



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 39 OF 2017

FREDRICK ODHIAMBO OGOLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment, conviction and sentence passed on 3rd

September 2015 by Hon H. WANDERE- P.M from Original Siaya PM Cr Case No. 928 of 2013)

JUDGMENT

1. The appellant **FREDRICK ODHIAMBO OGOLLA** was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. He was however acquitted of the charge of capital robbery and convicted and sentenced for the offence of handling stolen property contrary to section 322(1) and (2) of the Penal Code.

2. The particulars of the offence are that on night of 7th and 8th days of November 2013 at Abate trading center Siaya District within Siaya County jointly with others not before Court, while armed with pangas and rungas robbed the shop of **KENNEDY OCHIENG OKOTH** of shop goods as follows:

8 bags of sugar, 5 bales of wheat flour, 15 cartons of Lido shop, 7 bales of dola maize flour, 6 cartons of Aerial shop, 10 Jericans of top fry, 16 packets of always, 4 cartons of Royale cooking fat, 1 Carton of Kimbo, 1 Carton of Chips, 1 Carton of quencher, 3 bags of rice, 1 Carton of sweets, 1 Carton of Bata sandal, 10 bales of Tropicana wheat flour, 7 customer mobile phones which were on the charging all valued at Ksh. 147, 695.00 and the time of such robbery totally killed **Joseph JUMA MALA** who was the night watchman of the said shop.

3. The appellant pleaded not guilty before Hon. J.N SANI, acting Senior Resident Magistrate but was convicted by Hon. H. Wandere, PM.

4. The prosecution called 7 witnesses to establish their case against the appellant.

5. As is expected of the first appellate court, I must reassess and reevaluate the evidence adduced before the trial court and arrive at my own independent conclusion bearing in mind the fact that I neither saw nor heard witnesses as they testified firsthand. **See Okeno v Republic [1972] E.A. 32.**

6. Revisiting evidence before the trial court, **KENNEDY OCHIENG OKOTH** testified as PW 2 and stated that it was his goods at his shop at Abate trading Centre that were stolen on the night in issue and it was his night watchman **Joseph JUMA MALA** who got killed on the night in issue.

7. PW 4 Thomas **Omondi Obonyo** was a fellow night watchman who was with the deceased watchman when the robbers struck. PW 4 who called the Administration police that night of the attack using his mobile phone. PW 1 is a neighbor whose shop is also at Abate trading center to that of the complainant. PW3's mobile phone had been left charging at the shop of the complainant and was among the goods that were stolen on the night in issue. The report of the robbery was received by the Criminal investigations department at Siaya and PW6, a scenes of Crime Officer was dispatched to take photographs of that scene by the investigating's officer. They organized for the deceased watchman's body to be removed from that scene to Siaya Sub- County Referral Hospital where a postmortem report was carried out by PW 7 a doctor attached to that hospital. The body was then released to the family for burial.

8. On the 18th day of December 2013 the police in pursuit of the suspects recovered from this appellant a Nokia Phone make ITEL 51130 the property of PW 3. They arrested the appellant and after investigations, he was arraigned.

9. The complainant narrated to the court in his examination in Chief how he received the report of the robbery and the killing of the watchman but in cross examination he stated that he never saw the robbers that night as he was not present at the shop at the material time.

10. PW 3 **Jane Obiero Akuku** the owner of the phone that was allegedly recovered from the appellant also narrated in her examination in chief how she took her phone to be charged at the shop that was robbed. Upon cross examination by the appellant she told the court that she was illiterate. That the phone had been bought for her by her children so when it was stolen from the complainant's shop she took the receipts of the phone to the police. Later the police called her, after they had arrested a suspect with a phone which they required her to go look at that phone which she did. She was able to identify the phone as the one her children had bought her and which she had taken for charging at the complainant's shop on 6th November 2013. She said that she left it there for there was no electricity on the 6th hence it remained there on the 7th and that on the 8th she received information that the shop had been robbed.

11. The police after receiving information on the robbery started tracking the aforesaid stolen mobile phone using a tracking device. That is how it was found being used by the appellant.

12. The exhibits produced were exhibit 1 the post mortem of the deceased watchman; Exhibit 3 a Nokia phone, black in colour, Exhibit 4 a, b, e are photographs of the deceased watchman taken at the scene of crime; Exhibit 5 is the certificate of photographic exhibits, Exhibit 6 is the Safaricom call data request and exhibit 7 is the Safaricom search request.

