REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 57 OF 2014

(From original conviction and sentence in Criminal Case No. 1310 of 2012 of the Principal Magistrate's court at Baricho.)

PAUL MUCHEMI WERU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant Paul Muchemi Weru was charged before the Principal Magistrate Baricho Court in Cr. Case No. 1310/2012 with the offence of Robbery with violence Contrary to Section 296(2) of the Penal Code. After a full trial he was found guilty and he was convicted and sentenced to death.

2. He has appealed against the conviction and sentence based on the following grounds:-

(a) THAT, the Learned trial Magistrate erred in both law and facts when he convicted me in the present case by applying doctrine of recent possession application that was wrongly applied and that the charges are fatally defective.

(b) THAT, the Learned trial Magistrate erred in both law and facts when he convicted me in the present case yet failed to find that section 200(3) of C.P.C was not aptly applied.

(c) THAT, the Learned trial Magistrate erred in law and facts in failing to note that the appellant's fundamental rights enshrined in Article 49(1)F of the constitution were violated.

(d) THAT, the Learned trial Magistrate erred in law and facts in failing to indicate and note the appellant did not understand the language used at the trial.

(e) THAT, the Learned trial Magistrate erred in law and facts when he convicted me in the present case yet failed to find that investigations were shoddily performed and unreliable.

(f) THAT, the Learned trial Magistrate erred in both law and facts when he dismissed my plausible defence.

3. The appellant prays that the appeal be allowed. The conviction be quashed and the sentence imposed be set aside.

4. The State opposed the appeal and prayed that it be dismissed as it had proved its case the required standards.

5. This is a first appeal and this court has a duty to consider the evidence and make an independent finding but consider the fact that unlike the trial court it did not have the benefit of seeing the witnesses and assessing their demeanor and leave room for that. This was so held in the case of **Okeno –v- Republic (1972) E.A 32.** The appellant has a legitimate expectation that the 1st appellate court will consider the evidence afresh and make its own independent finding. This was stated by the Court of Appeal in the case of **Ondongo –v- R (2009) KLR 261**.

> ***"The appellant is entitled to expect the evidence tendered in the Superior court to be subjected to a fresh exhaustive examination and have this court's decision on that evidence. But as we do so we must bear in mind that we have not had the advantage (which the Learned Judge had) of hearing and seeing the witnesses and give allowance for that."***

6. This also applies to this Court when dealing with appeals from the Magistrates' courts.

7. The facts of these case are that on 5/6/12 a robbery was committed at Mitondo Coffee Factory Baricho by attackers who were armed with

offensive weapons to wit pangas and iron bars. They stole sixty bags of coffee valued at Kshs 1 Million, 3 mobile phones make Voda phone Serial No. 353307042086852 valued at Ksh 1,000/- and Forme valued Kshs 1,500/- and Nokia S/No. 351941036475275 valued at Kshs 3,500/- from Robert Ngari and Francis Mwangi who were also injured during the robbery. The two were watchmen who were guarding the factory on that material night.

8. The matter was reported to the police who later tracked the stole mobile phones to Luisoi in Nyeri County. The appellant was using the mobile phone which was stolen from the watchmen. The appellant had given the mobile phone to a lady, Anne Muthoni who was the 2nd accused in this case. The appellant was arrested. Later Anne Muthoni was arrested and a mobile was recovered. On 21/12/2012 a mobile phone make Voda phone Serial Number 353307042086852 was recovered by APC Samuel Wachira (PW-V) from one Karoche who escaped and left behind the mobile phone make Voda Phone Serial No. 353307042086852, MFI-1. Later the 2nd accused Anne Muthoni was arrested and a mobile phone was recovered from her. The two were then charged. The mobile phone make Voda phone was identified by Daniel Wanjohi (PW-1) who was the Manager of the coffee factory as the one which was stolen from the two watchmen who were guarding the factory on that material night, that is PW II and PW III, they did not identified any of the robbers. The appellant was charged on account of evidence that sometimes in August 2012 he used the stolen Voda Phone with his sim card. This evidence was shown by the data from Safaricom which was produced as exhibit -6-.

9. Other than the evidence from Safaricom, there was no other evidence as the said Voda Phone was not recovered from Anne Muthoni who was 2nd accused. It is apparent that PW VII Elizabeth Waiganjo had recovered a mobile phone from Anne Muthoni which was not related to this case and the record shows that the phone was returned to Anne Muthoni in open Court when Cpl. Elizabeth, (PW VII) testified.

10. The data from Safaricom according to Cpl Elizabeth Waiganjo PW.VII shows that the Sim card which was used in Voda Phone Serial No. 353307042086852 on 8/7/2012 was No. 0708[…] which was not registered and was used upto 2/8/2012. A number 0728[…] was used on 13/8/12. Another line No. 0173-471396 which was registered in the name of Paul Muchemi Weru ID. No. 11773781 was inserted. The handset was used from 13/8/2012 to 4/9/2012. From the data which was produced as exhibit line 713[…] used phone Serial No. 35330742086850. It is registered under name Paul Muchemi Weru ID 11773781. The phone which was recovered and identified by PW-1-Daniel Wanjohi Machagia who was the factory Manager, MFI-1 was not recovered from the appellant. From the charge sheet which was amended on 16/8/2013, the Serial Number of the stolen Voda Phone is given as 353307042086852. This Serial Number of the Voda which is given on the particulars of the charge sheet and that from Safaricom Data i.e No. 353307042086850 are clearly different. In her testimony PW VII. The Voda Phone which was recovered by PW IV APC Samuel Macharia Kenja is given as Serial No. 353307042086852. PW VIII Cpl Elizabeth Waithanje testified that she received data from Safaricom on Voda phone Serial No. 353307042086852 which had used the line of appellant No. 0713[…].

11. From the analysis of this evidence, it is clear that the appellant was not in possession of the stolen Voda Phone Exhibit 5. The particulars of the stolen Voda phone on the charge sheet were given as 353307042086852. On the other hand, the Safaricom Data shows the Voda phone which was used by the appellant in his mobile at some point was Serial No. 353307042086850. There is therefore no evidence to prove that the line of the appellant No. 713471396 ever used the Voda phone Serial No. 353307042086852 which is given in the particulars of the charge sheet. The mobile phone make Voda phone Serial number 353307042086852 was not recovered from the appellant.

12. The evidence of the mobile phone make Voda phone was the only evidence relied on to connect the appellant but the evidence was not cogent nor was it water tight. The trial Magistrate erred in his judgment by holding that the two accused Paul Muchemi Weru (appellant) and Ann Muthoni Kabebe were in possession of the Voda phone handset Serial No. 353307042086852 stolen from Mitondo Coffee Factory when no such evidence was tendered before him. His decision that his opinion is premised on the evidence of Administration Police Constable Samuel Macharia (PW VI) and Cpl Elizabeth Waithanji PW VII was totally wrong as PW VI stated that he recovered the phone from one Kamoche who escaped leaving behind his jacket and the phone while PW VII stated he did not recover the phone from the appellant and 2nd accused.

Possession is defined as –

> **"The state of having, owning or controlling something. It can also mean something that is owned or possessed."**

There was no evidence before the trial Magistrate that the appellant was in possession of the Voda phone in view of the fact the Safaricom Data does not support the evidence that the appellant ever used the phone which is stated on the charge sheet. The finding by the trial Magistrate was against the weight of the evidence. Had the trial Magistrate been keen on the Data from Safaricom he would have noted that the serial number of the phone the appellant is alleged to have used was different from the serial number given on the charge sheet.

