



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 13 OF 2014

BETWEEN

ALEX NGOKO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 84 of 2013 at Chief Magistrate's Court at Homa Bay, Hon. S. Ongeru, PM dated on 28th March 2014)

JUDGMENT

1. The appellant, **ALEX NGOKO** and his co-accused, Thomas Orina Gichana and Horrance Otieno Awana were charged with robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the charge were that on 24th January 2013 at Nyatoto Sub-location in Suba District they jointly robbed Millicent Akinyi Achola of her Kshs 15,000/- music keyboard, to mobile phones make 1280 Nokia, one suit case, assorted food stuffs all valued at Kshs. 34,000/- and at or immediately after the robbery used actual violence to the said Millicent Akinyi Achola.
2. The appellant was convicted and sentenced to death while his co-accused were acquitted. He now appeals against the conviction and sentence. As this is the first appellate court, we are enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether we should uphold the conviction bearing in mind that we neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**). In proceeding with this task, it is necessary to outline the material facts as they emerged from the trial.
3. PW 1, Millicent Akinyi Acholla, worked at an Mpesa Business at Nyatoto market called Seasons Logistics Services. On the night of 23rd and 24th January 2013 at about 1 pm, while she was sleeping in her house, she heard a heavy knock on the door. The door suddenly opened and she saw three assailants flashing torches at her. They demanded money from her but she said she did not have any. One of them drew a panga, took her to the sitting room and demanded that she transact through her Mpesa agency number. She inserted the Mpesa Sim card in her Nokia phone and performed two transactions of Kshs. 2,800/- each. Thereafter one of the assailants threatened to rape her and the other one of hit her with a panga on the left shoulder, head and neck. She tried to run but she became unconscious. Her brother-in-law, Moses Nyandiek (PW 2), who responded to the alarm, took her to the nearby health centre and thereafter to Homa Bay District Hospital.
4. After she was discharged from hospital, she went home and found her key board piano case,

- foodstuffs, two mobile phones and handbag with Kshs. 15,000/- missing from her house and which she valued at Kshs. 34,000/-. She reported the matter to the police and was issued with a P3 form. She admitted that she did not recognise any of the people who attacked her. She also gave the police her Mpesa agency number and confirmed that on the night of the robbery she completed two transactions of Kshs. 2,800/- each from her float of Kshs. 8,000/-.
5. Dr Auma Bildad Achieng (PW 5) examined PW 1 on 13th February 2013 and confirmed that she had injuries on the head, back of the neck and left ear and also on her right shoulder, thorax and abdomen. He opined that the injuries were caused by a sharp object. He classified the injuries as harm and signed the P3 form.
 6. Peter Ochieng Mboya (PW 3) testified that on 24th January 2013, the appellant bought from him a Techno TV20 phone for Kshs. 3,500/-. On that day he paid him Kshs. 2,500/- through Mpesa by number 0701***751 which belonged to Thomas Gichana and on the next day he paid the balance in cash. The appellant told him that his number had been blocked so he used Thomas Gichana's identity card to register the line. PW 3 knew Thomas Gichana as a herdsboy in the neighbourhood.
 7. A shopkeeper at Osodo Market, Joseph Ochieng Awiti (PW 4), testified that in the morning of 24th January 2013 he was surprised when he switched on his phone and found Kshs. 2,270/- sent to him by Thomas Gichana Orina from number 0701***751. He knew the number belonged to the appellant and when he called the number, it is the appellant who answered and told him that he would come to collect some goods from his shop. The appellant arrived within half an hour and took a loaf of bread, a bottle of quencher and the balance of the money in cash.
 8. Sergeant Robert Mutahi (PW 8) of Magunga Police Station testified he began investigating a robbery at Nyatoto area on instructions from the Station Commander. He proceeded to the scene of the crime and interviewed PW 1 who narrated to him her ordeal. He requested PW 1 to obtain her Mpesa account statement. The statement showed that two transactions were done on the early morning of 24th January 2013 from No. 0701***751 belonging to Thomas Gichana. The first transaction was at 1.41am and the second at 1.43 am. He managed to trace Thomas Gichana on 11th February 2013 but he told him that his number was 0707***736 and that the number he was calling belonged to the appellant. Thomas Gichana told him that he had assisted the appellant to register a line at Seasons Logistics Services at Nyatoto Market because he did not have an identity card.
 9. PW 8 further testified that he managed to get PW 4 who informed him how he had received money from the appellant and how he came to collect goods from the shop. He also got received evidence from PW 3 that the appellant had purchased the phone from him and paid him via Mpesa through the number of Thomas Gichana.
 10. PW 8 obtained an order to investigate several phone numbers and he made the following findings; PW 4 's number 0724***060 showed that on 24th January 2013 at 3.28am, he received Kshs. 2,270/- from Thomas Gichana. PW 3's number 0714***690 he received Kshs. 2,525/- at 5.05pm on 24th January 2013. The statement of Seasons Logistics Services, Nyatoto Market, account No. 38***708 showed two transactions of Kshs. 2,800/- at 1.41am and 1.43am.
 11. On the basis of the evidence, the accused was put on his defence. He testified that he did not know the complainant and on the material day he was in school. He stated that he was a student and that he did not have a phone or an identity card to enable him conduct an Mpesa transaction.
 12. From the evidence, the learned magistrate found that the prosecution had proved its case against the appellant. While he convicted the appellant, the co-accused were acquitted. The appellant now appeals against the conviction and sentence.
 13. The gravamen of this appeal as set out in the petition of appeal filed on 9th April 2014, is that

there was no evidence connecting the appellant to the offence. The appellant contended that there was no documentary evidence to show that he took out an identity card in the name of Thomas Gichana and that he did not have possession of the said identity card. In his written submissions, he pointed out that the Mpesa transaction printouts could not be relied upon as their authenticity could not be proved.

14. Mr Oluoch, learned counsel for the respondent, submitted that the evidence led by the prosecution clearly connected the appellant to the offence as he knew Thomas Gichana and that the witnesses testified that he transacted using the name, that the phone belonged to him and that he collected the goods and money which had been sent to the account of PW 4 following the robbery. He submitted that the evidence proved that the appellant participated in the robbery and that the conviction was sound.

15. We have evaluated the evidence. We find and hold that the essential elements of robbery with violence were proved by the prosecution. We find that indeed the complainant was robbed and that she suffered violence at the hands of three assailants. Her evidence of the assault was corroborated by that of PW 2, who took her to hospital, and the doctor, PW 5, who examined her. Likewise, the complainant's testimony was credible that her personal items were stolen during the robbery.

16. The main issue for consideration is whether the appellant was one of the assailants. The case against him is circumstantial and is founded on the Mpesa transactions evidenced by several computer generated statements of account from the mobile phone company; Safaricom. There was a statement of account from Seasons Logistics Services Nyatoto Market Account No. 38****708 which confirmed that money was sent to Thomas Gichana. The statement of Thomas Awiti (PW 4) Account for No. 0724***060 confirmed that he received money from Thomas Gichana. Statement of Peter Mboya (PW 3) Account No. 0714***690 confirmed payment for the mobile phone from Thomas Gichana. Statement of Account of Thomas Gichana No. 0701***751 confirmed that two deposits were made to the account from Seasons Logistics Services on the morning of 24th January 2013. It is these transactions evidenced by the Safaricom statements together with the testimony of the witnesses that established the connection of the appellant to the robbery that took place on the morning of 24th January 2013.

17. One issue has caused us anxiety and it is whether the statements from Safaricom produced by PW 8 could be relied upon to prove the case against the appellant. The production of computer generated statements or printouts is governed by **section 65(8)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which provides:-

In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say-

(a) Identifying a document containing a print-out or statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by the computer;

(d) dealing with any of the matters to which conditions mentioned in subsection (6) relate.

Which is certified by a person holding a responsibility position in relation to the operation of the relevant device or the management of the activities which the document relates in the ordinary course of business shall be admissible in evidence.

18. We have reviewed the proceedings and it is clear that neither the prosecution nor the learned

magistrate paid attention to the admissibility of the statements and the need to comply with the provisions of **section 65(8)** of the *Evidence Act*. The certificate required by the *Act* was not produced. In *Charles Matu Mburu v Republic* NYR CA Crim App. No. 34 of 2014 [2014]eKLR, the Court of Appeal, in similar circumstances, observed that;

In this case, the computer print-outs that were produced by the prosecution of the call history on the deceased's mobile phone do not contain the certification mentioned in the above provision. Further, no evidence was tendered on how the said print-outs were generated. We agree with the appellant's submission that the said print-outs had not been verified by Safaricom, hence they were inadmissible. We find that the two lower courts erred in relying on the said print-outs.

19. In our assessment the case against the appellant could not be proved without production of the computer generated statements of account from Safaricom connecting the complainant's Mpesa agency account, the account in the name of Thomas Gichana and the accounts of PW 3 and PW 4. In the absence of such statements, no connection could be made between the robbery of 24th January 2013 and the appellant.

20. The appeal is therefore allowed. The conviction and sentence are quashed and the appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 22nd day of May 2015.

D.S. MAJANJA

C. B. NAGILLAH

JUDGE

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.