



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 19 of 2009

JAMES KIINYUKIA KIHORO.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(appeal arising from Senior Principal magistrate's court

at Murang'a in criminal case no. 3229 of 2006)

JUDGMENT

The appellant herein James Kiinyukia Kihoro was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on 15th December 2006 at Murang'a township in Murang'a District within the Central Province jointly with others not before court while armed with dangerous weapons namely pistol robbed ANTHONY NJOROGI NJERI motor vehicle registration No. KAJ 519N Toyota Corolla E90 valued at Ksh. 240,000/- cash Ksh. 1000/- and mobile phone make Motorola T190 valued at Ksh. 3000/- and at or immediately before or after the time of such robbery threatened to use actual violence to the said ANTHONY NJOROGI NJERI.

The second count was that on 15th December 2006 at Gathinja Trading Centre in Murang'a District within Central province jointly with others not before the court while armed with dangerous weapons namely pistols robbed SAMUEL GITHINJI MUIGUA cash Ksh. 8000/- one mobile phone make Nokia 1100 valued at Kshs. 5000 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Samuel Githinji Muigua.

He also faced an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code, the particulars of which were that on 16th December 2006 at Murang'a Township within Murang'a District of Central province otherwise than in the course of stealing dishonestly retained a mobile phone make Nokia 1100 knowing or having reason to believe it to be stolen goods.

He was tried and convicted of the offence of robbery with violence and sentenced to death. Being dissatisfied with the sentence and conviction he lodged the present appeal and listed the following in his home made grounds of appeal which can be summarized as follows:

(a) The learned trial magistrate erred in law and fact on the issue of identification.

(b) The learned magistrate erred in wrongly applying the doctrine of recent possession of the alleged mobile phone.

(c) The learned magistrate erred in relying on an alleged confession.

(d) The learned trial magistrate erred in dismissing the appellants defence without giving cogent reason for its rejection.

Miss Mwai appeared for the appellant before us while Miss Maundu appeared for the state.

We must state at the on set that this appeal was conceded to by the state on the issue the recovery of the mobile phone since it was not stated as to who between the two persons the mobile phone was found. She further conceded that the identification parade was not properly conducted.

We are however not bound to allow the appeal on the basis that the same is conceded to by the state. We are duty bound to reevaluate all the evidence tendered before the trial court and to come to our own conclusion however taking into account the fact that we did not have the advantage of hearing and seeing the witnesses as the trial court did.

It is clear to our mind that the issues for determination in this appeal is whether the trial magistrate properly applied the doctrine of recent possession to the case before her and whether the identification parade was properly conducted.

On the issue of identification parade Miss Mwai on behalf of the appellant submitted that the appellant was not properly identified. She submitted that P.W.1 testified that he saw the appellant clothes but when the parade was conducted he did not have the same clothes. That it was only after the parade was conducted when she identified the clothes. She therefore submitted that the appellant was not positively identified.

She further submitted that P.W.2 indicated that she did not identify the attackers though during the trial his statement was changed to read can in place of cannot and that though the magistrate rejected the statement it seems to have been used in the judgment.

She submitted that there was no indication as to the person who was found with the phone and therefore the doctrine of recent possession was wrongly applied

she further submitted that the identification parade was conducted by unqualified person she submitted the authority of **R v. TURNBULL AND OTHERS (1976)3 ALLER 549** on the issue of identification and urged us to allow the appeal.

We have looked at the proceedings before the trial court and in particular the evidence of P.W.1 ANTONY NJOROGE NJIRI. He testified that he had parked his vehicle registration No. KAJ 519N when a young man came from the direction of Mugoiri and asked for taxi service to Mumbi police station. They agreed on fare of Ksh. 150 of which he was paid Ksh.100 and the balance of Ksh.50 to be paid. After fueling at Huhu petrol station they drove for about 100 metres when he was told to stop. He thereafter saw two people who came to the passenger side and the other opened the back door and the one at the passenger door had a pistol. When he inquired from the passenger he also pointed a pistol at him and demanded his mobile phone and money. He was thereafter ordered into the boot of the said car. After reporting to the police station he stated that he could easily identify his customer who was wearing a blue jean trouser, a white shirt with black pocket dots and a blue cap with white lines and that when they got to Mumbi he was wearing a khaki jacket.

Under cross examination he stated that there was light at the place where he picked the appellant. He stated that it was a round 7.30 p.m. It was at night.

P.W.2 Samuel Githinji Mwigwa testified that on 15th December 2006 at about 8.30 p.m. He was in his shop when he saw a vehicle stop outside. Four men alighted therefrom and pointed out pistols at him. They started ransacking his shop and took his mobile phone Nokia 1100 belonging to a customer and Ksh. 8000/- being sales for the day. They then took off and he reported the matter to the police at

Kirogo and after a few days the police informed him that the robbers had been arrested. He attended the parade and was able to identify the appellant. Under cross examination it turned out that the witness statement had been altered to read can identify in place of cannot identify the attackers the court therefore rejected the said statement.

P.W.3 Ignatius Muraga corporal of police testified that he conducted the parade.

When P.W.1 was recalled he stated that he gave the police the description of the appellant by the clothes he was wearing he further stated that after the appellant was arrested he was called by the police to identify him and that he gave his description as tall and thin.

P.W.5 pc. Benson Musau testified that on 16th December 2006 at around 17.25 hours he was on patrol when they received a tip in relation to a robbery that occurred the previous day. They proceeded to a shop along Family Bank where they arrested the appellant. They conducted a search and recovered a Nokia 1100 which was among the items alleged to have been stolen from Samuel Githinji.

Under cross examination he testified that he arrested the appellant in a mobile phone clinic. He stated that Stephen Mutahi was not charged with the appellant.

P.W.6 Corporal Stephen Wachira testified that on 16th December 2006 the OCS C.I. Kimalia in the company of p.c. Musau and others had arrested a suspect. He booked him in out of the cell. His name was James Kinyuki who led him to his house in Mukuyu area. He conducted a search and under his bed he recovered an imitation of a pistol and an iron bar. He asked him of the clothes he was wearing on 15th December 2006 and he gave him a jacket and a cap. He conducted the parade and the appellant was identified. After the parade he came to the office and identified the jacket and the cap as the clothes worn by the appellant on the said date.

When put in his defence the appellant gave sworn evidence and stated that on 16th December 2006 on his way to Murang'a town he met his class mate called Stephen Mwangi when suddenly two men who identified themselves as police men surrounded Stephen Mwangi and identified themselves as police men. They conducted a personal search and recovered the phone. They hand cuffed him and started walking to the police station when one of the officers asked for his name and that they stated that Stephen would be charged with the phone.

He testified that the police wanted him to take them to Stephen house but he said he did not know where it was and that in his house they recovered his photo album. He testified that the phone and the jacket and the cap were left at the police station by Stephen Muturi after he escaped from the police.

Under cross examination he stated that on 15th December 2006 at 7 p.m. He was at home that the police told him that they were arresting him so that he could inform them of his relationship with Stephen.

From the above evidence was the appellant properly identified? It is submitted by the appellant and conceded by the state that the identification parade was conducted by an officer who was not qualified to do so and therefore the said identification was null and void. It is further submitted by the appellant that the same was not wearing the clothes which the complainant said he could identify him with and we therefore find as a fact that the said identification parade was not properly conducted.

It was alleged by P.W.6 that he conducted a search at the house of the appellant but we note that no inventory was recorded of the alleged recovery.

On the issue of recent possession of the mobile phone which was used by the trial court to convict the appellant we find that the same was not properly applied. The appellant testified that the said mobile phone was found from one Stephen Mwangi Muturi and had that the trial court did not take into account the appellant defence herein.

We have also noted that the trial court faulted P.W.2's identification of the 2nd accused herein

since he was not sure whether he is the one he saw as the torch light was deem. What is not clear to our mind is as to how those prevailing circumstances could have made it possible for P.W.2 to identify the appellant.

We therefore for the reasons stated herein find that the conviction of the appellant was not safe. We therefore allow the appeal herein quash the conviction and set aside the sentence.

The appellant shall be released forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 4th October 2012.

J.K. SERGON
JUDGE

J. WAKIAGA
JUDGE
Miss Mwai for the appellant
Miss Kitoto for the state.

J.K. SERGON
JUDGE

J. WAKIAGA
JUDGE