



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO. 32 OF 2012**

HARON NDIRANGU NJOROGE .....APPELLANT

VERSUS

REPUBLIC ..... PROSECUTOR

*(Appeal from the Judgment of the Chief Magistrate's Court at Nyahururu Hon. A. B Mongare  
–Senior Resident Magistrate delivered on the 15<sup>th</sup> February, 2012 in CMCR Case No. 1053 of  
2011)*

**JUDGMENT**

The appellant **HARON NDIRANGU NJOROGE** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at the Nyahururu Law Courts. The appellant was brought before the trial court on 19/5/2011 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE**. The particulars of the charge were as follows:

*“On the 23<sup>rd</sup> day of March 2011 at 8.30 pm at Arasha Farm in Subukia District within the Rift Valley Province, jointly with others not before court being armed with dangerous weapons namely pangas robbed **FRANCIS MACHARIA KARANJA** cash money Ksh 66,800/= a mobile phone make Nokia 6070 m-pesa cash Ksh 14,033/= from mobile No. 0724140731 to mobile No. 0723829881, two blankets, singer sewing machine, a bag DVD machine, all valued at Ksh 102,833/= and immediately before the time of such robbery threatened to use actual violence to the said **FRANCIS MACHARIA KARANJA**”*

The accused entered a plea of ‘**Not Guilty**’ to the charge and his trial commenced on 17/10/2011. The prosecution led by **CHIEF INSPECTOR RUTTO** called a total of four (4) witnesses in support of their case.

The complainant ‘**Francis Macharia Karanja**’ who testified as **PW1** and his wife ‘**Tabitha Njeri**’ who testified as **PW2** gave similar evidence. The two told the court that on the night of 23/3/2011 at about 8.00pm they were both in their house at Subukia Arasha Farm. They were taking supper. **PW2** got up to go and feed their cat. When she opened the door she found two men standing outside. They forced **PW2** back into the house and followed. One of the men was armed with a knife. Upon entering the house the men picked up two pangas and used them to threaten **PW1** and his wife demanding money.

They stole cash Ksh 3,000 a mobile phone make Nokia 6070 as well as DVD. The men moved into the

bedroom and took Ksh 60,000/= which were church funds which **PW1** as Treasurer had in his possession. The men demanded to know how much money **PW1** has in his M-pesa Account. He told them he had Ksh 14,000/=. They demanded the PIN Number which **PW1** supplied. After stealing the robbers tied up the couple and left. **PW1** managed to release himself and then went and released **PW2**. The couple shouted for help and neighbours came. They went and reported the incident at Subukia police station.

**PW1** realized that the Ksh 14,000/= he had in his m-pesa account had been withdrawn. He went to safaricom and obtained a printout indicating that the Ksh 14,000/= had been sent to a number 0723829881 in the account name 'Harun Njoroge'. Police took up the investigations of the case and eventually arrested the accused who was arraigned in court and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused gave an unsworn defence in which he denied any involvement in the robbery. On 15/2/2012 the learned trial magistrate delivered his judgment in which he convicted the appellant on the charge of Robbery with violence and thereafter sentenced him to death. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

The appellant who represented himself during the hearing of his appeal relied entirely upon his written submissions which had duly been filed in court. **MS NGOVI** learned State Counsel made oral submissions opposing the appeal. She urged the court to uphold both the conviction and sentence of the accused. This being a first appeal this court is obliged to reconsider the prosecution case afresh and draw its own conclusions. In the case of **MWANGI Vs REPUBLIC 2004 KLR, 28** the Court of Appeal held as follows:

***“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellant court’s own decision on the evidence.***

***2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions”***

In this case there was no eyewitness evidence to place the appellant at the scene of the Robbery. Neither **PW1** nor **PW2** is able to identify the appellant as one of the men who robbed them. **PW1** stated

***“That night the lights were on, then I was however afraid because they were aiming pangas on me. I could not have looked at them”***

Similarly **PW2** states

***“There were lights. The lights were on. I was afraid and I did not see any person.....”***

Therefore neither of the two victims is able to positively identify the appellant as one of the men who robbed them.

The prosecution seeks to rely on circumstantial evidence to link the appellant to this robbery incident. It is alleged that monies stolen from the m-pesa account of **PW1** was transferred to a mobile account registered to the appellant from which account the funds were withdrawn.

**PW1** told the court that he was robbed of a mobile phone make Nokia. He told the court that during the robbery the attackers demanded the PIN Number to his m-pesa account which **PW1** gave them. He had Ksh 14,000/= in his m-pesa account. **PW1** later went to safaricom and obtained his m-pesa account statement **P. Exb 1**. The statement shows that on 23/3/2011 at about 20.40 (ie 8.40pm) a sum of Ksh 14,000/= was transferred from the phone of **PW1** No. 0724140731 to another mobile account No. 0723829881 in the names Harun Njoroge. It is pertinent to note that this transfer occurred barely ten (10) minutes after the robbery which both **PW1** and **PW2** said took place at about 8.00pm.

The question then is who was the holder of the mobile account No. 0723829881 to which the money from the complainant's phone was transferred? **PW4 CHIEF INSPECTOR JANE OLUDHE** was the investigating officer. She told the court that police went to the home of appellant at Mairo Inya. They recovered various documents including an ATM card, Faulu Agent Card, Treatment notes all bearing the name Harun Ndirangu Njoroge. All these documents were produced in court as exhibits. Police also recovered in that house an m-pesa registration form issued by safaricom serial No. 10246923 **P. Exb 8**. It was the form used by the appellant Harun Ndirangu Njoroge to register his mobile No. 0723829881 for m-pesa services on 26/6/2010.

**PW3 EVANS MANGAA OYORI** was an officer with the Registrar of Persons in Nairobi. He told the court that he received from the police the finger-prints of the appellant with a request that he conduct a search at the Registration Bureau. **PW2** did a search and found that the owner of the finger prints was registered as Harun Ndirangu Njoroge, holder of Identity Card No. 13397062 who hailed from Ndaragwa Division of Nyandarua County. **PW2** produced the record he retrieved from their data base **P. Exb 4** which bore a photograph of the appellant. There can be no doubt therefore that the appellant is the gentleman who goes by the name '**Harun Ndirangu Njoroge**'. Indeed the appellant does not deny that his name is '**Harun Ndirangu Njoroge**'. There can therefore be no doubt regarding the identity of the appellant.

As stated earlier no eye witness has placed the appellant at the scene of the robbery. However there is sufficient evidence to show that money from the complainants m-pesa account was transferred into an m-pesa account held by the appellant. Both **PW1** and **PW2** state that during the robbery **PW1** was robbed of his phone and forced to give out his m-pesa Pin number. Hardly half an hour after the robbery at 8.40pm the Ksh 14,000/= which **PW1** had in his account was transferred to the appellant's m-pesa account. **PW1** produced and identified his m-pesa transaction statement. **P. Exb 1**. It shows very clearly that on the material day 23/3/2011 at 8.40pm there was a transfer of Ksh 14,000/= from the mobile number of **PW1** – 0724140731 to the appellant's mobile number 0723829881. The name of the recipient is given as '**Harun Njoroge**' who is the accused. The court takes judicial notice of the reliance by many Kenyans on m-pesa for their financial transactions – it almost rivals the banking sector. It is a world-recognized form of money transfer run by the mobile services provider safaricom. The m-pesa statement produced by **PW1** is as good as a bank-statement in providing proof of transactions from that m-pesa account. It is pertinent to note that the status of this transaction being the transfer of Ksh 14,000/= was noted as '**complete**' meaning that the funds were indeed withdrawn. Thus the funds were withdrawn by the mobile subscriber. I further take judicial notice of the fact that proof of identity is required to enable one withdraw funds by m-pesa. Thus it is only the appellant himself who could have withdrawn that Ksh 14,000/=

The appellant has made no claim that he ever lost his mobile phone nor has he given any explanation of how Ksh 14,000/= came from **PW1** whom he did not know to his m-pesa account. Given the brief interval between the robbery and the funds transfer and withdrawal, the only logical explanation is that the appellant was involved in this robbery. Certainly he benefitted from the funds from **PW1**.

In view of the fact that there exists no evidence placing the appellant at the scene of the robbery I find that the evidence was not sufficient to convict him of the offence of Robbery with Violence. However I am satisfied from the evidence that the funds stolen from the complainant were sent to and withdrawn from appellants m-pesa account. The appellant therefore was the beneficiary of these funds stolen from the complainant. The fact that the appellant withdrew and retained money received from a person he did not know shows that he had the intention to permanently deprive the complainant of these funds. The timing of the transfer being a few minutes after the robbery is also very suspicious. The fact that the appellant made no attempt to return the money or to report to safaricom a mistaken deposit into his account is further proof of *mens rea*. I find that there is evidence sufficient to that the appellant took and retained money from the complainant's m-pesa account. The offence of stealing is proved. I quash the appellant's conviction on the charge of Robbery with Violence. Instead I substitute a conviction on a charge of stealing contrary to Section 278 Penal Code. The death sentence imposed by the trial court is hereby set aside. In its place I substitute a sentence of six (6) years imprisonment to run from the time of conviction by the trial court. It is so ordered.

Dated in Nakuru this 17<sup>th</sup> day of August, 2016

Appellant in person

Mr. Chirchir for State

**Maureen Odera**

**Judge**