



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 13 OF 2017

OLIVER KIKUYU NGONGESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Criminal Case 17 of 2015 of Hon. Onginjo. CM delivered by Hon. E. Juma, SRM on 8<sup>th</sup> December, 2016)*

**JUDGMENT**

**Background.**

1. Oliver Kikuyu Nyongesa, hereafter the Appellant, was charged in two counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the 1<sup>st</sup> count were that on 4<sup>th</sup> October, 2014 along Cemetary Road in Nairobi within Nairobi County, jointly with others not before the court, while armed with dangerous weapons namely AK47 rifle, pistols and a panga robbed Everlyne Kemunto Moige of two mobile phones make Black Berry serial number 354256042948620 and Samsung Duos serial number 359906053715590, a jacket, a cap and cash Kshs. 3,000/- all valued at Kshs. 133,000/- and at the time of such robbery used actual violence to the said Everlyne Kemunto Moige.
2. The particulars of the 2<sup>nd</sup> count were that on 4<sup>th</sup> October, 2014 along Cemetary Road in Nairobi within Nairobi County, jointly with others not before the court, while armed with dangerous weapons namely AK47 rifle, pistols and a panga robbed Alfred Ronny Muthomi of his wedding ring, national identity card, business cards and cash Kshs. 2,500/- all valued at Kshs. 38,000/- and at the time of such robbery threatened to use actual violence to the said Alfred Ronny Muthomi.
3. In the an alternative he was charged with the offence of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code in that on 5<sup>th</sup> October, 2014 at Lenana Village in Nairobi within Nairobi County, otherwise than in the course of robbery dishonestly handled a mobile phone make Black Berry serial number 354256042948620 knowing or having reason to believe it to be robbed property.
4. The Appellant was arraigned in court and at the conclusion of the trial found guilty in the two main counts. He was sentenced to suffer death in both counts but the sentence in the 2<sup>nd</sup> count was held in abeyance. He was dissatisfied with the decision against which he has lodged the present appeal. He set out his grounds of appeal in a supplementary memorandum of appeal filed on 5<sup>th</sup> March, 2018. They were that he was not properly identified, that the doctrine of recent possession was not properly applied, that investigations were not properly conducted, that his arraignment in court was selective for failure to charge the person found in possession of the phone and that the evidence of PW3 was not corroborated.

**Evidence.**

5. **PW1**, Everlyne Kemunto Moige, recalled that on 4<sup>th</sup> October, 2014 at around 6:30 p.m. she was in the company of her husband and child driving on the way from the show ground along Cemetery road. They stopped the vehicle so that the child could relieve himself. Her husband and child proceeded to a nearby bush and she also alighted from the car. She then noticed four men coming from the bush where her husband and child had gone and she instinctively tried to get back to the vehicle but as she got in one of the men caught her by the neck while a second one entered the passenger side of the vehicle and started ransacking it. When she turned around she saw her husband on his knees being guarded by two men. She co-operated and they stole her phones, ATM card and money she had in her jacket. Thereafter, her husband drove back to the showground where they reported the matter. On 31<sup>st</sup> December, 2014 they were called to Kilimani Police Station and informed that her Blackberry Bold phone IMEI number 354256042948620 had been recovered. She identified the phone and recorded a statement in which she indicated she could identify the suspect who strangled her. She was called again in January, 2015 to the police station

where she took part in an identification parade where she identified the Appellant as the one who strangled her and demanded money from her. Her husband, **PW2, Alfred Ronny Muthomi** corroborated her evidence adding that he identified the Appellant as the one who strangled PW1. He was also later called to take part in an identification parade that had around 20 members where he positively identified the Appellant.

6. **PW3**, Ali Saliam Mutua recalled that in October, 2014 he was approached by the Appellant who informed him that he had three phones he wished to sell to settle debts. He was interested in the Blackberry phone and they settled on a price of Kshs. 2,500/- which he paid. On 30<sup>th</sup> December, 2014 he was confronted by a police officer who demanded to see the mobile phone after which he as informed it was a stolen property. He was escorted to Kilimani Police Station where he explained how he acquired the phone.

7. **PW4, C.I. Bernard Kenyatta** carried out an identification parade on 4<sup>th</sup> January, 2015 in which PW1 and PW2 positively identified the Appellant. The Appellant was satisfied with its conduct acknowledging the same in the parade form. **PW5, CPL Evans Karanja** investigated the matter which included obtaining the IMEI numbers of the stolen mobile phones. He later got information that the stolen Blackberry mobile had been located in the Lang'ata area, during the day, and Racecourse at night. The phone was being used by PW3 and on 30<sup>th</sup> October, 2014 they proceeded to Langata where they recovered the phone. PW3 thereafter led to the arrest of the Appellant. An identification parade was conducted where he was positively identified.

8. In his sworn defence, the Appellant, **DW1**, stated that he was a carpenter. He recalled that on 3<sup>rd</sup> January, 2015 he left his place of work at midday and headed home where he visited a local beer house. That after about an hour everybody was asked to get out of the house and enter a vehicle parked outside. He was then taken to Kilimani Police Station and finally on Monday he was brought to court where he was charged with the present offences. In cross examination, he stated that he did casual work in Isinya and that he did not understand the process that took place at Kilimani Police Station. Further, that the person who claimed he sold him a phone had no proof of the sale.

### **Determination.**

9. After considering the record of appeal and the submissions by the respective parties this court finds that the following issues arise for determination:

- i. *Whether the doctrine of recent of possession was properly applied.*
- ii. *Whether the identification parade was properly conducted.*
- iii. *Whether the offences were proved beyond reasonable doubt.*

### **Whether the doctrine of recent of possession was properly applied.**

10. There is no doubt that the Appellant was convicted purely on account that he sold the Blackberry mobile phone to PW3. The investigators rightly conducted an identification parade so as to ascertain that indeed that person who sold the phone PW3 was one of the robbers. This behooves the court to interrogate the evidence of identification.

### **Identification.**

11. Ms. Omwakwe, for the Appellant, submitted that there were contradictions apparent in the evidence of PW1, PW3 and PW4 regarding the identification parade. She submitted that no description of the assailants was given in the initial report and this raised doubt with regards to the Appellant's arrest and the subsequent parade. That there were also contradictions on the complexion of the Appellant. That when the Appellant was arrested it was on the basis of the evidence of PW3 who did not give a description of the Appellant.

12. The court finds that the contradiction between the evidence of PW1 and the parade officer was not material as the discrepancy in numbers was negligible, that is; between the ten persons in the parade and his evidence that they were ten.

13. However, with regards to the testimony of PW2, the discrepancy amounted to more than double the members of the parade which was a substantial variance. Further, the court noted that the witness could not also recall the position of the Appellant in the parade. This raises doubts over PW2's participation in the parade.

14. The next contraction that was raised was with regards to the evidence of PW1 and PW2 about the Appellant's complexion. The evidence of PW1, in cross examination was that the Appellant was the robber of light complexion while the one who strangled her was dark. She then contradicted herself by stating that the Appellant was the one who strangled her. In re-examination, she clarified what she meant when she said that the person who strangled her was of dark complexion by testifying that she meant that the person was either brown or light. PW2 testified that he identified the Appellant by his skin colour as he was brown. It is clear that contradictions were evident in this respect, more particularly PW1 having testified that the Appellant is the man who strangled her. Her contradiction in cross examination therefore had the effect of calling into question her recollection of who robbed her.

15. Ms. Atina under this head submitted that complexion was subjective and the witnesses had simply testified as to what they had observed during the incident. The contention can clearly not stand as the description given by a witness is based on universal values of what amounts to light or dark complexion. To find otherwise would be contrary to society norms and would cause chaos in how body complexion should be described. In my view, the contradictions called into question the evidence of the complainants regarding their ability to identify the Appellant at the *locus in quo*. This is particularly when regard is paid to the failure to indicate a description of their assailants when they made their initial report. I therefore find that doubts abounds as to whether the Appellant was linked to the offence. I shall accord him this benefit of doubt.

***Whether the offences were proved beyond reasonable doubt.***

16. As such, even though the elements of the offence of robbery with violence under Section 296(2) were proved, there lacks sufficient evidence that the Appellant was involved in the robbery. I accordingly allow the appeal. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

**Dated and Delivered at Nairobi this 22<sup>nd</sup> day of November, 2018.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *M/s Omwakwe Appellant.*
2. *M/s Atina for the Respondent.*