



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 3 OF 2014

BETWEEN

DANIEL NJIRU TIRAS APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Majanja &

Ong'undi, JJ.) dated 16th December, 2014

in

H.C.CR.A No. 70 of 2012)

JUDGMENT OF THE COURT

1. The appellant was jointly charged with Charles Kimani Kabari, Charles Nyaga Ngumi and David Njeru Kibutu with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**; David Njeru Kibutu and the appellant were also each charged with an alternative count of handling stolen property contrary to **Section 322(2)** of the **Penal Code** in the Chief Magistrate's court at Embu.
2. The particulars of the first count of robbery with violence were that on 16th June, 2010 at Gitare Market, Embu East District within Embu County, the appellant and his co-accused jointly with others not before the court, while armed with dangerous weapons to wit a rifle and pangas, robbed Ann Leah Muthoni of cash Kshs. 11,000/=, Identification Card, two N.H.I.F cards, a voters card, one Equity bank plate and airtime scratch cards for Safaricom, Zain and Yu companies of different denominations, and at or immediately before or immediately after the time of such robbery, used actual violence to the said Ann Leah Muthoni. The particulars of the second count were that on the aforementioned date and place, the appellant and his co-accused while armed with dangerous weapons to wit a rifle and pangas, robbed Justus Njagi of an unspecified amount of money and at or immediately before or immediately after the time of such robbery, shot and killed the said Justus Njagi.

3. The particulars of the first alternative count were that on 25th September, 2010 at Njukiri Location in Embu West District within Embu County , David Njeru Kibutu having been detained by No. 73262 CPL Emmanuel Kiptoo as a result of powers conferred by **Section 26** of the **Criminal Procedure Code** , had in his possession a motor bicycle make Captain registration number KMCH 793W, engine number HS 157FMI *93121027*; frame number *LX6PJ310792120088*, that was reasonably suspected to be stolen or unlawfully obtained. The particulars of the second alternative count were that on 2nd July, 2010 at Irangi Village, Embu East District of Embu County, the appellant otherwise than in the course of stealing, dishonestly undertook the retention of a mobile phone make G-Tide serial number 356688002141960 knowing or having reasons to believe it to be stolen property.
4. The appellant pleaded not guilty and the prosecution called a total of 13 witnesses in support of its case. It was the prosecution's case that on 16th June, 2010 at around 9:00 p.m. while PW1, Ann Leah Muthoni (Ann), was in her shop two men came and one of them inquired whether she sold cigarettes. Ann informed him she did not have cigarettes in the shop. Suddenly, the man who had asked for cigarettes brandished a panga at Ann while the other man produced a pistol. Ann screamed and ran into the inner room of the shop. The intruder who was armed with a panga followed Ann into the inner room while the other remained at the shop. The intruder who followed Ann began cutting her with the panga.
5. Attracted by the screams, PW2, Sharon Grace Wanjiru (Sharon), Ann's daughter, who was in the house which was adjacent to the shop came out and found a man cutting her mother with a panga. Sharon also screamed and the said intruder cut her severally with the panga. By then Ann's brother, PW3, Peter Muthee Crispus (Peter), who lived nearby had arrived at the scene and the intruders fled.
6. After the intruders left, Sharon noticed that they had stolen her mobile phone make G-tide , scratch cards for Safaricom, and YU worth Kshs. 5,000/=, cash Kshs. 8,000/= and a hand bag containing her Identification Card, N.H.I.F. card and Equity Bank ATM card. When she went to the shop she found her brother one Justus had been shot and was on the floor. Justus was rushed to the hospital but subsequently died. Ann, Sharon and Peter testified that they were able to see the faces of the two intruders with the aid of the electricity lights.
7. PW13, Cpl. Emmanuel Kiptoo (Cpl. Emmanuel), testified that after receiving a report of the robbery he commenced investigations. With the assistance of Safaricom service provider, Ann's mobile phone was traced to the appellant's house in Irangi Village on 1st July, 2010. Upon searching the appellant's house, Ann's mobile phone was recovered therein. The appellant led the police to the arrest of his co-accused. Thereafter, Ann, Sharon and Peter participated in an identification parade wherein they picked the appellant as one of the intruders.
8. PW9, Joseph Njue Njeru (Joseph), testified that in mid-June, 2010 at about 4:30 p.m. he met the appellant who was well known to him at Mangunaandu Supermarket. The appellant transferred Kshs. 1,000/= via mpesa to Joseph's mobile phone; Joseph noticed that the appellant had a G-Tide phone which had red strips round it; the said mobile phone was similar to the one recovered on the appellant. Ann identified the mobile phone recovered in the appellant's house as the one which was stolen. The appellant and his co-accused were arraigned and charged in court.
9. In his defence, the appellant gave a sworn statement. He testified that prior to his arrest he used to run a video shop wherein he would also charge his customer's mobile phones for a fee. On 1st July, 2010 at around 2:00 a.m. he was asleep in his house when he heard the door being knocked. When he opened the door he was hit by a metal bar while his wife was hit on the chest. Police officers entered his house and took mobile phones, a blow drier and a camera. He was later arrested. The appellant denied committing the offences he was charged with and maintained that it was his step mother who had framed him.
10. After considering the foregoing evidence, the trial court convicted the appellant and Charles Kimani Kabari for the offence of robbery with violence and sentenced them to death. The other accused persons were acquitted for lack of evidence. Aggrieved with the said decision, the appellant and Charles Kimani Kabari preferred an appeal in the High Court wherein by a judgment dated 16th December, 2013, Charles Kimani's conviction was set aside while the appellant's conviction and sentence was upheld. It is that judgement that has provoked this second appeal based on the following grounds:-

