



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**CRIMINAL APPEAL NO. 28 OF 2016**

*(Being an Appeal from Original Conviction and*

*Sentence in Criminal Case No. 963 of 2014 of the*

*Chief Magistrate's Court at Naivasha – E. Kimilu, SRM)*

**BENSON WACHIRA THAIRU.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant herein was jointly charged with two others with Robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge are that on the 16<sup>th</sup> day of May, 2014 at Rubiri are in Naivasha Sub-County within Nakuru County, jointly with others not before court, being armed with dangerous weapons namely pistols and drugs, he robbed **Isaac Muigai Karanja** off a motor vehicle registration number **KBN 175N** make Mitsubishi FH valued at KShs 4,850,000/=, a mobile phone make Tecno valued at Kshs 6,000/= and a driving licence all totaling Kshs 4,856,000/= and immediately before the time of such robbery used physical violence to the said **Isaac Muigai Karanja**.

2. In the course of the trial in the lower court the 1<sup>st</sup> Accused died while the 3<sup>rd</sup> Accused absconded only to be rearrested when the trial in respect of the Appellant (2<sup>nd</sup> Accused in trial) was almost complete. The trial court ordered a fresh separate trial for him. At the close of this Appellant's trial the Appellant was found guilty of the offence and convicted. The court sentenced him to death.

3. Aggrieved with the outcome, the Appellant appealed to this court. Two grounds are raised in his amended grounds of appeal, filed on the eve of the hearing of the appeal. The grounds are:-

**“1. THAT, the learned trial magistrate erred in law and fact in conducting an irregular and unfair trial that violated the Appellants rights and fundamental freedoms that may not be limited.**

**2. THAT, learned trial magistrate erred in law and fact in convicting the Appellant yet the prosecution failed to supply the Appellant with witness statement, vitiated his ability to cross-examined witnesses and adversely affected his ability to defend himself.”**

4. In written submissions premised on Article 50 (2) of the Constitution the Appellant argues that his right to prepare adequately for his defence, and to receive the prosecution evidence in advance for this purpose was violated. He states that he did not receive statements by witnesses and other material, despite an order by the trial court to that effect. He submits that the trial held subsequently being in breach of the fair trial article is a nullity. Citing the withdrawal of his counsel prior to the commencement of the trial, the Appellant claims that he was not given time for the adequate preparation before trial.

5. Although the Appellant had by filing amended grounds signaled the intention to abandon earlier grounds of appeal that primarily challenged the evidence at the trial, his subsequent submissions also challenge material evidence adduced at the trial by **PW2, PW4** and **PW8**. In opposing the appeal, the DPP reiterated the prosecution evidence at the trial. That aside, it is the duty of the first appellate court to re-appraise the evidence and draw its own conclusions.

6. The Court of Appeal for Eastern Africa succinctly stated what the duty of the first appellate court ought to be in **Pandya -Vs- Republic [1957] EA 336** by observing that:-

**“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”**

7. However, before considering the evidence, the court deems it apposite to deal with the Appellant’s two legal challenges, which are really similar, and concerning the trial itself. The record of the lower court shows that the plea was taken on 19<sup>th</sup> May, 2014 and hearing fixed for 30<sup>th</sup> June, 2014. The matter was adjourned on the latter date as counsel for the Appellant stated that he had yet to receive instructions from the Accused persons and witness statements. The application was allowed.

8. On 13<sup>th</sup> August, 2014, the next set hearing date, Mr. Gichuki addressed the court as follows:-

**“We are not ready to proceed. The statements were received on 9<sup>th</sup> September, 2014 (an obviously erroneous date) when I was away so same were sent to my office by Flying Squad Officers in Naivasha. The instructing person was the deceased (1<sup>st</sup> Accused) and his family. I have to take fresh instructions in light of death of 1<sup>st</sup> Accused. I have not been supplied with other crucial doc (documents) like identification parade forms. This is our first application for adjournment.”**

9. The court upheld the objection by the prosecution that it was the responsibility of the defence to obtain the witness statements and ordered that the matter proceeds. The defence counsel, applied and was allowed to withdraw. Only one witness, the owner of the vehicle **KBN 175N** was heard on the said date. The Appellant cross-examined him albeit briefly, the witness evidence being primarily formal in nature. Before the next hearing date the 3<sup>rd</sup> Accused absconded. There followed a hiatus taken up by mentions all attended by the Appellant, for purposes of receiving updates on the warrant of arrest against his absconded co-accused.

