REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 109 OF 2015

(An appeal from the conviction and sentence by F. Kyambia (PM) in Sirisia

CrC No. 547 of 2013)

BENARD KOSKEI NGAINA……....APPELLANT

VERSUS.

REPUBLIC…….....RESPONDENT

JUDGMENT.

[1]. **BENARD KOSKEI NGANIA** alias **SIMBA** (the appellant was convicted on a charge of robbery with violence C/Sec. 296(2) P.C. and sentenced to death.

The particulars stated that on 5th July, 2013 at **CHEPKUBE TRADING CENTRE** in **CHEPTAIS** District within **BUNGOMA** County, jointly with others on before Court, while armed with AK47 rifles, pangas, axes and knives robbed **JOB KISO KANIA** of a mobile phone make **TECHNO** and a torch valued at Kshs.3,400/= and during the time of such robbery used personal violence on the victim. The appellant denied the charge.

[2]. On 5/7/2013 **JACOB KISO KANIA** (Pw2) was guarding **URUBA REAL** Petrol Station in the company of another guard named **PHILLIP KIPTAI OPICHO** (Pw4) when they were attacked by a gang of about 5 people armed with 2 guns at about 10.00 p.m. The attackers assaulted him, floored him onto the ground and robbed him of his mobile phone. Although there was security light at the scene, he was not able to identify anyone. He ran away from the scene. Then while about 80 metres away, began blowing his whistle. He heard gunshots and later realized that his boss **JAMA MUSE** had been injured and was being taken to hospital.

[3]. This evidence was confirmed by Pw4 who said they were attacked and ordered to lie down by persons who were armed with a gun. He however did not identify anyone saying

"The assailants were on (sic) muffin and they did not want anybody to look at them".

He confirmed that Pw1 lost his phone make **TECHNO** during the robbery.

(b) **P.C. BARNABAS KIGEN** (Pw6) was among Police Officers who responded to the sounds of whistles blowing from the Petrol Station – but as they approached the scene the robber began shooting at them before escaping.

[4]. Upon receiving reports about the incident, police set out on investigations and followed on data

communication leads that took them to the appellant from whom according to **PC. BENEDICT KIOKO** (PW2) they recovered a mobile phone make **TECHNO IMEI** No. 867480010742680 which had been stolen from Pw1 during the robbery. Pw1 identified the phone as his, saying

> ***"…I identified it because its charging system and particularly the plug in hole is broken. It also has on serial…."***

[5]. **P.C. GIDEON KURGAT** (Pw7) who was in the Investigation team told the trial court that upon interrogating the watchman named **JACOB**, they commenced Investigations and learnt from members of the public that one SIMBA of **KIPSIGON** was involved in the robbery. So they mounted a search from the said **SIMBA** and arrested him on 28/08/2013 who upon arrest threw away the phone he had. However, the phone was later recovered by members of the public who surrendered it to the Sub-chief of **KIPSIGON**. **SIMBA** is said to be the appellant's nickname.

[6]. In his sworn statement the appellant told the court that while grazing his bull in the forest at **KIPSIRO**, he was arrested and ordered to take part in an identification parade where no one identified him. He stated that on 05/07/2013 he was at his home and did not go anywhere, and he did not even know where **CHEPKUBE MARKET** was. He denied being found with any other mobile phone other than his own phone and said;

> "I saw a mobile phone being produced in this court but it was not mine".

[7]. In the Judgment the trial court held that the ingredients of robbery with violence were adequately proved as no one disputed that assailants were armed with guns – confirmed by the sound of gunfire heard by the two guards and the police who rushed to the scene.

[8]. The trial magistrate took cognizance of the fact that no one actually identified the attackers but was persuaded that the circumstantial evidence was inconsistent with the appellant's innocence, and incapable of any other explanation other than a reasonable hypothesis of guilt on the part of the appellant who was found with a phone recently stolen from a victim of the robbery.

[9]. The phone was recovered from the appellant two months after the robbery, and the trial magistrate noted that although police claimed to have used communication technology to track the phone (which showed that the Appellant was in constant communication with his accomplices) there was nothing produced as exhibit, including print out from the mobile phone service providers to justify such assertion. He however was persuaded that the appellant was in possession of the phone which had been recently stolen and was duly bound to give a reasonable explanation as to how he came to be in possession of it. Since the appellant offered no explanation, the trial magistrate held that the appellant acquired the said phone during the robbery and that the circumstantial evidence overwhelmingly pointed to him as being part of the assailants.

[10]. In contesting the trial court's findings the appellant submitted on writing that evidence did not even establish the ownership of the phone as Pw1 even confessed that he did not even have a receipt for it, so ownership was not proved.

[11]. The appellant argued that the purported members of the public who allegedly recovered the phone, and even the area chief who received it were not called as witnesses to confirm the claims about such recovery.

In opposing the appeal **MR. AKELLO** on behalf of the state submitted that the appeal lacks merit as the evidence was corroborated and proved the evidence beyond reasonable doubt. It was also his contention that the prosecution does not have to call a superfluity of witnesses and these left out were available to the appellant to call as his defence witness.

[12]. There is no doubt that from the scenario the two guards described a robbery with violence did take place and the trial magistrate correctly observed that the ingredients establishing such offence were

sustained.

Hence the question which needs to be addressed is whether the evidence proved appellant was among those who robbed the complainant. It was admitted that none of the witnesses saw or identified the attackers because they protected the identities by wearing muffins. The only issue to the purportedly linking the appellant to the robbery was the phone which he was said to have had. That phone was not physically recovered from him and police claimed that he threw it away the moment police arrived to arrest him. It was then recovered by unnamed member of the public who did not testify to confirm such position. It was then taken to an unnamed area chief who also did not testify to confirm that a phone recovered from an undisclosed place by an undisclosed individual was delivered to him.

[13]. Then there is a question of whether the appellant actually had the phone. The police officer (Pw6) went into very elaborate details as to how they were able to determine that the appellant had possession of the phone using tracking technology. However as properly pointed out by the trial magistrate no print out from the service provider was ever presented to the court to support this, and the matter was at best, speculative.

From the above observations, I find that the evidence was insufficient to prove the charge of robbery with violence or even being in possession of stolen goods, and the doctrine of recent possession was improperly invoked.

Consequently, the conviction was unsafe and is quashed, and the appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **14th** day of **July**, 2017 at **Bungoma.**

H. A. OMONDI

JUDGE