- ***That the first appellate court erred in law in upholding the conviction of the appellant without first critically examining and evaluating the evidence adduced before the trial court and drawing its own conclusions.***
- ***The first appellate court erred in law in not finding that the prosecution did not prove its case against the appellant beyond reasonable doubt.***
- ***The first appellate court erred in law in rejecting the appellant’s defence without giving cogent reasons.***
- ***The first appellate court erred in law in misapplying the doctrine of recent possession to the detriment of the appellant.***

11. Mr. Muchiri wa Gathoni, learned counsel for the appellant, submitted that the High Court did not re-evaluate the evidence tendered at the trial court and draw its own conclusion. He argued that the case against the appellant was based on the doctrine of recent possession; in his defence, the appellant testified that he ran a video shop wherein customers would charge their mobile phones. According to Mr. Muchiri, the recovered phone could have been in the possession of his customers. He contended that had the High Court properly evaluated the evidence it would have found that the doctrine of recent possession was inapplicable. Mr. Muchiri argued that there was no evidence from Safaricom that connected the appellant to the recovered phone. He urged us to dismiss the appeal.

12. Mr. Kaigai, Assistant Deputy Public Prosecutor, while supporting the appellant’s conviction submitted that the evidence of PW1 (Ann) was clear and consistent that there were electricity lights at the scene which enabled the identification of the appellant. Ann’s testimony was corroborated by PW2 (Sharon) and PW3 (Peter). He argued that not only was the complainant’s phone recovered in the appellant’s possession but also the appellant’s Sim card was found in the said phone. PW9 confirmed that the appellant made an MPESA transaction with the said phone. Mr. Kaigai urged us to dismiss the appeal.

