



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CRIMINAL APPEAL NO. 109 OF 2013**

**BETWEEN**

**PATRICK NJIRU NJUE..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Embu,*

*(Sergon & Ongundi, JJ.) dated 18<sup>th</sup> May, 2012*

*in*

*H. C. CR. A NO. 52 OF 2009)*

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**JUDGMENT OF THE COURT**

[1] The appellant Patrick Njiru Njue and three others who were acquitted by the High Court were convicted by Senior Principal Magistrate Embu for the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code and sentenced to death.

The full particulars of the charge were that:

***“On the 16<sup>th</sup> day of July, 2004 at Kangondu village, Runyenjes township location in Embu district within Eastern Province, jointly while armed with dangerous weapons namely AK 47 Rifle robbed OBADIAH KARIUKI off cash Kshs 18,000/-, two mobile phones make Samsung C100, Alcatel 311, T. V Remote control and a lessa all valued at Kshs 17,000/= and at or immediately after the time of such robbery used actual violence to the said OBADIAH KARIUKI”***

[2] The appellant and the other co-accused appealed before the High Court against the conviction and sentences, the appeals by the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> co-accused were allowed but the appellant's appeal was dismissed. This is therefore a second appeal.

[3] On 16<sup>th</sup> July, 2004 at about 1.00 am, the complainant Obadiah Kariuki Mwatha (PW1) and his wife

Lucy Njoki Kariuki (PW2) were inside their house at Kangondu village in Runyenjes. They heard a bang at the front and rear doors of their house. Upon checking, they saw many strange people demanding that they should open. Eventually the door gave way and the intruders gained access to the house. One of them came to the bedroom where PW1 was, he flashed a torch on him. PW1 was able to see one of the assailants was armed with a gun, he demanded for money. PW1 gave him his wallet that contained Kshs 16,000/=. The assailant said the money was not enough and he went on to demand for more money from PW2 who said she did not have any money. This infuriated the assailant who threatened to shoot PW1 and PW2, he ordered PW1 to surrender the mobile phones and then to go under the bed. PW1 gave him two mobile phones, one Alcatel and Samsung C100.

[4] By a strange twist of fate, there were two police officers who were guarding a broken down lorry along Embu, Runyenjes road which was not far from the scene of this robbery. When they heard the commotion they responded by coming to the scene, the robbers disappeared upon sensing the presence of the police officers. Chief Inspector Mutua Meden, (PW4), the OCS Runyenjes Police Station was called by PC Peter Waweru (PW5) and told about the robbery. He visited the scene the same night and recorded the report of the robbery. Following some information from unnamed sources, he was led to Manyatta area. That is where he found the appellant sleeping in the back room of a shop. He arrested the appellant and upon searching the house, he recovered two mobile phones hidden under a newspaper and other goods for the shop were placed on top. It was a Nokia phone and Samsung. The appellant was arrested. The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were arrested at place called Mutendawema near Chuka town and the 4<sup>th</sup> accused was arrested at Gikuuri. PW1 was able to identify the appellant at an identification parade and slo the Samsung phone as the one which was stolen from him. He produced a receipt which bore the same serial numbers.

[5] At the trial, the appellant denied the offence. He explained in his sworn evidence that the Samsung telephone set belonged to him. He claimed that he had bought it at a shop called Jamcon Electronics on 15<sup>th</sup> January, 2004 in Nairobi. He was issued with a receipt which was taken by one of the police officers who arrested him and was involved in the investigations of this case. The receipt and the mobile phone were given to the police officer at the report office while he was locked in the cells. The appellant said he took the police officer by the name PC Duncan Wachira to the place where he bought the phone and it was confirmed the receipt was genuine.

[6] The trial Magistrate evaluated the crucial evidence by PW1, PW2, PW3 and PW4 who said they identified the mobile phone and saw the appellant during the robbery. PW3 said he conducted an identification parade in respect of the suspects and all the accused persons before the learned trial magistrate were positively identified by PW1 and PW2. PW4 arrested all the suspects and recorded the statements by the complaints. Being satisfied the offence of robbery with violence was proved to the required standard. The learned trial magistrate concluded thus:

***“From the evidence of PW3 it is clear that the parade was properly conducted and was not flawed in any way. I find the parade was properly conducted and the accused were satisfied in the manner in which the parade was conducted. In the circumstances, I find that the accused were identified from the parade by PW1 and 2. This eliminates the possibility on the mistake on the identity of the people who robbed PW1 & 2....***

