



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

**AT MERU**

**CRIMINAL CASE NO 89 OF 2009**

***LESIIT & KASANGO, J.J***

**STATE.....PROSECUTOR**

**V ERSUS**

**S.G.I.....APPELLANT**

**JUDGEMENT**

The accused person S.G.I was charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that on the 7<sup>th</sup> of March 2008 at Gandone village in Igembe District. jointly with another not before the court robbed Stephen Aroi Kiunga of a mobile phone, one torch and cash Ksh.50 and that at or immediately before or immediately after the time of such robbery used actual violence to the said Stephen the complainant in this case. The appellant was found guilty for the offence and was sentenced to be detained at the Presidents pleasure because he was below 18 years of age. He was aggrieved by the decision of the lower court and therefore this appeal. At the hearing of this appeal the appellant was represented by Mr. Kiambi while the State was represented by Mr. Kimathi. Both counsels made their submissions which we shall consider in this judgment.

The facts of the case are that the complainant is an employee of Mutia PW2. Mutia sent the complainant to his wife Kaimuri. He collected milk to take to Charity, the other wife of Mutia. Kaimuri PW3, in addition to milk, gave the complainant her mobile phone so that her husband could charge it for her. It was at around 7.30 pm and Mutia had given the complainant a torch to use as it was at night. The complainant testified that as he went to his employer Mutia, place he met with the appellant, whose nickname is G, and another called Maore. He says that G held him by the neck and took 50 shillings and the mobile phone from his pocket. The complainant said that Maore hit him on his knees. He says that after they had robbed him they released him and that he ran back to Kaimuri's house. Both Mutia and Kaimuri confirmed that the complainant went back to them and reported that the appellant had robbed him while in company of Maore. The two witnesses said that the appellant was their neighbour. Mutia called Baariu PW6, who assisted them in tracking down the appellant. They arrested the appellant at a nearby Church and according to the 4 witnesses, PW1 the complainant, Mutia, Kaimuri and Baariu the appellant had in his possession a torch which had on the glass an inscription of Mutia's name.

PW4 PC Mangoli received the report of the complaint the next morning after the incident. He is the one who collected the appellant from the D.O.'s office at Mutuati, and took the torch which was an Exhibit in

this case. PC Mangoli also received the T-shirt and the trouser which the complainant was wearing at the time of the incident. The two clothings had blood stains. PC Mangoli said that he issued a P3 form to the complainant which was filled by Dr. Muriungi PW5.

The accused person gave a sworn statement and in that statement he claimed that the whole case was a fabrication by Mutia because Mutia and his father had a land dispute. The appellant also denied that the torch which was produced before the court was recovered from him.

We have carefully considered this Appeal together with the submissions by Counsel. We have also subjected the evidence that was adduced before the trial court to a fresh analysis and evaluation while bearing in mind that we neither heard nor saw any of the witnesses and have given due allowance for it.

See **OKWENO VRS REPUBLIC 1972 EA.**

Mr. Kiambi in his submission before us raised two issues for consideration by us. The first issue he raised was that of identification. Mr. Kiambi urged the identification of the Appellant was not positive because the incidence took place at 7.30.pm. Counsel submitted that the circumstances of identification were not conducive for proper identification of the assailant.

Mr. Kimathi submitted that the appellant had properly been identified. Mr. Kimathi urged that immediately before the attack, the complainant and the appellant spoke. Mr. Kimathi also submitted that it was the complainant's evidence that the appellant and his accomplice chased the complainant up to the house of PW3. He submitted that in the circumstances the identification was correct.

The second issue raised by Mr. Kiambi was that there were several contradictions regarding how the torch was recovered from the appellant. He claims that there was a contradiction by PW1 because he said that the torch was recovered from the appellant's pocket while at the Police Station. Mr. Kiambi urged that PW3 contradicted that evidence because she said that the appellant was holding the torch at the time of his arrest. Mr. Kiambi urged us to accept the appellant's statement in which he denied that the torch was recovered from him.

Mr. Kimathi submitted that the Appellant was arrested in recent possession of a torch that was bearing the name of PW 2. He submitted that the fact PW6 Baariu who assisted in the arrest of the appellant did not identify the torch did not shake the prosecution case. Mr. Kimathi urged that the Appellant had admitted that he was arrested in the manner described by the witnesses.

The learned trial Magistrate convicted the appellant on the strength of the evidence of identification by the complainant and on the strength of recovery of the torch stolen from the complainant from the appellant shortly after the incident. The evidence of identification was in our view strong. The complainant told the court that the appellant spoke to him before the attack. The complainant said that the appellant had asked him whether he wanted to beam the torch at him and that when the appellant complained about he put off the torch. In addition to the conversation just before the attack the complainant's testimony is that he also knew the appellant before as he was a neighbour. There was facial recognition because of the complainant having flashed the appellant on the left side of his body and his face; and the voice recognition as a result of the conversation the complainant and appellant had before the attack.

We agree that the circumstances of identification were difficult. However, we find that the identification of the appellant was not based entirely on facial recognition but also on voice recognition. The evidence of recognition was strengthened by the recovery of the torch in the possession of the appellant on the same night of the attack. That torch had inscribed on its glass the name of its owner that is Mutia PW2. Mr. Kiambi had urged that there was contradiction regarding the recovery of the torch and raised issue with the fact PW6 did not identify the torch. We have carefully perused the record of the proceeding and we are satisfied that there was no material contradiction in the evidence of the prosecution regarding the recovery of the torch. It is clear from the evidence of the complainant and Mutia that the torch was recovered from the appellant and that at the Police Station after the arrest it was taken as an exhibit in the case. The fact that PW6 did not identify that torch before the court is not material in the circumstances. PW 6 was clear in his evidence that at the time he apprehended the appellant he was holding a torch and that Mutia identified that torch as his because of an inscription on it. The complainant was not present at the place where the Appellant was apprehended it is therefore not a contradiction in evidence when the complainant said that he saw the torch only on arrival at the Police Station.

We find that the evidence adduced by the prosecution was both that of recognition and of possession of a recently stolen torch. We find this evidence was sufficient to sustain the conviction. The appellants sworn defence was a mere denial of involvement in the offence and of the recover of the stolen torch from his person. The evidence of the prosecution was very clear that the accused person had possession of the

torch at the time he was arrested by Mutia and Baariu. We find that the learned trial Magistrate arrived at the right conclusion. We are satisfied that the appellant had been proved to have committed this offence beyond any reasonable doubt. We find that the conviction entered against the appellant was correct.

We therefore dismiss the appellant's appeal, uphold the conviction and confirm the sentence.

**Read, signed and delivered at Meru this 29<sup>th</sup> day of October, 2010.**

**LESIIT J  
JUDGE**

**KASANGO M  
JUDGE.**

**In The Presence Of**

Kirimi.....Court Clerk

Accused Persons .....present

Mr. Kimathi for state.....present

**LESIIT,J.**  
**JUDGE**

**KASANGO, M**  
**JUDGE**