



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CR. APPEAL NO. 136 OF 2012**

**DOMINIC MBITHI MUTINDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal from the conviction and sentence in Criminal Case No. 105/2010 in the Principal Magistrate's Court at Makueni (Hon. J. Karanja, PM))*

**Judgment**

1. Dominic Mbithi Mutinda (“Appellant”) was initially arraigned before the Principal Magistrate’s Court at Makueni together with two others (Muala Charles Ndungi and Brian Masai Muthengi) and charged with four felony counts as follows:

**COUNTS I:**

**ROBBERY WITH VIOLENCE, CONTRARY TO SECTION 296(2) OF THE PENAL CODE.**

**1.DOMINIC MBITHI MUTINDA 2. MUALA CHARLES NDUNGI 3.**

**BRIAN MASAI MUTHENGI** On the 3<sup>rd</sup> day of March 2010, at kwa kulomba trading centre, kiteta location in Mbooni East District within the Eastern Province, jointly with others not before court, while armed with pangas and metal bars, robbed Brian Mumo Musyoka two mobile phones make Nokia 6060 and 1202 and cash Ksh. 1500/= valued at Ksh 11,500/= and the time of such robbery used actual violence on the said Brian Mumo Mosyoka.

**ALTERNATIVE CHARGE OF COUNT 1. IN RESPECT OF ACCUSED NO. 1**

**HANDLING STOLEN GOODS, CONTRARY TO SECTION 322(2) OF THE PENAL CODE**

**DOMINIC MBITHI MUTINDA:** On the 3<sup>rd</sup> of March 2010 at Machakos bus stage in Machakos District within the Eastern Province, otherwise than in the cause of stealing, dishonestly handing two Nokia mobile phones make 6060 and 1202 all valued at Ksh. 10,000/= the property of Brian Mumo Musyoka, knowing or having reasons to believe them to be stolen goods;

## COUNT II

### GRIEVIUS HARM, CONTRARY TO SECTION 234 OF THE PENAL CODE:

**DOMINIC MBITHI MUTINDA 2. MUALA CHARLES NDUNGI 3. BRIAN MASAI MUTHENGI;** On the 2<sup>nd</sup> day of March 2010, at Kwa Kulomba trading centre, Kiteta location, Mbooni East District within Eastern Province, jointly with others not before court, unlawfully did grievous harm to ZIPORAH MWENDE KYUMU.

## COUNT III

### ASSULT CAUSING ACTUAL BODILY HARM CONTRARY TO SECTION 251 OF THE PENAL CODE.

**DOMINIC MBITHI MUTINDA 2. MUALA CHARLES NDUNGI 3. BRIAN MASAI MUTHENGI;** On the 3<sup>rd</sup> day of March 2010, at Kwa Kulomba trading centre, Kiteta location, Mbooni East District within Eastern Province, jointly with others not before court, unlawfully assaulted Kelvin Musyoka Mumo thereby occasioning him actual bodily harm.

## COUNT IV

### ROBBERY WITH VIOLENCE, CONTRARY TO SECTION 296(2) OF THE PENAL CODE.

**DOMINIC MBITHI MUTINDA 2. MUALA CHARLES NDUNGI, 3. BRIAN MASAI MUTHENGI;** On the 3<sup>rd</sup> day of March 2010, at Kwa Kulomba trading centre, Kiteta location in Mbooni East District within Eastern Province, jointly with others not before court, while armed with *pangas* and metal bars, robbed John Mulinge Kimatu of ten packets of sportman cigarettes, twenty packets of rooster cigarettes, five packets of supermatch cigarettes, three cell phones make Nokia 1200, Nokia 1110, Nokia blue tooth, one long trouser and cash Ksh. 6400/= all valued Ksh. 20,400/= and at time of such robbery, threatened to use actual violence on the said John Mulinge Kimatu.

### ALTERNATIVE CHARGE OF COUNT 1V.

### HANDLING STOLEN GOODS, CONTRARY TO SECTION 322(2) OF THE PENAL CODE.

**DOMINIC MBITHI MUTINDA;** On the 3<sup>rd</sup> day of March 2010 at Machakos bus stage in Machakos District within the Eastern Province, otherwise than in the cause of stealing, dishonestly handled ten packets of sportman cigarets, twenty packets of Rooster and three packets of Supermatch cigarettes, all valued at Ksh. 2200/= the property of John Mulinge Kimatu, knowing or having reasons to believe them to be stolen goods.

2. The Appellant and his two co-accused pleaded not guilty to all charges. Before trial commenced, the Machakos Court was notified that the Tawa Law Courts which is nearer to the location of the crime and the residences of the witnesses had sufficient criminal jurisdiction to hear the matter. The matter was, therefore, transferred to Tawa Law Courts. However, after only one witness had been heard, the Learned Ben Mararo, who was by then, a Senior Resident Magistrate, was transferred from Tawa Law Courts. The Magistrate who replaced him, the Learned Josphat

Gichimu did not have the requisite criminal jurisdiction. Consequently, he referred the matter to Makueni Law Courts where the Learned Josphat Karanja, by then Senior Resident Magistrate (hereinafter “Learned Trial Magistrate”), took over the matter. The Learned Trial Magistrate heard the remaining ten Prosecution witnesses and ruled that the Appellant and his co-accused had a case to answer. The Appellant and one other co-accused gave sworn testimonies. The third co-accused gave an unsworn statement. At the conclusion of the case, the Learned Trial Magistrate found the Appellant guilty of all the four main counts. He also found insufficient evidence connecting the co-accused with the offences and acquitted them. He then proceeded to sentence the Appellant to concurrent sentences of three and seven years respecting counts III and II respectively and to death respecting counts I and IV.

3. The Appellant is dissatisfied with the conviction and sentence and has appealed to us raising six grounds of appeal. Some of these, however, overlap. Before coming to them, we will briefly outline the Prosecution case as it emerges from the Court record.
4. On the night of March 1<sup>st</sup> and 2<sup>nd</sup>, 2011, some robbers attacked a residential compound at Kwa Kulomba Trading Center. In particular, they attacked two residences – that of Brian Mumo Musyoka (“First Complainant”) and his wife, Ziporah Mwendu Kyumu (“Second Complainant”) and that of John Mulinge Kimatu (“Fourth Complainant”) and his wife. The robbers first struck the house of the Fourth Complainant.
5. The robbers first struck the Fourth Complainant’s house-cum-shop. They smashed in the door, and three men rushed in. They demanded for money and the Fourth Complainant gave them Kshs. 2,000/=. They were not satisfied. They demanded for more and continued ransacking the house hoping for more money. They also took packets of cigarettes, 3 phones and a pair of trousers with his wallet from the house. They then demanded that the Fourth Complainant takes them to the First Complainant’s house where they hoped they could get more money. They forced the Fourth Complainant to knock the First Complainant’s house.
6. When the First Complainant opened the door, two of the robbers went into the house and forced the Fourth Complainant in as well. The Fourth Complainant was forced to lie on the First Complainant’s bed as the robbers started demanding money from the First Complainant. He gave them Kshs. 1,500/=. They also took two phones. They demanded for more money. One of the robbers hit the First Complainant with a metal bar as the Second Complainant pleaded with them to spare the life of her husband. One of the assailants hit the Second Complainant with the blunt side of a *panga*. During the fracas, the Third Complainant, a young son of the First and Second Complainants walked in and tried to plead for his parents. He was stabbed on the back by one of the assailants. This infuriated the First Complainant who rose to fight with the assailants. He amassed sufficient energy to wrestle one of the assailants to the ground. A struggle ensued. At one point the Second Complainant tried to protect the husband too. In the end, the First and Second Complainants were badly injured as the assailants fled the scene on foot.
7. Roseline Wavinya Mwangangi, who testified as PW1 was in a neighbouring house during the whole melee. She heard some of the conversation between the robbers and the Fourth Complainant. She also saw, through a window, as the robbers left the Fourth Complainant’s house to the First Complainant’s house and watched as one of them hit the Second Complainant shortly before she took off running. She also observed them as they left. She was called by the Police on 11<sup>th</sup> March, 2011 to participate in an identification parade and she identified the Appellant as one of the assailants. She was unable to identify any other assailant including the Appellant’s co-accused.
8. During the ordeal, the First Complainant was sure that he was able to identify one of the assailants as the 1<sup>st</sup> Assailant. The assailants had flashlights and, at some point during the struggle, the Second Complainant knocked down the flashlight and it fell on a mosquito net beaming the room. The Fourth Complainant also thought he was able to identify the Appellants as some of the robbers who attacked him on that night.
9. Early in the morning of 2<sup>nd</sup> March, 2011, Francis Kituku Kivuva (“Francis”), a business man by occupation, was travelling in a *matatu* from Mbumbuni to Machakos. When the vehicle got to Kwa Kulomba, he learnt that a robbery had taken place there when the First and Second Complainants boarded the vehicle he was in to go to the hospital. The victims were dropped off at Tawa on their way to the hospital. When the vehicle stopped to pick up a new passenger about 200 metres from Tawa, Francis became suspicious of the man. He was carrying a yellow paper

bag and his shoes were very muddy. Francis made a mental note. When they alighted at Machakos bus station, he still noted the man was acting suspiciously. When Francis confronted him, the man took off and he gave chase. He caught up with him, wrestled him to the ground and overpowered him. Upon inspecting the yellow paper bag, he noticed three cell phones and packets of cigarettes. He suspected that these were part of the proceeds from the robbery. As any good citizen is wont to do, he arrested the man and took him to Tawa Police Station. While there, it was confirmed that the items in the yellow paper bag were, indeed, part of what was stolen from the First and Third Complainants.

10. The Prosecution also called Musyoka Mumo (“Third Complainant”) who is the son of the First and Second Complainants who also witnessed part of the robbery and was injured when he tried to plead with the robbers to leave his father alone. The arresting and investigating officers as well as the treating medical officers also testified as did the Police Officer who conducted the Identification Parade.
11. As a first appellate Court, we have an opportunity and a duty to re-evaluate afresh the evidence adduced during the trial and determine for ourselves whether the evidence can sustain the conviction. We draw our guiding orders in this regard from the case of **Okeno v Republic [1973] E.A. 32** where the predecessor to the Court of Appeal instructed:

***An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] E.A. 386 and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weight conflicting evidence and draw its own conclusions. It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s Court’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.***

12. With the **Okeno** admonition in mind, we now proceed with the task. From the record and the evidence adduced at trial, there is no doubt that the robbery took place on the night of 1<sup>st</sup> and 2<sup>nd</sup> March at which the Second and Third Complainants were assaulted and injured. The main issue for determination is whether there is sufficient evidence to connect the Appellant to the crimes. The Learned Trial Magistrate concluded on the basis of identification evidence as well as evidence of recent possession of the stolen goods that the Appellant was guilty.
13. The Appellant has raised a number of complaints on appeal which we now turn to. First, the Appellant complains that his right to fair trial was violated when he asked for an adjournment on 31<sup>st</sup> January, 2012 to enable his advocate to be present for the testimony of the First Complainant and the Learned Trial Magistrate denied the application. We can easily dispose of this application. While we think that in the circumstances it was probably unfair not to grant the Appellant’s request for adjournment especially given the Prosecution’s previous frequent similar requests, we do not think that this error was harmful to the Appellant to warrant a reversal of the conviction. We note that this was an important witness being the Complainant. However, we also note that the Appellant’s advocate did not raise the issue at her next appearance and did not make an application to recall the witness. We also note that the witness was stepped down after his examination in chief. This gave the Appellant’s counsel an opportunity to cross-examine him at the next hearing date which she did at length. We assume that she was only able to engage in that able cross-examination after perusing through the Court record to inform herself of the evidence adduced by the witness who was heard in her absence. In the circumstances, it is difficult to maintain the position that this was anything than harmless error.
14. Still on the subject of fairness of trial, the Appellant did not complain about the failure of the Learned Trial Magistrate to offer the accused persons an opportunity to recall witnesses when he accepted a substituted charge sheet after a number of witnesses had already been heard. Under section 314 of the Criminal Procedure Code, a Trial Court is permitted to admit an amended or substituted charge sheet but it is required to inform the criminal defendant of their right to recall any witnesses who have already testified. Our case law – see **Yongo v Republic 1983 KLR 319** – requires a magistrate to not only comply with the provision but to clearly indicate on the court

record that he did so. The Learned Trial Magistrate does not appear to have done so here. It might be argued that the technical requirement that the Trial Court records its compliance with the rule is somewhat lessened when the accused person is represented by counsel as here. In the instant case, we do not need to reach the argument because we make our decision on other independent grounds.

15. The Appellant raised issues with each of the two theories used by the Prosecution and accepted by the Trial Court as connecting him with the offences he was convicted of: identification and recent possession.
16. Respecting identification, the Appellant argues that the circumstances were simply not sufficient for error-free identification. He argues that it was dark at night and even with the flashlights the robbers had, it was not conducive to identify the assailants. The Appellant also impugns the reliability of the identification parade and argues that the proper procedures were not followed during the parade. He doubts that the witnesses actually identified him during the parade. Instead, he argues that the Police must have suggested to them his identity. In short, the Appellant argues that the circumstances were difficult for identification and that the Learned Trial Magistrate did not exercise the “great care” and “circumspection” called for by our case law before convicting on the evidence.
17. After re-evaluating the evidence on record, we agree with the Appellant that the identification evidence produced in this case is not sufficiently watertight to overcome the very high threshold in criminal law: beyond reasonable doubt.
18. The predecessor to our Court of Appeal stated the anxiety with which Courts approach visual identity evidence quite succinctly in **Roria v R [1967] EA 583** at pg. 584: -

***A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C. said recently in the House of Lords in the course of a debate on s.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:***

***“There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity.”***

19. Since **Roria**, a long line of cases have established clearly that identification witness especially that of a single identifying witness must be approached with great caution and circumspection. As the Court stated in **Joseph Ngumbao Nzavo v. Republic (1991) 2 K.A.R. 212:**

***Before accepting visual identification as a basis of conviction the Court had a duty to warn itself of the inherent dangers of such evidence. A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential.***

20. The Learned Trial Magistrate was alive to the inherent dangers of identification evidence. However, he was persuaded that the evidence in this case was sufficiently watertight to safely support a conviction. On appeal, it is our obligation to re-evaluate all the evidence adduced during trial – including the quality of the identification -- and come to our own independent conclusions about it – of course taking into account that we did not have a chance to see or hear the witnesses as they testified. See **Okeno v Republic (1972) E.A. 32.**
21. The English Court of Appeal case of **Regina v Turnbull (1976) 3WLR 445** laid down comprehensive guidelines for judicial officers in trials where identification evidence is an issue. The Court has to look at nine factors:
  - a. The amount of time the suspect was under observation by the witness;
  - b. The distance between the suspect and the witness;
  - c. The general visibility at the time the witness saw the suspect;
  - d. Any obstructions between the witness and the suspect;

