



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 113 OF 2017

BETWEEN

DENNIS NYAGA NJERU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera in Cr. Case No. 5391 of 2015 delivered by Hon. Ojoo (PM) on 21st August 2017).

JUDGMENT.

1. The Appellant, **Dennis Nyaga Njeru** was charged with the offence of robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 21st day of December, 2015 at Malazi Bed and Breakfast along Kilimani Road in Nairobi within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely a pistol and knife robbed **Emily Njihia Njuguna** of cash Kshs. 58,700/=, three mobile phones make Huawei P6 valued at Kshs. 25,000/= and two Samsung phones valued at Kshs. 3,500/= and at the time of such robbery threatened to use actual violence on the said **Emily Njihia Njuguna**.

2. He was also charged with an alternative offence of handling stolen property contrary to **Section 322 (1)** of the **Penal Code**. The particulars of the same were that on the 21st day of December 2015 along Kilimani Road Nairobi within Nairobi County, otherwise than in the course of stealing dishonestly handled two mobile phones make Samsung knowing them to be stolen property. The Appellant pleaded not guilty to both charges. Upon trial he was convicted of the main count and was sentenced to suffer death. Aggrieved by both his conviction and sentence, he preferred the instant appeal.

3. The Appellant raised six (6) grounds of Appeal in his Memorandum of Appeal filed on 4th September 2017. They can be summarized as follows: that learned trial magistrate erred in both law and fact by convicting the Appellant based on inconsistent and contradictory evidence prosecution, that crucial witnesses were never called by the prosecution, that the Appellant was not properly identified, that Section 169 (1) of the Criminal Procedure Code was not complied with and that the case was not proved beyond all reasonable doubt.

Evidence

4. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court and arrive at its own independent conclusions. In doing so, the court is required to take into account the fact that it neither saw nor heard the witnesses and give due regard for that. See **(Okeno v Republic (1972) EA 32)**.

5. The prosecution's case can be summarized as follows: On 21st December, 2015 at about 1.15 pm, **Emily Njihia (PW1)** and her colleague **Winnie Wangamini (PW2)** were in the office at Malazi Inn, a bed and breakfast facility at Adams Arcade, doing invoices. They heard a knock which they answered to. Three young men walked in. One of them moved next to PW2 and drew a gun. The other two remained next to the door and one of them closed the door behind him. The man with the gun ordered them to lie down which they did. The three men then started ransacking the drawers.

6. One asked for the key to the safe which PW1 gave him. He opened the safe and took Kshs. 58,700/= which PW1 had put in there earlier. A second man demanded for their mobile phones. PW1 gave out her mobile phone make Huawei worth Kshs. 25,000/=. Another one took two office phones Samsung models which were on the desk. The man with the gun then ordered them to keep lying down as they left closing the door behind them. Shortly after the men left, PW1 and PW2 got up and started screaming for help. PW1 ran to the kitchen and pressed the G4S Panic alarm.

7. Luckily, some members of the public who were nearby responded to their calls for help giving chase after the three men who were fleeing on foot. They managed to get hold of one who is the Appellant herein. He was found with the two Samsung office phones that had just been stolen from their office. PW1 was able to identify the Appellant because he watched him walk in last and his complexion was lighter than the other two men.

8. **Winnie Wangamini (PW2)** who was with PW1 in the office at the time of the robbery gave a similar narration of the events that took place when the three men walked in. She added that she followed the members of the public who gave chase. Shortly thereafter, the members of the public arrested the Appellant herein whom PW2 identified as the man who had walked into their office last and closed the door. She was able to identify the Appellant by his appearance. The Appellant was searched and found with the two Samsung phones which had been stolen from the office. He was detained until the police came.

9. **PC Victor Omondi Juma (PW3)** was one of the officers who responded to a radio call on the incident. He went to the scene with one CPL Kinyua and found that the Appellant had already been apprehended by the members of the public. They re-arrested Appellant and took possession of the two Samsung phones recovered from him. They then escorted him to the police station. **CPL Paul Limo (PW4)** was the investigating officer. He summed up the evidence of the prosecution's witnesses and produced in evidence the two Samsung phones recovered from the Appellant as exhibits 1 (a) and (b).

10. When placed on his defence, the Appellant gave a sworn statement. He stated that he was on his way to do a quick job on 21st December 2015 at around noon when he heard people screaming from behind him "mwizi mwizi". He saw two men being pursued by a small group of people but the men fled. The crowd then turned on him and arrested him claiming that he was with the men who had fled. He was then frog marched to Malazi Hotel as a suspect but the two ladies who had been robbed said they did not know him. He was later taken to Kilimani Police Station where he was charged with the offences in question. He denied having been found with the two Samsung phones which had been stolen from the victims and maintained that he was innocent.

Analysis and determination.

11. This Appeal was disposed of by both written and oral submissions. The Appellant appeared in person whilst learned State Counsel Ms. Nyauncho, represented the Respondent. The Appellant's written submissions are dated 27th February 2019. Ms. Nyauncho made oral submissions. She opposed that appeal.

12. Upon a careful reevaluation of the evidence on record and consideration of the parties respective rival submissions, I find the issues for determination to be as follows; *whether the Appellant's right to a fair trial under Article 50 (2) (j) of the Constitution was infringed; whether the doctrine of recent possession was properly applied; whether identification of the Appellant was free from error and whether the case was proved beyond a reasonable doubt.*

Whether the Appellant's right to a fair trial was infringed.

13. On this issue, the Appellant contended that he was furnished with the Investigation Diary after PW1 and PW2 had already testified. He submitted that he ought to have been supplied with all the material that the prosecution intended to rely on before the commencement of the trial. The failure to do so therefore infringed his right to fair trial under **Article 50 (2) (j) of the Constitution.**

14. **The said Article** provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. The essence of this right is to prevent ambush during trial by according an accused person the opportunity of knowing in advance the evidence that will be used in support of the case against him. However, it is noteworthy that the said Article does not provide that the evidence must be supplied before trial commences as the Appellant purports. Indeed, it is an acceptable practice that such evidence can be supplied in the course trial.

15. The remedy available to an accused person in that event would be to apply for recall of any witness whom he wishes to cross examine further on the contents of such a document or evidence. It is also prudent that an explanation be given for late supply of evidence. All in all, each case should be determined on its own merit, as in some instances, the court may decline to allow a late supply of evidence.

16. In the instant case, the Appellant applied for PW1 and PW2 to be recalled for further cross examination upon being furnished with the Investigation Diary. The trial court accordingly granted his request. However, the said witnesses were not availed since they could not be traced as they had long ceased working at the hotel. The Appellant argues that this was fatal as it prejudiced his case.

17. However, I find this argument to be unfounded as the Appellant did not inform the court whether there were any particular issues raised in the Investigation Diary which contradicted what the witnesses had stated earlier and thus needed clarification. Further, the typed proceedings show that the Appellant did not make any further demand for the witnesses to be recalled upon learning that the prosecution had a challenge in tracing them. Instead, after the last prosecution witness testified, he requested for court proceedings to enable him do submissions. Furthermore, his conviction was not based on the contents of the Investigation Diary but other evidence available in the case.

18. In the circumstances, I find that the Appellant did suffer any prejudice that amounted to unfair trial.

Whether the doctrine of recent possession was properly applied

19. It is not in doubt that a robbery occurred at the hotel where PW1 and PW2 worked. The assailants stole three mobile phones and cash and fled the scene when the said witnesses raised alarm. However, the Appellant was arrested a few minutes later by members of the public. He was found in possession of two Samsung mobile phones. The two witnesses were able to positively identify the mobile phones as the ones that had just been stolen from their office during the robbery. This is the evidence that linked the Appellant to the offence in question. It created an inference that he participated in the robbery. The Appellant did not tender any plausible explanation to rebut that presumption. He

merely denied having been found in possession of the said mobile phones.

The Appellant also argues that the ownership of the two phones was not established. It is true that no documentary evidence like purchase receipts were produced. There were also no peculiar identifying marks that were shown. The trial court also held that the prosecution established that the Appellant was found in possession of two mobile phones which he had just stolen from the hotel.

20. In the mind of this court, the doctrine of recent possession would apply conditional to satisfying the test set out in the case of **Malingi v Republic (1989) KLR, 225**, it was held thus;

“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 the 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 what 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.”

21. On proof of ownership, it is trite that PW1’s evidence on how the phones were stolen and recovered in the Appellant’s possession a few minutes later was well corroborated by PW2 whom they worked with in the same office. They were both able to physically identify the two phones upon the Appellant’s arrest and in court. On the other hand, the Appellant did not give a satisfactory account of how he came by the said mobile phones. I am therefore satisfied that ownership of the two phones was proved accordingly. I am guided by the case of **Stephen Makau Karega v Republic [2016] eKLR** where it was held that:

“Both PW1 and 2 were business partners and were therefore an acquaintance to each other. While testifying in court PW1 stated that although he had a receipt for his lost phone, he had not carried it to court. He therefore identified his phone by a cracked screen. This piece of evidence was corroborated by PW2 who also stated that PW1’s mobile phone had a cracked screen and he singled it out in court. My view is that although the receipt for the phone was not adduced, its physical identification was good evidence, particularly bearing in mind that the witness had reported that it was stolen. More importantly is the fact that the phone was in the person of the Appellant as it was removed from his pocket. Given that he was arrested at 6.00 am after the robberies at about 1.00 am gives the inference that he must have stolen it.”

22. Further, the mobile phones were recovered within minutes of the robbery during which time they could not have changed hands. I have no doubt that the doctrine of recent possession was properly applied and linked the Appellant to the robbery.

Whether identification of the Appellant was free from any possibility of error.

23. Under this head, the Appellant submitted that the circumstances obtaining during the robbery could not have enabled PW1 and PW2 to positively identify him as having taken part in the robbery despite the fact that the incident took place in broad daylight. He argued that the witnesses did not know him before and they only saw him very briefly during the incident. Additionally, he stated that the fact that the two witnesses testified that the assailants wielded a gun to them is proof that they are more likely to have paid more attention to the weapon than the perpetrators.

24. The Respondent on the other hand submitted that the identification of the Appellant was proper and free from any possibility of error. This was in view of the fact that he was arrested near the scene of crime and some of the people who apprehended him were within the parking area and saw him walking away. Further, that the witnesses were able to give a proper account of the events that took place during the robbery. They identified the Appellant as light-skinned as opposed to the other two assailants who were dark skinned. They were also able to identify him as he was the one who walked in last and closed the door behind him before they began terrorizing PW1 and PW2.

25. The incident took place in broad daylight at about 1.15 pm. PW1 testified that the Appellant was the last one of the three men to walk into their office. She observed the Appellant shut the door behind him before the raid started. She stated that she was able to identify the Appellant as he had a lighter complexion compared to the other two. She was also able to identify the Appellant as one of the robbers when he was apprehended by the members of the public and brought back to the hotel. PW1’s testimony was well corroborated by PW2 who was with her in the office at the time of the incident. The consistency of their testimonies is proof that the two witnesses had sufficient time to observe the Appellant before the robbery begun.

26. In any event, the identification of the Appellant was buttressed by his being found in possession of the recently stolen mobile phones upon being searched by members of the public who arrested him. In the premises, I have no doubt that he was positively identified by PW1 and PW2 as having taken part in the robbery.

Whether the prosecution proved its case beyond reasonable doubt.

27. The Appellant further argued that the evidence adduced by the prosecution fell short of the standard required as the circumstantial aspects relied on were disjointed and thus incapable of sustaining a conviction. On the part of the Respondent, it was submitted that the prosecution proved that the Appellant committed the offence in the company of two others who fled the scene. That the failure to break the chain of events from the attack to the arrest created no doubt that the Appellant was among the gang that attacked the complainants.

28. In the instant case, the Appellant was re-arrested by PW3 who responded to a radio call alert about the incident. Indeed, PW3 tendered evidence regarding the prior arrest of the Appellant by the members of the public. Thus, the role that any members of public would have played was well fitted by PW3. Furthermore, there is no particular number of witnesses required by law to prove any fact. What is vital is that the prosecution calls sufficient evidence to establish their case. They duly discharged this burden. (See **Section 143 of Evidence Act** and

Bukenya & Others v Uganda [1972] EA 549.)

29. In the end, I find that the prosecution proved their case beyond a reasonable doubt. His conviction was safe in the circumstances.

30. On sentence, the court's view is that a death sentence is not warranted. The circumstances of the case are that the stolen mobile phones were recovered. Although there was a gun used to threaten the victims, no one was shot. The Appellant was a first offender and he pleaded leniency. I find that a five year jail term would be sufficient punishment and a deterrence measure. Accordingly, I set aside the death sentence and substitute it with a five year jail term. The period of three years three months and ten days so far spent in custody since his arrest shall be taken into account whilst tabulating the jail. It is so ordered.

DATED and DELIVERED this 2nd day of April, 2019

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*
2. *Mr. Momanyi for the Respondent.*