



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MURGOR, J. MOHAMMED & KANTAI, J.JA.)

CRIMINAL APPEAL NO. 6 OF 2017

BETWEEN

ANTHONY MWANZIA MBIZI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment and order of the High Court of Kenya at Nairobi delivered by F. Ochieng & M. Warsame, JJ (as he then was)) on the 20th July 2011,

in

Nairobi High Court Criminal Appeal NO. 517 of 2007

JUDGMENT OF THE COURT

The appellant, Anthony Mwanzia Mbizi was convicted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars were that on the 10th September, 2006, at around Kahawa West area within Nairobi, he robbed Elizabeth Wangeshi PW1 (Elizabeth) of a mobile phone, Alcatel, valued at Kshs 3000 and immediately before or immediately after the time of such robbery, he used actual violence on her.

An alternative charge was preferred in that, in the course of stealing, he dishonestly handled a stolen mobile phone, the property of Elizabeth knowing or having a reason to believe that it was unlawfully obtained.

Briefly, the facts are that, at about 9.00 p.m on the material day, Elizabeth alighted at the Kahawa bus stage and was on her way home when she was approached by three people, a young woman and two young men. The woman demanded her phone, after which, one man wrenched her phone out of her hand, and ran off together with the second man. She followed them shouting "thieves" and was joined by a good Samaritan who also gave chase. The assailants disappeared into an alley causing Elizabeth to turn away and walk home. At a junction near her home, she saw Duncan Maina Kinyua (PW2 Duncan) and another man whom she later came to learn was an Administration Police officer, holding the two young men, she identified one of them as the appellant who had robbed her a few minutes earlier. She went with them to report the robbery at the Chief's camp, and on the way, they met some regular police officers, among them, PC Michael Kimani, (PW3) who interrogated the two assailants. The appellant and his colleague offered to take them to where the phone was hidden. They were led into an open field behind a petrol station from where the phone was recovered. Elizabeth keyed in a pin number into the phone thereby activating it, which pointed to her as having been its rightful owner.

Duncan stated that the shouts of "...thieves, thieves..." coming from Elizabeth attracted his attention, causing him to join her in chasing the appellant; that after the appellant disappeared down the alley, he decided to wait at the place he had last seen him, as he knew he would have to come back the same way since, there was no exit from the direction in which he had run. As anticipated, the appellant returned and was apprehended by Duncan and the Administration police officer who was on patrol. They also arrested his accomplice who was at the bus stage. He stated that the appellant then offered to return the phone, and had taken himself, Elizabeth and PC Kimani to the field behind the petrol station from where the phone was retrieved.

In his defence, the appellant stated that after he had just arrived in Kahawa West and had gone to relieve himself, he was arrested by an Administration Police Officer who demanded a bribe from him. When he stated that he did not have any money, he was arrested and taken to the Chief's camp and thereafter to Kiamumbi Police Station where he remained for a week, whereupon he was arraigned in court.

The trial magistrate convicted and sentenced the appellant to death upon finding that the offence was proved to the required standard, but acquitted the appellant's accomplice. The appellant was dissatisfied with the decision, and appealed to the High Court (Ochieng, J and Warsame, J. (as he then was)), which upheld the conviction and sentence. The appellant was aggrieved by the decision, and appealed to this Court on the grounds that; the High Court erred;

- i) in upholding the conviction which violated **section 71 and 77** of the retired constitution;
- ii) in failing to evaluate and re-analyse the evidence;
- iii) in failing to find that the prosecution evidence was full of contradictions, inconsistencies and discrepancies; and
- iv) in failing to take into account the appellant's defence, and in wrongly shifting the burden of proof to the appellant.

Mr. Ratema Oira, learned counsel for the appellant filed written submissions, which were highlighted on a virtual internet platform owing to the relentless spread of the Covid- 19 pandemic. Counsel submitted that the High Court failed to re-evaluate the evidence by relying entirely on Elizabeth's evidence that three people attacked her. It was argued that with the trial court having acquitted his accomplice, and without charges having been preferred against the young woman who initially approached Elizabeth, it meant that the ingredients for the offence against the appellant as the only person to have been charged were not established; that therefore, it was submitted, the appellant should have been charged with simple robbery.

