REPUBLIC OF KENYA

IN THE HIGH COURT OF KAKAMEGA

HCCRA NO. 36 OF 2014

REPUBLIC.....RESPONDENT

V ER S U S

PIUS SATIYA AMUKHUMA.....APPELLANT

(**Arising from the Judgment of Hon. H. Wandere in criminal case No. 655 of 2012 at Senior Principal Magistrate's court at Mumias)**

J U D G M E N T.

1. **Pius Satiya Amukhuma** hereinafter referred to as the "appellant"was charged with the offence of Robbery with violence contrary to section 296 (2) of the Penal Code . The particulars being that the appellant on the 24th day July ,2012 at Shianda shopping centre shianda Sub – location in Mumias District within Kakamega County,armed with a bicycle lock robbed **Jonathan Chitechi Nangabo** of one mobile phone make Motorolla C 115 valued at Kshs. 2500/= and cash, Kshs. 1700/= all property to the value of Kshs. 4,200/= and during the time of such robbery used actual violence to the said **Jonathan Chitechi Nangabo**.

2. He was in the alternative charged with handling stolen property contrary to section 322 of the penal Code . Particulars being that the appellant on the 25th day of July 2012 at Shianda shopping centre , Shianda sub location in Mumias District within Kakamega County other than in the course of stealing dishonestly received and retained one Motorolla phone C115 knowing or having reason to believe it to be stolen property ,

3. The prosecution called a total of five witnesses while the appellant testified without calling any witness . At the close of the whole case the learned trial magistrate found the appellant guilty of the principal count, convicted and sentenced him to death .

4. Being dissatisfied with the whole judgment he appealed raising the following grounds :-

i. THAT the trial magistrate erred both in law and fact in convicting him on a defective charge sheet.

ii. THAT the trial court did not consider that the initial report to Police was for the offence of assault and not robbery with violence as PW1 was alleging that he was being assaulted for not paying for the food he had eaten at the Hotel.

iii. THAT the trial court erred both in law and fact by not appreciating that the robbery with violence case was an afterthought in the instant case.

iv. THAT the trial court erred both in law and fact by not considering that there was no exhibit found in his possession if at all I robbed PW1.

v. THAT there was no proof of ownership of the alleged stolen items

vi. THAT the sentence meted was very harsh, in human , unconstitutional , and excessive .

vii. THAT the trial court did not consider that it beats logic as to why even the proprietor of the alleged hotel or any other employee came to court to shed more light on the prosecution's case.

5. The prosecution case is that PW1 Jonathan Chitechi Nangabo a mkokoteni operator at Shianda trading centre was on 24th July , 2012 8 pm at the said centre . He closed his business and left to board a bodaboda. It was dark and as he walked he was suddenly hit from behind at the back, and was hit again in the middle of his head as he turned . All this took place near a hotel and there was security light 40m away. Upon being hit he screamed, before falling down unconscious.

6. He was rushed to Makunga Hospital by PW2 Godfrey Anako Kweyu. He lost a Motorolla C115 phone and cash Kshs. 1,700/= . Upon his discharge from hospital he went to the Police to report, and he was issued with a P3 Form .PW2's testimony was that on 24th July 2012 8 pm he was at Shianda trading centre closing his business near Mama Edith hotel when he heard a loud scream , from beside the hotel . He saw a crowd gathered and holding the appellant, who struggled and ran away. He took PW1 to hospital as he had injuries and was bleeding. He had seen the appellant with a bicycle lock in his hands. He is the one who informed PW1's relatives of what had happened.

7. PW3 **Maloba Akwabi** is a clinical officer attached to Kakamega provincial general hospital. He examined PW1 and found him to have :-

i. Cut at the middle of his head, which was swollen and painful.

ii. Bruises on the left side of face.

iii. Pain on the right part of the chest.

The probable weapon used was blunt.

8. PW4 **Daniel Omumasaba** a brother of PW1 was notified of this incident by PW2 . He visited PW1 at the hospital and learnt that the appellant is the one who had attacked PW1. PW5 **Joseph Biwot** of Shianda patrol base confirmed receipt of this report at the base. He stated that PW1 had been robbed of a mobile phone Motorolla C115 and cash Kshs. 1000/- .

9. He testified that on 24th July, 2012 evening they had been called to rescue a robbery suspect at the trading centre. They went and found the appellant hiding inside a kitchen near the hotel. They took him away to await a report from PW1. A search was conducted on the appellant and a mobile phone retrieved from him. The phone was later on identified by PW1 as his stolen one .

10. When placed on his defence the appellant elected to give an unsworn statement with no witness to call . He stated that he was a farmer prior to his arrest. That on 24th July 2012 he left his home for the trading centre to take chang'aa, when police suddenly arrived and arrested him alongside others . At the Shianda police station some people refunded to PW1 Kshs. 7,700/-. He was unable to raise the amount hence his being charged . He denied any involvement in the case.

11. When the appeal came for hearing , the appellant relied on his written submissions signed on 8th April ,2017 . He submitted that the evidence of the prosecution witnesses was uncorroborated, fabricated, malicious and discredited. He referred to the issue of identification by PW1, where at one point he said he did not recognize the attacker, but later he said he identified him at the police post. The appellant also

referred to PW1's evidence on how the phone was recovered . He wondered how this evidence tied up given that the person who allegedly had the phone never testified.

12. He further stated that having been a dark night , PW2 could not have seen him running away . That his defence of alibi was never considered by the court and the complainant did not know him.

13. The appeal was opposed by the State, through Mr. Juma . who submitted that the appellant was well known to PW1 and so his evidence was that of recognition . Further that the appellant's demand for the person arrested with the phone to be availed had no basis as the phone was found on him.

14. Mr. Juma submitted that the ingredients forming an offence of robbery with violence contrary to section 296(2) Penal code had been established as per the law, as was stated in the case of **Oluoch vs R (1985) eKLR .** Counsel stated that though PW1 saw the appellant he did not recognize him due to the brutal attack on him. Elsewhere he states that indeed the appellant was identified by way of recognition as was held in the case of **Peter Musau Mwanzia V R (2008) eKLR.** Where Court of Appeal held :-

> " **We do agree that for evidence of recognition to be relied upon , the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger . He must show , for example , that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had not been in contact with the suspect before the incident in question . Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence , can recall very well having seen him earlier on or before the incident . It is not clear whether that is what Mr. Mutuku refers to as the basis for recognition ."**

15. It was his further submission that the appellant was indeed found with the stolen phone , as per the evidence of PW5, and that the said phone was positively identified by PW1 . Relying on the court of Appeal case of **Gedeon Meitekin Koiyet VS R (2013) eKLR** he submitted that the doctrine of recent possession was applicable as the evidence of PW1 and PW5 confirmed the recovery of the phone on the appellant . He therefore asked this court to dismiss the appellants appeal .

16. This being a first appeal this court is bound to evaluate the evidence before it and arrive at its own conclusion . In the case of **Okeno vs R (1972 E.A 32** the court of Appeal held thus:-

> " **It is the duty of a first appellate court to reconsider the evidence evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."**

17.In **Kiilu & Another vs R (2005) 1 KLR 174** the court of Appeal held that :-

> **"2. An appellant on a first appeal is entitles to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts own decision on the evidence. The first appellate court must weigh conflicting evidence and draw its own conclusions.**
>
> **3.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 courts' findings and conclusions; it must make its own findings and draw its own conclusion only then can it decide whether the magistrate's findings should be supported . In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".**

18. Having been guided by the above cases I now move on to evaluate the evidence before me . I have duly considered the evidence on record , the grounds of appeal and submissions by both the appellant and respondent and find three issues to be falling for determination. These are :-

> (i). Whether the offence of robbery with violence has been proved.

(ii) Whether the appellant was identified as the robber.

(iii) Whether the doctrine of recent possession applies.

Issue (i) – **Whether the offence of robbery with violence has been proved:**

19. The offence of robbery with violence contrary to section 296(2) Penal Code is said to be committed in **any** of the following circumstances :-

(a) The offender is armed with any dangerous and offensive weapon or instrument; or

(b) The offender is in company of one or more person or persons : or

(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats , strikes or uses other personal violence to any person .

One does not have to prove all these ingredients to establish an offence of robbery with violence. Proof of any one of them is sufficient proof . See **Oluoch vs R (**Supra).

20. From the evidence that was adduced by the prosecution witnesses it is clear that a mobile phone and cash were stolen from PW1 . In the process of the theft , PW1 was injured as confirmed by the witnesses and in particular PW3, the clinical officer (EXB 2a& b). I am therefore satisfied that a robbery with violence was committed against PW1.

Issue No. ii: **Whether the appellant was identified as the robber** .

21. The scenario here is that the offence occurred at 8 pm near Mama Edith's hotel . There is said to have been security light 40 M from the hotel. Did this security light assist any one to identify the appellant?

I shall start with PW1 . The narrative he gives at page 15 paragraph 11-19 is as follows:-

" **I went to board a bodaboda , it was dark then as I walked suddenly I was hit from behind at the back . I turned and saw someone .It was close to a hotel 40 meters away was electricity security light. As I turned was again hit on the head in the middle. It was a hard knock I lost consciousness. I screamed before that , then fell . I was taken to the hospital at Makunga."**

22.Upto the point that PW1 fell down he had not identified any one let alone recognizing anyone . All he says is that when he turned he saw someone. He does not make mention of the person he saw. It would therefore be wrong at this point to suggest that he recognized the appellant because he was familiar from him. Evidence of identification must be strictly analyzed especially in circumstances that are difficult, such as night time .

23. In the case of **Wamunga VS R (1989) KLR 424**. The court of Appeal expressed itself on this as follows:-

"1. Where the only evidence against a defendant is evidence of identification or recognition , a trial court is enjoined to examine such evidence, carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."

24. PW1's narrative is continued at page 16 paragraph 11-13 where he states ;

" **I was treated , then I went to the a post at Shianda . I saw this accused person held there . I was told he was arrested running away from the scene , after I had been attacked ".**

At this point PW1 was actually explaining to the trial court what he had been told at the Police post and not what he had seen. Who is this that was telling him these things ? The person should have testified since all that PW1 was saying amounted to hearsay evidence."

25. PW2 did not witness PW1 being robbed but was attracted to the scene by a loud scream, and he found a crowd holding the appellant . He said he had seen the appellant with a bicycle lock in his hands. Was this before or after the robbery ?. It is not clear from the evidence at page 20.

26. It is strange that none of the members of that crowd that held the appellant testified before the trial court. These are the people who should have explained why and how they arrested the appellant. PW1 who was unconscious when all these happenings occurred and having not identified the appellant cannot turn around to say he recognized him. I say this because from his own evidence he says " I turned and saw a person". If indeed he saw the appellant there is nothing that stopped from stating the names of the person he had seen, since he claims to know him.

Issue No.(iii) – **Whether the doctrine of recent possession was proved.**

27. There is no dispute that the mobile phone (EXB 3a) had been recently stolen from PW1. It is also true that the said phone was positively identified by the complainant (PW1). The issue is whether this phone was found with the appellant. PW5 who appeared to have been the investigating officer testified that upon his arrest the appellant was searched and a mobile phone (EXB 3a) was recovered from him. This was after he was placed in police custody.

28. The complainant (PW1) gave an interesting version of the occurrence which PW5 never alluded to. He states at page 16 paragraph 13-17 as follows:

" **He told the Police that his friend had kept my mobile.**

The police allowed him to call that friend . He arrived it was a total stranger. I heard accused telling that person to go get the phone which he had kept at a place he described to him. The friend left and minutes later brought back my phone. It is here in court".

At page 17 paragraph as 15 -17 he continues: This is the phone that was brought by a young man whom the accused had sent for. He sent his employer called Susan to go call that young man whom the accused sent to get his phone .

In cross examination he still repeatedly what he stated in examination in chief about the phone.

29. The appellant's employer called Susan and the young man who brought the phone to the police were never called to testify. Pw5 the supposed to be investigating officer therefore lied to the court when he said that he recovered the phone from the appellant at the police post . Why did he not present Susan and the young man who brought the phone to the Court as witnesses for the appellant to cross examine them?

30. In the case of **Bukenya & Others vs Uganda 1972 E.A 549 the** court of Appeal in allowing the appeal found as follows:

"(ii). The Prosecution must make available all witnesses necessary to establish the truth , even if their evidence may be inconsistent .

(iii) The court has the right, and the duty , to call witnesses whose evidence appears essential to the just decision of the case.

(iv) Where the evidence called is barely adequate , the court may infer that the evidence of uncalled

witnesses would have tended to be adverse to the prosecution ".

31. Section 143 of the Evidence Act provides that the prosecution is not obligated to call a particular number of witnesses . However the prosecution must where witnesses are available , call them to prove a particular fact, where no evidence has been adduced. In this case there is no evidence to show that the appellant was identified as the person who hit PW1 twice before robbing him. PW1 and PW2 did not see him commit this act . However there are persons who formed the crowd that apprehended him. None of them testified to show why they apprehended him or suspected him to have robbed PW1.

32. Secondly the evidence on record shows that this phone (EXB 3a) was not found on the person of the appellant . It was brought to the police base by a young man through one Susan. Neither this young man nor Susan were called as witnesses to explain how they got this phone . The evidence of PW5 on the recovery has been discredited.

33. The appellant raised an alibi, in his defence and this had run through his cross examination. I find that, with the gaping holes in the prosecution case, the appellants' alibi was not displaced. He could as well have been mistaken as the thief.

34. For the above reasons I find that the appeal has merit and I allow it. I quash the conviction and set aside the sentence.

The appellant to be released forth with unless lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed and dated this 18th day of August, 2017 in open

court at Kakamega.

H. I. ONG'UDI

JUDGE