



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 177 OF 2014**

**DICKSON MWAURA MBOGO.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 5077 Of 2012 delivered by Hon. Ochienja Ag C.M on 29<sup>th</sup> November, 2013).

**JUDGMENT**

**BACKGROUND**

Dickson Mwaura Mbogo, herein the Appellant, was charged alongside two others with committing four counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars were that, on 12<sup>th</sup> September, 2012 at Nkoroi village in Ongata Rongai township in Kajiado county, they robbed Samuel Muturi Maranga, Rose Nekesa Moturi, Nelson Nyairo Maranga and Dennis Birundu Maranga of various items namely; motor vehicle registration number KAP 096F, household electronics, mobile phones, kitchen ware, laptops and cash.

The Appellant was also charged on the alternative charge of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code. The particulars were that on 17<sup>th</sup> October, 2012 at Kware slums in Ongata Rongai Township in Kajiado County, the Appellant, otherwise than in the course of stealing, dishonestly received or retained a mobile phone make Nokia X3-02 Serial number 35912048383397 knowing it to be stolen goods.

They were arraigned in court and after the trial the Appellant was convicted for the four counts of robbery with violence. He was sentenced to death in the first count with the rest of the sentences held in abeyance. He was dissatisfied with both the conviction and sentence, hence this appeal. His grounds of appeal were as follows:

- 1. That the learned magistrate erred in law and fact by failing to find that there existed serious inconsistencies and contradictions in the prosecution case.**
- 2. That the learned magistrate erred in failing to find that the prosecution witnesses' narrations of evidence were unbelievable and illogical.**
- 3. That the learned magistrate erred in relying on weak evidence on identification and**

recognition of the Appellant.

4. That the learned magistrate erred by not finding that the identification parade was not conducted in a regular and lawful manner.
5. That the learned magistrate erred in failing to find that the prosecution failed and/or deliberately refused to produce all material exhibits which were in favour of the Appellant's case.
6. That the trial magistrate erred in convicting the Appellant on weak evidence of recent possession of the stolen mobile phone which was found a week after the robbery took place.
7. That the trial magistrate erred in finding that the prosecution proved its case beyond reasonable doubt.

Amended grounds of appeal, drawn by S.M. Righa & Company, also appeared on record dated 12<sup>th</sup> April, 2016. They were as follows:

1. That the learned trial magistrate erred by convicting the Appellant on a defective charge sheet.
2. That the learned trial magistrate erred in allowing the hearing to proceed via written submissions and failed to grant an opportunity to highlight the same.
3. That the learned trial magistrate erred in disregarding the provisions of Section 212 of the Criminal Procedure Code

## **SUBMISSIONS**

The parties filed their respective written submissions. The Respondent was represented by Learned State Counsel Ms. Wario while the Appellant was represented by Mr. Kyobika Advocate. The Appellant submitted that he was not accorded a fair trial. He submitted that after the close of the defence case the trial magistrate directed that written submissions should be made. He however contends that a chance to address the court as laid out under Section 213 and 310 of the Criminal Procedure code was not afforded to him as a chance to highlight the submissions. He relied on **Henry Odhiambo Otieno v. Republic[2006] eKLR** and **Robert Fanali Akhuyu v. Republic[2002] eKLR** to buttress this submission.

He further submitted that the fact that the charge sheet was drawn both under Section 295 and 296(2) of the Penal Code made it duplex and therefore defective. He relied on **George Gikeria Njihia v. Republic [2015] eKLR** and **Simon Materu Munialu v. Republic[2007] eKLR** to buttress this argument.

He also submitted that there were inconsistencies in the prosecution evidence. Particularly the fact that PW1, PW2 and PW3 were all inconsistent as to whether the Appellant had a weapon at the scene of the crime. Further, that PW9 testified that there was no dusting of the scene of crime for finger prints which contradicted other witnesses' testimonies. He relied on **Twehanga Alfred v. Uganda[2003] UGCA 6** as cited in **Eric Onyango Ondeng v. Republic[2014] eKLR**.

