



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 705 OF 2010

**REPUBLIC.....RESPONDENT**

VERSUS

**FRANCIS IRUNGU MUTHONI.....APPELLANT**

*[Being an appeal from the original conviction and sentence by Hon. M.A. Murage S.P.M. dated 15th December, 2010 at Limuru SPMCCR Case No. 691 of 2010.]*

## **JUDGEMENT**

The appellant, **Francis Irungu Muthoni** was charged, convicted and sentenced on an offence of robbery with violence contrary to S.296(2) of the Penal Code, Chapter 63, Laws of Kenya. The particulars of the offence were that on the 22nd day of June, 2010 at Kirasha junction in Kiambu West District within Central Province, jointly with others not before court while armed with knives, metal bars robbed **Benson Kimata Kiarrii**, cash Ksh.1,400/= and a mobile phone make Motorola C113, worth Ksh.2,000/=, all totalling Ksh.3,400/=, and at or immediately before or immediately after the time of such robbery used actual violence to the said Benson Kimata Kiarrii.

Again, the appellant was charged in the second count of robbery with violence in that on the 22nd day of June, 2010 at Kirasha junction in Kiambu West District within Central Province, jointly with others not before court while armed with knives, metal bars robbed Francis Kuria Njoroge cash Ksh.300/= and a mobile phone make Nokia 1200, worth Ksh.2,500/=, all totaling Ksh.2,800/=, and at or immediately before or immediately after the time of such robbery used actual violence to the said Francis Kuria Njoroge.

In the alternative charge, the appellant was charged with two counts of handling stolen property contrary to S.322(2) of the Penal Code. The particulars of the other two counts are that on the 22nd day of June, 2010 at Kirasha junction in Kiambu West District within Central Province, otherwise than in the course of stealing dishonestly undertook the retention of a mobile phone make Motorola C113, for the benefit of Benson Kimata Kiarrii, knowing or having reason to believe them to be stolen goods and also; that on the 22nd day of June, 2010 at Kirasha junction in Kiambu West District within Central Province, otherwise than in the course of stealing dishonestly undertook the retention a mobile phone make Nokia 1200, for the benefit of Francis Kuria Njoroge, knowing or having reason to believe them to be stolen goods.

At the trial, the prosecution called five (5) witnesses while the accused gave an unsworn statement and did not call any witnesses in defence. The prosecution case was that the appellant together with three other people accosted the complainants at Kiracha Shopping Centre where their motor vehicle registration no. KAG 11634 had broken down.

The evidence of PW1 and PW2 is that their vehicle stalled at Kiracha on 21st June, 2010. At about 2300 hours, the appellant approached them and enquired as to what problem they had. He left only to come back at 100 hours with four others whereby he demanded money and mobile phones. He threatened to break into the vehicle if it was not opened. When it was opened, four people entered and threw the complainants out. The appellant took from PW1 a mobile phone and hit him with a metal bar. PW1 also gave him Ksh.1,400.00 and PW2 was robbed of his mobile phone and Ksh.2,500.00. The matter was reported to the police the following day and the appellant arrested on identification by PW1 and PW2.

The trial court found the evidence against the appellant overwhelming and convicted him as charged with two counts of robbery with violence. He was sentenced to death as provided for by the law.

The appellant by an undated memorandum of appeal now appeals against conviction on grounds;

1. *THAT, the learned trial magistrate erred in law and facts when she convicted me in this case with no identification parade to prove the positive identification.*
2. *THAT, the learned trial magistrate erred in law and facts when she convicted me in this case with no exhibit.*
3. *THAT, the learned magistrate erred in law and facts when she convicted me in this case with contradiction evidence from the prosecution side.*
4. *THAT, the learned trial magistrate erred in law and facts when she convicted me while rejecting my defence with no good reason thus violating law provision under section 169(1) of c.p.c.*

At the hearing of the appeal, the appellant intimated that he had furnished written submissions and only wished to build on these by way of oral submissions.

In his submissions, he denies and disconnects his possession of the stolen phone and even the mode of recovery of the same from him. He submits that there was no recovery form indicating that the phone was recovered from him and therefore this allegation is not sustainable. He also introduces a new ground to the effect that he was not afforded an opportunity to ventilate his case in that he was forced to proceed with the trial at the lower court when he was unwell.

On the other hand, Mr. Kadebe opposed the appeal on ground that the record of the trial court speaks for itself. He submitted that the appellant had approached PW1 and PW2, the complainants on pretences that he wanted to assist them in their breakdown and being stranded only to reappear in the middle of the night with four others and threatened and robbed the complainants. At the time of the arrest, the police found the appellant with phones belonging to PW1 and PW2. This, he submitted, was concrete evidence and therefore the conviction and sentence should be upheld.

We proceed to consider these grounds in the paragraphs that follow.

From our independent analysis of the evidence before the trial court and the grounds of appeal and submissions of the parties, we find that three issues led themselves for our consideration in this appeal. The first one is whether the appellant was properly identified in the absence of an identification parade to prove the identification of the appellant. The second one is whether the prosecution case was built on contradictory evidence; and the last one is whether the trial court rejected the appellant's defence without any good reasons.

We wish to address and analyse the grounds of appeal as hereunder;

### **1. Identification of the appellant**

The appellant complains that he was convicted even though no identification parade was held. In this case, the appellant was identified by the complainants, PW1 and PW2 who had had two other encounters

with him the previous evening and night. The 1st encounter was at the time of the vehicle breakdown where the appellant approached them and enquired on their problem whereas the 2nd one was at 100 hours when the appellant and others attacked and robbed them (complainants) while armed and with threats.

It was not necessary to stage an identification parade, the appellant having been positively and clearly identified at the time of robbery. The site of the robbery was well lit. The incident took a long time and the appellant appeared before the witnesses twice on the night of 21st/22nd June, 2010 thus the ease of identification. The first incidence was when he came to enquire on the nature of the complainant's problem. The other incident was at 100 hours when he came with others and committed the robbery. The place was well lit and therefore ease of identification. It was not necessary to stage an identification parade in the circumstances.

## **2. Contradictory and unreliable evidence**

The other grounds of appeal are that there was no evidence that exhibits 1 and 4 - the phones were recovered from the appellants and contradictory evidence by the witnesses. The appellant was arrested and found in possession of the two mobile phones stolen from the complainants. This was the testimony of PW5, PC Edwin of Lari Police Station. It was not shaken on cross examination and neither was the other prosecution evidence. Again, it is trite law that a conviction need not necessarily be based on a display of exhibits at trial but can be obtained from other evidence connecting an accused person to the crime.

In his Supplementary Grounds of Appeal, the Appellant states that the prosecution did not produce in court a recovery form to show that the phone was recovered from him and further that there was no evidence to support that of PW4 regarding the recovery of the phones. We find that this line of submissions has no merit. PW4, one of the arresting officers, testified that he searched the appellant and recovered the two phones which both complainants identified as belonging to them. These two phones were produced as exhibits in court by PW5. PW1, who was present during the appellant's arrest testified that the phones were recovered from the Appellant's pockets. From the evidence before us, there is no doubt that the phones were recovered from the Appellant. Failure to produce an inventory of exhibits does not render the evidence connecting the Appellant to stolen items incredible.

The appellant has also complained that no exhibits were produced. Failure to produce exhibits is not necessarily fatal to a prosecution case. Each case turns on its own particular circumstances. In any event, the Clinical Officer produced the P3 Form and notes as Exhibits 1 and 2 respectively. We find this well supported by the authority of **John Wachira Muthike -vs- Republic [2014]eKLR, (High Court, Kerugoya.)**

The evidence on the prosecution witnesses at the trial was not contradictory, or at all, contrary to the submissions by the appellant. In this case, the totality of the evidence before the trial court was sufficient to secure conviction as already demonstrated above.

## **3. Defence evidence**

The appellant contends that the trial court did not consider his defence at the close of the trial. From the record, the appellant gave a brief and unsworn statement in defence. He denied the charge. He stated that on the material day he went to work and reported back home at 800 hours. That on 22nd June, 2010 people went to his place of work where ten people came and these included a police man. They then asked for his place, searched and got nothing. He further testified that he was arrested and this case framed against him.

The rejection of the defence of the appellant is not sustainable as a ground of appeal. It is not supported by the record of the trial court. Moreover, the evidence of the appellant at the trial was scanty and lacked direction and credibility. It did not in any way rebut the prosecution evidence or guide the trial court in any direction. It was not of value to the defence.

We agree with the finding of the trial court that the accused defence was a mere denial. He did not account for his evening. PW1 and PW2 testified at length and linked the appellant to the offence besides identifying him positively based on their two previous encounters with him during the night of the robbery. His defence did not displace this overwhelming evidence against him.

In the premises and for the foregoing reasons we find that the case was proved at trial. We dismiss the appeal and uphold the conviction and sentence.

Delivered, dated and signed the 17th day of June, 2014.

**R. LAGAT-KORIR**

**D.K.NJAGI MARETE**

**JUDGE**

**JUDGE**

In the presence of:

.....: Court Clerk

.....: Appellant

.....: For the Appellant

.....: For the State/respondent