***I have considered the sworn defence by the 1<sup>st</sup> accused. I find that its disapproved by testimony of PW1 & 2. The PW1 identified the mobile phone and had its receipt in his name. It is not possible that the accused could have a phone with the same serial numbers as those of the accused..... It was not put to PW1 when he was cross examined by the defence counsel Mr. Njage that the said Samsung mobile phone belonged to the 1<sup>st</sup> accused. For the 1<sup>st</sup> accused to say he owned the mobile phone is clearly an afterthought which cannot be possibly be true. I find that the defence is not true and so I reject it. It is also worthy to note that PC Wachira who accused said he gave the receipt exhibit is not the one he gave PC Wachira.....”***

[7] In the appeal before the High Court, the appellant contended, among other things, that the trial

Magistrate failed to consider that the conviction based on identification was not safe to sustain a conviction because the complainant did not give the description of the attackers to the police who allegedly arrived at the scene of crime immediately; the trial Magistrate failed to consider the identification parade was defective; that the circumstances surrounding the arrest were shrouded with mysteries because PW4 failed to give the details of the informer; and finally the prosecution did not discharge its burden of proof.

[8] The High Court considered all the grounds of the appeal and evaluated the entire evidence regarding the robbery, the arrest and the identification. The Judges of the High Court were satisfied that the complainants did not give a description of the attackers. The Judges reproduced the verbatim entries in the OB and the relevant verbatim evidence of PW1 and PW2 to demonstrate that they did not identify any of the attackers and therefore even the identification parade that was conducted by PW3 was dismissed as the trial Judges made the following conclusion in part of their judgment;-

***“Witnesses are not just bundled into an identification parade because suspects have been arrested. There has to be a basis laid. And the basis is that the witness has clearly indicated in the first report/or statement, that if he/she saw this person he/she could be able to sample him/her out as the person who committed the offence.***

***Apparently it is nowhere recorded that PW1 and PW2 even gave such an assurance as was held in the above case of Simiyu & Another vs Republic (2005) I KLR 192.”***

[9] The appeals against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants before the High Court were allowed, their convictions quashed and sentences set aside. As regards the appeal against the 1<sup>st</sup> appellant, it was dismissed on the grounds that he was found in possession of a mobile phone that was robbed from PW1 only ten hours before the recovery. The appellant now comes to the Court of Appeal by the way of a second appeal. That being so, only matters of law fall for consideration. See **Section 361** of the Criminal Procedure Code. As it has been stated many times before, this Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see ***Chemagony vs Republic, 1984 (1984) KLR 611.***

[10] In his homemade memorandum of appeal, the appellant raised seven grounds of appeal. Mr. Njuguna learned counsel for the appellant argued the grounds together as they revolved around the issue of whether the prosecution proved that the appellant was found in recent possession of a mobile phone Samsung C100 that was recovered from the appellant; and whether the appellant offered satisfactory explanation that the said mobile phone belonged to him and not to PW1.

[11] The conviction of the appellant was based on the doctrine of recent possession. According to Mr. Njuguna, there was doubt whether the mobile phone belonged to PW1 or to the appellant. The robbery occurred at 1.00am. The police responded and visited the scene immediately, whereupon PW1 recorded a statement but did not give the serial number of the mobile phone to the police. Later, about 5 days after the robbery, PW1 recorded another statement after he participated in an identification parade where he identified the appellant and other people who allegedly robbed him. He nonetheless did not give the serial number of the mobile phone. Later it transpired the receipt for the mobile phone was in a wallet that was stolen during the robbery and later recovered on the road.

[12] Counsel submitted that there was a gap in this evidence because the person who recovered the wallet did not give evidence, nor was it produced as an exhibit. The appellant also did not say the receipt for the mobile phone was in the wallet, thus there is a possibility that PW1 was piecing up his evidence as the case progressed. On the other hand, Mr. Njuguna argued that the appellant gave evidence that he bought his mobile phone from Nairobi, and while accompanied by police officers who were involved in the investigation of this matter, they visited the shop and confirmed the receipt which was taken by a police officer by the name of Duncan Wachira was from that shop, the said Wachira took away the appellant's receipt. According to Mr. Ndirangu, the said Duncan Wachira existed, the appellant kept requesting for the list of exhibits as indicated in the proceedings. There is therefore a possibility that the

mobile phone belonged to the appellant.

[13] On his part, Mr Isaboke for the prosecution supported both conviction and sentence. He submitted that PW1 positively identified the mobile phone by producing a receipt, he also used his Sim card and pin number to open the mobile telephone. On the other hand the appellant claimed that he bought the same mobile phone in Nairobi and in the company of police officers visited the shop but he failed to call the police officer by the name of PC Wachira. The appellant should have requested the court to summon PC Wachira to testify on his behalf. Mr. Isaboke urged us to dismiss the appeal.

