REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 27 OF 2015

CONSOLIDATING FORMER NAKURU CRIMINAL APPEAL NOS. 194, 195 AND 196 OF 2014

(Being appeal from original Conviction and Sentence in the Chief Magistrate's Court at Narok Criminal Case No. 1138 of 2013 by T.A.Sitati - SRM)

PETER MUGO MATHU…….1ST APPELLANT

MORE OLE SARITE…….2ND APPELLANT

MUSA IKUTE NKURUNA……..……..3RD APPELLANT

-VERSUS-

REPUBLIC……...RESPONDENT

J U D G M E N T

1. Peter Mugo Mathu, More Ole Sarite and Musa Ikote Nkuruna filed their appeals numbers 196 of 2014, 194 of 2014 and 195 of 2014, respectively in the High Court Registry at Nakuru. Upon transfer to this court the said appeals were sent in one bundle under HC.CR.A. 196 of 2014 in the name of Peter Mugo Mathu. In the Naivasha registry, the latter file was redesignated as Naivasha HC.CR.A. 27 of 2015. On the application by the Director of Public Prosecutions on the hearing date, the three appeals were consolidated for hearing with the said file becoming the lead file, the Appellants appearing in the same sequence they did at the trial.

2. These appeals emanate from the trial in Narok Chief Magistrate's Court Criminal Case 1138 of 2013, wherein Peter Mugo Mathu (1st Appellant), More Ole Sarite (2nd Appellant) and Musa Ikote Nkuruna (3rd Appellant) were jointly charged with two counts of robbery as follows:

COUNT 1 –ROBBERY WITH VIOLENCE CONTRARY TO SECTION 295 AS READ WITH SECTION 296 (2) OF THE PENAL CODE.

Particulars

On the night of 19th August 2013 at Patimaru village, Melili location, Mau Division in Narok East District within Narok county, jointly with others not before court while armed with dangerous weapons namely pangas, rungus and simis they robbed Stephen Wainaina Kigondu of cash Kshs 62,500/=, Safaricom recharge voucher cards worth Kshs 10,000/=, assorted cigarettes worth Kshs 5,000/=, two mobile phones makes **Nokia** and **Itel** both valued at Kshs 8,000/= all to the total value of Kshs 85,000/= and during the time of such robbery threatened to use actual violence to the said

Stephen Wainaina Kigondu.

COUNT 2 –ROBBERY WITH VIOLENCE CONTRARY TO SECTION 295 AS READ WITH SECTION 296 (2) OF THE PENAL CODE.

Particulars

On the night of 19th August 2013 at Patimaru village, Melili location, Mau Division in Narok East District within Narok County, jointly with others not before court while armed with dangerous weapons namely pangas, rungus and simis they robbed Samuel Kamau Njenga of thirteen mobile phones, one Sonitec radio, one torch and cash Kshs 15,000/= all to the total value of Kshs 49,000/= and during the time of such robbery threatened to use actual violence to the said **Samuel Kamau Njenga**.

3. The first Appellant was also separately charged with what is properly an alternative rather than a 3rd count as purported in the Charge Sheet. The charge is Handling stolen property Contrary to Section 322 (2) of the Penal Code. In that On the 27th day of August 2013 in Naivasha Town within Nakuru County, otherwise than in the course of stealing dishonestly retained one **Samsung** mobile phone, two **Nokia** mobile phones, one **Tecno** mobile phone and one **Vodafone** mobile phone knowing or having reasons to believe them to be stolen goods.

4. The Appellants denied the charges. Following a full trial, the 1st Appellant was acquitted while the 2nd and 3rd Appellants were found guilty and convicted on the first count. On the second count, the 2nd and 3rd Appellants were acquitted while the 1st Appellant was found guilty and convicted. The court correctly treated the third count as an alternative charge. The Appellants were sentenced accordingly and appealed to this court. All the Appellants filed amended grounds of appeal prior to the hearing of their appeals as well as written submissions in support of the said appeals against conviction and sentence.

