



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 31 OF 2014

BETWEEN

JOSEPH MACHARIA MAINA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Ougo &

Aboudha, JJ.) dated 19th December, 2013

in

H.C.CR.A No. 72 of 2011 consolidated with 73 of 2011)

JUDGMENT OF THE COURT

1. The appellant was jointly charged with Charles Maina Wanjohi, Paul Kahunyo Chiuri and Peter Muthee Maina with five counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in the Chief Magistrate's Court at Nyeri. Charles Maina Wanjohi was also charged with the offence of giving false information to a person employed in the public service contrary to **Section 129(a)** of the **Penal Code**. The appellant and Peter Muthee Maina were also each charged with an alternative count of handling stolen property contrary to **Section 322(2)** of the **Penal Code**.

2. The particulars of the first count of robbery with violence were that on the nights of 5th and 6th April, 2010 at Kenol Petrol Station in Karatina in Nyeri District within the then Central Province, the appellant and his co-accused jointly with others not before the court, while armed with dangerous weapons namely AK47 rifles, pistols, iron bars, crowbars, hacksaw and pangas robbed Jackson Maimba Njuki of cash Kshs. 3,028,250/= and a mobile phone make Smaide all valued at Kshs. 3,032,250/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Jackson Maimba Njuki.

3. On the second count of robbery with violence, the particulars were that on the aforementioned date and place, the appellant and his co-accused jointly with others not before the court while armed with the aforementioned dangerous weapons robbed Samuel Maina Ndungu of a mobile phone make Nokia 1210

valued at Kshs. 2,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Samuel Maina Ndungu. On the third count, the particulars were that on the aforementioned date and place, the appellant and his co-accused jointly with others not before the court while armed with the aforementioned dangerous weapons robbed Duncan Maina Kanunu of a mobile phone make Motorola valued at Kshs. 2,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Duncan Maina Kanunu.

4. The particulars of the fourth count were that on the aforementioned date and place, the appellant and his co-accused jointly with others not before the court while armed with the aforementioned dangerous weapons robbed Patrick Kahiu Rwigi of a wrist watch make Seelgul valued at Kshs. 300/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Patrick Kahiu Rwigi. The particulars of the fifth count were that on the aforementioned date and place, the appellant and his co-accused jointly with others not before the court while armed with the aforementioned dangerous weapons robbed Francis Muthee Kairia of a mobile phone make Nokia 1110 (1) serial number 353643015730369 and cash Kshs. 100/= all valued at Kshs. 2,600/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Francis Muthee Kairia.

5. On the charge of giving false information, the particulars were that on diverse dates between 6th and 12th April, 2010 at Karatina Police Station in Nyeri District within the then Central Province, Charles Maina Wanjohi informed Police Constable Bridgit Imella, a police officer, a person employed in the public service that a robbery with violence had taken place at Kenol Petrol Station in Karatina where he was robbed of a mobile phone make Nokia 1100 while he knew he had planned the robbery which information he knew or believed to be false.

6. The particulars of the first alternative charge were that on 19th May, 2010 at Kiguthu Village in Karatina in Nyeri District within the then Central Province, Peter Muthee Maina otherwise than in the course of stealing dishonestly handled one mobile phone make Nokia 1110 serial number 353643015730369 valued at Kshs. 2,500/= the property of Francis Muthee Kairia knowing or having reasons to believe it to be stolen goods. The particulars of the second alternative count were that during the month of April, 2010 at Kiguthu Village, Karatina in Nyeri within the then Central Province, the appellant otherwise than in the course of stealing dishonestly assisted in the disposal of mobile phone make Nokia 1110 serial number 353643015730369 valued at Kshs. 2,500/= the property of Francis Muthee Kairia for the benefit of Peter Muthee Maina knowing or having reasons to believe it to be stolen goods.

7. The appellant and his co-accused pleaded not guilty to all counts. The prosecution called a total of 11 witnesses. It was the prosecution's case that on 5th April, 2010 PW1, Jackson Maimba (Jackson), PW2, Samuel Maina Ndungu (Samuel), PW3, Duncan Maina Kanunu (Duncan), PW4, Patrick Wahiwi (Patrick), PW5, Francis Muthee Kariuki (Francis) and Charles Maina Wanjohi, one of the accused persons, were at work at the Kenol Petrol Station in Karatina. Jackson, the shift supervisor, testified that at around 11:00 p.m. Duncan and Charles went to sleep in a school van and a lorry respectively which were parked at the Petrol Station. At around 2:00 a.m. Jackson deposited Kshs. 7,135/= from sales into a safe which was in the office. Thereafter, Duncan and Charles woke up and took over Jackson's and Patrick's duties as they went to sleep in the van and lorry.

8. At around 3:00 a.m. while Samuel, Francis, Charles and Duncan were awake, a man came from the stage and inquired from Charles whether there was paraffin; suddenly, a group of men emerged from the stage and came to the Petrol Station. One of the said men drew a gun and ordered the employees at the petrol station to lie down. Samuel and Duncan testified that the robbers took their mobile phones.

9. Thereafter, one of the assailants asked Duncan where the other employees were; Duncan took some of the assailants to where the van and lorry had been parked. The assailants woke up Jackson, Patrick and Francis; they stole a mobile phone and Kshs. 100/= from Jackson, a wrist watch and Kshs. 500/= from Samuel and a mobile phone make Nokia 1110 from Francis. After the robbers left, Jackson noticed that the robbers had broken into the office and safe. PW6, David Njoroge (David), the owner of the Petrol

Station, testified that the robbers had stolen Kshs. 3,028,750/= which was in the safe.

10. PW11, SGT. Jacob Mureithi (SGT. Jacob), the investigating officer, testified that with the assistance of Safaricom they were able to trace Francis's mobile phone make Nokia 1110; they established that mobile phone number 0715589594 had activated the stolen mobile phone after the robbery; the said phone number was traced to Peter Muthee Maina, one of the appellant's co-accused. PW5 (Francis) positively identified the recovered phone as the one which was stolen from him on the material day. The said Peter Muthee Maina informed the police that it was the appellant who had given him the said phone. DW8, Nancy Nyachomba (Nancy), the appellant's mother, corroborated the aforementioned evidence by Peter Muthee Maina. Subsequently, the appellant went underground.

11. After searching the appellant's house, SGT. Jacob found a document relating to motor vehicle registration number KAS 848H, Toyota Corolla 111 which had been bought by the appellant seven days after the robbery for a consideration of Kshs. 370,000/=. The vehicle had been transferred to the appellant by one Zacharia Muriuki. One month later, the appellant was arrested in Karatina. After obtaining the requisite court order, SGT. Jacob learnt that the appellant had deposited a total sum of Kshs.157, 000/= in his Cooperative Bank account number 01109059414800 a day after the robbery incident. SGT. Jacob testified that the aforementioned transactions by the appellant were suspect since he was a handcart puller. Subsequently, the appellant and his co-accused were arraigned and charged in court.

12. After the prosecution closed its case, the appellant and his co-accused were placed on their defence. In his defence the appellant gave a sworn statement. He testified that on the material day he was in his house; he was arrested on 17th July, 2010 by the police and asked if he knew Peter Muthee Maina. While admitting that Peter Muthee Maina was his brother he denied giving him the stolen mobile phone. The appellant maintained that since his father died he had a strained relationship with his family; he had never spoken to his brother for a long time.

13. It was the appellant's evidence that his wife, DW7, Carolyn Njeri (Carolyn), had purchased motor vehicle registration number KAS 848H, Toyota Corolla 111; his name appeared on the document because at that time the document was executed, his wife had forgotten her Identification Card. Carolyn testified that she had purchased the said vehicle at Kshs. 370,000/=; she had obtained the purchase price through loans from Equity Bank and Cooperative Bank and from proceeds of her business. The appellant testified that he deposited Kshs. 56,000/= into his account while his wife deposited Kshs. 101,000/=. The appellant denied committing any of the offences he was charged with. The appellant's co-accused in their evidence denied committing any offence and maintained their innocence.

14. Convinced that the prosecution had proved its case against the appellant and Charles Maina Wanjohi, the trial court convicted them on all five counts of robbery with violence. Charles Maina Wanjohi was also convicted of the offence of giving false information while the other accused persons were acquitted for lack of evidence. Aggrieved with that decision, the appellant and Charles Maina Wanjohi preferred an appeal in the High Court. The High Court vide the judgment dated 19th December, 2013 confirmed the appellant's conviction and quashed the conviction against Charles Maina Wanjohi. It is that decision that has provoked this second appeal by the appellant on the following grounds:-

- ***The Honourable Judges of the 1st appellate court erred in law and facts in failing to find that the burden of proof was shifted to the appellant contrary to the law.***
- ***The Honourable Judges of the 1st appellate court erred in law and facts in finding that the circumstantial evidence pointing at the appellant was strong enough to found a conviction.***

15. Mr. Kimunya, learned counsel for the appellant, submitted that the only evidence against the appellant was the stolen mobile phone which was found in the possession of Peter Muthee Maina. The evidence of Peter Muthee Maina, the appellant's brother, was that of an accomplice and was not of any probative value. He argued that the evidence by DW8, Nancy Nyachomba (Nancy), the appellant's mother, to the effect that the appellant had given the stolen mobile phone to Peter Muthee Maina was hearsay. Mr.

Kimunya submitted that the appellant had given an explanation of the deposits made in his bank account; the deposits were from his wife's business. According to Mr. Kimunya, the prosecution did not tender any evidence to prove that it was actually the appellant who had purchased the motor vehicle in question. He urged us to allow the appeal.

16. Mr. Kaigai, the Assistant Deputy Public Prosecutor, supported the appellant's conviction. He submitted that the appellant was an active participant in the robbery. Mr. Kaigai argued that the huge deposits in the appellant's bank account were suspect given the nature of his work; it was also suspect that the appellant purchased a motor vehicle seven days after the robbery. The evidence of DW9, Francis Mugambi (Mugambi), clearly connected the appellant with the stolen mobile phone. He urged us to dismiss the appeal.

17. We have considered the grounds of appeal, the record, submissions by counsel and the law. By dint of **Section 361** of the **Criminal Procedure code** this Court is restricted to consider only points of law since this is a second appeal. This Court is also restricted from interfering 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**.

18. From the evidence on record, none of the victims were able to identify the assailants; the only evidence against the appellant was circumstantial. In **Sawe -vs- R (2003) KLR 364**, this Court expressed itself as follows:-

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

19. In this instant case, both lower courts made concurrent findings that the circumstantial evidence against the appellant was sufficient to warrant the inference of guilt on his part. The two lower courts relied on the doctrine of recent possession to infer guilt on the part of the appellant. From the evidence, it is clear that appellant's brother, Peter Muthee Maina, was found in possession of PW5's (Francis) mobile phone make Nokia 1110 serial number 353643015730369; Francis positively identified the said phone as the one which had been stolen on the material day by producing a receipt of its purchase. The said receipt bore the same serial number as the one on the stolen mobile phone. Peter Muthee Maina informed the police that it was the appellant who had given him the said phone.

20. The appellant contended that the two lower courts erred in relying on the evidence of Peter Muthee Maina since his evidence was that of an accomplice and had no weight. The appellant also contended that the evidence of his mother, DW8 (Nancy) did not have probative value since it was hearsay evidence motivated by malice. We cannot help but note that apart from Peter and Nancy's evidence, DW9 (Mugambi), testified that the appellant gave his brother, Peter Muthee Maina, the stolen mobile phone in his presence. He testified as follows:-

“I stay in Karatina, Kagochi. I shave people. I know the 3rd accused (Peter Muthee Maina, the appellant's brother). He is my uncle. He was arrested. I had gone to visit him. We were sited together. Macharia, the 4th accused (appellant herein) came and told Muthee to give him his phone and they exchanged phones. After a while I learnt that he had been arrested. Muthee was given the phone. I was there.”

The aforementioned evidence by Mugambi was uncontroverted and corroborated Peter's evidence as to how he came into possession of the stolen mobile phone.

21. Having expressed ourselves as above and taking into consideration that the mobile phone was found in the possession of the appellant's brother, did the two lower court err in invoking the doctrine of recent possession against the appellant? In **Anthony Kariuki Kareri -vs- R- Criminal Appeal No. 110 of 2002**, this Court held,

“The doctrine of recent possession is comprehensively dealt with in the case of Andrea Obonyo-vs- R [1962] EA 542 relied on by the appellant’s counsel. The presumption is that a person in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. That is a presumption of fact and not an implication of law which presumption is merely an application of the ordinary rule relating to circumstantial evidence.....

The main question raised in this appeal is whether the doctrine of recent possession applied to the facts of this case. The fact that the appellant was not in physical or personal possession of stolen radio cassette does not exclude the application of the doctrine for the first definition of recent possession, Section 4 (a) of the Penal Code is wide enough to include constructive possession. In that section the words “be in possession of” or “have in possession” are defined as: “Includes not only having in one’s own personal possession but also knowingly having anything in actual possession or custody of any other person or having anything in any place (whether belonging to or occupied by oneself or not) for the use or of benefit of oneself or any other person.”

Based on the foregoing we find that the appellant was in constructive possession of the stolen mobile phone. We also note that the appellant failed to give an explanation for being in possession of the said mobile phone which leads to the inevitable conclusion that he was involved in the robbery.

22. The two lower courts also found that financial transactions which had been carried out by the appellant a few days after the robbery pointed to his guilt. It was the prosecution's evidence that the appellant had deposited a total sum of Kshs.157, 000/= in his bank account a day after the robbery; he had purchased a motor vehicle for a consideration of Kshs. 370,000/= seven days after the robbery; the appellant was a hand cart puller hence the said transactions were suspect. We concur with the following findings of the High Court:-

“We have perused the 2nd appellant's (appellant herein) bank statement produced in court as exhibit MFI21 and we note that there were two deposits made on 6th April, 2010. 1st deposit was for Kshs. 56,000/= while the 2nd one was for Kshs. 101,000/=. The two deposits are very suspect considering the 2nd appellant's line of work as a hand cart puller and his bank transaction history all of which had very minimal amounts of Kshs. 1,000/=, Kshs. 700/= being transacted in and out of his bank account His claim that the deposited amounts were from a loan he got from his wife is just an afterthought intended to mislead the court.”

We find there was no evidence of the alleged loans taken by the appellant’s wife to purchase the motor vehicle in question. We therefore find that the two lower courts correctly rejected the said defence.

23. Based on the foregoing, we are of the considered view that the circumstantial evidence against the appellant was incompatible with his innocence and irresistibly pointed to his guilt. In **R-vs-Kipkering Arap Koske & Another 16 EACA 135**, the court observed:-

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

24. The upshot of the foregoing is that we find that the appeal 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

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR