



REPUBLIC OF KENYA

Court of Appeal at Kisumu

Criminal Appeal 203 of 2010

JUSTO BUMBE APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Kisii (Aroni & Karanja, JJ) dated 29th June, 2010).

In

H. C. CR. A. No. 139 of 2008)

JUDGMENT OF THE COURT

1. **JUSTO BUMBE** (the appellant) was upon trial before the Senior Resident Magistrate’s Court at Maseno on a charge of capital robbery convicted and sentenced to death. His appeal to the High Court having been dismissed, he has preferred a second appeal to this Court.
2. Mr. K’Opot, learned counsel for the appellant, compressed the six grounds of appeal in the appellant’s supplementary petition of appeal to three main issues: reliance upon circumstantial evidence, the doctrine of recent possession and the High Court’s alleged failure to re-evaluate the evidence on record as required.
3. On circumstantial evidence, Mr. K’Opot submitted that the two courts below having found the evidence on purported voice identification weak and rejected it, they erred in basing the appellant’s conviction on circumstantial evidence. In his view, the purported circumstantial evidence in this case did not meet the standard required by law. In this respect counsel pointed out that though the offence was allegedly committed on 13th February 2008 it was not reported until on 20th February, 2008. He also argued that neither of the two courts below considered the issue of the complainant’s SIM card, which was admittedly removed from the stolen phone and was never found.
4. Counsel for the appellant seriously faulted the two courts below on also pegging the appellant’s conviction on the doctrine of recent possession. He took up several points on this issue. The first one was that the complainant did not prove his ownership of the stolen phone. This is because he did not produce any document or point to any mark on the phone to prove that it belonged to him. Secondly, he argued that there was no evidence in court to show when or with whom the

phone was found. The complainant Paul Sikobe Ngobilia, PW1, and the Assistant Chief of Ebusakami sub-location, William Mathew Onono, PW3, both testified that a woman who claimed to be the appellant's mother took the complainant's stolen phone to PW3. That woman was not called as a witness. It is not clear who gave her that phone. There is also no proof that she is indeed the appellant's mother. In the circumstances counsel said PW1 and PW3's evidence on recent possession was hearsay. He urged us to find that both the trial and the High Court erred also on that point and allow this appeal.

5. For the State Mr. Kiprop, learned State Counsel, submitted that the appellant's conviction was based on sound evidence. Though failure to call the woman who took the phone to PW3 was an omission on the part of the prosecution, he said it is not fatal. As the appellant did not claim the ownership of the stolen phone, he said the prosecution did not need to prove that it belonged to the complainant. He urged us to dismiss this appeal.
6. We have considered the matter. As is clear from the judgments of both the trial and the High Court, the appellant's conviction was based on the doctrine of recent possession, the voice identification of the appellant by the complainant having, quite correctly in our view, been rejected. The issue before us then is whether or not the appellant was in possession of the stolen phone.
7. As was stated by this Court in the case of **Isaac Nganga Kahiga vs Republic, Criminal Appeal No. 272 of 2005 (CA Nyeri)**, for the doctrine of recent possession to apply, it must be proved that the complainant's property that had recently been stolen was found with the accused. The first of these two conditions were met in this case. When the complainant was summoned to the Assistant Chief's home, he identified the phone by the SIM card number 0721-611128 which he removed from it. As nobody else claimed the phone, we are satisfied that the complainant proved his ownership of the phone.
8. The other criteria, and in our view, the most important one, is that the stolen property was found in the possession of the accused. Possession has to be actual like when the stolen item is found in the accused's pocket, if it is something that can be carried in a pocket, or when it is found in his house. In other words, the accused must be shown to have had actual control over the stolen item. Was this criterion met in this case? In other words was the appellant found in possession of the stolen mobile phone or did he have actual control over it?
9. As we have pointed out, the Assistant Chief, William Mathews Onono, PW3, testified that the phone was taken to him on 18th February, 2008 by a woman who claimed to be the appellant's mother. That woman allegedly told him that the appellant gave him the phone. As that woman was not called as a witness, PW3's evidence was therefore hearsay. And in his short unsworn statement, the appellant said he knew nothing about the charge against him. That left the issue of his possession of the stolen phone hanging. In the circumstances, we agree with Mr. K'Opot that the circumstantial evidence of recent possession in this case fell far short of the required standard. As this Court has stated in several cases including the cases of **Republic vs Kipkering Arap Koske & Another (1949) 16 EACA 15** and **Sawe vs Republic [2003] KLR 364**, for it to found a conviction, the inculpatory facts in circumstantial evidence must irresistibly point an accusing finger at the accused and be incapable of explanation on any other hypothesis.
10. For these reasons, we find that the appellant's conviction cannot be sustained on the evidence on record. Consequently, we allow this appeal, quash the conviction and set aside the sentence. We order that the appellant be set free forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 21st day of February, 2012.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR