



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 52 OF 2010

DAVID MUCHIRI GAKUYA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Karatina Principal Magistrates' Court Criminal Case No.65 of 2008 (Hon. L. Mbugua, Acting Principal Magistrate) on 25.02.2010)

JUDGMENT

This appeal has had a somewhat chequered past. It was filed way back in 2010 before it was heard and dismissed by this Honourable Court in April 2014. The appellant preferred an appeal to the Court of Appeal, sitting at Nyeri, in Criminal Appeal No. 67 of 2014. The appeal was dismissed, more particularly on 17 March 2015. Subsequently, he came back to this court where he lodged a petition dated 18 March 2016 seeking a fresh trial under article 50(6) of the Constitution. For reasons I gave in my judgment delivered on 13 January 2017, I dismissed the petition. Not to be discouraged, the appellant returned to the Court of Appeal, in Criminal Application No. 2 of 2017 (Nyeri) seeking to set aside its earlier judgment dismissing his appeal. By a ruling delivered by that court on 11 May 2018, the application was allowed. The Court declared its earlier judgment a nullity and remitted the appeal to this court for the hearing of the appeal afresh primarily because the bench that had previously determined it was improperly constituted. It is against this background that I have had to hear and determine the appeal again.

The appellant's journey through the courts started on sometimes in February, 2008 when he was charged in the magistrates' court with the offence of robbery with violence contrary to section 296(2) of the Penal Code, cap. 63, Laws of Kenya. The particulars were that on the 30th day of January 2008 at Gatondo village in Nyeri district within central province, jointly with another not before court, while armed with dangerous weapons namely, metallic bars, robbed Francis Mathenge Wamae of a mobile phone make Nokia 3310 Serial Number 359746000 385042 valued at Kshs. 8500/= and Kshs. 300/= cash all totalling Kshs. 8800/= and immediately before or immediately after the time of such a robbery, used actual violence to the said Francis Mathenge Wamae.

He pleaded not guilty to the charge. He was, however, convicted and sentenced to death as by law provided.

As noted, the appellant filed the present appeal, against both the conviction and sentence, in 2010. He initially acted in person but he subsequently obtained services of counsel who filed a supplementary petition of appeal dated 10th December 2018, on his behalf. The supplementary petition, more or less, captures the grounds raised by the appellant himself in his initial petition but in a more comprehensible legal language. These grounds have been listed as follows:

1. The learned acting principal magistrate having found that the complainant was unable to identify his assailant, misdirected herself in holding that there was evidence, circumstantial or otherwise, to convict the appellant.
2. The learned acting principal magistrate erred in law and misdirected herself on the burden of proof in placing the burden on appellant to rebut the evidence of PW2 and PW3.
3. The decision and findings of the learned acting principal magistrate were against the weight of the evidence.
4. The learned acting principal magistrate's conviction is a nullity in law in that she failed to consider and totally ignored the appellant's defence.
5. The learned acting principal magistrate's conviction of the appellant is a nullity as it violates the mandatory provisions of section 169 of the Criminal Procedure Code.

He also challenged his sentence on the ground death is not the only penalty that could be meted out on conviction for the offence of robbery

with violence, apparently invoking the spirit behind the Supreme Court decision in **Petition No. 15 of 2015, Francis Karioko Muruatetu & Another versus Republic (2017) eKLR** where it was held, inter alia, that a trial court cannot be deprived of the discretion to mete out what in its view is a proper sentence depending on the circumstances of each particular case.

In appeals of this nature, it is always necessary for this honourable court, being the first appellate court, to consider the evidence afresh and come to its own factual conclusions, independent of those conclusions reached by the trial court; in doing so, the court has, however, to bear in mind that only the trial court had the advantage of seeing and hearing the witnesses. This was so held in **Okeno versus Republic (1972) EA32** where the Court of Appeal stated as follows: -

An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 magistrates' findings can 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 page 36).

The complainant (PW1) testified that on 30 January 2008 at about 8:30 P.M., he met two of his workers at Gatondo shopping centre to plan for the following day's work. He named them as Mithamo and Weru. They all sat at the same table at Starehe pub where there were many other revellers who were watching the Africa Cup of Nations tournament.

One of these revellers was the appellant who, according to the complainant's evidence, was seated at the opposite table, drinking beer. He was a man he had known for at least for two years prior to the robbery incident. He testified that he used to see him in the course of his work at Ragati Tea Factory where he, the complainant, worked as a tea clerk.

The complainant left the pub alone, at about 10: P.M. He walked to his home along a road that was lit with electricity although some of its sections were dark. It was while he was on one of these dark sections that he was attacked. His assailant hit him on his left cheek with what he described as 'something sharp'. He attempted to escape but, unfortunately, he tripped and fell. He was hit again, this time round, with what he described as 'something like a metal'. The attacker stepped on his chest, frisked his pockets and robbed him of his phone, a Nokia 3310 and Kshs. 300/=. As his assailant left, he heard him say "that was Kulman and I am through with him." It was his evidence that 'Kulman' was his nickname.

He remained on the ground for close to half an hour. When he finally rose, he went back to starehe pub where, after he narrated his ordeal, the revellers he found there sought to know who might have left the pub immediately ahead of the complainant.

They concluded that Daniel Muchiri was the person who left immediately before the complainant himself left and so they resolved to go to his home, suspecting him to have been the person who attacked the complainant.

They found Daniel at his house sleeping. When they questioned him on whether he was the person who attacked the complainant, he denied having been involved in the robbery.

Amongst that group of people who went to Daniel's house was one Miano (PW2). He told the rest of the people that he knew something about the robbery incident but he would only reveal it in the presence of the assistant chief.

With this information, they sought for the assistant chief and when they got him and was informed of what Miano knew, he directed that they go to the appellant's place. By then it was around 1:00 A.M. in the morning.

They did not find the appellant at his house. Miano led them to another house where the appellant was thought to be but again he was not there.

Finally, they found him at Mwangi's (PW3's) house together with Mwangi himself. As the complainant waited outside Mwangi's house, the assistant chief emerged from the house with a phone; he showed him the phone and asked him whether that was the phone that he had been robbed of.

The complainant positively identified it as his. At that point, the appellant was then taken to the Ihwagi police station where he was rearrested and booked in. The complainant produced a receipt showing that he purchased the phone on 15 September 2006 for Kshs. 7000/=; the same receipt showed that it was serialised as number 35974 60003 85042.

During cross examination, the complainant testified that he recognised the voice of the person who said "that was Kulman and I am through with him" as that of appellant; however, he admitted this information was not given to the police when he recorded his statement.

Bernard Miano Wangui (PW2), testified that on 30 January 2008, at about 11:00 P.M., he was in the same bar as the appellant and one other person who, incidentally, was also called Muchiri. They were drinking together when the appellant left and came back after about half an hour. He and the appellant then left immediately to go home. While on their way, the appellant showed him a nokia phone. He asked him to switch it on but he could not because it had no battery. The appellant gave him the battery but also asked him to remove and destroy the sim card. He declined and instead dropped the sim card on the ground when the appellant gave it to him. The appellant told him that he had snatched the phone from the complainant.

Miano testified further that he not only knew the complainant but he had also seen him that particular evening in the same bar where he had been drinking with the appellant. He was also aware that the complainant had left earlier.

Although each of them went to their respective homes, he decided to go back to Starehe bar and inform everybody what the appellant had done. He found the complainant, among other people, in bar. He noticed he was bleeding from the head and when he enquired what had happened, the complainant told him that someone had attacked him and also robbed him of his phone. He told the complainant that he had seen the appellant with the same phone which the complainant claimed to be his.

The complainant suggested that they proceed to the assistant chief's place, apparently, to report the robbery. The two of them went to the assistant chief and reported the matter.

They then left with the assistant chief and went to the appellant's home. They did not find him there and so Miano led them to the Mwangi's (PW3's) house. There they found the appellant together with Mwangi whom he described as the appellant's friend.

It was his evidence that when he was asked to remove the complainant's phone, he retrieved it from the ceiling of Mwangi's house. It is then that he was arrested and taken to the police station.

On cross examination, Miano testified that he handed over the complainant's sim card to the assistant chief the following day. It was his evidence that he retrieved it from where he had dropped it when the appellant gave it to him. This sim card was, however, not exhibited in court.

Robert Mwangi Mundi's(PW3) testimony was to the effect that on 30 or 31 January 2008 at around 2. 00 A.M., the appellant went to his house and told him that he had a phone he was selling. He told him that he was not interested in buying it. The appellant is alleged to have then sought to sleep at his place, a request that Mwangi declined. Just then, the assistant chief knocked at his door and asked if the appellant was in house. The assistant chief and the complainant entered the house. He told the complainant that the appellant had hidden the phone on the ceiling. The appellant was then immediately arrested.

The fourth prosecution witness was Daniel Muchiri Karoki (PW4) who testified that on 30 or 31 January, 2008 at around 2:00 A.M., he was sleeping in his house when he was awakened by the complainant and one Peter Muchangi. He came out of his house and noticed that the complainant was bleeding on the head and face. They told him that the complainant had been robbed of his phone and money. He told them that they go to the assistant chief. They called the assistant chief who in turn asked them to look for Muchiri, the appellant. The appellant's house was, however, locked and so they decided to look for him from his friend's place. They found him there and asked him where the complainant's phone was. He denied that he had it. While Mwangi (PW3), the alleged appellant's friend, was outside the house, Muchangi came in and told them that Mwangi had said that the phone was on the ceiling. It is from there that the appellant retrieved it.

Joseph Muhoro Mathenge (PW5) testified that he was the assistant chief of Thिंगingi sub location. On 31 January 2008 at about 12.30 A.M., he was at his home, sleeping, when five people who included the complainant called on him. He noticed the complainant had a bloody face; he told the assistant chief that he had been assaulted.

David Miano (PW2) told him that the appellant had taken the complainant's phone and they were to sell it at Karatina the following day. They requested him to assist them to trace the appellant. Even then, Miano led them to Mwangi's house where they found him and the appellant sleeping. He knocked at the door and Mwangi responded and opened it. When he enquired from him whether the appellant was in his house, he told him that indeed the appellant was there and he was sleeping. He entered the house and found the appellant sleeping on the bed. He told him the appellant that he was looking for the complainant's phone. The appellant denied having it. Miano called Mwangi outside the house and told him and the rest of the people who were outside where the phone was. One of them entered the house and retrieved the phone from the ceiling just above the bed where they were sleeping. He named the person who retrieved the phone as one Peter Gichora. The assistant chief sought to know from the complainant if that was the phone the that he had lost; the complainant confirmed that indeed it was. They then all left for the police station; he named those he went to the police station with as the complainant, the appellant, Daniel Muchiri Karoki, Mathenge Karani and Peter Muchangi Githara. It was the assistant chief's evidence that he lived in the same neighbourhood as Mwangi, their homes separated by about three kilometres.

Maina Ndirangu (PW6), a clinical officer at Karatina District Hospital, filled P3 form in respect of the complainant. He visited the hospital on 31st January 2008 with a history of having been attacked by someone known to him. He had sustained bruises on the face and on the mouth. He had also sustained fractures on the third and fourth fingers. The probable weapon used was described as 'blunt' and the degree of injury was described as 'grievous harm'.

The last prosecution witness for the state was police constable Peterson Muriithi(PW7) who testified that on the 31st day of January 2008 at 5:10 A.M., he was at Ihwagi police post where was then attached when the area assistant chief (PW5) woke him up; he was in the company of about ten other people. They told him that they had brought someone suspected to have assaulted the complainant. They also handed him a phone that had been recovered from the suspect. The suspect turned out to be the appellant who was rearrested and later charged with offence of which he was convicted.

In his defence the appellant opted to make an unsworn statement to the effect that on 30 January, 2008, he was at Joakim Stakwa's (DW 2's) bar waiting on customers from 11: A.M. till 11:00 PM. Stakwa himself was away and so the appellant was standing in for him. After he closed, he met Stakwa at Mwangi's house. He described Mwangi as Stakwa's cousin's employee and it was Stakwa's suggestion that they meet there. He handed him the proceeds of sale for the day. Since it was late, Stakwa also suggested that he spends the night at Mwangi's house.

At 2.00 A.M., in the morning, someone knocked on the door. When Mwangi went out to check who it was, he heard someone identify himself as the assistant chief and that he wanted a phone sold to Mwangi by Miano(PW2). Mwangi told him where to get the phone. The assistant chief asked him whether he knew anything about the phone. He resolved that the appellant together with Mwangi and Miano be taken to the police station. At the police station he was separated from Mwangi and Miano and put in a solitary cell. He was subsequently charged in court.

Stakwa(DW2), testified that he knew the appellant and that he worked for him at his bar on 31 January 2008. On the same date at about 11:00 P.M., he met the appellant at Mwangi's house. He told him to sleep there since it was late. He learnt of the appellant's arrest the following day when he went to collect milk from Mwangi's home. He was later arrested himself and even met the appellant in prison.

During cross-examination, he testified that in fact he met the appellant at his house and it is from there that he suggested to him to sleep at Mwangi's house.

And that is as far as the evidence from the prosecution and the appellant went.

Looking at the learned magistrate's judgment, it is apparent that her decision was largely influenced by circumstantial evidence which, in her respectable view, 'overwhelmingly' incriminated the accused and the evidence of Miano(PW2) which she described as direct evidence. After dismissing the evidence of identification of the appellant, the learned magistrate summed her appreciation of both the circumstantial and direct evidence as follows:

“However, there is circumstantial evidence that greatly and overwhelmingly does incriminate accused person.

Firstly it is evident that prior to the attack, accused had been in that bar. He had been with PW1 in the same bar and he had been drinking with PW2. And just after PW 1 had left PW 2 has averred that the accused had also left leaving PW2 to take care of accused's paper bag and beer. It means that the accused was in the vicinity of the incident. There is again the direct evidence of PW2 who avers that as they later walked home that night, accused showed him a Nokia phone that he (accused) had snatched from Mathenge (PW1). Accused has not categorically denied that piece of evidence of PW2. And this is the same phone PW2 identified in court as MFI P2 and which PW1 identified as his. Further, after realising that the accused had done something bad, PW2 had not let the matter just rest there. He had decided to go back to the bar to alert the people he would find there. And it is then that he found PW1 already injured and bleeding on the head. It is then that PW2 decided to assist in tracing accused and accused was eventually found in the house of PW3 one Mwangi”.

Now, as far as circumstantial evidence is concerned, it is trite that an accused may not only be safely convicted on such evidence but also that this type of evidence has been hailed as the best evidence. It was so held in **Tumuheire versus Uganda (1967) E.A at pages 328 and 331** that:

“It should be observed that there is nothing derogatory in referring to evidence against an accused as circumstantial. Indeed, circumstantial evidence in a criminal case is often the best evidence in establishing the commission of a crime by a person as in the present case.”

As to how this evidence should be examined, the court said:

“As we said by Lord Normand in Teper versus Republic (1952) A.C. at page 489:

‘Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another...It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference’

In R versus Taylor, Weaver and Donovan (1928), 21 Cr. App. Reports at page 20) the principle as regards the application of circumstantial evidence was enunciated in these words:

‘Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.’

Thus, it is not in doubt that an accused may be safely convicted on circumstantial evidence alone as long as it is wholly inconsistent with his innocence or, put differently, it is consistent with his guilt.

Where, however, the circumstances proved are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. (See **Sarkar on Evidence,12th Edition, Page 34**).

But in order to justify an inference of guilt the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Secondly, the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred. These conditions may be summarised as follows:

- (a) The circumstances from which the conclusion is drawn should be fully established;
- (b) All the facts should be consistent with the hypothesis;
- (c) The circumstances should be of a conclusive nature and tendency;
- (d) The circumstances should exclude every hypothesis but one proposed to be proved. (see **Sarkar** (supra), at page 34)

Besides **Tumuheire versus Uganda (supra)** this law has been applied in several other cases, closer home, where this type of evidence has had to be considered; they include **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715**.

In **Wills on Circumstantial Evidence (6th Edition, page 311)**, the conditions for conviction based on circumstantial evidence were summarised as:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.

This passage was quoted with approval and applied in **Republic versus Kipkering Arap Koske & Another (supra)**.

When I consider the evidence on record from this legal perspective, I am unable to agree with the learned magistrate that the circumstantial evidence, either by itself, or in combination with what the learned magistrate held to be direct evidence, was sufficient enough to sustain a safe conviction.

It is true, as the learned magistrate appreciated, that the appellant had been drinking in Starehe pub, the same bar where the complainant had been the evening preceding his attack; in the learned magistrate's words, the appellant was 'in the vicinity of the attack'.

However, the appellant could not possibly be the only one who would have been tied to the robbery incident because of being in the 'vicinity of the attack' or for having left the bar immediately before the complainant himself left.

Going by the evidence of the complainant himself, when he returned to the pub after the attack the revellers deliberated on who might left soon before the complainant and came to the conclusion that it was one Daniel Muchiri (PW4). And they were so sure that Muchiri (PW4) left immediately before the complainant that they resolved to pursue him to his home; they could only have been after Muchiri because, based on their own hypothesis, he must have been the person who attacked and robbed the complainant. For this reason, it was not tenable that the appellant could be tied to the robbery incident on the basis that he left earlier than the complainant when the complainant's evidence in this respect pointed to somebody else.

I note that the learned magistrate did not consider this aspect of the complainant's evidence and she probably would have come to a different conclusion had she taken it into account.

As much as she relied on the evidence of Miano (PW2) in concluding that the appellant left earlier than the complainant and that, in itself, linked the appellant to the robbery, it is worth noting that Miano himself was in the bar when the revellers decided to pursue Muchiri (PW4). It is clear from his own testimony that after he parted ways with the appellant, he decided to return to the bar to tell whoever he found there what the appellant had done. Among the people he found in the bar was the complainant from whom he sought to know why he was bleeding. When the complainant told him that he was a victim of violent robbery and that he had been robbed of his phone, Miano told him that he had seen the appellant with the phone.

Now, if Miano's evidence was true, why did the complainant together with the rest of the people, including Miano, who accompanied him, go after Daniel Muchiri (PW4) when it was obvious, at least to the complainant and Miano, that the culprit was the appellant and not Daniel Muchiri? Was it rational to make a futile trip to Daniel Muchiri's house suspecting him to have attacked the complainant when it was clear, from the very onset, that the perpetrator of the crime was in fact the appellant? An interrogation of these questions would create reasonable doubt as whether Miano (PW2) was telling the truth and, by extension, whether, based on his evidence, the appellant could be said to be the person who attacked the complainant.

The other angle of circumstantial evidence that the learned magistrate did not consider and which ought to have been vital in her determination is the complainant's evidence that he recognised the voice that uttered the words "that is Kulman and I am through with him" as that of the appellant. She disregarded this evidence as being insufficient for positive identification of the appellant; this is what she said:

Although PW 1 has stated that he recognised the voice of the accused, he only said this during cross-examination and not in his evidence in chief. The logical conclusion to make is that PW1 was not able to identify his assailants at the place of attack.

An aspect of this evidence which the learned magistrate ought to have also considered is that if the complainant was conscious that he had been attacked by the appellant, he ought to have disclosed this information to those people he found in the bar rather than send them on a wild goose chase, so to speak, pursuing some other person suspected to have attacked him only because he left the bar earlier than the complainant. When considered alongside the rest of the evidence on record failure to disclose this information should have created in the learned magistrate's mind some doubt whether the appellant was the person who perpetrated the crime in question.

One other aspect of the prosecution evidence which, in the learned magistrate's respectable view, linked the appellant to the robbery was the recovery, in Mwangi's (PW3's) house, of the phone alleged to belong to the complainant. She effectively held that the appellant was found in possession of the phone and therefore he must have been involved in the robbery. Although it was not so expressly stated in her judgment, the idea that the appellant was culpable for the offence of robbery with violence because he was found in possession of the complainant's property stolen in the course of the robbery was certainly based on the doctrine of recent possession. This doctrine was explained by Trevelyan and Hancox JJ., in **Chaama Hassan Hasa versus Republic (1976) KLR** where they stated as follows:

"Where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (though not

by way of retaining).” (See page 10.)

As to the centrality of the fact of ‘possession’ the court noted as follows:

“Whether the accused should or should not be convicted, depends not simply on his possession, but on all the facts since such possession is but one aspect of the circumstantial evidence the sum total of which must be unexplainable upon any reasonable hypothesis other than that of guilt of the person charged, before a conviction can be recorded.”

Thus, although ‘possession’ should be considered in the context of the rest of the evidence, it is still a necessary element for this doctrine to apply; in short, the doctrine would not apply if the act of possession is not in the equation.

Turning back to the appellant’s case, the material question would be whether there was sufficient evidence to prove possession on the part of the appellant. In answer to this question, the evidence of the complainant (PW1), Miano (PW2), Mwangi (PW3), Muchiri (PW4) and the assistant chief (PW5) is critical.

To begin with, all these witnesses were in agreement that the phone was found in Mwangi’s house, at its ceiling, to be precise. According to the complainant’s evidence, he remained outside while the assistant chief and others entered Mwangi’s house. It was while he was there that the assistant chief emerged from the house with a phone. To quote him he said:

“I had been seated outside due to pain so I was not amongst the people who entered that house. Sub chief then emerged with the phone and asked me if the phone is mine and I said it was mine.”

In answer to questions put to him during cross-examination, Miano’s (PW2’s) version on the recovery of this phone was this:

“I did enter the house where you were. In that house there were two people that is you and one Mwangi. It is you who retrieved the phone from the ceiling.”

On his part, Mwangi (PW3) the owner of the house testified as follows:

“I told Mathenge that Muchiri had put the phone on the ceiling at the card boards. It is Muchiri who had put it there when I declined to buy it”.

Daniel Muchiri Karoki (PW4), on the other hand, stated in his testimony as follows:

“We then decided to go look for him at his friend’s place and so we went to Robert Mwangi where we found the accused sleeping. We asked him about the phone and he denied. Mwangi had gone outside but even as we told him to give us the phone, Muchangi came in and said that Mwangi said phone was in the ceiling so accused retrieved it.”

The assistant chief’s (PW5’s) evidence with respect to this aspect of the prosecution case was as follows:

“Miano lead us to a place where we found Gakuya in the house of one Mwangi Weru and they were sleeping as it was at night. I had knocked the door Mwangi opened and I told him as to whether David Gakuya Muchiri was there and he said he was sleeping. So I entered and found Muchiri sleeping in the bed. I told him as to whom I was. I told him we were looking for the phone and Francis Mathenge. Gakuya denied having the phone. Then the boy he was with called Mwangi Weru stopped (sic) outside and told the people outside where the phone was. So one of the men entered and retrieved the phone from the ceiling just on top of the bed and I was just standing there beside the bed so I could see. I asked Mathenge if the phone was the one and he said it was”.

Upon cross-examination, he said:

“It was Mwangi who told the people outside as to where the phone was so Peter Gichora retrieved the phone from the ceiling.”

A closer look at the testimony of these witnesses reveals material inconsistencies; starting with the assistant chief’s testimony, it is not clear why, after he entered Mwangi’s house, Mwangi himself would opt to leave the assistant chief in the house and inform those people who were outside where the phone was yet it was the assistant chief who wanted the phone. If the assistant chief was in his house for the sole purpose of looking for the phone, was it not logical that he was the right person to be addressed on where the phone was?

Secondly, according to Miano (PW2), it was the appellant who retrieved the phone from the ceiling. Similar evidence was given by Muchiri(PW4) who testified that the appellant removed the phone from the ceiling after one Muchangi entered the house. But according to the assistant chief, one Peter Gichora removed the phone from the ceiling.

Besides the obvious conflict of the testimony of Miano and that of the assistant chief, neither Muchangi nor Peter Gichora testified to shed light on how they came to learn that the phone was on the ceiling and whether any of them removed it from there.

For present purposes, all I can say is that the circumstances in which the complainant’s phone was allegedly recovered raised several possibilities. It may as well be true that indeed the appellant had come to Mwangi’s house with the phone but it is also possible that, Mwangi,

the owner of the house, may have been the one in possession of the phone. There was also the possibility that, either Muchangi or Gichora may have planted the phone on Mwangi and the appellant although the appellant ended up being the one to bear the burden of being charged.

While it is the discretion of the state to call whoever it wishes as its witnesses, failure to call Muchangi or Gichora to testify how they recovered the phone in issue raised, in my humble view, reasonable doubt as to whether the phone was recovered in the alleged circumstances.

As the authorities I have cited demonstrate, in order to justify the inference of guilt on the part of an accused, in a case where the court has to rely on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. And the burden of proving facts which justify the drawing of such an inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution.

In my humble view, what has been presented as the inculpatory facts cannot be said with any sense of conviction that they are incompatible with the innocence of the appellant or that they cannot be explained upon any other reasonable hypothesis than the appellant's guilt. Instead, all I see standing out prominently, are co-existing circumstances which weakened or destroyed the inference of guilt on the part of the appellant.

I must not be mistaken to be saying that the complainant was not violently robbed; to the extent that he was assaulted and lost his property to the assailant in the process, this offence was proved to the required standard. What is in doubt is whether the appellant is the person who perpetrated this crime.

My reading of the prosecution evidence would suggest that it is possible that the 2nd, 3rd and 4th prosecution witness may have been behind the robbery visited upon the complainant. There is reasonable doubt, which could only have been resolved in the appellant's favour, that the appellant may or may not have been part of that gang.

If I am right, the evidence of the Miano (PW2) Mwangi (PW3) and Muchiri (PW4) was nothing more than accomplice evidence.

Not that the appellant could not be convicted on accomplice evidence; an accomplice is a competent witness and there is nothing wrong in choosing to have him as a witness rather than charging him.

It has been held that it may be desirable, in certain circumstances, to include the evidence of an accomplice for what it is worth; what really matters is the weight to be attached to such evidence. But the trial court has to be cautious of such evidence because it is natural that, not knowing what may happen to him, an accomplice will have a strong motive for minimising his own role in commission of a crime.

As a matter of fact, the principal reasons for holding the evidence of an accomplice to be untrustworthy are, first, because the accomplice is likely to swear falsely in order to shift the guilt from himself; secondly, because he is likely to disregard the sanction of an oath; and, third, because his evidence is likely to favour the prosecution. **(See Woodroffe's Law of Evidence, 9th Edition page 146.)** The evidence of 2nd, 3rd and 4th prosecution witnesses ought to have been looked at from this light.

It therefore follows that, an accused cannot be convicted on the evidence of the accomplice unless it is corroborated in some material and satisfactory manner. In this regard, it was incumbent upon the prosecution to bring the accomplice character of the evidence to the notice of the court at the earliest opportunity possible and then invite it to believe such as evidence by reference to corroborative evidence, if any. This it failed to do and with this omission the appellant could not be safely convicted on the basis of what, for all intents and purposes, is untrustworthy evidence.

For the reasons I have given, I find that there is merit in the appellant's appeal and it is hereby allowed. His conviction is quashed and sentence set aside. He is set at liberty unless he is lawfully held.

Dated, signed and delivered on the 15th day of June, 2020.

Ngaah Jairus

JUDGE