10. A hearing set for 14<sup>th</sup> January, 2015 did not materialize as the said 3<sup>rd</sup> Accused was still at large. Eventually on the 6<sup>th</sup> March, 2015 a substituted charge sheet in respect of the Appellant only was tendered by the DPP and admitted by the court. The Accused pleaded to the same charges as before.

11. During this entire period the Appellant never raised the question of witness statements or other material. The trial proceeded in earnest from 16<sup>th</sup> April 2015, the Appellant questioning all the witnesses who testified, and never once raising the question of witness statements or other materials.

12. Indeed on 16<sup>th</sup> September, 2015 when the trial court was informed about the arrest of his co-accused, (3<sup>rd</sup> Accused), the Appellant in his address to the court complained that he had suffered and urged that his case does proceed separately. By that date, eight witnesses had testified. Four more witnesses testified in the continuing separate trial of the Appellant.

13. The Appellant did cross-examine especially the material witnesses **PW10** and **PW11** in some detail. When the prosecution closed its case, he did pray for typed proceedings and filed typed submissions. The submissions are fairly extensive and discuss not only the evidence of key witnesses at the trial but also their statements to police.

14. For instance, at page 2 the submissions made at the trial, reference is made to failure by the **PW2** to record a description of the assailants in the statement made by him allegedly on 17<sup>th</sup> May, 2014 at 5.00pm, and also the alleged absence of a first report by the witness containing descriptions.

15. The Appellant’s claim to not have been supplied with identification parade forms is contradicted by the same submissions wherein he stated *inter alia* that:-

**“it is my submission that the three Accused persons have different height, complexion and physique, the question remains who did this eight members of parade of same height and physique resemble” (please refer to the names and addresses) of the parade members to the parade forms to prove my argument right..... May I submit that the police are people of record. It is evidence that: OB55:16:5:014 clearly indicates that I was arrested by the roadside by members of public clearly deleting the evidence of PW8.” (sic)**

16. Finally in the last page of the trial submissions refers to a statement recorded by **PW11** on 17<sup>th</sup> May, 2014. These submissions reveal clearly that the Appellant had in his possession the witness statements and evidentiary material during the trial. Moreover, in his defence the Appellant referred to the **OB No. 55 of 16<sup>th</sup> May, 2014**, produced the inventory compiled on his arrest on 16<sup>th</sup> May, 2014 as an exhibit. And once more, he referred to the police statement by **PW2** and asked to have that by **PW1** produced as an exhibit. Nowhere did the Appellant raise the complaint that he did not have the witness statements or evidential material in the course of the trial, which took almost two years.

17. There is no support for his present complaint therefore, and his allegations are an afterthought. The amended grounds of appeal are

afterthought, based on a superficial and selective reading of the proceedings by the Appellant as an attempt to challenge an otherwise lawful and regular trial, during which he had in his possession all witness statements and relevant documentary material. Thus his written submissions at the close of the prosecution case and cross-examination of witnesses and own defence. That said, this court is obligated to look at the record of the trial and to draw its own conclusions on the evidence tendered.

18. The prosecution case through twelve witnesses was as follows. **David Kahora Wainaina (PW1)** is a businessman operating in Naivasha. In the material period, he ran a transport business, hiring out his lorry **KBN 175N Mitsubishi** to customers requiring to ferry goods. He had employed a driver **Isaac Muigai Karanja (PW2)** to drive his lorry in the material period. On 15<sup>th</sup> May, 2014 while on duty at Longonot area, **PW2** was approached by a man who claimed that he wanted some sand transported to a site near High Peak Junior Academy in Naivasha. After they agreed on the charges, **PW2** continued with his duties.

19. On the next morning the customer called again and **PW2** having been authorized by **PW1** proceeded to procure the services of a turn boy named **Solomon Mwangi Wambui** to assist him in the job. **PW2** was directed by the customer that a contact who was duly described would meet him near High Peak Academy. Thus, having loaded sand on the lorry, **PW2** and the loader proceeded to the rendezvous. The lookout turned out to be the Appellant who led **PW2** to the alleged customer's plot. At the site were three people and a saloon vehicle with doors open.