- e. Whether the witness knows the suspect or has seen him before;
  - f. Any particular reasons or unique features by which the witness remembers the suspect;
  - g. Time lapse between when the witness saw the witness and when he gave a description to the Police; and
  - h. Any error or material discrepancy between the description given by the witness and the actual appearance of the suspect.
22. Looking at the relevant **Turnbull** factors, we conclude that the quality of identification in this case was **not** sufficiently strong to overcome any reasonable doubts. We note that:
- a. None of the witnesses testified that they had “spent” a reasonably long period of time with the assailants to identify their unique features;
  - b. The circumstances for identification were not great. Although the First and Second Complainant say they were able to identify the Appellant when the flashlight was knocked and it fell on top of the mosquito net beaming its light to the house, we note that this was during combat and the possibility of error is greatly increased. In any event, on cross-examination by the counsel for the Appellant, the First Complainant seemed to recant that he was able to identify the Appellant during the robbery. He says at page 54 of the record:

***“it is true I only identified one person, the one I sad was Charles. One of the men cut my hand. It is the man I was struggling with. He is not the one called Charles. Charles was left outside.”***

This could seem as a minor discrepancy but it takes major significance when one considers his testimony about the Appellant in examination-in-chief. He said:

***I identified the 2<sup>nd</sup> Accused at home as they attacked us and I identified the 1<sup>st</sup> Accused [i.e. the Appellant] at the parade. I did not know the 3<sup>rd</sup> Accused. I hear one of them was arrested at the bus park in Machakos. I was told he is the one who named the others. (page 48 of the Court Record)***

This statement implies that the First Complainant was not sure about the identity of the Appellant during the robbery but somewhat became sure about his identity when he saw him at the Identification Parade. This statement becomes more troubling in light of the analysis below that shows that the First Complainant was, in fact, mistaken about the Appellant’s identity at the first trial and was only able to pick him on the second line up. His explanation that the person he had mistakenly identified resembled one of the accused persons should trigger more worries than assurance about the possibility of error in the identification witness.

- c. It took more than a week for the Complainants to record any statement at all with the Police; and they only did so after the identification parade at which they ostensibly picked up the Appellant. In this regard, any descriptions they had in the statements are not useful because they came after the fact of identification and were tailored to fit that.
- d. There is also material discrepancy between the statement written by PW 1 and the testimony she gave in court even though her statement was recorded on 16<sup>th</sup> March, 2011 – fourteen days after the robbery and five days after the identification parade. This does not inspire much confidence in the witness’ recollection or fidelity to the facts of the event.
- e. Finally, it must be noted that this was evidence of identification not recognition – at least by two witnesses. PW1 is unsure if he knew the Appellant before or not. She contradicts herself in consecutive sentences on the issue: ***“I had not met him before. I knew him when he was in Machakos High School.”***
- w. As for the Identification Parade, we do not think it helped solidify the identification evidence very much. First, as we have already pointed out, we note that the Identification Parade was done before the description of witnesses by some of the witnesses. This raises two troubling issues. First, it begs the question how the Officer organizing the Identification Parade chose individuals of similar general appearance as the Appellant when he was yet to receive the description of the Appellant. Second, as aforesaid, it raises the possibility that the identifying witnesses wittingly or

unwittingly fashioned their descriptions of the Appellant to suit what they had witnessed at the Identification Parade. In any event, there is a serious question as to the credibility of the Identification Parade. The First Complainant conceded in cross examination that he was only able to pick out the Appellant at the Identification Parade at the second attempt after he picked out a completely different person who had nothing to do with the crime at the first attempt. The Police Officer who conducted the Identification Parade, Chief Inspector Peter Ndikwe, did not reveal in his testimony that the First Defendant had, in fact, failed to identify the Appellant at the first trial. Instead, he matter-of-factly made it sound as if the First Complainant had no difficulty in identifying the Appellant while the opposite is, in fact, true.

