



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA CRIMINAL DIVISION**

**HIGH COURT CRIMINAL APPEAL NO.33 OF 2015**

PETER OTIENO ACHAR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENTS

*(Being an appeal from the original conviction and sentence in Criminal Case Number 715 Of 2013 in the Senior Principle Magistrate's Court at Githunguri delivered on 6/2/15 by J.D. Kwena, S.P.M)*

**JUDGMENT**

The Appellant was charged together with Julius Maina Mwangi with two counts of robbery with violence contrary to Section 295 as read with 296(2) of the Penal Code. The particulars in Count I were that on the 13<sup>th</sup> day of January, 2013 at St. Joseph Secondary School in Githunguri District within Kiambu County, jointly with others who were not before court, robbed James Hungi Mugwe three mobile phones Serial Numbers 3578950493407, 352913023297450, 35326810893840 and one Ceska Pistol Serial No.288 with ten rounds of 9 millimetres all valued at Kshs.480,000/= and at or immediately before or immediately after such robbery while armed with crude weapons used personal violence on the said James Hungi Mugwe.

In the second count, the particulars were that on the 13<sup>th</sup> day of January, 2013 at St. Joseph Secondary School in Githunguri District within Kiambu County, jointly with others who were not before court robbed Francis Mungai Karangatha of one computer, one power point and one laptop make Acer all valued at Ksh.190,000/= and at or immediately before or immediately after the time of such robbery used personal violence on the said Francis Mungai Karangatha.

Having established that Julius Maina Mwangi was gunned down in another armed robbery incident in Buruburu, the case against him was terminated. The case proceeded against the Appellant who was found guilty in both counts and sentenced to death. Being aggrieved by the conviction and sentence he preferred this appeal. His appeal was premised on eighteen grounds which are condensed into the following seven;

- 1. That the judgment of the learned Senior Principle Magistrate was against the weight of the evidence.**
- 2. That he was not accorded a fair trial.**
- 3. That his defence was not considered.**
- 4. That there was no proper identification.**
- 5. That the case was not proved beyond reasonable doubt.**
- 6. That the learned trial magistrate based the conviction and sentence on circumstantial evidence.**
- 7. That the sentence was excessive.**

The Appellant's submissions are dated 10<sup>th</sup> September, 2015 and were filed by his advocate. He submitted that there was no evidence that linked the Appellant to the offence other than the Safaricom report which alleged that his card was inserted in a stolen phone. He reiterated the Appellant's defence given during the trial in which he stated that the said phone was given to him as a security for money which he lent Julius Maina Mwangi and that he inserted his Sim Card to test whether the phone was working. Further, it was submitted that the Appellant did not have the said phone in his possession at the time of his arrest. Counsel submitted that the evidence on record did not support the finding of the trial magistrate that the Appellant was a thief and that the prosecution did not prove its case beyond reasonable doubt. He submitted that other mobile phones which were stolen no evidence was adduced which could have shed more light as to who was actually involved in the robbery. He referred to the evidence of PW4 who in cross examination stated that he did not see the faces of the robbers. He urged this honourable court to allow the appeal.

The Respondent's submissions are dated 25<sup>th</sup> September, 2015 and were written by Senior Prosecution Counsel, Miss Linda Nyauncho who opposed the appeal on ground that the prosecution proved its case beyond all reasonable doubt. She submitted that the prosecution's case was that the Appellant robbed James Hungi Mugwe of his phones and pistol and afterwards caused his death. She submitted that the only evidence linking the Appellant to the offence was that he used his Sim Card in one of the deceased's phones. She submitted that although this was circumstantial evidence it was sufficient to convict him. She cited the case of **Michael Wambani and Samuel Kariuki Kinyua Vs Republic, Court of Appeal in Mombasa, Criminal Appeals No. Case No. 74, 75 and 76 of 2010** where the Court of Appeal held that no corroborative evidence is required to supplement evidence of recent possession in order to sustain a conviction of robbery with violence. It was further held in the same case that it is not good law that if one is found in possession of recently stolen goods there must be other evidence to corroborate that possession in order to convict for robbery with violence. She urged this court to dismiss the appeal.

