REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.184 OF 2018

(An Appeal arising out of the conviction and sentence of Hon. A. R. Kithinji SPM delivered on 27th July 2018 in Makadara CM. CR. Case No.5081 of 2013)

JOSEPH OTIENO WESONGA ……..…….……..APPELLANT

VERSUS

REPUBLIC……..…….....RESPONDENT

JUDGMENT

The Appellant, Joseph Otieno Wesonga, was charged in count 1 with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 26th October 2013 at Dandora Phase II Estate within Nairobi County, the Appellant, jointly with others not before court, while armed with dangerous weapons namely knives, robbed Moses Murigi Waweru of one mobile phone make Nokia 1110 and cash Ksh.15,000/- all valued at Ksh.17,500/-, and immediately after the time of such robbery used actual violence to the said Moses Murigi Waweru. In the alternative charge, the Appellant was charged with the offence of handling stolen property contrary to Section 322(1) & (2) of the Penal Code. The particulars of the offence were that on 26th October 2013 at Dandora Phase II Estate within Nairobi County, the Appellant, otherwise than in the course of stealing, dishonestly retained one mobile phone make Nokia 1110, knowing or having reason to believe it to be stolen.

The Appellant was charged in count 2 with the offence of having suspected stolen property contrary to Section 323 of the Penal Code. The particulars of the offence were that on 27th October 2013 at Dandora Jua Kali within Nairobi County, the Appellant having been detained by No.75046 PC Ayub Tete and No.83725 PC Jesse Wanjala as a result of the exercise of the power conferred by Section 26 of the Criminal Procedure Code, had in his possession two mobile phones make Nokia and Tecno reasonably suspected to have been stolen or unlawfully obtained. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted as charged on the main charge in count 1. He was sentenced to serve fifteen (15) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for convicting him based on the evidence of identification whereas the complainant failed to give a description of his assailants in the first report that they made to the police. He was aggrieved that the phone which was alleged to belong to the complainant, and which was the only evidence connecting him to the offence, was not produced in court as an exhibit. He was further aggrieved that the trial court relied on the evidence adduced by the prosecution which was inconsistent and full of contradictions. He took issue with the fact that the prosecution failed to avail crucial witnesses to testify before court. He was of the view that the trial court failed to properly consider his defence in making its determination. In the premises, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was meted by the trial court.

During the hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. Ms. Nyauncho for the State opposed the appeal. She made oral submissions to the effect that the prosecution had established its case on the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt. She submitted that the Appellant, in the company of two others, while armed with a knife, robbed the complainant of his phone and cash all valued Ksh.17,500/-. She explained that the Appellant also attempted to rob PW2 who was a police officer. She asserted that the Appellant was arrested in possession of the stolen phone and a knife. The complainant identified his phone after it was recovered from the Appellant. The knife that was recovered from the Appellant was bloodstained. Ms. Nyauncho submitted that a Government Analyst analyzed the blood stains found on the knife and confirmed that the same matched the blood sample obtained from the complainant. She submitted that the Appellant's identification was watertight. Learned State Counsel submitted that the trial court put into consideration the Appellant's age before sentencing him. In the premises, she urged the court to dismiss the appeal.

The facts of the case according to the prosecution are as follows: PW1, Moses Murigi Waweru, was the complainant. He stated that

he resided in Dandora. He hawked clothes for a living. On 26th October 2013, at about 10.00 p.m., he was going home from work. He alighted at a bus stop known as Jestan which was about 100 metres from his house. He saw a person walking towards him. Suddenly, two other men emerged from the side of the road. They stopped him. The man who was walking towards him inquired where he was going. The men grabbed him. He tried to resist but they threatened to kill him if he failed to cooperate. They pushed him to the ground and searched his pockets. They stole his phone, make Nokia which had a purple-black cover, and cash Ksh.15,000/-. He stated that one of the men had a knife which he used to stab him three times on the face.

When the assailants fled, he went home and was taken to hospital. He first reported the matter at Kinyago Police Post. He later dialed his mobile phone. A police officer from Mowlem Police Post picked the call. He informed him that the same had been recovered from a suspect who had been arrested. PW1 proceeded to the said Police Post and reported the robbery. He told the court that he was able to identify the assailant who stabbed him. He stated that the assailant was facing him. He was therefore able to identify him with the help of nearby security lights. He testified that although the intensity of light from the street lights was not strong, he was able to see his attacker. He said that the person who stabbed him was a short young boy. He identified the Appellant as the assailant who stabbed him.