13. The trial Magistrate stated that the Investigating Officer interrogated 2nd accused and she disclosed to her that she gave the said Voda phone to one Kamoche. That the disclosure led to the recovering of the said Voda phone. The 2nd accused denied that she received a Voda phone from the appellant. The evidence was inadmissible as no charge and cautionary statement was recorded from the 2nd accused, she was charged and was not a witness. In the absence of a charge and cautionary statement, that piece of evidence was of no probative value.
Section 25A(1) of the Evidence Act provides:-

> ***" A confession or any admission of fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a Judge, a Magistrate or before a police officer (other than the Investigating officer) being an officer not below the rank of Inspector of Police and a 3rd party of the person's choice."***

The evidence was not reliable and it is also clear from the Judgment of the trial Magistrate he arrived at conclusions which are not supported by the evidence on record.

The Trial Magistrate relied on the doctrine of recent possession. This doctrine could not apply in the circumstances of this case because for

one it is not proved that the appellant was in possession of the Voda phone. Secondly the offence was committed on 5/6/2012 and the phone was recovered on 21/12/2012, a period of nearly six months. The phone was not in possession of the appellant and there is no prove that the appellant at any one point used his line in the said mobile phone make Voda phone. The doctrine of recent possession cannot apply in the circumstance of this case. Even if the appellant was found with the phone six months after it was stolen that period would not have been stated to be recent. There would have been possibility of the property having changed hands and the probable offence would have been handling stolen goods where it was proved the appellant knew the property was stolen. Recent possession doctrine implies that the possession of the stolen property is so soon after it was stolen leaving no room for any other explanation other than the inference that the accused possessed the stolen item after stealing it and is the guilty person.

14. Having considered all the evidence which was tendered before the trial Magistrate, my finding is that the evidence was not cogent and was insufficient to prove the charge against the appellant beyond any reasonable doubts.

15. I will now consider the submissions. I agree with the appellant that on the doctrine of recent possession the trial Magistrate failed to find that the 1st principle, that is possession of stolen property was not proved and the doctrine could not therefore apply.

16. I am on agreement with the appellant that the charge sheet was defective as it listed two complainants on one charge. As for the 2nd count, the appellant was arrested on 5/12/12 and the charge sheet alleged that he was in possession of the stolen mobile phone on 21/12/2012. By then the appellant was in custody after he had been arraigned in court. The appellant and the 2nd accused were arrested separately before the phone was recovered and were alleged to have handled it on 21/12/12 long after they were arrested. This raises doubts on the allegation made by the police against the appellant.

17. The prosecution did not adduce any evidence to prove the ownership of the said mobile. PW-1- did not produce any receipt to prove ownership of the mobile phone or even any mark that helped to identify the mobile phone. The serial number was given after the mobile phone was recovered and necessitated the amendment of the charge sheet. A totally different serial number was given on the initial charge sheet. Again this cast doubt on the evidence by the prosecution. It leads to the conclusion that reliance on the serial number was not sufficient to prove the charge, plausible evidence like a receipt should have been tendered to corroborate the serial number and to prove that it belonged to the complainant and was robbed of on the material night. As it stands now the ownership of the mobile phone make Voda phone was not proved beyond any reasonable doubts.

18. The appellant raised the issue that **Section 200 CPC** was not complied with. Indeed the proceedings are strange as they were conducted by two difference Magistrates who were at the same station. The record shows that the trial was before Hon. S. Jalang'o Senior Resident Magistrate on 22/3/13 and one witness testified. On 22/3/13 the prosecution applied to amend the earlier charge sheet. The application was allowed. Two witnesses then testified on 9/7/13. On 16/8/13 the prosecutor applied to amend the charge sheet. The court informed the appellant and his co-accused on the right to recall witnesses. The appellant applied to have the witnesses recalled. The Trial Magistrate ordered that the matter starts afresh.

19. The record shows that on 4/8/13, the matter was before Hon. Keago, Principal Magistrate and at times it was before Hon. Jalango. Witnesses were recalled and the case proceeded before Hon. E. Keago, Principal Magistrate. After all the witnesses were recalled and matter proceeded before Hon. Keago, on 31/12/2013 the matter went back to Hon. Jalango who heard the remaining witness and gave Judgment. It is not clear why this happened and yet both Magistrates were at the station.

