



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, VISRAM & MURGOR, JJ.A)**

**CRIMINAL APPEAL NO. 153 OF 2016**

**BETWEEN**

**PETER MWANGI WAITHAKA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Nairobi (Lesiit & Kimaru, JJ.) dated 15<sup>th</sup> May, 2015*

*in*

*C. Cr. A. No. 171 of 2017)*

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**JUDGMENT OF THE COURT**

**1. Peter Mwangi Waithaka, the appellant,** has preferred this second appeal against his conviction for the offence of robbery with violence. As far as this appeal is concerned, we have no jurisdiction to entertain matters of fact by dint of **section 361 (1) (a)** of the Criminal Procedure Code. In ***Karani vs. R [2010] 1 KLR 73*** this Court expressed;

***“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”***

2. The concurrent findings of facts were that on 20<sup>th</sup> November, 2006 at around 12.30 am. Mary Waithira Gichia (PW1) was waylaid by a group of seven men while on her way home. One of the assailants brandished what looked like a pistol and another hit her causing her to fall down. While she was on the ground, she was robbed of her mobile phone make Siemens C 35. At the material time, Mary was in the company of Ann Wangui (PW2) and William Mwangi who screamed for help.

3. Meanwhile, PC Jackson Rotich Chemoro (PW3) and PC George Ochieng (PW4) who were on patrol 100 meters away heard the screams and headed towards the scene. The robbers noticed the police and fled. One of the robbers who was armed with the pistol fled towards PC Jackson. PC Jackson ordered him to stop but he refused to do so. Left with no other choice, PC Jackson shot the said robber who fell to the ground. However, he managed to get up and ran away. Following the blood trail, PC Jackson and his colleagues were able to trace the said robber who turned out to be the appellant in a kennel that was nearby. A toy pistol and a mobile phone make Siemens C 35 were recovered on him. The following day Mary was able to positively identify the recovered mobile phone as the one which was stolen.

4. Subsequently, the appellant was charged with one count of robbery with violence contrary to **Section 296 (2)** of the Penal Code. The particulars of the charge were that on 20<sup>th</sup> November, 2006 at Kawangware Mlango Soko within Nairobi area, the appellant jointly with others not before the court while armed with dangerous weapon namely, toy pistol robbed Mary Waithera a mobile phone make Siemens C 35 valued at Kshs.7,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Mary Waithera.

5. The appellant entered a plea of not guilty. In his sworn statement, he denied committing the offence. He testified that on the material day while he was on his way home it begun raining heavily. He decided to run home but before he could arrive at his house he was shot and he fell down. He managed to get up and run to a nearby kennel. He was later arrested and charged. He maintained that he was an innocent bystander who was shot by the police. He also denied that the toy pistol and mobile phone which were produced in court were recovered from him.

6. The trial Court weighed the evidence and found that the prosecution had proved that both the toy pistol and stolen mobile phone had been recovered on the appellant. The court relied on the doctrine of recent possession to convict the appellant and sentenced him to death. Aggrieved by the trial court's decision, the appellant filed an appeal in the High Court which was dismissed through a judgment dated 15<sup>th</sup> May, 2015. It is that decision that has sparked this second appeal predicated on the grounds that the learned Judges erred in law by:

***“a) Confirming the appellant’s conviction on the basis of a defective charge sheet.***

***b) Finding that the doctrine of recent possession was applicable.”***

7. Mr. F. Ogeta, learned counsel for the appellant, relied on his written submissions and also made oral highlights. He submitted that there was no identification evidence linking the appellant to the offence. The only evidence which the prosecution relied on was the fact that the appellant had been shot and the alleged recovery of the stolen mobile phone from him. He argued that the appellant was an innocent bystander who unfortunately got caught up in a cross fire between the police and robbers. According to him, the description of the stolen mobile phone in the police Occurrence Book (OB) differed from the description given in the charge sheet. In the former the phone was described as Siemens A 35 while in the latter it was described as Siemens C 35. Furthermore, the prosecution did not prove ownership of the alleged recovered mobile phone. Thus, the doctrine of recent possession was not applicable. He maintained that the conviction of the appellant was based on mere suspicion, and urged us to allow the appeal.

8. On her part, Ms. Maina, learned Senior Public Prosecutions Counsel contended that the prosecution had established that the appellant was in actual possession of the stolen mobile phone, and urged us to dismiss the appeal.

9. We have considered the record, submissions by counsel and the law. It is not in dispute that the only evidence against the appellant was circumstantial.

For a conviction to be rightly based on circumstantial evidence, such evidence must meet a certain criteria. This Court in ***Musili Tulo vs. R [2014] eKLR***, while discussing the criteria observed:

***“It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-***

***(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***

***(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***

***(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

10. The predecessor of this Court also set out an additional criteria in ***Simon Musoke vs. R [1958] EA 71*** as follows:

***“The circumstances must be such as to produce moral certainty to the exclusion for any other reasonable doubt .... It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference.”***

Emphasis added

11. Did the circumstantial evidence adduced by the prosecution meet the above criteria? In our view, the issue of the alleged variance of description of the mobile phone on the OB and charge sheet is matter of fact which does not fall for our consideration. The two courts below were satisfied that the mobile phone which was stolen was Siemens C 35, and there is no reason to hold otherwise.

12. Having taken into account the evidence on record, we concur with the following findings of the High Court: -

***“The police shot at one of them. He managed to escape. When the police arrived at the scene, they saw a blood trail.... They followed the blood trail to a kennel where they found the appellant hiding. He had a gunshot wound. When they searched him, they found him with a toy pistol and a C35 Siemens mobile phone which was later identified to be the one that was robbed from the complainant. The toy pistol and the mobile phone were produced as exhibits during trial.***

***In our considered opinion, the prosecution established a clear chain of events from the time the complainant was robbed to the time the appellant was arrested hiding in the kennel. Although, the complainant and her friends did not identify their assailants, the fact that the mobile phone robbed from the complainant was recovered in the appellant’s possession a few minutes after the robbery, proves beyond reasonable doubt that the appellant was in the gang that robbed the complainant. The doctrine of recent possession applies here. The mobile phone that was found in the appellant’s possession was positively identified by the complainant as the one that was robbed from her.”***

13. Contrary to Mr. Ogeta’s submissions, it is clearly on record that Mary had identified the mobile phone which had been recovered on the appellant as being hers and which had been stolen on the material day. She did so using the distinct scratch marks on the phone. In ***Isaac Ng’ang’a Kahiga alias Peter Ng’ang’a Kahiga vs. R [2006] eKLR*** this Court expressed:

***“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there***

**must be positive**

**proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other.**” Emphasis added.

14. We find that the circumstantial evidence against the appellant irresistibly points towards his guilt. Consequently, the appeal herein lacks merits and is hereby dismissed.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of June, 2017.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**