13. The Appellant gave sworn statement of defence. He stated that on 4th November 2013 he travelled to Nairobi in Pursuit of his fish business. That he stayed up to the 8th day of November 2013 when he got back. He produced two long receipts as defence exhibits so as to convince the trial court that he was nowhere near the scene of crime when it was alleged this offence was committed. He further stated that on 16th November 2013 he had used a neighbour's phone to get in touch with his sick brother. That he used the same phone to receive some money later from a mama Kiki. That he then travelled back home to see his brother whom he assisted and in that process he got arrested by the police.

14. The trial court acquitted the appellant of the charge of Robbery with violence and found him guilty of the offence of handling stolen property and sentenced him to serve seven years imprisonment.

15. Aggrieved by the conviction and sentence imposed, the appellant filed this appeal setting out the following grounds of appeal:

1. That the trial magistrate erred in law and fact in failing to observe that there was no receipt in court concerning the alleged exhibit 3;

2. That the trial court failed to consider the fact that the prosecution failed to state the nature of handling;

3. That the Imei serial number of the phone produced in court was not the one claimed;

4. That the prosecution case was not proved beyond reasonable doubt as some essential witnesses were not availed especially those who were present during the arrest of the appellant;

5. That the appellant wished to be present during the hearing of this appeal hence certified copies of proceedings be supplied to him to adduce sufficient grounds.

16. In support of this appeal, the appellant filed written submissions which were argued by Mr. Okello Advocate in support of the appeal. The appeal was opposed by the Senior Principal Prosecution Counsel Mr. Okachi who made oral submissions that. In the said submissions, it was asserted that the complainant claimed to have lost ITEL phone but that the appellant was found with Nokia phone. Further, that the Investigating officer was not called to prove whether he recovered a Nokia or ITEL phone from the appellant. That no inventory was produced and that there were contradictions in the evidence and judgment. Counsel maintained that PW5 recovered a Nokia Phone and that the Prosecution did not call all essential witnesses. Further, that PW3 the owner of the phone never identified it in court. He asserted that the prosecution's case was not proved beyond reasonable doubt.

17. Opposing the appeal, Mr. Okachi senior Principal Prosecution Counsel for the Respondent submitted that the complainant PW3 was illiterate and could not tell exactly the make of the phone but the receipt was produced to identify the phone in issue. That the appellant was found guilty of possession of stolen property. That the evidence by prosecution witnesses was not challenged hence the appeal should be dismissed and the conviction and sentence upheld.

18. In a rejoinder, Mr. Okello Counsel for the appellant submitted that the Police were the ones who recovered Nokia not ITEL phone. That the appellant used a neighbour's phone to call and not his phone. In addition, that the charge of handling stolen property is highly technical and that vital elements of positive identification of the stolen property was not proved by the prosecution. He urged the court to acquit the appellant and set him at liberty.

DETERMINATION

19. I have considered the, the grounds and submissions for and against the appeal. In my humble view, the main issue for determination is whether the prosecution proved the charge of handling stolen property against the appellant beyond reasonable doubt.

20. According to the appellant, the trial court erred in law and fact in convicting him for the offence of handling stolen property yet the ingredients of the offence were not proved beyond reasonable doubt.

21. From the evidence adduced by the 8 prosecution witnesses, there was indeed no eye witness to the alleged robbery and the only evidence which the prosecution relied on and the trial court believed and convicted the appellant for the offence of handling stolen property is the

recovery of a Nokia Phone which was found in possession of the appellant. The phone allegedly belonged to P3.

22. There is, however, no dispute that the robbery occurred at Abate Trading Centre and that the violence led to the demise of the deceased watchman. It is further not in dispute that several items were stolen and among the stolen items were mobile phones, one of which was recovered and led to the arrest of the appellant.

23. However, the issue in contention is whether the Nokia phone which was allegedly recovered from the appellant and produced as an exhibit was among those that were stolen; and whether it was recovered from the appellant.

24. The owner of the Nokia phone was identified to be PW3, who testified in detail how she took her phone to the complainant's shop for charging. She also produced receipts issued to her for the purchase of the subject phone to prove ownership thereof.

25. PW3 and the complainant in the robbery with violence charge positively identified the phone as the one which was in the shop on the night of the 7th and 8th November 2013 when the robbery allegedly took place.