PW2, PC Joseph Wanjala, was based at Mowlem Police Post. On 27th October 2013, at about 12.30 a.m., he was on night patrol duty together with PC Tete, who was deceased at the time he testified before court. They were both wearing civilian clothes. Three young men approached them. They wanted to attack them. PC Tete brandished his gun. The three men retreated and started running away. PW2 and PC Tete gave chase. PW2 shot in the air. They managed to arrest the Appellant who was one of the assailants. Upon searching him, they recovered three mobile phones, cash Ksh.950/- and a bloodstained knife. Two of the phones were make Nokia 1110 while the third one was a Tecno. One of the Nokia phones was ringing. PC Tete answered the call. A woman who was on the line informed him that the phone belonged to her husband who had been robbed and stabbed by his assailants, and was currently at the hospital.

PW3, Dr. Joseph Kimani, was a Government Analyst. On 8th November 2013, he received a bloodstained knife and a blood sample belonging to the complainant from Dandora Police Station. He was instructed to examine the same and generate DNA profiles to determine whether the blood on the knife belonged to the complainant. He testified that the bloodstains on the knife matched the blood sample obtained from the complainant. He produced a report of the same into evidence.

PW4, PC Julius Kirui then attached to Dandora Police Station was assigned to investigate the case. He interrogated the complainant as well as other prosecution witnesses and recorded their statements. The complainant informed him that he was robbed of a phone and Ksh.15,000/-. He was also assaulted by his assailants. One of the suspects had been arrested and was being held at Mowlem Police Post. He went to the said Police Post. The arresting officer handed over the custody of the Appellant as well as three phones, a bloodstained knife and Ksh.950/- that were recovered from the Appellant when he was arrested. He took the complainant to a hospital where his blood sample was taken. He then forwarded the complainant's blood sample and the knife recovered from the Appellant to the Government Chemist for analysis. After concluding his investigations, he charged the Appellant with the present offences. PW4 testified that the complainant was able to identify one of the phones recovered from the Appellant make Nokia 1110 as the one that was stolen from him. On cross-examination, PW4 stated that when he interrogated the Appellant, he was not able to explain where he got the complainant's mobile phone from. He stated that he did not conduct an identification parade since the complainant could not identify his assailants.

PW5, Dr. Maundu from Police Surgery stated that he examined the complainant on 30th October 2013. He told the court that the complainant had a bruise on the left side of his face, a cut wound on his lower lip and another cut wound on his nose. He said that the injuries were approximately three days old and that the same had been inflicted by a sharp object. He produced the complainant's P3 form into evidence. When the Appellant was put on his defence, he testified that he resided in Dandora and was a student at Ndurumo Primary School. He stated that on 20th October 2013, he went to watch a football match where he was arrested after a police raid. He was taken to Mowlem Police Post. He was transferred to Dandora Police Station the next day. The people he was arrested with were released. He denied taking part in the robbery incident.

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 Appellant 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 on record that the Appellants were convicted on the basis of circumstantial evidence and that of the application of the doctrine of recent possession. The evidence of identification relied on by the trial court was unsafe. PW1 testified that he was accosted by three robbers. They stole his phone and money. One of the assailants stabbed him on the face. He stated that he was able to identify the Appellant as the assailant who stabbed him since he was facing him. The robbery occurred at about 10.00 p.m. He stated that he used light from security lights whose intensity was not strong. However, on cross-examination, he testified that he was not able to give a description of his assailants since he had not seen them before. The investigating officer, PW4, told the court that he did not conduct an identification parade when the Appellant was arrested since PW1 could not identify his assailants. The Appellant was not known to the complainant prior to the robbery incident. This court is therefore of the view that the complainant did not positively identify the Appellant at the scene of crime. The identification of the Appellant in court amounts to dock identification which is useless in the circumstances since it has no probative value.

