



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 207 of 2009

SALIM MOHAMMED OYUGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ)
dated 21st July, 2009*

In

H.C. Cr. A. No. 103 of 2006

JUDGMENT OF THE COURT

This is a second appeal. By dint of the provisions of **section 361 (1) (a)** of the Criminal Procedure Code, we are confined to consider only matters of law unless we are persuaded that the trial court and the first appellate court have considered matters of fact that they should not have considered or have failed to consider matters they should have considered or that looking at the entire case, their decision on matters of fact are perverse in which cases the omission or commission would, be treated as matters of law.

On the night of 2nd and 3rd August, 2005 at about 1.30 a.m. the complainant Hellen Akinyi (PW1) (Hellen), her mother and Jacinta Juma (PW3) (Jacinta), arrived in Kisumu from Eldoret. It is not certain as to the exact spot where they were dropped in Kisumu, but wherever they were dropped, there were no taxis to take them to their home in Obunga area. They decided to walk home. They had a luggage with assorted clothes, a cell phone, Sargem 320 and cash Kshs.900/-. On the way, three persons accosted them. Those three persons introduced themselves as police officers and asked them for their ID cards. They spoke with them for about two (2) minutes but as it was dark, Hellen and Jacinta could not see them clearly. They were in dark coats. Hellen's mother produced her ID card but as Hellen and Jacinta asked them to produce torch and read it, one of them struck Hellen's head with the flat side of a panga and also hit her on the back. Hellen realized that two of those people had a panga and knife. They then took Hellen's pouch which was under her arm. That pouch contained cell phone, sargem 320 and cash Kshs.200/-. They also took a brief case that was carried by Hellen's younger sister. Hellen's mother was also assaulted. The robbers then ran away. Hellen, Jacinta, mother and sister went to Obunga police post and reported the incident. They were given police officers but on going back to the scene, they did not find the robbers. The following day, i.e. 3rd August 2005, in the morning, Hellen went to her mother. On her way back, she saw a person in a shop carrying her phone. She had stamp on it which she had kept. She approached that person and on asking him about the phone, the person, later identified as George Ouma (PW4) (George) told her that the phone had been sold to him. They took George to police station. George stated in evidence that he was approached by a person he had known as "Sanjay", who was his neighbour and with whom he had lived as a neighbour for one year, who requested him for Kshs.1000/- to enable him (neighbour) take his wife to hospital. That man gave him the subject phone which was Sargem 320 and asked him to keep the phone as a security for the money. That person "Sanjay" was identified by George Ouma as the appellant. George, in his evidence in court specifically identified the appellant as the one who gave him the phone. He also identified the phone that was given to him and said the appellant gave him the phone on 3rd August, 2005 (as per the original trial court's record which we have perused). Hellen, in her evidence, said the phone had her name in the welcome note as "Hely". She also identified the SIM card for the phone. The other goods stolen were blue jeans, white blouse, 2 blue tee shirts, one black skirt, one light green skirt, all of which belonged to Hellen and were retrieved from a toilet by some people at Makoi. John Ken Otieno

(PW2) was a teacher at Chuo Christian Academy and doubled up as a community police at Obunga. On 10th August 2005 (as is clear in the trial courts record we have perused), he ,together with Cpl. Richard Oyugi (PW5), were from Winam Court. They passed through Kondele and Nyawita Water Joint. They saw the appellant standing at the water joint. They had already received report about him in connection with this alleged robbery and other robberies. They arrested him. He was taken to the police station and charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the charge were that:-

“On the night of 2nd and 3rd August 2005, at Kamakowa Sub location in Kisumu District within Nyanza Province, jointly with others not before court, while armed with knife, robbed Hellen Akinyi of mobile phone make Sargem 3020, Brief case with assorted clothes and cash Kshs.900/- all valued at Kshs.13,000/- and at or immediately (sic) before or immediately after the time of such robbery used or threatened to use actual violence on the said Hellen Akinyi.”

He pleaded not guilty. In his defence he gave unsworn statement and said:-

“On 10.8.05 at around 2.30 p.m., I was a little drunk. I was arrested by two police officers and taken to the police station at Central. I stayed there for 2 days then I was brought to court. The charges were read and I denied them. I did not commit the robbery. That is all.”

The above was the entire evidence before the trial court. After considering that evidence, the learned Principal Magistrate (as he then was) (Abdul Elkindy) in a judgment delivered on 9th June, 2006, found the appellant guilty as charged, convicted him of the offence and sentenced him to death. The appellant was dissatisfied with the decision and appealed to the superior court against it. The superior court, (Mwera & Karanja, JJ), in a lengthy judgment delivered on 21st July 2009 dismissed that appeal. Hence this appeal before us based on 7 grounds in a supplementary memorandum of appeal filed by M/s Otieno, Yogo and Company, the advocates for the appellant. As grounds 6 and 7 of those grounds were abandoned by Mrs. Odoyo, the learned counsel who urged the appellant’s appeal, we will not reproduce them in this judgment. The remaining grounds were:-

- “1. The subordinate court and first appellate court erred in law relying on dock identification only convicting the appellant.***
- 2. The trial court and the first appellate court erred in law in failing to find that there was no nexus between one person named Sanjay and Salim Mohamed Oyuga the appellant herein.***
- 3. The trial court and first appellate court erred in law in failing to find that the ingredients of the offence of robbery with violence were not proved.***
- 4. The trial and first appellate court erred in law in relying on the doctrine of recent possession to convict the appellant when no stolen item was ever recovered from the appellant.***
- 5. The learned trial court and first appellate court erred in convicting the appellant on a crime which was not investigated.”***

In her address to us, Mrs. Odoyo submitted that the appellant was not properly identified as there was no connection between the appellant and the robbers, in that George who said he was sold the phone, said it was Sanjay who sold him the phone but did not give any physical description of that man Sanjay at the police station. She further contended that the date given in the charge sheet contradicted the evidence given by the witnesses on that issue. It was also her contention that as Hellen alleged that she was attacked, but produced no P3 form to prove the same, the offence of robbery with violence under **section 296 (2)** of the Penal Code was not proved. Lastly, Mrs. Odoyo maintained that the doctrine of recent possession is not applicable in this case as George’s evidence did not specify the date the subject mobile phone was given to him by the appellant and as the investigating officer did not give evidence in this case, many loose ends remained and thus the case was not proved within the standards required by law. On her part, Miss Oundo the Principal State Counsel, submitted that the conviction was properly entered against the appellant as it was based on recent possession of recently stolen property and as robbers were more than one, it did not matter whether personal violence against Hellen was proved or not. The stolen mobile phone was recovered next day and George who had it gave explanation as to how he came by it and his evidence was not shaken in cross-examination. On the discrepancy on the date of the arrest, Miss Oundo’s take, was that, that resulted from a typographical error and was thus curable under **section 382** of Criminal Procedure Code. Lastly, she submitted that even though the investigating officer was not called as a witness, nonetheless, the evidence that was adduced in court was adequate and there was no need for any other evidence in respect of the entire case.

The main issue in contention in this appeal as we understand it, is as to whether the doctrine of recent possession of the stolen property was applicable in this case. In our view, matters such as whether the failure by the prosecution to call the

investigating officer to testify is fatal or not and whether the discrepancy in the date of arrest as given in evidence and as appears in the charge sheet has any serious bearing in the case, are matters that cannot be of serious consequences in this case. We say so because under **section 143** of the Evidence Act, no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact and in the well known case of **Bukenya & Others vs. Uganda [1972] EA 549**, the predecessor of this court had stated that whereas the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent and that the court can on its own as a matter of a right and a duty call witnesses where evidence appears essential to the just determination of the case, nonetheless it is only:- where the evidence called is barely adequate that the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. In this case, the evidence adduced was not shown to be barely adequate to necessitate an inference that the evidence of investigating officer would have tended to be adverse to the prosecution. On the issue of the discrepancy between the date of arrest as in the charge sheet and as given in evidence, again we say nothing turns on that as the appellant himself agrees that he was arrested on 10th August, 2005 and not on 16th August as appears in the charge sheet. His evidence conforms to that of Cpl. Richard who arrested him. As we have stated above, date 10th March, 2005 put down in the record before us is a typing error. The original trial courts proceedings clearly indicates that Cpl. Richard said he arrested the appellant on 10th August, 2005. In our view, the error in the charge sheet is clearly curable by the provisions of section 382 of the Criminal Procedure Code and nothing turns on that aspect.

We now proceed to consider the main complaint which as we have stated, is whether the doctrine of recent possession is applicable in this case. In other words, could the conviction be based on the evidence of George alone?

It is not in doubt that Hellen and Jacinta, who were with their mother at the fateful time of robbery did not identify the robbers, and had Hellen not seen her mobile phone with George the next day after the robbery, it may have been difficult to know who the robbers were. She saw George with her phone the next day and it was George who volunteered the person who gave him the phone. George referred to that person as Sanjay, a name with which the appellant was not standing charged. However, George referred to the appellant as the person he was referring to as Sanjay. He described him as a neighbour with whom he had lived for one year and he stated in court under what circumstances the appellant had given him the phone which were that appellant's wife had problems and had to be taken to hospital. He needed money to take her to hospital. Kshs.1000/- was given to the appellant. The phone was described in details by Hellen and no complaints have been raised as to the identity of the phone. We can safely accept, as did the two courts below, that it was indeed Hellen's mobile phone stolen from her the previous night or that early morning by robbers.