20. As the sand was being offloaded, **PW2** conversed with the men. The purported customer pretended to pay Shs 20,000/= to **PW2** for two lorries of sand, and as **PW2** collected an extra Shs 200/= from one of the other men, he was struck on the neck and pushed into the saloon vehicle where he was threatened with death if he did not co-operate. He was frisked and robbed of Shs 28,000/=, a **Techno** Mobile phone and the lorry ignition keys. A hard pointed object that felt like a pistol was thrust in **PW2's** back and he could also see a knife.

21. Soon, the turn boy was brought to the vehicle with his face covered. The two men were forced to drink some substance which, according to the Government analyst, **Joyce Wairimu Njoya (PW7)** was ethanol. The turn boy was also robbed of his **Intel** phone and Shs 5,000/=. The robbers then took off with the lorry between 11 and noon leaving their victims at the site. Before passing out **PW2** managed to crawl to a nearby plot.

22. Workers at a nearby site who met him sought the help of a good **Samarian Peter Wainaina Kimani**, a teacher at Rubiri Primary School (**PW3**) who in turn called **PW1** and took the unconscious driver and turn boy to the police station, and then to the hospital, where they were admitted.

23. Meanwhile, **PW1** after reporting to police, also contacted Stoick Company Limited, a car tracking company which had fitted a tracking device on the lorry. Moses **Omonde Dede (PW6)** of the tracking company traced the movement of the vehicle from Naivasha through Longonot to Narok and onto Narok/Njoro road. He relayed the information to the flying squad officer on the case.

24. As the vehicle approached Mau Narok area, **CPL Kasavuli** of Flying Squad Nakuru (**PW8**) and others followed it closely and communicated with officers at **Mauche** road block to intercept the vehicle. When the vehicle was stopped the three occupants who included the Appellant were ordered out. A quick search on them yielded some exhibits including the **Intel** phone taken from the turn boy, a wallet, the identity card of the Appellant and a little cash.

25. Officers from Naivasha Flying Squad received the vehicle which **PW1** positively identified as his. The turn boy succumbed to his injuries a day later. According to **Dr. Ngulungu (PW12)** the post mortem exam revealed injuries to the wrist and extensive head bruises with contusion. His opinion was that death was due to the blunt trauma head injuries even while confirming the ingestion of a poisonous substance. On recovery and discharge from hospital **PW2** identified the Appellant in an identification parade.

26. In his defence, the Appellant gave an unsworn statement. To the effect that he was a trader at Nakuru Municipal Market. That on 16<sup>th</sup> May, 2014 he had travelled on business to Njoro. While there, gun shots rent the air. Everyone scrambled for safety but he was arrested by members of public and taken back to a road block where he was handed over to police. He relied on the inventory prepared by police regarding items found on him stating that no stolen items were found on him on arrest.

27. That from Nakuru he was driven to Naivasha by **PW1** and that later **PW2** recorded a statement on 17<sup>th</sup> May, 2014 after **PW1** had already seen him. He faulted the identification parade conducted on 18<sup>th</sup> May, 2014 before he could change his clothes. He produced a statement by **PW1** and the inventory dated 16<sup>th</sup> May, 2014 as he denied complicity in the offence.

28. From the foregoing, there was hardly any dispute that on 16<sup>th</sup> May, 2014, a false customer had lured **PW2** to deliver sand to a deserted plot within Naivashas town. The plot was owned by a slum project per the evidence of pastor **Christopher Kingori Mwangi (PW5)** who produced evidence on ownership of the plot by KCC Slum Project. That it turned out that the supposed customer was accompanied by others.

29. That while sand was being offloaded from the lorry owned by **PW1**, the group of four men attacked **PW2** and the loader, the latter who subsequently died from his injuries. That the victims were forced to consume a toxic substance after being robbed of their phones, cash and the lorry keys, before driving the lorry off. There is hardly any dispute that the stolen lorry was recovered on the same day in the evening at Mau –Narok-Njoro area. That was the same date of the Appellant's arrest. The issue for determination is whether the Appellant participated in the robbery described by **PW2**.

30. Two pieces of evidence connected the Appellant with the offence, namely, his presence, and participation in the offence through identification evidence by **PW2** and his presence in and possession of the stolen lorry and other items at the time of arrest at Narok/Njoro area.

31. On the former evidence, **PW2** testified that the robbery incident occurred in the morning before midday. That having had conversations

with the false customer, he loaded sand and proceeded to the rendezvous where he picked up the Appellant who directed him to drive to the site where the sand was to be offloaded.

32. **PW2** stated:

**“The customer called me and told me that person (guide) would be wearing a white shirt; red cap and blue trouser. We loaded sand and proceeded on since I knew High Peak. I pulled off and saw someone approaching. He told me he had been sent by our customer. He boarded and we proceeded to the “customers” plot. The person was leading me. We found three people.....I never bothered with them but (noted) motor vehicle was KBV. I alighted for turn boy to offload. I found the customer we had spoken the previous day.”**

33. **PW2** told the court that upon discharge from hospital and further treatment at Kijabe hospital he participated in an identification parade conducted by **CI Nzioka Sungu (PW4)**. **PW2** testified concerning the identification that:-

**“Later I was told to go and identify suspects at Naivasha Police Station. At the station I positively identified the three robbers among them is accused in court (Appellant). He is the person I found at High Peak junction and led us to the scene. He was helping with offloadign. It was during the day time and I saw him very well. When we were bundled in the car he came and joined other robbers in the small car ..... The Accused person in court was not known to me prior to this.”**

34. In cross-examination by the Appellant **PW2** stated:-

**“I picked you at High Peak junction. I saw you clearly. You sat at the co-driver’s extreme seat. Mwangi (deceased) sat between me and you. I never noted any unique physical mark on you. This is not a mistaken identity..... I was hit on the neck and thrown inside car. You brought Mwangi (deceased) in the car beating him with the shovel you were using to offload sand.” (sic)**

35. **PW4** outlined the manner in which he arranged the identification parade and measures taken to ensure that the witnesses had no contact with the suspect prior to the parade. He said he gave the Appellant the option to choose his place at the parade and to change clothes and shoes if he so desired. That the Appellant chose the position between members number 2 and 3 and he had raised no objection upon being identified. He denied that he pushed the Appellant back during the identification as a hint to **PW2**.

36. Reviewing the evidence by **PW4** and **PW2**, there is no reason to fault the manner in which the identification parade was conducted. The Appellant’s assertion that **PW1** had given **PW2** a description of the Appellant prior to the parade was not made to **PW1** or **PW2**. While **PW2** confirmed in cross-examination to have first seen the Appellant at Nakuru Police Station the Appellant did not suggest to **PW1** that he drove the Appellant to Naivasha. Besides, there were three arrested suspects and no amount of coaching by **PW1** would have superseded **PW2**’s own testimony as **PW1** himself was not at the robbery scene.

37. In his evidence, **PW2** clearly identified the interaction he had with the Appellant and the role he played during the robbery. Surely, **PW2** did not need the help of **PW1** to recall what happened. In my considered view, **PW2** having had a conversation with the Appellant at the rendezvous, taken him on board his cabin and travelled to the site where he remained in his view to the end, had ample opportunity to observe the Appellant. His narrative in the trial leaves no doubt about that.

38. The identification parade was carried out two days since the offence when **PW2**’s memory was fresh. He pointed out the Appellant confirming that he had indeed observed him well. The fact that the Occurrence Book report did not contain a full description of the Appellant does not detract from his evidence, the report was made while **PW2** was unconscious admitted in hospital. His statement to police makes a description of the robbers.

39. Regarding the police statement by **PW2** which contains a description of the Appellant, the Appellant contends that it was aided by **PW1**. As observed, that is incredible as **PW1** could not also have known what role the Appellant played as laid out by the witness as he did not witness the robbery. In my considered view, the identification evidence is unassailable and firmly placed the Appellant at the scene of the robbery. Besides, the identification evidence by **PW2** is corroborated by the evidence of recent possession which I now turn to.

40. Regarding the evidence of possession of stolen lorry, positively identified by **PW1** as his, there is uncontradicted evidence by **PW1**, **PW6** and **PW8** that from 3.30pm the motor vehicle was tracked proceeding on the Longonot Narok – Narok Njoro route as it was in motion. The car tracking data produced as Exhibit 10 (a) and (b) in court confirms this evidence. **PW8** and his colleagues followed the vehicle through reconnaissance with **PW6**. Eventually the police physically spotted it proceeding towards **Mauche**. The vehicle was eventually intercepted at **Mauche** road block and out came the occupants who included the Appellant.

41. **PW8** stated in his evidence that:-

**“We called officers from Mauche road block to intercept motor vehicle we were following by 100metres. We stopped and ordered three occupants to alight. The driver was tall and other two were medium height. Only one occupant is in court. We ordered them to surrender..... We searched them quickly. From accused in court we recovered brown wallet ..... inside it there was Kshs 300/=.....identity card number 21386074 in the name of Benson Wachira Theuri.....We arrested suspects at 6.30pm motor vehicle was moving at a low speed.” (sic)**

42. During cross-examination, **PW8** denied that the Appellant was beside the road at the road block, on arrest, stating:

**“I found you inside stolen motor vehicle it is the only thing we recovered. I recovered a mobile phone from you as well..... I**

**never asked you whether you had been given a lift at any moment.”**

43. The trial magistrate believed the evidence by **PW8** and observed that the Appellant was positively identified as one of the occupants of the undisputedly recently stolen property, in this case, the lorry wherein an **Intel** phone robbed off the deceased loader was also found. The learned magistrate dismissed the Appellant’s defence that he was arrested by members of public while going about his own lawful business and handed over to police at the **Mauche** road block.

44. Having reviewed the evidence touching on this aspect, I cannot find any reason to fault the findings of the learned magistrate. Why would a crowd single out the Appellant and for no seeming cause arrest and him over to police? The Appellant’s disclaimer of innocence in connection with his arrest is displaced totally by **PW2**’s identification evidence regarding the robbery. Both pieces of evidence must be considered together.

45. The court properly directed its mind to the fact of the possession of stolen property. This was a proper case for the application of the doctrine of possession of recently stolen property as stated in **Simon Kangethe -Vs- Republic [2014] eKLR** that:-

**“Section 111 of the Evidence Act provides that: existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him...”**

**In Ogembo -Versus- Republic, [2003]1 EA, it was held that:**

**“For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen.”**

Recently, this Court in **Moses Maiku Wepukhulu & PAUL NAMBUYE NABWERA -Versus- Republic C.R.A NO. 278 OF 2005 (Koome, Mwera & Otieno-Odek, J.J.A.)** quoted with the approval what constitutes the doctrine of recent possession in the case of **Malingi -Versus- Republic, [1989] KLR 225:**

**“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. That the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was (from the nature of the item and the circumstances of the case) recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items.” [Emphasis added]**

**The doctrine is a rebuttable presumption of fact. Accordingly, the accused is called upon to offer an explanation in rebuttal, which if he fails to do, an inference is drawn, that he either stole or was a guilty receiver.”**

46. Obviously the duty of proving guilt lay with prosecution and does not shift. However, with regard to the possession of recently stolen goods, the rebuttable presumption raised through the evidence by **PW8** called for an explanation by the Appellant. His explanation was found incapable of belief by the trial court, and this court concurs with that finding. It cannot be a coincidence therefore that the **Intel** phone stolen from the deceased was found in that lorry. Whether a passenger or driver the Appellant’s presence in the lorry in the circumstances of this case put him in constructive possession of the stolen lorry and the deceased’s **Intel** phone.

47. Thus the Appellant, through evidence of identification at the robbery scene, which is also strongly corroborated by the evidence of possession of stolen property was shown not to be an innocent bystander mistakenly arrested by police. Rather he participated in the robbery, playing a key role during the robbery and subsequently spirited away the stolen lorry owned by **PW1** and being found therein on arrest, the same day. In the circumstances, this court finds no merit in the appeal by the Appellant. The appeal is accordingly dismissed.

Delivered and signed at Naivasha, this 3<sup>rd</sup> day of **May, 2018.**

In the presence of:-

Mr. Koima for the DPP

Appellant – present

C/C – Japheth and Kamau

**C. MEOLI**

**JUDGE**