He submitted that he was not properly identified both in the identification parade and visually. He submitted that PW1's, PW2's and PW3's evidence showed an uncanny resemblance suggesting that the parties were coached on what to say. He submitted that the identification parade was maliciously orchestrated to implicate him. He stated that there was no description of him given in the initial OB report made on 12<sup>th</sup> September. The case of **Terakali & Another v. Rex [1952] EA** was cited to buttress this point. He relied on **Regina v. Turnbull [1976] 3 All ER 549** to assert that the law was settled with regard to reliance on identification evidence as the basis of a conviction. He further submitted that his identification was based on the fact that he had brown teeth and this was detrimental to him as the rest of

the parade members did not have brown teeth. Therefore, the identification parade was flawed. In that case, he stated that his identification was dock identification which could not be relied upon

He concluded by submitting that the doctrine of recent possession could not be used as a basis for identification as he adduced evidence showing how he came into possession of the phone in question.

Miss Wario for the Respondent opposed the appeal. She submitted that the ingredients of robbery with violence as set out in **Samson Nyandika Orwerwe v. Republic [2014] eKLR** were all proved by the prosecution making the conviction by the trial court safe. With regard to use of the doctrine of recent possession she submitted that it was a presumption of fact and that under **Section 119 of the Evidence Act** the court had the ability to presume the existence of any fact that it would think likely to occur giving due regard to the common course of natural events, human conduct and public and private business. She submitted that the court in this case could rely on the doctrine of recent possession as the prosecution satisfied its requirements as set out in **Gideon Meitekin Koyiet v Republic [2013] eKLR**.

She submitted that the fact that the charges were drawn under both **Sections 295 and 296(2) of the Penal Code** did not prejudice the Appellant as the statement and particulars of the offence were clearly shown and all the particulars and ingredients of the offence of robbery with violence were proved. She cited **Geoffrey Thiongi Mukunyi v. Republic [2016] eKLR** to buttress this submission.

On failure to highlight the written submissions, Ms. Wario submitted that the Appellant's advocate Mr. Kimathi did not wish to further make oral submissions, and he asked for a date of judgment after filing the submissions. She urged that the appeal be dismissed.

## **EVIDENCE**

The prosecution case was that the Appellant, in the company of others, waylaid the complainants as they got into their compound and proceeded to rob them of various valuables before making off in one of the complainant's motor vehicle. Police carried out their investigations and they caught up with the Appellant through one of the complainant's mobile phone. They then proceeded to arraign the Appellant before the court alongside others.

**PW1, SAMUEL MOTURI MARANGA** recalled that on 12<sup>th</sup> September, 2012 at 9.00pm he was at home when he received a call from his wife, PW3, who informed him that the vehicle ferrying guards to their house was involved in a traffic accident. He drove to the scene of the accident where the matter was resolved amicably. His wife got to the scene and they decided to use his motor vehicle to get home and have his wife's vehicle driven back to her office. He drove home with his wife, daughter and son.

When he arrived home the gate was open so he drove in for a short distance and then parked. His wife asked their son, PW5, to close the gate. As his son was leaving the vehicle, he heard some movement and he saw his son being accosted and knocked down. When he tried to open his door he was accosted by a person holding a gun at him. He was asked how much money he had in his pocket and he said Kshs. 14,000. He was forced to lie down.

He testified that they were near the gate which had security lights and he saw his attackers. He testified however that he could not describe the clothes they were wearing. They were then marched into the house where they used the front door. The assailants were about 5 in number. They tied his hands and informed him that they had come to collect Kshs. 1.7 million. He informed him he did not have it. He was on the ground and he kept moving his face and finally a cloth that had been placed on his face came off and he was able to see the Appellant as he walked in and out of the house. He testified that the robbers made off with 4 radios, 2 gas cylinders, 2 electric lamps, 4 mobile phones, that is, a Nokia 1100, Nokia X302 & his wife's 2 phones. The thieves packed the loots in the complainant's car and drove off. His son, PW5, was able to untie himself and then proceeded to untie them all. They then summoned the neighbour and also called the police. They went to the police station where they reported the robbery. They recorded their statements on the following day.

On 16<sup>th</sup> October, 2012 PW1 received a call from the officer in charge of the flying squad and was informed that the cell phone- Nokia X302 had been found on a recently arrested person. He produced the receipt of the phone's purchase whose serial number was 3579120483397. They went to the police station on 17<sup>th</sup> October, 2012, in the company of his son. They saw the phone and positively identified it. An identification parade was arranged and he was able to identify the Appellant. When he opened his mouth he saw his chocolate teeth which he had seen during the robbery and was able to identify him by pointing at him.

**PW2, DENNIS BIRUNDU MARANGA** testified that he knew the Appellant who he saw on the fateful day. He recalled that on 12<sup>th</sup> September, 2012 he was at home with his sister and the house girl when he decided to get a glass of water from the kitchen. While in the kitchen he noticed it being opened and saw his father in the company of a man holding a gun. His father ordered him and the other occupants of the house to lie down. They complied and lay down in the kitchen. After a while he heard footsteps as people got into the house. He could make out sounds of the house being ransacked and things taken outside.

After about 20 minutes he felt his hands being tied together. Thereafter, he heard a vehicle driving away and following a period of silence he realized that the robbers had left and he managed to untie his hands. He then went and locked the kitchen door before checking on everyone else who were still tied except for his brother, PW5, who had managed to untie himself. He went to the next room and found that his laptop, mobile phone- Nokia X302 and Kshs. 1,000/= in cash were missing.

He recalled that on 17<sup>th</sup> October, 2012 he was informed that a suspect was incarcerated at Ongata Rongai Police Station in connection with the robbery. He went to the police station where an identification parade was carried out. He was able to identify the Appellant.

In cross examination, he stated that he saw the Appellant's brown teeth which fact he included in his statement recorded after the parade. He further testified that he never indicated that the Appellant had brown teeth in the first statement.

**PW3, ROSE NEKESA MOTURI** recalled that she was coming from work on 12<sup>th</sup> September, 2012 when she suffered an accident. She testified that when they got to the house she told her son to go and lock the door. He encountered a robber when he got out and was ordered to lay down and his laptop taken. She testified they were about 5 robbers and the one with the gun was standing about 5 meters away from her. They were then all ordered into the house. Once inside three robbers started ransacking it. The other occupants of the house were then covered with sheets but she remained uncovered for around 10 minutes during which time she had a conversation, in Swahili, with the Appellant who inquired on the whereabouts of the money. She informed them it was in her bag in the car and one of them promptly left to fetch it. The Appellant took Kshs. 8,000/= from it.

When the robbers were done they tied them up using television cables and it took them about 10 minutes to untie themselves. She later heard that one of the robbers was arrested.

**PW 4** gave evidence pertaining to the arrest of the 2<sup>nd</sup> and 3<sup>rd</sup> accused. **PW5, NELSON NYAIRO** corroborated the evidence of PW1 and 3. He lost his Ideos phone, Kshs. 800/= and laptop accessories. He was not able to identify the robber who pinned him down and was holding a gun. On 17<sup>th</sup> October, 2012 he was summoned to Ongata Rongai Police Station to record a further statement. While there, he was asked to attend an identification parade. It is then that he asked the officer conducting the parade to allow him view the Appellant's teeth. He identified him with his teeth and face. His teeth were chocolate brown. The Appellant opened his teeth and he identified him.

**PW6, No. 233560 INSPECTOR EDWIN MUGENA** the then deputy O.C.S Ongata Rongai Police Station recalled that on 17<sup>th</sup> October, 2012 he was approached by Sergeant Kamau with a request to conduct an identification parade on the Appellant. He got the Appellant from the cells and informed him of the purpose of the parade. The Appellant agreed to take part in the parade but waived his right to have a witness present.

For the 1<sup>st</sup> witness the Appellant chose to stand between the 4<sup>th</sup> and 5<sup>th</sup> members. He called PW1 who identified the Appellant by touching his shoulder. He also informed him that the suspect had brown teeth and also he could identify his face. The Appellant then signed the form.

He then called the second witness, PW5, after the Appellant had chosen not to change positions. The witness informed him he had interacted with the Appellant and could therefore identify him. He went around and identified the Appellant by touching his shoulder. The Appellant again signed the form. He then called the third witness, PW2, after the Appellant chose to stand between the 7<sup>th</sup> and 8<sup>th</sup> members. The witness identified the Appellant by touching him. The Appellant was satisfied with the parade but he stated that the witnesses had confused him with another person who also had coloured or brown teeth.

**PW7, No. 55945 SERGEANT WILSON KOECH** was the investigating officer. He summed up the prosecution case and produced necessary exhibits.

**PW8, No. 61682 CPL MOSES NYOTA** testified that on 16<sup>th</sup> October, 2012 he was on normal patrol when he was raised on the radio by CIP Cheruiyot and informed to proceed to Ongata Rongai Police station. He was informed he was to track and arrest a suspect if possible. He was given the serial number of the phone that the person to be tracked was using. He and his crew traced the Appellant to a quarry. Thereafter, he led them to his grandfather's home where the subject mobile phone belonging to PW1 was recovered. He was escorted to Ongata Police Station where he was charged accordingly.

**PW9, No. 63772 SERGEANT JAMES KAMAU**, then working with CID Ongata Rongai Police Station recorded statements of the complainants. He testified that the Appellant was arrested on 16<sup>th</sup> October, 2012 by flying squad officers after being found in possession of a mobile phone that was stolen in the robbery.

The Appellant gave a sworn testimony as **DW1**. He testified that he lived in Rongai with his grandparents. He recalled on 16<sup>th</sup> October, 2012 he had arrived home from work when he saw a friend of his, Martin, accompanied by three people. The friend pointed him as Mwaura Dickson. The three people then identified themselves as police officers. They arrested him. He was escorted to Ongata Rongai Police Station where his friend was released. On the following day, he was escorted to his grandparents' home where a mobile phone believed to have been stolen in the robbery was recovered. He was interrogated as to how he came to possess the phone. He informed them he got it from someone in a trade-off where he gave the other party his phone and some money. On the same day, an identification parade on him was carried out.

**DW 4, JOHN NGANGA** recalled that in October, 2012 they were watching a premier league game on a Sunday when someone approached the Appellant and asked if he wanted to purchase a phone. The Appellant asked him to witness the sale of the phone, which he did in the company of their colleague, Ian. **DW5, IAN SEMBELE** also testified that he witnessed the Appellant buy the mobile phone.

## **DETERMINATION**

This court has considered the respective submissions and the record and finds that the following issues arise for determination:

1. Whether the charge sheet was defective.
2. Whether the Appellant was accorded a fair trial .
3. Whether the Appellant was properly identified.
4. Whether the doctrine of recent possession was properly applied.

The first issue that this court will deal with is whether the charge sheet, as drawn, was duplex having been

drafted both under Sections 295 and 296(2) of the Penal Code. I agree that drafting the offence under both provisions is superfluous and a waste of court's time. Section 295 defines the offence of robbery whilst Section 296(2) gives the ingredients of the offence of robbery with violence and prescribes the punishment for it. The Court of Appeal in **Simon Materu Munialu v Republic [2007] eKLR (Criminal Appeal 302 of 2005)** gave guidelines on the application of the two provisions as follows:

**‘...the ingredients that the Appellant and for that matter any suspect before the court on a charge of robbery with ...is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion....In our considered view, section 137 of the Criminal Procedure Code would be complied with if an accused person is charged, as the Appellant was, under section 296(2) because that section 137 requires one to be charged under the section creating the offence and in the case of robbery with violence under section 296(2), that section creates the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment.’**

Flowing from the above holding, I find that it was sufficient to draft the charge solely under Section 296(2) as the Appellant was faced with the offence of robbery with violence. His contention is that the charge was duplex and that that, of itself, prejudiced him. A charge is said to be duplex if it contains more than one offence in a single charge with the result being that the right of an accused person is compromised. Section 134 of the Criminal Procedure Code requires that a charge is sufficient if it contains “**a statement of the specified offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged**”. It can then be safely concluded that there existed duplicity of the charge. But again, the test is whether he was prejudiced by the error.

In the present case, the statement of the offence was of robbery with violence to which the Appellant pleaded. Likewise, the particulars of the offence required that the prosecution proved the elements of the offence of robbery with violence. As such, it is obvious that the Appellant was not prejudiced in any way merely because the offence was drawn under the two provisions of the law. In any case, the error being technical in nature is curable under Section 382 of the Criminal Procedure Code.

The next issue is the contention by the Appellant that his right to a fair trial was infringed when he was not allowed to highlight written submissions that were filed at the end of the defence case. He submitted that this was contrary to his right to be heard as set out under Section 213 and 310 of the Criminal Procedure Code. He relied on **Robert Fanali Akhuya v. Republic [2002] eKLR** and **Henry Odhiambo Otieno v. Republic[2006] eKLR** to buttress this submission. The record attests that the Appellant's counsel asked to file written submissions after he closed the defence case. The leave was granted and the submissions were filed and relied upon. The Court of Appeal has previously held that an accused has a right to listen to and understand all that is said at the trial. There has been a shift to this trend due to the congested court diaries. The practice is that where a party requests to file written submissions, ordinarily courts will accede so as to expedite the hearing.

Therefore, the test in determining this issue is whether any prejudice is occasioned to the accused if submissions are written. I am of the view that no prejudice or a failure of justice is occasioned because submissions do not constitute evidence. Even if a party failed to submit, a court is nonetheless obligated to evaluate the evidence before arriving at a decision. Further, where a party voluntarily offers to write submissions, he cannot later allude that the submissions did not offer him an opportunity to a fair trial. I therefore wholly associate myself with the persuasive holding of Warsame (now JA) and Ochieng JJ in **Otieno Kopiyo Gerald v. Republic[2010] eKLR**, that;

**“..[I]t is not necessarily a fatal mistake for the court to accept written submissions. The mistake is only fatal if the express consent of the accused is not obtained by his advocate, who then files written submissions.**

**To our minds, that would therefore imply that when an accused is not represented by an advocate, he should, if he requests, be allowed by the court, to file written submissions. Our said reasoning is informed by the reality that plays itself before us on a daily basis.**

...

**In the light of those experiences, we believe that the window of opportunity which the decision in Henry Odhiambo Otieno Vs. Republic(above cited) has opened, captures both the will of many accused persons, and the real sense of justice. That is because we cannot visualize how a person could purport to be prejudiced when he is permitted to do the thing which he asked for.”**

Furthermore, the highlighting of submissions usually takes the form of skeleton arguments and for the court to fully comprehend the written submissions it will have to look at the submissions as a whole with the skeleton argument forming a guideline and emphasizing the pleader's main points of contention. It should also be noted that the case law that was submitted was primarily based on the now abandoned notion that written submissions were not an allowable means of canvassing a criminal trial. The case law is usually attached to the main submissions which the court will give more emphasis to. In the circumstances, I find this ground of appeal without merit and I dismiss it.

I now examine the identification of the Appellant as one of the perpetrators of the offences. The identification was visual followed by an identification parade. It was held in **Freemantle v. The Queen(P.C) [1994] 1 W.L.R 1437** that:

**“...exceptional circumstances include the fact that the evidence of visual identification is of exceptional good quality. Accordingly, the ultimate issue in this appeal is whether the identification of the defendant was qualitatively good to a degree which justified the application of the proviso.”**

The court went on to state that;

**“...experience has shown that visual identification (even by way of recognition) is a category of evidence which is particularly vulnerable to error and that no matter how honest or convinced the eye witnesses may be as to the correctness of their visual identifications and no matter how impressive and convincing they may be as witnesses, there is always the possibility that they all might nevertheless be mistaken in their identifications.”**

Having observed the above, the court must then interrogate whether the identification of the Appellant in the identification parade corroborated the visual identification. The Appellant submitted that his identification parade was fatally flawed and did not comply with the force standing orders and it was primarily reliant on the colour of his teeth. PW1 testified that while he was inspecting the identification parade the Appellant '**opened his mouth and I saw his chocolate teeth which I had seen during the robbery.**' PW2, in cross examination, testified that he saw the Appellant's brown teeth and that the same were mentioned in his statement made on 17<sup>th</sup> September, 2012 and a further statement he wrote after the parade. He also testified that members of the parade were of the same height. PW5 testified that he identified the Appellant at the parade 'by his face and teeth.' In cross examination, he testified that he asked the parade members to open their mouths. PW6, who carried out the identification parade testified in cross examination that PW5 did not ask to see the teeth of the Appellant (contrary to PW5's testimony). He agreed that PW1 had touched the Appellant on the shoulder and said he had brown teeth. He testified that around four members of the parade had brown teeth.

Section 6(iv)(d) and (h) of the Forces Standing Orders provide;

**“(d) the accused/ suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/ suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent.**

**(h) if the witness desires to see the accused/ suspected person walk, hear him speak, see him with his hat on or off, this should be done, but in this event the whole parade should be asked to do likewise.”**

The Appellant's brown teeth constituted a disfigurement as that was a unique feature by which he was allegedly identified. As such, the person conducting the parade had a duty to make them (teeth) less apparent. Unfortunately, that was not the case as is evidenced in evidence particularly of PW5 who asked the parade members to show their teeth. In that case, it ought to have been disclosed by the parade officer that he had information that the suspect had brown teeth. He should then have constituted a parade with members with brown teeth so that it did not stand out that only one member had brown teeth that could make it easy for him to be identified. Failure to do so rendered the evidence from the parade prejudicial and this court cannot rely on the same as valid identification evidence.

More so, no evidence established that the witnesses who identified the Appellant with brown teeth in the parade had made a report to the police that the suspect had brown teeth. Had the same been done, it would have been more convincing that the Appellant was indeed one of the robbers. I also give regard to the fact that the robbery took place at night. PW1, 2,3 and 5 were accosted unawares. They were in a state of fright at the time of the robbery. They were also tied up as most of the robbery was going on. It then begs at what point in time that the teeth of the Appellant were clearly distinguished from those of other suspects. I take cognizance of the fact that brown teeth were not synonymous with the Appellant and are a common feature country wide. As such, I am not convinced that the Appellant was properly identified in the identification parade.

I will now determine whether the doctrine of recent possession was properly applied to support the conviction of the Appellant. The principles governing the doctrine were enunciated in the case of **Malingi v. Republic[1989] KLR 225** in the following words;

**“By application of the doctrine (to wit doctrine of recent possession) the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there're are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver. (emphasis is ours).**

The evidence of the prosecution was that the Appellant was found in possession of a Nokia X3-02 serial number 35912048383397 that was stolen from PW2. This was on 17<sup>th</sup> October, 2012 at Kware slums in Ongata Rongai Township. Prove of ownership of the phone was adduced by a receipt which contained the serial number of the phone. The question of the existence of the robbery is not in question. However, the recovery of the same was after one month. Considering that a mobile phone is a fluid item and therefore could have changed hands within a very short time, the test is whether the Appellant gave a plausible explanation of how he came by the same. He did not deny possession of the phone but he adduced evidence to the effect that he had obtained it while the watching a premier league game. He said he bought it and according to DW4 and DW5 they were there to evidence the same. The prosecution did not dislodge the explanation given by the Appellant. The doctrine of recent possession being a rebuttable presumption and the Appellant having given a plausible explanation of how he came by the phone, the court is unable draw an inference that the Appellant either stole it or was a guilty receiver. As such, the

learned trial magistrate did not properly apply the doctrine in founding a conviction against the Appellant. Likewise and for the same reasons, the alternative count of handling stolen property could not stand.

In the end, I find that the prosecution did not prove the case against the Appellant beyond a reasonable doubt. I quash the conviction and set aside the death sentence. I order that he be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

**DATED AND DELIVERED THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

- 1. Appellant present in person**
- 2. Ms. Wario for the Respondent.**