5. In his amended grounds the 1st Appellant takes issue with the sentence imposed on him, the applicability of the doctrine of possession of recently stolen goods, and the quality of evidence tendered by the prosecution. He complains that the charge sheet was defective and that his defence was not taken into account by the trial court.

6. For his part, the 2nd Appellant attacked the prosecution evidence on grounds that it was contradictory and unreliable, that expert reports were tendered in court contrary to the provision of Section 77 of the Evidence Act. He further complains about the application of wrong principles to the case, wrongful rejection of the defence evidence and the courts failure to comply with Sections 137 (f) and 211 of the Criminal Procedure Code. The 3rd Appellant contested the adequacy of the prosecution evidence and termed erroneous the dismissal of his defence. The Director of Public Prosecutions through Mr. Koima reiterated the prosecution evidence tendered at the trial

7. The duty of the first appellate court is to review the evidence of the trial and draw its own conclusions while giving allowance for the fact that it did not have the benefit of seeing and hearing the witnesses testify. (**Okeno –Vs- Republic [1972] EA 32**). The court will not interfere with findings of the trial court based on the credibility of witnesses unless such findings are plainly wrong and no reasonable tribunal properly applying itself could make them. (See **Francis Otieno Oyier –Vs- Republic Criminal Appeal No. 158 of 1984 2 (UR**))

8. The prosecution evidence at the trial was that on the night of 19th August, 2013 a gang of about five men who were armed with crude weapons forcefully entered the house where **Stephen Wainaina Kigondu** (PW1), employee of **Samuel Tumati Soit** (PW5) was sleeping with his family. They ordered PW1 to be silent and commanded that PW1 disclose the M-pesa PIN (authorization code) on the **Nokia 1280** phone (Exhibit 1) which was normally used at PW5's

shop at Melili, for M-pesa transactions. Using the said PIN, they transferred a sum of Shs 27,500/= on the **Nokia phone** to one Musa Ole (3rd Appellant). They also took cash Kshs 35,000/=, airtime cards and cigarettes from the shop which was next to PW1's house before leaving. Police were notified of the robbery.

9. Another shop operator at Melili, **Samuel Kamau Njenga** (PW3) was similarly attacked on the same night by a gang of 3 men. The armed gang took money from his wife and from his shop adjacent to the sleeping quarters. They assaulted the couple while demanding money, and ransacked the house in search of money. In total they took KShs 16,800/= as well as assorted phones which had been left at the shop for charging by the owners. These are **Nokia, Vodafone** (Exhibit 3) and **Tecno** and **Samsung** brands, the latter (Exhibit 2), belonging to **Isaac Meitamei Ole Soit** (PW4). The matter was reported to police after the robbers left.

10. On 21/8/2013 the 1st Appellant sold the **Samsung** phone, Exhibit 2, to **Daniel Muteru Nduati** (PW2) for Shs 700/= at Naivasha, but was later to exchange it for another phone a **Nokia** which the 1st Appellant had. PW4's **Samsung** phone had a tracker which sent back PW2's line details, when some Shs 10/= was sent to his line vie M-pesa. PW2 was lured into a police trap when he was called on his line, ostensibly, to collect a parcel.

11. On arrest PW2 led the police to Top Lodge bar Naivasha where 1st Appellant was employed. The 1st Appellant had the **Samsung** phone (Exhibit 2). Three more phones were recovered, namely the **Nokia 1280** (Exhibit 1) another **Nokia** Model **1208 or 1200** (Exhibit 4), **Vodafone** (Exhibit 3) and **Tecno** (Exhibit 5). These mobile sets were recovered from the 1st Appellant's house at the lodge.

12. On 2/9/2013 the 3rd Appellant and recipient of Shs 27,500/= sent from PW5's Mpesa account on the night of the robbery was traced and arrested at Naivasha. Police used him to lure the 2nd Appellant to Maai Mahiu but he fled on seeing police officers. With the help of members of public he was caught. Mpesa records from Safaricom Ltd indicated that the 3rd Appellant had transferred a sum of Shs 27,400/= on the night of the robbery to the 2nd Appellant.