It was further asserted that the appellant was charged 10 days after the offence was committed which would infer that there was insufficient evidence to charge him, and that after he was arrested, he was not informed of the nature of the offence which he faced. It was also pointed out that the Administration police officer who recovered the phone was not called to testify, and therefore, there was a break in the chain of events.

Counsel concluded by submitting that in so far as the sentence was concerned, this Court should apply the decision of the Supreme Court in **Francis Karioko Muruatetu & Another -vs- Republic, Petion No. 15 of 2015**, and reduce the sentence of death to a custodial sentence for the period already served, particularly since the phone was recovered and the complainant did not suffer any injuries.

In response for the State, learned counsel **Ms. Matiru** opposed the appeal and submitted that all the ingredients for the offence were satisfied; that the appellant was arrested for committing the offence with violence by twisting her hand and robbing her of her phone; that though no injuries were sustained, the complainant suffered apprehension and fear. It was further submitted that no break in the chain of events had occurred, from the theft of the phone to its recovery in the field.

On identification, it was submitted that the appellant was properly identified as, the robbery took place outside a well-lit supermarket, and there was sufficient light to enable her to see the appellant. It was further submitted that, it was the appellant who thereafter led the police to the field behind the petrol station where he had hidden the complainant's phone. Counsel asserted that this evidence pointed to him as the person responsible for attacking and robbing the complainant.

It was also argued that the offence took place when the previous Constitution was still in force, and therefore no violation of **section 71 and 77** of the **Constitution** had occurred.

With regard to the sentence, it was submitted that in view of the decision in **Francis Muruatetu (supra)**, this Court could consider reviewing the sentence from life to a minimum custodial sentence of 20 years.

We have carefully considered the grounds, the parties' submissions, the record and the applicable law. This being a second appeal and by dint of **Section 361(1)(a)** of the **Criminal Procedure Code**, this Court can only address a point or points of law. In the case of **Karingo vs Republic (1982) KLR 213** this Court stated,

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs R (1956)17 EACA 146.”

Being so guided, we consider the issues for consideration are whether;

- i) the appellant was properly identified; ii) whether the courts below rightly invoked the doctrine of recent possession; iii) whether the offence was proved to the required standard; iv) whether the courts below shifted the burden of proof to the appellant and in conjunction with this, whether his alibi and defence were considered; v) whether the High Court properly re-analysed the evidence having regard to apparent contradictions and discrepancies, and vi) whether the sentence should be reviewed.

Beginning with whether the appellant was properly identified, the trial court had this to say;

“The complainant identified the 1st accused, (the appellant) as the one who twisted her hand forcing her to let go of her phone which he took and ran away. She also told the court that she was able to identify him at the scene where she was robbed was outside a supermarket which was well illuminated. She described him as having spotted (sic) dreadlocks and worn a green shirt and added that he is the one who led them to recover the phone. Though the issue of the kind of lighting and the distance were not fully canvassed by the prosecution, any doubt that may have lingered to suggest that the complainant was mistaken in her identification are quickly destroyed by the evidence by all the prosecution witnesses that the 1st accused is the person who led

them to retrieve the phone a (sic) shortly after the theft. The doctrine of recent possession postulates that the fact that he was found with or led the complainant and the police to recover the phone hours or minutes after it was stolen suggests that he was the thief...

On its part, the High Court was satisfied with the trial court's conclusions that he was identified and further added that;

"...while we accept the appellant's contention that there was no continuous chain of events from the time the complainant was robbed until the suspect was arrested, the presence of both the green shirt and the dreadlocks on the suspect who was arrested could be sufficient to enable the complainant confirm that the suspect was the same person who had robbed her shortly before he was arrested."

The court further stated that when the appellant's description is considered alongside the evidence that he was arrested coming from the direction in which Duncan had seen him running, and thereafter showed the police where the phone was hidden and then recovered, all this evidence coalesced to point to him as being the person who had robbed Elizabeth.

Our re-evaluation of the evidence would lead us to the same conclusion. Elizabeth identified the appellant with the assistance of light from the supermarket. She also observed that he had worn a green shirt and had dreadlocks which was distinctive. Duncan testified that he saw the appellant run into an alley and since he was aware that there was no exit through the alley, Duncan waited for him to return. He did so, minutes later, and, Duncan together with an Administration police officer apprehended him. Based on the evidence, we are satisfied that the appellant was properly identified.

As regards application of the doctrine of recent possession, the appellant offered to show Duncan and PC Michael Kimani who was in the vicinity where he had hidden Elizabeth's phone. And after it was recovered from the field where he had led them, the appellant did not explain how Elizabeth's phone came to be there.

In the case of ***Hassan vs Republic (2005) 2 KLR 11***,

"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".

Having failed to provide any explanation as to how he knew the whereabouts of Elizabeth's phone, the only conclusion that can be reached is that he was the thief who had earlier stolen it from her.

As to whether the offence was proved to the required standard, the case of ***Johana Ndungu vs Republic Criminal Appeal No. 116 of 1995 (unreported)*** sets out the requirements thus;

"(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.

(1) If the offender is armed with any dangerous or offensive weapon or instrument, or

(2) If he is in company with one or more other person or persons, or

(3) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

The Court is not required to look for the presence of all three ingredients, as proof of one of the ingredients would suffice to secure a conviction. Both the trial court and High Court, found that Elizabeth was violently robbed after she was attacked and her phone wrenched out of her hand. The appellant was soon thereafter found in recent possession of the phone that would lead to the inescapable conclusion that he was the thief.

We do not agree that the trial court shifted the burden of proof when it considered the appellant's alibi defence that he had gone to relieve himself. In effect, the trial court's judgment makes it clear that, having led the police to recover the phone, pointed to him as the person who had stolen it only a few moments earlier. We therefore cannot fault the courts below for concluding that his defence was an afterthought. We say this because the prosecution's evidence when weighed against the defence, was not in any way displaced so as to render the conviction unsafe. In so finding, we dismiss this complaint.

In conclusion, on assessment of the evidence, the High Court was satisfied that the ingredients for robbery with violence were properly established, and that the prosecution proved its case to the required standard. Likewise, we have come to the same conclusion. As such, we uphold the trial court's conviction that was also upheld by the High Court. And since, the allegation that there were contradictions and discrepancies in the prosecution evidence was not substantiated, we find it to be unfounded, and accordingly dismiss it.

Regarding the alleged contravention of **sections 71 and 77** of the retired Constitution, it is apparent that the offence occurred before the promulgation of the Constitution 2010. Since the issue was not canvassed in the court below, the facts and circumstances surrounding his arrest and subsequent arraignment are unclear from the proceedings. This notwithstanding, in his defence, the appellant stated that after he was arrested, he was not brought to court until a week later, on 19th September 2006. **Section 77** of the retired Constitution provide that an accused person should be arraigned in court within 14 days from the date of detention. Since he was arraigned after a week, clearly, his rights

were not violated, and as such, we consider this allegation to be without merit.

Finally, on the question of the sentence, the trial court imposed the mandatory death sentence having found the appellant guilty of the offence of robbery with violence. In this appeal, the appellant has urged us to review the sentence of death owing to the Supreme Court's decision in the **Francis Muruatetu case** (supra) wherein the Court found the mandatory nature of death sentence to be as the minimum sentence to be unconstitutional and which was delivered after the appellant was convicted and sentenced.

In view of the immediate recovery of the stolen phone and his plea for leniency in mitigation being a first offender, noting also that Elizabeth was not injured and the stolen item was recovered immediately, we interfere with the mandatory sentence imposed and instead impose a custodial sentence.

For the reasons aforesaid, the appeal against conviction is dismissed, and we set aside the death sentence and substitute it therefore a sentence of fifteen (15) years imprisonment from the date of conviction.

Dated and Delivered at Nairobi this 18th day of December, 2020.

A.K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR