

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 180 of 2005

JOEL MAINA MUTAHI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the judgment of R.N. Muriuki, Senior Resident Magistrate in Senior Resident Magistrate's Court Criminal Case No. 61 of 2005 at Nanyuki)

JUDGMENT

The appellant was charged with robbery with violence contrary to **Section 296(2)** of the Penal Code and also faced an alternative charge of handling stolen goods contrary to **Section 322(2)** of the Penal Code. After trial the appellant was on 24th June 2005 convicted and sentenced to death. He was dissatisfied with that conviction and sentence and has therefore preferred this appeal. As the first Appellate court, we are expected to submit the whole evidence of the Lower Court to a fresh and exhaustive examination. In so doing we must weigh the conflicting evidence and draw our own conclusion. Further in so doing we should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. See the case of **OKENO vs R [1972] EA 32**. The complainant PW 1 recalled that on 31st December 2004 he had gone with his friends to a bar. When he left the bar he was attacked by two people. They threw him to the ground and robbed him of his Nokia mobile phone valued at Kshs.3000/-. He told his friend but because it was dark and the robbers had ran away they were unable to apprehend them. He said that he could not identify the robbers nor could he tell whether they were armed. On 7th January 2005 he was summoned by police and informed that the phone had been recovered. He was able to identify it by its serial numbers. PW 2 a police man confirmed that the complainant had reported the theft of his phone. On 7th January 2005 whilst he was at the police station he received a report that the appellant was trying to buy miraa with fake currency. He went to the scene and found the appellant. The appellant had two fake Kshs.1000/- notes. The appellant was taken to the police station where he informed him that he had obtained the fake notes from his co-accused when he sold him a mobile phone. It should be noted that his co-accused was acquitted of the charge of robbery with violence. When this policeman went to his co-accused that co-accused confirmed that the appellant had sold him the phone. That phone was the Nokia that the complainant had lost during the robbery. The prosecution closed its case after calling those two witnesses. The court found that the appellant had a case to answer. In his unsworn statement the appellant denied the charge. He denied knowing the co-accused and denied selling the mobile to him. The learned magistrate R.N. Muriuki in her considered judgement had the following to say;-

“having considered all the evidence adduced it is apparent that a few days after the robbery the first accused sold the complainant’s stolen mobile phone to accused 2. He did not give any reasonable explanation as to how he came to have it. He simply just denied that he knew about it. Considering that the accused 1 sold the phone just a few days after the robbery and he did not explain how he came by the mobile phone he complainant had been robbed (sic). I found (sic) and I was satisfied that the accused 1 was involved in the robbery which the complainant was robbed. The complainant was attacked by more than one person who pushed him and threw him to the ground.”

We have re-examined the prosecution’s evidence. The appellant on being found in possession on fake currency stated that he had obtained the money from his co-accused when he sold him a mobile phone. We have reconsidered that evidence and in our view it does not establish beyond a reasonable doubt that the appellant was one of the robbers. The mobile phone was stolen on 31st December 2004. The

recovery was made on 7th January 2005. With a commodity such as a mobile phone and in particular a stolen one the possibilities of it changing hands many times over are high. We entertain doubt whether the appellant was directly involved in the robbery of that phone. There is every possibility that the same could have come into his possession from someone else in those many days. That doubt that we entertain we shall resolve it in favour of the appellant. The phone was not recovered in the appellant's possession. It was in the possession of his co-accused. We therefore cannot also find him guilty of the alternative charge of handling stolen goods. We respectfully disagree with the finding of the learned magistrate in her finding of guilty on the charge of robbery with violence. In the end we do hereby quash the appellant's conviction, set aside his sentence and order that he be set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 22nd May 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE