



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO.84 OF 2012**

ISAAC MWANGI WANUYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal against the Conviction and Sentence by the Senior Principal Magistrate Hon. E. Makori at Nyeri Chief Magistrate's Court dated 18<sup>th</sup> May, 2012 in Criminal Case No. 40 of 2011.)*

**JUDGMENT**

1. **Isaac Mwangi Wanuyu** the Appellant herein was charged with the offence of Robbery with Violence contrary to **Section 296 (2)** of the **Penal Code**.

The particulars stated in the charge sheet were as follows;

*“The Appellant on the 9<sup>th</sup> day of December, 2010, at Pembe Tatu Estate in Nyeri district, within Central Province, jointly with others not before court while armed with dangerous weapons namely pistols robbed SCOLASTICA NJERU MURIUKI of two mobile phones make Nokia 2310 S/No.359830117388437 and E-Black berry and cash Kshs.1,800/= all valued at Kshs.15,000/= and immediately at or immediately before or immediately after the time or robbery used actual violence to the said SCOLASTICA NJERU MURIUKI.”*

2. He faced an alternative count of Handling Stolen goods contrary to **Section 322 (2)** of the **Penal Code**.

Particulars being that;

*“The Appellant on the 9<sup>th</sup> day of December, 2010 at Pembe Tatu Estate in Nyeri District, within Central Province, otherwise than in the cause of stealing, dishonestly received or retained one mobile phone make Nokia 2310 S/No. 35983011738437 knowing or having reason to believe it to be stolen or unlawfully obtained.”*

3. He pleaded not guilty and the matter proceeded to full hearing and he was found guilty and convicted of the principal count of Robbery with violence and sentenced to death. Being dissatisfied with the judgment he appealed against both conviction and sentence raising the following grounds;

- a. ***THAT, the trial Magistrate erred in both law and fact while basing his conviction in reliance of visual identification by recognition as was alleged against him by the Complainant at the scene of crime without considering that the same was obtained in difficult circumstances.***
  - b. ***THAT, the trial Magistrate erred in both law and fact while convicting him with charges which weren't adequately proved foregoing with the advanced evidence by the prosecution side.***
  - c. ***THAT, the trial Magistrate erred in both law and fact while he rejected his sworn defence without putting into consideration that it wasn't challenged by the prosecution side.***
4. A summary of the prosecution case is that on 9<sup>th</sup> December 2010 at 5.15pm PW1 **Scholastica Njeru Muriuki** left the office and passed through the salon and supermarket before heading home. She was driving motor vehicle registration no. KAT G. Toyota Saloon. Her house is 100M from the main road. At 7.10pm as she branched from the main road she saw a motor vehicle behind her. She branched to her house and parked at her gate and then opened the small gate but a boy living at her quarters opened the gate for her, so she went back to the car.
  5. She realised the white car had stopped ahead of hers. She entered the compound and when she got out the boy who had opened the gate called out her name. She turned and saw two men follow her. Security lights were on and there was also moonlight. She screamed as she saw one of the men moving round her car. He held an item in his hands, which he pointed at her. It appeared like a gun. He ordered her to shut up. She heard a gunshot and she fell down.
  6. While on the ground she saw the gunman leave while the other one took away her handbag. She identified the gunman as the Appellant and that it was him who took her handbag. Her handbag contained several personal effects like two mobile phones, a Nokia 2310 and Blackberry, and the items shown in the charge sheet.
  7. She was shot through the chest and it exited at the back but she remained conscious. She had written the serial number of the Nokia phone in her notebook as 359831011738487. She gave this number to the C.I.D. She was rushed to hospital by neighbours, she was transferred to Nairobi Hospital the next day. She remained in Nairobi Hospital for some time under rest. She recorded her statement while still in hospital.
  8. Later she was called from Nairobi to the Nyeri Police Station for an identification parade in which she participated and identified the Appellant by holding him. She identified him as the person who had been near her during the robbery. She was also able to identify her recovered Nokia 2310 phone (EXB1) by the mark of a letter "S" which stands for her name Scholastica.
  9. This mark was seen by the Court where the phone simcard lies, at the black surface of the body of the phone. In cross-examination she said she identified the Appellant by appearance and the head which had a peculiar shape.
  10. When investigations commenced PW6 **No.42444 Ag. I.P.Jacob Mureithi** the Investigating Officer used the Complainant's Airtel line No.0733970702 and Safaricom line no. 0727719761 to trace the handsets through Airtel and Safaricom service providers (EXB5 & EXB7). The print out from Airtel showed the serial number of the handset as 359831011738430 (EXB6). A print out from Safaricom (EXB8A & B) showed the numbers used in the stolen set as 0728591733 used from 10<sup>th</sup> December, 2010 to 30<sup>th</sup> December, 2010. This number belonged to Simon Ndumia Gatigi. (PW2).
  11. He traced the line being used in the handset and this was line No.0729333741 belonging to **Mary Muthoni Mbogo** (PW3). PW3 was traced in Naro Moru. She led them to PW2 as the person who had sold her the handset. PW2 was found in Nanyuki. PW2 led them to **Aggrey Ochari Ngamia** (PW4) who had sold him the handset. PW4 was traced in Nanyuki and he said he had

- bought the handset from Isaac Mwangi (Appellant) also of Nanyuki. The Appellant was then arrested and charged.
12. The phone serial number 359831011738437 was produced in Court as EXB3. This witness explained that the last digit in the serial number can be anything and it cannot affect the serial number given and it does not count for anything. That is why the serial number given by the service providers has a zero (0) as the last digit while the serial number of the phone in court ends with a seven (7). PW8 No. **6464366 Cpl. Samwel O. Nyamasi** also carried out investigations in this case. He gave similar evidence
  13. PW4 Aggrey **Ochari Ngamia** was at Labour stage waiting for casual jobs on 10<sup>th</sup> December, 2010 at 9.00am when the Appellant came there. They knew each other. He had a phone (EXB3) which he said he was selling to raise money for his sick child. They agreed that he buys it at Kshs.700 which he did. He decided to make some profit by selling it. He sold it to a person he knew. On 15<sup>th</sup> January, 2011 when he was arrested by the police because of the phone he took them to the one who sold him the phone and that was the Appellant.
  14. The Appellant gave a sworn statement of defence in which he stated that on 9<sup>th</sup> December, 2010 he was doing his regular work on the farm. He was growing snow peas. As he irrigated this farm he was called by Anthony (DW2) with whom he did business. They talked and he gave him (Appellant) Kshs.40,000 leaving a balance of Kshs.20,000. One Muriuki had warned him about the effect of the substance he was using on his cattle. He blamed Muriuki for his arrest, as the latter had a grudge against him.
  15. He said the phone produced in court was not the same as the one shown in the charge sheet. He alleged that the C.I.D officers had taken him photographs and so his identification was not without fault. He denied selling the phone (EXB3) to anyone.
  16. He called one witness **Anthony Maina Mwangi** (DW2), who explained how he had met the Appellant on 9<sup>th</sup> December, 2010. They discussed issues on snow peas which they used to sell. He paid the Appellant Kshs. 40,000 for delivered peas. He later on 16<sup>th</sup> December, 2010 learnt that the Appellant had been arrested.
  17. When the appeal came before us for hearing the Appellant relied on his written submissions which basically expanded on his grounds of appeal. He challenges the visual identification which he says was unreliable, for the reasons that PW1 did not give any description of the Appellant to the Police. Secondly, he says PW1 was in shock as the attack was sudden, and the court did not inquire into the conditions pertaining at the time of identification.
  18. He further submitted that the evidence adduced was not sufficient to convict him. That PW1 gave contradictory evidence on the issue of identification. Further he stated that the mobile phone connecting him to this robbery was not satisfactorily identified by PW1. It was his submission that his defence was not considered by the learned trial Magistrate.
  19. In reply Mr. Njue the learned Senior Counsel in opposing the appeal submitted that one of the stolen phones was recovered leading to the arrest of the Appellant. On identification he said the conditions were favourable, as there was security light, moonlight and light from the motor vehicle which enabled PW1 to see the attackers well. The attackers were not masked and she remained conscious.
  20. He further submitted that PW1 gave a description of the attackers to the police. Finally, the Appellant was picked by PW1 from the well conducted identification parade. The issue of photos though raised in cross-examination was refuted by the Investigating Officer (PW6).

On recovery he submitted that though not found in actual possession the tracking led to him as the

person who sold this phone to PW4, whose evidence was not shaken.

21. It was his submission that the recovered phone was well identified as belonging to PW1. The Appellant's defence was well considered by the learned trial Magistrate who correctly found the prosecution case proved. He referred us to the case of **CALVIN PETER OMONDI OWAYO eKLR 2010** on identification parades and the initial report and description.

22. This is a first appeal and this court is expected to reconsider and reevaluate the evidence adduced in the court below and arrive at its own conclusion. It should also bear in mind that it did not see or hear the witnesses, and give an allowance for it. See;

1. **Soki V R (2004)2 KLR 21**

2. **Mwangi & Anor. V R (2004)2 KLR 28**

3. **Simiyu & Anor. V R (2005)1 KLR 192**

We have accordingly considered the evidence on record plus the grounds of appeal. We have equally considered the submissions of the Appellant and the state.

23. We find the issues to be determined by this court to be as follows;

**(i) Whether an offence of Robbery With Violence contrary to Section 296 of the Penal Code was committed.**

**(ii) Whether the Appellant was identified as one of the robbers.**

**(iii) Whether the Appellant was found in actual possession or otherwise of the complainant's phone and whether the doctrine of recent possession is applicable in the circumstances of this case.**

**ISSUE NO. (I) WHETHER AN OFFENCE OF ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 OF THE PENAL CODE WAS COMMITTED.**

24. The ingredients that form the charge of Robbery With Violence as defined under **Section 296 (2)** of the **Penal Code** are;

*- The thief must have been in the company of one or more others*

*or*

*- was armed with a dangerous weapon*

*or*

*- used violence or threatened to use violence on the victim.*

25. The evidence on record shows that the complainant (PW1) was attacked by two people one of whom was armed with a pistol. Violence was used against her as she was shot as per her evidence and the medical evidence by PW5 **Dr. Ann Kabuthi**. She stated that PW1 had a gunshot wound in the chest, by a penetrating high velocity object. The injury was classified as Grievous Harm (EXB1). She was in the process robbed of the items stated in the charge sheet.

We are satisfied that the offence of Robbery with Violence was committed.

**ISSUE NO. (II) WHETHER THE APPELLANT WAS IDENTIFIED AS ONE OF THE**

## **ROBBERS.**

26. The robbery in issue took place at night. PW1 says she had just driven into her compound. There were security lights on and there was moonlight. She further stated that the person she identified was the one who was moving round her vehicle and was closer to her. It also came out in the course of cross-examination that the Appellant had a peculiar shape of the head at the back.
27. It has been confirmed by the evidence on record that indeed PW1, attended an identification parade on 16<sup>th</sup> January, 2011 at Nyeri Police Station and she positively identified the Appellant from the said parade. This has been confirmed by PW1.
28. PW7 **No.23294 I.P.Wesonga** who conducted the identification parade, confirmed this. The Appellant has challenged this identification parade on the ground that PW1 did not give any description of him in her report and that she contradicted herself in cross-examination over her identification of him.
29. PW1 admitted that she did not give a description of the attackers to the police prior to the identification parade. She further stated that she did not know that she had to give a description.

In the case of **Ajode Vs. Republic (2004)2 KLR 81** the Court of Appeal while dealing with a similar matter stated thus;

***1. 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.***

***2. 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.***

What was done in the present case amounted to dock identification. An identification parade can only be organized on the basis of a description having been given by the witness. See **Gabriele Kamau Njoroge V R (1982-88)1 KAR 1134.**

30. It also came out in the cross-examination of PW1 that the Appellant herein has a peculiar shape at the back of his head. PW1 stated in her evidence that she saw all this but it was never mentioned to the police. When the identification was organized it did not have members with protruding parts of their heads at the back.
31. PW1 was shot through the chest in the course of robbery. This was not an ordinary occurrence. She however says she remained conscious. From the record it's not clear for how long PW1 had the attackers under observation; and also how bright the light she relied on were.

In the case of **Simiyu & Anor. V R (2005)1 KLR 192** the Court of Appeal held thus;

***1. In the present case, neither of the two courts below demonstrated any caution. Further, there was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any inquiry, evidence of recognition may not be held to be free from error.***

32. It's helpful to make an inquiry into these issues in cases of this nature. In cross-examination PW1 said the incident took ten (10) minutes and even after being shot at she remained conscious.

We find that the court did not make any inquiry into these issues.

This identification by PW1 has gaping holes and cannot on its own be the basis of a conviction.

**(III) WHETHER THE APPELLANT WAS FOUND IN ACTUAL POSSESSION OR OTHERWISE OF THE COMPLAINANT'S PHONE AND WHETHER THE DOCTRINE OF RECENT POSSESSION IS APPLICABLE IN THE CIRCUMSTANCES OF THIS CASE.**

33. PW1 lost two mobile phones among other items. The two phones were a Nokia 2310 and Black Berry. PW1 gave the Investigating Officer PW6 the lines that were used in the handsets stolen.

He wrote to Airtel service providers (EXB5) who gave the serial number of the handset as 359831011738430 (EXB6). This was the Nokia 2310. The data also showed the numbers that had been used on this handset after 9<sup>th</sup> December, 2010.

34. The person using the handset was traced in Naro Moru. She was **Mary Muthoni Mbogo** (PW3). The users/sellers of the phone were traced upto **Aggrey Ambale Nguni** (PW4) who led them to the Appellant as the person who had sold him the Nokia 2310 EXB3 phone on 10<sup>th</sup> December, 2010.

35. The recovered phone was identified by PW1 at the Police C.I.D offices Nyeri. In court she showed her mark of "S" representing her name Scholar which was where the simcard lies, at the black surface of the body of the phone. We note that the identification is very detailed.

36. Further PW1 produced in court a notebook (EXB4) where she had written the serial number of this phone. The number is 359831011738437 this was the same serial number on the phone EXB3.

It was explained by PW6 (Investigating Officer) that the last digit on the serial number is always between numbers 0-7 and it matters not what the last digit is as it's the first fourteen numbers that matter.

37. Our finding is that the Nokia 2310 handset whose serial number is referred to in EXB 4 and 6 is one and the same phone whose owner is PW1 and which phone was stolen from her on 9<sup>th</sup> December, 2010 night.

38. The Appellant in his defence denied knowledge of the robbery and the recovered phone. He said he was doing business with Anthony (DW2) with whom he was with on 9<sup>th</sup> and 10<sup>th</sup> December, 2010.

It is however not disputed that the Appellant was not with DW2 throughout these two days. Each of them left to go to his home.

39. PW4 was a friend of the Appellant and no reason has been given as to why he could lie against him. In any event the Appellant blamed one Muriuki for his arrest and not PW4 to whom he sold the suspect phone on 10<sup>th</sup> December, 2010 a day after the robbery.

40. The Court of Appeal in the case of **Arum V Republic (2006)1 KLR 233** set out what must be proved before one is convicted on the basis of "*recent possession*."

41. In the analysis above, we have shown that there is proof of all those requirements.

The chain of the movement of this phone (EXB3) was never broken and it points out to the Appellant as the person who had possession of this phone a few hours after the Robbery on 9<sup>th</sup> December, 2010 at Pembe Tatu Nyeri.

42.This brings us to the case of **CALVINS PETER OMONDI OWAYO V R KSM CR. APPEAL (COURT OF APPEAL) NO. 322/08 eKLR 2010** where the court found that the exclusion of identification parade evidence weakened the prosecution case. In the present case we find that though the identification parade evidence was watered down, the evidence of recovery of the phone being part of the evidence on record, resuscitated it and gave it life.

43.Our finding is that the prosecution proved its case on the Principal count and the conviction is safe and we uphold it together with the sentence.

44.The end result is that the appeal is dismissed.

Right of Appeal explained.

**Signed, dated and delivered in open court this 15<sup>th</sup> day of December, 2015**

Hedwig Imbosa Ong'udi

Ngaah Jairus

**JUDGE**

**JUDGE**