



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 275 OF 2013

(From original conviction and sentence in Criminal Case No. 1032 of 2012 of the Chief Magistrate's Court at Narok, C. A. Nyakundi, P. M.)

WILSON DAPASH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Wilson Dapash (*the Appellant*) was charged with the offence of Robbery with Violence contrary to Section 295 as read with Section 296(2) of the Penal Code (*Cap. 63, Laws of Kenya*). He was on the evidence found guilty, convicted and sentenced to death as prescribed by the law.

2. Aggrieved both with his conviction and sentence the Appellant has come to this court on appeal and in his Petition of Appeal filed on 27th September 2013, sets out six grounds but which may be collapsed into two grounds, namely -

- (1) *that the identification was not watertight, and***
- (2) *that the trial court erred in the application of the doctrine of recent possession.***
- (3) *that his sentence was harsh.***

3. It is both the statutory duty of this court, and the command of precedent, as a first appellate court to consider and re-evaluate the evidence before the trial court in order to arrive at our own findings and conclusions.

4. Four witnesses testified before the trial court. PW1 and PW2 were the victims of the robbery, and therefore the primary complainants. The scene was Narok Township, the site was Pharmcare Chemists shop. The time was about 8.00 p.m., and therefore night. The actors were the Appellant and his two accomplices who were never caught.

5. The victims PW1 and PW2 were closing shop. The Appellant walks in on the pretext of buying airtime worth shs 20/=. He engages PW2 in small talk to distract PW1 in particular. In pops another man who points a pistol against PW1 and orders PW1 and PW2 to lie down and not to scream or call for help. A third accomplice walks and stands guard at the entrance door to shop. The accused and the pistol wielder demand cash and telephone. PW1 hands over the day's collection shs 55,000/= and cell-phone Samsung E1055. The three robbers leave running off. That essentially was the evidence of PW1

and PW2, the victims.

6. PW1 also testified that, about a month later the same people came and robbed him again. He did not specify the date or time. Through a tracking device they were able to locate the exact area where his cell-phone was being used, till it was recovered. He also identified the Appellant. His two colleagues went and are still at large.

7. After the accused was traced and arrested, both PW1 and PW2 identified him at a Police Identification Parade conducted by PW3. PW3 testified that he took out 8 members of the parade and lined them, and took the suspect (*the Appellant*), and asked him to choose his position. The Appellant chose Nos. 4 and 5 and stood between then PW2 identified the Appellant by touching him on his shoulder. Similar procedure was used when the Appellant was once again identified by PW2.

8. The Appellant contends that his identification was not watertight. It is however clear from the evidence of both PW1 & PW2 that they both spent “sometime with the Appellant at least on the first occasion of the robbery on 21.05.2012. The night was young, it was only 8.00 p.m. The shop was lit with electricity lights. Even though the Appellant was unknown to PW1 and PW2, on the first occasion of the robbery, a second robbery say in mid June 2012 or thereabouts would make a permanent imprint on the minds of PW1 and PW2 as to the Appellant's identity. As for the Identification Parade itself, the Appellant expressed satisfaction, in accordance with the evidence of PW3.

9. In the result therefore, we find no basis for the complaint that the identification was not watertight. We reject that ground.

10. On the question whether the trial court erred on the application of the doctrine of recent possession, that doctrine raises the presumption of theft unless the person found in possession of the goods recently stolen can give a reasonable explanation as to how he came into possession of such goods. The Appellant was not found in possession of the stolen cell-phone. The learned trial magistrate erred in finding him guilty of the alternate count of recent possession of stolen goods. We quash that conviction. As he was sentenced to death on the first count, the sentence on the alternate count was properly put in abeyance as a person can only die once.

11. Though the Appellant was not found in possession of the incriminating cell-phone originally stolen from PW1 with the application of violence, the evidence of PW4 clearly points to the Appellant as the person who had robbed PW1 of the cell-phone. A Mr. Vincent Wanyama who did not testify but in whose possession the cell-phone was traced, clearly implicated the Appellant as the person who sold the cell-phone to him. The Appellant's pretence that it was “Waingo” (“*a man from home*”) who sold the cell-phone to him will not hold sway. Having implicated Waingo as the person who sold him the cell-phone, the burden of evidence to prove his contention shifted to him. Section 111 of the Evidence Act, (*Cap. 80, Laws of Kenya*) says the burden of proof lies upon a person with special knowledge of a particular fact.

12. The Appellant's evidence consisted of denials and expressions of ignorance of where he was, and what he was doing on the material day. He failed to discharge the burden thrust on him by his own admission to PW4 that he was sold the cell-phone by “Waingo”. Having failed to discharge that burden, the trial court came to a correct finding that, it was in fact the Appellant, and not “Waingo” who sold the stolen cell-phone to Vincent Wanyama Munyani who also went underground after initial arrest and release by the Investigating Officer.

Consequently the second limb of the appeal also fails.

13. The third issue raised by the Appellant was the question of sentence. The Appellant contended that his sentence be “*withdrawn*”. The Appellant was sentenced to death as prescribed under Section 296(2) of the Penal Code.

14. The Constitution of Kenya 2010 guarantees under Article 26 thereof the right to life. Article

20(3) of the Constitution read together with Article 23(1) thereof, enjoins this court in applying the Bill of Rights to develop the law to the extent that it does not give effect to a right or fundamental freedom. It is the right to life which is guaranteed under the Constitution, not the death penalty.

15. In the circumstances, we set aside the sentence of death imposed upon the Appellant by the trial court and in lieu thereof sentence the Appellant to fifteen years imprisonment.

16. Save as aforesaid, the appeal herein fails, and is dismissed. It is so ordered.

Dated, signed and delivered at Nakuru this 10th day of October, 2014

M. J. ANYARA EMUKULE

JUDGE

A. MSHILA

JUDGE