



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 297 OF 2012

BETWEEN

GIDEON MEITEKIN KOYIET APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from Judgement of the High Court of Kenya at Kisii (Makhandia & Sitati, JJ)

dated 30th June, 2011

in

KISII HCCR.A.NO. 90 OF 2007)

JUDGEMENT OF THE COURT

On 30th March, 2006 **Jona Kibii Langat** (PW1) (“the complainant”) was at village hotel in Kilgoris Town entertaining his visitors. At about midnight, he left the hotel with some of the visitors. After a short distance from the hotel, he discovered that he had a file for the visitor who had remained at the hotel. He therefore decided to take that file to the visitor. He then dashed to catch up with the other visitors after the delivery of the file. As he did so, he was accosted by two people at the hotel gate one of whom held him with his hands. To get out of his grip, he hit the person with his fist. The person then hit him with a metal object and he fell down, temporarily losing consciousness. When he came to, he realized the following items had been taken: a Samsung mobile phone, a wrist watch, a pen and a cash sum of Kshs15,000/= . The robbers had escaped and his visitors were no where. He was also bleeding from the back of his head. He collected himself and went to his house where he freshened up. The following morning, he woke up his neighbour who escorted him to Kilgoris Hospital and later to Kilgoris Police Station.

He alerted proprietors of cellphone charging shops in Kilgoris Town of the loss of his mobile phone. He also personally checked on those shops. On 28th May, 2006 he found his cellphone being charged by **Hezron Amele Okombo** (PW 4) (Okombo) at his shop. Okombo told the complainant that the cellphone had been taken to him for charging by **Tom Wasike** (PW 2) (Wasike). The complainant then informed the police of the finding. The police visited Okombo's shop and took away the cellphone.

The complainant eventually traced Wasike at Kilgoris County Council offices. Wasike told him that he had purchased the cellphone from the appellant who had been introduced to him by **Malhalim Kasim** (PW3) (Kasim). Wasike then called Kasim and the trio went to the police station where Wasike and Kasim were locked up.

With the help of local muslims, the appellant was traced at the hotel where the complainant had been attacked. He was arrested by PC **Duncan Njuguna** (PW 5) (Njuguna). The appellant was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code. After a full trial before **J.D. Kwena** (SRM) at Ogembo, he was convicted of the offence and sentenced to death.

In convicting the appellant, the learned trial magistrate observed as follows in his judgment:

“First the complainant was attacked in an event which can be explained under the penal code to prove the offence of robbery with violence:- The attackers were more than one

- *The attackers robbed the complainant of his items*
- *They were armed with a metal bar which they used to injure the complainant who tried to resist their attack,*

*Those are the ingredients of **Section 296 (2)** of the Penal Code.*

*Two months later one of the items robbed from the victim of that attack is recovered and the series of recovery rested on the accused's hands as the person who had possession of the same. It is no doubt that the phone recovered from the accused is the phone that was stolen from **Johana**. The accused had no explanation he owned recently stolen property. It was within two months of the robbery and without any reasonable explanation, from him then he is presumed the (sic) robbed, the same from John on 30/3/2006 using violence.*

This Court applies that presumption as stated above and concludes that the evidence on record rests it back on the accused as the one who robbed the complainant attacking him on the date [in] charge sheet.

Accused is hence found guilty as charged and convicted of the main charge.”

After his conviction and sentence, the appellant appealed to the High Court (**Makhandia J (as he then was) and Sitati, J**) which also came to the conclusion that his appeal lacked merit and dismissed it. The appellant now comes before this court on a second appeal.

That being so, only matters of law fall for consideration. (**See Section 361 (1) of the Criminal Procedure Code**). As we have stated time without number before, this Court will not normally interfere with concurrent findings of fact by the two courts below unless those findings were 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 those findings. (**See Chemogong -Vs- Republic [1984] KLR 611**).

In a home made memorandum of appeal filed by the appellant on 16th August, 2011 the appellant cited four (4) grounds of appeal expressed as follows:-

“GROUND ONE.

THAT *the learned magistrate erred in both law and facts when she conducted the proceedings in Kiswahili/Ekegusi/English without an interpreter into Masai language, thus failing to inquire whether the accused understood the proceedings.*

GROUND TWO.

THAT *the learned trial magistrate erred in both law and facts when [she] convinced (sic) the*

appellant without corroboration of the evidence of PW 1 at the alleged scene of crime.

GROUND THREE

THAT the learned trial magistrate erred in both law and facts when she found the appellant guilty of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code without any proper identification parade having been conducted.

GROUND FOUR.

THAT the learned trial magistrate erred in both law and facts when she failed to consider that the period between the date of the alleged robbery was recent when cell phone [can] be purchased by any person at any time.”

At the hearing, of the appeal, **Mr. Abande**, learned counsel for the appellant, abandoned ground one (1) of the memorandum of appeal and in arguing the rest of the grounds, submitted that the evidence adduced before the trial court failed to support the charge. He further argued that the doctrine of recent possession was not correctly applied.

Mr. Abele, learned Assistant Director of Public Prosecutions, supported the conviction and sentence contending, in the main, that the appellant was found in possession a mobile phone which had recently been robbed of the complainant and the appellant's explanation of the said possession was, besides being contradictory, unreasonable.

In our view this appeal turns on one main issue i.e. whether the doctrine of recent possession was correctly applied by the two courts below. The doctrine applies when the following prerequisites are demonstrated.

- (a) *The property must have been found with the suspect;*
- (b) *The property must be positively identified as the property
of the complainant;*
- (c) *The property must be proved to have been recently stolen
from the complainant.*

(See the case of Andrea Obonyo -Vs- Republic [1962] EA 542 and that of Arum -Vs- Republic [2006] 2 E.A. 10 to name only a few. In the latter this Court differently constituted stated as follows:-

“Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case the possession must be positively proved, that is there must be positive proof; first that the property was found with the suspect secondly that property is positively identified as the property of the complainant; thirdly that the property was stolen from the complainant and lastly the property was recently stolen from the complainant”.

All the above ingredients must be demonstrated to prove recent possession. In the case before us, the learned judges of the High Court stated as follows on the doctrine of recent possession:-

“The case turns on the doctrine of recent possession. Both PW 2 and PW 3 narrated to the Court how the appellant offered PW 1's phone for sale on 31st March, 2006. This was only some hours since the phone had been stolen by some two persons from PW 1. The agreement for sale was produced in evidence. PW 1, PW 2 and PW 4 also told the Court how the phone was taken for charging at PW 4's Kiosk and immediately alerted PW 5 who had asked PW 1 to carry out his own private investigations to find the thief. The appellant

admitted as much. The fact that PW 1 may not have identified his assailants on the night of the attack was immaterial. The phone was found with the appellant. It was the appellant's duty to explain how the phone came to be in his possession.

22 The Court has considered the explanation given by the appellant and found the same to be wanting. The appellant stated he was given the phone by some friends of his, but he could not remember the names of those friends. It is our view that such friends spoken of by the appellant did not exist and the presumption we have made is that the appellant was one of the two people who knocked down PW 1 senseless on the material night emptied his pockets and also took away the phone which the appellant with PW 3 as the go-between, sold to PW 2. We are satisfied that the findings of the trial court based on the doctrine of recent possession were well founded.”

Having carefully considered the record of the trial court and that of the judges of the High Court, we are satisfied that both the courts below took into account all relevant factors in coming to the conclusion that the appellant was guilty of the offence as charged. The evidence on record shows that the appellant sold the stolen mobile phone to Wasike the day after it was stolen from the complainant in a robbery; that sale was witnessed by Kasim and was reduced to a written agreement which was produced at the trial. The appellant admitted selling the stolen mobile phone to Wasike and was unable to explain how he came into possession of the mobile phone leading to the inference that he was one of the robbers who attacked the complainant. All those crucial facts were taken into account by both courts below as was the defence of the appellant. All the ingredients of the doctrine of recent possession were demonstrated.

We find no basis to interfere with the concurrent findings of the two courts below.

In the result and for reasons outlined above, we come to the conclusion that the appellant's appeal filed on 16th August, 2011 has no merit and we order that the same be and is hereby dismissed.

Dated and Delivered at Kisumu this 27th day of September, 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR