



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO.241 AND 245 OF 2010(CONSOLIDATED INTO 241 OF 2010)**

**JUDGMENT**

**PETER NJOROGE MURIITHI**

**GEORGE MATHU KURIA .....APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the Conviction and Sentence in Nyeri CMCRC no. 851 of 2009**

**M. Nyakundi SRM)**

Peter Njoroge Muriithi, Joseph Kanyi Wairimu and George Mathu Kuria were jointly charged with robbery with violence c/s 296(2) of the Penal Code. It was alleged that on the 11<sup>th</sup> day of August 2009 at Ruringu Estate, Nyeri South District within Central Province they jointly robbed Joseph Kiilu Mulwa of mobile phone make USB valued at Ksh 4800 and at or immediately before or immediately after the time of such robbery used actual violence to the said Joseph Kiilu Mulwa.

In the alternative Peter Njoroge Muriithi was charged with handling stolen property c/s 322(2) of the Penal Code. It was alleged that on the 11<sup>th</sup> day of August 2009 at Ruringu Estate Nyeri South District within Central Province otherwise than in the course of stealing arranged the retention of one mobile phone make USB valued at Ksh 4800 the property of Joseph Kiilu Mulwa, knowing or having reason to believe it to be stolen property.

After hearing the case the trial court, on the 6<sup>th</sup> October 2010, delivered its judgment and in issued a sentence in the following terms;

“The offence as committed by the accused persons is serious a life was lost of an innocent person. I will therefore sentence the accused persons to hang. On the alternative sentence I will leave it in abeyance.”

It is against this conviction and sentence that the accused persons have filed the present appeal. It is important to note here that as the time of the judgment the 2<sup>nd</sup> accused was deceased.

The case for the prosecution was set out by PW1 no. 75881 Corporal John Sigei.

His testimony was that on the 11<sup>th</sup> Day of August 2009 he was on duty at the Nyeri police station when

he received a call from the OCPD that there was a robbery at Ruringu area near the St. Jude Catholic Church, and instructed him to immediately move to the scene.

He and his colleagues moved to the scene.

They found a person lying down, writhing in pain and covered in blood. He had a deep cut on the head. His mobile pocket was on his belt but the phone was missing. A quick search of the scene showed a lot of footprints.

They decided to rush the victim to PGH Nyeri.

On their way they received a call from an informer who told them that the victim was attacked by a gang who he overpowered but an accomplice of the gang came to his rescue. Instead they beat him up with weapons which he, the informer could not identify because he was very far from the scene. That the gang took their accomplice to hospital.

According to PW1 they reached the hospital gate at 9:40pm. They found Peter Njoroge who appeared suspicious, as he tried to run away. They arrested and interrogated him. He told them that he had come to the VCT and later that he had brought his friend who had been beaten for treatment. They left him in the patrol car.

When they entered the hospital at the cash office they met the 2<sup>nd</sup> accused who upon interrogation told them that he had brought the 3<sup>rd</sup> accused to hospital after he was attacked by robbers at Ruringu area while going home. He then took them to the 3<sup>rd</sup> accused who was on a bed in great pain, at casualty.

At the hospital they were joined by Sgt Mutiso.

The 3<sup>rd</sup> accused was placed under arrest at the hospital while the 1<sup>st</sup> and 2<sup>nd</sup> accused were escorted to police station.

PW1 later learnt that Sgt Mutiso had searched the accused persons at the police station and recovered a phone, and the phone's extra battery from the 1<sup>st</sup> accused.

The victim passed away. A relative provided the police with a receipt for the phone.

Under cross examination PW1 testified that it was 3<sup>rd</sup> accused who had attacked the victim, that it was 2<sup>nd</sup> accused who had gone to rescue the complainant.

PW2 no. 93902 PC Mwandili John Kiriga was on duty on the night of 11<sup>th</sup> August 2009 when the 1<sup>st</sup> and 2<sup>nd</sup> accused persons were brought in by Sgt Mutiso and PC Onyango. He booked them in and searched them. He recovered a mobile phone, without a sim card, and its extra battery from the 1<sup>st</sup> accused from inside his socks. he handed over the phone to Sgt Mutiso.

PW3 Ester Ndunge Kiilu was the wife to the victim. She identified the body for the postmortem. She also brought the receipt for the mobile phone serial no. 358863001278463.

PW4 Joshua Wambua Musau, a brother to the deceased also attended the postmortem exercise and identified the body.

PW5 no 66334 Sgt. Jacob Mutiso was the investigation officer.

His testimony was that he joined his colleagues at the PGH Nyeri on the night of 11<sup>th</sup> August 2009. He found the victim in the police patrol car, and the two suspects 1<sup>st</sup> and 2<sup>nd</sup> accused having been arrested. The victim was unconscious. When he tried to speak to him, he pointed at the two accused persons but he

could not talk. They left the two suspects in the car and escorted the injured victim to casualty. They found one person on a stretcher at casualty. The victim immediately pointed at that person. Upon inquiry he was told by his colleagues that the victim had been struggling with the person on the stretcher (3<sup>rd</sup> Accused) who injured him, and that the 1<sup>st</sup> and 2<sup>nd</sup> accused had escorted him to hospital.

The 3<sup>rd</sup> accused had a swollen face, and was unconscious. He was admitted in hospital. The victim died after three days.

The 3<sup>rd</sup> accused was discharged on 13<sup>th</sup> August 2009 and was arrested.

He gave the s/no for the phone as 35886300128463, and 35886301278463.

He produced the phone, the receipt, the battery and the postmortem report as exhibits.

Under cross examination he testified further that he found when the 1<sup>st</sup> and 2<sup>nd</sup> accused were already under arrest and in the patrol car and the victim was pointing at them. When he was recalled for further cross examination by the 1<sup>st</sup> accused he said that no inventory was made when the phone was recovered.

PW6 Dr. Keith Dindi produced the postmortem report on behalf of his colleague Dr. Kariuki. Cause of death was severe head injuries.

The accused persons were put on the defence.

The 1<sup>st</sup> accused testified on oath that on the material night he was from work when the police met him near the PGH gate. They arrested him, and brought the 2<sup>nd</sup> accused. They wanted to know if he knew him which he denied. They took him to the police station where upon search nothing was recovered.

The 3<sup>rd</sup> Accused testified how on the 11<sup>th</sup> August 2009 he had gone to the shops to buy food. It was about 7.30pm. On the way some people emerged and beat him. He was hit with a rungu on the head. He lost consciousness and found himself in hospital. He was arrested and charged with this offence. He did not know his co accused before.

In convicting the accused persons, the trial court stated;

“the evidence of the witnesses and the death of Joseph Kiilu Mulwa who succumbed to the injuries of the attack is indeed itself proof of a robbery that was meted on him. There is no doubt that a crime was committed. From the evidence of PW 1,2,3,5 it is clear that the mobile phone that was recovered from the first accused socks directly points the accused person being involved in the said crime. From the evidence of PW5, the defence by the accused person themselves, it is clear that three were together. The deceased second accused had mentioned having brought the third accused to hospital. PW5 stated that the deceased victim pointed at the 3<sup>rd</sup> accused who was on a stretcher at the hospital casualty. I find that the prosecution the case beyond reasonable doubt against the first and third accused”

Each appellant filed grounds of appeal which I reproduce here below.

1<sup>st</sup> appellant;

1. that the learned trial magistrate gravely erred in both points of law in fact and/or misdirected herself both in holding and in acting on the uncorroborated evidence of the purported recovery/possession which had no guarantee of accuracy as it was shaky and shoddy
2. that the learned trial magistrate gravely erred in both points of law in fact and/or misdirected herself both in not resolving or approaching the circumstances surrounding the arrest the due

circumspection

3. that the learned trial magistrate gravely erred in both points of law in fact and/or misdirected herself both in not giving my defence any preference or weighing it against the prosecution's case.

2<sup>nd</sup> appellant;

1. the learned magistrate grossly erred in both points of law in fact and/or misdirected herself in both accepting and relying on the conflicting evidence of identification given by both PW1 and PW five regarding the circumstances surrounding my arrest which makes the arrest manifestly unsafe

2. the learned trial magistrate grossly erred in both points of law and fact and or misdirected herself both in treating the alleged confession made by a co accused as sufficient to shed guilt on to me while such were not made on oath or cross examined to test his trustworthiness

3. the learned trial magistrate grossly erred in both points of facts and law and or misdirected herself in relying and acting on the dying declaration allegedly made to PW1 and PW5 which was contradicted by each and as such not safe to rely upon to find a conviction

4. the learned trial magistrate grossly erred in both points of law and fact and or misdirected herself in not putting into account the prosecution's failure to avail essential prosecution witnesses who were at the scene

5. the learned trial magistrate grossly erred in both points of law in fact and or misdirected herself both in giving my defence no amount of weight but merely detecting it.

The appeal was argued by Mr. Wahome Gikonyo and Mr. Ng'ang'a for both appellants while Ms. Jebet represented the state.

The appellants also filed a list of authorities

1. **Njeru versus R[2006] 2 KLR 44**

2. **John Mutura Muraya vs. R (Court of Appeal) Criminal Appeal case number 384 of 2009 (Nyeri).**

3. **Antony Murage Kabethi vs R [2012] eKLR,**

4. **Nguku vs. R [1985] KLR 412,**

5. **Juma Ngodia v R 1 KAR 454,**

6. **Kiarie vs. R [1984] KLR739**

The appellants submitted that the elements of the offence of robbery with violence c/s 296(2) had not been proved.

The prosecution failed to produce evidence to place the three accused persons at the scene of crime.

The appellants further challenged the evidence on the recovery of the phone on the 1<sup>st</sup> appellant pointing out the requirement for a quick search upon arrest, and entry of the search results in an inventory, and the contradicting evidence given by PC Sigei, Mwandili and Sgt Mutiso on the alleged recovery.

To support this point, he relied on the case of **John Mutura Muraya vs. R (Court of Appeal) Criminal Appeal case number 384 of 2009 (Nyeri)**

There was also the issue with the serial numbers that were recorded by PW5. The appellants argued that without a proper explanation the I.O must have been talking about different mobile phones.

He also submitted that the evidence on the arrest of the accused persons did not add up. What PW1 and PW5 told the court was contradictory. In addition, the officers did not give any evidence that they cautioned the accused persons that whatever they would say would be used against them in court. Similarly, the accused persons' so called admissions were inadmissible as they were not properly obtained.

The production of the postmortem report was also attacked for having been done contrary to the provisions of **s. 77 of the Evidence Act cap 80 LoK.**

The police also omitted to carry out forensic investigations that would have placed the 3<sup>rd</sup> accused squarely at the scene. He had injuries, and so did the victim. They were alleged to have been struggling with each other hence DNA from each of them could be found on the other. On this they relied on Antony **Murage Kabethi vs R [2012] eKLR.**

There was the issue of the pointing at the accused persons by the victim. PW1 said he died within 30 minutes of admission, PW5 said three days. Be that as it may, the witnesses said he was unconscious, the question then would be how he could point out at the accused persons. If the prosecution relied on this as a dying declaration, it did not meet the standards set in section 33 of the Evidence Act. Counsel submitted that the trial magistrate failed to interrogate this evidence. See **Kiarie vs. R [1984] KLR739**

Relying on **Okethi Okale v R** counsel further submitted that the court failed to consider the defence by the accused persons. The 3<sup>rd</sup> accused explained how he received his injuries. The 1<sup>st</sup> accused explained how he happened to be near the hospital gate.

Finally, that the judgment did not comply with section 169 of the CPC.

In response that state opposed the appeal.

It was submitted for that state that PW1's testimony was that Sgt Mutiso only conducted the search, but the phone was recovered by PW2.

That the wife of the victim produced proof of ownership of the phone and any apparent confusion was explained by PW5 as an error.

On the contradictions regarding the arrest of 1<sup>st</sup> and 2<sup>nd</sup> Accused, it was submitted that Sgt Mutiso arrived after the arrest and that is why he found both in the police patrol car.

Regarding the production of the postmortem report the state's position was that under section 77 and 33(b) of the Evidence Act the same was properly produced.

Regarding the blood sample, it was argued that there was no evidence that the 3<sup>rd</sup> accused person bled at the scene and all the blood at the scene belonged to the victim. That the prosecution's failure to carry out the forensic investigation could not be held to be fatal to its case.

Finally, that the court did consider the accused persons' defences. The coincidence of the 3<sup>rd</sup> accused's attack and the presence of the 1<sup>st</sup> accused at the hospital were considered to support the case for the prosecution.

The grounds of appeal can have determined through the consideration of two broad issues; whether the prosecution proved the ingredients of the charges and whether, there was sufficient evidence to support a conviction.

## **Section 295 of the Penal code defines the offence of robbery 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.

## **Section 296 (2) of the Penal Code provides the ingredients for the offence of robbery with violence to be where the offender**

- i. is armed with any dangerous or offensive weapon or instrument, or
- ii. 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 personal violence to any person,

In this case, the police first received information from some unknown person that there had been an incident. Then the officers who went to the scene were rang by an informer that the incident was actually a robbery. The informer could see from 'very far' according to PW1, the attack going on from the beginning to the end, but did not call the police in good time to avert the crime, only called after the event, and the alleged gang had left to take their own to hospital. That in is suspicious and leaves many questions unanswered.

The police tried to place the three accused at the scene of crime.

This informer did not identify the members of the gang or any of the three attackers specifically. The arrest of the three was all circumstantial.

According to PW5 the deceased kept pointing at the 1<sup>st</sup> and 2<sup>nd</sup> accused persons in the patrol car.

Now, that evidence is inconsistent with that of PW1. There is no time the three were together in the patrol car at the same time. According to PW1 the 1<sup>st</sup> person to be arrested was 1<sup>st</sup> accused/appellant. They left him in the patrol car as they took in the victim. It is noteworthy that PW1 did not mention any reaction from the victim when 1<sup>st</sup> accused was arrested because the victim was unconscious. They then took the victim inside the hospital. They found the second accused (now deceased). There was no reaction from the victim. The second accused allegedly took them to the 3<sup>rd</sup> accused. Hence what PW5 said about the victim pointing out his attackers is not supported by the evidence on record. Further gestures are not recognized by law to amount to a statement.

This is clear from section **33 of the Evidence Act which provides for Statement by deceased persons among others. That statements, written or oral or electronically recorded**, of admissible facts made by a person who is dead are themselves admissible in the following cases....

A dying declaration must either be oral, written or electronically recorded. That is the upshot of the provisions of the law. The gestures allegedly made by the victim could be interpreted to mean anything depending on how they were made, what expressions facial of otherwise, accompanied them. It would be dangerous to assume that they meant only one thing, that those were the attackers. The trial court misdirected itself by taking the alleged gestures by the deceased as proof of identification of his attackers.

This piece of evidence is untenable.

The alleged recovery of the phone was also marred with contradictory evidence from the police officers. The failure to conduct a quick search at the point of arrest. The lack of an inventory hence nothing to support the allegation that the phone and its battery were found on the 1<sup>st</sup> accused.

The various serial numbers mentioned by the wife of the victim, and PW5 raised the unresolved issue as to whether there were one or more phones involved and if so whose were the others. This evidence was unreliable.

The argument about failure to carry out forensic investigation and to avail forensic evidence cannot be wished away. The state cannot testify that all the blood at the scene belonged to the victim. Neither can the state be heard to argue that it was not told that the 3<sup>rd</sup> accused (2<sup>nd</sup> appellant) was bleeding. It was the duty of the state to confirm all these facts before bringing the charge against the appellants.

By the time they were charged the victim had died. The state knew it had no eye witness. It knew it needed to place the suspects at the scene. Its informer had given one very good lead; the allegation that it was the 2<sup>nd</sup> appellant had attacked the victim alone. He was injured in the process. What better way did they have than to seek DNA evidence? The failure to carry out investigations to this end left a big gap in the case for the prosecution regarding the allegation that the 3<sup>rd</sup> accused (2<sup>nd</sup> appellant) fought or struggled with the victim.

There was no evidence or evidence of investigations to recover any weapons or dangerous instruments despite the allegations by the informer that the victim was attacked with weapons which he could not identify. Considering the span of time between the attack and the arrival of the police and arrest of the suspects, that ought to have been a priority.

Without this evidence there is nothing to prove that the appellants inflicted the injuries on the victim.

From the foregoing it is clear that the ingredients of the offence were not proved. The evidence on record was weak, as the case was poorly investigated. The trial magistrate did not interrogate the evidence placed before her. The appellants did not have any obligation to prove their innocence. It was upon the prosecution to prove their case beyond a reasonable doubt.

With regard to the alternative charge, the particulars were that the 1<sup>st</sup> accused handled the stolen phone by arranging for its retention.

**Section 322(1) of the penal Code provides the ingredients of the offence of handling stolen goods; that**

a person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

The evidence that was led was that he was the one in possession of the stolen phone. According to the police he was searched and it was found on his body following its theft from the victim. No evidence was led to support the allegation that he arranged for its retention, how he did so, as that presumes the involvement of a third party. This casts further doubt on the evidence of the search and recovery on the 1<sup>st</sup> appellant. It appears as if the evidence of the possession was an afterthought and cannot be relied on.

There was the issue of the postmortem report. It was produced to establish the cause of death of the victim. Though the prosecution and the trial court did not abide by the requirements of Section 33 of the Evidence Act and the appellants were unrepresented, the production of the report did not cause any miscarriage of justice.

Finally, on the contents of the judgment section **169 (2)** of the **Criminal Procedure Act** provides

‘In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced’.

While it is true that at the end of the judgment the trial court did not state the specific sections, the court did mention these provisions at the start of the judgment. It was important to however be specific at the conclusion to state the provisions as required by law. However, that omission does not invalidate the judgment. The error is curable under Section **382 of the Criminal Procedure Code which provides;**

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, **judgment** or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, **unless the error, omission or irregularity has occasioned a failure of justice:**

It has not been demonstrated that the appellants suffered any injustice due to that omission as it is clear from the judgment they what charges they faced.

As a first appellate court, I have carefully considered the evidence as was placed before the trial court, the law, and the authorities cited. I find that it is not in doubt that the deceased Joseph Kiilu Mulwa was attacked by unknown people and sustained injuries that led to his death. It has not been established that the appellants are the persons who committed that heinous crime. The prosecution failed to place the appellants at the scene of crime despite their arrests as suspects.

There was poor investigation of the case, hence the evidence fell short of the standard of beyond a reasonable doubt.

In the circumstances I find that the conviction was unsafe. It is quashed. The sentence is set aside. Each appellant is at liberty unless otherwise legally held.

**Dated, Signed and Delivered in open court this 19<sup>th</sup> day of September 2017 at Nyeri**

**Teresia Matheka**

**Judge**

**In the presence of;**

**Appellants**

**Ms. Jebet for state**

Mr. Wahome

Mr. Ng'ang'a

Court Assistant Harriet.

Court Assistant: