



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 67 OF 2010

BETWEEN

**PATRICK AMUKATA MUKALO..... APPELLANT**

AND

**REPUBLIC..... RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Kakamega Mboghoi Msaga & Ochieng, JJ) dated 23<sup>rd</sup> October, 2008.*

*in*

*H. C. Cr. A. No.163 of 2005)*

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**JUDGMENT OF THE COURT**

***Patrick Amukata Mugalo, (the appellant)*** was charged with robbery with violence contrary to Section 296(2) of the Penal Code.

The particulars of the charge were that on the 16<sup>th</sup> November 2004 at Madegwa village, Walodaya sub location in Vihiga District within the Western Province jointly with others not before the court, armed with crude weapons such as pangas, iron bars and sharp torches robbed Annorld Kipchoge Kiberenge of cash Kshs. 3,800/-, a mobile phone, make, Siemens A 35, driving licence and a National Identity card all valued at Kshs. 15,000/- and immediately after or before such robbery wounded ***the complainant, Annorld Keberenge (Annorld)***.

The facts are that on 16<sup>th</sup> November 2004 at about 8.30p.m as Annorld was walking home in Madegwa village, assailants emerged from the dark and ordered him to stop. The assailants attacked him with a panga, cut him on both hands, and robbed him of his Siemens mobile phone, driving licence, National Identity card, car keys and Kshs. 3,800/-. Before disappearing into darkness, the assailants ordered to remove his uniform which was then left on the ground. Annorld dressed himself, and proceeded home from where he called the Chavakali police using his brother's cell phone. The police visited his home and he made a report. Thereafter, he sought treatment at the hospital in Mbale.

In Court, Annorld testified that he was not able to identify any of the assailants, but he was able to

identify his mobile phone which was produced in court together with the receipt which had the same serial number as the one on the mobile phone that was recovered. It was indeed the phone that had been stolen from him on the night of the robbery.

On 1<sup>st</sup> December 2004, **Peter Muriki, PW2**, Peter a businessman who supplies bread from Chavakali met the appellant at a shop in Lusala as he was going to Eregi to supply bread. The appellant offered to sell him a mobile phone. Before purchasing the phone, Peter enquired about the appellant's character from **Hesborn Lidugwe PW3**, Hesborn a village elder at Lusala.

According to Hesborn, the robbery of Annorld's mobile phone had been brought to his attention by the time Peter was making enquiries about the appellant. He encouraged Peter to purchase the mobile phone so as to ascertain whether it was the same one that had been stolen from Annorld.

The phone was purchased for a sum of Kshs. 1,500/- and taken to the police station where the police ascertained from their records that it was indeed the same mobile phone that had been stolen from Annorld. Hesborn who accompanied Peter to the police station confirmed that this was in fact the position.

**PC John Ogutu Ojijo PW5** testified that on 16<sup>th</sup> November 2004, Annorld and Hesborn had sought assistance from the police regarding the purchase of a phone, and they were encouraged to purchase it, as they too had already received a report that a phone had been stolen. He confirmed that the phone purchased from the appellant was the same one that had been stolen from Annorld. The appellant was arrested a few days after the mobile phone was recovered when he reappeared at his home.

In the meantime, **Godfrey Wangile PW4**, who described himself as a specialist at the Vihiga District Hospital, examined Annorld on 28<sup>th</sup> December 2004, after which he completed and signed a P3 form indicating that Annorld had sustained a tender injury to right wrist, laceration on the scar on the middle finger, a fractured wrist and scarring on the left hand below the index finger.

In his defence the appellant stated that he was arrested on 20<sup>th</sup> December 2004 as he was on his way home from the shops. He was driven from Chavakali Police station to Mbale police station. While at Mbale Police Station the appellant stated that he was asked for a bribe of Kshs. 2000/- to secure his release which he did not have. He was charged with the offence of robbery with violence which he denied.

Upon consideration of the entire evidence, the learned trial magistrate having found that the charge against the appellant was proved to the required standard, convicted and sentenced him to death as by law prescribed. In the judgment the learned trial magistrate stated thus,

***“I find the evidence of PW2 and PW3 to include (sic) the accused person as having possessed the stolen cellphone on 1.12.04. That being so, I import the doctrine of recent possession and find the accused person to have been among the group of thugs who robbed the PW1 on the night of 16.11.04.”***

The appellant being aggrieved by the decision of the trial court, filed an appeal in the High Court against both the conviction and sentence.

The appeal came up for hearing in the High Court and was heard by (Msaga Mbogholi and Ochieng JJ.) who were satisfied that the prosecution had proved its case, dismissed it and upheld the conviction and sentence. The High Court stated,

***“Having not offered any explanation as to how he came to be in possession of the complainant's phone, some 2 weeks after the said phone was stolen for the complainant, we hold the considered view that the doctrine of recent possession was applicable to the facts of this case.”***

The appellant was further aggrieved by the decision of the High Court and lodged this appeal which is before us.

The appellant filed four grounds of appeal, namely that, the appellant was not found in possession of the stolen mobile phone; that the appellant was not properly identified; that there was no circumstantial evidence linking the appellant to the robbery and that the conviction was against the weight of the evidence.