13. In his defence, the 1st Appellant denied the offences and claimed to have been arrested while having a good time at Top Lodge bar with friends. The 2nd Appellant also denied the charges. The 3rd Appellant narrated the incident of his arrest in a lodging at Naivasha on 1/9/2013. He was held overnight at Naivasha Police Station and moved to Maai Mahiu Police Station on the next day. He was allegedly put together with a group of strangers and questioned concerning one of them going the nick name "murefu". He testified that his name was Musa Ikote Nkuruna and not Musa Ole and had never met Ole Sarite *aka* "Murefu" (2nd Appellant).

14. As the learned trial magistrate correctly observed in his judgment, the evidence against the Appellants was circumstantial, as none of the victims of the robberies were able to identify the robbers at the time of the robberies. With regard to the 1st count, the prosecution case rested on the transfer of cash from PW1's **Nokia** phone at the time of robbery to the 3rd Appellant, who, nine minutes later transferred it to the 2nd Appellant's telephone number.

15. The first transfer is confirmed by Exhibit 6 which is a print out from PW5's shop. The print out confirms the evidence of the shop attendant PW1 that the robbers, using the PIN they forced out of him, transferred Shs 27,500/= from the M-pesa account of his shop. The transaction is shown to have been executed at 3.00am with particulars being **DV86BN621** to phone number 0700 701 *** registered to **Musa Ole**. Safaricom records produced show that the sum in question, was transferred from Musa Ole to the holder of Number 0706 434 925 – held by the 2nd Appellant within minutes of receipt (Exhibit 9).

16. In considering the prosecution evidence, the trial court cited the principles laid out in **Republic -**

Vs- Kipkering Arap Koskei (1949) 16EACA, **135** where the Court stated:-

> **"……..In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."**

These principles were further developed in **Simoni Musoke –Vs- Uganda (1958) EA 715,** the court quoting **Teper -Vs- R (2) (1952) AC 480** where Privy Council stated:

> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."**

17. The identification of the 2nd and 3rd Appellants and their nexus to the offence depended on the records from Safaricom Limited and the documents retrieved from the National Registration Bureau. The 2nd and 3rd Appellants have complained concerning manner in which this evidence was admitted and handled at the trial.

18. This is what the 2nd Appellant stated in his submissions:-

> **"My Lords, I submit that the learned trial magistrate conducted in an irregular trial in that he allowed exhibits to be produced in court without asking the defendants to raise their views if they consented or objected to the production of the exhibits as the same was secondary evidence (Documentary exhibits) prepared through computers. I am referring to MFI 9, MFI 10b produced by PW6 as exhibits……. These two exhibits (MFI 9 and MFI 10b) providing evidence were not supported by any certificates as required to prove that they were genuine documents. Further that the same were produced contrary to Section 35 and 77 of the Evidence Act Cap 80 Laws of Kenya. I submit that the evidence relied upon by the learned trial magistrate to convict was not safe at all to base and sustain conviction. I humbly invite the honourable court to discard the evidence in regard to MFI 9 and 10 b in the present case as the same were admitted contrary to the procedure. My Lords, now that the prosecution side failed to prove the authenticity of the exhibit 9 and 10 b as genuine, I submit that the principles and doctrines relied upon the trial magistrate were unfounded and unsupported." (sic)**

19. We could not more agree with these sentiments, notwithstanding the questionable applicability of provisions of the Evidence Act cited in support. Evidence in the form of Identification Records (Exhibit 10b) tendered in respect of the 2nd and 3rd Appellants constitutes public documents within the meaning of Section 79 of the Evidence Act, and upon proper certification in terms of Section 80 is admissible and presumed genuine (see Section 83 of the Evidence Act).

20. In this case, these documents bear a stamp of the Director of National Registration of Persons. It is not clear why an officer from the said bureau was not called to tender the evidence, the investigating officer instead, producing the record. No basis was laid for production of the record by the investigating officer as provided under Section 33 of the Evidence Act. Clearly this denied the defence an opportunity to question the responsible persons.

21. In this particular case where a lot depended on the identification of the unrepresented Appellants by way of records, we believe the court ought to have made inquiries as to any objections or requests they may have had. Nothing was done in this regard. Secondly, regarding the M-pesa records, these fall in the category of electronic and digital evidence which though admissible requires certification under Section 78 A of the Evidence Act. As for computer printouts, certification is required under Section 65 (6) of the Evidence Act.

22. Section 78 A (4) of the Evidence Act provides:-

> **"Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract."**

23. In order for the court to weigh the reliability of such evidence, it must have regard to the factors set out in Section 78 (A) 3 (a), (b), (c) and (d). The production of the M-pesa records through the investigating officer in our opinion was erroneous and the Appellants' stand on the same should have been obtained by the trial court. The failure to make inquiries in this regard was prejudicial to the Appellants in the circumstances of this case. The Director of Public Prosecutions did not have an answer to these matters during the appeal.

24. In the result, we would agree with submissions that these omissions rendered the conviction against the 2nd and 3rd Appellant's unsafe. We will therefore quash the conviction against the 2nd and 3rd Appellants on the 1st Count and set aside the sentence.

25. Moving on to the 2nd count, the evidence upon which 1st Appellant was convicted was primarily that of possession of recently stolen goods, namely PW4's Samsung phone (Exhibit 2) that was taken from PW3's shop during the robbery, the **Nokia** model 1280 phone (Exhibit 1) belonging to PW5 and stolen during the robbery at PW1's house as well as other phones, make **Tecno**, **Vodafone** and **Nokia** 1200 (Exhibit 3, 4 5) of which Exhibit 2 and 4 had apparently been charging at PW3's shop during the robbery.

26. The key prosecution evidence in this regard came from PW2 who testified that the 1st Appellant had sold to him the **Samsung** phone (Exhibit 2) on 21/8/2013, that he returned it because it had a problematic password, and was given a **Nokia** phone (Exhibit 5) not connected with this case, and confirmed by PW5 to belong to the 1st Appellant's brother. Clearly PW2 was as accomplice, his evidence being evidence of the weakest nature. (See **Anyangu -Versus- Republic [1968] EA 239**. It required corroboration. (See **Muiruri & 2 Others -Versus- Republic [2002] 1KLR**).

27. The trial court seemingly took PW2's evidence at face value and did not consider that he was an accomplice. The court did not therefore expressly seek corroboration, only alluding to PW4's evidence by stating:

> **"It is a tracker that led the owner (PW4) and the police to the 1st Accused."**

Applying the doctrine of recent possession the learned magistrate observed**:**

> **"Peter (1st Accused) had no reasonable explanation for this possession of the stolen phone 2 days after the robbery."**

28. It is undeniable that in some material ways PW4's evidence corroborated the evidence of PW2 and indeed the first lead in the investigations came from information by PW4. Although the witness should have tendered evidence of the M-pesa transfer of Shs 10 to PW2, we think the trial magistrate was entitled to believe PW4 in the circumstances of the recovery. That PW2 led the police officers to Top Lodge where he identified the 1st Appellant, is itself independent corroboration of PW2's testimony.

29. This is so especially in light of the subsequent recovery of the **Samsung** phone (PW4's property), the **Nokia** 1280 phone (PW5's property) and the **Vodafone** (identified as a customer's property by

PW3) in the 1st Appellant's possession. PW2, PW5 and PW6 confirmed that this recovery was made at the house of the 1st Appellant on 27/8/2015. The inventory Exhibit 11 tends to confirm the recovery. The evidence of recovery is not in any way weakened by the failure by the 1st Appellant's landlady to sign off the inventory. The 1st Appellant himself refused to sign, distancing himself from the recovered phones.

30. Is there any possibility that the police planted the phones on the Appellant? We do not think so. Of the five phones produced in court only Exhibit 1 (**Nokia** 1280), Exhibit 2 (**Samsung**, Exhibit 3 (**Vodafone**) were claimed by the witnesses in relation to the robberies herein. There can be no plausible reason for PW5 fabricating evidence against a man he did not know hitherto. The circumstances in which the 1st Appellant had come into possession of the phones are matters within his knowledge, under Section 111 of the Evidence Act. This is the foundation for the doctrine of possession of recently stolen goods.

31. In **Simon Kangethe –Versus- Republic [2014] eKLR** the Court of Appeal had this to say:

> ***"Section 111 of the Evidence Act* provides that: *existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him…***
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> **In *Ogembo -Versus- Republic, [2003]1 EA*, it was held that:**
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> > ***"For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen."***
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> **Recently, this Court in *Moses Maiku Wepukhulu & PAUL NAMBUYE NABWERA -Versus- Republic CR.A NO. 278 OF 2005* (Koome, Mwera & Otieno-Odek, JJ.A.) quoted with the approval what constitutes the doctrine of recent possession in the case of *Malingi -Versus- Republic, [1989] KLR 225*:**
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> > ***"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. That the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was (from the nature of the item and the circumstances of the case) recent; <u>that there are no co-existing circumstances which point to any other person as having been in possession of the items</u>."* [Emphasis added]**
>
> **The doctrine is a rebuttable presumption of fact. Accordingly, the accused is called upon to offer an explanation in rebuttal, which if he fails to do, an inference is drawn, that he either stole or was a guilty receiver.**

As was aptly stated in the case of *Hassan -Versus- Republic, (2005) 2 KLR 151*:

> ***"Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver."***

32. The 1st Appellant did not in any way attempt to rebut the prosecution evidence. By his statement, he wanted the court to believe that police arrested him at Naivasha while he was entertaining himself and falsely linked him to a robbery that had taken place some 200 kilometres away at

Melili. We agree with the Director of Public Prosecutions' submissions that the trial court was entitled to apply the doctrine of possession of recently stolen goods in this case. With regard to count 2, we find no merit in the appeal and dismiss it accordingly. We do confirm the 1st Appellant's conviction on the 2nd count and uphold the sentence.

33. The trial magistrate seemingly overlooked the evidence of the 1st Appellant's possession of PW5' **Nokia** 1280 phone (stolen from PW1) in considering the first count and subsequently acquitted him. The Director of Public Prosecutions did not cross appeal over the said acquittal and nothing turns on the question therefore. With regard to the 2nd and 3rd Appellants, having quashed their only conviction on Count 1, we have to consider what consequent orders to make.

34. The Appellants were charged with a serious offence. The principles to consider on the question whether or not to order a retrial were set out in **Fatehali Manji –Vs- Republic [1966] EA 343** by the Court of Appeal as follows:

> **"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecutor is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused."** (See also Muiruri –Vs- Republic [2003] KLR 552).

35. The Court of Appeal in **Pius Olima & another –Vs- Republic [1993] eKLR** in considering a similar issue stated:

> **"Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar –Vs- Republic [1964] EA 481; Manji –Vs-Republic [1966] EA 343; Mujimba –Vs- Uganda, [1969] and Merali & Others –Vs- Republic, [1971] 221. The principles that emerge are that a retrial may be ordered where the original trial as was found by the High Court……is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."**

36. Applying the foregoing principles to this case, we are convinced a retrial is in the interest of justice, that no prejudice will be occasioned to the Appellants, that the potentially admissible evidence could result in a conviction and ultimately, that this is a suitable case for retrial. We therefore order that a retrial be held with dispatch before a different magistrate in respect of the 2nd and 3rd Appellants on the first count. For this purpose the 2nd and 3rd Appellants will appear and take plea before Chief Magistrate's Court Narok on 15th November, 2015

Delivered and signed at Naivasha, this **6th** day of **November, 2015.**

In the presence of:-

State Counsel : Kibelion/Ms Waweru

For the Appellant : N/A

C/C : Steven

Appellant : Present

M. A. ODERO

JUDGE

C. MEOLI

JUDGE