



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 1 OF 2015

JACKSON MUSEMBI IVULI.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in **Mutomo Senior Resident Magistrate's Court Criminal Case No. 19 of 2013** by **Hon. S. K. Mutai Ag. P M** on 19/03/13)*

J U D G M E N T

1. Jackson Musembi Ivuli “the Appellant” was charged with offences as follows:

Count 1 – **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. Particulars of the offence were that on the **15th** day of **January, 2013** at about unknown time, **Voo Location** in **Mutomo District** within **Kitui County**, jointly with others not before court, being armed with dangerous weapons namely two pangas and a sword robbed **Jacob Mutonga Maanzo** of his mobile phone make **Nokia 2680** worth **Kshs. 5,000/=** and cash **Kshs. 900/=**.

Count 2 – **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. Particulars of the offence were that on the **15th** day of **January, 2013** at unknown time, at **Voo Location** in **Mutomo District** within **Kitui County**, jointly with others not before court, being armed with dangerous weapons namely two pangas and a sword robbed **Elizabeth Ngambai Kitheka** of her mobile phone make **Nokia 1112** worth **Kshs. 3,000/=**.

Alternative Charge – **Handling stolen property** contrary to **Section 322(1)(2)** of the **Penal Code**. Particulars of the offence were that on the **15th** day of **January, 2013** at unknown time, at **Voo Location** in **Mutomo District** within **Kitui County**, otherwise than in the course of stealing, dishonestly received or retained one mobile phone make **Nokia 1112** worth **Kshs. 3,000/=** the property of **Elizabeth Ngambai Kitheka** knowing or having reasons to believe it to be stolen property or unlawfully obtained.

2. He was tried, convicted on all counts and sentenced to serve **Life Imprisonment**.

3. Being dissatisfied with the judgment of the learned Magistrate he appealed on the following grounds as amended on the **8th March, 2016**, that:

(i). Evidence of identification presented by the witnesses was not satisfactory.

(ii). The Appellant was made to participate in the identification parade after appearing in court which was prejudicial to him.

(iii). The admission of the identification parade form (Exhibit 4) was in total violation of **Article 50(4) of the Constitution**.

(iv). Evidence of possession of a stolen phone was discredited therefore not capable of supporting a conviction.

4. Facts of the case were that on the **15th day of January, 2013** at about **6.30 a.m.**, PW1 **Jacob Mutonga Maanzo** and PW2 **Elizabeth Ngambai Kitheka**, the 1st and 2nd Complainants, a husband and wife respectively were on their way to work using a motorcycle Registration No. KMC as a means of transport. They were stopped by three (3) men at **Kwa Mutei River** who threatened to harm them. One of them was armed with a panga. They took their cell phones and cash **Kshs. 900/=** which PW1 had. They tied them up. Two (2) of them left as they were held hostage by their mate. The other two (2) returned at about **11.00 a.m.** They untied and released them. Having been freed they traced their motorcycle that was in the bushes and went back home. They reported the matter to PW4, **Onesmus Mutiangu**, the Assistant Chief who notified the police.

5. PW6, **No. 217759, Chief Inspector Jahaness Sandoka** upon receiving the report moved to the scene, at about **1.30 p.m.** with other police officers. He found a body of a person having been burnt by the roadside which they removed to **Kitui District Hospital Mortuary**. In the meantime, PW3 **Phillip Mwanzia Maanzo** found a person being beaten by members of public. He intervened and rescued him. Next to where the person lay was a cell phone that he picked. He later handed it over to the police. The cell phone was later identified as that of PW2.

6. On the **18th January, 2013** PW5, **No. 231686 Chief Inspector Otieno Okwero** conducted an identification parade where the Appellant was identified by PW1 and PW2 as one of the persons who robbed them. Consequently, he was charged.

7. When put on his defence the Appellant stated that he went in search of casual work and by **3.00 p.m.** having not found any he went to his sister's place at **Kivuuni** where he saw two (2) people armed with pangas. They asked him to sit down. They cut him on the left shoulder. They were joined by other people who called him a thief and tied him up. They beat him up. His sister took him to **Mbitini Health Centre**. The following day he was arrested.

8. At the hearing the Appellant canvassed the Appeal by way of written submissions where he submitted that the trial Magistrate failed to rule out the possibility of mistaken identification on the part of PW1 and PW2 as to their attackers. The identification parade was conducted in total violation of his constitutional rights to a fair trial as envisaged by **Article 25(c) of the Constitution**. Having appeared in court on **18th January, 2013** for plea, the identification parade must have been conducted after the witnesses saw him in court which was improper. With regard to the alleged possession of the cell phone he stated that it was found on the ground next to him where mob justice had been administered on his person therefore it should have been dusted to establish if it had his finger prints.

9. In response thereto, the Respondent (State) through **Ms. Amojong**, learned State Counsel opposed the appeal. She submitted that no evidence was adduced to establish that PW1 and PW2 were in court on the **18th January, 2013** when the plea was taken and the identification parade was carried out properly. The Appellant was identified at the scene, **Kwa Mutei River** having stayed with the witnesses for more than 4 hours. She dismissed the defence put up by the Appellant as mere allegations as he never called his sister as a witness.

10. This being a first appellate court, I am duty bound to reconsider evidence adduced at trial afresh and come up with my own conclusions bearing in mind the fact that I had no opportunity of either seeing or hearing witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).

11. The issue the court should be addressing at the outset is whether the identification of the Appellant was cogent? In the **Court of Appeal Case of Michael Nganga Kinyanjui vs. Republic (2014) eKLR** it

was stated thus:

“The courts have all along been alive to the fallibility of eye witness identification. The justice system has as one basic foundations, the assumption that witnesses are capable of accurately describing events that form the basis of a case. It is equally true that witnesses may be deliberately untruthful, but there may be many other causes of accuracy in a witness’s testimony, like imperfect observation, faulty memory or self interest. It is for these reasons that courts approach the question of identification with caution in situations of disputed evidence as demonstrated in the Case of Abdullah bin Wendo v Republic (1953) 20 EA CA 166.....”

The court went on to quote the case of **Cleopas Otieno Wamunya vs. Republic Criminal Appeal No. 20 of 1982** where it was stated that:

***“Evidence of visual identification in Criminal Cases can bring about miscarriage of justice and it is vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on correctness of the identification*”**

12. With this in mind, I do note that the Appellant was identified by PW1 and PW2, both Complainants. In his evidence PW1 stated that one of the persons who robbed them had a black T-shirt and brown trouser. After the arrest of the Appellant he identified him as one of the persons but he did not state what made him identify the person. PW2 on the other hand stated that the person had two pangas and a sword. One of them had a black trouser with brown spots and a hat. She identified the Appellant by the shoes and cut mark on the finger and added that he was the person who guarded them for 4 hours.

13. The Appellant was arrested some five (5) hours after the witnesses were released and at a different location. Although PW2 stated that he is the person who guarded them for four (4) hours she did not say whether or not he had any weapon or not or how he was dressed considering the fact that PW1 did not allude to the fact that he was the person who guarded them as they waited for his accomplices.

14. PW2’s cell phone was taken away from her and later recovered. PW3 found people beating up the Appellant and the cell phone was on the ground. He could not tell who had the cell phone prior to it being put where he picked it from. According to the evidence of PW6 he went to visit the Appellant in hospital where he had been admitted when one person approached him and gave him a cell phone alleging that it had been collected from the suspect. He did not interrogate any other person to establish how the cell phone was recovered. Evidence of how the cell phone ended up on the ground and/or how the person who had it recovered it is missing. It leaves a gaping doubt as to whether the Appellant had actual possession of it prior to being found.

15. It is not in dispute that the Appellant was arraigned in court on the **18th January, 2013** when the plea was taken. Thereafter at **3.29 p.m.** an identification parade was conducted. It is a requirement that witnesses should not see the Accused prior to the parade being conducted. Evidence of both PW5 and PW6 was silent on what transpired prior to the Appellant being identified at the parade. The question that will remain unanswered will be whether the two (2) Complainants were in court when the charges were read to the Appellant. In his testimony PW5 stated thus:

***“..... I recall on 18th January, 2013 that I conducted the identification parade at Mutomo Police Station. The offence was robbery with violence involving the accused. There were two witnesses namely Jacob and Elizabeth. I conducted the parade consisting of 9 persons. I asked the accused and he said he did not require assistance or a friend or advocate. I ensured that the two witnesses never met the accused*”**

16. The questions that remained unanswered are: Where were the witnesses prior to identifying the Appellant? Where exactly was the parade conducted? All these questions having popped up and

remained unanswered, it cannot be stated with certainty that the identification in the circumstances was proper.

17. In the result, the conviction was unsafe. It is quashed and the sentence imposed set aside. The Appellant shall be set free forthwith unless otherwise lawfully held.

18. It is so ordered.

Dated, Signed and Delivered at Kitui this 17th day of May, 2016.

L. N. MUTENDE

JUDGE