Having summarised the submissions by the respective parties, it is now our duty to re-evaluate the evidence and come up with our own independent conclusions. See the case of **Pandya vs Republic [1957] EA.**, 336 We begin with a brief summary of evidence on record. It all began on the 13<sup>th</sup> January 2013 at around 2.30 a.m when a group of more than seven (7) robbers struck St Joseph High School, Githunguri in Kiambu County. At the time, the school was being guarded by a number of watchmen including the complainant in count I. The latter testified as PW10. According to him the robbers emerged from 2 directions. He was the first to be subdued by being tied up and held on the floor. He was severely slapped on his face and, when on the ground was hit on the head with a metal object. Thereafter, he was frog marched to a form four classroom where they further tied his hands and legs. He was asked to disclose where the other watchmen and the head teacher were. He told them that the head teacher was not present but that the other watchmen were guarding the compound in different locations. As he talked with one of the robbers, his fellow watchman by the name Fred was also frog marched to the same classroom by another robber. He was followed by another watchman by the name John and minutes later a fourth one by the name Danice was also taken to the same classroom. The four of them remained in the classroom for about 3 hours. While there, they heard voices outside and recognised that of the head teacher. They coughed to attract attention and that is when the head teacher accompanied by police officers went to their rescue. The police officers untied them and informed them that the school administration block had been broken into and some items stolen. They were also told that a District Commissioner had been killed in the course of the robbery at the school gate.

As fate had it, when the four watchmen were confined in a classroom, other robbers were busy in the school administration block where computers, a power point and a laptop were stolen. As the robbers were accessing the compound at the school gate, they bumped into one James Hungi Mugwe who was leaving the compound while driving a motor vehicle RAV 4 Reg. No. KAQ 270T. The robbers thought that the said James Hungi Mugwe was accosting them and in fright killed him and robbed him of his 3 mobile phones, serial numbers as particularised in count I and one Ceska Pistol serial No. 288 with 10 rounds of 9 millimetres ammunitions all valued at Kshs. 480,000/=.

The deceased at the time was leaving the school compound from the house of PW1 Faith Dorcas Nyaiheru Kamau the then head teacher at Kiambu Township High school. She previously worked at St.

Joseph High School. The deceased had stayed in the house of PW1 between 10.30 p.m on 12<sup>th</sup> January 2013 and 2.30 a.m on 13<sup>th</sup> January 2013 before he met his death. According to PW1, she had agreed with the deceased that he would call her when he arrived at his destination. He did not call as agreed. Twenty minutes after his departure, PW1 decided to call him but his mobile phone was off air. Text messages were also not going through. She was thereafter called by a colleague who informed her that the school had been attacked by thugs. A neighbour thereafter went to her house and confirmed the information. At that moment, the OCS Githunguri Police Station had been raised and was already in the school compound with other police officers. The body of the deceased was lying at the school gate besides his motor vehicle. His shoes and a hat were next to the vehicle. His hands were spread on the ground. He was in a pool of blood and had an injury on the head. PW1 then informed the police that the deceased had left his house with a pistol tucked in the trousers and it was missing. His mobile phones were also not with him. Police officers took away the body of the deceased to mortuary and investigations commenced.

Amongst the witnesses who testified were, **PW2** Bernard Kanyui Kuria, **PW3** Dorcas Kalawa Kamuri, **PW4** John Ndirangu and **PW10** Francis Mungai Karangatha. The evidence of PW2, 3 and 4 was that when the robbers struck, they were wrestled to the ground and thereafter frog marched to a form four classroom where they remained guarded by one of the robbers until they were rescued by police officers. None of them was able to identify the robbers. All that they came to learn was that the school administration block had been broken into and computers, a laptop and a power point stolen from therein. Even PW10 who was the complainant in Count II testified that he was not able to identify the robbers.

The evidence of other witnesses did not salvage that of PW2, 3, 4 and 10 in so far as identification of the robbers was concerned. According to **PW5** Samuel Njuguna Mburu, a farm hand in the school, he learnt of the robbery through a police officer Sergeant Kiruthi who told him that the school had been attacked and one person had died. **PW6** Police Constable Silvester Mavika Kaduku from Safaricom Law Enforcement Security Department gave evidence that implicated the Appellant. He testified that the Appellant had inserted his sim card in one of the mobile phones stolen from the deceased. We shall revisit his evidence in detail later in this judgment. **PW7** a teacher at St Joseph High School resided in the school compound. At night he was called by Sergeant Kiruthi, an Administration Police Officer and informed that the school had been attacked and one person killed. He woke up and as directed by Sergeant Kiruthi went to the school gate where he found the deceased lifeless body lying. Beside it was a Toyota RAV 4 motor vehicle. Police officers had also arrived at the scene and were conducting early investigations. **PW8** Nancy Wangui Maina testified as the wife to the deceased. She testified that her husband was a District Commissioner at Lower Yatta District. She confirmed that the deceased owned Safaricom Numbers 0717539690 and 0728272625. She identified before the court a receipt dated 8<sup>th</sup> June 2012 from Midcom Ltd for Kshs. 25,300/= for the purchase of mobile Phone Serial No. 357895049349071. Her evidence was that she was called by telephone at 6.30 a.m on 13<sup>th</sup> January 2013 by her brother in law who informed her that her husband had been involved in an accident and had been admitted at Kenyatta National Hospital. She boarded a motor vehicle in company of a friend and her brother-in-law one Anthony who unfortunately led her to the City Mortuary. It is there that she found the body of her husband in a government motor vehicle. The same was later taken to Kenyatta University Mortuary and a post-mortem was conducted.

**PW9** Police Constable John Ongaria of Githunguri Police Station testified that he was informed by an Inspector Musyoka on the fateful night at about 3.00 a.m that some robbers had stormed St. Joseph High School and stolen from therein. He was accompanied by Police Officers to the scene. The school gate was locked and they were forced to jump over the gate into the compound. Next to the gate was a Toyota RAV4 car Registration Number KAQ 270T white in colour. Its front door was open and the dead man was lying next to it with multiple head cuts. There was also a hat and a black open shoes next to him. Thereafter, they proceeded to the administration block where the headteacher was. From the head teacher's office a computer, a laptop and power point projectors were stolen. Another computer was stolen from the secretary's office. They also proceeded to where the watchmen were confined and rescued them. Unfortunately all the robbers had fled. Scene of crime officers were called and took the necessary photographs. Police also removed the body from the scene and a post-mortem was conducted by a Doctor Johnson Oduor.

**PW11**, Chief Inspector Samuel Agutu then the DCIO Githunguri Division corroborated the evidence of PW9. In addition, he testified that investigations revealed that the last person who had used one of the mobile phones that was stolen from the deceased was the Appellant. That led to his arrest and was charged after failing to account how he came by the said mobile phone.

**PW12**, Corporal Stanslaus Ngugi testified that he had previously worked at Yatta District and was in charge of the armoury. He knew the deceased as a District Commissioner at Yatta. He confirmed that he had been issued with a Ceska Pistol Serial No. Go288 on 25<sup>th</sup> November 2012. The same was to be used for his personal security. **PW13**, Police Constable Erastus Matuanga of Githunguri Police Station produced the post-mortem report of the deceased on behalf of Dr. Oduor who conducted the post-mortem exercise.

In his sworn defence, the Appellant stated that he was given the phone in question by a Mr. Julius Maina Mwangi when he borrowed the sum of Kshs.1,000/= from his wife. The Phone was to act as security for the credit. He stated that he inserted his sim card to test if the mobile phone was working. On the 30<sup>th</sup> January 2013, the said Julius Maina Mwangi paid back the money and in turn gave him back the mobile phone. He was later arrested and interrogated by police. His further defence was that he enquired from Julius Maina Mwangi where he had gotten the mobile phone from and he told him that he had bought it. He stated that he also dealt with mobile phone accessories. In support of his defence was Branice Atieno his wife. Her statement was that it was true that the Appellant had acquired the subject mobile phone as security for a sum of Kshs.1,000 which she had lent to a Baba Mwangi. The money was refunded on 30<sup>th</sup> January, 2013 and the Appellant gave back the mobile phone to Baba Mwangi

From the above analysis of evidence, it is clear that the Appellant was arrested purely based on circumstantial evidence. This was evidence linking him to the use of the deceased's mobile phone serial No. (IMEI) 353268010893840. The same was being used by the deceased with sim card No. 0728272625. According to PW6, the mobile phone serial number 353268010893840 had been used by three sim cards numbers 0728272625, 0724342491 and 0703288603. Simcard no. 0728272625 was registered in the name of the deceased James Mugwe of Identity Card number 85838800 whilst sim card number 0724342491 was registered in the name of Peter Otieno (Appellant) of ID. No. 20132922 and Sim card 0703288605 in the name of Omondi Misenye of ID. No. 29509157.

We pose here to remind ourselves that for a court to rely on circumstantial evidence the same must be so strong as to justify nothing less than an inference of guilt and must be incompatible with the innocence of an accused person. See the case of **PROSECUTOR VS JOHN NDUNGU NJOKI & ANOR [2012] @ KLR, High Court at Nakuru Criminal case No. 112 of 2007**, in which it was held thus;

**“The Court of Appeal has re-affirmed the above position in the recent case of Peter Moate Obero & Gideon Kamau Mburu V Republic, Criminal Appeal No. 177 of 2008 (Mombasa), when the court said:**

***“It is the essence of circumstantial evidence that, in order to justify an 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. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference...with those safeguards in place circumstantial evidence is as good as any direct evidence which is tendered and accepted as to prove a fact.***

In the present case, there is no doubt that the Appellant had inserted his sim Card No. 0724342491 in the mobile phone set serial No. 353268010893840 that belonged to the deceased and in his own admission confirmed he used the said mobile phone hand set. In the learned trial magistrate's judgment, he found the Appellant guilty based on the fact that he was found in the possession of stolen property. The learned magistrate relied on the case of **Andrea Obongo and Anor vs Republic (1962) E.A., 542** in which a man was found dead on a street after a gang of robbers armed with crude weapons raided an area and stole several items. The accused in the case was never identified but was convicted on the basis of being

found in possession of the stolen property six days after the robbery. That drives us to conclude that the conviction was based on evidence of handling of recently stolen property. We then ask ourselves whether the doctrine of recent possession would apply in this case. The principles governing the doctrine of recent possession were well enunciated in the case of **Malingi vs Republic (1989) KLR, 225** in which the Court of Appeal stated that:

***“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).*”**

From the testimony of PW11, the Appellant used the deceased’s mobile phone on 29<sup>th</sup> January, 2013, which was 16 days after the robbery. He was arrested sometime in July, 2013 which was more than six months after the robbery. There is no doubt that the deceased mobile phone in which the Appellant’s sim card was used was a stolen property and that indeed the Appellant had used it after the theft. Unfortunately, apart from the deceased, the Appellant was not the only other person who had used the subject mobile handset. As was confirmed by PW6, there was a third user by the name Omondi Misenye who had inserted his sim card No. 0719539690 in it. Neither the OCS nor the DCIO shed light to the court on why the said Omondi Misenye was not sought for arrest to explain how he came by the said mobile phone handset. Whereas the doctrine of recent possession is a rebuttable presumption given that an accused ought to exonerate himself from guilt, we think that although he may not have given a plausible account of how he came by the phone, the circumstances of the case are such that he was not the only person who had the possession of the phone. Be that as it may, we take cognisance of the fact that a mobile phone is a very fluid property; that is to say, it changes hands very fast. In our view then, the sixteen days that had passed since the handset was stolen cannot be said to be such a short period as to justify the application of the doctrine of recent possession. Furthermore, it was also important that either PW6 or 11 explained and disclosed at what point in time that the said Omondi Misenye had used the handset. The failure to do so left a huge gap in the prosecution’s case with regard to the fact that another person may have used the subject phone within a shorter period after the theft before it landed in the hands of the Appellant.

Effectively, on our evaluation of the circumstantial evidence tendered against the Appellant, we think that the same was too remote and the inculpatory facts were not incompatible with his innocence. We have every reason in the circumstances to give him a benefit of doubt. In the end, we allow the appeal on ground that there was no sufficient evidence to warrant his conviction. We quash the same and set aside the death sentence. We order that he be and is hereby set free unless he is otherwise lawfully held.

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF OCTOBER, 2015**

**L. KIMARU**

**JUDGE**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the present of:**

1. Mr. Adhuok for the Appellant

2. No appearance for the Respondent