



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**Criminal Appeal No.268 Of 2010**

CHARLES MATU MBURU.....APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

***(Appeal against the judgment in the Chief Magistrate's Court at Nyeri in Criminal Case No.774 of 2009 by M. NYAKUNDI – SRM)***

**J U D G M E N T**

The appellant was charged with the offense of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars of the charge in count 1 were that on the night of 11th and 12th November 2008 in Nyeri District within the Central Province, jointly with others not before court while armed with dangerous weapons, namely pangas, runigus and axes robbed EWN of a mobile phone make Motorola C113 serial number 358901001216776, one radio cassette player make National Star serial number 299025, one bag, two mattresses, unknown number of bed sheets and blankets, unknown cash money, one blue rain coat, two hospital receipts numbers 1128 and 298 and one bed coverall value at Kshs.25,700/= and at or immediately before or immediately after the time of such robbery killed the said EWN.

The charge in count II was rape contrary to section 3(1) of the Sexual Offences Act No.3 of 2006. The particulars of the charge were that on the night of 11th and 12th November 2008 in Nyeri District within the Central Province, jointly with others not before court, intentionally and unlawfully committed an act of penetration with his genital organs of the deceased EWN.

The alternative charges was Indecent Act with adult contrary to Section 11(6) of the Sexual Offences Act No 3 of 2006.

The particulars were that on the night of 11th and 12th November 2008 in Nyeri District within the Central Province, jointly with others not before court, the appellant committed an indecent act with an adult namely the deceased EWN by causing his genital organs to touch her sexual organs.

The the other alternative charges were handling stolen property contrary to Section 322(2) of the penal code. The particulars were that on the 13th day of November 2008, at Gakanga village Endarasha in Nyeri District within the Central Province, otherwise than in the course of stealing dishonestly assisted in the disposal of a mobile phone make Motorola C113 serial number 358901001216776 valued at Kshs.2,500/- the property of the deceased EWN for the benefit of Hosea Kabara Nyoike knowing or having reasons to believe it to be stolen goods.

The particulars of the second alternative charge were that on 26th day of July, 2009 at Ihumbu village, Muranga South District in Central Province, otherwise than in the course of stealing dishonestly retained

one blue rain coat valued at Kshs.1,500/= the property of the deceased EWN knowing or having reasons to believe it to be stolen goods.

The particulars of the second alternative charge were that on 26th day of July, 2009 at Soweto village, Mwachuiru in Nyeri North District within the Central Province, otherwise than in the course of stealing dishonestly handled two blankets and one bed cover all valued at Kshs.1,600/= the property of the deceased EWN knowing or having reasons to believe them to be stolen goods.

The first prosecution witness, **Josephat Mwangi Wanduma**, a Supervisor of a slaughter house in Nyeri town recalled that the deceased was a friend and he used to keep some cows at her residence. On the 11/11/2008 he did some work at her home and parted but before parting, they agreed that he would come the following day in the morning. On the following day When he went to her home, as agreed, he found the doors not opened. He went round the compound and found everything intact. He called but did not hear any reply. He entered the kitchen and found the place dirty. Food had been cooked. He saw eggs and chocolate beverage but no fire had been lit. He saw a sim card. He left the kitchen and saw the lady who usually does casual work and told her that something was amiss. They went to the main house and entered together. The door of the main house was slightly opened. They entered the 1st living room to the second living room and the lady screamed and said that the deceased had been killed. He saw the deceased body on the floor with the hands and legs tied and the mouth stuffed. The forehead left side had been hit and blood was all over in the house. He did not see any weapon in the house. He raised alarm and reported to the chief and later the police who collected the body.

Nothing was stolen from the compound. The cows were intact.

PW1 knew the appellant as he used to see him at the neighborhood of the deceased.

The second prosecution witness, **Juliana Wothaya Kiboi** went to the deceased house on 12/11/2008 at 8.30 am and met PW1 who told him that the deceased had not woken up. She went to the kitchen and no fire had been lit. She went to the main house and knocked and called her but there was no answer.

She went to the 2nd living room and found her tied on the legs and hands and lying on the floor facing downwards. She screamed and called PW1 who came and saw what had happened. People came to see what had happened and called the relatives of the deceased. She stated that the appellant had been employed by the deceased as he used to take care of the animals and tender the shamba.

The 3rd prosecution witness **Hosea Kabara Nyoike** was a vegetable vendor. On the 13/11/2008 at 11.00 am he was looking for vegetables to go and sell at Gakaya sub-location in Mweiga. He was with Kingori and Wamuthumbi whom he had employed to look for vegetables. Kingori called him and came in the company of the appellant and one Mathenge. Kingori told him that the appellant wanted some assistance in terms of fare to go to Mukurweini and that he had a phone he was selling at Kshs.800. PW1 ultimately bought the phone and gave it to his father in law whose phone was not working. He was arrested by the police in connection with the mobile phone. His father in law was arrested but released after 10 days. He was also arrested and charged with the offence but was later released.

Later he was called to attend an identification parade at Nyeri police station. He identified the appellant in the company of nine persons as the person who sold him the deceased's phone. The appellant had been brought to PW3 by Mr. Mathenge and Kingori, persons he knew very well.

The 4th and 5th prosecution witnesses Mr. Joseph Kingori Wanjiru and Malcon Mathenge respectively are the persons who assisted the accused to sell the phone to PW3. PW4 was able to identify the appellant as the person whom they assisted to sell the phone.

PW6, **PKN** a principal [Particular Withheld] School in Mukurweini and a son to the deceased received a call and went to the scene and found many people, he entered the house with his brother and found her mother's hand tied at the back and the legs were also tied. Some clothes were stuffed in the mouth. She had been hit on the head and that there were signs of a struggle. Her phone Motorola C113 bought by

Christopher Mureithi Ngacha was missing. A radio cassette was also missing. Some beddings were also missing.

During postmortem, PW6 was present and the cause of death was established as strangulation. The deceased was also raped.

PW6 suspected the appellant who had been their former employee. He worked with the police and safaricom and they were able to activate the phone whose serial number was 358901001216776 using mobile number 0712220011 whose registered owner was the appellant. The phone was also found to have been used by Mr. Mathenge and Hosea Kabara. The appellant was later arrested and various items found at his home. Under his bed a sim card for mobile No.0712220011 was found. More items belonging to deceased such as blankets and a bed cover were recovered. The mobile phone was later recovered from Malcom Mathenge who had exchanged his phone with Hosea Kabara Mathenge who stated that he had bought the phone from a person he could identify. He later identified the appellant as the person who sold him the phone.

PW7 **Christopher Mureithi Ngatia** testified that he had bought the mobile phone Motorola C113 for his mother. The serial number was 3589011001216776. The phone was recovered from Malcom Mathenge. He had been given the said phone by Hosea Kabara. Hosea Kabara claimed to have bought the phone from the appellant. PW7 with the assistance of the police tracked the appellants mobile number to have been used in the phone. He saw the invoices from Dr. Mate No.298, he also identified a bed cover, rain coat and two blankets that he was told were recovered from the appellant's house.

Pw8, **Nicholas Kiplimo** was a police sergent who re-arrested the appellant but no crucial evidence was found as no investigation had been done at the time hence the appellant was put on bond to be reporting to the O.C.S once a week.

PW9 was **Dr. William Kibe** a doctor practicing at Outspan hospital. He did the postmortem at the Nyeri funeral home. The body was taken to him on 12/11/2008. The mouth was stuffed with clothing. Both hands and legs were tied. There was a bruise on the left side of the head and the left cheek and neck and external genitalia. There was evidence that she was raped. The voice box had collapsed. The front teeth upper jaw were lose. He concluded that she had died of strangulation.

PW10, **Nicholus Nyagah No.31215**, a police corporal received information that the deceased had been murdered. He went to the scene and observed that the deceased had been tied on the legs and hands. He communicated with the CID offices Nyeri. He requested corporal Mugo to visit the scene of crime and photograph the same and thereafter removed the body to Outspan Hospital Mortuary in Nyeri.

PW11 No.42502 **Corporal Benjamin Wachira** was the scene of crime officer who photograph the body and produced the report that showed the state of te body and the scene of crime.

PW12, Daniel Nyagah a police corporal at the PCIO office did investigations in respect of the robbery. He wrote to safaricom (k) ltd requesting for the user of mobile No.358901001216776. They received a reply on the 11/2/2009 and it was established that the mobile number used immediately the robbery was done was 0712220011 which was used on 12/11/2008 a few hours after the incident. Other subsequent users were also identified. They managed to track the phone and recovered it from Malcom who had received it from Mr. Hosea Kibera the latter who was traced at Murang'a doing business. He agreed that he gave the phone to Malcom but had bought it from a person he could identify. He gave description of the person that filled the appearance of the shamba boy, the appellant. The appellant was traced and arrested at maragwa within Ihumbu village. He was found in possession of the deceased documents.

They went to his house and found the sim card for mobile number 0712220011 which number they were investigating, a navy blue rain coat bought by one of the deceased's son , two blankets and a bed cover were recovered in his rented house at Soweto village in Narumoru. He did not give a satisfactory explanation as to how he came in possession of the items. He was charged with the offence of robbery with violence.

