



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CRIMINAL APPEAL NO. 2 OF 2008**

**CHARLES KIBURA MWANGI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(Appeal from the original conviction and sentence in Criminal Case No. 661 of 2005 of the Chief Magistrate's court Mombasa)***

**JUDGMENT**

The Appellant, CHARLES KIBURA MWANGI was charged with robbery with violence contrary to section 296(2) of the Penal code.

The particulars were that;

***“On the night of 18<sup>th</sup> and 19<sup>th</sup> day of February,2005 at Kaa Chonjo area within Mombasa District of the Coast Province, the appellant while armed with a dangerous weapon, namely a panga, robbed FRANSISCA MWATHI JOHN of her white polythene paper bag containing one Nokia 3310 mobile phone with Safaricom line 0721720747, National identity card Particulars Withheld , bunch of keys, cosmetics, one black bag, two blouses, one dress, one inner pant, one brassier, one trouser, all valued at Ksh 19,500 and at or immediately before or immediately after the time of such robbery use actual violence to the said FRANSISCA MWATHI JOHN.***

From the proceedings on record, the appellant was arraigned in court on 21.2.2005 when he took plea. The trial process lasted three (3) years to be concluded. He was found guilty of the offence, convicted and sentenced to serve a death penalty on the 14<sup>th</sup> January,2008. The Appellant, acting in person, filed an appeal on the 17<sup>th</sup> January, 2008 where he cited six(6) grounds of appeal. He subsequently sought leave of court under an indicated Notice of Motion and had the same amended and reduced to four (4) grounds. I wish to reproduce the same, while changing the speech where necessary, for example, where the appellant refers to himself in the first person, I will do so in the third party;

(i) That the learned trial magistrate erred in law and fact in basing his conviction and sentence on reliance on dock identification the evidence tendered in court by the complainant which was unreliable.

(ii) That the learned trial magistrate erred in law and in fact in convicting the appellant's arrest with the matter in question without proper finding the same had no connection since the appellant was not in possession of the stolen items when he was arrested.

(iii) That the learned trial magistrate erred in law and fact by failing to consider contradictory evidence of the prosecution's witnesses.

(iv) That the learned trial magistrate erred in law and in fact by failing to give due consideration to the defence.

The appellant prays for his conviction to be quashed and sentence set aside.

On a first appeal, this court has a duty to go through the evidence and may arrive at its own findings on the facts. And in so doing, there is a duty upon the court to take the case as it lacked the advantage the trial court had on the demeanor of the witnesses and the accused person. This is because, the mere fact the this court exercises and evaluates the recorded evidence, eliminates the bias the trial court may have formed from the demeanor of witnesses and accused who appeared before him and testified. By this, Justice is balanced and is seen to be done or actually it is due.

The prosecution adduced evidence of four witnesses and the appellant gave an unsworn testimony in his defence.

Pw1, FRANSISCA MWATHIA JOHN, who was the complainant in this case testified that on the night of 18<sup>th</sup> and 19<sup>th</sup> February, 2005 at around 9.45 pm, she set out to visit her friend at a place known as Kaa Chonjo in Mombasa. That upon reaching and after alighting from a matatu, Pw1 said that she noticed the appellant was following her as she was walking to her friend's house while holding her belongings in a polythene bag. Pw1 said that the appellant overtook her, then turned and grabbed her bag which contained all her items and attempted to snatch them from her. The complainant (Pw1) resisted and the appellant removed a panga from his waist which he raised as he pushed her aside, in the process of which she fell and got injured on her right arm. She screamed and let go of the paper bag which had her items. The people who heard her scream came to her help whereby she showed them the bush where the appellant had ran to. According to Pw1's testimony, the appellant was pursued up to Makupa police station where he was arrested with her items. She said that she was robbed near a church gate where there were lights

On cross examination the appellant, Pw1 confirmed that she saw him as the place was lighted. He also confirmed that she did not chase after him into the bush. She confirmed that she found the appellant at Makupa police station with her items.

Pw2 No. 63999 Corporal Daniel Otieno, is the investigating officer who was by the time attached to Makupa police station. He stated that on the night of 18<sup>th</sup> -19<sup>th</sup> February, 2005 at around 10.30 pm, he heard members of the public shouting while in the pursuit of the appellant who they believed was a chief. That the appellant threw items into the police compound before he jumped over. Pw2 then arrested the appellant as those who were chasing him informed him that the appellant was a robber. Pw2 went to check on what the appellant had thrown into the police station compound and found a panga. He escorted the appellant into the station. Pw2 went on to state that the complainant came to the station and identified the appellant as the one who had robbed her while armed with a panga. She then handed to him a paper bag which she informed him contained her other items. Pw2 checked around and found the three tiny bags which contained items the complainant identified as hers. Upon checking he recovered her identity card and that of the appellant. She had sustained some injuries and so Pw2 issued her with a P3 form and referred her to hospital for treatment.

Upon being cross examined, by the appellant, Pw2 confirmed that the appellant was chased into the police station compound and the appellant threw a panga and some items into the compound before he jumped over. Pw2 also confirmed that the complainant went there on the same night.

Pw3, ANTONY MBUGUA NJUGUNA, is the friend the complainant was going to visit. Pw3 testified that the complainant called and asked him to meet her at a place they agreed. He then said that he saw her as she was walking towards him and the appellant emerged and hit her with a panga he had, that she fell down. Pw3 went on to state that he ran there and the appellant ran into the bush that was nearby. He said

that when he reached the complainant she informed him that the appellant had snatched her handbag. He screamed and a certain watchman emerged. He gave him a spot light (torch) with which Pw3 followed the man into the bush, where he spotted him holding a panga in the right hand and a paper bag in the left hand. Pw3 said that the man then ran off and left the paper bag behind which he checked as he returned it to the complainant ( Pw1). He also said that the appellant had ran towards the bush in the area and other people found him pursuing the appellant through the Baptist school, AIC church fence and into the petrol station, Pw3 further states that the appellant jumped into Makupa police station compound while dropping a panga and small torch which he removed from his underwear. They followed him to the police station compound and thereafter retraced their footsteps to recover the items he had seen the appellant drop which he claims he recovered. According to Pw3, he was poked by thorns while chasing the appellant whereas the complainant (Pw1) was injured and was bleeding profusely. Pw3 said that he never lost sight of the appellant as he chased him up to Makupa police station.

On cross examination, Pw3 insisted that he saw the appellant attack the complainant, run into the bush where he chased after and found him with a panga and the paper bag which he saw him drop on the ground together with a panga and torch into the police station compound.

Pw4, is the doctor who produced the P3 form which was issued to the complainant on behalf of his colleague. He is Doctor LAURENCE GONE of Coast General Hospital. He testified that the colleague had left for further studies and aid heat the complainant was treated at Bakarani Maternity and the injuries assessed as having been caused by a blunt object.

The prosecution closed its case and the appellant was placed on his defence, whereby he opted to give an unsworn testimony.

Dw1 who is the appellant, CHARLES KIBURA MWANGI, testified that he resides at Majengo. He stated that on the night of 18<sup>th</sup> February 2005, he had closed his business at Kongowea at around 8.00pm and headed towards Majengo where he resides where, on arrival found his house broken into. He said that he was going to report the matter to Makupa police station, he ran into a mob which was armed with rungas and pangas. That the mob of people shouted that he was the one and started beating him. That a police man heard this and went to check. The crowd then handed him over to the police as the thief.

Dw1 told court that his ..... that he was not a victim of theft but that it was his house which had been broken into, fell on deaf ears. He was locked up and on 19<sup>th</sup> February,2005 at night, the investigating officer demanded Ksh 5000 so that he could release him. He also requested for his identity card on 2.2.2005, the investigating officer took him to court where he found he had been charged with the offence of robbery with violence. He was arraigned in court on 8.2.2005. At the hearing the appellant who had filed his written submissions indicated to court that he would rely on them. In his written submissions, the appellant consolidated and argued his four grounds of appeal together. He submitted that the evidence by him having been identified by the complainant was unreliable as there was no evidence describing his physical features, attire or other description. He stated that an identification parade was not conducted and so the possibility of mistaken identity remain a possibility.

M/s Kagori counsel for the state, submitted orally and opposed the appeal she submitted that the appellant was identified by the complainant because of the height at ..... and her evidence was corroborated by the evidence of Pw3, friend of the complainant who she was going to meet /visit. She also submitted that the appellant was seen throwing the recovered items which were identified by the complainant as hers. She further submitted that in view of the prosecution's evidence which the appellant could not rebut and explain why he had to jump over a wall, the trial magistrate was justified unruling his defence.

In evaluating and analyzing the evidence that was adduced before the trial court, the grounds of appeal and the submissions by both the appellant and the state, I find two issues arise for determination, which I believe should have been discharged by the prosecution's evidence.

(a) whether a proper procedure was followed in determining the identification of the appellant.

(b) whether the prosecution discharged the burden of proof beyond reasonable doubt

The appellant was charged with the offence of robbery with violence under section 296 (2) of the penal code (Cap 63, Laws of Kenya) which provides as follows;

***(2) “ if the offender is armed with any dangerous or offensive weapon or instrument or is in the company with one or more other person ,a person or if, at or immediately before or immediately after the time of such robbery he wounds, beats, strikes or uses any other usual violence to any person, he shall be sentenced to death”***

This section provides for the ingredients of robbery and what constitute the offence of robbery with violence. In other words, the offender must manifest any or a combination of the characteristics described herein. The definition of robbery is provided for by section 295 of the Penal code which states;

***“ any person who steals anything and at or immediately before or immediately after the time of stealing it, uses it, uses or thereafter to use actual violence to any person or property in order to obtain or retain the things stolen or to prevent or overcome resistance to its being stolen or retained is guilty of a felony termed robbery”.***

The burden on the prosecution is to discharge by evidence beyond reasonable doubt that the offence proved is robbery and that it was committed by the accused person.

The trial magistrate, after evaluating the evidence that was adduced before her. Observed that;

(2)The point for determination is whether or not the man is the accused”

The evidence of Pw1 was that the appellant walked past her, suddenly turned and grabbed her paper bag which contained her personal items. She said that this happened at a gate of a church which was well lit and so she had an opportunity to see the appellant. She also said that they struggled over the paper bag while facing each other and therefore she saw him properly. And as the struggle for the paper –bag ensued, pw1 said that the appellant removed a panga which he lifted as if to cut her and pushed her aside, that she fell down and injured her right hand.

Pw3 testified that the complainant had made a call to alert him so he had left his house to meet her and as he was approaching her, he saw the appellant emerge and hit her with a panga.

One can clearly see that the testimony of Pw3 is not similar with the version given by the complainant that a question arises if the two witnessed the same incident.

The two witnesses (Pw1 and Pw3) were the first to witness the incident but they have given two different versions, this leads to the conclusion that there is a doubt whether what they alleged happened and whether the appellant was responsible. Pw2 and Pw3 are the ones who gave evidence of how the appellant was arrested.

Pw2 who was the investigating officer as well as the arresting officer had this to say;

***“I was on duty at Makupa police station when I heard members of the public shouting while chasing a thief I went to the fence and saw them chasing a person. The person jumped over the fence into the police station compound. I then arrested him and interrogated him asking what thing he had thrown into the compound. As I interrogated him those chasing him arrested and informed me he is a robber. I then checked what he had thrown into the compound and recovered a panga. Thereafter we took him in company of those who chased him into our station while at the station the complainant came and identified him as the one who had robbed her while armed with a panga she gave me a paper bag robbed from her and which the accused had dropped in the bush where he had ran into. She informed me there was a small bag in the paper bag containing a mobile phone, identity card and other items when it was robbed from***

***her. I then went back to where the accused had thrown some items into the compound where I had recovered the panga. I checked around and found three small bags had hanged on a branch of a tree where the accused had thrown the items before jumping over to the compound. I recovered it and when I checked the bag confirmed that complainant's Nokia 3310 without sim card recovered....."***

Pw 3 on the same facts testified as follows;

***"..We followed him up to the police station. Thereafter we looked for the panga and a small pouch and found them. The pouch belongs to the complainant"***

The question here is, whose narrative is correct on how the items were recovered? Pw2 and Pw3? It is difficult to believe any of them. This testimony fails the test to challenge the defence where the appellant has alleged that he ran into a mob as he went to report his own case of burglary that had taken place in his house at Magongo. In his unsworn statement in defence, he stated;

***"On 18.2.2005, I had come from where I do business, Kongewea where I sell fruits. I closed at 8.00pm and came to Majengo where I stay . Then I found my house had been broken into and my household goods stolen. I then went to Makupa police station so as to report. A few metres before I reached there I met several people armed with pangas. They then said I was the "one" and started beating me. Since the police station is not far, a police officer heard an came to check. The police asked who was the thief and I told him I was not but had gone to report a matter there that my house had been broken into....."***

Pw3 also testified that a watchman gave him a stoplight which he used to trail the appellant into the bush and on spotting him he dropped the paper bag. The appellant then took off towards the hills as Pw3 picked up the bag and returned it to the complainant. Pw3 said that it is at that moment that he lost sight of the appellant or the robber. There is therefore the possibility that the appellant was by fate on the same spot and mistaken for the robber.

Again, Pw3 did not bother to have the statement from the watchman recorded, or inform pw2 about this watchman.

With the variance in the evidence of Pw2 and Pw3 on how the items were recovered and from whom, it is possible that the items were handed over to the complainant by Pw3 who in turn handed them over to Pw2 after the appellant had been arrested.

There was also evidence that the complainant sustained injuries which were not directly inflicted by the appellant. From her evidence, the appellant merely raised the panga to threaten her as he pushed her aside and in the process, she fell and injured herself. This is consistent with what Pw4 said in his evidence when he testified in that regard. She neither lost her life nor got maimed.

In the case of JOHN SAKWA VRS R (2013) e KLR,

***"The Constitutional court held that death sentence should be meted out sparingly and after taking into account the circumstances of the case. This is so because international standards call for fairness"***.

In this case, the evidence that was adduced failed to prove every allegation against the appellant and therefore it was unsafe for the trial court to have relied on it to convict the appellant. The duty to prove a case in a criminal trial is upon the prosecution and not the appellant.

In the case of Kennedy Peter Kungu vrs R (2011) e KLR, the court of appeal reiterated the need for the prosecution to prove each allegation beyond reasonable doubt in the following words.

***"It is the prosecution's duty to prove every allegations against the appellant beyond reasonable***

***doubt***".

Having established from my analysis of the evidence that was adduced before the trial court, I allow the appeal and quash the conviction against the appellant.

I also set aside the death sentence that was meted against the appellant and set him at liberty unless he's lawfully held.

**Judgment delivered, signed and dated this 3rd day of March, 2017.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/s Ocholla for the state

The Appellant in person

C/clerk- Kiaie