



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 55 OF 2015

BENSON OCHIENG OLOO.....1ST APPELLANT

EVANS ODUORI OCHIENG.....2ND APPELLANT

CHRISPIN VICTOR OTIENO.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

An Appeal from the Original Conviction and Sentence in Criminal

Case No. 1666 of 2014 of the Chief Magistrate's Court

at Busia – M.A. Nanzurshi, SRM)

JUDGEMENT

1. Benson Ochieng Oloo, the 1st Appellant, Evans Oduor Ochieng, the 2nd Appellant and Chrispin Victor Otieno, the 3rd Appellant were three of the five accused persons in Busia Chief Magistrate's Court Criminal Case No. 1666 of 2014. In that case, Benson Ochieng Oloo was the 1st accused person (A1), Evans Oduor Ochieng was the 2nd accused person (A2) and Chrispin Victor Otieno was the 4th accused person (A4). Philip Odinga alias Daddy was the 3rd accused person (A3) and Margaret Adhiambo Oginga was the 5th accused person (A5). The charge against A5 was withdrawn in the course of the trial and A3 was acquitted at the conclusion of the trial.

2. The appellants and their co-accused were charged with robbery with violence contrary to Section 296 (2) of the Penal Code. The allegation was that on 9th July, 2014 at Burumba estate in Busia township within Busia County, the appellants, jointly with others not before court, while armed with dangerous weapons namely rungas and sticks robbed Chrispinus Ouma of a motorcycle registration number KMDG 513V make Bajaj Boxer and a mobile phone make Tecno T343 all valued at Kshs.106,700/= and during the time of such robbery killed the said Chrispinus Ouma.

3. This being a first appeal, the duty of this court is to re-assess the evidence and arrive at its own independent conclusion. In doing so, the court must bear in mind that unlike the trial court, it did not have the opportunity of hearing the witnesses testify – see **Okeno v Republic [1972] E.A. 32**.

4. PW1 Inspector Mumo Shamalla told the court that he is attached to Safaricom Law Enforcement

Liaison Office and is tasked with giving information on use of phones as requested by the police or any other intelligence body. He testified that on 16th July, 2014 he received a request from the DCIO, Busia for information on the use of phone IME1 number 861275023295087. Upon checking he found that the sim card used in the handset from 5th July, 2014 to 8th July, 2014 was No. 0724219305 belonging to Chrispinus Ouma. From 10th July, 2014 at 1.24 pm to 13th July, 2014 at 7.50 pm the sim card used was number 0710155042 registered in the name of Anastacia Kiragu. He prepared a record which he gave to the Investigating Officer. The witness produced the said record as an exhibit in the trial court.

5. PW2 Zubeta Atieno Musa narrated to the court how she bought a motorcycle registration No. KMDG 513V for Kshs. 105,000/= on 3rd June, 2014. She was with the deceased Chrispinus Ouma alias Manyala. She handed over the motorcycle to him on the agreement that he would conduct boda boda business with it and give her Kshs. 300/= per day. On 9th July, 2014 she learned that the deceased had been attacked and robbed of the motorbike. She identified a purchase receipt for the motorcycle in court.

6. PW3 Scholastica Obonyo Simanyula the wife of Chirspinus Ouma told the court that on 9th July, 2014 at around 6.00 a.m. she received information that her husband had been seriously injured by robbers at Burumba and was in hospital. She went and found her husband who was seriously injured. She learned from her informer that her husband had been robbed of a motorcycle and a mobile phone. The doctors referred her husband to Moi Teaching and Referral Hospital where he succumbed to the injuries. PW3 identified to the court a receipt that was issued to her husband when he purchased the Tecno T343 mobile phone. She also handed over to the police items belonging to her husband being a jacket, a shoe and a helmet.

7. PW4 Linet Atieno Oluoch told the court that on 9th July, 2014 at about 6.00 a.m. two men went to her house in Sofia, Uganda and asked her if she wanted to purchase a mobile phone. She told them she was not interested. The men told her that they would take it to her mother. She told the court that she knew one of the two people as Daddy (A3). A3 was carrying the 3rd Appellant on a motorcycle. She told the court that at the time she recorded her statement on 28th July, 2014 Daddy had already been arrested. She identified A5 in court as her mother.

8. PW5 Police Constable Godfrey Ouma testified that on 9th July, 2014 at around 1.00 p.m. the OCS Busia Police Station instructed him and Police Constable Ogutu to accompany some boda boda riders to the residence of persons suspected to have committed robbery. When they reached a certain residence they found the wife of the 1st Appellant who told them he was not around. They nevertheless entered the house and found the 1st Appellant sleeping on a bed. The 2nd Appellant was sleeping on a chair in the same house. Upon searching the house they recovered two sticks resembling a stick that had been recovered at the scene of robbery. They also recovered four jackets. Two of the jackets which were bloodstained were taken to the Government Chemist for analysis. They also recovered a chest guard. Also found in the house were a jungle green T-shirt and a blue jeans which were freshly washed.

9. From the house of the 2nd Appellant which was about 100 metres away they recovered two bed sheets with bloodstains. These were also taken for analysis. They arrested the 1st and 2nd appellants and took them to the police station where they were booked.

10. PW6 Dr. Walter Nalianya of Moi Teaching and Referral Hospital produced a postmortem report showing that Chrispinus Ouma died as a result of severe head injury due to blunt trauma.

11. PW7 Erick Egesa Makokha told the court that he is the chairman of boda boda transporters in Busia County. His evidence was that on 9th July, 2014 he went to the scene of the robbery with other boda boda riders and Sergeant Ouma. At the scene they recovered a helmet and a big stick with a nail. The stick had blood. The items were taken to the police station.

12. PW7 further told the court that a person who came from that area informed him in confidence that two motorcycles had come and left at night. He alerted the police and they went to the residence of the suspect. When they arrived at the house they found a woman who told them that there was nobody in the house. However, somebody signaled to them that there were people in the house. On entering the house

they found the 1st and 2nd appellants. Various items were recovered from the house including sticks. PW2 testified that nothing was recovered from the house of the 2nd Appellant.

13. A5 testified as PW8 after the charge against her was withdrawn by the prosecution. She told the court that she sells chang'aa in Sofia in Uganda. On 9th July, 2014 at 7.15 a.m. she was woken up by A3 and the 3rd Appellant. She knew A3. She did not know the 3rd Appellant but recognized him. A3 informed him that the 3rd Appellant had a phone to sell as he had a patient in hospital. They wanted Kshs. 1,000/= but she told them she only had Kshs. 700/=. They took the money and left the mobile phone make Tecno with her.

14. Shortly after they left, police officers called her and told her to go with her phone. She went with it and they asked her how she got it. She explained to them how she had obtained it. The next day she identified A3 to the police. A3 led to the arrest of the 3rd Appellant. She told the court that A3 had taken the money for the phone and given it to the 3rd Appellant.

15. PW9 Sella Wanjala told the court that she is the village elder for Burumba D. She informed the court that she was present when the 1st and 2nd appellants were arrested. She knew them before their arrest. She also knew the 1st Appellant's wife. She testified that some items were recovered during the arrest of the appellants.

16. PW10 Hellen Adhiambo identified the 2nd Appellant as her tenant and PW11 Cornelius Wangira Owuor identified the 1st Appellant as his tenant.

17. PW12 Sergeant Charles Ouma told the court that on 9th July, 2014 he visited a scene of robbery in which a boda boda rider had been attacked and robbed of a motorcycle and a Tecno mobile phone. At the scene he recovered broken pieces of a helmet, a shoe and a stick with a nail. Later, the OCS took to the police station the 1st and 2nd appellants with two sticks, one of which matched the one that he had picked at the scene. With the assistance of Safaricom the mobile phone was later traced to PW8 who in turn led to the arrest of A3 and the 3rd Appellant. Upon cross-examination by the 1st and 2nd appellants, PW12 told the court that he was not in the team that arrested them.

18. The 1st Appellant testified that he was at Busia Town stage on 8th July, 2014 when Sergeant Charles Ouma went and arrested him telling him that the motorcycle he had was reported stolen. He took him to the police station where investigations revealed that it was not stolen. The motorcycle was then released to the owner. The officer asked for money but he had none and was thus charged. On cross-examination he insisted that he was arrested on 8th July, 2014 and charged on 9th July, 2014.

19. The 2nd Appellant in his defence told the court that he was arrested from his rental house. He named his landlord as Muli Onyango. He denied knowing the 1st Appellant or even knowing a place called Burumba D. He said that he was arrested on 8th July, 2014.

20. The 3rd Appellant told court that he was arrested on 1st August, 2014 at the bus park and brought to court on 4th August, 2014 and charged for committing an offence he knew nothing of. He denied knowing A3.

21. In a case where there is more than one appellant it is important to state the case of each appellant as presented to the court.

22. Mr. Jumba who appeared for the 1st Appellant relied on the petition of appeal and submissions filed by his client. He told the court that the 1st Appellant was only raising issue with the manner in which the sticks relied on by the prosecution were handled. He submitted that the evidence that was adduced showed that the said sticks were recovered by different teams. The team which included PW5 recovered a piece of stick when they raided the house of the 1st Appellant. On the other hand PW12 and his team recovered the other piece at the scene. Mr. Jumba submitted that this evidence was contradicted by the Investigations Diary which showed that both PW5 and PW12 were in one team and they went to the scene and also arrested the suspects. It is Mr. Jumba's submissions that the prosecution deceived the

court in order to give the impression that the sticks were recovered by different parties and they matched.

23. Secondly, Mr. Jumba submitted that some of the clothes allegedly recovered from the house of the 1st Appellant and taken to Nairobi for analysis were never produced as exhibits and no explanation was given for this failure. According to Mr. Jumba, it is most likely that the results of the analysis were not supportive of the prosecution case hence the failure to produce the same.

24. Mr. Jumba took the position that the only circumstantial evidence linking his client with the scene of crime was the broken stick allegedly recovered from his house. In his view, this evidence was tenuous hence the case was not proved to the required standard. He therefore urged the court to allow the appeal.

25. The 2nd and 3rd appellants relied on their grounds of appeal and written submissions.

26. The first set of submissions by the 2nd Appellant was filed on 28th September, 2016. He filed supplementary submissions on 13th February, 2017. The 2nd Appellant contends that the charge was incurably defective. He, however, does not provide any particulars in support of this allegation. He then proceeds to point out the contradictions between the evidence adduced and the contents of the charge sheet. I will therefore proceed on the understanding that he is alleging that the case against him was not proved by the evidence adduced.

27. The 2nd Appellant asserts that according to the charge sheet, the IMEI number of the mobile phone that was stolen is indicated as 861275023205087 but PW1 in his evidence testified that the DCIO had made a request in respect of mobile phone IMEI No. 861275023295087. I have cross-checked with the typed proceedings and find that PW1 did indeed talk of a request in respect of mobile phone IMEI No. 861275023295089. I, however, note that in the same proceedings he refers to the same mobile phone as IMEI No. 86127502305080. Upon perusal of the handwritten record, the number 861275023295087 does not appear anywhere. It is therefore clear that in the evidence captured in the trial court's original record PW1 only talked of the handset with IMEI No. 861275023205087. The number 861275023295087 is therefore a typographical error as it is only found in the typed proceedings.

28. The 2nd Appellant also claims there were contradictions in regard to the registration number of the motorcycle alleged to have been stolen. He asserts that PW1 referred to motorcycle registration number KMDG 513 instead of KMDG 513V as stated in the charge sheet. This argument does not hold water as the evidence of PW1 was restricted to the mobile phone. Nowhere did PW1 talk about the motorcycle. In any case, if there is any reference to motorcycle KMDG 513 by any witness, common sense would suggest the witness simply omitted letter "V" in the registration number of the motorcycle. It cannot be said that the witness is talking about a different motorcycle.

