



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CRIMINAL APPEAL NO. 166 OF 2011**

**BETWEEN**

**DANIEL MUTHOMI M'ARIMI .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from Judgment of the High Court at Meru*

*(Lessit & Kasango JJ.) delivered on 13<sup>th</sup> March 2011*

in

**H.C.CR. Appeal No. 42 of 2009)**

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**JUDGMENT OF THE COURT**

1. Daniel Muthomi M'Arimi was charged with the offence of robbery with violence contrary to **section 296 (2) of the Penal code**. The Information against the appellant was that on the 30<sup>th</sup> day of November 2006 at Kanyakine village, Kanyakine location in Meru Central District within Eastern Province, jointly with another not before court being armed with dangerous weapons namely pangas and rungus robbed Isaack Kirimi Mukindia one mobile phone make Sendo and cash Ksh. 700/= all valued at Ksh. 5,200/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Isaack Kirimi Mukindia.
2. The complainant PW1, Isaack Kirimi Mukindia , testified that on 30<sup>th</sup> November 2006 at 11.00 pm, he was walking home as it was raining and there was moonlight; when he almost reached his home, he met two young men one short the other tall. The short man hit him with an object and he started bleeding; they ransacked his pocket and they took Ksh. 700/= and a mobile phone Sendo by make. That the following day he reported the matter to Nkubu police station and sent young men to go where people drink liquor and see if his phone could be sold in those drinking joints. That on the next day, his son Gitobu, told him he had information that his phone was being sold near his home across the valley; he went to the market and while there, Nicholas Karania (PW2), a person who charges mobile phones called him. Nicholas knew his phone and told him his phone was being charged. He informed him that the person who took the phone for charging would collect it at 8.00pm. Subsequently, PW1 testified that he went to the Administration Police

- Officers at the Chiefs camp and gave this information.; a short while later he was called that the person had been arrested and that the appellant was the person who was found with his phone.
3. PW 2 Nicholas Karani testified that he is a barber and also operates a butchery and a bar; that within his business premises he also charges mobile phones. That on 3<sup>rd</sup> December 2006 the appellant brought a mobile phone at his bar for charging; that he knew the phone which was Sendo by make and he knew the owner as PW1 who normally brings it for charging. That he also had heard that PW1 had been attacked by thugs and he was robbed off his phone. That he called PW1 to see the phone and he reported the matter and an askari who waited until the appellant came to pay and collect the phone. The askari arrested the appellant. PW 2 testified that he knew the appellant before and he had never employed him and there was no grudge between them.
  4. The appellant in his defence denied ever taking a cell phone to PW2 for charging. He stated that he was arrested at Kanyakine market where khat is sold and then taken to PW2's barber shop; that while there PW2 produced the mobile phone and gave it to the police. That the son of the complainant a one Gitobu had also been arrested. He testified that PW 2 had employed him as a barber and had refused to pay and refund him money from his wages that PW2 used to save for him.
  5. The trial court having considered the evidence convicted the appellant and sentenced him to death; his first appeal to the High Court (Lessit & Kasango JJ) was dismissed. This is a second appeal. The grounds of appeal are *to wit*:
    - i. ***That the learned trial magistrate and the first appellate court erred in law and fact in basing their judgments on insufficient evidence of recent possession.***
    - ii. ***The learned trial magistrate and the first appellate court erred in law and facts in not appreciating that the evidence of recovery of the stolen item was insufficient to found a safe conviction.***
    - iii. ***The learned trial magistrate and the first appellate court erred in law and facts in failing to resolve the inconsistencies in the prosecution evidence.***
    - iv. ***The learned trial magistrate and the first appellate court erred in law in shifting the burden of proof to the appellant.***
  6. At the hearing of the appeal, learned counsel **C. M. Kingori** appeared for the appellant while the state was represented by the Assistant Director of Public Prosecution **Mr. J. Kaigai**.
  7. Counsel for the appellant elaborated on the grounds of appeal and submitted that the doctrine of recent possession which was relied upon by the trial magistrate and the High Court in convicting the appellant was not proved; that no proof was offered that complainant owned the mobile phone that was produced in court and alleged to have been found in possession of the appellant; that the charge sheet was defective to the extent it only referred to a mobile phone without giving the serial number; that each mobile phone has a distinct serial number and the absence of the serial number in the charge sheet and in the whole evidence on record led to the conclusion that the prosecution did not prove that the mobile phone produced as an exhibit belonged to the complainant. It was also submitted that the complainant did not identify the recovered mobile phone as belonging to him. Counsel submitted that there was no evidence that it was only the complainant who possessed such a mobile phone. The appellant also submitted that a crucial witness, a one Gitobu, who was the son of PW2, was not called to testify; that this witness could have given evidence adverse to the prosecution.
  8. The State opposed the appeal and supported conviction and sentence meted on the appellant. The State submitted that all the elements required for the doctrine of recent possession to apply were proved; PW 2 testified he informed PW1 that his stolen phone had been taken for charging. On his part, PW1 testified how he had been robbed by two young men and that PW2 was familiar with and knew the particular phone since he was in the business of charging mobile phones. The State submitted that there were concurrent findings of fact by the two courts below this Court was urged not to interfere with the findings of fact.
  9. We have considered the submissions by both learned counsel and note that this is a second appeal

