



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEALS NOS. 153 & 154 OF 2011(CONSOLIDATED)

EVANS OPONDO OWINO.....1ST APPELLANT

SAMSON JUMA NYAMBOK2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

**[APPEALS FROM ORIGINAL CONVICTION AND SENTENCE FROM KISUMU CHIEF
MAGISTRATE'S COURT BY E. AWINO S.P.M.**

IN CRIMINAL CASE NO.119 OF 2009 -

J U D G M E N T

On 28/11/08 Antipas Nyanjwa (PW1) and his wife Violet Akinyi Odawa (PW6) drove to their home at Nubian Estate in Kisumu town at about 10.30 p.m. PW6 was driving their family car. They reached the gate. PW6 came out to open it. She was followed by PW1. About four people wearing police jungle jackets and saying they were police officers from Winam Camp showed up and engaged them in a conversation. PW1 is a police officer based at CID Headquarters in Nairobi. These people suddenly attacked the couple. PW1 was cut at the back of the head. He fell down. He was cut and beaten into consciousness. PW6 was cut on the head and also beaten. PW1 woke up at Aga Khan Hospital after 3 or 4 days. He was airlifted to Aga Khan University Hospital in Nairobi for further treatment. PW6 was treated at Aga Khan Hospital and discharged on the same day. The attackers robbed PW1 of one pistol S/No.A051848, cash Kshs.328,000/=, two mobile phones make Siemens SL 55 S/No.IMEI 354-060-003-827-577 and Nokia 31108 S/No.IMEI 358-672-019-540-487 and other personal effects. From PW6 they took one Samsung mobile phone S/No.5GHU 750-356-594-017-079-445, cash Kshs.5000/= and a bag containing her personal effects.

The incident was reported to police. Following investigations nine people were arrested and charged with two counts of robbery with violence c/s 296(2) of the Penal Code (count 1 in respect of PW1 and count 2 in respect of PW6). The appellants were among the nine. They were the 5th and 4th accused, respectively. The 2nd appellant was in the alternative charged with handling stolen property c/s 322(2) of the Penal Code whose particulars were that on 22/2/09 at Likoni in Mombasa, otherwise than in the course of stealing dishonestly retained one mobile phone make Samsung S/No.5GHU 750-356-594-017-445 belonging to PW6 knowing or having reasons to believe it to be stolen property.

He was acquitted of the robbery with violence charges but convicted on the alternative charge and sentenced to serve five years in jail. The 1st appellant did not face any alternative charge. He was acquitted of the robbery charges, but was found to have been in possession of PW1's Siemens mobile phone SL 55 S/No.IMEI 354-060-003-852-577 in circumstances that led to the conclusion that he knew it to be stolen property. The trial court invoked section 179(1) of the Criminal Procedure Code and convicted him of handling stolen goods under section 322(2) of the Penal Code although not charged with the offence. He was ordered to serve five years in jail.

The appellants were respectively aggrieved by the conviction and sentence and preferred this appeal which they prosecuted in person. The Director of Public Prosecutions through Mr. Kiprof opposed the appeal. The substance of the complaint by the appellants was that they had been convicted on insufficient evidence. Their case was that it had not been proved beyond doubt that the phone each was found with was the same one robbed from the respective complainants.

The record shows that Corporal Chris Mbuaga (PW11) was among the officers who recovered PW1's Siemens SL 55 mobile phone which was produced in evidence as exhibit 2. They found the phone with one Rodgers Sunday. Sunday was not called to testify. Nonetheless, he claimed the phone belonged to Steve Biko Ouko (6th accused) who was arrested. The 6th accused told the police that he had got the phone from the 1st appellant. That is how the 1st appellant got to be arrested. The 6th accused made sworn defence to say that on 20/7/08 his friend the 1st appellant gave him a phone and a receipt. He used the phone until 2/11/08 when he sold it to his uncle Elly Rambima (PW3) for Kshs.1500/=. Later on Elly brought police who arrested him over a phone. He gave out the phones receipt in the name of the 1st appellant. He was not shown the phone. He led the police to the 1st appellant. The 1st appellant's evidence was that the phone that he gave to the 6th accused had a receipt and was in his name and was not the one produced in court; that he gave out the phone in July 2008 when the robbery in question happened in November 2008.

PW3 testified that there was no special mark on the phone that he bought. The record shows that he testified that if given 10 similar phones he would not be able to pick out the one he had bought. Sunday was the person found with exhibit 2. He, however, did not testify. He was a material witness. In fact, a suspect. Without him, one cannot say that exhibit 2 came from him or that it was the same phone that came from the 6th accused or the appellant. Secondly, the trial court did not inquire into the issue of the receipt that the 6th accused said he gave to the police. The receipt, according to the accused, showed that they had the phone before the robbery in this case. That would mean that the phones were different.

In relation to the 2nd appellant, PW6's evidence was that she lost Samsung SGHU 750-356-594-017-079-445 in the robbery. The evidence of Corporal Harrison Wanjohi (PW12) was that he recovered Samsung 700356594017079445 from the 2nd appellant in Mombasa. When cross-examined, he stated that the phone was 700356594017079415. The sworn evidence of the 2nd appellant was that the phone that he was found with was model 700 S/No.356594017079415 which was different from PW6's model 750 S/No.356594017079445.

Our considered view was that, in relation to the phones in respect of which the appellants were each convicted and sentenced, the trial magistrate did not subject the prosecution and the defence evidence to proper evaluation and analysis. We find that, on the evidence, the prosecution did not prove beyond doubt that the phones recovered belonged to the complainants. The consequence is that the appeal is allowed, the conviction quashed and the sentences set aside. Each appellant shall be immediately set at liberty unless he is otherwise being lawfully held.

Dated, signed and delivered this 10th December, 2013

A. O. MUCHELULE

H. K. CHEMITEI

JUDGE

JUDGE



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