REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 94 OF 2014

DANIEL RUO WANJIKU………. APPELLANT

VERSUS

REPUBLIC……………………. RESPONDENT

(*Being an appeal from the conviction and sentence in the Chief Magistrates Court at Madaraka Cr. Case No. 1865 of 2011 delivered by Hon. V.W. Ndururu, SRM on 10th of July 2014).*

JUDGEMENT

Background

The appellant, Daniel Ruo Wanjiku was charged with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code and an alternate charge of handling stolen property contrary to Section 322(2) of the Penal Code.

The particulars of count 1 were that on 19th March, 2011 at [particulars withheld] in Nairobi, within Nairobi Area Province, jointly with others not before the court, while armed with dangerous or offensive weapon, namely knives robbed C K M of cash Kshs. 800/= and a cell phone Nokia 2330C valued at Kshs. 4,300/= and at or immediately before or immediately after at time of such robbery threatened to stab the said C K M.

The particulars of count II were that on 19th March, 2011, at [particulars withheld] in Embakasi District within Nairobi Area Province jointly with others not before the court while armed with dangerous of offensive weapons namely knives robbed Joseph Muindi of cell phone Nokia valued at Kshs. 4,300/= and at or immediately before or immediately after the time of such robbery, stabbed and killed Joseph Muindi.

The particulars of the alternative charge were that on the 19th of March, 2011 at [particulars withheld] in Embakasi District of Nairobi Province, otherwise than in the cause of stealing dishonestly retained one mobile phone make ‘Nokia 2330 C’ having reasons to believe it to be stolen or unlawfully obtained from C K M and Joseph Muindi.

The appellant was convicted for the alternative charge and sentenced to serve 10 years’ imprisonment. He was dissatisfied with both the conviction and sentence and he preferred the instant appeal. His grounds of appeal are that;

1. ***That the Prosecution case did not meet the threshold required by law to warrant a conviction***

as the evidence was not corroborated.

2. That the retention, removal and disposal of the goods by the appellant was not proved.

3. That the sentence was harsh considering he was a first time offender.

Submissions

The appellant relied on submissions filed on the 8th of May, 2017. He submitted that a key witness by the name G was not called as a witness and yet he is the one who is alleged to have bought the stolen phone. He added that the failure to call vital prosecution witnesses prejudiced his case. He submitted that the prosecution did not prove that he was aware that the goods were stolen which is a mandatory element the prosecution must prove in a charge of handling stolen goods. On sentence, he faulted the trial court for not considering the period he was in remand before passing the sentence.

The State opposed the appeal. Learned counsel, Ms. Sigei submitted that the elements of the offence of handling stolen property were proved. She submitted that after PW1 produced receipts that proved she was the owner of the said phone, it was tracked to Umoja Estate to a Mr. Saitoti. PW1 corroborated the evidence of PW2 and PW3 that the appellant had sold the phone to a Maasai known as Mr. Saitoti who led the Police to the appellant as the person who sold to him the phone. Counsel submitted that the phone alongside some money were stolen from PW1 and her companion who died during the ordeal while PW1 was raped. She submitted that the sentence passed was lenient and the appeal ought to be dismissed.

Evidence.

In total, the prosecution called 4 witnesses. It was the prosecution case that **PW1, C M K** was attacked on the night of 19th of March, 2011 while in the company of the deceased, **Joseph Maundu** while on their way to his house in [particulars withheld]. The assailant was carrying a knife and he asked who they were and where they were going to before lunging at the deceased and stabbing him on the chest. As he continued to bleed, he dragged PW1 to a nearby bush where he raped her. He then asked for her identity card. She handed him her handbag which had some money amounting to Ksh 800/- and the phone in question, a Nokia 2330 valued at Ksh 4,300. She returned to the scene where the deceased was attacked and she found him bleeding profusely. Some people who were nearby told her he was dead. G4S security personnel saw her and took her to Kayole Police Station where she reported the incident after which she was escorted to Nairobi Women's Hospital for examination and treatment.

PW1 was able to demonstrate that the ownership of the robbed off mobile phone Nokia 2330 by a purchase receipt which she gave to the investigating officer. The same was produced as Exhibit 3. It bore the mobile phone serial number [particulars withheld]. The mobile phone through the serial number was traced to a repair shop run by both PW2 and 3. The two witnesses then informed the police that it had been sold to their colleague F G. When contacted by the police, the said G said that it had been brought to him to sell by a Maasai man by the name Saitoti. It is this Saitoti who disclosed that he had bought it from the appellant. This led to the arrest of the appellant. PW1 was able to identify the stolen mobile phone with its colour and purchase receipt.

At the scene of the crime, **PW4, CPL Eustus Waweru** accompanied by other CID officers from Kayole found the deceased and alerted scenes of crime personnel who took the body to the City Mortuary. He was also the investigating officer. At a later date, PW1 was called to identify the person who attacked her in an identification parade. However, she was not able to identify her attacker because, according to her, the attacker blinded her eyes with a touch and the scene was not lit with additional light that would have enabled her to clearly see her attacker.

It was the testimony of **PW2, Daniel Muriuki Mwangi and PW3, Jackson Ndegwa** both mobile phone repairers that the appellant sold a newly acquired phone to F G who they co-owned their phone repair shop with. And it was G who placed it on the shelf to sell. Their testimony was that they did not inquire the source of the phone from the appellant as they trusted him. It was only later when the Maasai man

(Saitoti) who had bought the phone returned with Police who had traced the stolen phone to him and accused them of having committed the crime where a lady was raped and a gentleman killed.

After the prosecution witnesses testified, the court ruled that the Appellant had a case to answer and was put on his defence. In a very brief unsworn defence, he stated that he was arrested in Kayole on the 20th of April 2011. He was shown four men whom he did not know, as well as a cell phone he knew nothing about. He said he was charged after failing to raise a bribe of Ksh 10,000.

Determination

This being the first appellate court, its duty is to re-evaluate the evidence and come up with its independent findings. It should however bear in mind that it has neither seen not heard the witnesses. See the case of **Pandya v. Republic [1957] EA., 336.**

I have carefully analyzed and examined the entire evidence on record and the submissions by the appellant and the respondent. I have subsequently deduced the issues for determination to be whether the prosecution proved the case beyond a reasonable doubt, whether all vital witnesses testified and whether the sentence passed was legal and justifiable.

Section 322 of the Penal Code sets out the threshold the prosecution must establish in proving the offence of handling stolen goods. The same provides in part that;

> ***(4) Where a person is charged with an offence under this section-***
>
> ***(a) it shall not be necessary to allege or prove that the person charged knew or ought to have known of the particular offence by reason of which any goods are deemed to be stolen;***
>
> ***(b) at any stage of the proceedings, if evidence has been given of the person charged having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in, or arranging to undertake or assist in, their retention, removal, disposal or realization, the following evidence shall, notwithstanding the provisions of any other written law, be admissible for the purpose of proving that he knew or had reason to believe that goods were stolen goods-***
>
>> ***(i) evidence that he has had in his possession, or has undertaken or assisted in the retention, removal, disposal or realization of, stolen goods from any offence taking place not earlier than twelve months before the offence charged;***
>>
>> ***(ii) provided that seven days' notice in writing has been given to him of the intention to prove the conviction) evidence that he has within the five years preceding the date of the offence charged been convicted of stealing or of receiving or handling stolen goods"***

It is trite that if an accused is arrested with alleged stolen goods the burden shifts upon him to disprove that he knew that the goods were stolen. In the instant case, the appellant could not satisfactorily explain how he came into possession of the mobile phone. He just stated he knew nothing about it. On the other hand, the prosecution had satisfactorily established that it was the appellant who last handled the phone after it left the hands of PW1. He had sold it to a Mr. Saitoti who helped the police to track him. Accordingly, the prosecution demonstrated that he had every reason to believe that the phone was a stolen property.

The second issue was whether all the vital witnesses testified. It was the submission of the appellant that the prosecution failed to call a Mr. Gikama who was a co-worker in the phone repair shop. However, PW2 and 3 gave concise testimony about how the appellant facilitated the sale of PW1's phone to Saitoti who then brought it to G. Even in the absence of the testimony of G, it was established how the phone was linked to the appellant.

On the third issue, whether the sentence was harsh, Section 322 (2) of the Penal Code provides for a sentence that does not exceed 14 years. The trial court noted that an imprisonment term of 10 years was necessary as PW1 had been raped and her companion murdered. But this was a misdirection on the part of the learned magistrate as the appellant was not identified at the scene and was convicted on the alternative charge of handling stolen property. Simply said, it was not established that the appellant committed the offences of robbery with violence. Whereas the offence for which the appellant was convicted is serious, the court failed to take into account that the appellant was a first offender. It is my view then that the sentence was harsh and excessive.

In light of the foregoing, I find that the prosecution proved the alternative charge beyond a reasonable doubt and I uphold the conviction in that regard. I however substitute the sentence with an imprisonment term of five years. Prior to his conviction, the appellant had been in remand for three years and about 3 months. He was sentenced on 10th July, 2014 which to-date adds up to a custodial period of five years and one month. He has therefore served his sentence. I accordingly order that he be forthwith set free unless otherwise lawfully held.

Dated and Delivered at Nairobi this 14th June, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant present in person.

2. Miss Kimiri for the Respondent.