



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 43 OF 2012**

**BETWEEN**

**MISHECK IRERI NJAGI ..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Embu Criminal Case 938 of 2011 by Hon. (Mrs) Wachira, CM on 5<sup>th</sup> March 2012)***

**JUDGMENT**

1. The appellant was charged with robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars were that on the 20<sup>th</sup> day of June 2011 at about 10.30pm at Kaunda Estate, Municipality location within Embu County with others not before court, being armed with dangerous weapons namely metals and rungun jointly robbed Benard Riungu Njeru of his Samsung mobile phone, Nokia Mobile phone (1110), wallet and cash Ksh 150/= all valued at Ksh 3,850/= and at or immediately before or immediately after such robbery used actual violence to the said Benard Riungu Njeru.
2. The appellant also faced a second count of handling stolen goods contrary to **section 322(1)(2)** of the **Penal Code**. The particulars being that on the 20<sup>th</sup> day of June 2011 at Kaunda Estate Municipality location within Embu County, otherwise than in the course of stealing, dishonestly retained one Nokia 1110 mobile phone knowing or having reason to believe it to be stolen good or unlawfully obtained.
3. The trial court considered the evidence and found the appellant guilty of the offence of robbery with violence contrary to **section 292(2)** of the **Penal Code** and sentenced him to death. He now appeals against the conviction and sentence.
4. The prosecution case was that on 20<sup>th</sup> June 2011 at about 10.00 pm, Bernard Mugo Njeru, PW1, was walking from town with his friend Kirunja, PW2. On arrival at the gate of the Embu Law Courts, three people armed with metal bars attacked them. One of the men hit him across the face as a result of which he fell down unconscious. After regaining consciousness he realized that his mobile phones, one Samsung and one Nokia and his wallet were missing from his pocket. He then proceeded to the Judge's residence where he explained the incident to the administration police officer guarding the residence. He accompanied the officer to the Provincial Commissioner's (hereinafter "P.C.") residence gate where he found the appellant under arrest. PW1 identified his Nokia mobile phone. PW1 testified that he was able to identify the appellant because there were

electricity security lights at the gate to the court.

5. PW2, Eustus Kirunja Charles, was with PW1 on the night of the attack. He corroborated PW1's version of events explaining that they were attacked by three people, one armed with a rungu and the other a metal bar at about 10.30pm. He was held by two people as PW1 was attacked by the third person. He explained that he struggled with the two men and run away. Upon his release he went to call the watchman at a nearby hotel and then called PW1's mobile number which at first went unanswered. It was then picked by a police officer who told him that the phone was recovered from a person who was now under arrest. PW1 identified the appellant and stated that he was able to identify him as there were street lights on and lights from the P.C's residence gate. He also identified the iron bar that was used.
6. Charles Kathuku Hiuko, PW3, testified that he was driving with others from Kanyuambora when he saw a person lying down while being attacked by three men. He stopped and switched on the full vehicle lights prompting the three men to run away. He followed them with the motor vehicle to the junction of Kaunda Estate where the attackers scattered in different directions. He continued giving chase to the man who had a metal bar while hooting until he was cornered at the end of the road where there was a locked gate. He was arrested and handed over to Administration Police officer's guarding P.C's residence. PW3 further testified that in the process of being interrogated by the administration police officer, a phone rang in the appellant's pocket. When asked who was calling him, he was unable to tell. The police officer scrolled and saw the number of his colleague and called him back.
7. APC Henry Njeru David, PW4, was attached to District Commissioner's ("D.C.") office Embu. He testified that on the material day and time he was at the residence of Resident Judge when he received a call from PW1's number. The person on the other side of the phone told him to go to D.C.'s residence and that he had arrested a person in possession of the mobile phone. As he left the residence gate, he met PW1 who told him that he was attacked and robbed of two mobile phones and money. He informed PW1 that he had been called from his mobile number and together they headed to the D.C.'s residence. The mobile phone was switched off and PW1 was asked to switch it on which he did. It was PW4's testimony that he had lived in the same residence with PW1 for two years and knew his mobile phone was white in colour. He identified it as the one before the court as exhibit 2.
8. PW5, Simon Muriithi Njeru, was one of the men in the vehicle driven by PW4 on the material day. He corroborated PW4's account of events.
9. Dr. Geoffrey Njuki Njiru, PW6, a doctor based at Embu Provincial General Hospital examined PW1. He told the court that his examination of PW1 revealed that he had a cut wound scar along nasal bridge. He also noticed a bruised scar on the left elbow and that the patient had pain on the right knee and bending around nasal. He concluded that the injuries were caused by a blunt object and assessed the degree of injury as harm.
10. PC Martin Thumbi Kinyua, PW7, was the officer stationed at D.C's residence on the material date when he heard a motor vehicle hoot continuously. He went out and saw a man with an iron bar being chased by a motor vehicle. He approached and arrested him. After arrest, a phone rang from his pocket. The appellant was hesitant to answer the phone as a result of which PC Thumbi removed it from the appellant's pocket. He discovered the caller was his colleague attached at the Resident Judge's residence. He answered it and the colleague told him that the owner of the phone, a worker at the Judge's residence was robbed and attacked and suffered injuries. He recovered the phone and iron bar from the appellant.
11. PC Moses Muraguri, PW8, an officer attached at Embu Police Station testified that at about 10.30 pm on the material day, he was at the station when administration police officers arrived in a motor vehicle with the appellant.

12. When put to his defence, the appellant opted to give sworn testimony and did not call witnesses. He denied committing the offence. His version of events is that on 20<sup>th</sup> June 2011 he closed his car wash business at around 7.00 p.m. and went to assist his wife who sold vegetables. At about 9.00 p.m., they closed the business and put things in store until 10.00 p.m. He then walked to his home and saw people running. He decided to run away to the left side. A motor vehicle came hooting and stopped. The occupants of the vehicle accosted him and called him a thief and beat him. It was the appellant's testimony that an administration officer came and upon conducting a search recovered his wallet with Kshs 200/= and his identity card. He then heard someone say that he recovered a mobile phone and a metal bar. Another said the mobile phone was his but he did not see the person. He was then taken to the police station and charged.
13. This being a first appeal, we are mandated to re-evaluate and re-consider the evidence and arrive at an independent decision with the caveat that we neither saw nor heard the witnesses as they testified and must therefore make an allowance for that. (See *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32).
14. The appellant raises several grounds of appeal; He alleges that the prosecution witnesses' testimonies were riddled with contradictions and therefore the case was not proved to the required standards. He also challenges his identification noting that the type of light used was not conducive for proper positive identification. The appellant submitted that since he was arrested a distance of about 400 metres from the scene of the crime, it is possible that there was mistaken identity as pedestrians were many. The appellant also grounded his appeal on the fact that PW1 and other witnesses work in the judiciary, and the trial court ought to have considered that fact.
15. The elements of the offence of robbery with violence can be found in **section 296(2)** of the Penal Code which states that, "(2) *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, or 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, he shall be sentenced to death.*" Proof any one of the above stated elements accompanied by robbery satisfies the offence of robbery with violence under **section 296(2)** of the **Penal Code** (See *Johana Ndungu v R Criminal Appeal No. 116 of 1995 (Unreported)*.)
16. The witness accounts of PW1, PW2, PW3, PW4 and PW5 all corroborate the fact that the appellant was in the company of more than one person. He was also armed with the metal rod which he was seen carrying by several of the witnesses as he ran and which was found and recovered from him by PW8 at the time of arrest. This weapon was positively identified in court. Violence was also meted out on PW1 and PW2 as corroborated by the various prosecution witnesses including the doctor who examined PW1 who confirmed that the injuries sustained were consistent with being struck by a blunt object. This essentially satisfies one of the elements of the offence.
17. The second element is whether the appellant stole from the complainants. The evidence on record is cogent in this respect. The mobile phone belonging to PW1 was recovered from him at the time of arrest. PW1 was able to identify the mobile phone as his. This evidence of possession is corroborated by the fact of PW2 calling the PW1's mobile number after the incident and it being picked by the police officer, PW 7 who had recovered it from the appellant. No reasonable explanation was tendered by the appellant to show how he came into possession of the mobile phone. In the case of *James Tiokoi Koitoi v Republic, Nyeri Criminal Appeal No. 138 of 2003 (unreported)*, it was stated that, "*Where an accused person is found in possession of goods recently stolen during a robbery, the trial court is at liberty to draw a presumption that the accused was one of the robbers unless the accused properly accounts for their possession.*"
18. The trial court must take into account the accused's defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of that defence being true. If there is any doubt, the benefit of that doubt always goes to the accused person. (See *Ouma v Republic*

**[1986] KLR 619).** The appellant's evidence confirmed that in fact that he was present at the crime scene where the weapon and mobile phone were recovered. We agree with the learned magistrate that the appellant's defence lacked merit in light of the clear prosecution evidence.

19.The appellant has challenged the trial court's decision on the basis of identification. It is a general principle that where the evidence is based on identification of a stranger as opposed to recognition, then the court ought to warn itself and be satisfied as to proper identification of the suspect (See *Anjononi and Others v Republic [1980] KLR 59*). Was the appellant properly positively identified? Given the time of the night and the events were have outlined, it was highly unlikely that there room for mistaken identity. The appellant was found in the act and followed in hot pursuit until the point where he was cornered and arrested and found with the offensive weapon and stolen phone. There was no break in between the events that could introduce doubt as to the overwhelming identification evidence. For this reason, the appellant's argument that there was no proof as to the strength of lighting and that the lighting condition was such that no proper positive identification of him is dismissed. We therefore find and hold that the appellant was properly identified.

20.We now turn to the ground that the conviction was founded on the complaint by PW1 and other witnesses who worked for the Judiciary. While there is nothing in the law that prevents any judicial officer or employee from lodging a criminal complaint with the Police, we have evaluated the entire proceedings and we find that the appellant was treated fairly without regard to the position of PW1 or the other witnesses. As we have found above, the conviction was well founded on the evidence.

21.Having reviewed the entire evidence, we find that the trial court was right in convicting the appellant. Accordingly, the sentence of death imposed on the appellant was in accordance with the law.

22.The upshot of all the above is that the appeal is dismissed.

**DATED and DELIVERED at EMBU this 16<sup>th</sup> December 2013.**

**D.S. MAJANJA**

**H.I. ONG'UNDI**

**JUDGE**

**JUDGE**