



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 119 OF 2012

MWANZIA MAITHYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

An appeal from the conviction and sentence by the Principal Magistrate at Mwingi (H.M. Nyaberi, PM) in Criminal Case No. 547 of 2010

JUDGEMENT

Mwanzia Maithya, the appellant, was the 3rd Accused in Criminal Case No. 547 at Mwingi Principal Magistrate's Court. He had been charged jointly with Maradaraka Mwendwa Kasyuko as 1st Accused and Muthami Kalima as 2nd Accused with Robbery with violence where it was alleged that on 31st May 2010 at Mwingi Township in Mwingi District within Eastern Province while armed with a crude weapon namely a hammer robbed Catherine Mutethya Wambua of Kshs 10,000, a mobile phone Nokia 2630, one handbag, Equity ATM card and a Sony Flash Disk all valued at Kshs 18,200 the property of Catherine Mutethya Wambua and at the time of such robbery used personal violence to the said Catherine Mutethya Wambua.

The appellant was charged with another count (second count) of handling stolen goods contrary to section 322 (1) and (2) of the Penal Code. It was alleged in the particulars that on the 11th day of June 2010 at Mwingi Town in Mwingi District within Eastern Province otherwise than in the course of stealing dishonestly received or retained one mobile phone make Nokia 2630 knowing or having reason to believe it to be stolen goods.

After a full trial the appellant was convicted on handling stolen property and sentenced to 10 years imprisonment. It is not clear from the lower court record how the charges against the appellant were handled. The record shows that on 9th September 2010 Criminal Case No 610 of 2010 was consolidated with Criminal Case No 547 of 2010. The new consolidated charge had three accused persons including the appellant. That consolidated charge had two counts, count one was on robbery with violence against the three accused persons including the appellant. The plea was taken by the first two accused persons, Madaraka Mwendwa Kasyuko and Muthami Kalima who pleaded not guilty. It is not clear from the record why the appellant was not asked to plead to that charge when his name was included.

The second count was against the appellant and he pleaded not guilty. The judgement of the lower court shows that the 1st and 3rd accused persons were convicted but it does not clarify for what offence. The trial magistrate remarked that **“There is strong presumption that the 3rd accused (Appellant before this court) participated in the robbery with violence but he is lucky to have been charged with a lesser offence of handling.”** I was not able to understand how the trial magistrate came to this conclusion and

fail to address the first charge against the three accused persons. He convicted the appellant to 10 years imprisonment with hard labour. The learned state counsel did not address this issue and so this court will deal with the appeal as presented by the appellant.

The appellant is challenged the following:

- i. Defective charge sheet for failing to state the owner of the goods.
- ii. The sentence of 10 years with hard labour contravenes Article 25 (a) and (b) of the Constitution.
- iii. The complainant did not mention the appellant as one of the attackers.
- iv. The case was not proved beyond reasonable doubt.
- v. The trial magistrate did not consider the appellant's mitigation and probation report.
- vi. The sentence is harsh and excessive.

The appellant made brief oral submissions that the trial court ignored his defence that the phone was left with him and that the appellant showed the investigating officer the person who had given him the phone. He submitted that the court was biased against him for sentencing him to 10 years with hard labour.

The learned state counsel, Mr. Orwa, opposed the appeal. Counsel submitted that the charge sheet complied with section 134 of the Criminal Procedure Code and if there are any defects, they are curable under section 382 of the Criminal Procedure Code; that the appellant knew the charges he was facing and he was not prejudiced.

That the sentence was lawful and the appellant has not demonstrated how his rights were infringed; that the defence that the phone was left to him as security is an afterthought; that courts are not bound by probation reports and the trial court was right in rejecting the report. Counsel urged this court to dismiss the appeal for lack of merit.

The appellant was connected to the robbery that occurred on 31st May 2010 after the phone stolen in the course of that robbery was traced to him. On that day, one Catherine Mutethya Wambua PW1 was attacked by two men as she was about to reach the gate to the home of her parents in Mwingi Town. She did not know the men. In the course of that robbery she lost the mobile phone Nokia 2630. This phone was traced to one Rachael Mwendu Muthui PW5 who testified that she had been given the phone by her aunt. Police Constable Nathan Wasilwa, PW7, told that court that PW5 took them to her aunt's home on 28th June 2010 where the aunt told them that it is her husband, the appellant, who gave her the phone leading to his arrest.

In his defence, the appellant told the court that on 2nd June 2010 he met one Madaraka Kasyuko Mwendwa who was the 1st Accused in Criminal Case No 547 of 2010; that Madaraka borrowed from him Kshs 500; that the appellant did not have that money and instead gave him Kshs 300; that Madaraka gave him a mobile phone Nokia 2630 as security for that money and that they entered into an agreement with the person.

I have considered this case afresh. The trial magistrate did not seem to believe the appellant that he was innocent and that he took the phone as security for the money he had loaned Madaraka Kasyuko who was 1st accused in the lower court and an appellant in Criminal Appeal No10 of 2012.

It appears to me that the only reason the appellant was convicted was because the trial court did not believe his defence. The reasons the trial court gave for doubting that defence is that the appellant was arrested on 29th June 2010 and did not inform the Investigating Officer about the phone until 21st November 2010.

It is trite law that the prosecution bears the burden of proving a criminal case. This burden never shifts unless where the law allows it. Even where the law allows shifting of the burden of proof to an accused person the standard of proof is always lower than that on the prosecution.

On the defective charge, I have considered the same and make a finding that the charge is not defective. It contains adequate information as to inform the appellant of the charges he was facing. He understood the charge and participated in the trial, cross examining witnesses in a manner that indicated that he understood what he was charged with. This ground has no merit.

On contravention of his rights in view of Article 25 (a) of the Constitution, one can make a case out of this. This Article states that despite any other provision in the Constitution, the following right and fundamental freedoms, among others, shall not be limited:

- a. freedom from torture and cruel, inhuman or degrading treatment or punishment.

Section 322 (1) of the Penal Code states as follows:

322. (1) 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.

(2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

The penalty is still in our statutes, complete with hard labour. This is draconian in my view and is inconsistent with the spirit and letter of the Constitution. I however do not think the trial magistrate was biased. I think he was genuinely applying the law as given.

As to whether the case was proved beyond reasonable doubt, I have considered the evidence of the appellant. All through the trial he was consistent. He cross-examined PW6 about loaning Kshs 300 to Madaraka Kasyuko on the strength of the mobile phone in question. He gave similar defence and he wrote a letter to the Investigating Officer, produced in the lower court as Exhibit 5, asking to be produced in court in order to provide more information regarding the person in prison who had given him the phone.

When PW6 was re-examined by the prosecutor he said that received this document from the appellant's wife and had he received it before charging the appellant he would not have done so.

In my view, the appellant has raised doubts as to its culpability in this case. The trial magistrate ought to have given him the benefit of doubt and acquit him.

I have carefully considered this evidence and come to a conclusion that the case against the appellant who was 3rd accused in Criminal Case No 547 of 2010 was not proved beyond reasonable doubts. I will give him the benefit of that doubt and acquit him forthwith. Unless for any lawful cause he is held in custody, I hereby order his immediate release from custody. It is so ordered.

Dated, signed and delivered this 28th November 2013.

S.N.MUTUKU

JUDGE