

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 35 OF 2018

JORAM KARIUKI NJUGUNA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. K. M. Njalale – SRM Limuru dated and delivered on the 9th day of May 2018 in the original Limuru Principal Magistrate’s Court Criminal Case No. 396 of 2015}

JUDGEMENT

The appellant was tried, found guilty, convicted and sentenced to death for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He has appealed against the judgement delivered on 9th May 2018 on grounds that the trial Magistrate shifted the burden of proof to him; that the conviction was not safe; that the trial Magistrate failed to consider that the evidence against him was purely circumstantial and further that the provisions of Sections 169 (1) of the Criminal Procedure Code were not adequately complied with. He prosecuted the appeal through written submissions to which Prosecution Counsel replied orally.

Briefly the facts of the case are that on 7th April 2015 Jeremiah Enos Otinga, the complainant (Pw4) was a fare paying passenger in a North Rift Shuttle that was being driven to Nairobi from Eldoret by John Wainaina (Pw3). They departed Eldoret at 3pm and stopped briefly at Nakuru then departed at 9pm. When they reached Kijabe one of the “passengers” indicated that he would alight at a place called Magina. They arrived there at about 10pm and Pw3 stopped the vehicle and opened the door for the said “passenger” to alight. The “passenger” then stated that he had luggage in the boot and Pw3 therefore went round so that he could open the boot to remove the luggage but before he could do so “the passenger” gave him a blow on the head that sent him sprawling to the ground bleeding. Pw3 ran off screaming but there was no one to assist. In the meantime, another of the “passengers” had alighted to assist the one who had attacked the driver. They then commandeered the motor vehicle and drove it to an isolated place where they robbed the passengers. The complainant lost a Samsung Duos mobile phone, a Laptop and 500/= which the attackers forced him to transfer to them on M-pesa. After robbing the passengers, the attackers pointed out the road to them and fled. The driver of the vehicle had reported the matter to their company and to police officers at a road block who using the cars tracking device went and rescued the complainant and the other passengers.

On 14th April 2015 Josephat Manyoni Ambalwa, (Pw1), a cobbler cum shoeshiner in Limuru Town was at his workshop when he was approached by a customer who asked him to clean his shoes and then admiring a pair of shoes he was selling requested him to trade-in the shoes with a phone. Pw1 agreed and the customer subsequently gave him a Samsung Duos and took the shoes with Pw1 only topping up KShs. 200/=. Pw1 went home with the phone and gave it to his wife.

Corporal Leonard Busuru testified that the incident was reported to them on the night of 7th April 2015 at about 10pm. He stated that he was one of the police officers who went to rescue the passengers of the carjacking and that the case was later assigned to him to investigate. He stated that the investigation mainly involved tracking of the complainant’s Samsung phone S/No. 351830056457360 and that his investigations revealed that the phone was used by the appellant on 13th April 2015 vide a line No. 0724 834 606. Later on 14th April 2015 it was used by Josphat Ambani (Pw1) who he arrested on 22nd May 2015 and who told him that the phone had been given to him by Zacharia Gichuru (appellants co-accused). The investigating officer stated that after learning the phone had been used by the appellant he started looking for him and arrested him on 22nd May 2015. The appellant allegedly admitted to have sold the phone to a cobbler in Limuru. Thereafter the appellant led him to Mai Mahiu where he arrested Zacharia Gichuru. The said Zacharia then led them to Karagita in Naivasha where his alleged accomplices were but they did not find them. The investigating officer produced data from Safaricom which he stated confirmed that the appellant had been in communication with Zacharia Gichuru, his co-accused, and that he had in fact called his co-accused who had admitted to this crime, five times. He therefore charged both of them with this offence.

In his defence, the appellant testified that he lived in Tigoni and that he earned a living from repair of phones and other electrical appliances. He recalled that on 10th April 2015 while he was in Limuru working, his co-accused called him and told him he wanted him to repair a phone that had a cracked windscreen and broken back cover. He stated that his co-accused left him with the phone and he repaired it and charged 800/=. He stated that his co-accused went for the phone on 13th April 2015 on his way to Nairobi but instead of taking it he requested him to sell it. He stated that he recalled a shoe shiner in Limuru who had asked for a phone to buy and so he went and showed him the phone. He then introduced the shoe shiner who he identified as Pw1 to his co-accused and they spoke and the shoe shiner bought the phone. He, the appellant collected the money from Pw1 and gave his co-accused 1000/= and promised to give him the balance later but his co-accused did not go back. They however spoke on phone and he sent him his cash. The appellant conceded that he used the phone to call Pw1 on 13th April 2015. He stated that he was arrested on 22nd April 2015 and that he led the officers to the shoe shiner and he too was arrested. Thereafter he took the officers to Mai Mahiu and they arrested his co-accused who when asked where he obtained the phone said it was given to him by some people in Naivasha. He stated that his co-accused took the officers to Naivasha but nobody came forward. The appellant stated that he was arraigned in court with his co-accused but the cobbler was released and turned into a witness. The appellant disputed there were witnesses when he sold the phone to the shoe shiner and contended that it was a lie that he sold the phone to him. He contended that the phone was sold to the shoe shiner by his co-accused but stated he and the cobbler worked 10 metres from each other and they knew each other. He also contended that the investigating officer did not carry out investigations and that the Safaricom data did not prove anything.

He stated that on 7th April 2015 he must have been at home with his wife and children. He denied any involvement in the crime but confirmed that the phone he passed to Pw1 was a Samsung. He stated that he used the phone for just a few minutes on the day he spoke to Pw1 but not on 13th and 14th. He also stated that he removed the phone's code (password) and that he had known his co-accused for 8 months. He told the court that it was his habit to test a phone he had repaired before returning it to the owner.

Being the first appellate court I have considered and evaluated the evidence so as to determine whether the charge against the appellant was proved beyond reasonable doubt. I have done so bearing in mind that I did not hear or see the witnesses who gave evidence (**see Okeno v Republic [1972] EA 32**).

There is no doubt that on 7th April 2015 a robbery in which the complainant in this case was a victim occurred. The perpetrators of the crime were more than one and immediately before carjacking the "matatu" they used violence against Pw3, its driver. The ingredients of the offence of robbery with violence were therefore established beyond reasonable doubt. One of the articles stolen during the robbery was a Samsung phone belonging to the complainant Jeremiah Enos Otinga (Pw4). Evidence was adduced that the phone was tracked using technology and call logs from Safaricom and it was found with Pw1, a cobbler at Limuru. Pw1 conceded the phone was traced to him. Indeed, it was his brother (Pw2) who took it to the police while he himself was in police custody. At the trial, the complainant identified the phone as his. This fact was also confirmed by the Safaricom call logs (Exhibit 2) which showed that he had used it up to about 9pm on the date the robbery occurred. The data revealed that the phone was not used again until 13th April 2015 when at about 11.03 the appellant made a call using it at a location described as lower Kirinyaga Road. He made and received several other calls from and at different locations the last of which was an incoming call received by him in Limuru Town at 10.03am on 14th April 2015. From 14th April, 20th and 22nd April the phone was used by Josphat Ambala (Pw1).

In his defence, the appellant admitted that it was him who took the phone to Pw1. His own words were that after his co-accused requested him to sell the phone he remembered a cobbler who had inquired if there was a phone on sale. He therefore took the phone to the cobbler (Pw1) and after he liked it he connected the cobbler to his co-accused and his only role was to deliver the phone to Pw1 and to receive the money on behalf of his co-accused. The call logs reveal that he was in possession of the phone barely six days after the robbery and also confirm that he sold it, because this is what he did, to Pw1, one day after it came into his possession. Whereas his evidence that he made only one call using the phone was not candid, his evidence that the phone was passed to him by his co-accused seems to be true. This is because, firstly, the investigating officer testified that once they arrested Pw1 and the appellant, the appellant told them that the phone was given to him by his co-accused and even led them to Mai Mahiu where they found his co-accused. The investigating officer also told the court that after arresting the appellant's co-accused he admitted he had given the phone to the appellant and also admitted to taking part in the robbery and volunteered to lead and did indeed lead police officers to Karagita in Naivasha where he alleged his accomplices were. Secondly, the call logs of both the appellant's and his co-accused's phones confirm there was communication between them on 8th April 2014, the day after the robbery and five days before he first used the complainant's phone. It is my finding that whereas the admission by the appellant's co-accused did not amount to a confession as against himself, these pieces of evidence confirm the appellant's explanation of how he came into possession of the phone was likely true and casts doubt as to his involvement in the robbery. Be that as it may, I find that his possession of that phone was not altogether innocent. I find that there is evidence that he knew or had reason to believe it was stolen and that he dishonestly received it and undertook and assisted in its disposal for the benefit of his co-accused. There is evidence that he used the phone a whole day hence negating his assertion that he only made one call to test. In my view that is evidence that he retained the phone and taking it to the shoe shiner on behalf of his co-accused (Pw1) is proof that he assisted or undertook to dispose it on behalf of his co-accused. Further, his admission that he received the proceeds of the sale from Pw1 and sent the same to his co-accused only goes to confirm that he participated in the phone's disposal. His further admission that the phone had a password which he decoded before selling the phone is evidence that he had reason to believe the phone was stolen and that his handling of the phone was dishonest.

In the upshot, I find that whereas there is doubt as to whether he took part in the robbery there is evidence to prove the alternative charge of handling stolen property beyond reasonable doubt. Accordingly, the conviction for robbery with violence is quashed for being unsafe and in its place is substituted a conviction for handling stolen goods contrary to Section 322 (1) as read with Section 322 (2) of the Penal Code. The sentence of death is also set aside and substituted with a sentence of imprisonment for ten (10) years. The appeal succeeds to that extent only.

Signed and dated this 4th day of November 2019.

E. N. MAINA

JUDGE

Signed and delivered in Kiambu this 14th day of November 2019.

C. W. MEOLI

JUDGE