money. She told him she did not have any phone or money on her. The man went to the Mpesa shop. Her phone was charging at the Mpesa shop. They ransacked the shop and left. She identified her phone that had been recovered from the two men. It was a Nokia 2310.

PW4, Augustine Mutinda was among members of the public who participated in the chase of the Appellants. He was a security guard stationed at a building next to the Mpesa shop. As they chased down the two men, he noticed that one was carrying a white polythene bag. They were shouting '**thief! thief!**' as they ran after the two men. The robbers ran towards G4S offices on Mombasa Road. They met police officers who apprehended them. The white polythene bag which contained stolen items and two toy pistols were recovered from them. Among the recovered stolen items was his phone, Safaricom Kabambe 125, which he had left at the Mpesa shop to be charged.

PW5, Sgt. Stanley Kibet was one of the arresting officers. On the material day, he had been deployed to the G4S offices along Mombasa Road on money escort duties. At around 10.30am, he saw two men being chased by members of the public. He apprehended them. He ordered them to lie down. He recovered a toy pistol from each of the men. He also recovered a polythene bag which contained five mobile phones, cash and scratch cards. The two men were arrested. He identified the Appellants in court.

PW7, Cpl. Kennedy Musyoki was the investigating officer in the present appeal. On the material day, he was instructed by his superior to go to Industrial Area, where two suspects had been arrested. He proceeded to Industrial Area with two of his colleagues. On arrival they found the two suspects, the complainants and Administration Police Officers. PW6 handed over to him the recovered items. The items were two toy pistols, five mobile phones, cash Ksh.5,050/-, scratch cards, a black wallet and receipts. They then went to the Mpesa shop where the alleged robbery was said to have taken place. He thereafter charged the Appellants with the current offences.

When the 1<sup>st</sup> Appellant was put to his defence, he testified that on the material day, he was on his way to work. He worked at a construction site in Mlolongo. He boarded a matatu and alighted at Nyayo Stadium. He proceeded to Shell/Kobil petrol station to board another matatu to Mlolongo. While at the stage, he heard people shouting "**thieves! thieves!**". He turned around and saw two men who were armed. They were carrying a polythene bag. He joined the crowd that was chasing the two men. The two men ran past G4S offices to a perimeter wall. They threw down the guns and polythene bag and proceeded to jump over the perimeter wall. The 1<sup>st</sup> Appellant stated that together with the 2<sup>nd</sup> Appellant, they volunteered to take the abandoned polythene bags and guns to the police station. Police officers suddenly appeared. They ordered them to lie down. The Appellants handed over the recovered stolen items and the guns to the police officers. They were instructed to go to the police station and record a statement explaining how they recovered the said items. They were interrogated at Langata Police Station. The investigating officer instructed that the 1<sup>st</sup> Appellant be locked up in the cells because he was rude. He was charged the next day with the offences herein. He denied taking part in the robbery.

The 2<sup>nd</sup> Appellant was put on his defence. He narrated the facts as stated by the 1<sup>st</sup> Appellant. He testified that the investigating officer locked him up because he worked as a tout. The said officer told him that touts were generally thieves. The 2<sup>nd</sup> Appellant denied being involved in the robbery.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32**). In the present appeal, the issue for determination is whether the prosecution established the charges of **robbery with violence** contrary to **Section 296(2) of the Penal Code** brought against the Appellants to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also had the benefit of considering the grounds of appeal and the rival submission made by the parties to this appeal. It was clear from the evidence that the Appellants were convicted on the basis of the evidence of identification and that of application of the doctrine of recent possession. PW3 Janet Wanja testified that on the material day, she was working in a salon in which the Mpesa shop was situated. Two men entered the shop and commanded them to lie down. They pointed a pistol at her. They ordered her to surrender her phone and all the money that was in her possession. They then went to the Mpesa shop, ransacked it and took the money and the phones that were at the shop. In respect to the evidence of identification, the key witness was PW2 Ochieng Okeyo, a security guard who was on guard duty in a building opposite the Mpesa shop where the robbery took place. PW2 testified that while at his guard post, he saw two men enter the Mpesa shop. One of the men was armed with a pistol. The two men ordered the three people who were inside the Mpesa shop to lie down. They were doing this while pointing a pistol at them.

PW2 pressed the alarm. He then saw the two men running out of the Mpesa shop while carrying items in a white polythene bag. PW2 and PW4 Augustine Mutinda, a fellow security guard and members of the public gave chase while shouting "thief thief". The two men ran towards the direction of the G4S Office along Mombasa Road. As fate would have it, PW5 Sgt Stanley Kibet, a police officer was on money escort duties on that day. When he saw the two men, he ordered them to stop and lie down. At that time, members of the public had arrived. Two toy pistols were recovered from the men who are the Appellants in this case. Also recovered was a polythene bag which contained five mobile phones, cash and scratch cards which were positively identified by PW1 Joyce Wangari Wanjiru, the Mpesa shop attendant where the robbery took place.

