Case Number:	Criminal Appeal 58 of 2013
Date Delivered:	03 Dec 2013
Case Class:	Criminal
Court:	High Court at Meru
Case Action:	Judgment
Judge:	James Aaron Makau, William Musya Musyoka
Citation:	Piston Kimathi Karungi v Republic [2013] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Gichimu J. W
County:	Meru
Docket Number:	-
History Docket Number:	Criminal Case 203 of 2011
Case Outcome:	Dismissed
History County:	Meru
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 58 OF 2013

PISTON KIMATHI KARUNGI …… APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(MAKAU AND MUSYOKA, JJ)

(FROM THE ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 203 OF 2011 OF THE SENIOR RESIDENT MAGISTRATE'S COURT TIGANIA HON. GICHIMU J. W.AG. PRINCIPAL MAGISTRATE)

JUDGMENT

The appellant **PISTON KIMATHI KARUNGI**, was charged with one count of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on 11th February, 2011 at Amugaa Location, Tigania East District within the Meru county, while armed with a dangerous weapon namely iron rod, robbed George MutabariM'Kailibia of one mobile phone make Itel Serial Number 3573110210-663136 valued at Kshs.2,500/- and immediately before such time of such robbery used actual violence to the said George MutabariM'Kailiba by hitting his left hand using the said iron rod.

After hearing of the case the appellant was convicted and sentenced to suffer death. The appellant being aggrieved by the conviction and sentence preferred this appeal setting out 3 grounds of appeal. That when the appeal came up for hearing the appellant relied on the amended petition of appeal which set the following grounds of appeal:-

1. The learned pundit magistrate erred in both point of law and fact in failing to not the prosecution witness who gave contradictory and conflicting evidence.

2. The learned trial magistrate erred in both point of law and fact by dismissing and disregarding my sworn defence for no cogent reason for the same.

3. The learned trial magistrate erred in both point of law and fact in making that prosecution had proved its case against me.

4. The learned trial magistrate erred in both point of law and fact by failing to resolve major contradiction of the prosecution evidence.

We are first appellate court and as expected of us we have subjected the entire evidence adduced before the lower court to a fresh evaluation and analysis while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance. We are guided by the Court of Appeal case in which sets out the principles that apply on a first appeal. These are ably set out in the case of **ISAAC NG'ANG'A KAHIGA ALIAS PETER NG'NG'A KAHIGA VS REPUBLIC CRIMINAL APPEAL NO. 272**

OF 2007 as follows:-

"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO –V- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantilala M. Ruwala v. Republic [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 the lower Court's findings and conclusions; 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 V. Sundays Post, [1958] EA 424."***

During the hearing of the appeal the appellant, who appeared in person, opted to produce written submissions which he relied on entirely. The state was represented by Mr. Moses Mungai, learned State Counsel.

Mr. Moses Mungai, learned State Counsel strongly opposed the appeal. He urged that the appellant was arrested immediately at the scene of crime and during day time. He urged that there were two witnesses. He relied on doctrine of recent possession and argued that the appellant was found with the complainant's phone. He urged that the phone was positively identified. That after the robbery he submitted violence was meted upon the complainant through using an iron bar. He concluded by submitting that the offence was proved to the required standard.

The appellant in reply submitted that his finger prints ought to have been taken and concluded by stating that he was not found in possession of anything.

The brief facts of the prosecution case is that on 11th February, 2011 during day time complainant in company of his wife were taking their sick child to hospital. That they alighted at Kioro Market and on the way to the hospital Piston Kimathi emerged from the forest armed with an iron bar, hit the complainant's hand holding a mobile phone and it fell down. That the complainant was knocked on his knees.That the appellant picked the phone. The complainant screamed for help and chase followed. The appellant fell down and the complainant held him as he continued screaming for help. That Kaberia (PW 3) and Mutuma joined the complainant and the appellant was overpowered and the mobile recovered from him. The appellant claimed ownership of the phone and on being asked his phone number he was unable to give any. The appellant was then escorted to Mikinduri police station. The phone that was recovered was Itelby Model. The complainant was referred to Miathene Hospital for treatment. He was thereafter issued with P3 form. The complainant identified the phone by the model and produced receipt showing its serial number. The receipt was in the complainant's name. The complainant identified the iron bar used to hit him. The complainant during cross-examination testified that he had not known the appellant before but came to know his name at the police station. He further testified that he was robbed at 11.00 a.m. The complainant testified that he chased the appellant for about 10 metres. The complainant denied having framed the appellant and emphatically stated that he had not known the appellant before. He stated that the appellant had a yellow T-shirt.

PW2 AndrianoMuthui testified that at 11.00 a.m. he was at his shamba when he heard shouting. PW 2 rushed to the scene and found the complainant George Mutabari holding on to Piston Kimathi. He asked them what was happening and each claimed that each other had stolen his mobile phone. That George Kaberia, PW3 interrogated the two and established that Piston was the one who had stolen the complainant's phone. PW1 gave his mobile number and when they rang, the call wentthrough. The appellant told PW2 he could not recall his mobile number. PW 2 stated thatthe phone had been dropped nearby and they heard it ring and picked it. The appellant told them that he could not recall his phone number but the model of the phone was Itel. The recovered phone was handed over to the police. PW2 testified the appellant had used metal rod to attack PW1. He identified the metal before court and stated the person he referred to as Piston was the appellant who was before the trial court. During cross-examination PW2 testified that PW1 identified the thief and that he found PW 1 holding on to the appellant.

PW 3 KaberiaMuruabwa testified that on 11th February, 2011 at 11.00 a.m. he was at his Kiosk when he heard Mutabari shouting that he has lost his phone. PW3 proceeded to the scene and found one Kimathi being held by PW1 and PW2. PW1 and the appellant were each claiming ownership of the phone. PW1 gave the correct phone number and upon calling the number it went through whereas the appellant could not give his phone number. The phone rang a few metres away on being rang. PW3 testified that PW1 had injuries to his index left finger and leg as he had been hit with a metal rod. PW 2 and PW3 arrested the complainant and took him to the police station. PW 3 testified that phone model was Itel. The rod was recovered at the scene. During cross-examination PW 3 testified that nothing was recovered from the appellant but the phone was recovered from the ground where it was abandoned. PW 3 testified that they did not frame the appellant.

PW4 PC James Okoth testified that on 11th February, 2011 at 1.15 p.m. he received complainant who was brought by members of public escorting the appellant. The complainant complained of having been robbed of his mobile phone make Itel and injured. PW4 booked the report and escorted PW1 to the hospital for treatment. He also issued PW1 with P3 form. PW4recovered the phone and iron bar used during the attack. PW 4 gave the mobile phone No. as Serial No. 357311021066 3136. He testified that PW1 positively identified the phone and also presented sale receipt to PW4 which bears the same serial number. PW4 produced exhibit 1 being receipt dated 16th December, 2010 and exhibit 5 being iron rod.

PW 5 Martha Njeri Murumba, Clinical Officer at Miathene District Hospital testified that she examined the complainant, PW1 on 11th February, 2011 and referred him to Meru District Hospital for X-ray which revealed fractures of 3rd digit. That right knee was bruised and was tender. She assessed the degree of injury as harm. PW 5 produced P3 Form as exhibit 2 and treatment notes as exhibit 3.

The appellant gave sworn statement and called no witness. The appellant testifies that on1st February 2011 at 11.00 a.m. he was at his place of work at Meru Town. That he went to Mikinduri and met George Mutabari who called him and arrested him. That he took him to police station alleging he was to pay for his timber. He stated that he called Joseph Mutwiri, and told him he had been arrested. During cross-examination the appellant admitted that he knew the complainant but stated he was not aware that PW1 had been robbed. He said on material date he was a loader in motor vehicle plying Meru/Mikinduri road being motor vehicle KAG 132 K bus christened "Dot com" owned by one Mukuushi. He said on the material date one Mugambi Joseph was the driver. He testified that he would not call him as a witness, however he stated he would call the turnboy Joseph Mutwiri. He testified that the owner of the bus knew he was on duty on the material date. The appellant testified that he did not commit the offence but was framed. The appellant stated that the complainant had employed him in 2010 to split timber for him and that the complainant was demanding applicant to refund his lost timber. He claimed that he told PW4 that PW 1 had framed him because of the timber. He testified that no one

else knew he owed the complainant money and that no one knew he used to split timber for the complainant. He claimed the complainant had asked him to pay him Kshs.10,000/- for the lost timber. The appellant closed his defence without calling his defence witness claiming he had been released from the prison after he had been acquitted.

PW1 testified that when he was attacked by his assailant it was 11.00 a.m. and after the attack, the assailant picked PW1's mobile phone which fell down after the attacker hit his hand which was holding his phone with an iron rod. The attacker started running away as PW1 gave chase screaming for help. PW2 and PW 3 came to the PW1's aid and found PW1 and the assailant struggling. On being asked why they were struggling each claimed the other had stolen his phone. PW 3 asked each to give his phone number. PW1 was able but the assailant was unable. That is when PW 3 and PW 2 called the number given by PW1. The phone rang and they found it next to where PW1 and the assailant were struggling. PW2 and PW3 were told by PW1 he had been assaulted by the assailant and inflicted some injuries. They noted the injuries. They arrested and escorted him to Mikinduri police station. PW4 received the appellant, mobile phone Itel by make, iron rod and issued PW1 with P3 Form to attend hospital.

PW2 and PW3 were convinced that the appellant was found with complainant's mobile phone barely a few minutes after he had stolen the same from PW1. The appellant even claimed ownership of the mobile phone but he was unable to identify the phone as his own before PW2 and PW3. We find from the evidence of PW1, PW 2 and PW3 that the appellant was in this case found with the stolen mobile phone after robbery. The fact that it was lying next to the appellant and not in his pockets does not mean he was not in possession as he had picked it from the complainant and on being chased and in the process of struggling it must have fallen. The appellant when PW2 and PW3 came still claimed the phone was his and as such we find that he did not deny beingin its possession and continued claiming that the same was his own property and by such he was in possession of the stolen property.

The appellant did not produce any receipt or number of his phone when asked to do so by PW 2 and PW 3. He did not give any mobilenumber to PW4. PW4 stated that PW1 identified his phone asItel and gave its serial number as No.3573110210663136 and a receipt which bore the same serial number and in the complainant's name.

We find that the appellant failed to give satisfactory explanation on how he came intothe possession of the said mobile phone.

In the case of **SAMSON ETYANG & 2 OTHERS -V- REPUBLIC CRIMINALCASE NO. 1249 OF 2012,** a two Judge Bench quoted with approval the case of **MALINGU -V- REPUBLIC (1989) KLR 225**where the court applied the doctrine of recent possession in which court held:-

"**The doctrine of recent possession is one of fact and it arises under Section 119 of the Evidence Act (Cap 80).**

With respect to the offence of theft or handling, recent possession raises a presumption of fact that the one in possession is either the thief or guilty receiver.

By application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. The accused can only be asked to explain his possession after the prosecution has proved certain basic facts".

"The trial court has the duty to decide whether from the facts and the circumstances of

the particular case under consideration the accused person either stole the item or was guilty or innocent receiver. By the application of the doctrine, the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession of the time complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly, that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of item from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver".

Further to the above in the case of **WANDUE -V- REPUBLIC – 2003** KLR 26 Court of Appeal stated:-

"……**the doctrine of recent possession of stolen property to be invoked and a conviction founded, the prosecution must prove that the appellant had physical possession or control of the stolen items. We entirely agree with him. See Charles Lamambavs Republic (Criminal Appeal No. 8 of 1984) where this court held that: "The doctrine of possession of recently stolen property could not apply until possession by the appellant was satisfactorily proved".**

In the case of **MWACHANGE & 2 OTHERS -V- REPUBLIC (2002) KLR 341,** the High Court stated as follows:-

"**Where an accused is found in recent possession of goods alleged to have been stolen, he is under an obligation to explain how he came into such possession and that such possession is innocent. Failure to do so lead to the inescapable conclusion that he is a thief or robber".**

Having carefully considered the evidence on record, we are satisfied that the evidence which was adduced by prosecution witnesses in the trial court prove the charge of Robbery with Violence beyond reasonable doubt.

We find that the recovered property which had been stolen a few minutes was satisfactorily proved to have been in appellant's possession. That at the material time of robbery the appellant was armed with iron rod and inflicted injuries to the complainant which PW 5 termed as harm in the P3 form.

The appellant gave defence of alibi and claimed he was framed by PW1 due having gone with PW1's money after splitting his timber. We have carefully considered the evidence of PW1 who stated that he did not know the appellant before that incident. We have considered the appellant's evidence in which he stated that no one knew of the timber issue or that he was splitting timber for the complainant. We have also considered the fact that this issue of being framed because of timber was not raised at any time during cross-examination of the prosecution witnesses and that the issue of the appellant being not at the scene of the robbery was not raised either through cross-examination.

We have considered the evidence of PW1 and find that there was no reason for him to frame the appellant who he had not known before. We have further considered the evidence of PW1, PW2 and PW3 who placed the appellant at the scene of crime and find that their evidence dislodges that of the

appellant who was arrested 10 metresfrom the scene of crime and within a few seconds. We find that the appellant defence as an afterthought and the trial court was correct in stating that his defence was not convincing and was a mere denial and an afterthought.

We have no doubt that the appellant is the person who robbed the complainant during day time. We are of the considered opinion that the conviction is safe and well deserved.

The upshot is that we hereby dismiss the appeal since the same has no merits at all. We hereby uphold the conviction and confirm the sentence that was imposed by the learned trial magistrate.

R.O.A

DATED, SIGNED AND DELIVERED AT MERU THIS 3rdDAY OF DECEMBER, 2013.

J. A. MAKAU **W. MUSYOKA**

JUDGE **JUDGE**

Delivered in open court in presence of

Appellant in person – present

Mr.Moses Mungai for State Counsel

J. A. MAKAU **W. MUSYOKA**

JUDGE **JUDGE**

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