Section 4 of the Penal Code defines possession as follows:-

(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;"

In this case, George was found in actual possession of Hellen's mobile phone stolen in a robbery incident only few hours after the robbery. His immediate explanation was that the phone was pledged to him by the appellant as a security for Kshs.1000/- he advanced to the appellant to help the appellant take his wife to the hospital. This was made to the police and in court. Although George did not produce any document to confirm the same but we must admit that in such situations, documentary exchanges rarely occur. The trial court considered that evidence and in accepting it stated:-

"According to PW4 he received the phone from the accused who asked him to keep it in exchange of Kshs.1000/-. PW4 readily volunteered to offer information of Sanjay the accused who have (sic) offered him the Sargem 3020 cell phone. PW4 had known the accused as a neighbour and popularly called him "Sanjay".

The robbery occurred during the night of 2nd and 3rd August, 2005. The cell phone was recovered on 4. 8 05 (sic) from PW4. It was PW4's unbreakable evidence that the phone was given to him by the accused.

The accused in defence has not been able to discredit as (sic) rebut any of the prosecution evidence. The prosecution evidence is candid and strongly implicates the accused in the said offence."

And the superior court, in analyzing and evaluating the same evidence afresh as is required of it, being the first appellate court - see the case of **Okeno vs. Republic [1972] EA 32**, also accepted the evidence of the prosecution witnesses that George received the subject mobile phone from the appellant. This conclusion, we would say, was reached by that court after fully considering the matter. It stated on that issue:-

“The learned trial Magistrate relied on the evidence of the milk vendor (PW4) to convict the appellant on the strength of the circumstantial evidence based on the doctrine of recent possession.

The learned trial Magistrate believed the evidence of PW4 as compared to that by the appellant and held that it was “unbreakable”. We cannot purport to doubt the findings of the learned trial Magistrate on credibility knowing that he had the opportunity to see and hear the witnesses.

Consequently, we would also hold that the complainant’s stolen phone was found with PW4 a day after robbery. He gave an explanation to the police of how he came by the same. He showed that the phone came into his possession in one way or the other through the appellant whom he had previously known (sic) by his nickname “Sanjay” who had been his neighbour. The appellant was therefore in recent possession of the stolen phone a few hours after it had been stolen from the complainant and before he handed it over to PW4.”

The above were findings of fact by the trial court and the first appellate court. As we have stated above, this being a second appeal, ours is to consider only matters of Law. George’s evidence that the appellant is the person who gave to him the subject phone is a matter of fact. The two courts, one of which saw George give evidence and the other which had the duty to analyze the same evidence afresh and evaluate it have made a concurrent finding that George was a witness of truth. In law, this Court would be reluctant to interfere with such a finding on second appeal. In the case of **M’Riungu v. Republic [1983] KLR 455**, where a similar situation obtained, this Court held inter alia as follows:-

“1. Where a right of appeal is confined to question of Law, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law. (Martin v. Glyned Distributors Ltd (t/a MBS Easterners - The Times of March 30, 1983).”

We have anxiously considered the evidence that was adduced in the trial court. We have considered the judgment of the trial court and that of the first appellate court as is demonstrated above. We cannot, with respect to Mrs. Odoyo, say that no reasonable court could have reached the conclusion they reached in the circumstances of this case. This being our view, we have no proper grounds to disturb that conclusion. In saying so, we are aware that George was the only witness as to the question of who gave the phone to him. We are also aware that he was arrested for being in possession of the subject phone but the explanation he gave exonerated him from the offence. We are also of the view that the learned Magistrate was on the verge of shifting the burden of proof to the appellant when he stated in his judgment that the appellant in his defence had not been able to discredit or rebut any of the prosecution evidence, but what we think the learned Magistrate was saying was that George stated in court about his giving the appellant Kshs 1000/= in exchange of a stolen phone as a security and the appellant, who elected to give unsworn statement in his defence did not say anything in that allegation.

In our view, the two courts were plainly right that the appellant was shown by George, whose evidence was believed by the two courts to have been in possession of the stolen mobile phone only a few hours after robbery. He gave no explanation whatsoever for that possession. The law is clear that under the circumstances he was proved to be one of the robbers. As the robbers were more than one, it did not matter that Hellen did not prove violence by producing P3 form. Even if that ingredient was ignored, the other ingredient of Hellen and others being attacked and robbed off their properties by more than one person was enough to prove the offence under **section 296(2)** of the Penal Code. We thus cannot accept Mrs. Odoyo’s argument that as P3 form was not produced, the offence as charged was not proved.

The upshot of all the above is that the appeal has no merit. It is dismissed.

Dated and delivered at Kisumu this 23rd day of September, 2010

E.O. O’KUBASU

.....
JUDGE OF APPEAL

E.M. GITHINJI

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.