IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 371 OF 2009

BETWEEN

ELIUD MOSES OWINO OPWAPO …..... APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisumu,(Mwera & Karanja, JJ) dated 1st December, 2009

in

HCCRA NO. 50 OF 2008)

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JUDGEMENT OF THE COURT

The appellant, Eliud Moses Owino Opwapo, was charged before the Principal Magistrates Court, Siaya, with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code particulars being that on the 2nd day of August, 2007 at around 2030 hours, at Rabango estate in Siaya within the then Nyanza Province, jointly with others not before court, he robbed Marshal Tito Abonyo of a mobile phone make Motorola V 980 serial number 354909002279564, a wrist watch make Armitron diamond and cash Kshs. 600/= all valued at Kshs. 70,000/= and that at or immediately before or immediately after the time of such robbery he wounded the said complainant. There was an alternative charge of handling stolen goods contrary to Section 322 (2) of the Penal Code particulars being that on the said day at the said time and place the appellant dishonestly retained the said items.

The second charge facing the appellant was that he was found in possession of narcotic drugs contrary to Section 3 (1) as read with Section 3 (2) (a) of the Psychotropic Substance Control Act No. 4/19 Chapter 70 Laws of Kenya. Particulars relevant to this charge were that the appellant on 1st October, 2007 at the said time and place he was found in possession of 90 rolls of bhang which were not in a medicinal preparation form.

A trial took place before the learned Principal Magistrate (G. K. Mwaura) who in a judgement delivered on 12th May 2008 convicted the appellant and sentenced him to death on the first count and to four years imprisonment on the second count. The appellant appealed against conviction and sentence

to the High Court. In a judgement delivered on 1st December, 2009 (J. W. Mwera, J (as he then was) and J. R. Karanja, J) the appeal was found to have no merit and was dismissed. The appellant was again dissatisfied hence this second appeal.

Section 361 (1) (a) of the Criminal Procedure Code limits our jurisdiction on second appeals as it provides that:

> **"A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-**
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> **(a) on a matter of fact, and severity of sentence is a matter of fact;...."**

This position has been stated and restated in many decisions of this court such as **Thiongo v Republic [2004] 1 EA 333** where this court differently constituted said:

> **"A second appellate court would not interfere with concurrent findings of fact unless the findings were bad in law for being perverse i.e. no reasonable tribunal could on the evidence have arrived at such findings."**

See also **Njoroge v Republic [1982] KLR 388.**

What matters of law therefore fall for our consideration in this appeal?

In the Supplementary Grounds of Appeal filed through the appellants counsel Mr. Onyango Jamsumba on 16th September, 2013 three grounds of appeal are taken as follows:

> **"1. The learned Judges erred in both law and fact in upholding the conviction and sentence of the subordinate court without considering that the Appellants' Constitutional rights were violated.**
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> **2. The learned Judges erred in both law and fact when they failed to re-evaluate the evidence on record and came to an obviously wrong conclusion.**
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> **3. The learned Judge (sic) erred in both law and fact when he failed to find that the prosecution failed to prove their case beyond reasonable doubt."**

The case for the prosecution was through the evidence of six witnesses and was that on the 2nd August, 2008 the complainant, Marshal Tito Abonyo (PW1) closed his shop at Siaya town at 8:30 p.m. and drove home. He was alone in the motor vehicle. He reached the gate of his home and was suddenly confronted and attacked by three men who had been hiding in a bush at the gate. The attackers wore face masks and did not talk to him at all. They fired a gun; the bullet hit the door of the vehicle ricocheting and hitting PW1's hand. The attackers hit him with a blunt object injuring him on the arm and leg. All this was witnessed by the watchman Boniface Musumba (PW6) who was in the compound near the gate. PW6 and PW1's family raised alarm. The attackers took the items listed in the charge sheet and fled the scene. Police arrived at the scene moments thereafter but did not find the robbers. PW1 was taken to Siaya hospital where he was admitted. He later obtained a P3 Form from the police which was completed at Siaya District Hospital by a Clinical Officer Ali Asman (PW3) on 22nd January, 2008. PW1 recorded a statement with the police where he gave particulars of the stolen phone and wrist watch including serial number for the phone and a guarantee form for the watch. PW1 was later summoned to Siaya Police Station where he was shown a phone which he identified as the stolen phone. He opened the phone and found contacts which he had stored in the phone book and was able to demonstrate and show the serial number of the phone which matched the serial number in the form which he had earlier given to the police. When PW1 operated the phone camera he found a photograph of the appellant which had been stored without his (PW1) consent. PW1 identified his watch at the police

station which had also been recovered by the Police.

No. 79599 P. C. Dennis Miheso (PW2) of Criminal Investigations Department, Siaya, was in Siaya town on 2nd August, 2007 at about 9:00 p.m. when he heard gunshots being fired in Rabango village. He, in the company of other police officers rushed to the scene. They found PW1 being taken to hospital. He took the complainants' telephone number ***[particulars withheld]*** and instructed PW1 to report to the police station after receiving treatment.

PW2 wrote a letter to Safaricom requesting information whether PWI's stolen phone was in use. Safaricom wrote back to PW2 informing him that the stolen phone was indeed in use as telephone number ***[particulars withheld]***. His mostly called number was ***[particulars withheld]***. Upon calling this latter number it was answered by a woman. PW2 carried out investigations and found that the woman lived at Pandi Estate in Siaya town. He was able to identify the particular house which led him to lay an ambush. On the material day the appellant arrived riding a bicycle. He was arrested and 90 rolls of bhang found in a bag on the bicycle. The appellant had a Nokia phone with a number used on the stolen phone 11 hours after the robbery. PW2 found that the very same often called number was displayed on this phone. On entering the appellants' house they found the appellants' wife who had a phone with the most called number (she was convicted by the lower court but acquitted on the first appeal). A search of the house yielded the stolen phone which was now using number ***[particulars withheld]***. The wrist watch was also recovered in the house.

PW2 operated the recovered phone and found a photo image of the appellant that was stored in the phone on 9th August, 2007 about a week after the robbery incident. This image was played and shown to the trial court.

PW2 prepared relevant documents in respect of the second count and submitted the bhang to the Government Chemist. The bhang was analysed and a report produced in court confirming that the same was cannabis sativa.

PW3 examined PW1 some five months after the robbery and confirmed that he was injured.

No. 73299 PC Collins Shikuku (PW4) of Criminal Investigations Department, Siaya, a colleague of PW2, also testified and confirmed the testimony of PW2 on how they received report, carried out investigations, arrested the appellant and recovered stolen items and bhang.

No. 61475 Corporal David Ongwenyi (PW5) of Provincial Criminal Investigations Office produced photographs of the damaged motor vehicle, that had been taken at the scene of crime showing inter alia damage caused by gun shots.

That was the case for the prosecution upon which the appellant was found to have a case to answer and was put on his defence. The appellant elected to give an unsworn statement in which he stated that on 1st October, 2007, upon dropping his daughter at school, he proceeded to his place of work at the "Jua Kali" area of Siaya. On the way he met police officers one of who was PW2 who he knew before. The police handcuffed him and loaded him into their vehicle and drove to his home. The officers entered his house where they remained for 15 minutes whereupon his wife was also arrested and they were taken to the police station. At the police station the appellant was shown various items like nozzles, gas welding equipment and shaving machine. All these were his items which he was able to account for. He was tortured while being asked to produce a gun. He was threatened that if he did not produce a gun he would be charged with the offence leading to this appeal. He was kept in police custody for 18 days and finally charged in court together with his wife. He denied that the phone or wrist watch were recovered from his house.

The trial magistrate found the appellant guilty of both offences and sentenced him to death on the first count and to 4 years imprisonment on the second count. As we have already stated the first appeal was dismissed.

When this appeal came for hearing before us on 16th September, 2013 counsel for the appellant submitted that the learned judges on the first appeal had erred by not re-evaluating the evidence as it was their duty to do. Counsel submitted further that the trial court was wrong in admitting telephone call data from Safaricom without the same being produced by an expert. Counsel was also of the view that the appellants' photograph captured in the stolen phone was in the phone through electronic manipulation.

On breach of constitutional rights counsel submitted that the appellants' rights were violated because he was not taken to court within the time allowed in law.

The Assistant Director of Public Prosecutions Mr. Abele was of contrary view and supported conviction and sentence as confirmed by the High Court in the first appeal.

Learned Counsel for the State submitted that the High Court had properly carried out its duty by re-evaluating the evidence. The phone and wrist watch were found in the appellants' house about 2 months after the robbery and it did not matter, according to counsel, how the items were recovered. Counsel submitted further that delay in taking the appellant to court could not lead to an automatic acquitted.

Mr. Jamsumba had the last word as far as submissions went and submitted that the appellant could not give an explanation to disclaim recent possession because the charge facing the appellant was denied and the appellant could not explain away that which had not been found with him.

There can be no doubt that there was no identification of any of the assailants who attacked PW1 at the gate to his home. Neither PW1 nor his watchman PW6 saw any of the assailants who wore masks to cover their faces and distort their identity. The prosecution case proceeded purely on the doctrine of recent possession.

There is however no doubt that the complaint was attacked, injured and robbed on the material day. This is because there is the evidence of PW1 himself supported by the evidence of his watchman, PW6 and the injuries suffered by the complainant are confirmed by evidence of the Clinical Officer, PW3. Police Officers arrived at the scene immediately upon being attracted by the sound of gunshots which is further evidence to corroborate the complainants' evidence on the events that took place on that day.

On whether the complainant was robbed of the items set out in the charge sheet this is how the trial magistrate addressed his mind to the issue:

> **"The complainant testified that indeed these items were stolen from him by the robbers. He says that the police that is P C Miheso (PW2) and his group came and met him at the scene and organized he be taken to Siaya District Hospital where he was admitted. Clearly, at that time, he may not have been in a position to give details of this (sic) items. He says that later after discharge, he went for the P3 form and also took with him the mobile phones manual and the watches guarantee documents.**
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> **I have look (sic) at those documents and verified that they bear the items details. The phone manual indeed bears the phone serial numbers amongst other details. It is true that complainant does not give the phones serial number in police statement. He does however mention that he gave the police its manual which I have found has its serial number amongst other details. Further the complainant gave the police the phones' sim number ….."**
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> And later:
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> **"I take note of that (sic) the accused persons did not claim the subject phone. From all these, I have no doubt at all that the robbers stole the phone and watch Exh. 5 and 6. I have already stated that PC Miheso has testified that when the first accused was**

arrested, he had with him a bag that had the 90 rolls of bhang. Further that he took him to his house where the robbed mible (sic) phone and watch were found...."

The trial magistrate believed the evidence before him that the items were stolen from the complainant; that the stolen phone was used very soon after it was stolen from the complainant and that upon laying an ambush the police apprehended the appellant who was ferrying rolls of bhang and upon entry into the appellants' house the stolen phone and wrist watch were found. The appellant did not offer any or any reasonable explanation how he came to use the stolen phone soon after it was stolen and why it was in his house about two months after it was robbed from the complainant. In any event, according to the trial magistrate, the appellant did not offer any explanation how his photograph or likeness came to be captured in the stolen phone a few days after the robbery. In the premises the learned trial magistrate invoked the doctrine of recent possession and dismissed the appellants' defence.

On the first appeal the appellants' complaints were more or less the same complaints raised before us. After reviewing the evidence the learned judges were satisfied that robbery with violence had taken place and the appellant was one of the robbers who attacked and stole from the complainant. The stolen items which involved the complainants' mobile phone and wrist watch were found in the appellants' house and the appellant did not offer any explanation for using the stolen phone very soon after it was stolen and how the same phone was found in his house by the police. Let the judges speak for themselves:

"We are satisfied that the conviction of the appellant on the first court (sic) was sound and proper in so far as it was based on the doctrine of recent possession. All the elements for the application of the doctrine were duly established (See Isaac Nanga Kahiga Alias Peter Nganga Kahiga vs Republic Criminal Appeal No. 272 of 2005 c/a [unreported]).

There was sufficient evidence from which a strong inference emerged that most likely or not, the first appellant having used the complainant's stolen mobile phone a few hours after it had been stolen was one of the three masked men who committed the offence...."

The appellant has raised before us in grounds 2 and 3 of the Supplementary Grounds of Appeal issues on alleged failure by the High Court judges on first appeal, to re-evaluate the evidence and that the judges erred in finding that the charge had been proved beyond reasonable doubt as required by law.

Counsel for the appellant submitted before us that both the trial court and the first appellate court proceeded in error when they relied on telephone data from Safaricom when the data was not produced in court by an expert. It is indeed true that the prosecution should have summoned an expert from the telephone service provider to explain the process and compilation of data that was produced in court as evidence. But in this case the facts do not stop there. After the robbery was reported evidence on record is that the police commenced investigations that eventually led to recovery of the stolen phone and wrist watch at the appellants house. The recovered stolen phone and wrist watch had serial numbers that matched numbers in documents surrendered to the police by the complainant after the robbery. Upon operation of the phone the appellants' image or likeness was found in the phone and had been captured a few days after the robbery.

In such circumstances the appellant had a duty in law to explain how he came to be in possession of the stolen items and in the absence of a reasonable explanation the trial court was entitled, as it did, to hold that the appellant was most likely one of the robbers. The Evidence Act places a duty on an accused person in certain cases by providing in Section 111:

"(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall -

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity."

In the appeal before us, the appellant did not give explanation for his possessing the items allegedly stolen from the complainant when robbery took place.

The appellant has raised as a ground of appeal alleged violation of constitutional rights. On this issue counsel for the appellant submitted before us that the 18 day delay before the appellant was taken to court was a breach of constitutional rights for which the appellant should have been acquitted. Counsel for the respondent however was of the view that a delay of 2 – 3 days cannot lead to an acquittal.

The learned judges on first appeal held, correctly, we think, that the trial magistrate had erred because he had no legal authority to give an explanation on behalf of the prosecution to discharge the burden of proving that the appellant was taken to court as soon as was practicable which burden was placed on the prosecution by dint of Section 72 (3) of the retired constitution. The judges reviewed a relevant authority of this Court differently constituted - **Dominic Mutie Mwalimu v Republic Criminal Appeal No. 217 of 2005 (unreported)** where it was held that the mere fact that an accused person is brought to court either after the twenty four hours or fourteen days as the case may be stipulated in the Constitution does not ipso facto prove a breach of the Constitution.

The first appellate court also considered the case of **Paul Mwangi v Republic Criminal Appeal No. 35 of 2006 (unreported)** where it was held by this court differently constituted that as long as the explanation preferred was reasonable and acceptable the court would countenance delay particularly where the delay was for a few days.

In the circumstances the first appellate court held that the delay of about two days was not inordinate.

Breach of constitutional rights was also discussed in **Paul Mwangi Murunga v Republic Nakuru Criminal Appeal No. 35 of 2006 (unreported)** where the appellant in that case was taken to court some 24 days after he was arrested. The court reviewed various decisions like **Ndede v Republic [1991] KLR 567 and Albanus Mwasia Mutua v Republic Criminal Appeal No. 120 of 2004 (unreported)**. In the latter case the court suggested some examples of what might amount to an acceptable explanation by the prosecution in failing to produce an accused person as required by the Constitution. These may be such instances as where upon arrest and on being taken to a police station the accused person falls ill, is taken to hospital and admitted and kept there beyond the period allowed. Another instance would be a case

where the accused is arrested on a Friday evening and as weekends are not court working days in Kenya and if the accused could not be released on bail he was taken to court on the next working day. Another instance was where the court house was far from the police station and the station motor vehicle broke down or had no fuel. These instances were obviously not exhaustive but were a reasonable summary of reasons that would avail the prosecution an explanation to comply with constitutional requirement on production of an accused person before the court within time stipulated.

In **Paul Mwangi** (supra) a delay of ten days before producing the accused before court was found to be unreasonable and the appellants' conviction was quashed.

In the instant appeal the appellant was taken to court about two days beyond the period allowed in law. As found in the **Paul Mwangi** (supra) case a delay of one or two days was not inordinate. We agree with those findings and hold that the delay in producing the appellant before court being by about two days was not inordinate and we shall leave the issue at that.

The upshot of our findings is that this appeal has no merit and it is accordingly dismissed.

Dated and Delivered at Kisumu this 8th day of November 2013

J. W. ONYANGO OTIENO

….....

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