



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 191 of 2011

EVANS NYANG'AU GADINAR .....APPELLANT

V

REPUBLIC .....RESPONDENT

From original conviction and sentence in Criminal Case number 117 of 2011 of the  
Principal Magistrate's Court at Kisumu – Mr. S. N. Riechi Esq)

Coram

Aroni, Chemitei – JJ

Mr. Kiprop for state

Court clerk Ochollah / Omollo

**JUDGMENT**

The Appellant herein **Evans Nyang'au Gadinar**, was charged with another with the offence of Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code.

The particulars are that on the 1st day of march 2011 at Nyamasaria Estate in Kisumu East District within Nyanza Province jointly with others not before court while armed with a dangerous weapon to wit a knife robbed **PHYLIS NYABOGETE NYAMBANE** of one 21 inch T.V. Set make Samsung one AMCO DVD Player, one floor carpet, one Samsung GT B 3310 mobile phone and one Nokia 1680 mobile phone all valued at Kshs., 32449 and at or immediately before or immediately after the time of such robbery

wounded the said **PHYLIS NYABOGETE NYAMBANE**.

After full trial the appellant was convicted and sentenced to death. His co-accused was acquitted.

Being dissatisfied with the said judgment the appellant has filed six (6) grounds of appeal. The same can be summarized as :-

- a) There was insufficient identification of the appellant by the complainant and his witnesses.**
- b) the doctrine of recent possession was not proved and**
- c) Failure by the court to evaluate his defence.**

The brief facts of this case are that the complainant as well as her members of her family were asleep during the material night. At around 4:00 a.m., she was awakened by a person who was pointing a lit torch on her. He was also armed with a knife. The intruder demanded some money from her which she did not have. He then forced her to remove her under-pant and took her to the next room. In the said room he put on the lights and was able to identify the assailant. Suddenly and for unknown reasons the assailant took off.

Subsequently, they discovered several assorted household items had been stolen. Luckily for her, her phone had a tracker and after reporting to Nyamasaria Police Post she was able to track her phone.

She told the court that they sent the sum of Kshs. 50 to her phone and it showed the appellant as the owner of the phone. He had already changed the sim card.

The complainant used her friend to track the appellant who with the assistance of the police he was arrested on 3<sup>rd</sup> March 2011. The appellant then took them to the house of the co-accused where several items including the T. V. were recovered.

**PW2 – Cliff Kengaro Mwege** was in the same house with the complainant but in a different room. At around 4:00 a.m. he had people being pushed to his room when the light was lit he saw PW1 naked. He then saw a stranger who took off immediately. When he came out of the bedroom he realized that the items had been stolen. Later he was called to the police station where he identified the appellant. He was also present when the carpet was being recovered in the appellant's house.

**PW3 George Maile** a clinical officer produced the P3 form in respect to the complainant. He classified the injuries she suffered as harm.

**PW4 Fredrick Dangana Changara** owns an Mpesa shop at the Bus park. On his way home he was called by some person who needed her phone. When he came back he saw the appellant whom he knew as one of his customers who was at that time with the police. He identified the phone which he had left to charge in his shop.

**PW5 Mercylene Nyabungo Nyambane** was a student at Mombasa Polytechnic. The complainant is her sister. He told the court that at about 4:00 a.m. she heard someone catch the mosquito net. She woke up and saw a person holding a torch and a knife. The intruder then ordered them to keep silence or he will kill them. She further testified that the assailant ordered her sister to remove her underpants and to give him money. The assailant after seeing his cousin took off. The following day the items were recovered. She said that she saw the appellant when he put on the light.

**PW6 P. C. John Munyi** is the police officer who took photographs of the stole items. He later produced the photographs as exhibits.

**PW7 CPL Samson Shama** was the investigating officer. He received the report and commenced investigation. He told the court that after receiving the message vide phone no. **0710949122** he tracked the appellant to Nyamasaria where he recovered the handset. The appellant let them to recover the floor mat and also to the house of the co-accused where the T. V. Set was recovered. After recovering the items he preferred the charge s against both accused person.

When put on his defence the appellant confirmed that he was called on his mobile phone by Mercylene Nyabungo whom they agreed to meet in the evening. When he went for the said meeting at Nyamasaria he was arrested by the police. He said that Phylis had a grudge with her for he had a relationship with her sister.

Having heard both submissions of the appellant and the respondent and this being the first appeal, our responsibility is cut out, namely, to analyze and evaluate the evidence afresh with a view of arriving at an independent finding.

The issues to determine is whether indeed the appellant participated in robbing the complainant on the fateful night and if the circumstances obtaining at the moment enabled the complainant and her witnesses to identify or recognize the appellant

What is not in dispute though is that a robbery took place on 1<sup>st</sup> March 2011 in the complainant's house. The complainant was injured and several assorted household items were stolen. The said items were later recovered although not all. The photographs were produced as exhibits during trial.

PW1 told the court that he woke up and saw a person who had a torch and a knife. She told the court.

**“He removed my heard scarf on hair and took me to our bedroom. He lit the bedroom light and allowed it. He pushed me inside. He came again and lit the light, I saw a black person with the knife and torch. I had never seen that person”.**

On cross examination the complainant insisted that she saw the appellant when he put on the light.

PW2 equally confirmed this position. He said:-

**“At about 4:00 a.m. I heard people being pushed to my room. Light was lit. I saw Philis naked. I saw a stranger who ran away. I saw the face of the stranger”.**

PW5 equally confirms that she saw the appellant when he put on the light.

What runs across the testimonies of the witnesses is that the assailant lit the light when he entered the room where the witnesses were. Although the intensity of the light is not clear we strongly belief that this was light from electric source. The strength was sufficient for the witnesses to identify the assailant.

Although the appellant has submitted that the light from the torch could not have enabled the witnesses to identify the attacker, non of the witnesses relied on the torch as the source of the identification.

In the premises we do hold that the appellant was properly identified by the witnesses. He had not covered his face nor did he have anything to suggest that his face was covered or for that matter the head. We thus dismiss this ground of appeal.

The other issue to determine is how the stolen items were recovered. As it can be deduced from the evidence it is the tracking by the complainant phone that assisted in the apprehension of the appellant. Although the appellant disputes this his testimony betrays him. He told the court that:-

**“The following day on 2<sup>nd</sup> March 2011, I again went on duty, I was called on my mobile phone. I was called by Mercylene Nyabungo. She told me that we meet in the evening. In the evening we met at Nyamasaria where I was arrested by Police”.**

It is clearly this telephone call that had him arrested. This was corroborated by the complainant's evidence.

Despite the fact that the appellant claimed to have a relationship with the complainant's sister, this did not feature during the hearing and more so during cross examination.

The evidence of PW4 further confirmed that indeed the phone stolen belonged to the complainant. It had been left by the appellant to be charged by PW4 whom he knew very well.

Although it is always safe to treat the evidence of a co-accused with a lot of caution, we do not find it contradictory or at least given to exonerate himself from the robbery. This is buttressed by the fact that as soon as he was arrested, it is the appellant who took the police to the co-accused home where the T. V. set was recovered. We also are of the considered opinion that the explanation given by the co-accused was plausible although he should have been charged with handling stolen property.

The appellant has also raised in his submission the issue of time when the offence was committed. Although the typed proceedings read 4:00 p.m. the hand written notes by the trial court indicates 4:00 a.m.

He has also argued that the charge sheet was defective and it rans contrary to the provision of Section 89 (5) of the Criminal Procedure Code. We respectfully disagree. There was no anomaly in the said charge sheet or at all.

Having come into the above findings we do not see any merit in the appellant's application save to add that under the provision of Section 329 of the Criminal Procedure Code the trial court ought to have granted the appellant the opportunity to mitigate before the sentence. For this reason we shall exercise the inherent jurisdiction of this court and order that the appellant do mitigate before we make the final orders regarding the sentence.

**Dated, signed and delivered at Kisumu this 14<sup>th</sup> of May 2013**

**ALI-ARONI**

**JUDGE**

**H. K. CHEMITEI**

**JUDGE**

**In the presence of:**

**Mongare for State**

**Appellants in person**

*HKC/aao*