



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, J.J.A.)

CRIMINAL APPEAL NO. 6 OF 2014

BETWEEN

MESHECK IRERI NJAGIAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a decision of the High Court of Kenya at Embu (Majanja & Ongu'ndi,JJ) dated 16th December, 2013

in

HCRA No. 43 of 2012

JUDGMENT OF THE COURT

Introduction and Background.

1. The appellant **Mesheck Ileri Njagi** was tried and convicted on 5th March, 2012 by the Chief Magistrate at Embu (**Mrs. Wachira**) for the main offence of robbery with violence contrary to **section 296(2)** of the Penal Code. It was alleged in the charge sheet that on the 20th day of June, 2011 at about 10.30pm at Kaunda Estate Municipality location within Embu County with others not before court, being armed with dangerous weapons namely metals and *rungus* jointly robbed **Benard Riungu Njeru** of his Sumsang mobile phone, Nokia mobile phone (1110), wallet, and cash **Kshs.150/=** all valued at **Kshs.3, 850/=** and at or immediately before or immediately after such robbery used actual violence to the said **Benard Riungu Njeru**.

2. In the alternative, the appellant faced the offence of handling stolen goods, contrary to **section 322 (1)** of the Penal Code. It was alleged that on the 20th day of June, 2011 at Kaunda Estate municipality location otherwise than in the course of stealing, dishonestly retained one Nokia 1110 mobile phone knowing or having reason to believe it to be stolen or unlawfully obtained.

3. The brief facts are that, on the material day of 20th day of June, 2011 at about 10.00pm the complainant, **Benard Mugo Najera (PW1)** was headed home from Embu town while in the company of PW2 **Eustus Kirunja Charles** attached to Embu Law courts. The duo were accosted by three assailants

armed with metal bars. PW1 was hit and he fell down unconscious and was robbed of the items listed in the charge sheet. PW2 struggled with two of the assailants and managed to escape.

4. Meanwhile, PW3 **Charles Kathuku Hiuko** who was driving in the same direction while in the company of PW5 **Simon Murithi Njeru** among others saw a person lying on the ground being attacked by three people. PW3 stopped the vehicle, turned on full lights and then started hooting. The three assailants stopped beating the victim and took off. PW3 chased them. They ran in different directions. He followed the one with an iron bar who had taken a road leading to the area District Commissioners' Residence where PW7 **P.C. Martin Thumbi Kinyua** was on guard duties.

5. PW7 was attracted by the continuous hooting and when he came out he saw a person armed with an iron bar just outside the gate. Behind him was the hooting vehicle. The appellant was cornered and detained. Shortly, a phone rang in the appellant's pocket. He was asked to respond to it but declined. PW7 took it and scrolled it and found that the number which had rang belonged to a colleague PW2. The two communicated (PW7 & PW2) and then PW2 informed PW7 that he and PW1 had just been attacked and the number he had rang belonged to PW1.

6. Shortly thereafter PW1 arrived at the scene with a view to seeking help. He identified the appellant as one of the three assailants who had attacked and robbed him. He said that the recovered phone was his. PW1 said he had seen the appellant very well before the attack with the help of electricity lights from the gate which he and PW2 were approaching before they were attacked.

7. The appellant was arrested and handed over to PW4, **No.8708379 P.C. Henry Njeru David** who was guarding the Provincial Commissioners' Residence nearby. From there, the appellant was handed over to the police, then subsequently charged in court, prosecuted, found guilty and convicted on the main charge.

8. The appellant was aggrieved by that decision and he appealed to the High Court (**D.S. Majanja and H.I. Ong'undi JJ**) which in its judgment of 16th December, 2013 dismissed the appeal. The appellant is now before us on a second appeal in a home made memorandum of appeal raising eight (8) grounds namely:-

1. ***That the learned Judges erred in both points of law and facts in not finding out that the appellant was convicted on insufficient, unreliable, inconsistency, weak, contradictory and uncorroborated evidence based on the recovery of the alleged phone according to PW3 and PW5.***
2. ***That the learned Judges still erred in both points of law and facts by not carefully putting in point that the complainant 1st report given to PW8 based on the offence committed differs from the report he gave PW6 the doctor who examined him.***
3. ***That the learned Judges still erred in both points of law and facts when they uphold (sic) the conviction imposed by the lower court without putting in mind that the appellant was just mistakenly identified while on his way at home.***
4. ***That the learned Judges erred in both points of law and facts in not finding that the appellant was not arrested in front or in presence of PW2 the colleague of PW1 yet No parade was conducted to prove whether PW2 could identify the appellant at identification parade and the complainants names were contradictory in according to the trial records and judgment.***
5. ***That the learned Judges erred in both points of law and facts when they uphold (sic) the appellant's conviction without putting in mind that PW2 was giving descriptions of the appellant while on the Dock but not during his report to police.***
6. ***That the learned Judges erred in both points of law and facts when they failed to put in mind that No strength of light was mentioned during the hearing of this case by the complainant so***

as to find whether PW1 and PW2 were able to identify the appellant positively at the status Quo (sic)

7. *That the learned Judges erred in both points of Law and facts by upholding the conviction without putting in mind that the appellant was arrested many meters away (400m) from the scene of crime and Neither PW1 nor PW2 was around during his arrest.*
8. *That the learned Judges erred in both points of law and facts by upholding the conviction without going over the defence of the appellant which contained sufficient facts to secure an acquittal leaving section 169(1) violated.*

Appellant's submission.

9. Learned counsel **Mr. Muchiri Wa Gathoni** urged us to allow the appeal on the grounds that the learned first appellate court judges failed in their duty by not reassessing, re-evaluating and re-analyzing the evidence afresh as required by law. Had they done so, argued **Mr. Wa Gathoni**, they would have unearthed the glaring contradictions and inconsistencies with regard to the alleged recovery of the complainant's phone on the body of the appellant. According to **Mr. Wa Gathoni**, PW1 claimed the phone was recovered from the appellant's coat, PW5 on the other hand claimed that the appellant dropped the phone on the ground, while PW7 claimed that he is the one who recovered the phone from the appellant's pocket. According to **Mr. wa Gathoni**, had the two courts below reconciled these crucial contradictions and inconsistencies, they would have arrived at the conclusion that there was doubt as to whether the complainant's phone was recovered from the body of the appellant. **Mr. wa Gathoni** therefore urged us to reconcile the contradictions and inconsistencies, give the appellant the benefit of doubt and acquit him. Further **Mr. Wa Gathoni** invited us to note that the issue of identification which was never considered by the two courts below should be considered and a finding made that, positive identification of the appellant as one of the assailants was ruled out. Lastly that the appellant gave a plausible defence which should not have been rejected.

Respondent's submissions.

10. In response, **Mr. Kaigai** learned Assistant Director of Public Prosecution urged us to dismiss the appellant's appeal in its entirety on the grounds that the prosecutions' case was proved to the required standard because there is no doubt that PW1 was robbed and injured; PW3 who arrived at the scene immediately used his motor vehicle head lights to pursue the assailants; PW3 never lost sight of the appellant during that chase. **Mr. Kaigai** went on further to urge us not to interfere with the concurrent findings of fact of the two courts below because, the complainant positively identified the phone as the one that had just been robbed from him a while ago; identified the appellant as one of the assailants; and there was electricity light at the scene which enabled PW1 to positively identify the appellant soon after his arrest. Lastly, the prosecutions' evidence that the appellant was found in physical possession of the complainants' phone and failed to give a reasonable explanation on how he came to be found in its possession should be believed. As for alleged existence of contradictions and inconsistencies, **Mr. Kaigai** urged us to find these to be minor and inconsequential as they do not go to the roof of the prosecution's case and did not cause any miscarriage of justice to the appellant; lastly that the defence of appellant was considered by both courts below found wanting and rightly rejected.

Analysis and determination.

