REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL APPEAL NO. 5 OF 2016

(Being an Appeal from Original Conviction and Sentence in

Criminal Case No. 423 of 2014 of the Chief Magistrate's Court

at Naivasha – P. Gesora CM)

EVANS NJOROGE MBOGO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **Evans Njoroge Mbogo** was charged with Robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. In that on the 19th day of February, 2014 at Ngondi trading centre in Naivasha Sub-County within Nakuru County, jointly with others not before court, while armed with dangerous weapons to wit pangas and rungu, he robbed **Paul Maina Mbugua** of cash Kshs 190/= and one mobile phone make **Nokia** valued at Kshs 4,000/= all to the total value of Kshs 4,190/= and during the time of such robbery, used actual violence to the said **Paul Maina Mbugua**.

2. In the second count, he was charged with Assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars stated that on the 19th day of February, 2014 at Ngondi trading centre in Naivasha Sub-County within Nakuru County, jointly with another not before court, he assaulted **Stephen Mbugua Kamau** thereby occasioning him actual bodily harm.

3. Following a full trial, the Appellant was convicted on both counts and sentenced to suffer death in respect of the first count. Sentencing in respect of the second count was held in abeyance. On the day set for the hearing of his appeal, the Appellant filed amended grounds of appeal. The six grounds of appeal primarily target the identification evidence and evidence of the Appellant's recent possession of stolen goods.

4. The Appellant's submissions start off by citing the decision in **Joseph Ngumbao Nzaro -Versus- Republic [1991] KAR 212** on the question of identification. The Appellant highlights the difficult circumstances of the offence and the complainant's failure to name their assailant to the first persons to appear at the robbery scene.

5. In his view, the voice and visual identification by **PW1** and **PW2** is not free from error. The Appellant also tore into the evidence of **PW3** that the Appellant was one of the persons who attempted to withdraw cash using a Nokia phone 1280 whose sim card was registered in the name of **Paul Maina Mbugua**. He argued that the record in respect of transaction being electronic data was irregularly produced at the trial by **PW3** in contravention of Section 106 of the Evidence Act.

6. He has also challenged evidence in connection with **PW5's** purchase of the stolen phone and highlighted alleged discrepancies in evidence by **PW3** and **PW6** in that regard. And that **PW1** did not positively identify the recovered hand set as his stolen property. And besides, that the Appellant was not connected to the recovered phone, stating that the witness **PW5** was himself a suspect.

7. In support of the 4th ground, the Appellant faulted the identification parade in which **PW5** picked him out, asserting that no prior description of the suspect had been given to police by the witnesses and neither did **PW1** and **PW2**. He relied on the case of **Francis Kariuki Njiru & 7 Others -Vs- Republic [2001] eKLR**. He complained further that his defence was not given adequate consideration.

8. Mr. Koima for the DPP opposed the appeal defending the conviction. Mr. Koima reiterated the evidence by **PW1** and **PW2** stating that this was a case of recognition. He also highlighted the rest of the evidence gathered in the course of the investigations leading to the

Appellant's arrest.

9. As has been severally held by superior courts, the first appellate court is obligated to review the evidence of the trial and to draw its own conclusions. In **Okeno –Vs- Republic [1972] EA 32** the Court of Appeal stated in this regard that:-

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya -Vs- R [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters -Vs- Sunday Post [1958] EA 424."**

10. The prosecution called ten witnesses during the trial. The prosecution case was that **Paul Maina Mbugua (PW1)** resided at Ngondi, at the same residence as his father **Stephen Mbugua Kamau (PW2)**. They are farmers. On the night of 19th February 2014, **PW1** was headed home from the market when two men accosted him suddenly.

11. They threw him down and robbed him of a phone **Nokia 1280**, a sum of Shs 190/= and forced him to reveal his Mpesa account PIN. His Mpesa account had Shs 5,900/= at the time. They trussed his hands and legs and gagged his mouth with a piece of cloth. It was moonlit night and **PW1** recognised the Appellant as one of the robbers who wielded a panga and metal bar. He struck **PW1** severally.

12. After the robbers left him **PW1** managed to untie his feet and proceeded to his home. His father **PW2** freed **PW1's** hands and set out with him to the market to block the MPESA account. But the two robbers struck again, this time cutting **PW1** and **PW2** with the panga. They cried out for help. Members of public came to their rescue and they took the two complainants to hospital after making a report to the police.

13. An hour or so, later on the same night, two men approached an MPESA agent, **David Kinuthia Gitome (PW3)** at his shop at Ngondi. They had a **Nokia 1280** handset and sought to withdraw Kshs 5,800/= in the name of **Paul Maina Mbugua**. However the Appellant was unable to tender the identity card in the name and **PW3** refused to give him the cash. After an argument during which the Appellant demanded payment he left promising to return for the cash with his identity card.

14. Instead on the next morning, the witness received a call through the phone of a colleague, **Peter Nyutu Kimani (PW4)**. He realized it was the same night customer. He demanded the money threatening **PW3** with dire consequences if he did not pay up. Alarmed, **PW3** reported to police at Ngondi Patrol base. **PC Isaack Mwanja (PW6)** had already been informed about the attack on **PW1** and **PW2** and on checking the telephone number involved in MPESA transaction on **PW3**'s record noted that the same matched with that on the handset reported stolen by **PW1**.

15. On the next day 21st at 5.00pm, the Appellant approached **John Njohu (PW5)** a guard based at Maai Mahiu seeking to sell the Nokia 1280 handset. They settled on a price of Shs 700/= but subsequently while **PW5** was using the phone which was at the time being tracked by police, he was arrested. Upon arrest he explained how he obtained the phone. Meanwhile, through an informer **CPL Julius Rop (PW7)** of Karagita Police Station traced and arrested the Appellant on 28th February, 2014 within Longonot area. On 6th March, 2014 **CI Nzioka Singi (PW10)** mounted an identification parade in which the Appellant was identified by **PW5**. The Appellant was subsequently charged.

16. Placed on his defence the Appellant elected to make an unsworn statement. To the effect that he hails from Ngondi and worked as a turn boy. That while at Longonot state on 28th February, 2014 he was arrested by police officers who took Shs 30,000/= from his pocket. That the investigating officer in this case later took him to Naivasha Police Station and referring to a previous encounter with him demanded Shs 50,000/= to release him. He refused to part with the cash. He said he was known to the complainant but was surprised that he did not name him.

17. There is no dispute that the complainants herein are, like Appellant, residents of Ngondi. There was hardly any dispute that PW1 was robbed, on the material night, and both he and his father assaulted as they tried to go to the local centre after the initial robbery incident to block the MPESA account of **PW1**. The two incidents occurred at night. There seemed to be little dispute that a **Nokia 1280** phone and cash had been taken from **PW1** during the robbery.

18. The key issue in the case was the identity of the persons who robbed and assaulted **PW1** and his father. The injuries sustained by **PW1** and **PW2** are documented in the P3 forms produced by **Tabitha Ndungu (PW8)**, a clinical officer at Naivasha District Hospital, where the two victims were admitted for treatment subsequent to the robbery.

19. The trial magistrate in his judgment analysed two key pieces of evidence before returning a verdict of guilt. These are the identification evidence by **PW1**, the evidence of the Appellant's possessions of the first complainant's phone on the same night of the robbery at **PW3's** shop, and subsequently while selling the same to **PW5.**

20. Regarding **PW3** the trial magistrate failed to note that no identification parade was held, and yet, **PW3** said the Appellant was not previously known to him. Secondly, that the identification parade held in connection with **PW5** was superfluous as **PW5** stated that he was familiar with the Appellant as he "**used to see him within (Maai Mahiu) town**."

21. The Appellant has attacked the identification evidence by **PW1** and **PW2** on the basis that neither of them named him in their "first reports". It is not clear what first reports are referred to as the Occurrence Book in this case is not a first report (See **Tekerali s/o Korongozi & 4 Others -Vs- Republic [1952] EA 259**).

22. That a report was made to police on the night of the offence is not in dispute. The witnesses statements are ideally the first report in this case, as both **PW1** and **PW2** having sustained severe injuries were immediately hospitalized and remained in hospital for several days. However, their statements referred to the Appellant by the name **"Evans"** as emerged during their cross-examination.

23. There is no dispute that the Appellant lived in the same village as the complainants and was known to them. It is true however that as exhorted in many authorities, courts have to examine closely evidence of identification in difficult circumstances to assure themselves that the identification was not erroneous.

24. In **Joseph Muchangi Nyaga & Another -Vs- Republic (2013) eKLR** the court stated in this regard that:-

> **"Evidence of visual identification should always be approached with great care and caution (See Waithaka Chege versus Republic (1979) (KLR 217). Greater care should be exercised where the conditions for favourable identification are poor. (Gikonyo Karume and Another Versus Republic (1980) KLR 23) ……before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of and the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him……"**

25. No doubt the attack on **PW1** happened at night and suddenly. However **PW1** maintained that there was bright moonlight enabling him to see the Appellant who also demanded to be given the PIN in respect of the said complainant's MPESA account. Under cross-examination **PW1** remained unshaken but was truthful to admit that when he got home he did not name the Appellant to his father, **PW2**.

26. Not at all surprising because the witness was trussed on his hands and although he explained that robbers had stolen from him, he was very keen to proceed to the local market centre immediately to block his MPESA account which had a sum of Shs 5,900/=. But even before that could happen, the two were again accosted and attacked viciously by the selfsame duo.

27. It was the evidence by **PW2** that he recognized the Appellant's voice when he uttered words to the effect that:-

> **"*tumekata mzee*" (we have slashed the old man).**

PW2 said he had known the Appellant since childhood and had given him odd jobs on his farm. He said that he had not only known Appellant for a long time, but also knew the Appellants parents. The Appellant admitted **PW1** was known to him.

28. Upon reviewing evidence by **PW1** the trial court observed that:-

> **"PW1 stated that the moon lit the area and was able to see and recognize the accused herein. It should be borne in mind that the stated accused hails from their locality and was well known to him. He stated that when making his report with the police he listed his name as Evans. It is my holding that to have mentioned that name, PW1 knew who he was referring to. Having known Accused for about 10 years he was seized with the knowledge to recognize him. The presence of moonlight further created a conducive environment to afford positive identification."**

29. On my own part reviewing the identification evidence, particularly by **PW1** I have come to the same conclusion. As stated in **Anjononi – Vs- Republic [1980] KLR 59:-**

> **"……recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because, it depends upon the personal knowledge of the assailants in some form or other".**

30. Beyond visual recognition is evidence by **PW3,** matched by a contemporaneous record (Transaction register Exhibit 4) showing that an hour after the robbery two men approached **PW3** seeking to withdraw money from the MPESA account of the complainant, but that **PW3** refused to pay them when they failed to produce a matching identity card.

31. **PW3** clearly stated that he did not know the man who wanted to withdraw Shs 5,800/= from **PW1's** MPESA account but had already made a record of the withdrawal. Contrary to the Appellant's submission on this appeal **Exhibit 4** is not an electronic record at all, but rather a manual transaction sheet confirming the attempted transaction.

32. The witness (**PW3**) however clearly stated that a **Nokia 1280** handset was in the possession of the customer. Unfortunately, **PW3** who did know the Appellant previously was not called to identify him at an identification parade. Thus, evidence in respect of identification of the Appellant is dock identification and worthless. (See **Ajode -Vs- Republic [2004] 2 KLR 81**).

33. However, his oral evidence in respect of the attempted transaction matches with the Transaction Register which was properly produce as Exhibit 4 during the trial. Further the witness, apprehensive after a phone conversation with the alleged customer, reported to **PW6** and gave the telephone number used call him viz **0715 654271** which was tracked by police hence the arrest of **PW5** in possession of the handset identified as the property of **PW1** stolen during the robbery.

34. **PW1's** identification of the phone was adequate: he identified the actual set. Ditto **PW5**. The fact that **PW5** referred in one instance to a **Nokia 1200** handset or that **PW1** did not tender receipts does not diminish the witnesses' evidence on identification. The set was in court and was a **Nokia 1280** and **PW1**, **PW3** and **PW5** positively identified, and at no point did the Appellant claim it to be his property.

35. Moreover, the Appellant was known to **PW5** who had previously seen him in Maai Mahiu. **PW5** explained the circumstances in which

he purchased the phone form the Appellant, two days since the robbery on **PW1.** He had no relationship with the other witnesses nor any reason to make false allegations against the Appellant. Besides, it seems that **PW5** was arrested a week or so after the phone sale.

36. The transactions between **PW5** and the Appellant happened during day time and the two men haggled over the price before settling on Shs 700/=, and the Appellant explaining that he needed the cash to travel to Narok. It was a case of recognition as **PW5** said he had previously seen the Appellant in Maai Mahiu town. **PW5** may have been in possession of a stolen phone on arrest, but the circumstances of the possession indicate no guilty knowledge on his part. Mobile phone sets are items which are freely sold between parties without any formal agreement.

37. In my own view **PW5** was a witness of truth as indicated by the fact that when summoned by police he took himself to the police station and gave a ready explanation for possession of the phone. He was not shaken during cross-examination. The evidence of **PW5** was believed by the trial court. The court believed he was a truthful witness and found ample corroboration of his evidence. That finding cannot be faulted. (See **Kinyua -Vs- Republic [2002]1 KLR 256**).

38. As I indicated earlier, there was no need for an identification parade in respect of **PW5** as he was acquainted with the Appellant prior to the transaction. Thus, taking in sum the evidence by **PW1, PW2, PW3** and **PW5** the trial court was satisfied of the Appellant's guilt. The court's findings in this regard cannot be faulted as the evidence by **PW1**, taken together with the possession evidence by **PW3** and **PW5** was overwhelming.

39. The Appellant's defence was a denial suggesting that he was arrested for no fault and police took his money and demanded more from him before charging him. Thus the defence offered no explanation for his possession of the complainant's handset one day after the offence. His defence was properly dismissed the case made against him was overwhelming as to his guilt.

40. In the case **David Nzongo –Vs- Republic [2010] eKLR** the court discussed the application of the doctrine of recent possession as follows:-

> **"There is a rebuttable presumption of fact under Section 119 of the Evidence Act, Cap 80, Laws Kenya that the appellant was either the robber or a guilty receiver, unless he offers a reasonable explanation as to his possession of suspected stolen items.**

In the case of Francis Kariuki Thuku & 2 others -Vs- Republic [2010] eKLR this Court held that:-

> ***"Concerning the application of the doctrine of recent possession to the facts in the case, we are of the view that the appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of R. V. Loughin 35 Cr. Appl. 269 by the Lord Chief Justice of England and this Court's own decision of Samuel Munene Matu V. R. Criminal Appeal No. 108 of 2003 at Nyeri demonstrates that the doctrine was properly applied. The recovery of the items in the case before us was within* 7 days *whereas in the MATU case (supra) a period of* 20 days *was held to be recent. We accordingly uphold the superior court's view of the law on the point. In this regard we would re- echo the decision of this Court in the case of Hassan -vs- Republic [2005] 2 KLR 11 where as regards recently stolen goods it delivered itself thus:-***

> ***"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver." (*Emphasis supplied)**

41. Based on the evidence by **PW1, PW2, PW3** and **PW5**, the Appellant must be the person who one hour after the robbery attempted to withdraw money from **PW1's** MPESA account, and having failed, retained the stolen handset for another day before selling it to **PW5**. He is also one of the robbers who assaulted and robbed **PW1** and soon after assaulted both after the initial attack injuring both.

42. The Appellant was convicted on strong and credible evidence. His appeal to this court has no merit and must fail in its entirety. I accordingly dismiss the appeal.

Delivered and signed at Naivasha, this **3rd** day of **May, 2018.**

In the presence of:-

Mr. Koima for the DPP

Appellant – present

C/C – Japheth and Kamau

C. MEOLI

JUDGE