20. Section 200 Criminal Procedure Code provides for situation where the trial Magistrate ceases to exercise jurisdiction and is succeed by another one. The accused has a right to demand that any witness be resummoned and reheard by the succeeding Magistrate Section 200(4) provides:

> ***"where an accused person is convicted upon evidence that was not wholly recorded by the convicting Magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby set aside the conviction and may order a new trial."***

There was a wrong application of section 200 by Hon. Jalang'o who relied on the section to have witnesses recalled after the charge sheet was amended. The substitution of the charge sheet must have been done under section 214(1) of the Criminal Procedure Code which provides:

> ***214.(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 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.***

Section 200 of the Criminal Procedure Code was not applicable. The appellant was prejudiced as the trial was conducted by two Magistrates who were in the same station without any explanation for that unlawful procedure. This would entitle this court to order a retrial but I will not order a retrial in view of the other matters I have pointed out in this case.

21. The appellant raised the issue that the trial Magistrate failed to consider that his fundamental rights under **Article 49(1)(4) of the Constitution** were violated due to the fact that he was detailed at the Police Station for more than 24 hours. The issue of violation of the rights of accused does not render the trial invalid, null and void. It entitles the appellant to damages which must be pursued in a different forum.

22. The appellant submits that the trial Magistrate did not indicate the language used during trial and his right to fair trial under **Article 50(2) of the Constitution** was violated. The record of the trial Magistrate does not reflect the language used. The appellant did not raise the issue before the trial Magistrate. From the record it is clear that the appellant followed the proceedings and cross examined witnesses. The appellant was also able to give his defence. Though the trial court has an obligation to record the language used in the proceedings and the interpretation used as well as the interpreter as required under **Article 50(2),** failure to do so did not prejudice the appellant. He fully participated in the proceedings, communicated with the court, cross-examined witnesses and he gave his defence.

23. On the issue of the investigations and tracking of the Voda phone, I have already dealt with it above. There was a lacuna in the prosecution case as no witness was called from Safaricom to give evidence on tracking of the Voda phone. The Investigating Officer was not maker of the documents from Safaricom. The documents which were produced were generated from computers.

24. On the issue that the trial Magistrate did not consider the defence of the appellant, I have partly dealt with it earlier. The trial Magistrate made a decision which was not supported by the evidence because, the Voda phone was not recovered from the 2nd accused. All the witnesses were in agreement that the phone which was recovered from the 2nd accused was not the Voda phone and the person who had the Voda phone is still at large. The finding by the trial Magistrate was prejudicial as it was not supported by the evidence adduced before him. The finding by the trial Magistrate was against the weight of the evidence. The 2nd accused never admitted that she received the Voda phone. The appellant was not given an opportunity to cross-examine the 2nd accused (DW-2-). He defence was that she received a Kabambe phone not the Voda phone. The Kabambe Phone was not in issue before the trial Court as it was not the stolen mobile phone. If the trial Magistrate found that this was the phone which the appellant gave the 2nd accused (DW-2-) there was no basis for convicting the appellant. He trial Magistrate did not consider the defence of the appellant. The defence was plausible and if it was properly considered the trial Magistrate would have arrived at a different conclusion.

IN CONCLUSION.

Though the prosecution proved that a robbery was committed on the material night, the prosecution failed to adduce evidence which placed the appellant at the scene of the robbery. The prosecution also failed to proof that the appellant was in possession of the stolen mobile phone so soon after it was stolen or at all. The conviction was clearly against the weight of the evidence. The

appellant was entitled to an acquittal. I find that the appeal has merits and so I allow it. I quash the conviction and set aside the sentence. The appellant will be set at liberty unless he is otherwise lawfully held.

Dated at Kerugoya this 19th Day of July 2018.

L. W. GITARI

JUDGE