



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT KITUI

#### CRIMINAL APPEAL NO. 28 OF 2016

**SEMBA KALOVWE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the Sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 87 of 2015 by K. Sambu P M on 26/04/16)*

### J U D G M E N T

1. **Semba Kalovwe**, the Appellant was jointly charged with another with two (2) counts of **Robbery with Violence** contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code**. The Complainants were **David Mwandurua Munyithya** (1<sup>st</sup> Complainant) and **Wilson Mutinda Muthini** (2<sup>nd</sup> Complainant) respectively.

2. Facts of the case were that on the **30<sup>th</sup>** day of **September, 2014** at about **11.00 p.m.**, the 2<sup>nd</sup> Complainant a semi-trailer lorry driver was on his way to Garissa when he stopped at Nguni Petrol Station where he met the proprietor, the 2<sup>nd</sup> Complainant a person well known to him. He intended to fuel the motor-vehicle and also add pressure to the tyres. As he proceeded to the service bay two individuals dressed up in Military and Administration Police jungle uniforms emerged from nearby bushes. One of them was armed with a rifle. They exchanged pleasantries with them. All over a sudden they were ordered to lie down. One of the persons hit the 1<sup>st</sup> Complainant with a metal rod on the head. He fell down and lost consciousness. He (2<sup>nd</sup> Complainant) was also hit with the metal rod and made to lie down. A mobile phone make Asha, **Kshs. 7,000/=** in a wallet, his National Identity Card, a Somali sword, shoes and clothes that he was wearing were taken away from him. The 1<sup>st</sup> Complainant on the other hand lost cash **Kshs. 5,000/=**, a mobile phone make Hauwei. After the attackers fled the 2<sup>nd</sup> Complainant went to assist the 1<sup>st</sup> Complainant who was injured. They reported the matter to the police and sought treatment.

3. In the month of **October** or **November, 2014** the Appellant and other companions went to drink at a bar owned by PW3 **Shumei Ombaso Getembe** within **Kwa Rueben area, Nairobi**. They consumed alcohol worth **Kshs. 1,500/=** an amount of money that he could not raise. He paid **Kshs. 600/=** and gave him a cellphone Nokia Asha Serial Number **35789705-3052** as security for the unpaid debt. The cellphone was found by the police in possession of his wife. In the course of investigation PW6 **No. 237476 APC Francis Kamau** went to Mwangaza Shop and recovered a blue bag that contained a Military jungle trouser, an Administration Police Jacket, a cap, two civilian jackets and a pair of trouser, two Kenyan lessos. The luggage was alleged to have been left behind and confiscated. PW5, **Mui Kagutu** the owner of Mwangaza shop testified that he carried in his motor-vehicle the Appellant and another person who had the bag amongst other passengers. When the police stopped the motor-vehicle the person fled leaving behind his luggage while the Appellant was arrested. Nobody claimed the luggage therefore he kept it at his shop. Further investigations were carried out that resulted into the Appellant being charged.

4. When put on his defence the Appellant denied having committed the offence and explained circumstances in which he at one point in time used a cellphone given to him by his son **Ken Kalovwe** a convict and Prosecution witness.

5. The learned trial Magistrate considered evidence adduced and found that circumstantial evidence adduced linked the Appellant to the offence. He convicted and sentenced him to death as provided in law.

6. Aggrieved by the conviction and sentence by way of amended grounds of Appeal the Appellant stated that:

- The charges were duplex hence defective.
- Evidence adduced was marred by malice, contradiction and inconsistencies.
- Relying on circumstantial evidence was erroneous as he was not found in possession of what would connect him to the offence.
- The defense of alibi was rejected without cogent reasons.

7. The Appellant relied on written submissions that I have taken into consideration. The State through learned Counsel **Mr. Mamba** opposed the Appeal and reiterated facts as presented by the Prosecution.

8. This being the first Appellate Court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. (See **Okeno vs. Republic (1973) EA 32**).

9. The learned Magistrate has been faulted for failure to find that the charge was defective for being duplex. The Appellant cited the case of **Joseph Njuguna Mwaura** where the Court stated that:

*“..... The ingredient is that the appellant and for that matter any suspect before the court on charge of robbery with violence in which more than one person takes part or where a victim is wounded or threatened actual bodily harm or occasioned actual harm is charged under section 296(2) of the penal code, it is this ingredients which need to be explained to such accused person so as to enable him to know the offence he is facing and prepare his case. In short section 296(2) is not only punishment section, but it also incorporates the ingredients for the offence of robbery under section 295 as read with 296(2) of the penal code as that would not contain ingredients that are in section 296(2) of the penal code and might create confusion..... The offence of robbery with violence is totally different from the offence defined under section 295 of time of stealing it, use or threatens to use actual violence to any person or property in order to steal, it would not be correct to frame a charge for the offence of robbery with violence under section 296(2) as thus would amount to DUPLEX CHARGE.”*

10. In the case of **Cherere s/o Gakuli vs. Republic (1955) EA CA 622** the Court of Appeal held that:

*“The test still remains as to whether or not a failure of justice has occurred. In our opinion the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity.”*

11. **Section 295** of the **Penal Code** provides thus:

*“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.”*

12. Looking at the marginal note, it is the definition of robbery but the provision of the law also creates the offence of robbery.

13. **Section 296** of the **Penal Code** provides as follows:

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

*(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses.”*

The marginal note spells out the punishment for the offence of robbery. Simple robbery is provided for in **Sub-Section (1)** whereas the punishment for the aggravated robbery is provided for in **Sub-Section (2)**.

14. The particulars of the offence were that:

*“On the 30<sup>th</sup> day of September, 2014 at Nguni market in Mwingi East sub-county within Kitui county, jointly with another before court, robbed WILSON MUTINDA MUTHINI of cash kshs. 7,000/=, one mobile phone make Nokia Asha valued at kshs. 5,000/=, one jacket valued at Kshs. 2,200/=, a pair of shoes valued at Kshs. 2,800/=, Somali sword valued at Kshs. 500, one torch valued at Kshs. 250/= and one driving license valued at Kshs. 14,500/=, all valued at kshs. 26,250/= the property of WILSON MUTINDA MUTHINI and at the time of such robbery used actual violence to the said WILSON MUTINDA.”*

15. The offence of robbery is stated to have been committed if:

*“(i) The offender is armed with any dangerous or offensive weapon or instrument; or*

*(ii) If he is in company with one or more other person or persons; or*

*(iii) If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.” (See also Oluoch vs. Republic (1985) KLR 549; Johana Ndung’u vs. Republic Criminal Appeal No. 116 of 1995 (UR)).*

16. Ingredients of the offence of robbery have been captured in the particulars of the offence that were read to the Appellant. The fact that he understood the charge that he faced is demonstrated by the way he cross examined witnesses who testified. The cross examination was intense. In the premises the alleged defect where the Appellant was charged with the offence contrary to **Section 295** as read with **Section 296(2)** was not fatal as the Appellant was not prejudiced (See also **Paul Katana Njuguna vs. Republic (2016) eKLR**).

17. The Appellant was not identified as one of the attackers who robbed the Complainants. Evidence adduced against him was therefore circumstantial in nature. The learned Magistrate based his decision on the basis of the doctrine of recent possession. He was of the view that there was overwhelming evidence that the Appellant was the first person to handle the mobile phone, Nokia blue in colour which was stolen from the 2<sup>nd</sup> Complainant. He cited the case of **Malingi vs. Republic (1989) KLR 227**. In the stated case it was stated as follows:

*“The trial court has a 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 after the prosecution has proved certain basis facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short 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 pointed 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.”*

