REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL CASE NO. 5 OF 2014

(Appeal from the judgment of H. M. NYABERI (Mr.) Senior Resident Magistrate, Mwingi)

CHARLES MWINZI MUKUNGU.....APPELLANT

-VERSUS -

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant was convicted by Mwingi Ag. Senior Resident Magistrate for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to suffer death in the manner authorized by the law. Being dissatisfied with the judgment of the learned magistrate, he appealed to this court.

The grounds of appeal may be condensed into four main grounds.

Firstly, the appellant argues that the charge was defective in that it does not contain the requisite ingredients of the offence and that the weapon named in the charge sheet was not supported by the evidence. Secondly, it is contended that there was no positive identification to support the conviction. Thirdly, the appellant argues that the doctrine of recent possession was not correctly applied. Finally, the appellant is of the opinion that the trial magistrate shifted the burden of proof to him which was a misdirection.

Briefly, the facts of the case are that on the 28th June 2011 around 7.30 p.m., the complainant was walking to her home from her place of work. When she was about 60 metres away from her house, she was attacked by a man who had just passed her from behind. She testified that she was hit on the left eye with a metal and immediately fell down unconscious. On regaining consciousness about ten (10) minutes later, the attacker was not at the scene and her bag containing her Nokia Classic 2600 phone, cash 100/=, universal phone charger, Equity Bank ATM card and national identity card was missing. The complainant was bleeding from the left eye. She reported the matter to Mwingi Police station. Her phone was tracked by Mwingi CID officers who traced it in the hands of PW5 who claimed that the phone had been sold to him by the accused. He pointed out the accused person to the police and after investigations, he was charged with the offence.

On the issue of the defective charge, the appellant's submission is three fold: That the charge names the weapon as a knife while PW1 said she was attacked with a metal bar; that the charge sheet leaves out some items which PW1 alleged were robbed of her namely cash Ksh.100/=, identity card and universal charger; that the serial number of the stolen phone on the charge sheet differs with the one given by the

complainant in her evidence.

In her testimony, PW1 told the court that she was attacked using a metal bar while the charge sheet names the weapon used by the attacker as a knife. It should be noted in the course of the investigations, police did not recover the weapon used during the robbery. The prosecution did not explain why the weapon was said to be a knife instead of a metal bar. However, it is our considered opinion that the wrong naming of the weapon in the charge sheet does not render the charge defective based on the fact that being armed with a dangerous weapon is not the only ingredient which is required to prove the offence of robbery. Any other ingredient among the three contained in **Section 296(2)** may form the basis of a conviction. In this case, the magistrate did not dwell on the discrepancy, perhaps because the conviction was based on the doctrine of recent possession. An accused person may be convicted for robbing the complainant of only one item and the offence will be complete under **Section 296(2) Penal Code**. The Section does not make any distinction where an accused is convicted of robbing one or several items. We are also of the opinion that the omission of one or two of the alleged stolen items from the charge sheet does not render the charge defective.

The serial number of the phone on the charge sheet was indicated as 3582350321589 leaving out the last two digits as per the receipt produced by the complainant being 33. An amendment was made in the charge by hand using black ink to include the last two digits. At the time the charge sheet was received in court the serial number of the Nokia phone 2600 read as 358235032158933 which is the correct number as per receipt. We say this because, the record does not show that the charge was ever amended in the course of the trial. PW6 the police officer who recovered the phone gave the correct serial number in his testimony and so did PW1 the complainant. The phone was produced in court and serial number recorded by the court as PW6 testified and from the receipt produced by PW2 the investigating officer. We therefore find no discrepancy in this regard.

The issue of identification in this case does not arise. The complainant was very categorical in her evidence that she did not recognize the person who attacked her. The trial magistrate relied on the doctrine of recent possession in convicting the accused. We find no basis for this ground of lack of positive identification.

In the case of **George Otieno Dida alias Stevo & Another vs. Republic** (2011) eKLR. The appellant was convicted for robbery with violence under **Section 296(2) Penal Code** based on the doctrine of recent possession. It was held that where a person is so convicted, there is no requirement that positive identification should also be proved.

The other issue was whether possession was proved and whether the doctrine was correctly applied. PW1 testified that she was called by a police officer to go to Mwingi police station to identify her phone which had been recovered. She did identify it using receipt no. 0159 dated 31/12/09 from Sparco Communications for KShs.4500/=. PW5 testified that he knew the accused as a hawker in Mwingi town. On 30/06/11, the appellant approached him and told him he wanted to sell his phone to get money to facilitate him to attend his mother's funeral. The appellant showed him the Nokia 2600 phone and offered it for sale at KShs.1000/=. PW5 bought the phone and inserted his sim card for use of the phone. The witness continued using the phone and a week later, he noticed an mpesa transaction on the phone of KShs.17,000/= which made him suspicious. He reported the matter to one P.C . Omollo at Mwingi Police station who told him to continue using the phone for he was not aware of any report of a stolen phone at the station. On 17/07/11, PW5 was sent KShs.50/= through the phone and was arrested shortly after. He was interrogated and later assisted police to arrest the appellant. There was no issue regarding the identity of the appellant since PW5 knew him before the incident. He was found in possession of the phone only two days after it was stolen from PW1. The court believed the evidence of PW5 which portrayed him as a straightforward and honest person. PW5's evidence to the effect that he had reported the matter to one PC Omollo when he noticed a suspicious mpesa transaction exonerates him from any prior knowledge that the phone was stolen. In his defence the appellant did not make any attempt to explain how he came into possession of the phone. The failure to give a reasonable explanation formed the basis of the conviction. The prosecution is required to prove possession to the standards set in the case of **Erick Otieno Arum vs. Republic Court of Appeal at Kisumu Criminal Appeal 2006 eKLR** as

follows:

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;

The judgment of the trial court was very clear that the prosecution had proved possession and that the accused did not offer any explanation as to how he came into possession of the stolen phone which he was selling to PW5 only two days after the incident. We concur that the evidence passes the test laid down in the **Arum** case as to the doctrine of recent possession and that the trial court followed the established principles in convicting the appellant.

In regard to shifting burden of proof to the appellant, the legal position is that once possession has been proved the burden of proof shifts to the accused to explain the possession. It is therefore not correct that the trial court shifted the burden to the accused.

In conclusion, we find no reason to interfere with the judgement of the trial court. It is our finding that this appeal has no merit and it is hereby dismissed. The judgement is hereby confirmed and sentence upheld.

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

F. N. MUCHEMI **S. N. MUTUKU**

JUDGE **JUDGE**

Delivered on the 18th day of September **2014 by Justice S. N. Mutuku.**