



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 129 of 2006

(Arising from criminal case no. 3746 of 2004 of the Senior Resident Magistrate court Mombasa)

ALI MBWANAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

Ali Mbwana , the appellant herein and one Salim juma Abdullah were jointly tried for the offence of robbery with violence contrary to section 296 (2) of the penal code. In the end the appellant was convicted and sentenced to death while salim Juma Abdullah was acquitted. The appellant was dissatisfied hence this appeal. On appeal the appellant put forward a total of five [5] grounds in his petition. Those grounds are produced as follows:-

- 1 That the learned magistrate erred in law and fact by convicting me without considering that the charge sheet preferred against me wasn't 100% accurate.**
- 2 That the learned trial magistrate erred in law and fact by basing my conviction and sentence on strength of visual identification of PW1 without carefully considering that identification was surrounded in mistaken identity factors.**
- 3 That the learned trial magistrate erred in law and fact by convicting me without considering that the theory of recovery of the said mobile phone was surrounded by mass contradictions to constitute a possession.**
- 4 That the learned trial magistrate erred in law and fact by convicting me without considering that the prosecution side wasn't proved beyond any shadow of doubt and it was rested on nullity to borne safe convictions.**
- 5 That the learned trial magistrate erred in law and fact by failing to consider my defense evidence with no apparently reason rather than directing her mind in hearsay evidence.**

We wish to re-evaluate the case that was before the trial court before determining the merits' of the appeal. Six witnesses were summoned by the prosecution in support of their case. Monica Mweni Muthoni [PW1] told the trial court that on 4/12/2004, she attended a wedding ceremony at God's Miracle Church, Bombolulu. After the wedding at about 5.00P.M. she left for her residence situate behind V.O.K. On the way she said she was confronted by the appellant who was armed with a knife. PW1 said

the appellant placed the knife on her neck threatening to slit it if she did not surrender her mobile phone. PW1 dropped her mobile phone which was promptly collected by the appellant. The appellant was said to have been in company of other people. PW1 said the appellant was the one who held her by the throat. The appellant and her accomplices are said to have escaped by jumping over the nearby perimeter wall. PW1 screamed and her screams attracted the members of the church who in turn gave a chase. PW1 said her mobile phone was of the make Samsung. In its cover was tucked KSh.250/-. Two people were arrested but PW1 was able to identify the appellant to be her assailant by the attire he wore i.e. a whitish shirt and grey jeans. The appellant was searched whereupon a Samsung phone was recovered.

Pw1 identified the same to be her property. By then the sim card had been removed. Carolyn Wahu Njenga [PW2] confirmed having rushed to the scene when she heard PW1 scream. She saw people follow the direction the people who had robbed PW1 had taken. PW2 said she witnesses the appellant being searched with a Samsung mobile phone being recovered from him. Ernest Njuguna [PW4] said PW1 came running to inform those who were sitting at the high table inside the church that she had been robbed outside the church by youth who had jumped over the fence. PW4 said he immediately telephoned the police. PW4 said the police arrived and followed the suspects already arrested. Silvester Mutisya Muli [PW5] said he rushed out to answer the distress screams by Pw1. He was amongst the people who gave a chase on the direction the robbers were said to have taken. PW5 who with others managed to arrest the appellant took him to the scene. PW5 said members of the public beat him and in the process the mobile phone fell from his pants. Pw1 managed to identify the mobile phone to be hers. PC Fairfax Masinde [PW6] said the police received the information about the robbery through the 999. PW6 said he visited the scene where he re-arrested the appellants and took possession of the mobile phone from PW5.

When placed on his defence, the appellant denied having committed the offence. The appellant said that he had just left his residence near VOK for the shops. On the way he claimed he met somebody who was running. Shortly he met people who were in hot pursuit. Those people alleged the appellant was the thief. He was then arrested and taken to the scene of crime.

Having re-evaluated the evidence, we now wish to revisit the grounds of appeal. The five grounds of appeal can be summarized to three main grounds. First, the prosecution did not prove its case to the required standards of beyond reasonable doubt. Secondly, that the appellant was not properly identified. Third that the trial magistrate did not consider the appellants defence. We propose to deal with the first and second grounds together. We have taken our time to critically consider the written submissions tendered by the appellant. According to the appellant, his identification was not reliable because the particulars of his appearance and attire were not given to the investigating authority or the church members who gave a chase. The appellant was of the view that he was a case of mistaken identity. The appellant also attacked the evidence of the recovery of the mobile phone. According to pW1 the same was recovered from the left hand pockets of the appellants. According to pW5 the mobile phone was recovered when it fell down from the appellant's pants. The appellant also attacked the evidence of the mobile's ownership. The appellant said the complaint did not prove ownership because she failed to give a receipt or the serial number of the same.

It is the submission of Mr. Ondari, learned Assistant director of Public prosecution that the doctrines of recent possession puts the appellant on the spot. We have carefully considered the aforesaid submissions. It is not in dispute that the offence took place during day time. The complainant [PW1] clearly stated to the church members who gave a chase that one of the persons who assaulted her wore a whitish shirt and grey jeans. She gave the direction the robbers took. PW5 was amongst the people who gave a chase. The appellant was arrested not far from the vicinity of crime. He was identified by the complainant as the person who had violently robbed her a few minutes ago.

According to Pw1 the mobile phone was recovered from the appellant's hand pockets whereas PW5 states that the same fell down from the panties of the appellant. In our assessment, the fact remains the same. That is to say that the mobile phone was recovered from the appellant. It did not matter whether the same was recovered from his pockets or his panties.

There is no doubt that the same is of the make called Samsung. The complainant was not called upon to give the serial number nor the receipt of purchase. It was incumbent upon the appellant to explain how he came to the possession of the mobile phone. The appellant did not lay any claim on the mobile phone. We have no doubt the mobile phone belonged to the complainant in the circumstances of this case. We have come to the conclusion that the doctrine of recent possession applies. Consequently the appellant is placed at the scene of the crime and that he is the robber and no one else.

It has been argued the trial magistrate did not consider the appellants defence. We have carefully examined the recorded proceedings and we are convinced that the learned Senior Resident Magistrate ably considered the appellants defence. In fact she was of the firm opinion that the defence was a make-up story. We have

re-considered the same and we have come to the conclusion that the same did not cast any doubt on the prosecution's evidence. We think the same was properly rejected by the trial magistrate.

In the end, we find no merit in the appeal. It is dismissed in its entirety.

Dated and delivered this 5th day of May 2009

J. K. SERGON.

F. AZANGALALA

JUDGE

JUDGE