



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO.77 OF 2013

JAMES MWANGI NJUGUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal against the Conviction and Sentence by Hon. W.A. Juma at Nyeri*

*Chief Magistrate Court dated 7<sup>h</sup> June, 2013 in Criminal Case No. 56 of 2012.)*

**JUDGMENT**

1. **James Mwangi Njuguna** hereinafter referred to as the Appellant was charged with the offence of Robbery with Violence contrary to **Section 296 (2)** of the **Penal Code**.

The particulars as stated in the charge sheet were as follows;

*“The Appellant on the 18<sup>th</sup> day of January, 2012 at Mathari Area in Nyeri County within Central Province jointly with others not before court being armed with an offensive weapon namely a Toy Pistol robbed Kenneth Mburu Muthoni of his Acer laptop valued at Kshs. 49,000 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Kenneth Mburu.”*

2. He faced an alternative count of having suspected stolen property contrary to **Section 323** of the **Penal Code**.

The particulars being that;

*“The Appellant on 18<sup>th</sup> January, 2012 at Mathari Mweiga road junction, having been detained by PC Paul Kemep as a result of exercise of the powers conferred by Section 26 of the Criminal Procedure Code, had in his possession a samsung mobile phone serial number 355055041956207 reasonably suspected to have been stolen or unlawfully obtained.”*

3. He pleaded Not Guilty and the case proceeded to full hearing with the prosecution calling five (5) witnesses.

The Appellant gave a sworn defence and called one witness. He was eventually convicted on both counts and sentenced to death on the 1<sup>st</sup> count. The sentence on the alternative count was left in abeyance.

4. He was aggrieved by the Judgment and filed this appeal on the following grounds;

*a. That the trial court erred in law and facts by failing to hold that prima facie case was not established against him.*

*b. That the trial court erred in law and facts by failing to make an observation that forensic expert report was vital to prove the allegation the alleged possession.*

*c. That the trial court erred in law and facts by failing to hold light intensity purported to have been relied on was never defined.*

*d. That the trial court erred in law and facts by failing to hold that no identification parade was conducted.*

*e. That the trial court erred in law and facts by failing to hold that no description was ever given as required by the law.*

5. A summary of the prosecution case is that on 18<sup>th</sup> January, 2012 at 5.00pm (PW1) **Kenneth Mburu Muthoni** who is the Complainant and Operator of a Cyber Cafe known as Winnet Creation Computers at Mathari trading centre left his Cyber and went to Joy Hotel.

6. In his Cyber he left **Stanley Kariuki** (PW2) and Ian playing computer games.

While in the hotel PW2 called and informed him that he had a customer.

He left the hotel and headed for the Cyber. He met the Appellant leaving the Cyber. PW2 informed him the customer had left to get his friends. He went back to the hotel and within a short while he heard PW2 shouting “*thieves, thieves.*” He rushed out and saw PW2 running after some two people. He went through a short cut but when they reached the road they were told the two people had left on a red motor bike.

7. He called and reported to a police officer Kenei who said he was at the road block. Meanwhile, the witness and Charles Wamugunda hired a motor vehicle and pursued them. PW2 and others followed on foot. On reaching the road block they found a young man having been arrested. PW1's laptop make Acer, (EXB1) was down and he identified it, together with the mouse and the missing two key pads. There was a toy pistol on top of the laptop (EXB2).

8. He had been bought the laptop by his aunt staying in Australia. The aunt sent him a warrant in respect of the laptop through email on 23<sup>rd</sup> March, 2012 at 7.37 pm. (EXB4). He identified the Appellant as the person he had met as he left the hotel for his Cyber.

9. PW2 **Stanley Kariuki** is the one who was in the Cyber with Ian playing games on the computer. He testified that as they played a young man came to inquire about internet costs and the owner of the Cyber. He left and returned with another. One held him while the other held Ian. The one who held him by the neck had something like a pistol, which he pointed at him. He reached for the laptop, released him and they took off. Ian ran out screaming and the witness followed and chased the thieves upto the tarmac road. The thieves jumped on a motor bike and left.

10. PW1 and another took another motorbike and rode towards King'ongo. The witness boarded a pick up and also followed PW1 and the other towards King'ongo road block where they found the Appellant having been arrested. He identified him as the person who had held him by the neck and pointed a pistol at him and taken the laptop.

11. PW3 **No.75410 P.C Japheth Omutelema** confirmed receiving a call and report from PW1 of the theft of his laptop. He was told the thieves were on a motor bike. He was at Mathari junction on roadblock duties. Minutes later a motorbike arrived at the roadblock carrying four (4) passengers.

12. The Appellant was seated behind the rider of the motor bike, and was holding the laptop. He immediately arrested him. The others escaped. The Appellant was searched and a toy pistol (EXB3) and samsung mobile, pink in colour (EXB4) were found in his back trouser pocket. There and then PW1 arrived on another motor bike and identified the laptop and mouse, as his which had been stolen.

13. In his sworn defence the Appellant denied the charges. He stated that on 18<sup>th</sup> January, 2012 he went to Nyeri town to do shopping for his mother. When he went home his mother informed him that his grandmother wanted to see him so he left for Mweiga to see her. He boarded a motor vehicle for Mweiga at 4.30pm. Inside the motor vehicle he noticed a familiar face which he later remembered was that of a police officer he had a confrontation with before.

14. At Mathari Junction the officer ordered him out and told him he was going to teach him a lesson. He was later taken to Mweiga Police Station. His phone was taken away and he was charged. He produced a receipt of its purchase as DEXB1.

15. His witness DW3 **Michael Wachira Mwangi** stated that on 18<sup>th</sup> January, 2012 at 4.30pm him and the Appellant boarded the same motor vehicle and sat in the driver's cabin. At Mweiga Mathari Junction they found a police road block. A police officer asked the driver for his licence. He went to check on the sticker. Thereafter he pulled the Appellant out because he had not fastened his seat belt. After a while the driver drove away leaving the Appellant behind. He called the Appellant's mum and informed her of his arrest.

16. When the appeal came before us for hearing M/s Mwai submitted that the circumstances were not sufficient for a positive identification as PW2 who was the only identifying witness only saw the thief on the screen. No identification parade was conducted as required.

17. She further submitted that the Appellant raised an alibi defence right from the start of the case. This alibi was not investigated. She also submitted that though the Appellant had asked for the recalling of PW4 he was not recalled. She further submitted that no identification parade was conducted nor the motor bike registration number indicated. Further that the person arrested with the motor bike was acquitted. She referred us to the case of **Wang'ombe V R (1976-1980)1 KLR 1683** where it was held that the burden of proof never shifts. In reference to **Suleiman V R (1987) KLR 219** she said the failure to recall PW4 was fatal.

18. Mr. Njue learned state counsel opposed the appeal. He however submitted that there was no second but an alternative count. And it was wrong for the learned trial Magistrate to have convicted on both counts.

19. He submitted further that the Robbery occurred during day time and the Appellant was identified by two people (PW1 and PW2) and there was no need for an identification parade. The Appellant was arrested by police officers at a road block with the laptop, which was identified. He did not explain possession of the same. He submitted the defence of alibi was considered alongside other evidence and was properly rejected. Further that failure to recall PW4 for further exam was not fatal as his evidence was not dislodged. The receipt produced as DEXB1 was for the phone and not laptop.

20. This is a first appeal and this court has a duty to reconsider and reevaluate the evidence afresh and arrive at its own conclusion. We are alive to the fact that we did not see nor hear the witnesses and we have to give an allowance for that.

21. In the case of **Suleiman V R (1987) KLR 219** the Court of Appeal stated thus;

***“1. A first appellate court should subject the evidence of the case as a whole to fresh and exhaustive scrutiny. The appellant was in his first appeal entitled to the court's own consideration and views of the evidence as a whole and its own decision thereon.”***

Further in **Mwangi V REPUBLIC (2004) 2 KLR 28**.

**1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.**

**2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.**

**3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness.**

22. We have dutifully considered the evidence adduced in the Court below, plus the grounds of appeal. We have equally considered the submissions by M/s Mwai for Appellant and those of the State.

We find the following to be the issues falling for determination.

**(i) Whether a robbery occurred as claimed.**

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

**(iii) Whether the Appellant was found in possession of the stolen items.**

#### **ISSUE NO (I): WHETHER A ROBBERY OCCURED AS CLAIMED**

23. Under **Section 296 (2)** of the **Penal Code** Robbery with Violence may be said to have been committed in any one of the following circumstances.

**(i) Attackers are more than one.**

**(ii) Attackers are armed with dangerous weapons.**

**(iii) Attempted or actual violence is used on the victim.**

Proof of any of the above therefore satisfies commission of the said offence.

24. PW2 who was in the Cyber Cafe when the incident occurred said there were two people who entered the said cafe at about 5.00pm. One person had held him by the neck and dropped him on the seat pointing something like a pistol at him, before taking off with the laptop (EXB1). He was however not injured. It's clear some amount of force was used but very minimal. The thief had something like a pistol but not a pistol in the real sense of it. He was with another person. Ian who was said to have been with PW2 at the time did not testify. Considering the circumstances under which the offence occurred and the evidence available on this we find the attackers were two and PW2 was threatened with violence. An offence of Robbery with Violence was therefore committed.

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

25. This incident occurred at 5pm. PW2 and another had been left in the Cyber cafe by PW1 playing games on the computer when an alleged customer came to inquire about internet. PW1 who was outside and saw the customer walk in went back to the cyber but met with the customer walking out. Those inside told him the customer had wanted internet and had gone back to get his friend.

26. PW1 left instructions on what should be done if the customer returned. He went to a nearby hotel but before he could sit he heard screams from PW2. He rushed back and learnt of what had happened, and

that the thieves had taken off on a red motor bike. He immediately called a police officer (PW4) whose mobile number he had and reported to him. Fortunately the officer was at the Mathari junction roadblock, on duty. PW1, PW2 and others took off on motorbikes and motor vehicles to pursue the thieves. When the red motorbike reached the roadblock the rider was stopped, as the officers at the roadblock were aware of the theft that had been reported.

27. PW4 **No. 92025 P.C Paul Kimei** who was one of the officers at the roadblock testified that the Appellant was a pillion passenger on this red motorbike. He sat right behind the motorbike rider and was holding the laptop (EXB1) and its HP mouse. Just as the motorbike rider and his passengers had been stopped, PW1, PW2 and others arrived at the road block. PW1 and PW2 identified the laptop (EXB1) as the one stolen from the cyber.

28. PW2 also identified the Appellant as the customer who had been to the Cyber twice and had held him by the neck and taken the laptop (EXB1). PW1 identified him as the young man he had seen going into and leaving his Cyber. A toy pistol was also found with the appellant.

29. M/s Mwai submitted that an identification parade ought to have been conducted for PW1 and PW2 to identify the suspect. With all due respect we disagree. From the circumstances of the case there was no need of conducting an identification parade. PW1 and PW2 arrived at the roadblock soon after the suspect motorbike had been stopped by the police. They found the Appellant there with the laptop (EXB1). They identified the Appellant as the thief. They also identified the laptop. There had been no time for the witnesses to give descriptions of the thieves to the police. The Appellant was arrested a few minutes after the incident, and the witnesses saw him so what could an identification parade have assisted?

30. In his defence the Appellant said he was arrested from a matatu by a police officer with whom he had differed. The matatu had been stopped for police checking. His witness (DW3) who says he was in the same matatu with him said the Appellant was arrested for not fastening a safety belt. PW4 **No. 92025 P.C Paul Kimei** who with others arrested the Appellant testified in court on the arrest. The Appellant did not put to him in cross examination all these issues brought up by him and his witness in the defence.

31. The learned trial Magistrate weighed all this evidence adduced by the prosecution and defence witnesses and chose not to believe the defence. Even where an accused person raises a defence of an alibi, this alibi is considered alongside the evidence of the prosecution before a decision is arrived at. The law does not state that once a defence of an alibi has been raised an accused is to be acquitted.

32. The conditions at the scene of the offence were conducive for a positive identification as it was broad day light.

Quick action was taken by PW1, PW2 and others and there was recovery within a very short time.

### **ISSUE NO. (III) WHETHER THE APPELLANT WAS FOUND IN POSSESSION OF THE STOLEN ITEMS.**

33. PW1, PW2 and PW4 have confirmed that the Appellant was the one found with the laptop (EXB1), which PW1, said had been bought for him by his aunt who lives in Australia. He produced a warrant for it which had been sent to him by her via email. The same was produced as (PEXB4). He therefore proved ownership. The person the laptop was snatched from was PW2 who was a special owner in the absence of PW1.

34. We do find that the learned trial Magistrate analyzed the evidence well in finding that the Appellant was one of the thieves in the principle count and that he was found in possession of the stolen laptop. (EXB1).

35. There was an alternative count of being found in possession of suspected stolen property. This ought to have been a separate count and not an alternative count as it was not related to the Principal Count.

However, since it was presented as an alternative count the learned trial Magistrate having convicted on the Principal Court could not convict on the alternative count. The learned Senior Counsel conceded to this. We hereby quash the conviction on the said count.

36. Having offered an explanation for his possession of the said phone and even producing a receipt that was not disputed, we find that he had satisfactorily proved ownership. We direct that the said phone be returned to him.

37. The result is that the appeal is dismissed save for the orders made at paragraph 36. The Conviction and Sentence on the Principal Count are upheld.

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

Hedwig Imbosa Ong'udi

Ngaah Jairus

**JUDGE**

**JUDGE**