which must be confined to points of law. As was stated in Kavingo – v – R, (1982) KLR 214, a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. In David Njoroge Macharia – v- R [2011]e KLR it was stated that under **section 361 of the Criminal Procedure Code**:

***“Only matters of law fall for consideration and the court 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 the findings. (See also Chemagong vs. Republic (1984) KLR 213).”***

10. In the present case, the appellant is faced with a charge of robbery with violence contrary to **Section 296 (2) of the Penal Code**. A charge under this section has three essential ingredients that must be proved by the prosecution. In Johana Ndungu –v – R, Criminal Appeal No. 116 of 1995, the ingredients for the charge of robbery with violence were stated to be:

- (i) if the offender is armed with any dangerous or offensive weapon or instrument or**
- (ii) if he is in company with one or more other person or persons or**
- (iii) if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.**

11. We are alive to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction on under **Section 296 (2)** of the Penal Code. In the case of Juma v. Republic, [2003] of R.A 471, it was held that ***“where the prosecution is relying on an element or ingredient of being armed, it must be stated that in the particulars of the charge that the weapon or instrument which the appellant was armed was a dangerous or offensive one.”***

12. It is our duty to examine if the two courts below erred in law in finding that the prosecution had proved the essential ingredients of the charge of robbery with violence. The appellant contends that the trial court and the first appellate court failed to reconcile the inconsistencies in the prosecution evidence. From the record it is clear that there was no eye witness to the offence. The complainant PW1 did not identify the appellant and consequently, the identity of the appellant as the person behind the crime must be proved by the prosecution beyond reasonable doubt. Later in this judgment we shall consider the evidence which was adduced to prove the identity of the appellant.

13. The charge sheet indicates that the persons who robbed the complainant were armed with dangerous weapons namely “rungus” and “pangas.” We have examined the testimony of the complainant PW1 Isaac Kirimi. Nowhere in his testimony does he refer to “pangas and rungus” as the dangerous weapons used by the two persons who robbed him. No evidence was led in connection with the use or existence of “pangas and rungus”; the prosecution should not have mentioned these weapons in the charge sheet if no evidence was available. As was pointed out in the case of Juma –v – R, {2003} EA 471:

***“...That in charging a person under Section 296 (2) of the Penal Code, the prosecution must be extremely careful as the consequences of conviction are serious. Care must be taken when dealing with drafting of charges as it is the life of an individual which is at stake.”***

14. Since no evidence was led to prove the existence of the alleged dangerous weapons in the form of “pangas and rungus”, the prosecution failed to prove the first limb of the essential ingredients of the charge of robbery with violence. PW1 testified that he was hit with a hard object like a metal; no object was produced in court as an exhibit.

15. The other issue for us to consider is whether the trial court and the High Court erred in

finding that the prosecution had proved that the appellant was in the company of another person at the time of the robbery. PW1 testified he was not able to identify his attackers; in his own words “*I didn’t identify those who robbed me during the material night.*” What evidence is there to prove beyond reasonable doubt that the appellant was one of the two persons? The description given by the complainant is one person was short the other tall. Does this description fit the appellant and is it adequate to identify the appellant beyond reasonable doubt as being linked to the crime? We do not think so, there are many short and tall persons and this description cannot irresistibly point to the appellant. In ***Simiyu & others -v- R, (2005) 1 KLR 193***, it was stated that “in every case in which there is a question as to the identity of an accused, the fact of there having been a description given and the terms of that description are matters of highest importance of which evidence ought always to be given by the person or persons to whom the description was given.” For a charge of robbery with violence to be proved under **Section 296 (2) of the Penal Code**, it is essential that the prosecution must lead evidence that the appellant was accompanied by at least one other person. The relevant testimony in this case is from PW1 Isaac Kirimi. In the case of ***Charles O. Maitanyi vs. Republic, (1986) KLR 198***, this Court held that:-

***“Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification”***

16. We now turn to the doctrine of recent possession which provides evidence of probative value that could link the appellant to the crime. The appellant was found in possession of the mobile phone. If PW1 was not able to identify his attackers, can an irresistible conclusion be drawn that it is the appellant who was one of the attackers simply because he was found in recent possession of the stolen mobile phone. In ***Andrea Obonyo & Others – v- R, (1962) EA 542*** it was held by the Court of Appeal of Eastern Africa thus:

***“(i) where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt and if a finding that he stole the article depends on the presumption arising from his recent possession of the stolen articles, such a finding would not be justified unless the possibility that he received the article has been excluded.”***

17. The quote in the **Andrea case** cited above leads us to inquire if there is on record independent and additional evidence that corroborate and identify the appellant as one of the two persons who attacked the complainant. Where identification arises from the possession of stolen items, it is advisable to seek corroborative evidence on identity. In cases where the doctrine of recent possession has been applied to convict an accused person, there has been additional evidence on identification such as confessions or the complainant being able to describe or identify the accused person and the recovery of the recently stolen items have been held to corroborate the evidence of identification. (See ***David Kiragu Thuo & 5 others – v- R, Criminal Appeal No. 57 of 2007 (2008) eKLR; Samuel Mucheru Kariuki & Another, Criminal Appeal No. 185 of 2004 (eKLR 2005)***). In the **David Kiragu case**, the court in convicting the appellants under the doctrine of recent possession observed that the evidence on identification of the appellants by eye witnesses was proper, the offence was committed in broad daylight and there was recovery of the stolen items. In the instant case, the evidence of identification of the appellant is non-existent, the offence was committed at night and the appellant’s possession of the stolen mobile phone is an item of circumstantial evidence. There was no single eye witness who identified the appellant as the perpetrator of the offence. In the absence of direct testimony on the identity of the persons who committed the crime, can an inference be drawn from the doctrine of recent possession that the appellant was involved in the robbery and he was not a mere receiver or handler of the stolen mobile phone? The prosecution’s case at the trial was wholly based on circumstantial evidence which is that the appellant was found in possession of the mobile cell phone. In the case of ***Margaret Wamuyu Wairioko –v- R, Cr. Appeal No. 35/2005*** it was stated that circumstantial evidence is very often the best evidence. However, we observe that in the case of ***R v. Kipkering Arap Koske and Another, (1949) 16 EACA 135*** on circumstantial evidence it was stated:

***“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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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.”***

18. It is our considered view that in the absence of additional independent and corroborative evidence that links the appellant to the robbery with violence committed on 30<sup>th</sup> November 2006, it is unsafe to convict the appellant. We find that the prosecution did not lead evidence to the required standard to identify the appellant as the perpetrator of the crime. When taken together with the fact that no evidence was led to prove the existence of the dangerous weapons namely “pangas and rungas”, the circumstantial evidence tendered does not lead to an irresistible conclusion that the appellant was one of the two persons who committed the crime as charged. We find that the prosecution did not prove and pass the three tests of circumstantial evidence which are well set out in the case of **ABANGA ALIAS ONYANGO V. REP CR. A NO.32 OF 1990(UR)** at page 5 as follows:

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

19. On the whole, we find that the case against the appellant in relation to the charge of robbery with violence contrary to **Section 296 (2) of the Penal Code** was not proved beyond reasonable doubt and we can only agree with the Court of appeal in **Suleiman Juma alias Tom – v- R, Criminal Appeal No. 181 of 2002 (Msa)** that where the life of an individual is at stake, the prosecution must be extremely careful not to bring evidence that is less than watertight.

20. In our evaluation of the evidence on record, we have considered that PW1 testified that he was robbed of his Sendo mobile phone. PW2 Nicholas Karani testified that the appellant took the recovered mobile phone for charging at his place of work. PW 3 Nicolas Koome testified that he laid an ambush and arrested the appellant when he went to collect the mobile phone where it was being charged. Both the trial magistrate and the High Court found that the appellant was in possession of the mobile phone and the doctrine of recent possession was invoked. In the case of **Malingi v Republic, [1989] KLR 225**, the Court of Appeal had this to say about the doctrine of recent possession:

***“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver”***

21. We have considered the evidence on record and the judgment of the High Court. The appellant contends that the prosecution failed to prove that the mobile phone was owned by the complainant. It was submitted that the complainant is not the only owner of a sendo mobile phone and it was incumbent upon the prosecution to provide the serial number of the phone and the complainant to present the purchase receipt thereof to prove ownership. We have considered this submission and it is our view

that the serial number of a mobile phone is not the only manner of proving ownership. PW1 identified the phone as his through familiarity and use; he had inscribed his name on the back of the phone and the name had been erased. PW2 testified that he knew the particular phone as belonging to PW1 who frequently brought the phone for charging at his business place. PW1 and PW 2 positively identified the recovered mobile phone. We find that the mobile phone was positively identified as belonging to the complainant. We are satisfied that the two courts below properly invoked the doctrine of recent possession. We concur that the appellant was found in possession of the mobile phone and it was incumbent upon him to explain how he came into possession of the phone. The appellant contends in his appeal that the trial magistrate and the High Court erred in shifting the burden of proof upon him. We do not agree; both the trial magistrate and the learned Judges did not err in requiring the appellant to offer explanation as to how he came to be in possession of the cell phone. Recently, this Court in ***PETER KARIUKI KIBUE VS REPUBLIC, CRIMINAL APPEAL NO. 21 OF 2001 AT NAIROBI*** (unreported) dealt with a similar matter where the appellant was found in possession of recently stolen items and he failed to give a satisfactory explanation as to how he came by them. 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. This is a rebuttable presumption of law based on the provisions of Section 119 of the Evidence Act”***

22. In totality, we find that the prosecution did not prove its case against the appellant on the charge of robbery with violence contrary to **Section 296 (2) of the Penal Code**. However, having re-evaluated the evidence on record, the applicable law and considered the submissions made, we find that the offence disclosed by the facts of the case is that of handling stolen goods contrary to **Section 322 (2) of the Penal Code**. **Section 322 (1) of the Penal Code** provides that “a person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so. **Sub-section 322 (2)** provides that **“a person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term of not less than seven or more than fourteen years.”**

23. We accordingly substitute the charge of robbery with violence contrary to **Section 296 (2) of the Penal Code** with that of handling stolen goods contrary to **Section 322 (2) of the Penal Code** and convict the appellant for the same. The appeal is allowed to the extent that the sentence of death imposed as mandatorily required by **Section 296 (2)** of the **Penal Code** is set aside and we substitute the same by a term of seven (7) years imprisonment from the date when the appellant first appeared in court on 19<sup>th</sup> December, 2006.

***Dated at Nyeri this 3<sup>rd</sup> day of October, 2013.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***M. K. 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**