



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

MILIMANI LAW COURTS

**CRIMINAL APPEAL NO. 112, 116 & 117 OF 2007**

**PETER GATHIRA KARIUKI.....1<sup>ST</sup> APPELLANT**  
**JAMES MAINA NJOKI.....2<sup>ND</sup> APPELLANT**  
**SAMWEL KARIUKI MWANGI.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 918 of 2006 in the Chief Magistrate's Court at Kibera – Mr. Kiarie (SPM) on 28<sup>th</sup> February 2007)*

**JUDGMENT**

1. **James Maina Njoki**, the appellant herein and two others were tried for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**.
2. The brief facts were that on the night of 19<sup>th</sup> and 20<sup>th</sup> January, 2006 at Gakoe village in Kiambu District within Central Province, jointly with others not before court while armed with dangerous weapons namely axes and rungas, they robbed Samuel Mbugua Gatheru of one mobile phone make nokia 1100 IMEI 35931001715486, radio cassette make Panasonic, one electric motor, table clothes and loose covers all valued at Kshs.32,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Samuel Mbugua Gatheru.
3. In the alternative they were each charged with handling stolen property contrary to **Section 322(2) Penal Code**.
4. At the close of the trial the 1<sup>st</sup> and 3<sup>rd</sup> appellants were convicted on the alternative charge and sentenced to 7 years imprisonment. The second appellant was sentenced to death as by law prescribed.
5. Being dissatisfied with the verdict they each appealed to the High Court against conviction and sentence, whereupon the 1<sup>st</sup> and 3<sup>rd</sup> appellants were placed on notice of the likelihood of enhancement of sentence should they lose their appeals.
6. Subsequently the 1<sup>st</sup> appellant Samuel Kariuki Mwangi, was released on presidential amnesty, and the 3<sup>rd</sup> appellant Patrick Gathira Kariuki, withdrew his appeal. There is therefore only one appellant James Maina Njoki, who prosecuted his appeal before us.

7. The 2<sup>nd</sup> appellant's appeal was predicated on four grounds as follows:

1) *The circumstantial evidence adduced was inconclusive.*

2) *Secondary evidence was admitted contrary to the provisions of Sections 22, 33 and 78 of the Evidence Act, Cap 80A, laws of Kenya.*

3) *The computer printout produced in evidence was inadmissible for reasons that it was not certified.*

4) *That his defence was not adequately considered.*

8. Mr. Muriithi learned counsel for the state in opposing the appeal, urged that the evidence of prosecution was overwhelming against the appellant.

9. We have examined and re-evaluated the evidence on record afresh to draw our own conclusions, as is our mandate as the first appellate court. We are also alive to the fact that we did not have the advantage of observing the witnesses as they testified.

10. An analysis of the evidence on record shows that there was no direct evidence placing the appellant at the scene of the robbery. There was also no evidence of identification of the perpetrators since the victim was alone during the robbery, and he died as a result of injuries inflicted upon him during the attack. The record shows that the appellant was convicted on circumstantial evidence based on the doctrine of the recent possession.

11. The issue for determination is whether the circumstantial evidence was sufficient to form a basis for the conviction of the appellant, and whether the doctrine of the recent possession was properly invoked.

12. The summary of the inculpatory facts is that the appellant presented himself to PW8 John Njoroge Mburu, on 22<sup>nd</sup> January 2006, with a motor which was later found to have been stolen from the deceased during the robbery on the night of 20<sup>th</sup>/21<sup>st</sup> January 2006.

13. **PW8** was arrested and taken to Kiambu police station. In the police cells he met and identified the appellant as the person who brought the motor to him.

14. On 24<sup>th</sup> January 2006 **PW11** the investigating officer, obtained from Safaricom Ltd, the history of the deceased's phone make Nokia 1100. The history showed that five SIM card numbers were reflected as having been used in the phone after it was stolen from the victim.

15. Two months later on 24<sup>th</sup> March 2006, while interrogating a suspect who was being held at Githunguri police station, the investigating officer found that three of the five SIM card numbers that had been reflected as having been used in the victims' phone after it was stolen, appeared in the suspect's phone book. The SIM cards bore the following numbers:

- **0721906909**, which had been inserted in the deceased's phone on **20<sup>th</sup> January 2006 at 10.53 hours**,
- **0722948329** which was inserted in the phone on **20<sup>th</sup> January 2006 at 21.44 hours** and on **27<sup>th</sup> January 2006 at 20.19 hours**,
- **0722908384** which was inserted in the phone on **30<sup>th</sup> January 2006 at 10.29 hours**.

16. The suspect who later became the 1<sup>st</sup> accused and the 1<sup>st</sup> appellant in the ensuing case, led the investigating officer to Maragua where they found the 2<sup>nd</sup> appellant. The investigating officer dialled one

of the three numbers which was reflected in the posthumous activities captured in the IMEI history of the deceased's phone, and which also appeared in the phone book of the 1<sup>st</sup> appellant. The phone that responded to the call was 0722948329 make Motorola and it rung from the 2<sup>nd</sup> appellant's pocket. The appellant was arrested and brought to Kiambu police station and charged alongside two other suspects.

17. We subjected the inculpatory facts as set out above to the litmus test applicable to circumstantial evidence. The Honourable Judges of the Court of Appeal gave direction with regard to circumstantial evidence in the case of **SAWE V REPUBLIC 2003 KLR 372**. Their lordships stated as follows:

**“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co existing circumstances weakening the chain of circumstances relied on.”**

18. On the doctrine of recent possession, it is improbable that both the motor which bore the victim's initials S.M.G., which stands for the victim's name, Samuel Mbugua Gathiru and which was stolen on the night of the robbery could end up in the possession of the appellant who used the deceased's phone on that same night. We referred to the case of **Abdalla Juma Okengo and another vs. Republic cr. App 50 & 51 of 2009** (unreported), in which the Court of Appeal sitting at Kisumu applied the doctrine of recent possession. The complainant in the quoted case was robbed at 10 p.m. and the goods found in the possession of the appellant at 3.00 a.m. the same night. The Court of Appeal held that it was improbable that the goods had changed hands at night.

19. In the case before us, the 2<sup>nd</sup> appellant used the deceased's phone on the same night of the robbery, and two days later he presented the deceased's motor to **PW8**. On the basis of the material before the trial court, the appellant had the onus of giving a reasonable explanation as to how he came be in possession of both the deceased's mobile phone and motor very shortly after the robbery. He did not offer any explanation on the matter and in those circumstances a rebuttable presumption arises under **Section 111** of the **Evidence Act Cap 80 laws of Kenya**, that he was either the thief or a guilty receiver.

20. It is however our view, that considering the lapse of time between the time of the robbery, and the time the 2<sup>nd</sup> appellant used the deceased's phone, and even the time he took the motor to **PW8**, that it cannot be said that the goods had changed hands. The inference to be drawn from the inculpatory facts above, is that the appellant was one of the robbers.

21. We are therefore satisfied that the learned trial magistrate applied the doctrine of *Recent Possession* properly in this case.

22. Having found that the appellant was one of the robbers, which places him at the scene of the robbery we analysed the evidenced and found that the offence of robbery was proved because the victim's property was stolen and he was wounded as was evinced by the cuts on his head which resulted in his death

23. Having considered the appeal at length we find the evidence on record was sufficient to sustain the conviction against the appellant for the main charge of robbery with violence.

24. We therefore find that his appeal is lacking in merit and dismiss it in its entirety. We uphold the conviction and the sentence.

**SIGNED DATED and DELIVERED** in open court this **20th** day of **February, 2012**.

**F. A. OCHIENG**  
**JUDGE**

**L. A. ACHODE**  
**JUDGE**