



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL NO. 60 OF 2012**

**LESIT, MAKAU, JJ**  
**DOUGLAS GITONGA.....APPELLANT**  
**VERSUS**  
**REPUBLIC .....RESPONDENT**

*(An appeal from the original conviction and sentence in Criminal Case No. 736 of 2011 on PM's Court at Tigania)*

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

1. The appellant DOUGLAS GITONGA was charged with robbery with violence contrary to Section 296(2) of the Penal code. The particulars of the offence were:-

*On the 4<sup>th</sup> day of September, 2011 at Isiolo township area in Isiolo County within Eastern Province jointly with others not before court being armed with a dangerous weapon namely sword robbed QABALE IBRAHIM YUSUF of her purse worth Kshs.380/- containing cash money Kshs.5,000/- a mobile phone make Nokia 2700/- worth Kshs.5,000/- and a rack-sack bag black in colour worth Kshs.600/- all valued at Kshs.10,980 and immediately before or immediately after the time of such robbery killed RAMADHAN ADAN KARA.*

2. The appellant faced an alternative charge of handling stolen goods contrary to Section 322(1), (2) of the Penal Code. The particulars of the offence were:

*On the fourth day of September, 2011 at Isiolo township in Isiolo County within Eastern Province, otherwise than in the course of stealing dishonestly received or retained a rack-sack bag black in colour knowing or having reasons to believe it to be stolen goods.*

3. After trial the appellant was convicted on the main charge and sentenced to suffer death. Being aggrieved by the conviction and sentence the appellant preferred this appeal setting out (4) grounds of appeal being as follows:-
  - i. *That the trial Magistrate erred in both law and facts in failing to consider that the alleged identification under circumstances that they prevailed during the night was not free from the possibility of error.*
  - ii. *That the learned trial magistrate erred in both law and facts in failing to note that the conviction and sentence was not supported by the weight of evidence tendered by the*

*prosecution.*

- iii. *That the learned trial magistrate erred in both law and facts in failing to note that the complainants herein failed to record a first report to the police with my names or any descriptions.*
- iv. *That the learned trial magistrate erred in both law and facts in flouting Section 211 subsections (1) of the CPC 75 LOK.*

4. The appellant's counsel by then Mr. Ashford G. Riungu learned Advocate filed supplementary petition of appeal on 16<sup>th</sup> October, 2013 challenging death sentence meted against the appellant. The appeal was heard by Lesiit and Gikonyo ,JJ who delivered their judgment on 28<sup>th</sup> November, 2013, finding Mr. Riungu's argument that the death sentence was unlawful as per incurium. The court ruled that since the appellant's counsel had abandoned all the supportive grounds in the appellant's petition of appeal filed on 25<sup>th</sup> May, 2012 which attacked both conviction and sentence, the learned Judges ordered this appeal to be heard denovo.
5. When the appeal came up for hearing the appellant was in person and relied on written submissions for his appeal. We have considered the said written submissions.
6. We are first appellate court and have subjected the evidence adduced in the lower court to afresh evaluation and analysis and have drawn our conclusions, while bearing in mind that we neither saw or heard any of the witnesses. We have been guided by the principles set out in the case of **Okeno V Republic(1972) EA 32.**
7. The facts of the prosecution case are that PW1, who was a school girl aged 17 years arrived at Isiolo Town at 7pm. PW1 met one Ramadhan Adan Kara(deceased) who volunteered to escort her home at BulaPesa estate in Isiolo. The deceased took PW1's bag which contained PW1's mobile phone make Nokia 2700, Kshs.5,000/- and other personal items. It had rained and the road was muddy. The deceased mobile had a spot light which they were using. That at Jamia Mosque in Isiolo three(3) men emerged in front of them, one of them borrowing the deceased spot light while the other two men attacked PW1 as the other attacked the deceased. One of the attackers grabbed PW1's handbag and ran away.
8. The man who was left behind tore up PW1's clothes with an attempt to rape her but she screamed for help and heard the deceased pleading with one of the assailants not to kill him. The deceased then fell down while PW1 continued screaming. A person at Jamia Mosque asked her what was wrong and she told him that they were being attacked and that is when the person who had been left behind ran away, leaving them with one assailant who had accosted the deceased. The attacker then picked PW1's bag which had fallen down and ran with it as PW1 chased him. PW1 caught up with the attacker and grabbed him by the collar. The attacker dropped the bag and ran away but PW1 continued with the chase as she screamed. A person appeared from the direction they were running to and managed to arrest the attacker as many people came to the scene.
9. PW1 went back to the scene to check on the deceased who she met on the way holding his chest, with a knife stuck on his chest. They escorted the deceased to where the appellant was being held but on arrival where the appellant was he collapsed. A good Samaritan rushed him to the hospital and after a while police officers came to the scene and found the appellant being attacked by mob and rescued him. The appellant was taken to Isiolo Police Station in presence of the person who had arrested him. The appellant was placed in cells. PW1 then proceeded to Isiolo District Hospital where she found the deceased undergoing treatment. On the following day, PW1 learnt that the deceased had succumbed to the injuries. PW1 told the court that the appellant had stabbed the deceased and at the time of the attack she did not lose sight of the appellant while chasing him until his arrest by PW3 as there was light from Jamia mosque which aided her identify the appellant who she had not known before that incident. The knife used to stab the deceased was produced as exhibit P2.
10. PW2 Ahmed Noor Ali testified that on 4/9/2011 at 7.30 p.m he was on his way home when at Jamia Mosque he heard a girl screaming for help. That he saw a girl emerge from a corner

- chasing a tall man shouting and claiming the tall man had robbed her. He saw another man emerging from the same corner, holding his chest who told him he had been stabbed by the man who was fleeing and he pleaded with him not to let the man escape. PW2 supported the deceased who had a knife protruding from his chest. That a short distance away he found a crowd of people surrounding the tall man whom he had seen earlier on fleeing.
11. PW3 Hussein Isaac Ibrahim testified that he heard screams ahead of him at around 7.00 pm on 4/9/2011 from Jamia Mosque area and that he found PW1 struggling with a man who was carrying a bag as she screamed. That he interviewed and separated them. The girl told him the man had robbed her and killed her companion. He struggled with the man and arrested him. That a few metres he saw another crowd and on checking he found the deceased whom he knew had a knife stuck on his chest. He hired a motorcycle and took him to Isiolo District hospital where he was admitted. The deceased told PW3 that the appellant had stabbed him. He returned to the scene and found the person he had arrested being beaten by mob and he prevented the mob from lynching the appellant. He telephoned PC Leboo of Isiolo Police Station informing him what had happened and after 10 minutes police officers came to the scene and rearrested the appellant and took him to police station. He accompanied police officers to the station with the complainant PW1. He identified the person he arrested as the appellant and the PW1's bag as P.exhibit 1 which he found the appellant carrying.
  12. PW4 Ramadhan Abdikadir testified that on 4/9/2011 at around 7.50 p.m he received report of the stabbing of the deceased; who was his close friend. He rushed to Isiolo District Hospital and found the deceased had a deep wound on his chest and the following day he learnt of his death. PW5 Cpl Albert Okumu testified that on 4/9/2012 at around 7.30 p.m he received information of a person who had been arrested by public for allegedly stabbing another person and public were threatening to lynch him. He rushed to the scene and found the appellant being threatened to be lynched. That he passed through Isiolo District Hospital and found the deceased having been transferred to Kiirua Mission Hospital. He escorted the appellant to Isiolo Police Station and booked him. PW5 was with PW6 when they arrested the appellant. PW7 Dr. Stephen Kiluva performed postmortem on the deceased body on 5/9/2011.
  13. The appellant denied the charge and put forward his defence testifying that on 4/9/2011 at around 7.00 p.m he was going home from a bar when he reached near Alfarah Mosque he met 4 men whom he did not know. They talked to him in a language he could not understand and one of them complained he refused to answer as he entangled him as he fell down. He was then attacked, cut on the right hand with an object he could not identify by one of the men while another hit him on the back of the head with a metal bar and he lost consciousness only to find himself at Isiolo Police Station on the following day. That his mobile phone, shoes and money were missing. That he was taken to Isiolo District Hospital where he was treated before being taken to court and charged with the instant offence.
  14. Mr. Makori, learned State Counsel appeared for the State in this appeal. he opposed the appeal urging that the appellant was positively identified by PW1 with the aid of electricity light and spot light from a mobile phone which the deceased was carrying. He urged that amongst the items stolen from PW1 included phone, cash, and handbag. That the appellant used violence by stabbing the deceased which was witnessed by PW1. That PW1's handbag was recovered from the appellant when he was arrested by PW3. That PW1 gave chase and caught the appellant with the help by PW3. That the appellant was rescued by PW5 and PW6 from members of public who wanted to lynch him. He urged that this is a case of identification and recent possession referring to the case of **NZONGO V REPUBLIC CRIMINAL NO. 536 OF 2010(NBI)** which we shall refer to later in this judgment. Mr. Makori learned State Counsel submitted further that the appellant was caught red-handed and was placed at the scene of the incident and urged that the prosecution proved the case beyond reasonable doubt.
  15. Regarding the issue of identification we are guided by the case of **PAUL ETALE & ANOTHER V REPUBLIC C.A NO. 24 OF 2000(UR)** page 2&3, where the court stated:-

***“The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.”***

16. We have carefully examined the evidence of identification adduced by the complainant, (PW1), PW2 and PW3. According to PW1 she was able to identify one of the attackers as a tall man. She testified that the person who was with Ramadhan took her bag which had fallen down and she followed him, grabbing him by the collar. He dropped the bag and hit her on the shoulder and ran away. She followed him screaming and as he was fleeing he was arrested by another person who was following him. That many people came to the scene. PW1 testified that she did not lose sight of the appellant until he was arrested as the road was straight and there was light from Jamia Mosque. That they could see properly save the ground and that is why they were using a spotlight. That she saw the appellant properly when she grabbed him and that she was following him closely till he was arrested. PW2 testified that he saw PW1 chasing a tall man as she was seeking for help alleging that person had robbed her but before reaching PW2 he diverted. He saw someone following them holding his chest and he told him the person fleeing had stabbed him. He helped the stabbed person and they followed PW1 and saw public surrounding the tall person who was fleeing. PW3 testified he found a man and a girl struggling. That the man was carrying a bag and that darkness had started setting in but it was not dark. The girl was screaming and he joined them and separated the two. PW1 shouted saying the man had robbed her and killed her companion. PW3 then got hold of the appellant, struggled with him as they fought and eventually overpowered him down. People came and at about 25 metres he saw another crowd and on checking he found that it was the deceased who had a knife stuck on his chest. PW3 was at the scene when police came and re-arrested the appellant after he had telephoned PC Leboo. He accompanied police officers to police station. PW5 and PW6 found the appellant having been arrested and beaten by public and took him to police station.

17. We find that the evidence of PW1, PW2, PW3, PW5 and PW6 to be consistent. PW1 identified the appellant at the time of the attack. There was electricity light and spot light which enabled PW1, to identify the appellant. PW1 never at the time of attack lost sight of the appellant any time and he was arrested by PW3 who found the appellant struggling with the complainant. PW1 and PW2 identified the appellant. PW1, PW2, PW3, PW5 and PW6 evidence placed the appellant at the scene of the crime. We find that the evidence of PW1, PW2 and PW3 do not only place the appellant at the scene of the crime but that he was caught red handed.

18. We have carefully considered the evidence of PW1 and PW3 in which the appellant was arrested with the PW1's handbag. The appellant in his defence did not offer any reasonable explanation of his being in possession of the complainant's handbag and this leads us to the conclusion that he was the robber as he was arrested at the scene of crime. In this regard we are guided by the Court of Appeal in the decision of the case **DAVID MUTUNE NKONGO V REPUBLIC CRIMINAL APPEAL NO. 536 OF 2010(NBI)** where the Court of Appeal referred to its own decision in **Hassan V Republic(2005) eKLR 11** where as regards recently stolen goods it delivered itself thus:-

***“Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for the possession a presumption of***

***fact arises that he is either the thief or receiver”***

19. We have very carefully considered the appellant’s defence in which he claimed he was a victim of mistaken identity as he alleged he was a victim of robbery by four men whom he did not know. The appellant did not disclose his defence during the cross-examination of prosecution witnesses nor did he challenge PW1 and PW3 as to how he was arrested and what he was found in possession of. The evidence of PW1, PW2, PW3, PW5, and PW6 placed the appellant at the scene of crime. We find that the trial court correctly analyzed the evidence of the appellant’s defence and correctly rejected the same.

20. We have come to the conclusion that the appellant was a member of the gang that attacked and robbed the complainant and killed Ramadhan Adan Kara on 4<sup>th</sup> September, 2011. We have come to the conclusion that the evidence adduced by the prosecution was sufficient and safe to found a conviction against the appellant. For that reason we find no merit in this appeal. Accordingly the appeal against both conviction and sentence is dismissed.

**DATED, SIGNED AND DELIVERED AT MERU THIS 24<sup>TH</sup> DAY OF JULY, 2014.**

**J. LESIIT**

**J. MAKAU**

**JUDGE**

**JUDGE**