11. This being a second appeal, this Court is restricted to address itself on matters of law. As this Court has stated many times before in a long line of its own decisions 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 its findings. See **Chemangong Vs. Republic, [1984] KLR 611**. In **Karingo Versus Republic [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 a second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja Vs. Republic [1950] 17 EACA 146)."

12. We have considered the home made grounds of appeal, the record of appeal, the rival submission, and the law.

13. On the proper exercise of the first appellate courts' mandate, it is now trite that the appellant on a first appeal expects the first appellate court to subject the entire evidence before it to a fresh and exhaustive examination, weigh conflicting evidence if any before arriving at its own independent conclusion, but bearing in mind the fact that the trial court had the benefit of seeing the witnesses. (See the case of ***Kiilu and another versus Republic [2005] KLR 174***).

14. We have on our own revisited the first appellate courts judgment. We note the following at paragraph 13 thereof:

"13. This being a first appeal, we are mandated to re-evaluate and reconsider the evidence and arrive at an independent decision with the caveat that we neither saw or heard the witnesses as they testified and must therefore make an allowance for that (see Njoroge versus Republic [1987] KLR 19 Okeno versus Republic [1972] EA32).

15. The court then set out a summary of the evidence tendered before the trial court, re-evaluated that evidence in the light of the findings of the learned trial magistrate before proceeding to affirm the appellant's conviction and sentence. We are therefore satisfied that the 1st appellate court properly exercised its mandate with regard to the disposal of the appeal then placed before it.

16. With regard to existence of inconsistencies and or contradictions in the prosecutions evidence, the correct position in law is that both courts below were obligated to reconcile these if any and then determine whether they go to the root of the prosecution's case or not.

See the decision in the case of ***Josiah Afuna Angulu versus Republic Nakuru CRA No 277 of 2006 (UR)*** and ***Charles Kiplang'at Ngeno versus Republic Nakuru Criminal Appeal No. 77 of 2009 (UR)***.

17. The alleged contradictions and inconsistencies related to the alleged recovery of the stolen mobile phone from the body of the appellant. All that the trial magistrate noted of the recovery of the mobile phone was this:

"Moreover that when administration police at judges' residence called the mobile phone of complainant, the phone rung in the accused's pocket."

18. The first appellate court on the other hand had this to say:-

"He alleges that the prosecution witnesses' testimonies were riddled with contradictions and therefore the case was not proved to the required standard...."

17. The second element is whether the appellant stole from the complainant. The evidence on record is silent in this respect. The mobile phone belonging to PW1 was recovered from him at the time of his arrest. PW1 was able to identify the mobile phone as his . This evidence of possession is corroborated by the fact of PW2 calling PW1's mobile number after the incident and it being picked by the police officer PW7 who had recovered it from the appellant. No reasonable explanation was tendered by the appellant to show how he came into possession of the mobile phone. In the case of James Tiokoi Koitos versus Republic, Nyeri Criminal Appeal No. 138 of 2003 unreported, it was stated that "where an accused person is found in possession of goods recently stolen during a robbery, the trial

court is at liberty to draw a presumption that the accused was one of the robbers unless, unless the accused properly accounts for their possession.

19. The various witnesses who testified in respect of recovery of the phone stated as follows:

PW3 had this to say in his examination in chief:-

“The administration police interrogated him and a mobile phone rung in his pocket. The accused was asked who called him and he was unable to tell who was calling him. The administration police took it and scrolled it and saw a number of a colleague. He called the colleague. His colleague brought the person who was being attacked. He was bleeding and his clothes were blood stained.”

When cross-examined, PW3 responded inter alia thus:-

“The mobile phone we recovered from you is before court”.

PW4 had this to say in his examination in chief:-

“They switched it off and asked him to switch it on. Benard switched it on...”

When cross- examined PW4 responded thus:-

“the mobile phone was recovered from you after it rung from your pocket...”

PW5 on the other hand had this to say in his examination in chief:-

“As he was questioned by Administration Police he dropped a mobile phone. One of the administration police scrolled the numbers in the telephone and noticed a number of an administration police colleague. He called him and the administration police said the phone belonged to Benard, who resides at judges residence and Benard had just informed him he was attacked, the administration police brought Benard. Benard identified the phone.”

When cross-examined PW5 responded inter alia thus:-

“After arrest, you were found with complainant’s mobile phone. You dropped the mobile phone after arrest...”

20. Turning to PW7s testimony he stated thus in his examination in chief:-

“I approached him and I arrested him. After arrest a phone rang in his pocket and I asked him to receive the phone and answer. He hesitated and I noted the number was of a colleague attached to judge’s residence. I answered it and he told me that the owner of the phone was a worker at the judge’s residence and was robbed and attacked and suffered injuries.... I received the phone..”

When cross-examined, PW7 responded inter alia thus:-

“It is not true the phone was recovered on the ground. I personally removed the phone from your pocket because I told you to receive the phone call and you declined...”

21. From the above, we find that as correctly submitted by **Mr. wa Gathoni** that there were contradictions and inconsistencies with regard to the recovery of the mobile phone from the body of the appellant. It is PW5 who stated that the phone had been dropped on the ground by the appellant, while PW3, 4 and 7 stated that the phone was recovered from the body of the appellant. PW5 was a passenger in PW3s vehicle. He was present throughout during the chase. It is not however clear how keen he was in observing events at the end of the chase. From the evidence PW3 who had mounted the chase; PW7 who

responded to the chase and PW4 who rearrested the appellant took a very keen interest in the events after the arrest. There is therefore a possibility that PW5 who was just a passenger in PW3's vehicle may not have paid much attention on the happenings after the arrest hence the minor discrepancy between his evidence and that of the other three witnesses. It is therefore our considered view that the discrepancy is minor when considered against the totality of the prosecution's evidence on the recovery of the mobile phone which left no doubt in the mind of the two courts below that the appellant was sufficiently linked to the recovered phone. We agree with the respondent's stand that the discrepancy, if any, is minor and it did not cause any miscarriages of justice to the appellant.

22. On identification, we do not agree with **Mr. Wa Gathoni's** submission that it was never considered at all by the two courts below. The learned trial magistrate stated clearly that one of the issues for determination was whether the appellant had been positively identified. In response thereto the learned trial magistrate had this to say;-

“Therefore, PW5 (SIC) having followed accused after witnessing him robbing PW1, without losing sight of him and the robbed phone having been recovered from the accused person shows accused was not just walking home as claimed in his defence. He is positively identified as the robber who was found committing robbery with violence against the complainant...”

The first appellate court on the other hand *inter alia* had thus to say:-

“He also challenges his identification noting that the type of light used was not conducive for proper positive identification...”

19. The appellant has challenged the trial courts decision on the basis of identification. It is a general principle that where the evidence is based on identification of a stranger as opposed to recognition, then the court ought to warn itself and be satisfied as to proper identification of the suspect (see Anjononi and others versus (Republic 1980] KLR 59). Was the appellant properly positively identified? Given time of the night and the events were (sic) have outlined, it was highly unlikely that there (sic) room for mistaken identity. The appellant was found in the act and followed in hot pursuit until the point where he was cornered and arrested and found with the offensive weapon and stolen phone. There was no break in between the events that could introduce doubt as to the overwhelming identification evidence. For this reason, the appellant's argument that there was no proof as to the strength of lighting and that the lighting condition was such that no proper positive identification of him is dismissed. We therefore find and hold that the appellant was properly identified...”

On our own, we find that the stand taken by the two courts below on identification was well supported by the evidence on the record.

23. As for the appellant's defence, we find that all that he said was that he found people running away and he too started running away innocently which was disbelieved and rejected by both courts below. We find the rejection on both occasions arose after both courts had considered, weighed the appellant's defence as against the totality of the prosecution evidence and found it was wanting. We make no hesitation in affirming that stand as we find no reason in PW 3 and 5 who gave chase and PW4 and 7 who made the arrest, to have had reason to frame the appellant.

In the result we find the appellants' appeal has no merit and the same is accordingly dismissed.

Dated and Delivered at Nyeri this 27TH day of May 2015.

P.N. WAKI

.....

JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR