



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 107 OF 2012

ISAACK MATHENGE GITONGA-----APPELLANT

VS.

REPUBLIC-----RESPONDENT

(Appeal against conviction and sentence of death for Offence of Robbery with Violence Contrary to Section 296 (2) Criminal Procedure Code passed by the late S.A.Okato Chief Magistrate Nyeri on 26/06/12 in Criminal Case No. 811 of 2011).

JUDGMENT

1. Isaack Mathenge Gitonga the Appellant herein was charged and convicted of the **offence of Robbery with Violence Contrary to Section 296(2) Penal Code.**

The particulars in the Charge sheet were as follows:

“The Appellant on the 21st day of August 2011 at Chaka trading centre within Nyeri County jointly with others not before Court being armed with a dangerous weapons namely “Rungus” robbed MR. CHARLES MWANGI GACHEGO of his phone make wing, one pair of shoes and cash Kshs.400/= and at or immediately before or immediately after the time of such robbery wounded the said CHARLES MWANGI GACHEGO.”

2. After a full hearing the Appellant was convicted and sentenced to death.

Being aggrieved by the judgment he filed this appeal challenging both the conviction and sentence.

3. He has raised the following grounds of appeal;

- i. ***THAT , the trial magistrate erred in both law and fact while convicting him on the basis that he was identified at the locus in quo by PW1 of which the same revolved on a more exposure basis and disputed by the O.B entry of 22.8.11 of Kiganjo Police Station.***
- ii. ***THAT , the trial magistrate erred in both law and fact while convicting him on charges that weren't proved to meet the needs of justice.***
- iii. ***THAT, the trial magistrate erred in law while rejecting his sworn defence that wasn't challenged by the prosecution side as per law requires in Section 212 of the Criminal Procedure Code Cap 75 Laws of Kenya.***

4. The prosecution called a total of five (5) witnesses. A summary of their evidence is that **PW1 (Charles Mwangi Gachengo)** was from Nyeri town on 21st August 2011 at about 7.30p.m. When he alighted from the matatu at Chaka his phone rang and he received the call. The moment he finished speaking his phone was snatched by a man who was behind him and whom he chased and caught up with. They struggled to the ground.
5. In the process he was hit by another man. When he rose up he was hit again by the same man on the head and he fell down unconscious. He remained there till about midnight when he regained consciousness and crawled home. He reported the next day at Kiganjo Police Station and he was issued with a P3 form.
6. From the attack he lost his wings phone, cap, shades and cash Kshs.400/= . He said he clearly saw the person who robbed him as there was bright electricity light. He had known the person well as he used to see him at Chaka Stage, though he did not know his name. He was however able to identify the person at Kiganjo Police Station. He also identified his phone Exhibit 2 by the mark of CW on the phone and "M.G" on the battery.
7. **PW2 (Jackson Kariuki Gachengo)** a younger brother of PW1 was in Chaka town on 23rd August 2011. Behind the Municipal Council Offices he met two men talking and holding a phone. He got close and identified the phone they held as that of his brother. He identified it by the mark. He went and called the police officers guarding Municipal Council Offices. He led the Police Officers to the two men who were then arrested. They were taken to the Police Station from where they were searched and the complainant's phone (Exhibit 2) recovered from the Appellant's pockets.
8. **PW3 (Dishon Mutiso)** confirmed that the complainant (PW1) had a swelling with tenderness and bruises on the forehead, with marked tenderness and swelling on both legs. He assessed the injuries as harm (Exhibit 1).

PW4 (NO.2002054720 Fredrick Muriithi Maina) and another got a report of some two people who had a suspected stolen phone. They rushed to where the people were and found them. It was the Appellant and another. They were searched and a phone Exhibit 1 was recovered from the Appellant's left front trouser pocket. The phone was identified by PW3.

9. **PW5 (NO.52217 CPL Nelson Ntwiga)** was the Investigating Officer. He said he was in the office when he was informed of the presence of the Appellant and another person at the Station. He called PW1 who identified the phone (Exhibit 1) and the Appellant as one of those who had robbed him.

In cross-examination he said that no Identification parade was conducted. He also said the other suspect who had been arrested together with the Appellant is the one who implicated him.

10. In his sworn defence the Appellant denied the charge. He said he had been arrested with his co-worker Joel Mwangi Kamau on 23rd August 2011 as they waited for lorries. They were taken to a road block from where they were asked to remove all that they had in their pockets.

He removed his Shs.100/= while Joel Mwangi removed a phone. Joel Mwangi never returned after being taken out.

11. When this Appeal came for hearing the Appellant relied on his written submissions. A summary of his submissions are that the complainant (PW1) could not have identified someone after struggling with him for six (6) minutes.
12. He questioned the circumstances pertaining to the identification. He further submitted that there were contradictions in the evidence of PW3 and PW4 concerning his arrest. He said he gave a plausible sworn defence which was not challenged, but the same was not considered by the

Learned Trial Magistrate.

13.The State through M/S Maundu the Learned State Counsel opposed the appeal. She submitted that the Appellant was recognized and picked from the cells by the complainant (PW1). She said the phone was identified by PW1 and PW2 by the marks on it. The same was recovered from the pockets of the Appellant. It was her submission that the doctrine of recent possession was established.

14.This is a first appeal and we are enjoined to re-examine and re-consider the evidence and arrive at our own conclusion bearing in mind that we did not see nor hear the witnesses. See,

Republic Vs. Okeno 1972 E.A 32;

Republic Vs. Mwangi (2004)2 KLR 28;

Boru & Another Vs. Republic – (2005) 1 KLR

15.We have accordingly considered the evidence on record and the grounds of appeal. We have equally considered the submissions by the Appellant and the State.

From the narrative of the complainant (PW1) and the medical evidence by PW3 we are satisfied that an offence falling under **Section 296 (2) of Penal Code** was committed. The issues we find falling for our determination are two namely;

- i. ***Whether the Appellant was identified by the complainant (PW1)***
- ii. ***Whether the Appellant was found in possession of the phone.***

16.The incident complained of occurred at night. PW1 was aboard a matatu from Nyeri to Chaka on 21st August 2011 at 7.30p.m. It's not clear what time he arrived in Chaka. Among those who testified, he is the only one who was at the scene. This is therefore evidence of a single identifying witness at night.

17.PW1 explained to the Court that his phone was snatched from behind just after he finished talking to his brother. He then chased and caught up with the phone snatcher and a struggle ensued. As they struggled a 2nd person hit him on the back when he rose up the same person hit him again on the head, and he passed out.

18.PW1 did not know the name of the person who snatched his phone, but he said he had been seeing him in Chaka town and so recognized him. On conditions for identification the Court of Appeal in the case of **Ogeto Vs. Republic (2004)2 KLR** stated as follows:

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken”.

19.In the present case PW1 did not see the phone snatcher before the act. He snatched the phone from him from behind. The snatcher took off with the phone followed by PW1. As he chased him, the phone snatcher was not facing PW1. PW1 was following him from the back. PW1 then says he caught up with him and as they struggled on the ground he was hit on the back, then on the head and he passed out.

20.At what point in this chain of events did PW1 get an opportunity to see the phone snatcher? It is nowhere mentioned at all. Even if there was bright electricity light it was impossible for PW1 to identify the phone snatcher from the back. Secondly when they were on the ground struggling were they facing each other for PW1 to be able to see the man who snatched his phone?

21. In the case of **Odhiambo Vs. Republic (2002) 1 KLR 241** the Court of Appeal stated thus:

“The Court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification”

In the present case we find that the circumstances for an accurate identification were difficult. When PW1 went to the police station he says he was able to identify the Appellant from among other prisoners in the cells.

22. **PW5 (NO.52217 CPL Nelson Ntwiga)** who was the investigating officer said this in his evidence at page 36 lines 10-12 -

“I called the complainant who identified the mobile phone to be his. He also identified the accused to be among the robbers who had robbed him of his mobile phone and other things”.

In cross-examination he confirmed that no identification parade had been conducted.

23. The issue then is whether the complainant recognized or identified the Appellant. In this case before us this witness who did not know the name of the attacker was required to give a description of the person he said he had known. Thereafter an identification parade could have been organized for him to identify the culprit. In **Ajode Vs. Republic (2004) 2 KLR 81 the Court of Appeal** stated;

“It is trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then conduct a fair identification parade”.

24. The **Investigating Officer (PW5)** did not demonstrate how the Appellant was identified by PW1. His identification of the Appellant in Court amounted to dock identification which is not sufficient unless there is some other evidence to corroborate it. In **Muiruri & 2 Others Vs. Republic (2002) 1 KLR** the Court of Appeal had stated this;

“It cannot be said that all dock identification is worthless. The Court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the Court duly warns itself of the possible danger of mistaken identification”.

Later in **Ajode Vs. Republic (Supra)** it held;

“It is trite law that dock identification is generally worthless and a Court should not place much reliance on it unless it has been preceded by a properly conducted identification parade”.

25. We agree with the holding in the **Ajode Case** considering that the charge faced by the Appellant is a very serious one carrying a death sentence. The Court cannot therefore rely on dock identification without an identification parade having been conducted. Our finding on the 1st issue is that the conditions were not favourable for a positive identification. Secondly PW1 did not give any description to the police to enable them arrange for an identification parade.

Issue (ii): Whether the Appellant was found in possession of the phone.

26. PW2 states at page 17 lines 10 – page 11 lines 1-3

“On 23/8/11, I went to Chaka town to see a fellow carpenter Mwangi. Behind the Municipal Council Offices, I met 2 men talking and holding a phone. I got interested and got closer. I managed to identify the phone as that of my brother. I identified it with the mark. I went and called police guarding at the Municipal Council Offices. I told them my brother had been

beaten and I had seen his phone with the 2 men. I led the police to the 2 men and the police arrested them. They were still at the same spot with the phone as they talked.

The two of them were arrested and taken to the police station. At the police station, they were searched and the phone was recovered from the pocket of accused before the Court”.

27. PW2 states that both the Appellant and Joel Mwangi were holding the phone and talking. For him to have seen the marks on the phone he must have moved very close to the 2 people. Apparently he did not hear what they were talking about in spite of him moving close to them. This witness also stated that the two (2) men were searched at the Police Station and the phone recovered from the Appellant's pockets.

However **PW4 (NO.2002054720)** who was one of the officers who went to effect the arrest said the two (2) men were searched upon arrest. It was after this that they were taken to Kiganjo Police station. From the evidence of PW2 and PW4 it is not clear where the search was conducted from.

28. The evidence of PW5 the Investigating Officer is that the 2nd man who had been arrested was released. The main reason for his release was that it was the Appellant who had been found with the phone (Exhibit 1).

Earlier on PW4 had at page 28 lines 14-15 states;

“They told me they had seen two suspects selling a phone which was similar to their brother's phone”.

29. This is the report he received from PW2 and another. According to PW2 the two men were holding the phone and talking. The police found them in the same position still. Given this scenario who then could be said to have been the seller and who was the buyer?

30. The Appellant in his sworn defence and cross-examination of PW2, PW4 and PW5 insisted that it was Mwangi who had the phone and not himself.

31. In the case of **Arum Vs. Republic (2006) 1 KLR 238** line 4-12 Court of Appeal stated thus:

“In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the Court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version. That duty as has been said is wholly on the trial Court and on the first appellate court”.

32. In the present case the evidence of arrest, search and recovery is given by **PW2 (Jackson Kariuki Gachengo)** and **PW4 (NO.2002054720)**. PW2 said the search was conducted at the Police Station after the arrest. PW4 stated that it was conducted at the scene where the two (2) men were arrested. That they were taken to the station after the recovery.

33. This evidence of PW2 and PW5 does not corroborate each other on this. Secondly given that PW2 saw the Appellant and Mwangi holding the phone and talking it was important to establish who between them was selling the phone to the other. Who else could have been a better witness for them than the Mwangi they released?

34. Our conclusion is that either of them may have been the phone snatcher. The mere fact that the Appellant may have been found in actual possession did not necessarily mean he was the phone snatcher. He may as well have been the buyer of the phone from Mwangi. Mwangi should have been called by the prosecution as its witness.

35.Had the Learned Trial Magistrate analysed well the evidence on identification and recovery he could have arrived at a difference conclusion. There are doubts created in our minds concerning the identification of the Appellant at the scene and recovery of the phone. We find his guilt to be doubtful. He will benefit from the doubts.

36.The result is that the appeal succeeds and is allowed. The conviction is quashed and the sentence set aside.

37.The conviction is quashed and the sentence set aside. The appellant will be released unless otherwise lawfully held under a separate warrant.

Signed, dated and delivered in open court this 15th day of December, 2015

Hedwig Imbosa Ong'udi

Ngaah Jairus

JUDGE

JUDGE