26. The trial magistrate who had the opportunity of hearing and seeing PW2 and PW3 testify stated as follows regarding the discrepancy in the description of the recovered phone:

“I have keenly noted what the appellant said in his defence and find that the difference in digits by the witnesses in respect of this phone does not take away the fact that it is the same phone being referred to. The accused was found with the phone that had been recently stolen....”

27. The trial court which had the opportunity to hear and see the witnesses testify especially PW3 the owner of this phone and PW 5 the arresting officer, who recorded the phone, was persuaded and observed that there was none whose demeanor suggested that he or she was telling the Court an untruth.

28. Appellant in his defence stated that he was using a neighbour's phone. However, it is the recovered phone that was tracked down to him leading to an inference that he was part of the robbers by virtue of the undisputed fact that he was found in physical possession of the stolen phone, a few days after the alleged robbery. The phone was stolen on the night of 7th and 8th November 2013 and it was recovered from the appellant on 18th December 2013.

29. Although the appellant was arraigned before court for a charge of robbery with violence contrary to section 296 (2) of the Penal Code and found guilty of the charge of handling stolen property contrary to section 322(2) of the Penal Code, and convicted accordingly, in the court exercising discretion under section 179 of the Criminal Procedure Code, I am satisfied that on the evidence availed, the appellant committed the offence for which he was convicted which was a lesser offence than the one charged and that the trial court had the power to so convict him. Section 179 of the Criminal Procedure Code stipulates:

“179 (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

43. The Court of Appeal in **Robert Mutungi Muumbi vs. Republic [2015] eKLR** stated, as follows on the above provisions:

“The third issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda's response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged...As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171 and WACHIRA S/O NJENGA V. REGINA (1954) EA 398). Spry, J. explained the essence of the first consideration as follows in ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

“Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor,

cognate, offence (proved) and may then, in its discretion, convict of that offence.”

30. The above conclusion is normally arrived at the judgment stage when it is not practical to require the accused person to plead afresh to the minor offence as is required under section 214 of the Criminal procedure Code which provides that:

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that -

(i) Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.”

31. Thus, the decision to convict an accused person for a lesser offence than that which is subject of the charge before the trial court is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial.

32. The Court in the above case of **Robert Mutungi Muumbi vs. Republic** further stated:

“The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See REPUBLIC V. CHEYA & ANOTHER [1973] EA 500). In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied.”

33. The trial court in this case was satisfied, after hearing all the prosecution witnesses that the charge of robbery with violence was not proved but that the evidence on the whole proved the offence of handling stolen property. Albeit the appellant claims that PW3 did not give evidence to prove that the phone which was recovered was hers as it was a Nokia and not ITEL, the evidence clearly showed that the witness was illiterate and that she could therefore not differentiate the two types of models but she was able to positively identify her Phone which was produced as Exhibit 3 and she also produced receipts of purchase of the said phone which matched the phone. More so, she stated that the phone was bought for her by her daughter.

34. As correctly observed by the trial magistrate, minor discrepancies in the description of the phone would not vitiate the appellant's conviction for the offence of handling stolen property as he did not lay claim to it nor explain how he came into its possession.

35. For the above reasons, I find and hold that the conviction of the appellant for the offence other than that which he was charged was based on sound evidence adduced by the prosecution and therefore the conviction was safe. I uphold it and dismiss the appeal herein against conviction.

36. On sentence, there was evidence that the appellant was a repeat offender who was a convict serving a two (2) years jail term in Criminal Case number 228 of 2015 for an offence of escape from lawful custody. Therefore, he had previous convictions. For the above reason I find no fault in the sentence meted out on the appellant. However, as the appellant has already served more than $\frac{3}{4}$ of the jail term, I exercise discretion and set aside the seven years imprisonment and substitute it with six (6) years imprisonment to be calculated from the date of his arrest on 18/12/2013.

37. In the end, I dismiss this appeal against conviction and allow the appeal against sentence to the extent stated above.

38. Orders accordingly.

Dated signed and Delivered at Siaya this 3rd Day of December, 2019

R.E.ABURILI

JUDGE

In the presence of:

Mr. Okello Advocate for the appellant

The appellant present

Mr. Okachi Senior Principal prosecution Counsel for the Respondent

CA: Brenda & Modestar