On re-evaluation of this evidence of identification, it was clear to the court that the Appellants were positively identified as the men who robbed the complainants. From the time of the robbery, to their arrest, PW2 and PW4 did not lose sight of them. PW2 and PW4 gave chase immediately after the robbers ran out of the Mpesa shop. PW2 and PW4 were assisted by members of the public to give chase to the robbers. PW5 testified that he was on duty on the material day at about 10.30 a.m. He saw two men running towards his direction. He ordered them to stop and lie on the ground. He saw that they were armed with toy pistols. They also had a polythene bag from which the items robbed from the Mpesa shop were recovered. In their defence, the Appellants testified that they were victims of mistaken identity. They narrated how on the material day they responded to the alarm raised by members of the public who were chasing robbers. They joined in the chase. The robbers managed to make good their escape by jumping over a perimeter wall. They left the toy pistols and the polythene bag on the ground. They picked the same with a view to taking it to the police. They were shocked when they were subsequently accused of being the robbers.

On re-evaluation of this evidence, it was clear to this court that the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellants were positively identified. As stated earlier in this judgment, from the time the Appellants ran out of the Mpesa shop to the point of their arrest, PW2 and PW4 did not lose sight of them. The robbery took place in broad daylight. The Appellants were apprehended by PW5 while in possession of the toy pistols and the polythene bag that contained the robbed items. This court therefore holds that the testimony of PW2 and PW4 regarding the identification of the Appellants was watertight and free from the possibility of error or mistaken identity.

Further, even if this court was to discount the evidence of identification, the Appellants would still have been convicted on application of the doctrine of recent possession. The evidence adduced by the complainant (PW1) clearly established that the Appellants were found in possession of items which were robbed from the Mpesa shop a few minutes after the said robbery. The said items which included mobile phones, scratch cards and cash were found in possession of the Appellants so soon after the robbery. The items were in a polythene bag which PW2 saw the Appellants carrying from the Mpesa shop after the robbery. The principle on the application of the doctrine of recent possession was enunciated in Malingi –Vs- Republic [1989] KLR 225 at P.227 (Bosire J as he was then):

***“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.”***

In the present appeal, even though the Appellants attempted to explain their possession of the robbed items by stating that they had collected them after the robbers had dropped them when they made good their escape, this court was not persuaded by their defence. It was clear to this court that the Appellants were found in possession of the robbed items in circumstances that clearly pointed to the fact that they were the robbers. The doctrine of recent possession was properly applied in their case: the prosecution established that the robbed items (which were positively identified) were found in the Appellants' possession so soon after the robbery. The explanation given by the Appellants regarding the circumstances under which they were found in possession of the robbed items did not dent the otherwise strong and culpatory evidence adduced by the prosecution witnesses that connected the Appellants to the robbery.

The Appellants complained that their right to fair trial was infringed in that they were not availed copies of the witnesses' statements before the trial commenced. This court has perused the proceedings of the trial court. It was clear to this court that the Appellants have a case when they say that at the commencement of the trial they were not supplied with witnesses' statements. However, it was clear that they were supplied with the said witnesses' statements later during trial. They were given an opportunity to cross-examine all the prosecution witnesses. This court therefore holds that their right to fair trial was not infringed. The delay in supplying them with witnesses' statements did not prejudice them.

For the above reasons, this court holds that the prosecution established to the required standard of proof beyond any reasonable doubt the two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The Appellants' respective appeals on conviction lack merit and are hereby dismissed.

On sentence, the Appellants were sentenced to serve life imprisonment. This court has considered their mitigation on this appeal. It has also taken into account the circumstances in which the robbery took place. Although the Appellants used toy pistols to subdue the victims of the

robbery, this court notes that the victims were not in a position to know that the pistols were toys. They were terrorized and feared for their lives. That is the reason why they complied with the directions given by them by the Appellants. This court has also taken into consideration that the Appellants have been in lawful custody for a period of about seven (7) years since their arrest and subsequent conviction. This court formed the opinion that the sentence of life imprisonment imposed upon the Appellants was therefore excessive in the circumstances. That sentence is set aside and substituted by a sentence of this court. The Appellants are sentenced to serve ten (10) years imprisonment with effect from today's date. For avoidance of doubt, this court has taken into consideration the period that the Appellants were in custody while awaiting trial. It is so ordered.

**DATED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH 2019**

**L. KIMARU**

**JUDGE**