29. The 2nd Appellant also took issue with the different dates of arrest as disclosed in the charge sheet. This argument is not sustainable as it is clear from the record that the persons who were charged were arrested on different dates. The prosecution simply indicated in the charge sheet the different dates on which the appellants and their co-accused were arrested.

30. The 2nd Appellant also took issue with the contradictions in the evidence of the witnesses as to what was recovered at the time of their arrest. He pointed out that it is only PW5 who talked about the recovery of two bed sheets from his house.

31. The 2nd Appellant faulted the failure by the State to avail the results of the analysis of the items allegedly submitted to the Government Chemist.

32. The 2nd Appellant's overall take on the evidence adduced is that the same was too weak to sustain a conviction. He contends that he was not identified at the scene of crime and neither was there anything else to link him to the crime.

33. The 2nd Appellant also faults the trial court for failing to comply with Section 211 of the Criminal Procedure Code. He states that the said Section was not explained to them. This ground of appeal has no

basis as the record clearly shows that Section 211 of the CPC was complied with on 30th October, 2015.

34. In the supplementary grounds of appeal, the 2nd Appellant accused the trial Magistrate of stage-managing the case for the prosecution thereby leading to injustice. He asserts that PW7, PW9, PW10 and PW11 wrote their statements after hearing the other witnesses testify. He indicated that all these witnesses recorded their statements in 2015 yet the incident took place in July, 2014. According to him, this was prejudicial to his case. Further, that he was arrested on 8th July, 2014 before the alleged robbery took place on 9th July, 2014.

35. The 2nd Appellant also contends that he was never given an opportunity to mitigate. I will dispose of this allegation straightaway. The record shows that this allegation has no basis. The handwritten record shows that each appellant indicated before the sentence was passed that they had no mitigation.

36. The 3rd Appellant's submissions were filed on 21st February, 2017. He first alleges that he was never supplied with copies of witness statements and exhibits thus infringing his constitutional right to a fair trial as protected by Article 50(2)(j) of the Constitution.

37. As for his identification, he avers that the same was not sound. He states that PW4 and PW8 told the court that they were not familiar with him. His view is that his identification was dock identification and the same was worthless. It is his case that there was need to conduct an identification parade. He therefore concludes that his identification was not free from error.

38. On the allegation that he sold the mobile phone to PW8, he asserts that there was no evidence to support such allegation. He points out that no agreement was produced to corroborate the sale and neither was the alleged sale witnessed by a person in authority.

39. The 3rd Appellant faults the court for applying the doctrine of recent possession in finding him guilty. It is his averment that the trial court in invoking the said doctrine applied different standards to him and A3.

40. The 3rd Appellant also contends that the State's failure to call Anastasia Kiragu, whose line was used in the mobile phone from 10th July, 2014, weakens the case against him.

41. In response to the appeal, Mr. Owiti for the Respondent submitted that the first date of arrest as shown in the charge sheet is 9th July, 2014 thus dislodging the 2nd Appellant's claim that he was arrested on 8th July 2014. Further, that the court record shows that plea was taken on 10th July, 2014 meaning that the 2nd Appellant was not taken to court on 9th July, 2014 as he alleges.

42. On the alleged contradictions between the evidence of the witnesses and the contents of the Investigations Diary, it is submitted for the Respondent that there is no such contradiction. It is the Respondent's position that the evidence adduced and the contents of the Investigations Diary all point to how certain recoveries were made and the 1st and 2nd appellants arrested.

43. On the issue of the recovery of the sticks, Mr. Owiti asserts that the evidence adduced shows that two sticks were recovered from the house of the 1st Appellant. Another stick was recovered at the scene. According to Mr. Owiti, these sticks link the 1st and 2nd appellants to the offence.

