**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL CASE NO. 105 OF 2010**

**HARRISON OWOUR OKUMU .....APPELLANT**

**VERSUS**

**REPUBLIC ……RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 1711 of 2008 of the Chief Magistrate's Court at Thika by L. W. Gicheha – Senior Resident Magistrate on 17th February 2010)*

**JUDGMENT**

## Introduction

1. The appellant has appealed against the conviction and sentence of death imposed upon him by L.W. Gicheha, Senior Resident Magistrate (as she then was) in **Cr. Case No. 1711 of 2008**, for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**.

## Facts of The Case

2. The chief facts of the prosecution case were that on the 10th day of May 2008 at Kolping Vocational Training Centre Gatuanyaga location, Thika district within Central Province, the appellant robbed one Nancy Wairimu of cash Kshs.2000/= and two mobile phones make Motorola V-188 and Nokia 2310 respectively and at the time of the robbery used violence against the said Nancy Wairimu.

## Grounds of Appeal And Reply Thereto

3. Being aggrieved by the conviction and sentence the appellant filed an appeal and in the amended grounds thereof, he argued that his identification was made in reliance on **PW1**'s evidence where evidence of recognition was not free from error; that his conviction was based on circumstantial evidence which was inconsistent and contradictory, and that his defence was not considered. The appeal was opposed by learned state counsel Miss Maina on behalf of the state. She contended that there was sufficient evidence to support both conviction and sentence and urged the court to dismiss the appeal.

## Summary of the Case Before The Trial Court

4. The case presented before the trial court and from which this appeal sprung was that the appellant

was a causal worker at the Kolping Vocational Training Centre, in Gatuanyaga. He did odd jobs whenever they arose and payments were made by the complainant on the instructions of the manager. On the Saturday of 10th May 2008, the complainant who worked as an accountant was in the office alone when the appellant burst in and demanded money. He took Kshs.2000/= from the cash box and two mobile phones from the complainant's desk. He produced a telephone cable from his waist and used it to strangle the complainant till she lost consciousness. When she regained consciousness she ran outside and sought help from colleagues. The police were informed and the complainant was taken to hospital and treated.

5. A search was mounted for the appellant which saw the complainant's colleagues search the appellant's residence, and Thika and Nairobi towns respectively. Eventually in the evening of the same date, the appellant was arrested as he sat in a Migori bound bus and a sum of Kshs.1250/= and a Motorolla phone recovered from him. The phone was identified by **PW1** as one of those stolen from her earlier in the day.

6. In his defence, the appellant gave an unsworn statement. He admitted that he worked for the stated company but which he called Delmonte. He testified that on the material date he was at work and at about noon, he went to see **PW3** the Manager who sent him to go and see **PW1** for his payment for the day's work. The latter refused to pay him and referred him back to **PW3** to obtain written authorization, but when he went to the office he found that **PW3** had already left. He decided to travel to Kisumu and was arrested in a bus that evening while waiting to travel. He claimed that the police took Kshs.6,800/= and personal effects from him and that the Motorolla phone recovered from him was his property.

**Analysis of The Evidence**

7. The learned counsel Mr. Ngoge who relied on the amended grounds of appeal filed by the appellant consolidated them and urged them together, pointing out several salient features from the record. Mr. Ngoge first submitted that there was no proof tendered by the prosecution beyond reasonable doubt, that the mobile phone recovered from the appellant belonged to **PW1** or her brother, since no documentary evidence by way of receipt was produced, yet the trial magistrate believed **PW1** as to ownership of the phone and convicted the appellant for a charge which attracts a death sentence.

8. In response to this argument Miss Maina urged that it did not matter if **PW1** did not produce a receipt because she said she had the phone which was given to her by her brother, and she identified it in court while no one else including the appellant claimed it.

9. Mr. Ngoge's second argument was that the medical evidence submitted before the trial court confirmed that the alleged injuries sustained by **PW1** did not exist. Further that there were no physical injuries seen by the doctor who said that at the time of examination there was pain in the neck of **PW1** but could not explain the source of the pain, yet **PW2** said she spotted bruises on the neck of **PW1**.

10. On this ground Miss Maina contended that **PW6** the Police Doctor had confirmed that the degree of injuries sustained by **PW1** was harm and that **PW1** had some pain in the neck. In her view the reason for the pain in the neck was the strangulation by the appellant.

11. Mr. Ngoge's third contention was that the sums of money alleged to have been stolen from **PW1** did not match what was recovered from the appellant at the time of arrest and that the trial magistrate was therefore, wrong to rule that since the recovered sum was approximate to what was stolen from **PW1,** the appellant was guilty.

12. To counter this contention, Miss Maina argued that the fact that the sum stolen from **PW1** was said to be Kshs.2000/= while that recovered was Kshs.1200/= was immaterial and could not shake the prosecution case.

13. Mr. Ngoge in his fourth point urged that the provisions of **Section 200(3) Criminal Procedure Code** were curtailed for the reason that the appellant's evidence in defence, which includes his demeanour was not taken by the magistrate who convicted him who placed belief on inconsistent and incoherent evidence of the prosecution and did not take into account the appellant's rights.

14. Lastly, Mr. Ngoge urged that the trial magistrate did not take into account the appellant's defence, that he was framed by **PW1** with whom they had personal differences arising from their place of work.

15. In rebuttal Miss Maina urged that the appellant was well known to **PW1** and they had no grudge or it would have been brought out during cross-examination. Further that the wire referred to by the witnesses was produced in evidence by **PW5** the Investigating Officer. She opined that the failure of the charge sheet to indicate that the weapon used was dangerous was not fatal to the prosecution case, since under **Section 296 (2)** of the **Penal Code,** one may be armed with an offensive or dangerous weapon or an instrument and immediately after the robbery a person is wounded or harmed. In this case she argued that the wire was used in the robbery to harm **PW1** who sustained injuries.

**Issues for Determination**

16. The issues which arise for determination are whether the prosecution adduced sufficient evidence to prove their case to the required standard and whether the procedural law was contravened to the extent that would cause us to quash the conviction herein and set aside the sentence imposed by the trial magistrate. To consider the weight of the evidence adduced by the prosecution, we have consolidated and considered together the questions of proof of ownership of the recovered phone, the proof of injuries inflicted on the person of **PW1** and the discrepancy of the sums of money said to have been stolen and recovered.

**The weight of The Evidence**

17. We are in no doubt that **PW1** was attacked and robbed of cash and phones on the 10th May 2008. The question is what the appellant had to do with any of it. We revisited the age old caution which has been restated in cases without number, and which was well captioned in the case of **Kiarie v Republic [1984] KLR pg 739,** wherein Kneller, Chesoni & Nyarangi JJA, held, *inter alia*, that:

> **"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken.**
>
> **Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."**

We have therefore, been circumspect on the question of identification, noting that although the appellant and the identifying witness worked together and had been known to each other for some months mistakes in identification could still occur.

18. We are alive to the fact that this being a criminal trial the appellant was under no burden to prove his innocence. We note from the evidence however that his initial line of defence was that there was bad blood between him and **PW1** and that she had framed him for the robbery. The record does not bear him out on the claims of the existence of bad blood or ill-will between him and **PW1**. **PW1** denied it and **PW2** a fellow workmate testified that she was not aware of any existing bad blood between them.

19. On the question of the ownership of the recovered phones it is our humble view that the learned trial magistrate weighed the evidence before her properly and made a finding that **PW1** who testified that the Motorolla phone recovered from the appellant belonged to her, was able to

explain that it was given to her by her brother and that it was defective. The learned trial magistrate who noted that the appellant was under no duty to explain his innocence, observed that he said no more concerning the recovered phone other than that it was his. As a matter of fact the appellant did not raise the question of the recovered phone being his, during his cross-examination of any of the witnesses.

20. On what Mr. Ngoge termed as a discrepancy in the sum of money which was stolen and which was indicated in the charge sheet to be Kshs.2000/= while that which was recovered from the appellant was Kshs.1250/=, we ascribed this to the fact that the robbery occurred at about 2 p.m. while the appellant was arrested five hours later at about 7 p.m. In the meantime the appellant had travelled from the Kolping Project to Thika town and then on to Nairobi. He therefore had ample time to dispose of some of the money and we do not find that this alone would shake the prosecution case.

21. On the question of the injuries that **PW1** said she had sustained, the evidence of **PW2** was as follows:

> **"She came crying loudly and entered my house. She had no shoes. She said she had been strangled by Harrison Owour our casual worker (accused identified). She had bruises on her neck."**

Not only therefore, was **PW1** in a state of distress when she arrived at the house of **PW2**, but she immediately reported to her what had happened to her and who had done it. **PW2** also stated that when she escorted **PW1** back to her office, they found the cable which the appellant had used to strangle her still lying on the floor. It was produced in evidence by **PW5**.

22. The appellant would have us believe that this case was born out of animosity that existed between him and **PW1** and that she was reluctant to pay him for work done. In cross examination **PW1** stated that she had already paid the appellant on that date at 10. a.m. for the work done in the week preceding that day and **PW3** the Project Manager confirmed this when he testified that he went to the office at 10 a.m. with the appellant and confirmed that the appellant had received his payment for the work so far done.

23. **PW2** on the other hand told the court that when she left the office at about 2.30 p.m. on the ill-fated day the appellant was seated on a bench outside the office while **PW1** was still working inside. This therefore places the appellant at the scene of the robbery at the material time.

24. This being the court of first appeal we have analysed and re-evaluated both the facts and the law in the evidence on record alongside the grounds raised by the appellant and argued on his behalf by learned counsel Mr. Ngoge. In so doing we were mindful of the fact that we did not have the opportunity of seeing or hearing the witnesses as they testified, and gave due allowance therefore. See **Okeno vs. Republic 1972 E.A. Pg. 32.**

25. After a careful inquiry into the evidence we are satisfied that the learned trial magistrate who had the advantage of seeing and hearing the witnesses on both sides, weighed the evidence properly and found that the prosecution's version of the events was the credible one. We have reassessed the evidence and find no fault with her conclusion.

