



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 70 OF 2014**

**JOSHUA BUNDI NGANATHA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against conviction and sentence in Nanyuki Chief Magistrates' Court Criminal Case No. 804 of 2013 (Hon. T.W.C Wamae) on 19<sup>th</sup> August, 2014)*

**JUDGMENT**

**1. Background**

On 12<sup>th</sup> September, 2013, at about 10.30 am **Fredrick Johnness Van Hulst alias Freddy Van Hulst (Freddy) (PW1)** was riding a motor cycle on Nanyuki-Mount Kenya Safari Club road with his wife, **Maaika Yohanna Elizabeth (Elizabeth) (PW2)** as his pillion passenger. They were on their way to Mt Kenya from Nanyuki.

The couple stopped at Kenya Wildlife Services junction to take pictures; meanwhile, they parked their motor cycle at the side of the road.

After their brief excursion, they went back to their vehicle but just as they were going, they noticed three strangers also on a motor bike on the opposite side of the road. They did not pay much attention to them but proceeded to climb their motor cycle in readiness to resume their journey.

As Freddy ignited the motorbike, the three strangers confronted them from behind; one of them switched off the motor cycle engine and took the key. The other one hit Elizabeth with the machete he was armed with. He also hit Freddy with the same weapon. These attackers took Elizabeth's bag which contained their camera. They also frisked Freddy's pockets and removed the couple's cell phones, student identity cards and ATM cards. They also took away Freddy's driving licences. They also rode off on the two motor-bikes leaving the couple stranded on the road.

On 20<sup>th</sup> September, 2013 the appellant was arrested as one of the suspects who had robbed Freddy and Elizabeth. Upon interrogation, it is alleged that he admitted to have been involved in the robbery and offered to lead the police officers to the place he had taken the complainants' camera ostensibly for 'repairs.'

According to one of the officer's evidence, the appellant led them to a shop in Nanyuki town where he had taken the camera. The owner of the shop removed the camera from the shop and gave it to the officers. He was arrested and taken to the police station together with the appellant.

Freddy was summoned to Nanyuki police station where he identified the camera and the bag in which it was kept as his property.

It is against this background that the appellant together with one Joseph Kaume Kimenchi were on 23<sup>rd</sup> September, 2013 charged with the offence of robbery with violence contrary to **section 295** as read with **section 296(2)** of the **Penal Code**.

According to the particulars of the offence, it was stated that on the 12<sup>th</sup> day of September, 2013 near Kenya Wildlife headquarters junction in Laikipia county within the Republic of Kenya jointly with others not before court while armed with a dangerous weapon, namely, a panga, the appellant and his co-accused robbed Freddy Van Hulst cell phones, make E1200 GSM valued at Kshs 1490/=, Nokia make 1661 valued at Kshs 3750/= a camera make Panasonic Lumix DMC FZ-38 valued at Kshs 32,200/=, motorcycle registration number KMDC 285T make ranger valued at Kshs 82,000/= a wallet containing Kshs 5,000/= a driving licence, a student identification card and ATM cards all valued at Kshs. 127,430/= and immediately before such robbery, they used personal violence to the said Freddy Van Hulst.

At the conclusion of their trial the learned magistrate convicted the appellant and acquitted his co-accused. The appellant was sentenced to death.

The appellant has now appealed to this court against the lower court's judgment and in his petition of appeal he has raised the following grounds:-

1. The learned magistrate erred in law in convicting the appellant on the basis of the complainant's evidence whose credibility was doubtful and this contravened section **163(1)(c) of the Evidence Act**;
2. The learned magistrate erred in law in ignoring the fact that the complainant was a hostile witness;
3. The learned magistrate erred in law in not considering that the 4<sup>th</sup> prosecution witness should have been an accused person;
4. The learned magistrate erred in law in convicting the appellant based on circumstantial evidence;
5. The learned magistrate erred in law in convicting the appellant yet the charges against him were not proved to the required standard and thereby contravened **article 50(2)(a) of the Constitution**;
6. The learned magistrate erred in law in rejecting the appellant's defence which was not challenged by the prosecution;
7. The learned magistrate erred in law in not according due weight to the evidence of the **Occurrence Book** produced at the trial.

In order to appreciate the appellant's grounds of appeal and in order to satisfy ourselves whether the

decision the learned magistrate came to is sustainable, it is necessary that we relook at the evidence afresh and come to our own conclusions which ultimately may or may not be consistent with the findings of fact of the trial court. Whatever decision we arrive at, we are mindful that the trial court had the privilege and the advantage, which we do not enjoy, of seeing and hearing the witnesses. (See **Okeno versus Republic (1972) EA 32**).

## **2. The prosecution case**

According to Freddy's testimony, he and his wife were attacked by three men one of whom was armed with a panga on 12<sup>th</sup> September, 2013. They had just been taking photographs on their way to Mt Kenya from Nanyuki at the junction to Kenya Wildlife Services.

Apart from attacking them, the three men rode away on their motor cycle which was never recovered, at least by the time they testified. They also lost other personal belongings, including a camera to the thugs.

The couple was rescued by a Good Samaritan who took them to Nanyuki police station to report the robbery and thereafter took Freddy to hospital for treatment. The police issued him with a P3 form which was duly completed by the doctor in the hospital where he was treated on 25<sup>th</sup> September, 2013.

On 20<sup>th</sup> September, 2013, the witness was informed by the police that they had recovered a camera and that two suspects had been arrested. He went to the police station and identified the camera as his. He confirmed that when the camera was stolen its battery was low but that it had apparently been charged when the camera was recovered.

On 25<sup>th</sup> September, 2013, the witness was invited to inspect an identification parade and possibly identify his assailants. He identified the appellant's co-accused as the person who had assaulted him. He said he recognised the appellant's co-accused because of the shape of his head and eyes and also because he had ample time to see him properly at the time he attacked them. A second parade was organised and for the second time he picked the appellant's co-accused again. The parade form shows that the 2<sup>nd</sup> parade was conducted at the request of the 2<sup>nd</sup> accused person. According to the complainant, the 2<sup>nd</sup> accused had a broad face and red eyes. He admitted however, that he did not give the description of the 2<sup>nd</sup> accused person to the police. Two other parades were conducted but he was not able to pick out anybody, including the appellant, from any of those parades.

Freddy identified the recovered camera in court as his; it was a Panasonic DMC-F238 by make. He also identified the bag in which it had been kept when it was stolen. He could recognise some special features on it; for instance, he demonstrated in court that whenever the bag was shaken, it made a particular noise. Apart from these special features, he also provided receipts for its purchase and those of the phones.

The witness testified that the registration number of the motor cycle he lost was KMDC 285T Ranger; he produced an agreement of sale showing that he purchased it from one Julius Gitonga.

Freddy's wife, Elizabeth corroborated her husband's testimony and testified that at some point on their way to Mt Kenya, they parked their motor cycle off the road and walked a few metres as they took photographs. She said that they were attacked by three men one of whom held her hand and pulled her from the motorcycle. The attackers demanded money from them; one of them hit her husband on the face with a panga. They took the bag she was carrying; it is this bag that contained the camera. The witness identified the camera and its bag as theirs. She also testified that the battery was low when the camera was stolen but it had been recharged when it was recovered.

**Police Constable Boniface Kithinji (PW3)** was stationed at Nanyuki police station and was on duty when Freddy reported the robbery at the station on 12<sup>th</sup> September, 2013. He received the report from Freddy that he and his wife had been robbed of their money and other personal belongings. He confirmed that the complainant was bleeding from the face when he arrived at the station.

On 20<sup>th</sup> September, 2013, this officer got information from an informer that the appellant was involved in the robbery; he informed the Officer in Charge at Nanyuki police station and two of his other colleagues at the station. Together they arrested the appellant at Makutano centre and brought him to the police station.

It was this officer's evidence that upon interrogation of the appellant, the latter told them that he was involved in the robbery and even told them where they could find the camera that had been stolen from the complainant. He infact led them to **Henry Ngari Ndungu's (PW4's)** shop where the camera had purportedly been taken for 'repair'. **Henry Ngari Ndungu (PW4)** removed the camera from his drawer and gave it to the police officers.

The appellant also told the police officers that he was with one Joseph Koome when they robbed the complainant and his wife. He also led them to the place the said Koome lived. They found him together with other men at Makutano trading centre. He was arrested and was charged together with the appellant.

The officer confirmed that the complainant identified the camera and its bag at the police station as his property and infact he produced documents in proof of ownership.

During cross-examination, the witness told the court that the camera had been taken to **Ndungu (PW4's)** shop for repair but that when he (Ndungu) checked it, he noticed that the camera had run out of power and all it required was to charge it.

