REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 122 OF 2013

VANISTA BUSHMAN …….... APELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

(An Appeal from the Judgment of the Senior Resident Magistrate Honourable E. TANUI in Eldoret Criminal Case No. 352 of 2012, dated 26th June, 2013)

JUDGMENT

1. The appellant was charged in the lower court with the offence of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***. It was alleged that on the 20th day of August, 2012 at Keroka Estate Eldoret West District within the Rift Valley province, jointly with others not before the court, while armed with dangerous weapons namely knives and iron bars, the appellant robbed *Peter Gachuki Mwangi* of one mobile phone make Nokia valued at Kshs.3,000, one pair of shows valued at Ksh. 2,000, one belt valued at Kshs. 200 and cash in the sum of Kshs. 800 all valued at Kshs. 5,950 and immediately before the time of such robbery wounded the said *Peter Gachuki Mwangi*.
2. In the alternative, the appellant was charged with the offence of handling stolen goods contrary to ***Section 322(2)*** of the ***Penal Code.*** The particulars were that on the 21st day of August 2012 at road block area Eldoret West District in the Rift Valley province otherwise than in the course of stealing, he dishonestly obtained one pair of shoes and one mobile phone make Nokia 1202 knowing or having reason to believe them to be stolen goods.
3. After a full trial, the appellant was convicted of the main count of robbery with violence and was sentenced to death. He was dissatisfied with his conviction and sentence. He proffered an appeal to the High Court through a petition of appeal filed on 4th July, 2013. He subsequently filed amended grounds of appeal on 21st May, 2015 with leave of the court granted under ***Section 350*** of the ***Criminal Procedure Code.***
4. In his amended grounds of appeal, the appellant mainly complained that he had been convicted on the basis of contradictory and uncorroborated evidence; that the learned trial magistrate erred in law and fact by relying on exhibits which the complainant did not positively identify to be part of his stolen property and that the learned trial magistrate's judgment did not conform to the requirements of ***Section 169*** of the ***Criminal Procedure Code*** in that she convicted him under the wrong section of the law.

5. In prosecuting his appeal, the appellant largely relied on handwritten submissions filed on 30th July, 2015.

In his submissions, he urged the court to find that he was wrongly convicted as the evidence of the prosecution's key witnesses namely PW1 and PW4 was contradictory with regard to the manner in which the exhibits were allegedly recovered in his possession; that the exhibits, a pair of shoes and a mobile phone make Nokia 1202 were not positively identified by the complainant as he did not point to any distinctive mark on them which was peculiar to him.

6. The appellant also submitted that the trial magistrate erred by indicating in her judgment that he had been charged with the offence of robbery with violence contrary to ***Section 396(2)*** of the ***Penal Code*** which is not the provision of the law which created the offence and that therefore, the judgment failed to comply with ***Section 169*** of the ***Criminal Procedure Code***. He implored the court to find that the appeal was merited and that it ought to be allowed.
7. The state contests the appeal. Learned prosecuting counsel *Ms Oduor* while opposing the appeal submitted that the appellant was properly convicted by the trial court as the prosecution had proved the offence with which the appellant was convicted beyond any reasonable doubt; that though the appellant was not identified as one of the complainant's assailants during the robbery, he was found in possession of the complainants property stolen during the robbery and that the trial court correctly applied the doctrine of recent possession in convicting the appellant. For this proposition, she relied on the authority of ***Richard Oduor Adera V Republic Kisumu Criminal Appeal No. 382 of 2008 [2010] eKLR.***
8. Regarding the alleged failure to cite the correct provision of the law in the trial court's judgment, *Ms Oduor* contended that such an error if any was an irregularity which was curable under ***Section 382*** of the ***Criminal Procedure Code.*** She invited the court to dismiss the appeal for lack of merit.
9. This is a first appeal to the High Court. I am thus required to re-evaluate all the evidence on record and draw my own independent conclusions remembering that unlike the trial magistrate, I did not have the advantage of seeing or hearing the witnesses.
10. The prosecution in this case called a total of four witnesses. Briefly, the prosecution case is that on 20th August, 2012 between 9 and 10 p.m, the complainant (PW1) was walking home when he met with three young men. He noted that one of them was carrying a metallic rod. After passing them, he was suddenly attacked from behind by being hit on the right shoulder. He fell down. The three men ransacked his pockets as they flashed knives at him. They took his belt, Kshs. 800, wallet and his shoes before disappearing into the darkness. The wallet contained his son's passport and other documents.
11. After the incident, PW1 reported the matter to PW2 ***PC Daniel Odipo*** at Baharini police post. As he had been injured, he was issued with a P3 form and advised to seek medical attention. On 25th August, 2012, he was treated by PW3, a clinical officer at Huruma Sub District hospital. According to PW3, his examination revealed that the nape of PW1's neck and chest area was swollen and tender. He assessed the degree of injury as harm. He completed the P3 form which he produced as exhibit 1.
12. PW4 was the prosecution's key witness. He is the person who allegedly recovered some of the items stolen from the complainant during the robbery. He testified that he was PW1's son and that on the morning of 21st August, 2012, he found his passport on a road. As PW1 was previously its custodian, he asked him to explain the presence of the passport on the road. PW1 then narrated how on the previous night he was robbed of the passport and other items. He recalled that on the same day at about 6 p.m, he met with the appellant wearing shoes resembling those that had been stolen from his father. An altercation ensued between them and people gathered. According to PW4, he searched the appellant's pockets and found a Nokia mobile phone make 1202 resembling the phone stolen from his father the previous night. Assisted by members of the public, he arrested the appellant and handed him over to PW2 after PW1 identified the recovered items as his stolen property.
13. When put to his defence, the appellant elected to give an unsworn statement and did not call any witness. He denied having committed the offence as alleged or that he had been found in possession of a pair of shoes and a mobile phone as alleged by PW4. He claimed that the items were taken by PW1 and PW4 in a black paper bag to the place where he had been taken to wait for PW1 by members of the public upon his arrest before he was escorted to the police station.
14. I have carefully re-evaluated the evidence tendered before the trial court as summarized above. I

have also considered the submissions made by the appellant and the state as well as the amended grounds of appeal.

I wish to start by observing that I did not find any material contradictions between the evidence adduced by PW1 and PW4. Though in his evidence in chief PW1 testified that the appellant led PW4 and other members of the public to a place where the mobile phone was recovered, he changed this narrative in his evidence in re-examination and testified that the mobile phone was recovered from the appellant's pockets. This was the same position taken by PW4 who claims to have recovered the said mobile phone. It is important to note that PW1 did not witness the alleged recovery. He did not also disclose the source of his information regarding how the alleged recovery was done. His evidence on that point therefore amounted to hearsay and could not have assisted the prosecution case in any way.

15. That said, the next issue that falls for my determination is whether the offence of robbery with violence was committed in this case. The offence of robbery is defined under ***Section 295*** of the ***Penal Code***. It is committed when any person steals anything and either before, at, during or after the theft uses or threatens to use violence to any person or property in order to facilitate the theft.
16. The offence of robbery with violence is established if any of the following three circumstances stipulated under ***Section 296(2)*** of the ***Penal Code*** is proved to have existed in the course of a robbery. These are;

    i. That the offender was armed with any dangerous or offensive weapon; or
    ii. That the robber was in the company of one or more people; or
    iii. That immediately before or after the robbery, actual violence was caused to the victim.

    It is now settled law that in order to sustain a conviction, the prosecution need not prove all the above essential elements of the offence. Proof of any one of them to the required legal standard is sufficient to establish the offence.

    See: ***Jairus Mukolwe Ochieng V Republic Criminal Appeal No. 217 of 2007 (2013) eKLR***; ***Johana Ndungu V Republic (1995) KLR 387.***

17. In this case, there is undisputed evidence that PW1 was accosted by three people on the night of 20th August, 2012 who robbed him of a pair of shoes, a mobile phone, money and a wallet. The men were armed with dangerous weapons namely a metallic rod and knives. The complainant according to the evidence of PW3 was injured during the incident. In view of the above, I have no doubt in my mind that the offence of robbery with violence was committed against the complainant in this case.
18. The critical question that this court must resolve is whether the evidence on record was sufficient to prove beyond doubt that the appellant was one of the three criminals who perpetrated the robbery in question. From the evidence, it is clear that no direct evidence was adduced in the lower court to implicate the appellant with the offence. This is because he was not identified by PW1 as one of the culprits who accosted and robbed him at the material time.

    He was implicated with the offence solely because of PW4's claim that he had arrested him with assistance of members of the public on the day after the robbery wearing a pair of black shoes and in possession of a mobile phone which items resembled those that had been stolen from his father during the robbery.

    A reading of the trial court's judgment shows that the learned trial magistrate found as a fact that a pair of shoes and a mobile phone stolen during the robbery were actually recovered from the appellant on the following day and that therefore, going by the doctrine of recent possession, the appellant must have been one of the three people who had committed the offence. This was the basis of the appellant's conviction.

19. My analysis of the evidence on record leads me to a different conclusion from that of the learned

trial magistrate. The doctrine of recent possession simply put is a rebuttable presumption of fact that a person found in possession of recently stolen goods is either the thief or a handler of the same knowing or having reason to believe that the goods were stolen or unlawfully obtained.

For the doctrine to apply, the prosecution must establish beyond any reasonable doubt three things;

First, that the property in question was recently stolen; second, that the accused person was found in possession of the stolen goods and thirdly, that the property was positively identified by the complainant. See: ***Arum V Republic [2006] KLR 233; Martin Oduor Lango & 2 others V Republic Criminal Appeal No. 282 of 2012 [2014] eKLR.***

20. In this case, though the prosecution managed to prove that a pair of shoes and a mobile phone were among the properties stolen from the complainant during the robbery, it is my view that it failed to adduce sufficient evidence to prove beyond doubt that the appellant was indeed found in possession of the shoes and mobile phone stolen from PW1 during the robbery.
21. In finding that the appellant was found in possession of shoes and a mobile phone stolen from the complainant a day before, the trial magistrate failed to thoroughly interrogate the evidence to establish whether the complainant had positively and conclusively identified the said items to be his property stolen during the robbery.

    With regard to the pair of shoes for instance, the evidence is that the appellant was found wearing black shoes which resembled those that belonged to the complainant. In his evidence, PW1 did not point to any unique mark or characteristic of the shoes allegedly recovered from the appellant that enabled him to identify them as his shoes stolen during the robbery. The fact that they were black in colour and resembled those stolen during the robbery is different from proof that they were actually the shoes stolen from the complainant. Black shoes are common items and it is possible that they were owned by many people in Keroka Estate or elsewhere in the Republic. I thus find that the complainant totally failed to positively identify the shoes as part of his property stolen during the robbery.

22. As far as the mobile phone is concerned, I find that the prosecution did not adduce sufficient evidence to prove beyond doubt that the said phone was actually recovered in the possession of the appellant. According to PW4, he recovered it from the pockets of the appellant in the presence of other members of the public. But for undisclosed reasons, none of those other people was availed as a witness by the prosecution to confirm or deny PW4's claim that the mobile phone was recovered from the appellant as alleged.

    Though I am alive to the provisions of ***Section 143*** of the ***Evidence Act*** that no number of witnesses is required to prove a fact, where the prosecution chooses not to call vital witnesses who would have assisted the court establish material facts in a criminal case, the court is entitled to presume that had the witnesses been called, they would have given adverse evidence to the prosecution case. See: ***Bukenya & Others V Uganda [1972] EA 549***

23. Unlike the evidence relating to the recovery of the shoes from the appellant which was founded on the evidence of PW4 supported by the testimony of PW2, PW4's claim concerning the alleged recovery of the mobile phone from the appellant was not supported by any other evidence. Given that the appellant had denied being found in possession of the said phone, the evidence before the trial court amounted to the word of PW4 against that of the appellant which was insufficient to prove beyond reasonable doubt that the said phone was recovered from the appellant's pockets.
24. Even if for the sake of argument I were to accept the claim that the mobile phone was actually recovered from the appellant, I find that the evidence adduced by the prosecution fell short of establishing beyond doubt that it belonged to PW1. PW2 and PW 4 claimed in their evidence that PW1 identified the phone by pointing to a mark written on the phones battery "Baba Steve". PW1 in his evidence however said no such thing. He only identified the phone by saying that it had a unique cover and its battery had his mark. He did not describe the unique cover or mark or show

how the same were exclusive to his phone such that they could not be found on any other phone.

The burden of proof in criminal cases rests with the prosecution throughout the trial. Subject to the provisions of ***Section 111*** of the ***Evidence Act***, it does not shift to an accused person. The appellant in this case did not have any obligation to prove his innocence or to fill in the gaps in the prosecution's case.

See: ***Bhatt V Republic (1957) EA 332: Abdalla Bin Wendo & Another V Republic (1953) EACA 166.***

25. In view of the foregoing, I am satisfied that the prosecution in this case failed to prove the charges against the appellant beyond any reasonable doubt as required by the law. More importantly, I find that the learned trial magistrate erred in finding that the doctrine of recent possession applied to the appellant when as demonstrated earlier, the prerequisites for its application were clearly missing in this case.

26. In the result, I find that the appellant was not properly convicted. His conviction is unsafe and cannot be allowed to stand. I consequently allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 7th day of April 2016

In the presence of:

The appellant

Ms Naomi Chonde Court Clerk

No appearance for the state.