



Case Number:	Criminal Appeal 61 of 2013
Date Delivered:	29 Dec 2015
Case Class:	Criminal
Court:	High Court at Embu
Case Action:	Judgment
Judge:	Florence Nyaguthii Muchemi
Citation:	James Gichovi Ndwiga v Republic [2016] eKLR
Advocates:	Ms. Nandwa for Respondent
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Embu
Docket Number:	-
History Docket Number:	CMCR. Case 2194 of 2010
Case Outcome:	Appeal Dismissed.
History County:	Embu
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 61 OF 2013**

***(An appeal from the Orders of the Senior Principal Magistrate, Embu in CMCR. Case No. 2194 of 2010 dated 14/10/2014)***

JAMES GICHOVI NDWIGA.....APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

**J U D G M E N T**

1. This is an appeal against the conviction and sentence by the Senior Principal Magistrate in criminal case number 2194 of 2010. The appellant was convicted of robbery with violence contrary to Section 296(1) of the Penal Code.

2. This appeal was canvassed by way of written submissions.

3. The appellant submitted that the case was not proved beyond reasonable doubt. The magistrate overlooked the evidence of PW2 who said he had been given the stolen phone by the appellant. The appellant argued that the phone was found in the possession of PW2 and not in his as alleged. No witnesses were called to support the testimony of PW2 despite his allegations that he was given the phone by the appellant in the presence of many people. He further stated that the phone that was stolen was not exhibited in court. The magistrate rejected his defence on weak reasons.

4. The respondent submitted that PW3 was able to identify one of the robbers the 1<sup>st</sup> accused who was her workmate. PW2 also stated that he knew the appellant as he used to frequent his premises where he operated a pool table. The appellant approached him for a loan of KShs.1,000/= and offered an LG phone as security. The appellant was given the soft loan but never went to collect the phone which confirms that he had stolen it and did not want it back. PW3 proved that the phone belonged to the shop where she worked by producing a receipt with the serial number.

5. The respondent further submitted that the appellant wanted to dispose of the stolen phone under the pretence of offering it as security for the loan. The conditions that must be proved before the doctrine of recent possession can be applied were explained in the case of ***ISAAC NGANGA KAHIGA ALIAS PETER NGANGA KAHIGA VS REPUBLIC Criminal appeal No 272 of 2005*** which was cited by the court of appeal in the case of ***DAVID MUGO KINUNGE VS REPUBLIC [2015] eKLR***. This conditions were proved in evidence.

6. It was further stated that PW2 explained how he came into possession of the phone and how he gave it to PW4 to use.

7. According to the respondent, the alibi by the appellant that he was not in Embu at the time of the

robbery was not convincing. The appellant did not call witnesses to support his alibi. The magistrate analyzed the appellants alibi as required and came to the conclusion that it was not true.

8. The respondent further argued that there was no need for identification evidence in respect of the appellant. PW2 recognized the appellant as the person who gave him the stolen phone. He had known the appellant for sometime as his customer at the Pool Table business. In cross-examination, the appellant confirmed that he and PW2 knew each other well. The robbery report was made by PW3 on 5/12/2010 and investigation commenced leading to the arrest of the appellant. According to the respondent, the magistrate was lenient in meting out a sentence of 4 years as the maximum sentence is life imprisonment.

9. The duty of the 1<sup>st</sup> appellate court was explained in the case of **OKENO VRS. REPUBLIC 1972 EA 32** as follows;

*An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."*

10. Section 295 of the Penal Code provides that;

*Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.*

11. Section 296 (1 ) of the Penal code which provides that;

*Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*

12. Section 322 provides:-

*(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*

13. PW1 testified that in the month of January she received a phone from her brother in law. It was an LG phone. In the month of May the same year while at her parents home, she was arrested by police on allegations that the phone was stolen property. She explained to them that the phone was given to her by PW2 her brother in-law. PW2 was also arrested and interrogated on how he had acquired the phone. She stated that she did not know both accused persons. The serial number of the phone was 359034032334480 as shown by the purchase receipt.

14. PW2 testified that in December 2010, he was playing a game of pool at Dallas where he worked as the manager of the pool table game. The appellant used to frequent the premises and PW2 knew him well. The appellant told him that he needed Kshs.1,000/= to solve some financial problem. He offered a mobile phone as security for the soft loan. PW2 accepted the phone as security for the Kshs.800/= that he was able to lend the appellant. He was later arrested together with his sister in-law PW1 and explained to the police that he was given the phone by the appellant. He later pointed out the appellant to the police.

15. PW3 testified that she works in a shop in Embu town. In December 2010 the 1<sup>st</sup> accused in the criminal trial was David Njogu Ndege her co-worker in the shop. They had worked together for a whole year before the incident. On 4/12/2010 they worked together and closed at around 6p.m. and parted ways. PW3 carried a paper bag which contained receipts, books, calculator, an LG phone, her personal phone which was of Samsung make and a Nokia phone for her friend. She was also carrying a flask, dish, cash of Kshs.78,510/= and a cheque. The cash was for the shop daily sales.

16. When she reached near their estate, she was seized from behind and was asked where the money was. Her mouth was covered and she was forced to face down after her mouth was slapped. She could see 4 men in front and a 5<sup>th</sup> one standing near the security lights of their plot. The 5<sup>th</sup> man was about 4-5 metres away and she realized that it was Ndege who was still wearing a white t-shirt and a cream cap that he was wearing during the day. PW3 thought of asking Ndege to assist her but realized that he was armed with a sword just like the other thugs. They took all the items she had including her hand bag and fled.

17. The complainant testified that she stood up and started screaming and ran to her neighbour's house. The watchman of the plot came and accompanied her to the scene where they found her Samsung phone, her friend's Nokia phone, a food flask and a dish. Later her sister came with her purse and informed her that she found it outside the gate of the plot. PW3 said the keys for the shop and her identity card were also recovered. The police were called by her sister who came and accompanied her to the shop. Later she was informed that the lost books had been recovered near a certain hotel. She later learnt that the LG phone had also been recovered.

18. PW3 later showed the police the receipt of the LG phone which was bought at Kshs.6,000/=. The serial number of the phone was 359034032334480. The 1<sup>st</sup> accused (Ndege) knew that when the owner of the shop did not come for the daily sale proceeds, it was PW3 who would carry the money to her home. The receipt books were also later recovered. The cash and the cheque were not recovered. The LG phone had money in the Mpesa account. The security lights were not bulbs or fluorescent. They were

large ones which lighted the scene. The 1<sup>st</sup> accused stood where the lights were and did not talk.

19. PW4 testified that on 4/12/2010 he heard screams and proceeded to that direction. He found a girl screaming and she informed him that she was mugged by 5 men and had been robbed of money books and other items. PW3 accompanied PW4 to the scene. PW4 noticed signs of struggle at the scene which was lighted by electricity light from a nearby building. They Samsung mobile phone was recovered at the scene.

20. PW5 testified that on 4/12/2010 at 7.20 p.m. she was attending a function at Nyeri when she was called by her employee of the wines and spirit shop who informed her that she had been robbed by men who had mugged her. PW3 said that she was able to identify the 1<sup>st</sup> accused who was her work colleague. PW5 called 1<sup>st</sup> accused after the incident but he did not answer her calls. He was later traced and arrested by the police and some items recovered from him.

21. PW6 testified that that on 5/12/2010 at 5.00 p.m. he was instructed by the DCIO to accompany two other officer on a report from PW3 that 1<sup>st</sup> accused had robbed her while walking home. She had been robbed of her Kshs.78,510/= mobile phone, black court, 4 receipt books. The suspects were armed with rungun. Police led by PW6 arrested the appellant at Murinduko and brought him to the CID office for interrogation.

22. PW7 testified that in December 2010 he was in Embu when he was informed of a robbery incident that the late Cpl. Mugambi was investigating. The officer had arrested one suspect who had been charged in court. Cpl. Mugambi had also recovered goods from the dump site in Dallas area including 4 receipt books, counter book, black bag and a lady's purse. An LG GS 108 phone was stolen from the complainant and PW7 obtained its purchase receipt from Cpl. Mugambi.

23. PW3 He tracked the phone using its IME number through Safaricom. On 27/5/2011 he arrested PW1 who was using the phone at the material time. She said she was given the phone by PW2 who was also arrested. He explained that the he was given the phone as security for a loan of KShs.800/= by the appellant. The appellant was later arrested and charged alongside the 1<sup>st</sup> accused David Ndege Njogu. PW7 gave the phone's serial No. as 359034032334480 which matched with the one in the purchase receipt.

24. The appellant testified that he worked at Gerish bar as a cashier. He denied robbing the complainant on 4/12/2010 or selling any stolen phone to anyone. He said he was not in Embu during the incident as he had left on 29/11/2010 for Nairobi where he stayed until January. On 2/6/2011 he went to play pool table game near Kakonze and was arrested while at the premises. The owner of the pool table accompanied them to the police station and stated that the appellant is the one who had given the phone to him.

25. The prosecution witnesses were clear in their testimony that even though the exhibit was recovered from the appellant, he was in recent possession of the LG phone which was allegedly stolen from the complainant. PW1 testified that in the month of January she received a phone from her brother in law PW2. It was an LG phone of serial number of the phone was 359034032334480.

26. PW2 testified that in December 2010, he gave Shs.800/= to the appellant as a soft loan and a mobile phone was given as security. PW2 said he gave the phone to PW1 to use.

27. Both PW1 and PW2 explained how they came to be in possession of the LG phone. It is not in dispute that the appellant was in possession of the phone after it was stolen before handing it over to

PW3.

28. It is clear that the LG phone serial 359034032334480 was stolen from PW3, it was recently recovered and traced to the appellant. The phone was positively identified by tendering a receipt with a serial number matching the one on the phone.

29. The appellant's defence did not rebut the evidence of PW2 that it is him who gave PW2 the LG phone. The appellant did not satisfy the court that PW2 had any reason for framing him. It was confirmed that her sister called the police immediately after the incident. PW6 testified that on 5/12/2010 the DCIO Instructed them to attend to a robbery case that had been reported by PW3.

30. During cross-examination the appellant confirmed that he used to frequent the pool table that was being managed by PW2. This is clear indication that PW2 knew the appellant well.

31. The appellant said that the provisions of Section 169(1) were violated. Even assuming that the appellant meant Section 169(1) of the Criminal Procedure Code which deals with contents of a judgment, I find the judgment compliant. It contains the points of determination, the decision, it is dated and signed by the trial magistrate.

32. The magistrate considered the defence of the appellant as shown by the record. He stated that the appellant was silent on whether he gave PW2 the LG phone and that even though the appellant said that he was with his relatives in Nairobi on 4/12/2010, he did not call evidence to support his alibi. The defence did not raise any doubt in the prosecution's case.

33. In the case of **WANGOMBE VS REPUBLIC** [1976-80] 1 KLR 1683, the Court of Appeal addressed itself to the treatment of defence of alibi by a court trying a case and held that even where the accused does not call witnesses, it is the duty of the court to weigh the evidence adduced in totality and make a finding on the culpability or otherwise of the accused.

34. In the case of **UGANDA VS SEBYALA & OTHERS** [1969] EA 204, the learned Judge quoted a statement by Georges CJ., in Tanzania Criminal Appeal No. 12D 68 of 1969 who observed that:

*The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.*

It is therefore correct to say that the prosecution's case was strong and that the appellant's alibi did not raise doubts that were capable of weakening the prosecution case.

35. The appellant was not arrested until about 5 months after the incident. The phone was given to PW2 by the appellant as security for a loan only one day after the incident. The phone was positively identified by producing a purchase receipt with a serial number which matched the one on the phone. This amounted to recent possession of the stolen property.

36. The trial court correctly found that the appellant was not identified by the complainant at the scene. The conviction was therefore based on recent possession of the phone which evidence was found to be sufficient.

The appellant did not tell the court how he came into possession of the phone which he had give PW2 as security for an advance. The appellant did not pay PW2 the money and neither did he pick the phone.

37. The doctrine of recent possession was explained in the cases of;

***ANTONY KARIUKI KARERI VS REPUBLIC [2004] eKLR*** the court of appeal citing the case of ***ANDREA OBONYO VR [1962] EA 542*** explained the doctrine of recent possession and stated that ***the presumption is that a person in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for their possession.***

38. In the case of ***ALEX BONIFACE MULIUNGI VS REPUBLIC [2014] eKLR*** the court of appeal citing the case of ***ARUM VS REPUBLIC Court of Appeal at Kisumu Criminal Appeal No. 85 of 2005*** explained that the doctrine of recent possession applies where the stolen property was found with the suspect; that the property was positively identified by the complainant; that the property was stolen from the complainant; that the property was recently stolen from the complainant.

39. The trial court convicted the appellant of simple robbery based on the fact that it was not established that assailants of PW3 were armed and that it was not demonstrated that any weapon was used on the complainant. I am in agreement with the finding that it was not established whether the robbers were armed with pangas or rungus.

40. However, there is evidence of use of force on the complainant immediately before she was robbed. She testified that she was attacked by five men including the 1<sup>st</sup> accused one David Ndege Njogu. One of the robbers slapped her and covered her mouth before taking away her property. The evidence supports simple robbery as opposed to robbery with violence contrary to Section 269(2) of the Penal Code.

41. I find that the conviction on the offence of robbery with violence contrary to Section 296(1) of the Penal Code was based on cogent evidence. the sentence of four (4) years imprisonment was lenient but I find no reason to interfere with the discretion of the trial magistrate.

42. The upshot is that this appeal has no merit and it is hereby dismissed.

43. The conviction and sentence are hereby upheld.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF DECEMBER, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Nandwa for respondent**

**Appellant present in person**



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