**Henry Ngari Ndungu (PW4)** himself testified that he was an electrician. His services include computerised repair of phones and general electronics and that he had a shop called ZKen Computerize at Nanyuki for that purpose and which he had been operating for the past six years.

He stated that on 12<sup>th</sup> September, 2013 at around 2 pm, someone brought him a Panasonic camera in a black bag for repair. He charged him Kshs. 500/= which was to be paid upon collection of the camera. He produced the duplicate of the receipt he had issued the 'owner' of the camera with. He had identified himself as 'Bundi' which name was recorded on the receipt.

When **Ndungu(PW4)** checked the camera, he found out that it was only the battery that was low but that as he waited for the owner to collect it, the latter accompanied by police officers came for the camera on 20<sup>th</sup> September, 2013. This witness gave out the camera when the purported owner asked for it. The police, according to this witness, told him that the camera had been stolen and therefore he was asked to record a statement at the police station. The witness identified the camera and pointed out the appellant as the person who had brought the camera to his shop for repair.

**Benson Njoroge Gichuki (PW5)** is the person who rescued the complainant and his wife when they were left stranded after the attack. He testified that on 12<sup>th</sup> September, 2013 at around midday, he encountered the complainant and his wife at the junction of Kenya Wildlife Services. The complainant was bleeding on the face and that he asked that he be taken to the police station to report a robbery. This witness carried them both and later took the man to Nanyuki cottage hospital for treatment.

**Julius James Murithi (PW6)** testified that he sold the motor cycle registration number KMDC 285T to the complainant at Kshs 82,000/= but they agreed that he would resell the motor cycle back to him after three months and for this reason he retained its log-book.

The investigations officer **Corporal Evans Musungu (PW7)** investigated the complainant's complaint. He confirmed the complainant to have been bleeding from the forehead at the time the complaint was made. The officer testified that the complainant's camera had been recovered from **Ndungu (PW4)** who informed the police officers that it had been brought to his shop for repair by the appellant. He produced the receipts for the camera and the cell phones for the complainant and his wife. He also produced the duplicate receipt book from which a receipt had been issued to the appellant when he left the camera for repair at **Ndungu's (PW4's)** workshop.

The officer who conducted the identification parade was Inspector of **Police Vincent Kamasi (PW8)**. He testified that he conducted two separate parades for each of the accused persons. The complainant did not identify the appellant but he was able to identify the 2<sup>nd</sup> accused person.

**Dr Butt (PW9)** a consultant medical officer at Nanyuki cottage hospital examined the complainant on 12<sup>th</sup> September, 2013. He testified that the complainant's clothes were stained with blood and that he was in shock and pain when he arrived at the hospital. He had sustained a laceration on the frontal region and that the type of weapon used was a sharp object. He filled the P3 form which was admitted in evidence.

### **3. The defence case**

The 1<sup>st</sup> appellant gave sworn testimony in his defence. He simply stated he was arrested in the course of his business on 20<sup>th</sup> September, 2013. He denied having committed the offence with which he was charged.

Similarly, the appellant's co-accused person said that he was arrested on 21<sup>st</sup> September, 2013 as he left Nanyuki town to go to his home. According to his evidence, the police demanded Kshs. 30,000/= from him but that he was unable to raise this amount and that it is then that he was charged.

### **4. Parties' submissions**

At the hearing of the appeal, the appellant acted in person and informed the court that he entirely relied on his written submissions which were filed in court on 27<sup>th</sup> March, 2015.

In summary, the appellant submitted that he was not identified by the complainant as one of the people who had attacked him and his wife.

Taking this argument further, the appellant argued that there was no direct evidence that linked him to the offence he was convicted of. He urged that he was convicted on the basis of circumstantial evidence yet the learned magistrate did not warn herself of the danger of relying on such evidence. In this regard, he relied on a case which though not properly cited, the point that the appellant wants to bring out is clear that before convicting on the basis of circumstantial evidence, the trial court must be certain that the inculpatory facts are incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused person.

On the holding by the trial court that he was linked to the robbery because he was found in possession of the complainant's camera, the appellant argued that he was not in possession of the camera and the prosecution's attempt to link him to the camera was for ulterior motives. In particular, the appellant urged that the learned magistrate ought to have found the evidence of **PW3** and **PW4** which linked him to possession of the camera not credible and uncorroborated. In this regard, he relied on the decision of **Abel Monari Nyanamba & Others versus R Criminal Appeal No. 86 of 1994** where the Court of Appeal held that evidence which itself requires corroboration cannot provide corroboration for other evidence.

