



**REPUBLIC OF KENYA**

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

**HCCRA NO. 75 OF 2018**

**LIVINGSTONE KEVIN KOMBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Maseno (Hon. R.S. Kipngeno SRM) dated the 12<sup>th</sup> July 2018 in Maseno SPMCCRC No. 454 of 2017]***

**JUDGMENT**

The Appellant, **LIVINGSTONE KEVIN KOMBA** was convicted for the offence of **Robbery with Violence** Contrary to **Section 296(2)** of the **Penal Code**. He was then sentenced to 15 years imprisonment.

1. In his appeal, the Appellant invited this Court to re-evaluate all the evidence on record.
2. Being a first appellate Court, I am obliged to carry out a re-evaluation of the evidence and to draw my own conclusions therefrom. However, I am alive to the need for me to always bear in mind the fact that I did not have the advantage of observing any of the witnesses when they testified.
3. The first point that was raised by the Appellant was that the evidence of the Complainant was hearsay or was an after-thought.
4. Primarily, the Appellant's contention is that the phone was allegedly recovered from a person who said that he had bought it from the Appellant.
5. I understand the Appellant to be saying that because the Complainant was not present when the Appellant was allegedly selling the phone to **PW2**, then the evidence of the Complainant was hearsay.
6. Secondly, the Appellant submitted that the prosecution had failed to prove that either the Appellant or PW2 had used the stolen phone between the time it was allegedly taken away from the Complainant, until the time when it was recovered.
7. In his considered opinion, the prosecution failed to provide Essential Witnesses, who would have shed light on the following assertions;
  - (a) *That PW3 phoned Koffi;*
  - (b) *That the Complainant's room-mate, Lydia Mwikali phoned the user of the stolen phone;*
  - (c) *That officers of Equity Bank were called by PW3, who directed them to where the appellant was; and*
  - (d) *That phone-calls were made using the phone in issue, after the Complainant had been robbed.*
8. The Appellant invited the court to find that the prosecution failed to tender any explanation for its failure to call the Essential Witnesses.
9. In the absence of an explanation for the failure to call the alleged Essential Witnesses, the Appellant submitted that this court ought to draw an inference that if the said witnesses had testified, their evidence would have been or would have tended to be adverse to the prosecution case.
10. Another issue which was canvassed by the Appellant was about the Confession which he had allegedly made.

11. He pointed out that the said Confession was made whilst he was in police custody.
12. In the circumstances, the Appellant submitted that any confession should have been made in the presence of either a Magistrate or of a police officer who was of a rank of or above that of an Inspector.
13. As the Investigating Officer was not of the rank of an Inspector, the Appellant submitted that a confession as was recorded in the presence of the said Investigating Officer, was not admissible in evidence.
14. Finally, the Appellant submitted that the learned trial magistrate had failed to give consideration to the Defence.
15. In the opinion of the Appellant, his Defence was capable of earning him an acquittal, if the trial court had given it due consideration.
16. When answering to the appeal, the Respondent submitted that all the ingredients of the offence of Robbery with Violence had been duly proved against the Appellant.
17. The Respondent submitted that the Complainant had proved that she was the owner of the phone which was the subject matter of the offence with which the Appellant was charged.
18. The Respondent further pointed out that **PW3** was present when the Appellant tried to sell the phone to **PW2**.
19. This court was told that two of the Appellant's accomplices were killed by mobs, whilst one accomplice, (name Kofi) escaped and remained at large.
20. I was invited to hold that the doctrine of Recent Possession was properly applicable to this case, as the phone which had been recently stolen from the Complainant, was found in the Appellant's possession.
21. **PW1** is the Complainant. She was a student at the Maseno University. She testified that she lived outside the University.
22. On the material date, **PW1** was accosted by one man when she was returning to her house after answering the call of nature.
23. The said man, together with his accomplices took electronics, a laptop HP; a cell-phone; Hooper and a "Total Gaz" cylinder.
24. When **PW1** reported the matter at the Maseno Police Station, she provided the police with the IMEI Number of her cell-phone.
25. Two weeks later, the CID called the Complainant and informed her that her phone had been recovered.
26. **PW2** is a student at Esiba Primary School.
27. On the date following the day when **PW1** was robbed, **PW2** received a phone- call from a person who gave his name as Ambani.
28. The said Ambani invited **PW2** to go and see the phone which was being sold at Luanda Market.
29. When **PW2** got to Luanda Market, he found 2 young men who had the phone. One of the said young men was a person whom **PW2** had known by his nickname "LIPUKA".
30. **PW3** was a lorry conductor. He was with a colleague at Luanda, when he heard two young men talking about a phone which they wanted to sell.
31. **PW3** approached the two young men and told them that his cousin would like to buy the phone.
32. Both **PW2** and **PW3** confirmed that **PW2** gave Kshs 1,500/= to **PW3**, for use towards the purchase of the phone.
33. Both witnesses also said that the person who had the phone was Lipuka, and that the said Lipuka negotiated with them until they agreed on the price of Kshs 3,500/=.
34. According to **PW3**, the person who was with Lipuka was called Kofi.
35. The said Kofi asked **PW3** for the balance of Kshs 2,000/=, but **PW3** insisted that he would only pay the balance after **PW2** had been shown the PIN that would enable him to unlock the phone.
36. When Kofi did not provide the PIN, he told **PW3** that the phone (which Lipuka had given to **PW2**), was the only phone belonging to Lipuka, and that it was therefore not possible for Kofi to reach Lipuka on the phone, as the phone was already in the hands of **PW2**.
37. Two weeks after **PW2** had bought the phone, he was arrested by CID officers.

38. **PW3** led the police to Lipuka, and the police arrested him.
39. **PW4** was the Investigating Officer. After the Complainant had reported to the police about having been robbed, **PW4** lured **PW2** to Luanda.
40. Once **PW2** identified **PW3** as the person who had handed over the phone to him, the police traced the phone back to Lipuka.
41. The Investigating Officer testified that the Appellant, **LIVINGSTONE KOMBA**, was also known by the name **LIPUKA**.
42. On 13<sup>th</sup> October 2017 when the Investigating Officer tried to stoop the Appellant, who was riding a bicycle in Luanda town, the Appellant knocked him down.
43. As the Appellant also fell down after knocking the Investigating Officer, he was arrested.
44. During cross-examination, **PW4** said that the Appellant was not found in physical possession of the mobile phone belonging to the Complainant.
45. He explained that the Appellant was arrested because he is the person who had sold the phone to **PW2**.
46. When the Appellant was put to his Defence, he confirmed that he was arrested on 13<sup>th</sup> October 2017.
47. He said that he was arrested after he crashed into somebody, as he was riding a bicycle at Luanda Market.
48. He explained that he crashed into that person because, there was a drizzle and he was unable to brake, as he was riding fast, in an attempt to avoid being rained on.
49. The Appellant denied having been involved in the offence for which he was convicted.
50. Having re-evaluated the evidence on record, I find that the Complainant was robbed by a group of young men.
51. Pursuant to the definition in **Section 296(2)** of the **Penal Code**, the offence of Robbery with Violence is said to have been committed;
- “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 robbery, he wounds, beats, strikes or uses other personal violence to any person .....*”**
52. In this case the Charge Sheet indicates that the persons who robbed the Complainant were armed with dangerous weapons, namely a panga.
53. The Charge Sheet further indicates that the robbers threatened to use violence against the Complainant.
54. The only person who was an eye-witness to the robbery was the Complainant.
55. Nowhere in her testimony did she make any reference to a panga or any other dangerous weapon.
56. However, she made it clear that the robbers were more than one in number. Therefore, if the evidence proved that the Appellant was in the company of one or more of the persons who robbed the Complainant, the conviction would still be founded on solid ground.
57. As regards the “Confession” cited by the Investigating officer, the same would have been inadmissible in evidence if it did not comply with the provisions of **Section 29** of the **Evidence Act**.
58. Pursuant to that statutory provision;
- “No confession made to a police officer shall be proved against a person accused of any offence unless such police officer is –***
- a) of or above the rank of or of a rank equivalent to, sub-inspector; or***
- b) an administrative officer holding first or second class magisterial powers and acting in the capacity of a police officer.”***
59. In this case, the prosecution did not lead evidence to show that the police officer before whom the alleged confession was made, met the requirements of **Section 29**. Therefore, the confession was not admissible in evidence.
60. As regards the contention that the evidence of the Complainant was hearsay, I find that the matters about which the Complainant had a first-hand experience of are matters about which she was competent to testify.

61. In particular, the evidence about the manner in which the robbery was carried out, as well as how the Complainant provided evidence to show that she was the owner of the phone; are admissible.
62. However, the Complainant did not identify the Appellant nor did she lead to the arrest.
63. Lydia Mwikali was the room-mate of the Complainant. She is said to have called the Complainant's phone, which led her and the Complainant to Equity Bank, Luanda, where they met **PW2**.
64. As **PW2** corroborated the evidence of PW1 concerning their meeting, I find that Lydia Mwikali could not have added anything to the case for the prosecution.
65. The record of the proceedings shows that Lydia called the person who had the Complainant's phone. She did not call any officers of the Equity Bank.
66. Therefore, it is not the officers at that bank who led **PW1** to where the phone was.
67. Accordingly, the officers of Equity Bank were not Essential Witnesses, as alleged by the Appellant.
68. Njuguna was a colleague of **PW3**, and the 2 of them were together when two young men informed them that they had a phone for sale.
69. **PW3** said that Njuguna had left the area of Luanda after the Elections. That would explain why Njuguna was not called as a witness.
70. The Safaricom Service Provider was not an Essential "Witness", as it was not an ingredient of the offence of Robbery with Violence, that the prosecution should prove the use to which the phone was put, between the time it was stolen and the time it was recovered.
71. Kofi was said to have been one of the accomplices of the Appellant.
72. The Investigating Officer said that after two of the accomplices were killed by mobs, Kofi disappeared from Luanda, and is believed to have moved to Nairobi.
73. **PW4** said that the police had been unable to trace Kofi.
74. I find that Kofi was not an Essential Witness.
75. I find that the Appellant was connected to the phone of the Complainant through **PW3, PETERSON AMBANI**, who bought the phone from him.
76. The Appellant was not a stranger to either **PW2** or **PW3**. They met him in broad daylight when he and Kofi were selling the phone to **PW3**.
77. Thereafter, the Appellant and Kofi continued to remain in touch with **PW3**, as the latter had not paid the balance of the purchase price.
78. It is through the continued communication that the Appellant was traced and arrested.
79. As it is he who sold the stolen phone on the day after the said phone was stolen from the Complainant, I find that the doctrine of Recent Possession was applicable to this case.
80. The Appellant was found in possession of the Complainant's phone soon after it was stolen, and therefore the conviction was founded upon solid evidence.
81. Accordingly, there is no merit in the appeal, and it is thus dismissed.

**DATED, SIGNED and DELIVERED at KISUMU this 16<sup>th</sup> day of July 2019**

**FRED A. OCHIENG**

**JUDGE**