In his submissions, learned counsel for the appellant, **Mr. Lore**, contended that no proper and cogent identification was carried out to confirm that it was the appellant who had committed the offence, particularly as Annorl had been unable to identify the appellant, and therefore no link could be established between the appellant and the offence. Another complaint was that it was wrong for the trial court to import the doctrine of recent possession to convict the appellant as the recovery of the subject mobile phone had neither been made at the scene of the crime nor in the appellant's possession. It was also counsel's contention that the prosecution evidence was contradictory as Hesborn indicated the time of Peter's enquiry about the stolen phone was 10.00 am, while Peter PW2 had specified the time as 8.00 a.m. According to the counsel, it was not clear whether it was Peter PW2 or Hesborn PW3 who purchased the phone.

On his part, **Mr. Sirtuy**, learned Provincial Prosecution Counsel, submitted that the issue of recent possession was a point of law, and that the doctrine was properly applied by the trial court. He further submitted that the High Court had re-evaluated the evidence and arrived at its own independent findings on the issue of recent possession, particularly as the appellant had not offered any explanation as to how he came to be in possession of the complainant's mobile phone despite being given an opportunity to do so. Counsel stated that the offence took place on the 16<sup>th</sup> November 2004, and on 1<sup>st</sup> December 2004, only 14 days later, the complainant's phone was found in the appellant's possession. This evidence was corroborated by Peter PW2 and Hesborn PW3. As a consequence the prosecution had proved its case that the appellant was one of the members of the gang that robbed the complainant.

This being a second appeal, by dint of *section 361 (1) of the Criminal Procedure Code*, issues of fact do not fall within our remit. Therefore we shall only examine issues of law as stated by this Court in the case of ***Mwita v R. [2004] 2 KLR 60.***

On the issue of identification, contrary to the Mr. Lore's submissions, it is apparent from the judgments of the two courts below that the trial court did not base the appellant's conviction on his visual identification, but on the doctrine of recent possession for the reasons to be addressed in the next issue.

In this regard, the appellant's other complaint was that it was wrong for the trial court to convict based on the doctrine of recent possession as the recovery of the subject mobile phone had neither been made at the scene of the crime, nor in the appellant's possession.

The guidelines for reaching a conviction on recent possession were succinctly set out by this Court in ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic -Criminal Appeal No. 272 of 2005***, where it was stated thus,

***"...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."***

In the case of ***Peter Kimaru Maina vs Republic Nyeri Criminal Appeal No. 111 of 2003***, this Court also addressed recent possession in the context of the sale of a stolen item when it stated thus,

***“Where there is evidence that the accused person is found in actual possession or has, shortly after a robbery sold one of the items stolen during the robbery, he is deemed to be in recent possession of the stolen property.....Evidence of recent possession of a stolen item alone is sufficient to find a conviction for the offence of robbery with violence.”***

And in ***Peter Kariuki Kibue vs Republic, Nairobi Criminal Appeal No. 21 of 2001 (unreported)*** when dealing with a similar matter where the appellant failed to explain how he came to be in possession of the complainant’s leather jacket and jeans trousers shortly after a robbery this Court stated that:

***“The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver. Since he did not offer any explanation the rebuttable presumption in law raised, based on the provisions of Section 119 of the Evidence Act, is that he was one of the people who robbed Damaris of the items together with her car and also robbed Irungu of his car. It is a presumption of fact which courts often refer to as the doctrine of possession of recently stolen property”.***

In this case, it is undisputed that Annorld was violently robbed and injured on the night of 16<sup>th</sup> November 2004 at Madegwa village, where various items including a mobile phone, make, Siemens A 35 were stolen from him. The evidence of Peter and Hesborn corroborated the fact that on 1<sup>st</sup> December 2004 the appellant offered to sell, and actually sold a mobile phone to Peter, and that upon purchase of the phone, it was confirmed by PC Ojijo PW5 that, the phone purchased from the appellant was the same one that had been reported to have been stolen from Annorld, only fourteen days earlier. The same mobile phone was retained as an exhibit and produced in court.

In his defence, the appellant did not offer any explanation as to how the complainant’s mobile phone came to be in his possession.

As a consequence, there is no doubt in our minds that the appellant was amongst the gang that robbed the complainant on the night of 16<sup>th</sup> November 2004.

On the issue that the Hesborn’s evidence was contradictory, we consider that the time that he stated that Peter came to his residence was not material, and did not prejudice the appellant in any way. It is evident that the courts below accepted and believed the testimonies of Peter and Hesborn. These are concurrent findings which this Court cannot interfere with, see ***M’Riungu v Republic [1983] KLR 455***, also ***Mwita v Republic [2004] 2 KLR 32***.

For the aforesaid reasons, we find that the appellant’s appeal is without merit, and we order that the same be and is hereby dismissed.

We so order.

***DATED and delivered at Kisumu this 18<sup>th</sup> day of June 2015***

**D.K. MARAGA**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU FCIArb**

**JUDGE OF APPEAL**

**A.K. MURGOR**

**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original

**DEPUTY REGISTRAR**