



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL APPEAL NO. 28 OF 2014**

**KENNEDY MWENDA NKANATA.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGEMENT**

The Appellant Kennedy Mwenda Nkanata filed appeal against conviction and sentence in Meru Chief Magistrates Court Criminal Cases No. 965 of 2011 on the grounds that the learned trial magistrate erred in law and facts when she failed to consider that he was a victim of circumstances:

That the learned trial magistrate erred in law and facts in failing to consider his defence. In the amended petition of Appeal the Appellant through his Counsels M/s M.G.Kaume & Co. Advocates said further that;

**The** Trial Magistrate erred in law and fact by convicting on unsafe and insufficient evidence;

**That** the trial Magistrate erred in law and fact by convicting appellant when the prosecution evidence was grossly contradictory;

**That** the Trial Magistrate erred in law and fact by failing to consider the well built and succinct defence of the appellant;

**That** the Trial Magistrate erred in both law and fact by convicting the appellant when she relied on uncorroborated and/or unsubstantiated evidence from the prosecution;

**That** the Trial Magistrate erred in law and fact by relying on the purported expert witness evidence to convict the appellant;

**That** the trial Magistrate erred in law and fact by refusing to accord the appellant the benefit of doubt despite the fact that the offence was not proved beyond all reasonable doubt standard.

**That** the entire Conviction and Sentence was against weight and evidence;

The appellant sought that the conviction against him be quashed and that the sentence be set aside.

Kennedy Mwenda Nkanata was 4<sup>th</sup> accused person in charge sheet where the suspects were charged with four counts of Robbery with Violence Contrary to Section 296(2) of the penal code where the victims who were night guards were murdered in the cause of the robberies.

Kennedy Mwenda Nkanata, Fridah Kananu and Everelyne Mpinda were also charged with offence of handling stolen goods in 3 separate alternative counts and the alternative charge against appellant was that Kennedy Mwenda Nkanata on the 12<sup>th</sup> day of August 2011 at Kagorine village in Meru Township Imenti North District within the Meru County otherwise than in the course of stealing dishonestly undertook the retention of one mobile phone make Nokia 1200 Serial Number 355734/02/407509/0 valued at Kshs 5000/= knowing or having reasons to believe it to be stolen goods.

The Phone according to count VI was stolen when the appellant jointly with Peterson Nthiga the 2<sup>nd</sup> Accused were suspected to have robbed Joseph Bundi on the nights of 16<sup>th</sup>/17<sup>th</sup> July 2011 at Karindeine village Imenti Central District within Meru County and killed the said Joseph Bundi.

When the matter came up for hearing on 28<sup>th</sup> November 2011 the prosecution indicated it had 40 witnesses to call but by the close of prosecution case only 26 witnesses had testified.

PW4 was one of the victims and he was cut on the left hand and was also stabbed in the stomach. He was going home at 8.00 p.m when he was attacked and didn't therefore identify the 3 attackers who emerged from the banana plantation along the way to his home.

PW5 was found with one of the phones that had been robbed and its owner killed in the course of the robbery. He said it is his landlord's daughter who exchanged the phone with his as she was unable to use it and he gave her his. He said his phone was Nokia 2700. The phone given to him by Landlord's daughter was red in colour.

PW6 Judy Ntinyari Kimathu – daughter to PW5 Land lord testified and said she bought phone from JJ and Mbai on 17<sup>th</sup> July 2011 at about 10.00 am at Kshs 1500 and she paid Ksh 1400/- and remained with a balance of 100/- which JJ was to collect the following day when he was to bring charger and receipt for the phone but the phone didn't go through and JJ didn't come back. When Police and Dennis went looking for her she confirmed she gave phone to PW5 – Dennis as she was unable to operate it. She identified JJ and Mbai as accused persons. She identified Accused 1 – Dennis Mwirigi alias JJ as the one who sold to her the phone. She said Accused disappeared for about 3 months after selling phone to her. She said Accused 2 was with Accused 1 when Accused 1 sold to her the phone but stood at some distance.

PW7 also said that Isaiah Miriti Accused 3 gave him phone Nokia 2690 as security for Kshs 1500/= on 24<sup>th</sup> July 2011. That on 28<sup>th</sup> July 2011 PW7 Simon Mwenda Anaine met with police who told him to produce the phone he had, when he produced the phone he was asked who gave it to him and she led police to Isaiah Accused 3 who was arrested.

PW7 too was arrested and charged but later released. He gave Serial number of phone as 1354837/04/800972/1. He said he knew Isaiah Miriti Accused 3 as phone repairer.

Pw8 said that Accused 2 and Accused 6 went to him seeking to sell phone make 1680 at Kshs 1200/=. When he didn't have the money they left phone with him to look for a buyer. He got a buyer one Hassan who immediately gave him 1200/= and he took it to accused 6 the wife of accused 2 as per their introduction.

PW9 said he bought phone from PW8 and sold it to Fridah Kananu at Kshs 1600/= and Kananu's old phone was part of the payment to PW9 Hassan Kithinji.

The transaction happened on 17<sup>th</sup> July 2011. On 19.7.2011 Fridah Kananu was arrested by CID officers. CID officers also went to PW9's house and when he learnt this from his wife he feared and went to sleep in the mosque. He was arrested on 20th July 2011. He identified accused 5 as Fridah Kananu. He said the phone he took from Fridah was also taken - Ex. 7. He said he didn't know Accused 1, Accused 2 and Accused 3 but Accused 4 was his brother in law, brother to his wife. He said Accused 5 gave him 1000/- and later 300/= together with her old phone.

PW10 Boniface Murungu was on 16.7.2011 was at 9.00 p.m going to visit a cousin in company of Geoffrey Muchui his brother when they were attacked and Geoffrey murdered while he escaped. He said Geoffrey was robbed of Nokia 2690 which was black in colour. EX. 6 which was later recovered but he didn't know from whom it was recovered.

PW11 responded to alarm raised by PW10 when he and Geoffrey Muchui the deceased in count IV was killed. He said they found Geoffrey lying on the road opposite Karindine Catholic Church and he had injuries – stab wound on the neck – left shoulder and left ribs and right ribs as well as stomach. They took him to hospital but he died while being attended to.

PW12 the brother of Jacob Gitobu – victim in count VI said he learnt from police his brother who was guard at butchery in Kariene was among those murdered on the night of 16<sup>th</sup> of July 2011. PW12 didn't know if anything was stolen from the deceased and he didn't know how his phone looked like. He didn't know the accused persons including A4 who was implicated in the robbery against his deceased brother.

PW13 Purity Kagwiria testified that on 19<sup>th</sup> July 2011 at around .....PM Accused went to her house in company of police officers asking for her husband PW9 but he was not at home. She led them to a hotel where she thought he was but didn't find him. That she borrowed A4's phone to call her husband. She said her brother A4 was at her father's shop nearby when they went to look for her husband at the hotel. She said that the police went to look for her husband on 17<sup>th</sup> July 2011. She said later the phone she borrowed from her brother was also stolen.

PW13 was also arrested on 17<sup>th</sup> August 2011 within court premises. She said she used her brother's phone for 3 days. She said the phone was Nokia 1200, she identified it in court EX. P8. She said she had seen her brother with the phone for a short period of time.

Pw13 Knew A5 as she rented her father's shop where A5 was selling milk. PW13 said that she received 500/= from her uncle Kithinji through suspect phone. She said that when phone was tracked it was found with A4 but she had used and her M-Pesa transaction was her phone number was in the statement. She said she didn't know where her brother A4 got the phone.

PW14 Josephat Ndungu acting DCIO Imenti Central was on 16.7.2011 at 11.00 PM called by P.C Gathati and informed that while on mobile patrol in Kiriene market they came across 2 bodies of males who had been murdered. He accompanied P.C Gathati and OCS Kariene Police station to the scene and found the 2 male bodies which had stab wounds at the chest and one had another stab wound on the neck from where blood was oozing profusely. He said the body with stab wound at the neck was identified as that of Joseph Bundi Mirijo. That the 2<sup>nd</sup> body was for Yusuf Mohamed.

That about 300 metres away 3 other people were found murdered. A fourth victim of the series of attack Geoffrey Muchui was taken to hospital but he succumbed to the injuries while undergoing the treatment. Boniface Koome who was also attacked on same night died while undergoing treatment at Consolata Mission Hospital.

PW14 drew sketch plans for all the scenes and produced fair and rough sketches as exhibits. The scenes were also photographed.

Pw14 enumerated about 9 names of persons who were attacked and killed on the night of 16<sup>th</sup>/17<sup>th</sup> July 2011 in what appears to have been a serial killing spree.

Erick Bundi was also attacked but survived upon being taken to Nkubu Mission Hospital. Investigations commenced on 19<sup>th</sup> July and A5 was arrested in possession of a mobile phone Nokia 1680. Chief Inspector Yagan affected the arrest. PW14 and Chief Inspector Njenga of Special Crime Unit Nairobi travelled to Mara on 19.7.2011 and arrested Solomon Mugambi who had handled mobile phone Nokia 1680 that was recovered from A5. Solomon Mugambi John testified as PW8.

PW14 and Chief Inspector Yagan arrested A6 at Kathuanga village within Katheri Location and recovered Sim card 07072238662 which she said she was using together with Peterson Nthiga.

A6 ID card No. 258570271 was also recovered Ex P2 sim card number 07072238662 Ex.P4. Pw14 said nothing concerning appellants involvement in the crime

Pw15 witnessed post-mortem of Joseph Bundi and Boniface Koome on 19<sup>th</sup> July 2011 at 4.00 pm at Meru Level 5 hospital.

PW16 witnessed post-mortem done on the body of Geoffrey Muchui at Consolata Mission Hospital.

PW17 Sergeant Virginia I'ikiugu on 17<sup>th</sup> July 2011 got instruction to go to scene of the killings in company of the P.C. Njeru and an officer from special crime unit. They proceeded to Nkubu police station where they were briefed of the death/killing of 8 people on the night of 16<sup>th</sup> July 2011.

She said the deceased Julius Gatabu had mobile phone make Nokia 1680C2 which was paired with sim card No. 0723101810. There was also phone make Smaldal which was for the deceased Jacob Mutua whose sim card was 0717373941.

PW17 got call data on 18<sup>th</sup> July 2011 for sim card No. 0723108810 which was confirmed belonged to the deceased Julius Gatobu of ID card No.13359560 which established his handset as SIM IMEI 352693042295200. The history of the handset was recovered and it was established that sim card no. 0702235662 had been used on it and it was not registered. She said that the same phone was used by sim card No. 0727278712 which was registered in the name of A5 from Thimbiri Location on 19.7.2011 and the phone recovered.

The phone Nokia 1680C2 was positively identified by the deceased Julius Gatobu's wife – EX P1 A5 sim card – Ex P9.

A6 was established to name used Nokia 1680C2 in the early hours of 17.7.2011 having been used by A6 – Evelyn Mpinda. She said the phone kept on changing between A2, A5 and A6 and at 22.37 hrs on 17.7.2011 it was paired with sim card no. 0723928465 in the name of Hasan Rashid Kithinji before it was returned to 5 who was found in possession.

Pw17 also investigated data for mobile make D99 Smaldal which belonged to the deceased Jacob Mutua with IMEI 3557316321 30870/355-131032/30878. The phone was lastly used by deceased on 16.7.2011 at 21.39 hrs and later sim card No.0718199695 was also used and it was registered in the name of Dennis Wabomba – PW5. Dennis was arrested on 20.7.2011 the phone was recovered and he said he bought it from Judith. He led to arrest of Judith Ntinyari – PW6.

PW6 Said she bought phone at Kshs 1500/- from A1 but A1 didn't come back with receipt and charger as well the balance of 100/=.

PW17 identified phone as EXP2. She produced Safaricom Analysis Report EXP 13(b)

Pw17 said phone make Nokia 2690 IMEA No. 35483704800972 belonged to the deceased Geoffrey Muchui ID No. 25425481 using sim card No. 0729803709 registered in the name of the deceased. It was established that Dennis Mwirigi alias JJ. She said the phone was switched off upto 24.7.2011 at 13.58 hrs and also on 26.7.2011 at 8.41 pm and paired with Safaricom sim card No. 0726143178 registered in the name of Simon Alaine.

That Simon Alaine changed line to 0727098340 up to 28.7.2011 which was used to track and arrest him. Alaine led police to the home of Isaiah Miriti who were alleged to have sold phone to Alaine at Kshs 1500/=. That Isaiah didn't use his sim card in mobile phone make 2690 but there was evidence he was in communication with Dennis Mwirigi alias JJ A1.

According to PW17 Nokia 1200 belonging to the late Joseph Bundi was lastly used by him at 10.38 pm on 16.7.2011 and thereafter by the appellant who paired it with sim card No.070365395 at 12.10 hrs.

The late Joseph Bundi's phone was also used with sim card no. 0702235662 belonging to Peterson Nthiga and Everlyn Mpinda. The phone changed hands to Gideon Kithinji. PW17 said that they left officers in Meru to continue with investigations before recovering phone belonging to Joseph Bundi. She said A6, A5, A3 and A2 were arrested in her presence. She produced Safaricom Data Analysis Reports Exhibits ExP4, Ex P5, Ex 6 and 7.

Safaricom Movement Analysis Report for Nokia 1200 belonging to Joseph Bundi was produced by PW17 as Ex P8

PW18 Inspector Muano Shamalla Safaricom Law Enforcement Liaison officer testified that SP John Onyango requested for data in relation to Telephone number;

1. 0723101810
2. 0717373941
3. 0712710506
4. 0729203709

The data was in relation to incoming and outgoing calls between 1.7.2011 to 17.7.2011 and to provide names of persons subscribed with numbers and IMEI. He said No. 0723101810 was registered in the name of Julius Gatobu ID 13359530 paired with 3 handsets

IMEI

- 353085021027980
- 356959013115130
- 3526930422955200

From evidence of PW18 it appears no request for incoming calls or outgoing calls in relation to appellant's sim card. NO. 070365395... and Pw18 investigation didn't establish the sim was used in any of the deceased person's handsets.

PW19 Chief Inspector Joseph Lorio received reports of series of robbery with violence and visited several scenes where he found several male persons killed. He said he called scenes of Crime officer who took photographs and bodies were taken to the Mortuary. He didn't investigate the case.

PW20 P.C Martin Mumaina of special crime unit testified that in company of CPL Muthoka P.C Mwenda and P.C Driver Musyoka they were instructed by SSP Koki to proceed to Nkubu and carry out investigations in relations to a series of robberies in which 8 people were killed. The DCIO Kariene briefed them on arrival at 7.30 p.m on 17.7.2011 and they commenced investigations. He said they tracked a phone to KPCU where it was found with Mr Waboba who told him he was given phone by Judith Ntinyari. Judith Ntinyari was also arrested and Waboba's phone recovered from her. That Judith Ntinyari said that she was given phone by JJ. An inventory of the Nokia 2700 was taken and witnessed by CIP Yagan, CPL Muthoka, CPL Martin, P.C Maina and Boniface Miriti as well as Dennis Waboba.

PW21 P. C Humphrey Mwenda from special crime prevention unit reiterated what PW 20 said as they conducted investigations together. He also said that they tracked Nokia 1680 phone belonging to the deceased Julius Gatobu from Majengo area. The phone was recovered from Fridah Kananu A5.

PW21 also said that on 12.8.2011 they arrested A4 (Appellant in possession of Nokia 1200 phone belonging to the late Joseph Bundi. The phone allegedly recovered from appellant was in court when

PW21 testified and it was identified as MFI- P18 Appellant was arrested on 12.8.2011 when phone was recovered. PW21 says they tracked phone to Kenya Methodist University at about 3.28pm. PW21 said appellant didn't explain where he got phone from and didn't answer their questions. PW21 said that A5 said she was given phone by Hassan who was arrested in Embu while escaping g after learning of A5 arrest. He said Hassan was arrested.

PW22 CPL Mwangi accompanied Chief Inspector Njenga to the Meru Bus stage where a young man whose name he could not remember led them to A3 who was arrested and taken to CID office for investigations into loss of phone during robberies that took place on the night of 16<sup>th</sup> July 2011 and 8 people were killed. PW23 Dr Ndegwa produced post-mortem report of Julius Gatobu Githinji conducted on 19.7.2011 at 5.30 pm at Meru District Mortuary by Dr. Thairu conducted on 19.7.2011 at 5.30 p.m at Meru District Mortuary by Dr. Thairu. He also produced Ex.P4 post mortem Report for the body of Lawrence Kirimi Githinji. The post-mortem Report Jacob Mutua was also conducted by Dr. Maingi and produced by PW23. Dr Thairu conducted post mortem on the body of Yusuf Mohamed on 18.7.2011 at 2.20 pm and PW23 produced it. PW24 P.C Musinga took photographs at scenes of Murder/Robbery with violence and he produced the photographs and certificate.

PW25 IP Lawrence Murithi Njeru and P.C Reuben Thuo of Abothuguchi West Central Division effected the arrest of Peter Kiongo Munyao and a woman on 28<sup>th</sup> July 2011 upon being tipped by the Area manager Mikirimi, on interrogation of the woman she told IP Lawrence that her sister was in custody for offence committed by the man who was in her company and she is the one who gave tip off.

The DCIO Imenti North went to Githongo AP camp to collect the man who had been arrested and escorted him to Imenti North DCIO's office for interrogation. He said the CID officers interrogated suspect and he gave his name as Peterson Nthiga. He said it is A2 whom they arrested. He said phone recovered from A2 on arrest was small Samsung and was not connected to the offence for which he was arrested. PW25 said the woman in company of A2 said her sister was in custody over a phone A2 had sold to her.

PW26 Chief Inspector Samuel Yagan investigated the case and preferred charges against the 6 accused people's including the appellant. The evidence against appellant given by PW26 the Investigating Officer is that on arrest at KEMU a4 (Appellant) was interrogated and he said that A2 and A6 went to borrow Kshs 300/= and gave him Nokia 1200 as security PW26 said ten people were arrested but 6 were charged after DPP recommended withdrawal of charges against Judy Ntinyari, Hassan Kithinji, Solomon Mugambi and Simon Mwenda Alaine. PW26 produced sim card holder recovered from Evelyn Mpinda A6 which were established to have been used in one of the phones robbed from one of the deceased person's sim card no. 0702238662 and 0701117468.

## **ISSUES FOR DETERMINATION**

1. Whether the doctrine of recent possession was properly relied upon by the trial magistrate to arrive at the conclusion made in the Judgment.
2. Whether the phone was established to belong to the deceased Joseph Bundi.
3. Whether the appellant gave a satisfactory explanation how he came by the phone in question.

The decision of the lower court in relation to the appellant herein is found at pages 292 (214) to 294(216) of the Judgment and is also the effect doctrine of recent possession applies and the court finds the accused guilty as charged and convicted on count VI and acquitted on count VII which ought to have been the alternative charge. According to the trial magistrate PW13 the sister of appellant, the appellant was aware police were looking for stolen phones by 19<sup>th</sup> July 2011 when PW13 borrowed the phone to call her husband PW9 but A4 didn't lead police to arrest A2 whom he claimed gave him the phone on 17.7.2011. That according to A4 he was to keep phone as security for one week and return upon refund of 300/= but didn't do so until on 12.8.2011 when he was arrested long after A2 had been arrested and he didn't report. The court found A4 unreliable witness on account that he didn't volunteer information to

the police that A2 had given him the phone after A2 had been arrested.

The Trial Magistrate also doubted if A2 was residing at the place stated by A4. She said that claim that A2 gave phone to A4 was an afterthought as A4 would have volunteered. Unfortunately if the claim was bonafide A4 defence was thus dismissed and being he was in possession of phone hours after same had been taken from deceased who was murdered at the time the phone was taken, the trial magistrate stated that doctrine of recent possession was applicable.

This court has considered the grounds of Appeal as well as the evidence in the trial courts record and the decision of the trial magistrate as is the duty of the 1<sup>st</sup> appellate court to look at evidence of the trial court a fresh, re-evaluate and reassess and reach its own conclusion see Njoroge vs REplic KLR 19 +, Okeno vs Republic (1972) EA 32 wish to start by stating the position of the law as far as doctrine of recent possession is concerned. In the case of Ng'ang'a, Kahiga alias Peter Ng'ang'a Kahiga vs Republic court of Appeal at Nyeri CR.Appel No. 272 of 2005 it was held:-

**“ It is trite law that before a court of Law can rely on the doctrine of recent possession as a basis of conviction in a criminal case the possession must be positively proved. In other words there must be positive proof, 1<sup>st</sup> that the property was found with the suspect, secondly that the property is positively the property of the complainant, 3rdly that the property was stolen from the complainant and lastly that the property was recently stolen from the complainant. The proof as to time as has been stated over and over again will depend on the easiness with which the stolen property can move from one person to other.”**

And in the case of **Hassan VS Republic [2005] eKLR** regarding recently stolen goods the court held:-

**“Where an accused person is found in possession of recently stolen property in absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or the receiver.”**

In consideration of the ingredients established/spelt out in the case of Peter Ng'ang'a Supra this court is to consider, analyse or establish if the prosecution evidence in magistrates court meets the standard set.

Starting with the question as to whether the property was identified positively as that of the deceased Joseph Bundi the deceased persons brother PW12 Silas Mwenda said the deceased had a phone but he didn't know make of phone, he didn't know sim number and doesn't know if the deceased persons phone was stolen at the time of robbery in which he was murdered.

In count VI appellant was accused of having robbed Nokia 1200 S/NO. 355 734/02/407509/0 valued at Kshs. 2000/- and in the VII count the phone was Nokia 1200 S/No. 355734/02/407509/0 valued at Kshs. 5000/=.

PW13 says she borrowed grey phone from appellant on 19<sup>th</sup> July 2011 when she wanted to call her husband PW9 whom police were looking for.

PW17 claimed that she conducted investigations and analysis of call and text message data into and out of phones of deceased persons and in relation to Nokia 1200 she said it was paired with sim card no 0712710506 belonging to the deceased Joseph Bundi. She said she got call data from headquarters on 18<sup>th</sup> July 2011. She said that the deceased Joseph Bundi used Nokia 1200 at 10.30 p.m on 16<sup>th</sup> July 2011 and at 12.10 hrs. Kennedy Mwenda Kanata paired it with 070365395 and thereafter it was paired with sim number 0725210838 on 19<sup>th</sup> July 2011 at 21.34 hrs by Purity Kagwiria – PW13. That on 22<sup>nd</sup> July 2011 the phone was paired with Safaricom line 0702238662 belonging to Peterson Nthiga and Everlyne Mpinda A2 and A6 respectively.

From Peterson Nthiga the hand set went to Gideon Kithinji. She said phone was traced from Gideon Kithinji – Ex P8. The evidence of PW17 which is most crucial as far as evidence against appellant is

concerned shows the phone passed through many hands and it was finally traced to Gideon Kithinji. It also passed through hands of A2 who was identified by many of the witnesses as having been involved together with A1 and A6 in selling and handling many other phones that were identified to belong to some of the victims of serial murders on the night of 16<sup>th</sup> July 2011. Gideon Kithinji didn't testify although PW17 says phone was traced to him. Evidence of P. C Humphrey Mwenda PW21 is to effect that on 12<sup>th</sup> August 2011 he arrested appellant Mwenda Nkanata who had phone Nokia 1200 taken from the deceased by the name Joseph Bundi during a robbery. PW21 did identify phone he referred to as having recovered from appellant. He said Nokia 1200 was identified as belonging to deceased. He said he was led by tracking machine to where appellant was at Kenya Methodist University at 3.28 pm. He said accused didn't answer them questions. He said accused was not an employee of KEMU but was working at some houses which suspected were hotels.

When PW26 was cross examined by appellants counsel he said that Nokia 1200 was recovered from appellant who on interrogation said that he was given phone by A2 and A6 who approached him and told him they had a problem and requested for some money and gave phone as security and appellant used phone until he was arrested by which time A2 and A6 were already in the cells.

PW26 in cross-examination confirmed allegations by appellant in his defence that A2 and A6 were tenants to his aunt who by the time PW26 was testifying had died. It appears that the Trial Magistrate termed appellants defence as an afterthought without considering evidence of PW26 the Investigating officer in cross examination which confirms that it was not the 1<sup>st</sup> time that he raised his defence. Although trial magistrate said appellant didn't volunteer information to police, PW26 confirms he even visited A1, A2, A4 and A6 houses and conducted search. The trial magistrate seemed to shift the burden of proving the case against the appellant without a basis.

Although PW17 claimed that Safaricom line No 070365395 belonged to appellant, that number is incomplete and evidence adduced by PW18 doesn't seem to show that any request was made to investigate Nokia 1200 mobile phone as paired with 070365395 or even the deceased Joseph Bundi's number.

Request made to PW18 Inspector Mumo Shamalla was to investigate Safaricom Lines 0723101810, 0712710506 and 07299803709 and mobile phones S/No. 353085021027980, 356959013115130 and 3526930422955200. The request was made to PW18 on 17.7.2011 which results he released to Mr Onyango of DCI Nairobi on 26<sup>th</sup> July 2011.

He also received another request to investigate phone Serial number 352693042295200 paired to 0702238662 which he established was used on 17.7.2011 at 05.09 hours , 5.09 am and it was not registered. That No.0727278712 was paired with the phone in question at 11.32 hours on 17.7.11 registered in the name of Fridah Kananu Id 255893875. That 3<sup>rd</sup> phone No. 0723928465 was also paired with it was not registered. He said that on 2<sup>nd</sup> phone S/NO. IMEI 355/310321-30870/878 he established Safaricom line Number 0717373941 was used on it and 0718199695 was also used on it immediately after incident and it was not registered. He said 0712474518 in which was paired with IMEA 355834024075090 belonged to Gideon Kithinji but 0702238662 which was also paired with it was not registered. If there is evidence that Gideon Kithinji's number was used immediately after robbery on the one of the phones that was robbed during incident and murder committed and yet Gideon Kithinji was not charged and didn't testify; If A1, A2 and A6 were mentioned severally and evidence of them having been in possession of phones that were passed to other persons who were witnesses in this matter and whose evidence was believed by the trial magistrate it is not understood why evidence of the appellant that is supported by PW26 is not believed. It is not understood why PW8 and PW9 who even escaped on realising they were wanted could be understood and their evidence accepted if that of appellant was not believed.

I find there was a lot of overwhelming evidence against A1, A2 and A6 which the trial magistrate ought to have looked at critically rather than casually finding that the doctrine of recent possession applied to evidence against appellant.

I do not find that the elements that are spelt out in that case of Ng'ang'a Kahiga have been proved in this case. The prosecution evidence can't be relied upon to infer and presume that the appellant herein committed the offence of robbery with violence considering that the phone Ex P8 was not investigated. This court cannot therefore uphold the conviction as it was not based on sound application of the law. The conviction quashed and sentence set aside. The appellant is at liberty unless lawfully arrested.

**A.ONG'INJO**

**JUDGE**

**In the presence of:-**

Mr. Murage for state

Mrs Kamene Advocate for Appellant.

C/A - Penina

**COURT**

**Judgment delivered, dated and signed in Court this day 29<sup>TH</sup> JUNE 2017**

**A.ONG'INJO**

**JUDGE**