The prosecution adduced other circumstantial evidence against the Appellant. PW2 was on night patrol duties in Dandora on the material night of 26th October 2013. He was accompanied by PC Tete, now deceased. They were both in civilian clothes. He stated that at about

12.30 a.m., three young men approached them. They wanted to attack them. PC Tete drew his gun. The three men retreated and started running away. PW2 and PC Tete chased them. They were able to arrest the Appellant who was one of the three men. They searched the Appellant and recovered three mobiles phones, cash Ksh.950/- and a bloodstained knife. Two of the mobile phones were make Nokia 1110 and the other was a Tecno. They took the Appellant to the police station. While at the police station, one of the phones, make Nokia that had been recovered from the Appellant rung. PC Tete answered the call. PW2 was present as well. A woman who was on the line informed them that the phone belonged to her husband who had been robbed that night. He was at the hospital since the assailants had stabbed him.

The investigating officer (PW4) told the court that the complainant was able to identify his mobile phone among the ones that had been recovered from the Appellant during his arrest. PW4 stated that the complainant's phone was off by the time it was handed over to him by the arresting officer. He charged the phone. The complainant identified it as the one that was stolen from him. He was able to input the correct pin which confirmed to PW4 that the phone belonged to him. The trial court in convicting the Appellants relied on the doctrine of recent possession. **The principles to be considered before the doctrine of recent possession is applied were 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 has 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, it was established to the required standard of proof beyond any reasonable doubt that the Appellant was arrested in possession of the complainant's mobile phone which had recently been stolen from him. The Appellant was arrested on the same night that the complainant was robbed. This was barely three hours after the robbery incident. The burden of proof in this case shifts to the Appellant to explain possession of the alleged stolen phone. The Appellant failed to give an explanation of how he came to be in possession of the recovered mobile phone that had just been stolen from the complainant. The Appellant in his defence stated that he went to watch a football match on the material night when he was arrested by police officers in a police raid. He failed to explain to the court why he was found in possession of the complainant's mobile phone. **It therefore follows that the doctrine of recent possession was properly applied in this case.**

In addition, the Appellant was arrested in possession of a bloodstained knife. PW1 in his testimony stated that the assailants stabbed him on the face with a knife during the robbery incident. PW3, who was a Government Analyst, analyzed the blood stains on the knife and compared it with blood sample obtained from the complainant. He told the court that bloodstains on the knife recovered from the Appellant matched the blood sample recovered from the complainant after DNA analysis. This evidence further supports the conclusion that the Appellant was indeed among the assailants who robbed and wounded the complainant on the material night. This court is of the opinion that circumstantial evidence adduced by the prosecution unerringly pointed on the guilt of the Appellant, and the prosecution evidence taken into totality formed a chain so complete that established that the Appellant was indeed among the assailants who robbed the complainant. There was no other reasonable hypothesis other than that of the Appellant's guilt.

In the present appeal, the ingredients of the offence of **robbery with violence** were established by the prosecution. The assailants were more than one at the time the robbery was committed. The Appellant was armed with a knife which is considered a dangerous and offensive weapon. Personal violence was occasioned on the complainant by the assailants. Medical evidence adduced by PW5 corroborated the complainant's testimony that the assailants stabbed him on the face. The Appellant's defence did not rebut the otherwise overwhelming and cogent evidence adduced by the prosecution. The prosecution proved the Appellant's guilt with regard to the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** in count 1, to the required standard of proof beyond any reasonable doubt. The Appellant's appeal on conviction is without merit and the same is hereby dismissed.

The Appellant was sentenced to serve a custodial sentence of fifteen (15) years. The trial court in sentencing him took into consideration the fact that the Appellant was sixteen (16) years of age when he was charged before the trial court. The trial court was also mindful of the fact that the Appellant had spent five (5) years in custody during the trial period prior to his conviction. This court has considered the Appellant's mitigation. It has also considered the pre-sentencing report by the Probation Officer dated 14th August 2018. The Appellant was a minor when he was arrested. He is also a first offender. The Appellant is remorseful. He asserted that he was continuing with his education while in prison. In the premises, this court sets aside the custodial sentence of fifteen (15) years imposed by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve ten (10) years imprisonment with effect from the date he was sentenced by the trial court. This court has taken into consideration the period that the Appellant was in lawful custody both before his conviction and after his conviction by the trial court. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF NOVEMBER 2019

L. KIMARU

JUDGE