18. The 2<sup>nd</sup> Complainant lost a Nokia Asha cellphone. He availed to the police a box for the cellphone. Its International Mobile Equipment Identity (IMEI) Number was 357877053052021 used by PW12 No. 47370 P C John Njuguna who engaged PC Kilasi who obtained a call data print. PW11, No. 83306 P C Nicholas Kilasi authored a letter addressed to the Police Liaison Officer, **Safaricom Kenya Limited (Exhibit 21)** seeking to be furnished with call data information in respect of the stated IMEI Number. The Prosecution did not adduce the print out in evidence but the stated witness testified that:

*“I was given the IMEA NOS were 357897053-052-021. The complainant brought the box with serial numbers containing the Imea Nos. on the purchase of the mobile phone handset. Witness referred to PMFI – 11. I commenced investigations and requested for information from the Safaricom service providers vide letter dated 13<sup>th</sup> December, 2014. Letter produced PMFI – 21. I later received a report from Safaricom service providers vide a print out on the use of the reported stolen mobile phone from 28<sup>th</sup> September, 2014 till 14<sup>th</sup> December, 2014. It was established that one Ken Semba who was using mobile phone No. 0722-626-618 with a registered national identity card No. 28733165 within Nuu area from 11<sup>th</sup> October till 16<sup>th</sup> October, 2014.*

*It is possible that the alleged mobile phone was in use prior to 11<sup>th</sup> October, 2014. After the 16<sup>th</sup> October, 2014 the mobile phone remained unused until 19<sup>th</sup> October, 2014, when same was reported to have been used by one Semba Kalovwe vide mobile phone No. 0704-366-814 noted identity card No. 97778010 within Nuu area. The said Semba Kalovwe kept using the phone till 28<sup>th</sup> October, 2014 when at Mukuru Kwa Reuben in Nairobi in the morning hours when same changed hands on the same morning at 9.45 a.m. When same was used vide mobile phone No. 0719 608082 in the registered names of Shumbei Gitembe national identity card No. 11688530. PW3 who continued using the mobile phone till 11<sup>th</sup> November, 2014 when it again changed hands to one Judith Kwamboka mobile phone No. 0725-234402, noted identity card No. 27251112 within Mukuru Kwa Reuben area in Nairobi which she used for only one day before same was reverted to Shumei Gitembe. The mobile phone at the material time was being used by one Shumei Gitembe (PW3).*

*I subsequently proceeded to Kisii on 7<sup>th</sup> March, 2015 to trace Shumei Gitembe, a Kisii by tribe and was unable to get hold of him as he had gone back to Mukuru Kwa Reuben in Nairobi. I went back to Nairobi and kept tracking Shumei Gitembe until 12<sup>th</sup> March, 2015 when I managed to arrest Shumei Gitembe who upon interrogation informed me that he had given out the mobile phone to one of his close family members Judith Kwamboka who was reported to have travelled out of town. I interrogated Shumei Gitembe (PW3) on the circumstances which led to his possession of the subject mobile phone and he did inform me that he was given the subject mobile phone Nokia make by one of his close friends and customer as his pub, namely Semba Kalovwe who had failed to pay up the bills on the drinks taken, which mobile phone was to be a security pending payment of the balance. He further told me that said Semba Kalovwe did not go back to him for payment of the outstanding debt.*

*It was until 18<sup>th</sup> March, 2015 when Judith Kwamboka, in liason with DCIO Makadara had surrendered the subject mobile phone to Makadara CID offices. I later proceeded to collect the mobile at Makadara CID offices. It was a blue Nokia mobile phone. Witness identifies PMFI – 10. The mobile phone was dual with the first line being 357897053052-021 which was the same Imei number I was using to track. I wish to produce the Safaricom service providers print out in evidence same marked PMFI – 22. The last digit by the Safaricom service providers is only 0.*

*I later handed over the suspect Semba Kalovwe and the recovered mobile phone to the investigating officer Mr. Njuguna having completed my assigned investigation.”*

19. PW12 the Investigation Officer stated that it was established that after the robbery where the cellphone was stolen the first person who used it was **Ken Semba**. At the outset after the police concluded their investigation they charged **Ken Kalovwe Semba** jointly with **Jacob Nzuki Mwendwa** and **Semba Kalovwe**. Thereafter, the charges against him were dropped and he was treated as a Prosecution witness after he was charged with the offence of giving false information to the police, a charge that he admitted.

20. PW8 **Ken Semba Kalovwe** told the Court that on the **1<sup>st</sup> October, 2014** before he took their herd of cattle to the river his mother gave him some two (2) mobile phones to go and charge at **Tuvani Town**. Along the way he inserted his sim card and started using the Nokia one. Thereafter his father asked him to continue using the cellphone. After using it for one and a half weeks he gave it to his father (Appellant) who went with it to Nairobi but upon his return he did not see it again. He was arrested on the **21<sup>st</sup> February, 2015** and accused of using a cellphone stolen from a robbery victim. That he told the police that if he ever used such a phone it must be the one that he collected at **Nguni Stage**. He claimed that he had indeed collected another Nokia mobile phone blue in colour from **Nguni Market Stage**. And for that reason charges were dropped against him and he was treated as a witness.

21. In the case of **Erick Odhiambo Okumu vs. Republic (Mombasa Criminal Appeal No. 84 of 2012)** the Court of Appeal stated that:

*“It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form a strong basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in MUSILI TULO V. REPUBLIC (supra),:*

*“Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”*

22. **Ken** was indeed the first person to use the cellphone that was stolen from the Complainant on the fateful night. He was purportedly given the cellphone by his mother who was not availed as a witness to confirm the allegation and/or state where exactly she got the cellphone from.

23. He was an accomplice to the Appellant from the outset and at the point of testifying he was serving sentence. In the case of **Nguku vs. Republic** the Court of Appeal held that:

*“In dealing with the evidence of an accomplice, trial court should first establish whether the accomplice is a credible witness and then look for some independent evidence as corroboration connecting the accused person with the offence. In this case, the evidence of the complainant, who was a statutory accomplice, had been sufficiently corroborated.”*

24. The witness, was charged with the offence of giving false information to the police. The nature of falsity was that at the outset he stated he had collected the cellphone from **Nguni Stage** then later he stated that he acquired it from his father, the Appellant. Such a witness' evidence required corroboration.

25. There is evidence that PW3 who was found in possession of the cellphone stated that he got it from the Appellant. The Appellant did not deny having possessed the cellphone but explained that he lost it while in Nairobi. No report was made of loss of the cellphone. However the Prosecution had a duty of proving that he was the one who gave the cellphone to PW3.

26. In the course of investigations it was established that the cellphone changed hands severally. PW3 claimed without proof that he held the cellphone as security for a debt the Appellant owed him. And that he used the cellphone and even a member of his family used it. He did not divulge the name of his family member. The police however established that the cellphone was used by **Judith Kwamboka** of **Mukuru Kwa Reuben** area in Nairobi. And after it was surrendered to the police they did arrest the Appellant and his son.

27. What the Prosecution did prove is that at the outset it was **Ken** who was in possession of the cellphone. This was a person whose evidence required corroboration as to how he got the cellphone that was lacking.

28. The circumstantial evidence adduced therefore points at either the Appellant or PW3 as the person who had the cellphone after the 2<sup>nd</sup> Complainant was robbed. Evidence adduced does not unerringly point towards the Appellant as solely the person who could have been one of the persons who robbed the Complainants.

29. In the premises it was unsafe to convict him. Therefore, I quash the conviction for the offence of robbery on both counts and set aside the sentence meted out. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

30. It is so ordered.

**Dated, Signed and Delivered at Kitui this 29<sup>th</sup> day of August, 2018.**

**L. N. MUTENDE**

**JUDGE**