- x. It is our conclusion, then, that the identification evidence received in this case was insufficient and, standing alone, would not have been enough to sustain the conviction of the Appellant.
- y. The Prosecution, however, also relied on a second theory to buttress the identification evidence and link the Appellant to the crime. The Prosecution argued, and the Learned Trial Magistrate was persuaded, that there was sufficient evidence of recent possession by the Appellant of the recently stolen goods belonging to the First and Fourth Complainants.
- z. To invoke the doctrine of recent possession, the Prosecution must prove beyond reasonable doubt each of the following four elements:
  - a. First, that the property was stolen;
  - b. Second, that the stolen property was found in the exclusive possession of the accused;
  - c. Third, that the property was positively identified as the property of the complainant; and
  - d. Fourth, that the possession was sufficiently recent after the robbery. As to what constitutes “recent” possession is a question of fact depending on the circumstances of each case including the kind of property, the amount or volume thereof, the ease or difficulty with which the stolen property may be assimilated into legitimate trade channels; the property’s character, and so forth.
- aa. In the case of ***Malingi v Republic [1989] KLR 225***, the Court of Appeal had this to say about the doctrine of recent possession:

***By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver.***

- 28. To establish the applicability of the doctrine of recent possession, the Prosecution primarily relied on the testimony of Francis, who testified as PW8. While we think Francis’ testimony is believable and his actions of apprehending a person he thought had committed a serious crime are commendable, we do not think the evidence raises to the standard required in criminal trials. This is essentially because of the problem of chain of custody. Francis testified that he arrested the Appellant with three mobile phones and cigarettes which included at least 58 packets of Rooster. There were also other brands of cigarettes including Sportsman and Rocket. The mobile phones were of the make Nokia 6060; Nokia 1202 and Alcatel.
- 29. At the witness box, Francis pointed out, however, that one of the mobile phones (the Alcatel) was never produced in evidence. He was also surprised to see the number of cigarettes greatly reduced from what he saw when he apprehended the Appellant. This raises the question: are the exhibits produced in Court the same ones found with the Appellant? The Prosecution had the onus to establish this fact beyond reasonable doubt. In our view, they failed to do so.
- 30. First, the First Complainant admitted that he was given back the phones on the same day the Identification Parade was conducted. **See page 54 of the Court Record.** It is not clear how he identified the phones at the Police Station as his or what basis he laid to do so. In any event, by

handing over the phones to him, the chain of custody was broken. It is impossible to know whether the phones that were later produced in evidence were the same ones which were found on the Appellant. In any event, the fact that the First Complainant was unable to input the correct security code on the phone raises some doubts as to the ownership of the phone.

31. Finally, Francis expressed explicit doubts whether the cigarettes produced as evidence were the same ones that he had apprehended. He remarked that they seemed fewer than what he found the Appellant with when he arrested him. Even more worrying is that the number of packets of cigarettes that are included in the charge sheet as stolen are fewer than those produced as recovered in the possession of the Appellant; and even then Francis says there were more when he arrested the Appellant. For example, Francis testified to recovering 58 packets of Rooster cigarettes; yet the charge sheet speaks of 20 packets of Rooster cigarettes. Francis also testified that among the things he recovered there was an Alcatel mobile phone which was never produced in evidence.
32. These discrepancies raise a serious doubt about the integrity of the physical exhibits. Indeed, P.C. George Kamau all but confirmed that these doubts are well founded when he testified that Chief Inspector Kimanthi “misplaced” some exhibits.
33. Owing to this grave doubts about the physical integrity of the exhibits and the conceded broken chain of custody, we find that the doctrine of recent possession is inapplicable in this case. The element of exclusive possession and legal ownership of the complainants are not proved beyond reasonable doubt to warrant an application of the doctrine.
34. Since both the evidence of identification as well as the doctrine of recent possession have failed to link the Appellant with the offences charged, it follows that the Appellant’s appeal must succeed. We, therefore, quash the conviction, and set aside the sentence. We order the Appellant to be released from custody forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED this 10<sup>th</sup> day of December 2013.**

**JOEL NGUGI, Judge**

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**B. T. JADEN, Judge**

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