



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 9 OF 2014

ANTHONY KABUTHU NDWIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by A.N. Makau S.R.M at Siakago on 2nd July, 2014 in CR. 548/2013)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of death in respect of a charge of robbery with violence contrary to Section 296 (2), Penal Code imposed by the trial court on 25.07.14.
2. Furthermore, the appellant, has listed nine grounds in his petition of appeal. He has stated that the trial court failed to consider:
 - a) That he was not mentioned in the initial report made at the police station.
 - b) That the police conducted poor investigations.
 - c) That the police failed to produce the O.B entry which would have shown that the serial number of the phone booked was different from that of the complainant.
 - d) That the safaricom data was not produced in court to prove the tracked phone.
 - e) That the second accused was not a prosecution witness and had no document to prove that the alleged phone was received from him.
 - f) That nothing was recovered from the appellant.
 - g) That the rejection of the defence evidence was on weak grounds.
3. Counsel for the respondent has supported the conviction and sentence. She relied on the doctrine of recent possession by the appellant of the stolen but recovered mobile cell phone of the complainant (P.W. 1).

The Case for the Prosecution:

4. The prosecution evidence is that the complainants (P.W 1 and P.W 2) were attacked and robbed cash money (Kshs 38,000/-), two mobile phones (vodafone and Nokia 1280) by a gang of six armed robbers, who as posed as customers.
5. The complainants sustained injuries which the examining doctor (PW 4) classified as harm.
6. Samuel Njiru Kagonda (P.W 3) the employer of the complainants was informed of the robbery at his Kiritiri petrol station. Amongst the stolen properties was Nokia 1280 mobile phone bearing serial number 356339052413442, which was recovered from the acquitted accused No. 2 Risper Awuor Sidero.
7. According to PW 3, he had bought the Nokia 1280 mobile phone for Kshs 1,800/- in respect of which he produced a copy of the receipt, which was put in evidence as prosecution exhibit P.ex. 1.
8. The robbery was reported to police who investigated it. According to the investigating officer, No. 57963 Cpl David Otieno (P.W. 5) of Kiritiri police station, he was ordered to go to the scene of robbery, which he did.
9. Later PW 3 went to the police station with the second accused who had been found with the stolen Nokia 1280 mobile phone.
10. The second accused led police to the appellant as the person who gave her the stolen Nokia 1280, who was then arrested and charged.

The Defence Case:

11. The appellant gave sworn evidence. He stated that he was arrested in the night of 29th and 30th June 2013 at Kenol petrol station at Embu where he had gone to pick his wife the second accused.

The appellant stated that the arresting police officers took him to Kiritiri police station and booked him with the Nokia 1280 mobile phone. He says that they took his Techno TV 30 mobile phone. The appellant further stated that he had given his wife the Nokia 1280 to use before he bought her another phone.

12. It was his further evidence that Nokia 1280 mobile phone belonged to a fellow businessman called Patrick Mutinda to whom he had lent Shs 400/-. Patrick Mutinda then left his Nokia 1280 mobile phone with the appellant as security.
13. The appellant denied knowing where Patrick Mutinda came from. He also denied knowing Mutinda's current whereabouts. Finally, the appellant stated that he did not want to call him as his defence witness. The second accused gave sworn evidence. She described the appellant as her husband. She admitted being given the Nokia 1280 mobile phone by the appellant. Following her arrest in Nairobi she led police to Kenol petrol station in Embu town, where the appellant was arrested.

Issues for Determination:

14. The appellant in his sworn evidence admitted to have been in possession of the stolen Nokia 1280, which he gave to the second accused. This Nokia 1280 mobile phone was positively identified as the property of PW 3, who had given it his employee (PW 1) to use.
15. Consequently, the main issue for determination is whether the appellant was found in possession of recently stolen property. And secondly, whether or not the appellant's explanation was plausible.
16. Thirdly, whether the purchase receipt (P.Ex.4) was properly admitted in evidence.
17. Fourthly and finally, whether the defence evidence of the second accused (appellant was the first accused in the lower court) would be taken into account by the trial court against the appellant.

The Law Applicable:

18. In the light of the foregoing evidence the issues for determination, the law that applies in this appeal include the principles applicable to the assessment of the evidence tendered in the trial court.
19. Furthermore, the law that governs the doctrine of recent possession of stolen property by the

- appellant is equally relevant.
20. Since the issue of the purchase receipt being a copy was received in evidence, it is important to ascertain whether the rules governing its admissibility were complied with.
 21. More importantly is the issue of whether the sworn defence evidence of the second accused could legally be used against the appellant.
 22. According to *Pandya v. R. 1957) EA 336*, a first appeal court is required to treat the evidence produced in the trial court as a whole to a fresh and exhaustive scrutiny before affirming the conviction.
 23. The *Evidence Act in sections 68(1) (c) and 69*, requires secondary evidence, which includes copies of original documents, to satisfy the following conditions before being admitted:
 - a) *that the original has been destroyed or lost and,*
 - b) *that the party proposing to produce the document has given the opposite party reasonable notice.*

Apart from the foregoing, the court is entitled to take into account defence evidence even if it is incriminating the accused, and it is the sole evidence that brings about the conviction of such an accused. In *Ramadhani v. R. (1962) EA 682*, the Court of Appeal held that where an accused has been put on his defence and by his own evidence has brought about his own conviction, an appellate court will not set aside the conviction solely on the ground that the trial court should have held that there was no case to answer.

24. Finally, a court is entitled to draw an adverse inference where the prosecution has failed to call relevant evidence. If the prosecution does not do so, then it has a legal obligation to disclose that evidence to the defence. This is in accordance with *Article 50 (2) (J) of the 2010 Constitution*, which in terms provides that an accused has a right to a fair trial which includes the right:

“(i) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;.....”

Evaluation of the Evidence, Findings and the Law:

25. We have independently re-assessed the whole evidence tendered at the trial as we are required to do by *Randya v. R, supra*. Following this re-assessment, we find that it is common cause between the appellant and the prosecution that the Nokia 1280 mobile phone serial No. 356339052413442, which was put in evidence as exhibit P.ex.1, was in the possession of the appellant.
26. The admission into evidence of a copy of the purchase receipt as a prosecution exhibit P.ex.1 was not proper, because it is secondary evidence in respect of which service of notice upon the appellant in terms of sections 68(1) (c) and 69 Evidence Act should have been done. However, its admission did not occasion a failure of justice.
27. This mobile phone was in the custody of the complainant (PW.1) as a special owner, which the appellant admittedly gave to the second accused to use. The phone was robbed from P.W 1 during the night of 7th and 8th June 2013. It was recovered from the second accused on 26th June, 2013.
28. The explanation of the appellant in respect of being in possession of this stolen phone was that it was given to him by Patrick Mutinda as security for lending him Shs 400/-. He did not want to call him as his witness. He also did not know his whereabouts.
29. The appellant was found in possession of a recently stolen phone less than three weeks after it was stolen. In the circumstances, we find that his explanation was rightly rejected by the trial court.
30. Furthermore, the argument of the appellant that the police carried out a poor investigation is not borne out by evidence. This was an afterthought as the appellant never put this issues in his cross-examination of the investigation police officer (PW 5).
31. As to the argument of the appellant that the trial court failed to consider that there was a difference in the serial number of the phone with which he was booked and that of the complainant (PW 1), the answer to that is that he confessed to be in possession of a recently stolen phone. The failure to produce the police O.B did prejudice his case and has not occasioned a failure of justice in

- terms of section 382 of the CPC.
32. There appears to be merit in the appellant's argument that the safaricom data was not availed in court to prove the tracked phone. The police were under a constitutional obligation to avail this evidence even if they themselves did not use it.
33. However, failure to avail this evidence did not prejudice the appellant's case in view of his confession that he was in possession of the stolen phone. Furthermore, the appellant complains that the second accused was not a prosecution witness. He also complains that there were no documents to prove that the stolen phone was received from the appellant.
34. The above argument is without merit. The appellant admitted giving the phone in issue to the second accused. The second accused in her sworn evidence also admitted receiving the phone from the appellant. The court was entitled to take into account this defence evidence. The case of **Ramadhani v. R. supra**, supports this view.
35. Additionally documentary proof that it was received from the appellant was therefore not necessary.
36. Finally, we find that the defence of the appellant was fully considered and rightly rejected.
37. The upshot of these is that the appellant's appeal against conviction and sentences is hereby dismissed.

F. MUCHEMI

J. BWONWONGA

JUDGE

JUDGE

JUDGEMENT DATED, SIGNED and DELIVERED at EMBU this 13th day of MAY, 2015

In the presence of The appellant and Ms Nandwa for Respondent.

Court clerk **Mr. Nyaga**

Right of appeal explained

F. MUCHEMI

J.M. BWONWONGA

JUDGE

JUDGE