



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CRIMINAL APPEAL NO. 26 OF 2013**

BRIAN STANLEY MAINGI *alias* BABA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(From the convict and sentence of Hon. J.Ndururi, Principal Magistrate, Kericho dated 31st May 2013)*

**JUDGMENT**

**BRIAN STANLEY MAINGI** *alias* **BABA** (the appellant) was convicted on a charge of robbery with violence and sentenced to death. The case against him was that on 19th May 2012 at MAJENGO area in Kericho District, jointly with others not before court, while armed with offensive weapons, namely knives and pangas, robbed **S K** of one mobile phone make Samsung Wifi S/NO.355977047533815, a 14inch TV set make Wega 14, a microwave make LG, a 13Kg gas cylinder, a radio, make sony, and associated clothings, all valued at Kshs.60,000, and at the time of such robbery, threatened to use actual violence to the said Stella Kagendo. The Appellant denied the charge.

**S K M** (PW1) recalled how while inside her house on 19/05/2012 at about 9.45pm, with her nine year old son, **C M**, two men armed with a knife and a panga entered into the house. The electricity lights were still on and she was washing the dishes while watching the television. The two who had not covered their faces, announced to her that they had come to rob her. PW1 led them to her bedroom and they took away two mobile phones – one make Nokia, and the other a Samsung. They demanded for money and she gave them Kshs.2500 which was in her purse. She described one of them as a bit brown; not very tall and of medium built is the one who had the knife.

Although they both wore caps, they did not cover their faces and the brown man was left with her in the bedroom and he used an iron box cord to tie her hands and legs while threatening to rape her. The electricity light in the sitting room was streaming into the bedroom, lighting it well. After ransacking the house for about twenty minutes, they left and a neighbour by name Njoki saw them. PW1 was then “rescued” from her bedroom where she had been locked up, and she narrated to her neighbour what had happened.

She reported the incident to police, and a week later she was called and informed that one of her mobile phones had been recovered. She went at the police station and identified the recovered phone as hers because of the serial number which matched the purchase receipt which had been issued to her. She identified the appellant as one of the people who had robbed her, saying he was the one who was armed with a knife. After his arrest she was never asked to identify him at an identification parade, and she next saw him in court. She also conceded on cross-examination that she did not give a description of the robber to the police, at the time of recording, her statement.

**JAMES OKONDA ANGOTE** (PW2) who worked at Mulembe Hotel in Kericho, told the trial court that on 21/05/12 at about 2.00pm, the appellant whom he knew even before as Baba went to the bar accompanied by two twilight girls and after consuming drinks worth Kshs.1350, the appellant offered to leave his black Samsung mobile phone as a pledge as he did not have money then. He identified the phone produced in court as the one appellant had on that date.

On cross-examination he stated that he had known the appellant since the year 2000, and the appellant was a regular customer at the said hotel and a good friend to PW1's brother by name Geoffrey. In fact, the appellant frequently took drinks on credit and Geoffrey would stand surety for him.

**GEOFFREY ANGOTE** (PW3) confirmed that the appellant whom he had known since childhood pawned his Samsung phone for drinks he had taken, on the understanding that once he settled the bill, he would collect the phone. Since the appellant was too drunk, PW3 also gave him a room at a cost of Kshs.300 still pegged to the pawned phone. In the morning, he realised the appellant had left and because of a past incident where a client left a phone to cover a bill and failed to return and PW3 sold the phone to recover the bill leading to problems with police, PW3 decided to report the matter to police. He explained that his action stemmed from the fact that it was an expensive phone which no prudent person would abandon for a bill of Kshs.1650 only . Eventually, the appellant was traced after PW3 identified him to police.

PW3 explained that after making a report to police about the phone, he was advised by one Cpl Susan to retain the phone and insert his sim card and use it, as a way of helping Safaricom trace the phone. This immediately led to him being arrested as a suspect in the robbery and /or one handling stolen property, indeed Cpl George Otuoma PW4, who was investigating the case with the help of Safaricom traced the phone to PW3.

When PW4 interrogated PW3, he learnt about the pawn arrangement with the appellant. Using Safaricom's data, he was able to establish that after the phone was stolen from PW1, on 20/3/12, the next user was number 077860223, which PW3 told the officer, belonged to the appellant, followed by the one belonging to PW3. He confirmed this because upon arresting the appellant, he conducted a body search and recovered a samsung phone which had a sim card No.0707860223. Safaricom's data also confirmed that number but not the owner. Since the appellant could not explain how he got the phone which had pawned, he was arrested and charged.

PW3 also gave the officer the receipts for the drinks the appellant had consumed and the room that he had spent the night in – these were produced in court as exhibit.

PW6 (**Mutuma Serguta**) the Safaricom Law Enforcement officer generated call data relating to the phone in question, upon request by the DCIO Kericho. The phone apart from being used by the Complainant/ Owner's number had been used by No.0707880223 on 20/05/13 at 2.31am but the owner of that line was not registered. It also showed use by the line belonging to PW3.