The state through Mr Njue opposed the appeal. Counsel testified that the appellant was positively identified and considering that the appellant took roughly ten to fifteen minutes with the complainant and that the robbery took place in broad daylight, circumstances for identification were favourable. It was counsel's argument that the appellant was properly identified in an identification parade that was subsequently conducted for this particular purpose.

Here, we must hasten to state at outset that counsel must have misapprehended the evidence as it is clear from the record that the complainant clearly admitted that he could not identify the appellant in the parade. The only person he identified was the appellant's co-accused who was the 2<sup>nd</sup> accused person in the trial in the lower court but who was acquitted because the learned magistrate did not find any basis for the parade in which he was apparently identified. The appellant was not convicted on the basis of positive identification.

Counsel also urged that the appellant was found in possession of the camera stolen from the complainant who established ownership by production of relevant ownership documents. The evidence, according to the state counsel put the appellant at the scene of crime. It was his submission that the appellant was properly convicted and that conviction and sentence should be upheld and the appeal dismissed.

## **5. Analysis of evidence and determinations**

### **(a) Robbery with violence**

The first port of call in our fresh analysis of the evidence at the trial and the submissions by parties is the determination of the question whether it was established beyond reasonable doubt that the offence of robbery with violence as defined under **section 296(2)** of the **Penal Code** was committed. ‘Robbery’ as an offence is defined in the preceding section **295** of the **Code**; that section provides:-

*“295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”*

Section **296(2)** of the Code defines when ‘robbery’ graduates into robbery with violence; it says:-

*“296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”*

What this section shows is that for one to be convicted of the offence of robbery with violence the prosecution has to establish that the victim was robbed and all or any of the following circumstances obtained, that is:-

- a. The accused was armed with any weapon or instrument that may deemed to be dangerous or offensive;
- b. The accused was in the company of one or more persons;
- c. Immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person.

The evidence on record reveals that each of these components of the offence of robbery with violence was established. The uncontroverted evidence of **Freddy (PW1)** and **Elizabeth (PW2)** was that they were attacked by three men one of whom was armed with a panga. The armed attacker struck the complainant and injured him. **Police Constable Boniface Kithinji (PW3)**, **Benson Njoroge Gichuki (PW5)** and **Corporal Evans Musungu (PW7)** were all consistent in their evidence that the complainant was bleeding from the face when they encountered him. **Dr Butt (PW9)** who examined and treated the complainant confirmed that the latter was injured by what in his opinion was a sharp object; he produced a medical report in that respect. In the cause of the robbery, the complainant’s property was stolen and retained by his attackers.

It is apparent from the evidence of these witnesses that all the three ingredients of the offence of robbery with violence were established although either of them would have been sufficient.

### **(b) The perpetrator**

The next question is whether the appellant was one of those who perpetrated the offence of robbery with violence against **Freddy (PW1)** and his wife **Elizabeth (PW2)**.

The appellant was subjected to an identification parade but the appellant could not identify him; though he was able to identify his co-accused the learned magistrate rejected his evidence and held that he had not been positively identified merely because the complainant had not given his description to the police before the parade was conducted.

We doubt this is the proper appreciation of the law since the Court of Appeal has held in **Criminal Appeal No. 63 of 2008 Nathan Kamau Mugwe versus Republic (2009) eKLR** which was recently adopted in **Criminal Appeal No. 63 of 2014 John Mwangi Kamau versus Republic (2014) eKLR** that a parade cannot be held to have been invalid merely because the witness or witnesses had not previously given a description of the suspect. However, since the state did not appeal against that decision we choose to say nothing more on this issue.

### **(i) Recent possession as the basis for conviction**

Although the learned magistrate did not state it expressly in her judgment, she convicted the appellant based on the doctrine of recent possession. This doctrine was explained in **Chaama Hassan Hasa versus Republic (1976) KLR at page 10** where the High Court (**Trevelyan and Hancox JJ**) stated as follows:

*“Where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (though not by way of retaining).”*

The evidence on record suggests that the appellant was in possession of the complainant’s camera together with the bag in which it was kept soon after these items had been stolen from the complainant and his wife.

