



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Criminal Appeal No. 130 of 2004**

**DAVID KAVULANI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant David Kavulani was charged with the offence of Robbery with violence contrary to **Section 296 (2) of the Penal Code**. The particulars of the offence were that on the 25<sup>th</sup> of August, 2003 at Kivumbini Estate Nakuru District, the appellant jointly with others not before court robbed Lazarus Adela of Ksh.1000/= and a mobile phone make NEC all valued Ksh.10,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Lazarus Adela. He was alternatively charged with **Handling stolen property contrary to section 322(2) of the Penal Code**. The particulars of the charge were that on the same day and the same place, otherwise than in the course of stealing, the appellant dishonestly handled one mobile phone make NEC knowing or having reasons to believe to have been stolen or unlawfully obtained. The appellant pleaded **not guilty** to the charges. After a full trial, the appellant was convicted for the alternative charge of handling stolen property. He was sentenced to serve Seven years imprisonment. He was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds challenging the decision of the trial magistrate in convicting him. He was aggrieved that the trial magistrate had failed to consider that the prosecution had not established a case against him to the required standard of proof beyond reasonable doubt. He faulted the trial magistrate for relying on uncorroborated and flimsy evidence of the prosecution to convict him. He was aggrieved that the trial magistrate had failed to consider his defence, which explained the circumstances under which he was found with the mobile phone and hence erroneously convicted him. He was finally aggrieved that the trial magistrate had failed to weigh the evidence and therefore had arrived at a decision convicting him.

During the hearing of the appeal, the appellant explained the circumstances under which he came to be found with the mobile phone. He stated that the person who had stolen the mobile phone had thrown the mobile phone to the ground when he realized he was being chased. He submitted that he picked the phone with a view of taking it to the police. While on his way to the police station, he was arrested by the police who then accused him of having robbed the mobile phone from the complainant. He submitted that he had no intention of stealing or retaining the mobile phone in his possession and had all along intended to hand over the mobile phone to the police. He submitted that this court should consider reviewing his sentence downward if it reached a decision not allowing his appeal against conviction.

Mr. Koech, learned State Counsel submitted that he was not opposed to the appeal. He submitted that upon review of the evidence, he was convinced that the conviction of the appellant was unsafe. He submitted that the complainant was robbed of the mobile phone and chased the person who had stolen it from him. The complainant started beating the person who had stolen the mobile phone from him. The appellant intervened and in the process the person who robbed the complainant of his mobile phone dropped the mobile phone and ran away. The appellant picked the phone and was in the process of taking it to the police, when he was arrested and charged with the offence which he was convicted. Mr. Koech submitted that the appellant was arrested by the police because the complainant had made a report to the police about the incident. He submitted that in the circumstances he was not going to support the

conviction of the appellant.

I have considered the submissions made before me by the appellant and by Mr. Koech on behalf of the State. I have also re-evaluated the evidence which was adduced by the witnesses before the trial magistrate's court. The issue for determination by this court is whether the prosecution established its case against the appellant to the required standard of proof beyond reasonable doubt. This court is aware of its duty as the first appellate court in criminal cases. This court is mandated to re-evaluate and to reconsider the evidence adduced before the trial magistrate's court to enable it to reach an independent determination whether or not to uphold the conviction of the appellant by the trial magistrate. This court is also required to put in mind the fact that it neither saw nor heard the witnesses as they testified (**See Okeno vs Republic [1972] E.A 32**).

What are the facts of this case? On the 25<sup>th</sup> of August, 2003 at about 10.30 a.m., while PW1 Lazarus Adela Agola (*hereinafter referred to as the complainant*) was riding his bicycle in Bondeni Estate, a man robbed him of his mobile phone when he removed it from his pocket to receive a phone call. The complainant chased the man and caught up with him. He started beating him up. The appellant who was nearby intervened and stopped the complainant from beating the man. In the course of the intervention, a quarrel ensued between the appellant and the complainant. The man who had stolen a mobile phone from the complainant took the opportunity to make good his escape. In the process of escaping, he dropped the mobile phone. The appellant picked the mobile phone.

Meanwhile the complainant had gone to the police station and made a report to the effect that it was the appellant who had stolen a mobile phone from him. He described the appellant. He was accompanied by a police officer PW2 Patrick Opiyu to the scene where the complainant had managed to apprehend the man who had stolen a mobile phone from him. On the way, the complainant and the police officer met the appellant walking towards the police station with the mobile phone. He was arrested and charged with the offence of robbery with violence. The appellant was alternatively charged with being found in possession of the mobile phone in circumstances that suggested he had dishonestly received it. When the appellant was put on his defence, he explained the circumstances under which he came to be arrested and charged with the offence. He called two witnesses DW2 Samuel Kamau and DW3 James Mwangi who corroborated his evidence as regard the circumstances under which he came to be found with the mobile phone.

Having re-evaluated the evidence and also having considered the submissions made before me by the appellant and by the State, it is clear that the appellant was a victim of circumstances. He went to the rescue of a man who was being beaten by the complainant after the said man had been apprehended for stealing a mobile phone from the complainant. The appellant intervened because, in his view, there was no reason why the complainant was beating the mobile phone thief yet he could have apprehended and taken him to the police. In the course of the intervention, a quarrel ensued between the complainant and the appellant. The thief escaped. In the process of escaping, the man dropped the mobile phone. The complainant was obviously not happy that the appellant had intervened and prevented him from meting out instant justice to the man who stole his mobile phone. He developed a grudge against the appellant. He went to the police station and made a false report that it was the appellant in company of others who had robbed him of his mobile phone. The complainant was accompanied to the scene of the incident and while on the way, they met the appellant who was walking towards the police station with a view to taking the mobile phone which he had recovered from the thief to the police. The appellant was arrested by the police and charged with the offence which he was convicted.

Having carefully re-evaluated the evidence adduced, it is clear that the appellant is an innocent man who was caught up with the machinations of the complainant who was unhappy with the manner in which the appellant had intervened and thus prevented him from beating up the man who had stolen the mobile phone from him. The police officer who investigated this case was obviously partial and failed to consider the explanation of the circumstances under which the appellant was found in possession of the mobile phone. Unfortunately too the trial magistrate failed to consider this crucial aspect of the case. Having reconsidered the evidence adduced, it is clear that reasonable doubt was raised by the explanation given by the appellant. I therefore hold that the prosecution failed to prove its case to the required

standard of proof beyond reasonable doubt.

I will consequently allow the appeal, quash the conviction of the appellant and set aside the sentence imposed. Mr. Koech, rightly in my opinion, conceded to the appeal. There was no evidence that could have been relied on by the trial magistrate to convict the appellant. The appellant is therefore ordered acquitted. He shall be released from prison and set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT NAKURU this 10<sup>th</sup> day of March 2006**

**L. KIMARU**

JUDGE