The investigating officer in the case was **Jacob Mureithi** a Sergeant attached to CID Nyeri Province performing general duties. The deceased had been found murdered and a mobile phone with serial number 358901001216776, with radio cassette, bedsheets, blankets, raincoat and unknown documents stolen. He was given the carton for the mobile phone bearing the serial number. He was also given a receipt for the same phone in the name of the son of the deceased. He wrote to safaricom on the 11/2/2009 requesting for the user of the handset. He received a reply that the immediate user after the robbery was the user of sim card No.0712220011. He established that the user of safaricom mobile No.0712220011 was the appellant. After a lengthy search he was arrested and further items recovered at his various residences.

On 20/2/09 they were able to track Malcom Mathenge with the handset. Hosea Kabara was also traced as it was alleged by malcom that kabara had given him the handset. Kabara had bought the handset from the appellant who had been introduced to him by Kingori. He traced Kingori who said he knew the appellant. The appellant was identified by Mr. Kingori and Mr. Kabara.

PW14, **Daniel Kande** No.86225 inspector of police and O.C.S Nyeri police station. He did the identification parade at Nyeri main cells along the corridors. He informed the suspect the purposes of identification parade and the latter consented to appear on the parade. He signed by thumb printing the report. Hosea Kabera Nyoike of box 261 Endarasha identified the appellant amongst 9 participants including himself. He positioned himself amongst the 9 participants as No.6. The witness identified him by touching his shoulder. He was identified by his physique.

**Mr. Vitalis Ochido**, Chief Inspector of police did a second identification parade. The witness was one Joseph Kingori. He selected eight (8) members of the parade from the cells of the same age, race, height with the suspect. He informed the suspect the reason of the parade. The suspect signed the relevant forms and was willing to participate. Joseph Kingori Wanjiru identified the appellant by touching him.

In his defence the appellant states that he was arrested at Ewasonyiro. He had been called by Joseph who told him that his former employer had been killed and was to be buried on Monday. He went there before the burial date. He stayed at a friend's place until Tuesday of the burial. He went there and found the person had been buried on Monday. He met people from the same village and they advised him to go to the home of deceased but he was reluctant.

He went to the house in the homestead and was taken to the police station where he was arrested but later released. He was later arrested and told that he had sold the deceased phone to somebody. He did not know the person. They removed items from his house. He claimed that he had been given items by the deceased. He claimed that the deceased gave him the jacket. The deceased had given him a shamba to plant vegetables and used to pay him a salary. He realized that onions were not doing well and the deceased did not increase his salary hence he decided to leave through resignation. He claims to have not known Mr. Hosea Kabera Nyoike who had claimed that the appellant sold him the phone.

In his judgment, Hon. Nyakundi found that the evidence of PW3 and PW4 clearly showed that the appellant sold the phone to PW3. PW4's evidence corroborated PW3's evidence on the issue. The accused was found in possession of the deceased property. The appellant number 0712220011 was found to have been used in the deceased's phone hours after the robbery. He found that the evidence on record directly pointed at the appellant for having been involved in the crime.

In his petition of appeal, the appellant has urged this court to find that the trial court erred in law and fact by failing to find that the alleged offence was never committed as alleged in the charge sheet. He argues that PW1 alleged that the offence was committed on 11/11/2008 while the charge sheet indicates was committed on 12/11/2008.

This ground lacks basis as the charge sheet shows that the offence was committed on the night of 11th and 12th November 2008. PW1 woke up in the morning of 12/11/2008 and visited the home of the deceased and found her dead. He could not know the exact time of the killing.

On the issue of identification, in ground 2 of the appeal, this court finds that the appellant was properly identified by Mr. Kingori and Hosea Kabera. He was placed between persons of the same physical, race, colour and age.

Ground 3 also fails as the investigating officer wrote to Safaricom who gave them the details of the person who used the mobile phone immediately after the robbery. The appellants No.0712220011 was found to have been used a few hours after the robbery. The *doctrine of recent possession* was adequately established confirming that the appellant was the first to use the deceased's phone immediately after the robbery. The appellant failed to explain how his sim card was used in the phone.

The upshot of the foregoing is that the appeal lacks basis and is ultimately dismissed and the decision of the lower court is upheld.

*Dated, signed and delivered at Nyeri this 30th day of January 2014.*

**J. WAKIAGA**

**JUDGE**

**A . OMBWAYO**

**JUDGE**

Judgment is read in the presence of the appellant and Mr. Njue for the state. The appellant has right of appeal.

**J. WAKIAGA**

**JUDGE**

**A . OMBWAYO**

**JUDGE**