



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CRIMINAL APPEAL CASE NO. 230 OF 2009**

**MOSES NGUGI KANGETHE.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of M. W. Mutuku Senior Resident Magistrate in the Senior Resident Magistrate's Criminal Case No.1344 of 2008 dated 16<sup>th</sup> December 2008 at Kigumo)*

**JUDGMENT**

**Moses Ngugi Kang'ethe**, the appellant herein, was tried on a charge of robbery with violence contrary to *Section 296(2)* of the Penal Code. He also faced an alternative count of handling stolen goods contrary to *Section 322(2)* of the Penal Code. After undergoing a full trial, the Appellant was convicted on the main count and was sentenced to suffer death. Being aggrieved, the Appellant preferred this appeal.

On appeal, the Appellant put forward the following grounds in his petition:

0. *That I the accused person I had no exhibit at the time of my arrest which was booked with me.*
1. *That there was no eye witness nor the complainant proved or recognized I was the person that I was involved in the robbery. Complainant testified clearly that he never showed me at the time of offence.*
0. *That the sentence imposed was harsh and unbearable.*

The Appellant later filed the following amended grounds:

- (i) *That the learned trial magistrate gravely erred in both law and fact while failing to scrutinize keenly whole of the prosecutions evidence that tendered no nexus to the alleged crime especially from the evidence of P.W.3 in page 12<sup>th</sup> line three from bottom.*
- (ii) *That the learned trial magistrate gravely erred in law and fact when he misdirected himself to base a conviction without evaluating the whole evidence giving an opinion judgment that is unbearable and harsh as far as the charges are concerned, in page 20 line four(4) from bottom.*
- (iii) *That the learned trial magistrate erred in both law and fact when he misdirected himself and*

**disregarded my defence statement without disclosing his objection as the law enjoins in Section 169(1) C.P.C.**

**(iv) That the learned trial magistrate gravely erred in both law and fact while basing a conviction, without considering that the afore evidences by prosecution had not revealed the mysterious dischargement of my co-accused persons found in page 13 line 3 from the bottom. My Lord it is in trite law that whenever circumstances are said the person found with the property was not a thief then the trade of that suspect shall be taken into account.**

We wish, at this juncture to set out in brief the case that was before the trial court. The prosecution's case was supported by the evidence of three witnesses. The Complainant i.e. Francis Theuri (P.W.1) was asleep in his house when at 4.00 a.m. on 1<sup>st</sup> November 2008, a group of people broke his gate and entered his compound. Those people went to the Complainant's bedroom and demanded to be given money and mobiles from the Complainant's wife. When P.W.1 switched off the lights to the living room those people threatened to burn the house. At the living room P.W.1 surrendered his mobile make Nokia 6070 and Ksh.200/= to those people. Those assailants ordered P.W.1 to remove his SIM card from the phone before going with the mobile phone. Later three men were arrested at 'Penny Inn' and the Appellant was found in possession of a mobile phone make Nokia 6070. P.W.1 went to identify the mobile phone to be his at Maragua Police Station on 8<sup>th</sup> November 2008. When placed on his defence the Appellant claimed he was arrested by Police while he was on his way to Penny Inn. He alleged that the Police took from him a sum of Ksh.9,000/=. He claimed he was framed up with this case by the Police when he demanded to be given back his money.

Having set out in brief the case that was before the trial court, we now turn our attention to the merits or otherwise of the appeal. It is the Appellant's submission that the learned trial magistrate convicted him on the basis of unevaluated evidence. It is also alleged that the trial magistrate did not consider his defence. The Appellant further complained that the sentence meted against him was harsh and excessive. Miss Maundu, learned State Counsel urged this court to find no merit in the appeal. Miss Maundu was of the view that the Appellant was connected with the offence by the doctrine of recent possession.