In his unsworn evidence, the appellant stated that he finished his day's work as a bodaboda rider on 19/05/12 at 8.00pm and went to his house at Nyagacho Estate where he slept until the next day. He continued with his work until 27/06/12 when he was arrested. The police searched his house but did not recover anything of significance. He first saw the “*stolen*” Samsung phone at the police station when he was arrested. He explained that he had disagreed with PW3 over a girl and PW3 later threatened to do something to him which would never forget.

In his judgment, the trial magistrate had no doubt that from what PW1 narrated, a robbery indeed occurred as there were at least two armed persons, who beat PW1 and threatened to rape her, then stole her property. He faulted the dock identification by PW1 pointing out that both PW4 and PW5 stated that PW1 did not identify the robbers, so the dock identification had no probative value.

The trial magistrate noted that the only incriminating evidence was the mobile phone which undoubtedly belonged to PW1 as demonstrated by the receipt she had plus Safaricom data.

The trial magistrate was satisfied with the explanation given by PW3 as to how he came to be in possession of the phone as he even produced bills for drinks which the appellant had consumed and the room he took. He believed that PW3 (being the appellant's close childhood friend) most certainly knew the appellant's phone number and the appellant gave PW3 the phone only a day after the robbery, and as a step of good faith, when appellant failed to return to the hotel, PW3 made a report to police relating to the pawned phone and its missing owner. The trial magistrate relied on the doctrine of recent possession to enter a judgment the case against the appellant was proved.

In his amended grounds of appeal, the appellant contested the conviction and sentence saying:

1. **The evidence was contradicting.**
2. **No identification parade was conducted.**
3. **The trial magistrate failed to consider the fact that the phone was recovered from another person, and Safaricom Data did not show the owner of the number which was tracked to that phone.**

In conceding this appeal, Mr. Mutai on behalf of the State submitted that there were material contradictions in the evidence of PW3 at page 22 and PW2 at page 18. PW3 stated that after the appellant had consumed drinks he had money in his M-pesa account which he did not want to use for fear that in his drunken state he would cram his pin number and offered to leave the phone. In contrast, PW2 stated that the appellant and PW3 agreed that since the former did not have money, PW3 could keep the phone until the payment was made, then the phone would be returned to the appellant. We fail to detect a material contradiction on view is that whether the appellant said he did not have money or that he could not pay because the money was in his mpesa account, the material fact is that both witnesses stated the appellant did not have cash in hand to make the payment and pawned the phone as a guarantee to making payment later. We hold that this discrepancy was not material as to render the outcome of the trial fatal and with the greatest of respect to Counsel for the State, we disagree with his views on this aspect.

The second aspect of the concern is that PW3 may well have been an accomplice as he was the one found with the phone in question and it was only after some time that he deigned to report that the appellant had given it to him. It is pointed out that the appellant and PW3 were childhood friends, and that the evidence on cross-examination suggested they may have disagreed over a girl; so this case was a frame up. Actually, the converse could also be true, that because they were childhood friends PW3 trusted that the appellant would show up, pay the bill and reclaim the phone, which is why he took time before reporting the matter to the police. The issue of there being a love triangle was raised by the appellant in cross-examination of various prosecution witnesses including PW3 – but none of them suggested that there was such a situation. It is significant that the alleged girl remained nameless.

Our view is that the fate of this appeal hinges on two aspects:

- a. **Identification of the appellant.**
- b. **The link between the phone and the appellant, since it was not found in his possession.**

Although in court PW1 claimed to have seen and identified the appellant during the robbery, it is significant that when she gave the statement to the police officers i.e PW4 Cpl George Otuoma, and PW5 PC Mark Tonja, both officers were categorical that PW1 had told them she could not identify the robbers. Indeed thereafter no identification parade was conducted and little wonder that the trial magistrate remarked in the judgment that the identification of the appellant by PW1 was simple dock identification and amounted to nothing. We hold the same view and it was at this point that the trial magistrate ought to have reconsidered the veracity of PW1's evidence. Indeed, PW1 seemed to have made up her mind that the appellant was the culprit because she was informed that the phone had been traced back to him. Why for instance did prosecution not call the neighbour named Njoki who was alleged to have seen the robbers on the night of the robbery. We hold the view that this is because had Njoki been called as a witness, she would probably have contradicted PW1- we refer to the case of **Bukenya and 5 Others V U (1972 EA) Pg 54** which held inter alia:

***“Where the evidence is barely adequate and prosecution fails to call a vital witness without a satisfactory explanation, an inference can reasonable be drawn that were the witness to testify, that evidence would have been adverse to the prosecution. The same was echoed in the case of Juma Ngodia V R (1982-88)”***

The other significant feature in this appeal which the Director of Public Prosecution concedes and on which we agree, is with regard to the identity of the sim card which was allegedly used in the phone and which prosecution attempted to link to the appellant. PW4 did not establish who was the owner of the line 077860223. The call data from Safaricom did not establish who was the registered owner of that number – this was made clear by the Safaricom Law Enforcement Officer (PW6).

This, then coupled with the fact that the phone was not recovered in the appellant's possession, rendered the conviction unsafe and we hold that the appeal is properly conceded.

Consequently, the conviction is quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Dated, signed and delivered in open court this 17th day of July, 2014.**

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**J.K.SERGON**

**JUDGE**

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**H.A.OMONDI**

**JUDGE**