



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL CASE NO. 50 OF 2012

(Appeal from the judgment of B. M. MARARO Principal Magistrate, Kyuso)

DANIEL KIMANZI..... APPELLANT

-VERSUS -

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant was charged jointly with two others in Criminal Case no. 45 of 2010 at Kyuso Law Courts with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** convicted and sentenced to life imprisonment.

The grounds of appeal against the judgment of the Senior Resident Magistrate raises three main issues:

- a. **That there was no positive identification;**
- b. **That the doctrine of recent possession was not correctly applied;**
- c. **That the court relied on the evidence of an accomplice to convict him;**
- d. **That his defence was not taken into consideration by the trial court.**

The appeal was opposed by the State on whose behalf Mr. Mulama submitted that there was no need of establishing positive identification because the conviction was based on recent possession. It was argued that all the elements of the doctrine of recent possession were proved as set out in the case of **Arum vs. Republic**. The State referred the court to the record of appeal which it stated that the trial court considered the defence of the appellant.

The brief facts of the case are that on the 28th October 2010 at Katithini village, Katooni sub-location of Kyuso district of Kitui county, PW1 the complainant was walking home from Katithini market when he was accosted by four men. He was robbed of his Samsung phone C160, his bamba valued KShs.20/=, a pair of sandals, a pair of shoes and trousers. The 1st accused was arrested the following day in the market selling maize and he gave the names of his accomplices including the appellant. The appellant on arrest was found in possession of the PW1's phone while the pair of shoes was recovered from the house of one Munyoki who is still at large. PW1 was injured during the robbery and was treated at Kyuso District hospital.

PW1 testified that he was not able to identify the appellant and the 2nd accused. He said that he identified the first accused whom he had known for a period of two years. As for the appellant, there was no evidence of identification. When the first accused was arrested he gave the name of the appellant and

the second accused as his accomplices in the robbery. PW3 the village elder was sent by the Assistant Chief to go arrest the suspects. He went with PW4 a member of community policing group and arrested the suspects in different places. PW5 also joined PW3 and PW4 as the suspects were interrogated and as recovery of the exhibits was done. These witnesses told the court that the appellant was found in possession of the complainant's phone which PW1 identified as his property. The appellant was escorted to Kamuwongo Administration police camp where PW6 re-arrested him and handed him over to Kyuso Police station.

The fourth suspect who was found in possession of the shoes fled and is still at large. The appellant was arrested at a place called Matalani four days after the arrest of the 1st and 2nd accused. This was on 2nd November 2010 and was found in possession of PW1's phone.

The court in convicting the appellant relied on the doctrine recent possession of stolen property. The appellant was found with the stolen phone only four (4) days after the incident. Although the court did not explain or give the elements of recent possession, there is no doubt in this judgement that this was the basis of the conviction.

In the case of **Eric Otieno Arum vs. Republic Court of Appeal (2006) eKLR** it was held that the doctrine of the recent possession is applicable where the court is satisfied that the prosecution has proved the following:

- a. **That the property was found with the suspect;**
- b. **That the property was positively identified by the complainant;**
- c. **That the property was stolen from the complainant;**
- d. **That the property was recently stolen from the complainant.**

In this case, the Court of Appeal upheld a conviction on the offence of robbery with violence based on recent possession.

The evidence of PW1 was that he was robbed of his phone on the material evening. He saw the phone after it was recovered from the appellant and identified it in court. There is evidence from PW1, PW2, PW3 PW4 and PW5 that the appellant was found in possession of the phone only four days after the incident.

The prosecution proved the four (4) elements of recent possession. The appellant failed to give any explanation in his defence of how he came into possession of the complainant's phone. The burden of proof had shifted to him and he had the onus to discharge it. The defence of the appellant was a mere denial in that he gave an alibi and denied that he was found in possession of the stolen phone.

It was the appellant's contention that the trial court convicted him relying on the evidence of an accomplice. The evidence on record is that the 1st accused gave names of his accomplices including the appellant. This led to the arrest of the appellant and the 2nd accused. However, this was not the evidence that the court relied on. The appellant on arrest was found in possession of the complainant's phone which was positively identified. We find that the conviction was therefore not based on the evidence of an accomplice.

The appellant claims that his defence was ignored by the court. The magistrate after evaluating the defence of each of the three accused persons weighed it against the prosecution's evidence and reached a conclusion that the prosecution's evidence was "**consistent, corroborated and overwhelming.**" He did not believe the defence of the accused persons. The claim of the appellant that the defence was not considered is in our view is without any basis.

We find that the prosecution's evidence proved all the required ingredients of recent possession which led to a correct finding of guilt on part of the appellant.

The court sentenced the appellant to serve life imprisonment which sentence the state urges this court to review. **Section 296(2)** of the **Penal Code** provides for death sentence upon an accused being found guilty of the offence. We rely on the case of **Joseph Njuguna Mwaura & 2 Others Court of Appeal no.45 of 2008** where a five judge bench held that courts have no discretion on death sentence. The court overruled the judgment case in **Godfrey Mutiso vs. Republic Court of Appeal no. 85 of 2008** had found that such a discretion would have been correctly exercised. The correct position is that death is the only sentence that a court can impose for the offence of robbery with violence contrary to **Section 296(2) Penal Code**. The learned magistrate misdirected himself and erred when he purported to exercise discretion by imposing a sentence of life imprisonment. This was based on the reason that the accused persons were fairly young. There was no legal basis for this finding for there was no evidence of the age of the accused persons.

We hereby quash the sentence of life imprisonment and substitute it with that of death. The appellant shall suffer death in the manner authorized by the law.

The appeal is dismissed and conviction upheld.

Dated and signed this 11th day of September, 2014.

F. N. MUCHEMI
JUDGE

S. N. MUTUKU
JUDGE

Judgment delivered by Justice Stella N. Mutuku this 18th day of **September 2014.**