



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 100 OF 2015

THOMAS OKONGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable T. W. CHERERE in Eldoret Criminal Case No. 512 of 2015, dated 29th July, 2015)

JUDGMENT

1. The appellant *Thomas Okongo* was jointly charged together with one *Stephen Bwalel* in two counts with two different offences.
2. In the first count, they were jointly charged with the offence of Robbery with violence contrary to *Section 296 (2)* of the *Penal Code*.

The particulars alleged that on the 20th of January, 2015 at Mwanzo Estate in Eldoret District within Uasin Gishu County, jointly with others not before court while armed with dangerous weapons namely metal bars, they robbed *Millicent Kimutai* of cash Ksh.10,000/- a mobile phone make Infinix X502 Serial Number 359142050051926 valued at Kshs.27, 999/- and immediately before the time of such robbery they used actual violence to the said *Millicent Kimutai*.

3. In the second count, the appellant and his co-accused were charged with the offence of malicious damage to property contrary to *Section 339(1)* of the *Penal Code*. It was alleged that on the 20th day of January 2015 at Mwanzo Estate in Eldoret West District within Uasin Gishu County, jointly with others not before court, they willfully and unlawfully damaged a television set make Sony Led 32HD ready valued at Kshs. 31,995 the property of *Millicent Kimutai*.
4. After a full trial, the trial court acquitted *Stephen Bwalel* of both counts under *Section 215* of the *Criminal Procedure Code*. The appellant was found guilty of both counts and was convicted accordingly. He was sentenced to death in the first count while in the second count he was sentenced to six months imprisonment. The trial court correctly ordered that the sentence in count 2 be held in abeyance.
5. The appellant was aggrieved by his conviction and sentence hence this appeal. In his amended grounds of appeal, the appellant raised three main grounds. He complained that the trial magistrate erred in law and fact by relying on the evidence of an accomplice which was not corroborated by any other independent evidence; that the trial magistrate erred by convicting him on the basis of the doctrine of recent possession which was not applicable in his case; and finally that the trial magistrate erred by

relying on the evidence of an exhibit which was not produced in court.

6. In prosecuting his appeal, the appellant relied entirely on homemade written submissions which he submitted to the court. In his submissions, he urged the court to find that he was wrongly convicted and allow the appeal. He contended that he was not positively identified as one of the two people who robbed the complainant; that the prosecution case was based on circumstantial evidence which was not sufficient to prove the charges in both counts beyond any reasonable doubt; that the trial magistrate erred in applying the doctrine of recent possession yet he had not been found in possession of the mobile phone stolen during the robbery; and, that the trial court erred by relying on accomplice evidence which was not corroborated.

7. The state concedes to the appeal on grounds that the appellant was not positively identified as one of the persons who robbed the complainant; that there was insufficient evidence to support the application of the doctrine of recent possession as the phone which was the basis of application of the said doctrine was not recovered.

8. This being a first appeal to the High Court, it is my duty to re-evaluate the evidence adduced before the trial court and reach my own independent conclusion regarding the validity or otherwise of the appellant's conviction.

See:- **Okeno V Republic (1932) EA ; Kiilu & Another V Republic (2005) KLR 175.**

9. I have considered the evidence on record, the submissions made by the appellant and the state. I have also read the trial court's judgment. I find that the prosecution called a total of five witnesses but only three of them gave material evidence in support of the prosecution case. These were the complainant who testified as PW1 and PW3 her neighbor. PW2 arrived at the scene after the robbers had fled and only noted injuries on PW1. PW4 was the clinical officer who examined PW1 on 3rd February, 2015 and filled her P3 form (P exhibit 1).

10. In her evidence, PW1 narrated how she was accosted by two people who she did not identify. One of them hit her with a stone on the head occasioning her injuries. They stole her mobile phone and Kshs.10,000. As they were struggling to steal her Television set, PW3 went to her rescue and as they fled, they dropped her Television set damaging its screen. PW3 claimed that he saw and identified the two men who were running away from the complainant's house as the appellant and his co-accused. He saw them with the aid of security lights through his window. He however admitted that he did not know the appellant before.

11. The investigating officer is described in the record as PW4 though she testified as the fifth witness. She confirmed that the appellant was arrested after he was identified by his co-accused as the person who had given him the mobile phone suspected to have been stolen during the robbery. The said phone was not recovered.

12. From the evidence on record as summarized above, there is no doubt in my mind that the prosecution proved beyond any reasonable doubt that the complainant was assaulted by two men on the night in question who also stole her mobile phone make Infinix and cash Kshs.10,000/-. The prosecution therefore managed to prove that the offence of robbery with violence was committed against the complainant.

13. On my appraisal of the evidence, I find that the evidence fell short of establishing beyond doubt that the appellant was one of the two men who robbed the complainant on the material night. I say so because it is evident that PW1 did not identify her attackers. PW3's evidence regarding his alleged identification of the appellant is suspect and unreliable. He conceded that he did not know the robbers before yet he claimed to have identified them while peeping through a window as they were running away. The offence was committed at night and though PW3 claimed to have seen the appellant and his co-accused through security lights, no attempt was made to describe the intensity of the said security lights or the distance at which PW3 claimed to have seen them. I find that the circumstances in this case were not conducive to a

reliable and positive identification of the robbers. I therefore agree with the state and the appellant that he was not positively identified as one of the culprits. His alleged identification was not free from the possibility of error.

14. Besides his alleged identification at the scene of the robbery, the appellant was also convicted on the basis of the application of the doctrine of recent possession. And though the learned trial magistrate addressed her mind to the elements that need to be established for the application of the doctrine of recent possession, and she referred to several authorities on the subject, she misdirected herself when she wrongly applied it in this case. For the said doctrine to be applicable, the prosecution must prove beyond any reasonable doubt that the person accused of the offence was found in possession of the property in question; that the property belonged to the complainant and that it was recently stolen from the complainant. See *Erick Otieno Arum V Republic (2006) eKLR; Martin Lango & 2 others V Republic (2014)eKLR.*

15. In this case, the investigating officer confirmed that the mobile phone stolen from the complainant was not recovered at all let alone being recovered in the possession of the appellant. I am at a loss on how the learned trial magistrate ended up misapplying the doctrine of recent possession when it is so clear from the record that she was aware of the circumstances in which it is supposed to be applied which were so obviously missing in the appellant's case.

16. As the appellant was not positively identified as one of the two people who robbed the complainant as alleged, it necessarily follows that the offence of malicious damage to property charged in count 2 was not proved against him beyond any doubt considering that the robbers were the same people who were supposed to have maliciously damaged the said TV set. In addition, the mensrea required to found the offence was not established against the appellant in this case.

17. In view of the foregoing, I agree with the appellant that the prosecution failed to prove any of the charges preferred against him beyond any reasonable doubt. Infact, the truth of the matter is that the evidence on record was insufficient to prove a prima facie case against the appellant and he should not have been put on his defence. The only evidence which to some limited extent linked him to the commission of the offence was accomplice evidence which was not corroborated by any other material evidence as required by the law. I have in the end come to the conclusion that the appellant was wrongly convicted in both counts. The learned prosecuting counsel was therefore right to concede to the appeal.

18. In the result, it is my finding that this appeal is merited. It is consequently allowed. The appellant's conviction in both counts is hereby quashed. The sentence imposed by the trial court in both counts is accordingly set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Those are the orders of this court.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 10th day of November, 2016

In the presence of:

The appellant

Miss Naomi Chonde court clerk

No appearance by the state