13. We have anxiously considered the grounds of appeal, the record, submissions by counsel and the law. This being a second appeal, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***Chemangong -vs- R [1984] KLR 611***. In ***Karingo -vs- R (1982) KLR 213*** at p. 219 this Court said:-

“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 unless 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 C/O Karanja -vs- R (1956) 17 EACA 146)”

14. On the issue of the identification evidence we concur with the following findings by the High Court:-

“We have analyzed the evidence of identification and we conclude that the evidence falls short of the kind required to convict the appellants. It was apparent from the witnesses’ testimony that no description regarding the appellants’ unique features were given in the first police report and indeed in subsequent reports. PW1 and PW2 who had contact with the attackers for the longest period during the horrifying ordeal did not provide a description of the attackers immediately after the incident to the police, particularly given that they identified unique features which would have been used to identify the appellants. In the circumstances, an identification parade could not be carried out.”

In ***Maitanyi -vs- Republic (1986) KLR 198***, this Court held,

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description.”

15. Based on the aforementioned findings, the only evidence against the appellant herein was on recent possession. Both lower courts made concurrent findings that the appellant was found in possession of the stolen mobile phone. This Court has decided in several cases and outlined when the principles of recent possession may be applied to a case. In *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic -Criminal Appeal No. 272 of 2005*, this Court held,

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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 person to the other.”

16. PW13, Cpl. Emanuel Kiptoo testified as follows in relation to recovery of the recent stolen mobile phone from the appellant:-

“I am force No. 73262 Cpl. Emmanuel Kiptoo of CID headquarters Nairobi and formerly of CID Embu police. On 16/6/2011 a case of robbery with violence was reported to us. It had been committed at Gitare Market. The complainant, Leah Muthoni had been robbed off her cell phone G-tide, cash, identity card, two NHIF cards, voter's card, Safaricom, Zain and YU airtime. With the other police officer, investigations commenced. We were assisted by Safaricom service provider. The 1st accused (appellant herein) used the phone one Daniel. On 1/7/2010 we traced the 1st accused at his house in Irangi Village. We introduced ourselves to him and sought to search his house. We searched the house in his presence and did recover the said G-tide phone from therein. The phone had his number in. we also recovered a Sim Card P.K holder of the accused phone being used in the said phone..sic.”

17. In this case, Cpl. Emmanuel testified that they were able to trace the stolen mobile phone to the appellant's house with the assistance of Safaricom. We note that the prosecution did not tender any evidence of the said assistance by Safaricom. However, we note that the appellant did not deny that the stolen mobile phone was recovered from his house when a search was conducted; he also did not deny that his Sim card was also found inside the said mobile phone. We find that the prosecution did prove that the stolen mobile phone was found in the appellant's possession. We also note that Ann positively identified the said mobile phone as the one which had been stolen by producing the receipt of its purchase. The receipt bore the mobile phone's serial number 356688002141960.

18. From the record, we cannot help but note that despite the appellant testifying that he used to charge mobile phones for his customers he did not give any evidence that the recovered mobile phone belonged to his customer. We therefore find that the appellant did not give a reasonable explanation of being in possession of the complainant's mobile phone. In the case of *Francis Kariuki Thuku & 2 others -vs- Republic [2010] eKLR* this Court held that:-

“Concerning the application of the doctrine of recent possession to the facts in the case, we are of the view that the appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of R. V. Loughin 35 Cr. Appl. 269 by the Lord Chief Justice of England and this Court's own decision of Samuel Munene Matu V. R. Criminal Appeal No. 108 of 2003 at Nyeri

demonstrates that the doctrine was properly applied. The recovery of the items in the case before us was within 7 days whereas in the MATU case (supra) a period of 20 days was held to be recent. We accordingly uphold the superior court's view of the law on the point. In this regard we would re echo the decision of this Court in the case of Hassan - vs- Republic [2005] 2 KLR 11 where as regards recently stolen goods it delivered itself thus:-

“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.”

19. We find that the appellant having been found in possession of the stolen mobile phone a few days after the robbery leads to the inevitably conclusion that he was involved in the said robbery. See this Court' decision in ***George Otieno Dida & Another -vs-Republic [2011] eKLR***.
20. The upshot of the foregoing is that we find that the appeal herein lacks merit and is hereby dismissed.

Dated and delivered at Nyeri this 21st day of January, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO- ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR