REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 65 OF 2013

BENARD MWANGI NJERI…….……APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

(*An appeal from the original conviction and sentence in the judgment in the Chief Magistrate's Court at Milimani Cr. Case No. 299 of 2013 delivered by Hon. P. Biwott on 8th February, 2013).*

JUDGMENT

BACKGROUND.

The Appellant was charged alongside two others with two counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. He was convicted in the first count and sentenced to suffer death. The particulars of the charge in the first count were that on 19th January, 2006 the Appellant with others while armed with a pistol robbed Justine Peter Geda Okeyo of a phone, Nokia 7260, valued at Kshs. 30,000/- and at or immediately before or immediately after the time of the robbery shot and killed him. The particulars on the second count were that on the same day, the Appellant together with others, while armed with a pistol robbed Fiona Mutta Nandia of a phone, handbag, prescription glasses, national ID card and a beauty case all valued at Ksh. 40,000/-.

The Appellant was dissatisfied with both the conviction and sentence and he preferred this appeal. He filed his ground of appeal on 25th April, 2013. In summary, he was dissatisfied that the mobile phone transcripts obtained from Safaricom mobile phone subscriber was not adduced in court in line with the provisions of the Evidence Act. He faulted the learned trial magistrate therefore in holding that in view of the production of the transcripts, he was positively identified. He was also dissatisfied that the trial court contravened Section 200(3) of the Criminal Procedure Code because the magistrate who wrote the judgment is not the one who delivered it. He further faulted the learned trail magistrate in not properly considering his defence and rejecting the same without good grounds. Finally, he was dissatisfied that the evidence on record if considered in its totality did not prove the prosecution's case beyond all reasonable doubts.

EVIDENCE.

The prosecution's case was that the deceased, Justine, was dropping off the second complainant, Fiona, at her home in South B after work when they were accosted by gangsters. The assailants' pulled up behind them as they were about to enter the gate. One of the robbers ordered Fiona to step out of the car and

ordered her to hand over her possessions which she duly did; the robber then walked away. She could hear the other robbers demanding the car keys from Justine but there was commotion since Justice was resisting. The robber who had walked away after robbing Fiona was called back by another robber and he shot Justine. The robbers then drove off and Fiona started shouting for help. PW1 who was a neighbour helped her take Justine to Mater Hospital where he was declared dead on arrival.

PW8, No. 214694 CPL Joseph Waihenya, was assigned the duty of investigating the case. In the course of his investigations and with the help of Safaricom mobile phone subscriber, he found that the stolen phones had been used after the robbery. He traced the transactions to a phone number he associated with the Appellant. Of particular interest was the fact that airtime had been transferred from the deceased's number to a Safaricom line associated with Benard Mwangi Njeri shortly after the robbery. When a call was placed to the line that had received the airtime, the owner gave his location as Buru Buru Outering Estate. However, when the officer traced the house described the individual was not there. An informer led them to a place where the former occupier of that house had moved from where they arrested the Appellant and consequently charged him.

PW1, Said Rajab Kombo, a businessman testified that on the night of 18th and 19th January, 2006 at about 1.00 a.m. while sleeping in his house, heard gun shots and whistle blowing which woke him up. He went to the children's bedroom from where he viewed his gate which is where the noise was coming from. There was a car with its headlights on. A lady who he identified as Fiona (PW7) was shouting that someone had been shot and needed help. He knew her. PW1 saw someone lying by the motor vehicle at the gate. Thereafter, Fiona's mother together with Fiona rushed to his gate. They informed him that Fiona's friend had been shot and requested that he helps them take him to the hospital. PW7 took the victim to Mater Hospital where he was pronounced dead. Meanwhile, PW7 had raised the OCPD Embakassi and informed him about the incident.

PW2, Grace Mwendwa Muchohi was the fiancée to the deceased. She confirmed that the deceased owned mobile phone number 0721211607 and previously had another line number 0733744273. Her further evidence was that on 15th November, 2005, the deceased bought her a Nokia 7260 mobile phone but from around 17th November, 20005, the deceased started using it. She was informed of his death on 19th January, 2006.

PW3, Chacha Odero testified that the deceased was his brother in law being a brother to his wife. He only received the information of his death on the morning of 19th January, 2006 after 1.00 a.m. He went to Mater Hospital where he confirmed the information. Thereafter, he and other family members transferred the body to the Lee Funeral Home.

PW4, Inspector Beston Nzomo then of Likia Police Station testified that he arrested the 3rd accused on 22nd February, 2006. **PW5, Corporal Richard Kibet** then of CID Embakasi was an arresting officer in respect of the Appellant. His evidence was that based on intelligence information, were directed to a house within Kariobangi South where he and other CID Officers arrested him on 16th February, 2006. **PW6, Peter Maturi Mwamba** was a Pathologist who conducted the post mortem on the body of the deceased. His opinion was that the deceased died of severe hemorrhage due to a single gunshot wound to the rungs and heart**. PW7, Fiona Muta Nandia** was the 2nd complainant and her evidence formed the summary of the prosecution's case. **PW8, Chief Inspector Josphat Wahinya** was then working with CID at Embakasi. He was the investigating Officer. He summed up the evidence of all prosecution witnesses and charged the Appellant and his co-accused accordingly.

After the close of the prosecution's case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave an unsworn statement of defence in which he denied committing the offences. He stated that on 19th January, 2006, he was at home as usual and did not go anywhere else. On 16th February, 2006 at about 3.00 a.m. he was in his house sleeping when five police officers woke him up and asked him whether he was called Benard. When he answered in the affirmative, they arrested him without giving an explanation. He showed him his identify card as well as his driving

licence. He also showed him his employment card as a teacher. He stated that he was both a driver and an Arabic teacher. He gave his identify number as 22422709. The Police then proceeded to conduct a search in his house but found nothing incriminating or of importance. He also surrendered his mobile phone a Samsung C100, his identify card, his driving licence and his employment card to the police. He was locked up at Embakasi Police Station for six days. On the 7th day, the investigating officer Mr. Wahinya interrogated him on the robbery which he denied having been involved in. He was thereafter charged accordingly. He denied that the details of the Safaricom line that was adduced as evidence allegedly linking him to the offences were untrue. His defence was that the details ought to have contained his identification card details which they lacked. He stated that he was charged based on untrue informers report.

SUBMISSIONS

The parties decided to argue their cases by way of written submissions which they highlighted on 10th March 2016. The gist of the Appellant's submissions was that first of all, the charge sheet on record was not the final charge sheet agaist which the Appellant was charged; therefore the proceedings were a mistrial. Secondly, the Appellant stated that the only thing that connected him to the offence was the telephone transcripts showing that airtime credit had been sent to someone with a similar name, adding that the owner of the phone that received the credit was not properly identified. Further, the Safaricom transcripts had been produced by PW8 who was not the maker and were therefore, inadmissible. Thirdly, the Appellant submitted that Section 200 of the Criminal Procedure Code was not complied with.

The state through Ms. Wario, opposed the appeal. It was averred that the fact that the Appellant understood the particulars of the charge he was facing and participated fully in the trial meant that he understood the charges. Secondly, that the conviction was based on cogent circumstantial evidence linking the Appellant to the offence as corroborated by the evidence of PW8. The Respondent relied on the case of **Republic –v- Veronica Wanjue Njue [2014] eKLR(Criminal Case Number 4 of 2010, Embu)**to support the same. It was further submitted that the Safaricom transcripts were properly produced, thus Sections 77 and 78 of the Evidence Act were complied with. Finally, the respondent added that Section 200 of the Criminal Procedure Code had been complied with since Hon. P. Biwott heard the case and wrote the judgment.

DETERMINATION.

Upon evaluating the record before me and the parties' submissions, this court identifies the following issues for determination:

1. **Whether the charge sheet was defective**
2. **Whether section 200 of the Criminal Procedure Code was complied with.**
3. **Whether the mobile phone transcripts relied on by the prosecution were admissible.**
4. **Whether the prosecution established its case against the Appellant.**

This being a first appeal, the court is under an obligation to weigh the evidence as a whole and reach its own independent conclusion. See ***Okeno Vs Republic*** **(1972) EA 32 where the court stated:**

> ***"An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (Dinkerrai Ramkrishan Pandya Vs Republic (1957) EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shanlal M Ruwala Versus Republic (1957) EA 570). 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 court's findings and conclusions;. It must make its own findings and draw its own conclusions. 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''.***

The first issue for determination is whether Section 200 of the Criminal Procedure code was not

complied with. This provision states:

> ***"200. (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -***
>
> ***(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or***
>
> ***(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.***
>
> ***(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.***
>
> ***(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right***
>
> ***(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."***

The record of proceedings shows that this matter first came before Hon. E.N. Maina for plea-taking and determination of the Appellant's application for bail. Thereafter, Hon. P. Biwott heard all the witnesses in the case, acquitted the 2nd and 3rd accused, but found that the Appellant had a case to answer. Shortly thereafter, he was transferred and the case was reallocated. When the matter came before Hon. K. W. Kiarie, the court explained Section 200 of the Criminal Procedure Code to the Appellant, who requested that all the witnesses be heard afresh. Consequently, the Chief Justice directed that the case is heard by Hon. Biwott. The Appellant renewed his request before Hon. Biwott who declined the request for the reason that the matter had simply reverted back to the same court that heard the other witnesses. The magistrate proceeded to explain the provisions of Section 211 of the Criminal Procedure Code, and the Appellant gave an unsworn testimony in his defence. The case concluded and Hon. Biwott wrote the judgment which was delivered on his behalf by Hon. L. Mbugua who also sentenced the Appellant.

From the above explanation, it is clear that when Hon. Biwott heard the matter again, he was merely continuing from where he had reached. He was the trial magistrate seized of the trial before he went on transfer. When the then Hon. Kiarie took over the trial, he did not hear any evidence. Hence, there was no need for Hon. Biwott to explain Section 200 since no evidence had been heard or recorded by a different magistrate. Further, the fact that the judgment written by Hon. Biwott was delivered on his behalf by Hon. Mbugua who consequently sentenced the Appellant was well within the law. Section 200(2) of the Criminal Procedure Code cited above allows a succeeding magistrate to pass the sentence based on the judgment written by the preceding magistrate. This court therefore dismisses that ground of appeal as baseless.

The second issue that this court must deal with involves the Appellant's contention that the charge sheet was defective. He challenged the fact that the charge sheet, the basis of which he took his plea on 5th March, 2012 was not contained in the record of proceedings. The record shows that that there are 4 charge sheets dated 27th February 2012, 27th February 2012, 5th March 2012 and 9th July 2012. The first three charge sheets are clearly shown as cancelled out and clearly marked as substituted. This court noted that the copy of proceedings supplied to the parties contained only the final charge sheet and none of the substituted ones. This appears to have been a mere oversight and this court is sufficiently satisfied that the Appellant was convicted of the charges contained in the final charge sheet to which he entered a plea on 5th July, 2012. They are also the charges referred to in the judgment. This ground of appeal is therefore

also dismissed.

The third issue is on the admissibility of the Safaricom transcripts that were used to connect transfer of airtime credit from the deceased's phone to a mobile phone line allegedly belonging to the Appellant. The issue as raised by the Appellant is whether the production of the evidence by PW8 contravened Section 33 of the Evidence Act which provides thus:

> ***"33. Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases -***
>
> ***(b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;"***

PW8, the investigating officer testified that he applied to Safaricom for a print out of the deceased's phone records on 2nd February, 2006. At the trial, the Appellant objected to the investigating officer producing the transcripts and the court ordered that the maker attends court and produces them citing that Safaricom was a known company and their absenteeism was therefore inexcusable. The prosecution sought a 10 day adjournment to enable them get a witness who could produce the exhibits in question. The Appellant objected since the prosecution had previously been granted a final adjournment. The prosecution agreed that it had indeed promised to close the case on that material day but was unable to due to the absence of a witness from Safaricom. The court decided that the prosecution had been granted ample time to procure a witness and on failing to do so, an adjournment was declined. The court granted a 30-minutes' adjournment, but an employee from Safaricom could not be produced. The prosecution implored the court to allow PW8 to produce the exhibits **'for sake of justice only(sic)'.** The court acquiesced to their application and PW8 was recalled and he produced the documents in a ruling the court said was in the interest of justice.

In **Mombasa Criminal Appeal No. 214 of 2001**, **Fahim Salim Swaleh vs Republic,** it was stated **that;**

> ***"Under section 33, statements written or oral, of admissible facts made by persons whose attendance inter alia, cannot be produced or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appear to be unreasonable, are themselves admissible when such a statement among other conditions, was made in the discharge of a professional duty such as was the case herein. It is however an established practice & law that before the court admits such a statement (which in this case, is the Government Analyst report) it has to be satisfied that the necessary conditions for such an admission have been proved on the court record."***

Majanja J. in **Boaz Owiti Okoth & Another vs Republic[2014] eKLR** stated that:

> ***"In order to admit a document without calling the maker under section 33 of the Evidence Act, the prosecution must establish the conditions precedent outlined in the section, that is, the maker of the document is dead, cannot be found, is incapable of giving evidence or whose attendance cannot be procured without great delay or expense. I would hasten to add that admissibility is a threshold issue that must be determined before the document is admitted."***

In the present case, the prosecution had to adduce the evidence as directed by the court and they did so using PW8 even though he was not the maker. Would this amount to a determination that the threshold for admittance was met? This court finds that the court weighed the counterpoints of either granting an

adjournment to grant the maker an opportunity to admit the documents and allowing PW8 to admit the documents and found it was duty bound to allow PW 8 to do so since not allowing it would have resulted in **'great delay'.** The Black's Law Dictionary(9th Edition) defines *delay* as:

delay, *n.* (13c) 1. The act of postponing or slowing

2. An instance at which something is postponed or slowed.

This court has looked at the matter and evaluated the same and it appears that the documents were properly allowed in the interest of ensuring no undue delay was occasioned; simply because the trial court had disallowed any further adjournment. This does appears to have been within the threshold required. Hence, the documentary evidence was admissible and properly produced.

Turning to the issue of identification, the Appellant also contended that the person identified as the registered owner of 0721 950591 was Benard Mwangi Njeri of P.O. Box 1232 Thika. The Appellant contended that since the Safaricom data in respect of the line did not contain a National Identification Card number which could incontrovertibly tie him to the line in question he was thus a victim of mistaken identity. The investigating officer, PW8, countered that he used the phone records and that led to the arrest of the Appellant. Given that none of the prosecution witnesses directly identified the Appellant as having been at the scene of the crime, it is safe to conclude that the Appellant was convicted purely based on circumstantial evidence. Fiona, 2nd Complainant, too, was adamant that she did not 'capture his face'. The law is now settled in respect of reliance on circumstantial evidence as the basis of a conviction.

See the case **of Republic v Kipkering Arap Koskei & Kimure Arap Matatu [1949] 16 E.A., 135.** The then East African Court of Appeal said;

> ***"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt, and the burden of proving facts which justify the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to accused"***

Again, in **Abanga alias Onyango vs Republic Criminal Appeal No. 32 of 1990** as cited in **Solomon Kirimi M'rukaria vs Republic Criminal Appeal No. 46 of 2011**, the Court of Appeal outlined the principles which should be applied in testing the strength of circumstantial evidence. The court delivered itself as follows;

> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests (i) the circumstances from which an inference of guilt is sought to be drawn, must cogently and firmly established, (ii) those circumstances should be of a definitive tendency unerringly pointing towards guilt of the accused (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."***

The courts have stated that circumstantial evidence has the same force as all other. In **Republic vs Taylor Weaver & Donovan[1928] 21 Criminal Appeal CA 20** the court stated:

> **"Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified exam is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial."**

This court then has to grapple with the question as to whether the circumstantial evidence prevailing was so strong such that put together no other conclusion other than the inference of the guilt of the Appellant could be deduced. The records relied on by the prosecution were related to mobile lines numbers 0721211607 and 0723488113, both connected to the deceased. Call data relating to 0721950591, registered to the Appellant was produced as MFI 7 and related to 5th February, 2006 to 15th January

2006.The prosecution produced evidence to show that on the material night, there had been a balance query, to *144# at 00.56.35 hours which was followed by a transfer of airtime credit at 00.57.35 hours to 0721950591. A request for the subscriber's details, Exhibit 2, showed that the number 0721950591 belonged to Benard Mwangi Njeri of P.O. Box 1232 Thika.

Given that the deceased was killed around midnight the investigating officer concluded that whoever had made this transaction after the deceased had died was most likely connected to the crime. When a call was made to this number, the holder directed PW8 to Buru Buru Outering estate. Upon arrival PW8 and other officers learnt that the holder of that line had moved to Kariobangi estate. They traced the house but did not find him. Corporal Kibet, PW5, was instructed to trace him at night, which eventually led to the Appellant's arrest. The Appellant's number appeared to have used handset with IMEI Number 3533830077310 on 19th January, 2006 at 22.52 hrs. This IMEI number matched the phone stolen from Fiona, the second complainant.

The evidence adduced from the Safaricom transcripts showed that the credit was sent to Bernard Mwangi Njeri after the deceased was robbed. Evidence also proved that the same line was also used in a phone number with the same IMEI as the deceased phone. The Appellant was arrested following leads given when he received a call from the police.

Needless to say, the police arrested the Appellant based on what they said was his link with the deceased's stolen mobile phone, details of which I have analysed elsewhere in this judgment. But a big gap existed in closing the gap as to how the police concluded that the mobile phone into which the money transfer was credited belonged to the Appellant. Of course the Appellant's name is Benard Mwangi Njeri which is the same name as provided in the details of the transcripts by the mobile phone subscriber. According to the investigating officer, he did not recover any mobile handset from the Appellant upon his arrest. It is the humble view of this court that had any handset been recovered from the Appellant it would have been easy to investigate its connection with the alleged money transfer. More importantly, in the absence of the recovery of an identification card from the Appellant, which would have confirmed his identity through the Registration of Persons Bureau, the police ought to have taken his finger prints so that they could match them with their true owner. These were critical areas of investigations which the police overlooked that rendered the case a fatal blow. Coincidentally, although the Appellant stated that he handed over his identity card to the police during the arrest, the Investigating Officer did not mention or counter that fact in his evidence. The fairest thing that the police ought to have done was to establish the true identity of the Appellant through the Registration of Persons Bureau. The mere fact that the Appellant bears the name Benard Mwangi Njeri that was reflected in the Safaricom transcripts is not full proof that he is the one and the same person as the Benard Mwangi Njeri therein. It is important to note that people carry identical names and the only elimination method as to who is who is through proper and formal identification process. Let me also note that the mobile phone transcripts produced in court did not bear any identity card numbers that would otherwise have linked the Appellant to the transactions between his alleged mobile phone and that of the deceased. Therefore, bearing in mind that there was no visual identification of the Appellant, it is now safe to conclude that the circumstantial evidence adduced was extremely remote to link him to the robbery. It was then not safe to convict the Appellant.

Finally, let me comment on the fact that the Appellant was held in police cells for more than the required period of 24 hours under the current Constitution. I hasten to add that the Appellant was arrested when the old Constitution was in place, in which case the persons held for capital offences such as robbery with violence and murder would be incarcerated for up to fourteen days. As such, the Appellant's assertion that his constitutional rights were violated because he was held in custody for seven days has no merit.

In the end, I find that the prosecution did not prove their case beyond all reasonable doubt. This appeal has merit and I allow the same. I quash the conviction, set aside the death sentence and order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and **DELIVERED** this **28th** day of **April, 2016**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *M/s B. Rashid for the Appellant*
2. *M/s Aluda for the Respondent.*