



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.)

CRIMINAL APPEAL NO. 190 OF 2014

BETWEEN

FRANCIS ODHIAMBO OWINO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kisumu, (Muchelule & Chemitei, JJ.) dated 27th June, 2014

in

H.C.C.R.A. NO. 117 OF 2012)

JUDGMENT OF THE COURT

[1] The appellant, Francis Odhiambo Owino and two others were charged before the Chief Magistrate’s Court- Kisumu with five counts of robbery with violence contrary to section 296(2) of the Penal Code. The appellant was separately charged with one count of gang rape in view of a family member contrary to section 7 of the Sexual Offences Act. In the sixth count, the appellant and the co-accused were alleged to have jointly robbed Richard Kyalo of one mobile phone, make Ideos and a laptop, all valued at Kshs. 96,300/- on 30th May, 2011. The appellant was the second accused at the trial.

[2] After the trial the appellant was convicted of three counts of robbery with violence including the sixth count and of the count of gang rape. The co-accused were acquitted in respect of the sixth count but were convicted in respect of three counts of robbery with violence. Upon conviction, the appellant and co-accused were sentenced to various terms of imprisonment, and the sentences to run concurrently. In respect of the sixth count, the appellant was sentenced to 30 years imprisonment.

[3] The appellant and the co-accused appealed to the High Court against conviction and sentence. The appeal of the co-accused was wholly successful and convictions and sentence in the respective counts were quashed. The appeal of the appellant was partially successful. His conviction was quashed and sentences set aside except in respect of the sixth count. In respect of the sixth count, the High Court said:

“In relation to count 6, PW5 lost the phone, laptop and money. Only the phone was found with the 2nd appellant. It was found with him soon after the attack and in the same town. He has made no explanation for the possession. We find that in the circumstances, he had the phone because he had got it in the robbery in which he had taken part. The attack was by armed people. We confirm his conviction in respect of count 6 and therefore his appeal fails. “

As regards sentence, the High Court set aside the sentence of 30 years imprisonment and substituted it with a sentence of death for the reasons that the only sentence provided by law is the death penalty.

[4] This appeal is against the decision of the High Court. The main complaint against the decision of the High Court is that the High Court erred in applying the doctrine of recent possession without carefully re-valuating the evidence. Mr. Onsongo, learned counsel for the appellant submitted that the phone had passed through the hands of three people before it was sold to the appellant 21 days after the robbery, and that there was ample evidence from the prosecution witnesses of how the appellant came to be in possession of the mobile phone. Mr. Ketto, learned counsel for the respondent conceded the appeal on the ground that the application of the doctrine of recent possession was misplaced as the appellant led the police to the person who had sold the mobile phone to him.

[5] **Richard Kyalo** the complainant in the sixth count testified that he was robbed of a mobile phone, Kshs. 20,300, an ATM card and other documents and a laptop on the night of 30th May 2011 by three people, one of whom was armed with a gun, and that he was not able to identify any of them. According to the evidence of **Sgt. Fred Bunusu (PW1)**, he arrested the appellant at his place of work after he was informed that the appellant had a mobile phone suspected to be stolen. On interrogation, the appellant produced the phone and explained that it was sold to him for Kshs. 4500/- by **Allan**. The appellant led him to Allan who was arrested. Allan explained that the phone was sold to him by **Abraham** and he led to the arrest of Abraham. Abraham in turn explained that the phone was sold to him by **Victor Otieno Akoth** and he led the police to his home. **Victor Atieno Okoth** was arrested but escaped while in police handcuffs. His house was searched and some properties belonging to other complainants were recovered. **Allan** and **Ibrahim** were the co-accused.

[6] The trial magistrate made a finding that the evidence of **Sgt Fred Bunusu** on how he arrested the appellant and co-accused and made recoveries was not challenged and believed it. It follows that the prosecution case itself showed that the appellant explained that he bought the phone from Allan who was a co-accused and that Allan led the police to Abraham (co accused), who in turn led the police to the house of Victor from where other stolen properties were recovered. It is noteworthy that the trial magistrate acquitted the co-accused in respect of robbery in the sixth count. The phone was recovered three weeks after the robbery and could have changed hands. The appellant's explanation to the arresting officer of how he acquired the phone was reasonable in the circumstances. In the premises, the learned State Counsel has properly conceded the appeal.

[7] In the result the appeal is allowed, the conviction of the appellant for robbery with violence in the sixth count is quashed and the sentence of death set aside. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered at Kisumu this 27th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR