



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.162 OF 2014**

*(An Appeal arising out of the conviction and sentence of Hon. A. Ong'injo – CM delivered on 13<sup>th</sup> October 2014 in Kibera CMC. CR. Case No.3444 of 2010)*

**KIMSON MUTURI MURIITHI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Kimson Muturi Muriithi was charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 20<sup>th</sup> May 2010 at Engasura Farm, Kiserian in Kajiado County, the Appellant, while armed with dangerous weapons to wit a panga and a rungu robbed Jane Wairimu Njoroge of a mobile phone make Nokia valued at Kshs.1,999/- and Kshs.540/- and at the time of such robbery killed the said Jane Wairimu Njoroge (hereinafter referred to as the deceased). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to death. He was aggrieved by his conviction and sentence. He has appealed to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of circumstantial evidence that did not establish his guilt to the required standard of proof beyond any reasonable doubt. The Appellant complained that his rights to fair trial were infringed in that his rights in accordance with **Section 200(3)** of the **Criminal Procedure Code** were not read to him before the convicting magistrate took over the proceedings from the previous magistrate. The Appellant took issue with the fact that the trial magistrate convicted him yet crucial and essential witnesses were not called to testify in the case. The Appellant accused the trial court of advancing theories and speculations that she used to fill glaring loopholes and gaps in the prosecution's case and thereby convicted him. The Appellant was of the view that the trial magistrate had failed to properly evaluate and analyze the evidence and thereby reached a skewed and unfair finding against him. He was finally aggrieved that his alibi defence had not been taken into consideration before the trial court reached the impugned verdict convicting him as charged. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. In summary, the Appellant stated that his trial was conducted before four (4) magistrates. When the convicting magistrate took over the proceedings from the previous magistrate, she did not read him his rights as provided under **Section 200(3)** of the **Criminal Procedure Code**. The Appellant was therefore denied an opportunity to indicate to the trial court whether he wished to have the witnesses recalled or have the case proceed from where it had reached. The Appellant argued that the failure by the convicting magistrate to read him his rights rendered the proceedings null and void and therefore the subsequent proceedings and judgment was unsustainable in law. In that regard, the Appellant relied on the cases of, *inter alia*, **Rebecca Mwikali Nabutola –vs- Republic [2012] eKLR**, **Bob Ayub alias Edward Gabriel Mmbwana alias Robert Mandiga –vs- Republic [2010] eKLR** and **David Kimani Njuguna –vs- Republic CA Criminal Appeal No.294 of 2010.**

As regard circumstantial evidence that was relied on by the trial court to convict him, the Appellant submitted that the evidence adduced by the prosecution witnesses did not meet the threshold that would enable a court convict an accused on the basis of such evidence. The Appellant cited the cases of **Sawe –Vs- Republic [2003] KLR 364** and **Abanga alias Onyango –vs- Republic CA Criminal Appeal No.32 of 1990** in support of his submission that the chain of events narrated by the prosecution witnesses did not connect him to the commission of the offence. The Appellant submitted that there were gaps in the prosecution's case that raised reasonable doubt that he was the one who had committed the offence. It was the Appellant's appeal that taking into consideration the totality of the evidence adduced by the prosecution witnesses, the trial court could not have convicted him on the basis of the evidence that was adduced. The Appellant faulted the manner in which the trial court evaluated the evidence, which in his view, did not take into account his defence and gaps in the prosecution's case that would have led the court to reach the verdict that he was not guilty as charged. The Appellant urged the court to allow the appeal.

Ms. Aluda opposed the appeal. She submitted that the deceased inexplicably disappeared from her home. Her parents looked for her for some time. They reported her disappearance to the police. They informed the police that the Appellant had a Nokia 1202 mobile phone which was

black in colour. They gave the police the IMEI number and the mobile phone number that was registered to the deceased. The police sought the assistance of Safaricom, the mobile services provider, and were able to trace the mobile phone to the Appellant. The Appellant at the time was in Embu. He was arrested and brought back to Kiserian where he led the police to a bush where the decomposed body of the deceased was found. Documents that were found with the body confirmed that the decomposed body was that of the deceased. A DNA analysis of the clothes found at the scene established that the human bones at the scene were that of the deceased. Ms. Aluda submitted that the trial court had properly evaluated the evidence on circumstantial evidence to find the Appellant guilty as charged. She urged the court to disallow the appeal and uphold the conviction and sentence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

*“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.*

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence that was adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. It is the Appellant’s appeal that his rights as provided under **Section 200(3)** of the **Criminal Procedure Code** were breached. This section requires a magistrate taking over proceedings from a previous magistrate who ceased to have jurisdiction, to inform the accused of his rights to have any of the witnesses who had testified before the previous magistrate to be recalled for further cross-examination. This court has perused the proceedings of the trial court. The Appellant’s trial was before four (4) magistrates. This court noted that whenever the succeeding magistrate took over the proceedings from the previous magistrate, the Appellant was informed of his rights under **Section 200(3)** of the **Criminal Procedure Code**. On each occasion, the Appellant told the court that he wished to have the proceedings go on from where it had reached. The Appellant’s complaints therefore that he was not informed of his rights to have the witnesses who had testified before the previous magistrates recalled for cross-examination is not factual. That ground of appeal lacks merit and is hereby dismissed.

It was common ground that the trial court convicted the Appellant on the basis of circumstantial evidence. No one saw the Appellant rob the deceased. There was no direct evidence connecting the Appellant to the robbery of the mobile phone from the deceased. This court agrees with the Appellant and the prosecution that for a conviction to ensue on the basis of circumstantial evidence, the evidence adduced by the prosecution witnesses must irresistibly point to the Appellant and no one else as the person who committed the offence. In **Sawe –Vs- Republic [2003] KLR 364** at page 372 the Court of Appeal held that:

*“In order to justify, on circumstantial evidence, 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. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other 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.”*

In **Solomon Kirimi M’rukaria v Republic [2014] eKLR** Lesiit J held thus:

*“In Abanga alias Onyango v Republic CR.A No.32 of 1990 (UR) the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:*

*“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:*

- (i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,*
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*
- (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”*

In the present appeal, what was the evidence that the prosecution adduced in support of its case to establish the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** that was brought against the Appellant? PW6 Anthony Paul Kailu testified that at the material time he owned a 150 acre farm at Engasura in Kiserian, Kajiado County. He kept livestock at the farm. He testified that between February and 22<sup>nd</sup> May 2010, he had employed the Appellant to work for him at the farm. At the time, PW6 resided in Embu. The Appellant stayed alone at the farm. On 21<sup>st</sup> May 2010, the Appellant called him and requested for permission to attend the funeral of his grandfather. PW6 granted him permission. He sent the Appellant Kshs.5,000/- to enable him travel and attend the funeral. On 31<sup>st</sup> May 2010, the Appellant called him and requested him for transport to return to work. He sent the Appellant Kshs.650/-. PW6 was not able to contact the Appellant again because he had switched off his mobile phone.

Meanwhile, on 20<sup>th</sup> May 2010, PW1 Raphael Gitau Njoroge and PW3 Susan Nyakena Njoroge (husband and wife) residents of Kiserian in Kajiado County testified that they gave the deceased who was their daughter Kshs.500/- to go to Ngong where she was supposed to apply for an identity card. PW1 gave the deceased a copy of his identity card. PW1 and PW3 then left their home to attend to their normal duties. PW3 recalled that when she travelled to Ngong on the particular day, she realized that there was a police crackdown which was being conducted to net unroadworthy matatus (public service vehicles). Due to the crackdown, many public service vehicles were removed from service by their owners. PW3 called the deceased and inquired where she had reached. The deceased told her that the matatu that she was travelling in had stopped and was not proceeding further to Ngong Township due to the police crackdown. The deceased told PW3 that she had decided to return back home and would pursue the issue of her identity card on the following day.

PW1 and PW3 testified that when they returned home that evening, they did not find the deceased. They were surprised because the deceased had never, prior to that date, slept away from home. She was nowhere to be seen three days later. They reported her disappearance at Kiserian Police Station. Investigations commenced. The police got the particulars of the mobile phone that the deceased had at the time of her disappearance. PW1 gave them a copy of the receipt that he was issued when he purchased the particular Nokia 1202 mobile phone. The receipt, which was produced into evidence, contained the IMEI number of the mobile phone. PW1 also gave the police the mobile number that the deceased used. When the matter was reported to the police, PW9 Cpl. John Getonto, then attached to CID Ongata Rongai Police Station was assigned to investigate the case. Using the particulars of the mobile phone, he requested Safaricom, the mobile services provider to assist him trace the whereabouts of the mobile phone. The phone was tracked to Embu. PW9 sought the assistance of a Liaison Officer of Safaricom based at Embu. The mobile phone was traced to PW4 Stella Mukami Ndwiga.

PW4 told the court that on 31<sup>st</sup> May 2010, the Appellant who was known to her and her husband PW5 Wilson Nyaga, came to their home and requested for Kshs.500/- to enable him pay his house rent. The Appellant had previously worked for them. PW4 and PW5 were unwilling to give the money to the Appellant. The Appellant persisted. He offered them a Nokia 1202 mobile phone as security in a bid to persuade them give him the money. PW5 relented and give him the money in exchange for the mobile phone being left with them as security. A few days later, the Appellant approached PW5 and requested him to give him a further Kshs.300/- so that he could sell the mobile phone to him. PW5 paid the money. PW5 allowed PW4 to use the mobile phone.

About two weeks later, when coincidentally the Appellant was at the home of PW4 and PW5, a lady by the name Fatuma called PW4 on the mobile phone. She requested to know how PW4 came to be in possession of the mobile phone. PW4 told her that the person who had sold her the mobile phone was nearby. She gave the phone to the Appellant. PW4 testified that the Appellant spoke to the person on the mobile phone and immediately switched it off. The Appellant then took off. PW5 pursued the Appellant but failed to catch up with him. PW4 then called Safaricom and requested for the mobile phone line to be disconnected because the Appellant had taken off with her SIM card. It was then that she was informed that the particular mobile phone could not be switched off because the police were trying to trace its whereabouts. PW4 and PW5 were later on 15<sup>th</sup> August 2010 summoned to the CID office at Embu where they recorded their statements.

PW7 Samuel Muriithi, a resident of Kiriri in Embu, a shoe shiner, testified that on 18<sup>th</sup> August 2010, his friend by the name Erick Munene went to his place of work and showed him a mobile phone which he requested him to purchase. PW7 was not interested in buying the same. Erick Munene told him that he was selling the mobile phone on behalf of the Appellant. PW7 knew the Appellant. He was an acquaintance. Erick Munene told him that he was selling the mobile phone because he wanted to assist the Appellant whose wife at the time had been arrested and was being detained at Manyatta Police Station. When he heard of this plight, PW7 gave Erick Munene Kshs.1,000/- to give to the Appellant. He retained the mobile phone as security. He was arrested by the police when the mobile phone was traced to him.

PW9 John Getonto testified that upon the Appellant's arrest in Embu, he brought him back to Ongata Rongai Police Station. He then mobilized police officers and members of the public to undertake a search on PW6's farm where the Appellant previously worked. The Appellant directed them to where some of the items were recovered. Their search was successful. They recovered clothes which were later identified to be the ones that the deceased wore on the day that she disappeared. The clothes included a pair of black jeans trousers, a red jacket, a pair of black open shoes, a beige underpant and a blue cap. Also found at the scene were, a copy of school leaving certificate from Onyori Primary School belonging to the deceased, a child health post-natal clinic card of the deceased and a copy of the identity card of PW1. All these items were produced into evidence. A further search revealed a skeleton of a human being. The bones were scattered. PW1 was summoned to the scene. He saw the skull at the scene. He identified it to be the skull of the deceased from two artificial teeth that the deceased had. The bones were collected and taken for DNA analysis. PW8 Elizabeth Waitthera Onyiego, a Government Analyst testified that she conducted a DNA on the bones and clothes and the DNA samples provided by the parents of the deceased (PW1 and PW3). She confirmed that the bones belonged to the deceased by virtue of the fact that they belonged to a child of PW1 and PW3. The DNA report was produced as an exhibit in court. PW2 Cpl Shem Ondieki, the Scenes of Crime Officer, took photographs at the scene of crime. He produced the photographs as exhibits when he testified before the trial court.

When the Appellant was put on his defence, he denied committing the offence. Other than narrating the circumstances of his arrest, the Appellant said nothing in connection with the evidence that had been adduced against him by the prosecution witnesses. He admitted that he had worked for PW6 for about five (5) months before he left employment due to a dispute that he had with PW6 over his wages. He denied the allegation that he left employment on 20<sup>th</sup> May 2010. He told the court that he left employment in June 2010. He denied that he had any access or he was found in possession of the mobile phone that belonged to the deceased. He denied knowledge of PW4 and PW5. He denied robbing the deceased.

From re-evaluation of the evidence adduced before the trial court, it was clear to this court that the prosecution did establish, on circumstantial evidence, that it was the Appellant who robbed and killed the deceased. PW6's evidence placed the Appellant at the vicinity where the body of the deceased was retrieved. This was at Kiserian near where PW1 lived with his family. According to PW1's and PW3's evidence, the deceased left their home at Kiserian on 20<sup>th</sup> May 2010. She did not travel to Ngong because public service vehicles were not on the road on the particular day due to a police crackdown. The deceased was abandoned on the road by a matatu. She called PW3 and informed her that she was going back home. She never reached home. The deceased had a mobile phone make Nokia 1202 which had been purchased for her by her father, PW1.

On 21<sup>st</sup> May 2010, the Appellant requested PW6 to be granted leave of absence so that he could attend his grandfather's funeral. As it later

emerged from the evidence, no grandfather of the Appellant had died or was being buried at the time. PW6 granted the Appellant permission to travel to Embu. On 31<sup>st</sup> May 2010, the Appellant sold the mobile phone which was positively identified to belong to the deceased, to PW4 and PW5. Two weeks later, when he realized that the mobile phone was being looked for by the police in connection with the deceased's disappearance, he snatched the same from PW4 and disappeared with it. He later sold it to PW7. It was from PW7 that the police retrieved the mobile phone.

From re-evaluation of the evidence, the prosecution was able to adduce evidence which traced the mobile phone from the time it was robbed from the deceased to the time its possession was placed in the hands of PW4 and PW5 and subsequently to PW7. The link between when the phone left the deceased's possession and these witnesses is the Appellant. If there was any doubt that the Appellant was involved in the robbing and killing of the deceased, that doubt was removed when the Appellant led the police to PW6's farm where the deceased's remains were discovered. The documents that she had in her possession were also recovered in the farm. This court is of the view that **Section 111** of the **Evidence Act** applies. **Section 111** of the **Evidence Act** provides thus:

***“Where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence which is charged and the burden of proving any fact especially within the knowledge of such person is upon him.”***

In this case, the Appellant did not give a reasonable explanation of how he came to be in possession of the mobile phone that belonged to the deceased. He did not explain how the remains of the deceased were found in the farm where he used to work. The Appellant had the opportunity to displace the evidence connecting him with the deceased's mobile phone and the recovery of the deceased's remains by at least giving exculpatory explanation. The Appellant's situation is similar to the situation in **John Macharia Gachanja –vs- Republic [2009] eKLR** where the court held thus in connection with the evidence that had been adduced against the Appellant:

***“In this case, the Appellant was the last person seen with the deceased prior to the deceased being found seriously injured and thereafter her death. He was the only person who had special knowledge of what could have happened to the deceased. He had to explain that aspect of the matter. We have carefully perused the evidence that was before the trial court and the defence of the Appellant. The Appellant never made any effort to discharge that burden.”***

In the present appeal, it was clear to this court that the prosecution did establish to the required standard of proof that the Appellant got possession of the deceased's mobile phone after he had robbed and killed her. The Appellant then disposed the deceased's body in the farm that he used to work. A day after the robbery, he left employment and returned to his rural home at Embu. He sold the mobile phone that he had robbed from the deceased to PW4 and PW5 and later to PW7. The evidence that he adduced in his defence does not exonerate him from the crime. The circumstantial evidence adduced by the prosecution witnesses irresistibly points to the Appellant and no one else as the person who robbed and killed the deceased.

It is clear from the foregoing that the Appellant's appeal against conviction and sentence lacks merit and is hereby dismissed. It is so ordered.

**DATED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JUNE 2018**

**L. KIMARU**

**JUDGE**