[14] We have considered the background to this appeal, the rival submissions by counsel and now turn to the single issue that is before us, whether the prosecution proved beyond reasonable doubt that the appellant was found in possession of a mobile phone Samsung C100 that was stolen from the complainant only ten hours ago and recovered from the appellant. The prosecution's case before the trial Magistrate was hinged on recovery of stolen mobile telephone and identification of the appellant during an identification parade. The identification parade was found lacking in credibility and rightly so, as the learned Judges of the High Court carefully analyzed the regulations that guide identification parades and concluded that the procedure adopted violated the laid down procedure of identification. It is on that basis that the appellant's three co-accused person's convictions were quashed and sentence set aside.

This is what the learned Judges concluded about the appellant:

***“The 1st appellant offered no explanation for being in possession of property robbed from the complainant. The only logical conclusion is that he was one of the robbers and that is the finding that we make.”***

[15] The appellant offered an explanation that the mobile phone was his and that the receipt was taken to PC Wachira. The OB produced in court of 17<sup>th</sup> July, 2004 shows that one PC Wachira was in one way or another involved or was among the police officers who were reported as having something to do with the arrest or investigations in this matter. The question we have asked ourselves is whether the appellant can be faulted for failing to secure the attendance of PC Wachira in court as his witness, whom he had allegedly given the receipt for the mobile phone.

[16] We are aware of the well settled law that where an accused person is found in possession of recently stolen property and in the absence of any reasonable explanation to account for his possession, a presumption arises that he is either the thief or the receiver (see *Andrea Obonyo vs Republic 1962 EA 542 at page 549.*

It is also trite, that a complainant must positively identify the ownership of the recovered item. (see the case of *Isaac Ng'anga Kahiga alias Peter Ng'anga Kahiga V R, Nyeri Criminal Appeal No 272 of 2005* where this court differently constituted stated as thus:

***“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of convict 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; that property is positively the property of the complainant; thirdly the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time 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 order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses”.***

[17] In the instant case, issues were raised regarding the description of the recovered item. First of all, PW1 did not include the description or serial number of the stolen mobile phone in his statement. When asked about this discrepancy during cross-examination by the appellant, that is when he contended the serial number was stolen with the wallet and the wallet was brought to him the following day by the Chief

of the area. He identified the phone by inserting his sim card and pin number. This is what the complainant said in his own words:

***“I identified the phone as I would open it with my PIN. The phone itself is locked so if a sim card is put in the phone, I use the PIN number to open it.”***

[18] To us there was nothing that was special by PW1 inserting his sim card and PIN on the mobile phone as a special way of identifying it. PW1 nonetheless produced a receipt that was indicated the same serial number as the phone but the appellant could not produce his own receipt. The appellant claimed his receipt was allegedly in possession of a police officer. The fact that the said PC Wachira was part of the investigating team of the prosecution's case was not challenged and this aspect has bothered us. Indeed his name featured as one of the officers who were recorded in the relevant OB and in the appellant defence. We have also considered the possibility or the practicability of the appellant as an accused person being able to summon a police officer to testify on his case. The trial court in this case and as in all cases had a duty to ensure there is reasonableness and proportionality by according all the parties a fair trial. We do not say at all in this case any rules of a fair trial were breached. However, the fact that the said PC Wachira who was mentioned by the appellant was part of the prosecution's case, the court should have summoned him to clear the air that the prosecution was not involved in withholding material evidence to the detriment of the appellant. We also note that the appellant did not apply for witness summons to issue for his attendance. The way matters were left and considering the conviction of the appellant was mainly hinged on the evidence of the identification that was found lacking in credibility, we are not satisfied that the conviction of the appellant that was left standing solely based on possession of the mobile phone was safe to sustain.

[18] Getting back to the evidence, PW1 did not give the serial number of the mobile phone to the police, nor did he report that his wallet was stolen. This therefore lends some credence to the appellant's counsel's submission that PW1 was piecing up his evidence of ownership of the mobile phone as the case progressed. It was PW1's evidence that the wallet was subsequently recovered from the road by the Chief of the area, however the wallet was also not produced in evidence and the Chief who found it did not testify in the matter.

[13] If the two courts had addressed themselves to the above, the conclusion would have been different; the appellant offered some explanation which created doubts as to whether PC Wachira took his receipts to weaken his defence and strengthen the prosecution's case. Obviously the prosecution's case should never depend on the weakness of the defence. The totality of this evidence entitles the appellant to the benefit of doubt. This appeal is allowed, conviction quashed, death sentence set aside and the appellant is set free unless otherwise lawfully held.

***Dated and delivered at Nyeri this 26<sup>th</sup> day of February, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**