26. On whether or not the actions of the appellant amounted to the offence for which he was convicted, we examined the evidence against the essential elements of **Section 296(2)** of the **Penal Code** which provides as follows:

> **"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other personal violence to any person ..."**

In the case before us the appellant did attack **PW1** and rob her of Kshs.2000/= and two mobile phones. When he did so he was armed with a cable which he retrieved from his waist.

27. We have carefully considered the evidence on record and find that the evidence of PW1 is well corroborated by **PW2, PW3** and **PW6**. The evidence of the four witnesses interlocks well to establish that the appellant was at the *locus-in-quo* at the material time. The appellant was armed with what **PW1** only identified as a "wire," or "cable" which he used to strangle her. In this case the wire/cable in the hands of appellant qualified to be called an offensive weapon. We say so because the test of whether an article can be described as a dangerous or offensive weapon is really the use or the purpose for which the person possessing it intends to put it to (see **David Odhiambo and anor vs. Republic Cr. app No. 5 of 2005.** In the above case their Lordships cited **Section 89(4)** of the **Penal Code** which defines an offensive weapon as meaning:

> ***"any article adapted for use for causing injury to the person, or intended by the person having it or under his control for such use."***

The wire/cable was, indeed in the circumstances intended by the appellant for use of harming the **PW1**. Thus the article falls under the category of offensive weapons. The court notes that the piece of wire/cable was used to strangle and injure **PW1** during the robbery. In the course of the attack, PWI did lose her two mobile phones make Nokia 2310 and Motorolla 188 and Kshs.2,000/- in cash. The appellant did therefore commit an offence under **Section 296(2)** of the **Penal Code**.

**Procedural Law**

28. Under the procedural law Mr. Ngoge submitted that the appellant was not cautioned of his rights under **Section 200(3) Criminal Procedure Code** and his rights under **Articles 25, 47** and **50** of the **Constitution** were also curtailed. That therefore, there was miscarriage of justice by the trial magistrates. The record shows that Mrs. Meoli, Chief Magistrate (as she then was), conducted the proceedings from the beginning of the trial upto to close of the prosecution case. After the close of the prosecution case she gave her ruling on 27th August 2009 in which she stated that the appellant had a case to answer and directed, for reasons that are not evident on the record, that the defence hearing should be conducted by Mrs. Gicheha Senior Resident Magistrate.
29. On 9th September 2009 Mrs. Gicheha conducted the defence hearing and upon the close thereof ordered the return of the file to Mrs. Meoli for the writing of the judgement. The record does not however, show that **Section 200(3)** of the **Criminal Procedure Code** was complied with when Mrs. Gicheha took over conduct of the trial, nor when it reverted to Mrs. Meoli. It is therefore correct as stated by Mr. Ngoge that the rights of appellant on fair administrative action under **Article 47** and on fair hearing under **Article 50** both of the Constitution may have been infringed in this regard.

30. The vexing question however is whether or not we should order the immediate release of the appellant. This is mainly because the quashing of the conviction herein would not be based on a patent weakness of the prosecution case. As we have sufficiently demonstrated, there was a procedural error committed by the learned trial magistrates, and not failure of the prosecution to produce sufficient evidence, which has led to the quashing of the conviction. In our view no prejudice was suffered by the appellant by the non-application of the provisions of **Section 200(3)** of the **Criminal Procedure Code.** The requirement to inform the accused person of their right under the said section is however couched in mandatory terms.

31. Rutakangwa, Mbarouk and Bwana, JJA agonised over the question of setting an appellant free on the basis of a procedural technicality thus, in **Rashid v Rep [2011] 2 EA page 354**:

> **"We take it to be our unavoidable duty to do justice to all parties in any case. Should the prosecution, indeed the public, be punished because of the trial magistrate and the public prosecutor being remiss in their duty? We think not. If there is a right, the law should always provide a remedy. The remedy here, in our considered view,**

**would be an order for a retrial, if the interests of justice so required."**

We addressed our minds to the question as to whether the interests of justice in the case before us would require a retrial.

32. In the case of **Fatehali Manji v The Republic [1966] 1 EA 343** the factors to be considered in deciding whether or not to order a re-trial were thus succinctly stated:

> **"In general, a retrial may be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial…Each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."**

In considering what the fair and just thing to do in the matter before us we had recourse to the words of Lord Taylor in the case of **R v Smurthinaite [1994]1 All ER 898 at page 903** in which he said:

> **"Fairness of the proceedings involves a consideration not only of fairness to the accused but also, as has been said before, fairness to the public."**

We totally agree.

33. In the light of the above, having considered the interests of both sides of the scale of justice in this case, we are wholly satisfied that the interests of justice will best be served by an order of a retrial. We therefore order that the appellant be retried by a magistrate of competent jurisdiction as expeditiously as possible.

**SIGNED DATED** and **DELIVERED** in open court this **27th** day of **November 2013.**

**MUMBI NGUGI** **L. A. ACHODE**

**JUDGE** **JUDGE**