



No. 2928

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL APPEAL NO. 257 OF 2010

LUKAS KERARIO SANGAI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal of the Original Conviction and Sentence of the Senior Resident Magistrate's Court

at Kehancha Hon. J. Ndururi in Criminal Case No. 267 of 2010 dated on 9th December, 2010)

Lucas Kerario Sangai, the appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the **Penal code** before the Senior Resident Magistrate's Court at Kehancha. It was alleged that on 22nd February, 2010 at Mabera trading centre in Kuria West District, while armed with a panga robbed **Leonard Khamala Wasike**, "**the complainant**" of one mobile phone make Nokia 1100 valued at KShs. 6,500/= and at or immediately before or after the time of such robbery wounded the complainant. The appellant denied the charge and he was duly tried.

The prosecution's case against the appellant was that on the material night at about 8.30p.m, the complainant was walking home within Mabera trading centre when the appellant confronted him whilst armed with a panga, ordered him to hand over his mobile phone and when the complainant hesitated the appellant cut him with the panga. In the process, he surrendered to him the mobile phone. The complainant was attacked near the door to his house, as he was trying to make a call on his said mobile phone. When he snatched the phone, the appellant ordered the complainant to run away. The complainant ran into his landlord's house and informed him of what had happened. The complainant then used his landlord's phone to telephone a police officer at Mabera AP camp to alert them of the incident. According to the complainant, it was not dark at the scene and he was able to recognize the appellant as someone he used to see at the trading centre with a Rasta hairstyle.

The complainant then went to the said AP camp and reported what had happened. As he was making his report, other police officers arrived with the appellant who the complainant immediately identified as the

one who had just robbed him. The appellant was armed with a panga. The police officers also frisked the appellant's pockets and recovered the complainant's mobile phone which he identified by his initials "LW" which he had inscribed below the battery slot in red in the mobile phone. The appellant was then taken to Isebania Police Station where the complainant made a report and recorded a statement. He thereafter went to Isebania Sub-district hospital where he was treated and a P3 form issued. The same was duly filled by **Stephen Kerario Chacha** (PW3), a registered clinical officer. He assessed the degree of injury as harm. **APC Shadrack Mangare** (PW2) of Mabera AP Camp stated that as soon as the complainant made his report at the said camp, he and his colleagues went looking for the appellant whom they found near the entrance to Alliance One Tobacco Co. Ltd. They found him armed with a panga and that it had some blood stains on it. They then searched his clothes and from the left bottom pocket of his jacket, they recovered a mobile phone make Nokia 1100 which the complainant identified as his, as it had his initials inscribed below the battery slot. PW2 stated that he used to see the appellant within Mabera Market, and knew him as "**Rasta**" because he used to wear Rasta hairstyle. He was subsequently charged with the offence.

In his defence the appellant gave unsworn testimony and stated that he was arrested as he was taking chang'aa in a chang'aa drinking den. He therefore denied having committed the offence charged.

Having carefully considered all the evidence on record, the learned magistrate was satisfied that the prosecution had proved its case against the appellant on the offence charged, convicted him and sentenced him to death in accordance with the law.

Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal on the grounds that he was denied representation by an advocate of his choice, that the court relied entirely on the prosecution evidence despite weaknesses therein, the court failed to accord him opportunity to call defence witnesses and that his defence was not given due consideration.

When the appeal came up for plenary hearing before us on 26th July, 2011, the appellant tendered written submissions in support of his appeal, which we have read and carefully considered.

On behalf of the Republic, **Mr. Mutuku**, learned senior principal state counsel opposed the appeal. He submitted that the appellant was recognized by appearance by the complainant as he knew him. Further the appellant was found in possession of the complainant's mobile phone so soon after the robbery, hence the application of the doctrine of recent possession was in order.

This is a first appeal. As such this court is expected to subject the entire evidence tendered before the trial court to fresh and exhaustive evaluation so as to reach its decision as to whether the trial court's conviction of the appellant can be upheld. Of course in doing so, we must not forget the fact that the trial court had the added advantage of hearing and seeing the witnesses as they testified and therefore in a better position to observe their demeanour. See generally **Okeno –vs- Republic (1972) E.A 132**.

It would appear from the judgment of the learned magistrate, that the basis for the conviction of the appellant was that "... ***The accused person was arrested only minutes after the robbery and was found by PW2 armed with a panga. PW2 also recovered for (sic) the accused person's jacket a mobile phone which the complainant identified as his, by the initials "LKW" below the battery slot, against the overwhelming evidence, the accused person merely denied that he committed the offence...***". Actually the initials on the battery were L.W meaning **Leonard Wasike** and not "**LKW**" as indicated by the learned magistrate in his judgment.

Be that as it may, there is no doubt at all that the complainant was robbed of his mobile phone. The offence was committed at about 8.30p.m. According to the complainant, the scene at which he was robbed had no lights. It was in a corridor leading to his house and though "***the corridor usually has security light but there were off that day***". That being the case, how was it possible for the complainant to recognize the appellant and be able to give his description to the Administration Police Officers who proceeded to arrest him thereafter? In the absence of any source of light at the scene of crime, we doubt that the complainant would have been able to identify, leave alone recognize the appellant. The evidence

of recognition and or identification would thus not count really. The learned magistrate was thus right to discount such evidence.

On the evidence on record, the learned magistrate was right in invoking the doctrine of recent possession in convicting the appellant. The offence was committed at 8.30p.m as already stated. The complainant immediately made a report to the Mabera AP camp through a telephone call by his landlord. On the way to the AP camp aforesaid they met with AP officers on patrol. Soon thereafter they came across the appellant whom they arrested on suspicion of being the robber. He was frisked by PW2 and in his pockets, the complainant's mobile phone Nokia 1100 was found. The complainant positively identified the phone as his, by the initials L.W and his payroll No. 0204 which he had inscribed inside the battery slot with a red marker. The appellant did not claim ownership of the same nor explain how he had come by it. Indeed in his cross-examination of prosecution witnesses and in his own defence, he made no reference at all to the mobile phone and or his possession of the same. Under the doctrine of recent possession, the appellant was duty bound to explain how he had come by goods so recently stolen. The appellant was found in possession of recently stolen phone hardly an hour after the commission of the offence. The period of time between the robbery and when the appellant was found in possession thereof is so short that one cannot claim that the phone had passed through several hands before it landed with the appellant. In any event the appellant has not advanced such defence. Neither did he dispute being found in possession. Nor did he claim that the case was a set up. There could not have been any reasons for the police to confront him with trumped up charges. It cannot be that he was found in a chang'aa den. In those circumstances, the doctrine of recent possession applies.

The other complaints raised by the appellant with regard denial of legal representation, failure to inform him in advance of the prosecution evidence and failure to accord him opportunity to call defence witnesses are to our mind a mere afterthought as they are not borne out by the record before us.

In the result, we find that the appellant was convicted on sound evidence. The appeal lacks merit is accordingly dismissed in its entirety.

Judgment dated, signed and delivered at Kisii this 23rd day of September, 2011.

ASIKE-MAKHANDIA
JUDGE

RUTH NEKOYE SITATI
JUDGE