REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Criminal Appeal 118 of 2003

JOHN NYABUTO BOSIRE…….....…….APPELLANT

VERSUS

REPUBLIC…….....……..RESPONDENT

JUDGEMENT OF THE COURT

The appellant was charged with robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 28th day of May, 2003 at Kericho Township, in Kericho District jointly with others not before court, while armed with dangerous weapons namely swords and pangas robbed Peres Juma Opinda of cash Kshs.4,550/-, one siemens A35 mobile phone, one wrist watch, one identity card and a bunch of keys all valued at Kshs.26,050/- and immediately before or immediately after the time of such robbery used personal violence to the said Peres Orinda Juma.

The appellant was tried and convicted and sentenced to death. He was aggrieved by the conviction and sentence and he preferred this appeal.

The complaint (PW2) told the trial court that on 28/5/03 at around 9.00 p.m. she closed her shop and left for home in the company of one Paul Odumo. She had a purse in a paper bag with a mobile phone siemen A35, and the other items as stated in the charge sheet. Near KCC round about, they saw six people ahead of them. They passed three of them and the other three went ahead of them. There were street lights in the area. There was also a motor vehicle which passed by and presumably it had its lights on. The complainant stated that one of those people drew a sword and another grabbed her purse with all the contents as in the charge sheet. Another person slapped her on the face and she fled as she screamed and members of the public went to the scene. She said that the entire incident took about 10 seconds and that she identified one of the robbers as the appellant. She further said that he was a taxi driver and had taken her to her house sometimes in the past. She added that he was the one who had grabbed the purse from her. Her colleague, Paul Odumo, was also attacked. She reported the matter to the police on 29/5/2003 and on 30/5/2003 a taxi driver by the name **Evans, (PW4)** told the complainant that the appellant was selling a mobile phone. The complainant had told PW4 what had happened to her. The complainant then sent **John Onyango (PW5)** to go and buy the phone. PW5 went and obtained the phone from the appellant, having promised to pay for it later and he gave it to the complainant who said that she recognised it as her phone which had been stolen. When she opened it, her initials "***P.J.O.***" were visible although the make of the phone had been rubbed off. She then went with PW5 and report to the police and as the appellant was being paid Kshs.3,200/- for the phone, he was arrested. The appellant did not have the receipt for the purchase of the phone as it had been stolen together with the phone but she knew the serial number which she said was in a container in which she had bought a telephone line and

when the police pressed the phone the serial number appeared.

In cross examination by the appellant's counsel, the complainant said that although she had recognised the appellant at the time of the robbery, she did not identify him to the police when she went to make a report immediately after the robbery. She denied having marked the inside of the phone with her initials when PW5 brought it to her. The complainant also admitted that she had not given the serial number of the phone to the police.

PW3, Paul Odumo Onyango who was accompanying the complainant at the time of the robbery said that the scene of the attack was well lit by electric lights and he was able to recognise the appellant although he had never seen him before. In his report to the police, he did not indicate that he identified one of the robbers.

PW4, Evans Agengo told the trial court that he was a taxi driver and had known the appellant for a long time. On 29/5/2003 at around 10.00 a.m. the complainant told him that her mobile phone, siemens A35 had been stolen and she asked him to be on the look out for the same. He further stated that on the following day the appellant was seen with a siemens A35 mobile phone which he was offering for sale. He then reported the issue to the complainant who sent PW5 to see the seller**. PW5** on his part said that the complainant had on 29/5/03 told him that she had lost her mobile phone and money to thugs. He said that on 30/5/03 the complainant asked him to pretend that he wanted to buy a phone and then approach the appellant. That was after PW4 had directed PW5 to the appellant. PW5 then obtained the mobile phone from the appellant and took it to PW2 who looked inside and said it was hers. Thereafter a report was made to the police. The witness said that he did not know the accused prior to that day.

In his unsworn defence, the appellant denied having robbed the complainant and gave an account of his movements on the night of 28/5/2003. He added that he had told PW4 that he wanted to sell his mobile phone and on 30/5/2003 PW4 took a customer to him to buy the same and he gave it to him, only for PW4 to return with policemen after a little while. He called his brother Charles Saoke Obombo as a witness (DW2) who told the court that on 22/12/2002 he bought a mobile phone, Siemens A35 Serial No. 3900995593143 for Kshs.4,999/- and he produced a receipt for the purchase of the said phone (D.Exh.1). Later in March or April, 2003 he gave it to the appellant.

The learned trial magistrate held that both the complainant and PW3 recognised the appellant as the person who grabbed PW2's paper bag, although they did not say that to the police. That was possible because of the street lights that were on, he held. The trial court further held that the complainant rightly stated the serial number of the phone which according to him was easily identifiable by operating a certain formula which was never alluded to by either the prosecution or the defence. He discredited the evidence of the appellant and that of his witness and dismissed it as worthless.

Mr. Orina for the appellant raised six grounds of appeal which he chose to argue all together. He started by submitting that there was no proper evidence on identification since the robbery was committed within ten seconds and the surrounding circumstances were not favourable for a positive identification. He also faulted the learned trial magistrate for introducing extraneous issues in his own effort to determine whether indeed the said mobile phone belonged to the complainant. He also said that the learned trial magistrate erred in law by shifting the burden of proof to the appellant.

Mr. Koech, Senior State Counsel supported the conviction and sentence saying that the appellant had properly been recognised by the complainant. He also submitted that the mobile phone in question was found in the appellant's possession barely two days after the robbery and there was sufficient evidence that it truly belonged to the complainant.

As the first appellate court, we have a duty to reconsider and re-evaluate the evidence that was adduced before the trial court and draw our own conclusions.

It is trite law that a trial court must carefully scrutinise identification evidence and ensure that it is positive and free from the possibility of error before it can convict on the basis of the same. All

surrounding circumstances relating to that identification must be scrupulously considered, see ***BONIFACE OKEYO VS REPUBLIC*** Criminal Appeal No. 52 of 2000 (unreported). The complainant and PW3 were walking home when they were suddenly attacked. The complainant said that one of the robbers slapped her on the face and she fled and her assailants turned to PW3. Before that her handbag had been grabbed and she had been threatened with a sword. It was about 9.00 p.m. and they were near a round about and street lights were on. She said that the whole act took about ten seconds. Although she told the trial court that she recognised the appellant as having been the one who grabbed her purse, it is doubtful if she did. This is because on the following day when she made a report to the police she did not state as such. If a person has been robbed by somebody whom he or she knows very well, the complainant is reasonably expected to identify the robber to the police at the earliest opportunity. The complainant said that she forgot to name the appellant but that is unbelievable. When she ran away after the attack, she screamed and members of the public answered her distress call and assisted her to take PW3 to a hospital. Why did she not also tell them the name of the person who had robbed her if she knew him very well as she claimed? This serious omission points to the fact that she did not know who had robbed her. The encounter with her assailant was very brief and she was obviously in a state of shock after having been slapped and threatened with a sword. It was not stated how bright the street lights were and in our view, the aforesaid circumstances were not favourable for a positive identification. Even when she told PW4 about the robbery incident she never said that it was the appellant who had robbed her and neither did she even express any suspicioun about him. She only seemed to zero in on the appellant after PW4 told her about the mobile phone which the appellant was selling.

PW3 did not also describe to the police the identity of the appellant yet he said that the attack on him took about five minutes and he was able to identify the appellant. No identification parade was conducted to see whether the complainant and PW3 could pick out the appellant as having been one of their assailants. In our view, the appellant's conviction on the basis of identification evidence was unsafe and the same cannot stand.

We now turn to the issue of identification of the mobile phone by way of its serial number. **PW1 Corporal Samuel Kibor** told the trial court that when they arrested the appellant, the complainant was able to recognise the phone by way of its serial number. He did not talk of any initials which had been inscribed in the handset. He gave the serial number as 350019721732457. However, the complainant said that the receipt for the purchase of the handset had been stolen together with the handset and when PW5 took the handset to her, she identified the same because inside it there were initials ***"P.J.0."*** which she had inscribed, although there were doubts that she may have done so when PW5 gave it to her. Even PW5 himself did not testify as having seen those initials. The complainant stated that when they took the handset to the police, it is the police who operated it and it displayed on its screen its serial number then she copied the same down and presented the same to the trial court as P. Exhibit 2. The prosecution did not lead any of its witnesses, either PW1 or PW2 to state how the police got to know the serial number. In his judgment, the learned trial magistrate said that he had taken judicial notice of the way in which a person can get to know the serial number of a particular mobile phone handset and he proceeded to state that method. Mr. Orina for the appellant took issue with that and stated that **Section 60** of the **Evidence Act Cap 80** was clear as to the facts which a court could take judicial notice of and he faulted the learned trial magistrate for considering extraneous issues in arriving at his decision. Mr. Orina further submitted that expert evidence should have been adduced as to how the serial number could have been obtained.

We anxiously considered this ground of appeal and carefully perused the provisions of Section 60 of the Evidence Act. We agree with Mr. Orina that the method of determining the serial number of a mobile phone handset is not something which a court can take judicial notice of. It is not one of the facts listed under the said Section neither is it a matter of general or local notoriety. The learned trial magistrate said that applying the formular as he stated in his judgment the serial number that came on the screen was 19721732457. However, that was different from the number which PW2 stated as 350019721732457. A court of law ought to confine itself to the provisions of Section 60 of the Evidence Act before it takes judicial notice of any fact. In any event the appellant had no idea what the serial number of her handset was until the police showed her a certain number on its screen. Given that there was no evidence that she knew it before her encounter with the police, it was unsafe to rely on that evidence to found a conation against the appellant.

For the aforesaid reasons, we allow the appeal, quash the conviction and set aside the sentence that was handed down by the trial court. The appellant should be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED at Nakuru this 3rd day of February, 2006

D. MUSINGA

JUDGE

2/2/2006

L. KIMARU

JUDGE

2/2/2006