



CRIMINAL

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL CASE NO. 90 OF 2008**

**JOHN MBAE ELIAS ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the judgment of the Mr. P. Ngare SRM in Chuka Criminal Case No. 2169 of 2006 delivered on 6<sup>th</sup> June 2008)*

**JUDGMENT**

The appellant was charged before Chuka Principal Magistrate Court for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The complainant PW1 on 28<sup>th</sup> August 2008 was attacked and robbed of her bag which contained mobile phone, Kshs. 50/= and clothes and shoes. It was the evidence of PW1 that she was attacked as she walked home on 25<sup>th</sup> August 2006 at 7pm. The robbers held her from the back (*ngeta*) and whilst holding her robbed her of her property. It is important to reproduce some of her evidence as herein under.

***“I was not able to identify the people who attacked me at the time. There was darkness at the time. My father gave me painkillers and the following day I went back to Chogoria on that day. I tried to make inquiries of a phone being sold there but to no avail. On Sunday 27/8/2006 a boy who knew the***

***My day***

*phone came and I told me of my predicaments. He told me that there was a mobile phone that had been offered to him but he refused to buy it. He went away and on 2.00pm he went and brought a phone together with a boy called Mawira Nyaga who offered me the phone. I recognized the phone mine. I asked him to give me a receipt and charger. I called a friend of mine called Mugambi from the church where I was. He also identified same. The boy started bringing problems. A gathered and the man was questioned. He he had been given the phone by on Mbae sell.”*

*as  
the  
crowd  
said that  
to*

PW1 continued to state that the appellant (Mbae) and Mawira were arrested. Mawira was not charged with the offence but the appellant was. Mawira was a witness for the prosecution in this case. He stated in his evidence:-

*“I recall on 27/8/2006 at 4.00pm I heard people talk outside my home. I peeped and saw two people who I recognized. I knew one Makena. I went back to sleep at about 7.00am. Makena came and told me that there was a man who had a mobile phone for sale. It was siemens C45 which is before court.*

*I told him that I didn't have money but I offered to introduce him to a buyer on the following day Mbaka (accused 1) came and I took him to one Kangai (PW1) and on looking and it she identified it as hers. Accused run away but I gave chase and arrested him. I took him to Chogoria Police Post and he was later charged with the offence herein.”*

The appellant on being put to his defence stated that he was on that day at Chogoria charging his battery. In his defence he further stated:-

*“As I waited for it to charge and I saw people beating one Mawira and I saw him point where we*

***were. The people came and passed me and on their return I was arrested and framed the charges herein.”***

The learned magistrate in his judgment made a finding that the robbery PW1 suffered was not aggravated and accordingly convicted the appellant of robbery contrary to section 296 (1) of the Penal Code. We have re examined and re-valuated the lower court’s evidence as it is our duty. We have borne in mind that we did not have the opportunity of hearing and seeing the witnesses who testified before the learned trial magistrate. See the case of **Okeno Vs. Republic** [1972] E.A. 32. as can be seen from the evidence, PW1 was robbed of her mobile phone amongst other items but she did not see the persons who robbed her. Two days later, a boy informed her that he had been offered a mobile phone to buy but he did not have money. That boy later took that phone to PW1 in the company of Mawira. It was then that PW1 realized that the mobile phone that was being sold to her was the one stolen from her previously. When she realized that the phone was hers, according to her, Mawira “*started to bring problems.*” It is not explained what problem Mawira brought. However, the proceedings are clear that Mawira begun to be interrogated about that mobile phone by a crowd of people who had gathered. It is at this time of interrogation that Mawira said that it was the appellant who had given it to him to sell. The evidence of Mawira does not entirely support that of PW1. Mawira stated in evidence that when PW1 identified the mobile phone as hers, the appellant run away. He gave chase and was able to apprehend the appellant and to take him to Chogoria Police Station. That evidence of Mawira was not supported by the investigating officer. The investigating officer stated that it was the appellant who was in possession of the mobile phone and that he was apprehended when he was in the process of selling it. Our re-evaluation of the prosecution’s evidence leads us to find that the said evidence was riddled with contradictions. It did not prove that the appellant was the one who robbed PW1. even the doctrine of recent possession could not apply in the light of those contradictions. The defence offered by the appellant bearing in mind the prosecution’s evidence offers a very plausible explanation. It seems that when PW1 identified the phone as being hers, there was

commotion and Mawira was subjected to interrogation by members of the public. In his defence, the appellant stated when this was going on, he was at Chogoria waiting for his battery to be charged. It was then that he saw Mawira point out to him which led him to be arrested by the crowd. The question that comes to mind is, did Mawira on realizing that he was in trouble with the crowd that had gathered look for a scapegoat in the appellant? That is very possible. It is for that reason that we find that it was unsafe to have convicted the appellant on the evidence submitted by the prosecution. We find that the appellant's appeal has merit and is allowed. The appellant's conviction is hereby quashed and the sentence is hereby set aside. We order the appellant to be set free unless he is otherwise lawfully held.

Dated and delivered at Meru this 29<sup>th</sup> day of October 2010.

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

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

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

**In The Presence Of:**

**Kirimi/Mwonjaru ..... Court Clerks**

**Appellant ..... Present**

**Mr. Kimathi ..... For the State**

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

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