We have anxiously considered the rival submissions after re-evaluating the case that was before the trial court. It is not in dispute that on 1<sup>st</sup> November 2008 the Complainant was forced to surrender his mobile phone make Nokia 6070 plus Ksh.200/= to people who had threatened to burn his house if he refused to hand over the same. On 4<sup>th</sup> November 2008, the Appellant was arrested by Police officers inside Penny Inn in Maragua Township. On 8<sup>th</sup> November 2008, the Appellant positively identified the mobile phone to be his. The serial number of the mobile tallied with the one stated in the receipt issued to the Complainant by the seller. The Complainant could not identify the attackers because they wore masks to hide their identities. The only piece of evidence which linked the Appellant with the offence is the recovery of the mobile phone which turned out to be that of the Appellant which he had surrendered to those who attacked him on 1<sup>st</sup> November 2008. The evidence of P.C. Charles Odhiambo (P.W.3) indicates that the Appellant's right hand side pocket of the trouser was searched by P.C. Mwangi and therein was found the Complainant's mobile phone make Nokia 6070 serial No. 35765301379952. The Appellant gave unsworn statement in his defence. He did not explain how he came to possess the mobile phone. It is argued that the Appellant was convicted on unevaluated evidence. The question which we must grapple with is whether the offence of robbery with violence contrary to *Section 296(2)* ever took place? The complainant and his wife stated in their testimonies that a group of people broke the padlock to their gate to gain entry into their compound. It was in the wee hours of the night. The couple did not state the number of people. It is alleged the attackers smashed the Complainant's window using an axe. In order for the offence of robbery with violence to be established, the following ingredients must be established:

- (i) The offender is armed with dangerous or offensive weapon or
- (ii) He is in company with one or more people or

(iii) If or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other personal violence to any person.

After a critical examination of the evidence, we are of the view that there is doubt whether the above ingredients were established. We are aware that there is an allegation that an axe was used to break the Complainant's window. An axe is a common domestic implement used at home. For the reasons we will advance later, we will not regard it in this case as an offensive or dangerous weapon. It is possible that those people who entered the complainant's compound were more than one. It is also possible that the Appellant was alone. We note that the Complainant and his spouse were unable to establish the number of people who entered their compound. The main reason for their failure to do so is that they were suddenly woken up while they were asleep. Secondly, they were ordered to switch off the lights hence they could not tell the number of people. In the circumstances we think it is safe to assume that the Appellant was alone. Having come to the above conclusion, we think the evidence tendered established the offence of robbery under *Section 296(1)* as opposed to that of robbery with violence under *Section 296(2)* of the Penal Code. The offence of robbery is defined in *Section 295* of the Penal Code as follows:

***“S. 295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stole or to prevent or overcome resistance to it being stolen or retained, is guilty of the felony termed robbery.”***

In the case before us, the attacker broke the Complainant's window using an axe and thereafter threatened to burn the house if he was not given money and mobile phones. Those threats forced the Complainant and his wife to surrender money and their mobile phone. With respect, we agree with the submissions of Miss Maundu, that the Appellant is connected with the robbery by virtue of the application of the doctrine of recent possession. The Appellant did not explain how he came to possess P.W.1's mobile phone. We have come to the conclusion that the Appellant instead, is guilty of offence of simple robbery contrary to *Section 296(1)* of the Penal Code. The orders of conviction and sentence for the offence under *Section 296(2)* are quashed and set aside respectively. We have power to convict for any other offence proved by evidence under *Section 199(2)* of the Criminal Procedure Code. In its place, the appellant is convicted for the offence of robbery under *Section 296(1)* of the Penal Code. The next question is what sentence should we pass? The maximum sentence provided by law is 14 years imprisonment. We note that the prosecution did not have records of the Appellant's criminal record. We shall treat him as a first offender. We also take into account that the Appellant has been in custody since 4<sup>th</sup> November 2008. He has been in custody for three years three months. We sentence him to serve three (3) years from the date of this judgment.

***Dated and delivered at Nyeri this 10th day of February 2012.***

**J. K. SERGON**  
**JUDGE**

**J. WAKIAGA**  
**JUDGE**