**Henry Ngari Ndungu (PW4)** was in the business of repairing electronics; while in the course of that business the appellant brought him a camera for repair on 12<sup>th</sup> September, 2013 at 2 pm less than four hours after the complainant had been robbed of the same camera. He found out that except for the low battery, there was nothing wrong with the camera. However, he made this discovery after the appellant who had left and with whom he had agreed that he would collect the camera after seven days.

His evidence that the battery was low and all he did was to recharge rather than repair it was corroborated by the evidence of **Freddy (PW1)** and **Elizabeth (PW2)** who testified that when the camera was stolen its battery was low but that it had been charged when it was recovered.

To prove that the appellant had left him the camera, **Ndungu (PW4)** gave him a receipt whose duplicate copy was produced and admitted in evidence in court. We have had the benefit of looking at this exhibit and established that what was referred to as the receipt is actually a job card. The entire book from which these job cards are issued was exhibited in court. Each leaf of the job card contains provisions for the particulars of the equipment, the work to be done and the cost of repair, amongst other details. At the foot of the job card, there is some kind of notification, alerting the owners of whatever equipment is brought for repair that their property should be collected within 30 days of the date of issue of the job card failure of which it will be disposed of.

There are 98 leaves in the book out of which 74 leaves had been issued; the appellant’s was the 56<sup>th</sup> in the book and it was issued on 12<sup>th</sup> September, 2013. We find no doubt with the **Ndungu’s (PW4’s)** explanation that he received the camera in the course of his usual trade or business.

Although the appellant denied it in his defence we have not found any reason why the learned magistrate should have dismissed or disregarded the evidence of this particular witness that it was the appellant who delivered the complainant’s camera in his shop. We agree with the learned magistrate that based on the evidence before her, the finding that the appellant was in possession of the stolen camera and its bag was the correct finding.

### **(ii) Possession**

The appellant argued that it is **Ndungu (PW4)**, who was found in possession of the stolen camera and therefore it is him who should have been charged. From what we can gather, this particular witness explained how he came to be in possession or custody of the camera. The fact that he was in physical possession does not necessarily mean that the appellant did not exercise control over it; for purposes of criminal culpability, the appellant was in ‘possession’ of the camera. **Section 4** of the Penal Code makes this clearer and defines what amounts to possession when it comes to criminal liability. It says:-

**“possession”—**

***(a) “be in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;***

***(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;***

We are satisfied that the appellant was in possession of the camera and its bag. Having so found the law placed the burden upon the appellant to explain or account for his possession of the complainant’s property which had just been stolen. In the absence of his explanation to account for his possession of the complainant’s property, a presumption arose that he was either the thief who had robbed the complainant and his wife or a handler. Considering that the camera had been stolen a few hours before it landed into Ndungu’s (**PW4’s**) shop we are inclined to believe that the appellant stole the camera in circumstances that amounted to aggravated robbery.

### **(iii) Circumstantial evidence**

We are cautious to note that the conviction of the appellant on the basis of his possession of the stolen items is a conviction based on circumstantial evidence. But we are also aware that such evidence can sustain a conviction as long as it has been established that the inculpatory facts are incompatible with the innocence of the accused and incapable of any other reasonable hypothesis than that of his guilt. This is what was said of a conviction based on circumstantial evidence in **Simon Musoke versus Republic (1958) EA page 715** at page 718 where the Court of Appeal stated:-

***“... in a case depending exclusively upon circumstantial evidence he( the trial judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.”***

This decision was followed in the case of **Okeno versus Republic (1972) EA 32 at page 35** where the Court of Appeal said;

***“In our view the magistrate clearly appreciated that a conviction based on circumstantial evidence can only be had where the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”***

We think that the appellant’s possession of the complainant’s camera and the absence of any explanation of how he came in possession of that camera are what one would consider as the inculpatory facts that the Court had in mind in the foregoing decisions. They are circumstances that are incapable of explanation upon any other reasonable hypothesis than that of the appellant’s guilt.

## **6. Conclusion**

After what, in our humble opinion, is careful reconsideration of the evidence on record and the law, it is

our humble our view that the appellant was properly convicted and sentenced. It follows that we do not find any merit in his appeal and we hereby dismiss it accordingly. It is so ordered.

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

Hedwig Imbosa Ong'udi

Ngaah Jairus

**JUDGE**

**JUDGE**