44. As for the 3rd Appellant, Mr. Owiti submits that the evidence of PW1, PW4 and PW8 clearly links him to the mobile phone that was stolen from the deceased during the robbery.

45. The questions for determination in this appeal are whether the prosecution proved the commission of the offence of robbery with violence and successfully linked each appellant to the commission of that offence.

46. The ingredients of the offence of robbery with violence under Section 296 (2) of the Penal Code are (a) the offender being armed with dangerous or offensive weapon, (b) the offender being in company with

one or more other person(s); and (c) the offender immediately before or immediately after the time of the robbery wounds, beats, strikes or uses any other personal violence to any person – see Court of Appeal decision in **Criminal Appeal No. 98 of 2008, Fanuel Otieno Omido v Republic**. Of course theft has to occur. Proof of any one of the ingredients is enough to lead to a conviction and the prosecution need not prove all ingredients – See Court of Appeal decision in **Johana Ndungu v Republic; Criminal Appeal No. 116 of 1995**.

47. In the case at hand, the prosecution has established that violence was used resulting in the death of the deceased. A motorcycle and a mobile phone were stolen from the victim during the robbery. Indeed, that the injuries sustained as a result of the violence were fatal was evidenced by the postmortem report produced as exhibit in the matter. The fact that the victim of the crime died as a result of the injuries sustained in the robbery is of itself sufficient evidence that dangerous and offensive weapons were used to inflict the injuries.

48. This appeal will therefore turn on the question as to whether the evidence that was adduced was sufficient to convict all or any of the appellants for the offence with which they were charged.

49. The 1st and 2nd appellants were allegedly arrested together. The evidence against them was the same and their appeals will thus be considered together. Nobody saw the people who beat and robbed the deceased of his motorcycle and mobile phone. The motorcycle was not recovered. The evidence surrounding the recovery of the mobile phone was directed towards proving the guilt of the 3rd Appellant. In essence none of the stolen items was recovered from either the 1st Appellant or 2nd Appellant. Scientific evidence that could have linked the 1st or 2nd appellants to the robbery was not availed. Counsel for the 1st Appellant submits that it is likely that had the said evidence been adduced the same may have exonerated his client. Mr. Owiti indicated that the Respondent was forced to prosecute the case without the evidence since the trial magistrate had given the prosecution a last adjournment.

50. It is lamentable that in this age and time crimes still go unpunished due to the inordinate delays in availing forensic evidence. I sympathise with the prosecution since they have no control over the experts who examine exhibits and prepare reports. Even where reports have been prepared it is always difficult to get the expert witnesses to testify.

51. The courts on the other hand in discharging their constitutional mandate to dispense justice without undue delay are under pressure to finalise matters within the shortest time possible. In the pull and push between these competing interests, justice is bound to suffer. It is therefore important for trial courts to exercise a little patience and understanding when requested by the prosecution to adjourn a matter to await examination of exhibits or the production of expert witnesses. Justice should be done taking into account the resources and infrastructure available in this country. The Constitution requires that both the accused person and the victim of crime receive justice.

52. It is unfortunate that the exhibits that were taken to the Government Chemist were never produced in court and neither was the report of the examiner of those exhibits produced in court.

53. In view of the fact that some evidence was not availed to the court, the question is whether the evidence that was adduced against the 1st and 2nd appellants was sufficient to sustain a conviction. The evidence of PW5, PW7, PW9 and PW12 all point to the recovery of a stick with a nail at the scene of crime. The evidence also shows that sticks were recovered from the house in which the appellants were arrested. The sticks were bloodstained. Also recovered were bloodstained clothes. Some of the clothes were freshly washed. PW5 in reference to the sticks stated in his evidence in chief that **“[t]he one we got at the house was a piece broken from the piece found at the scene of crime.”** Earlier in the evidence he had stated that: **“We did a search in the house and behind the door of the house of the 1st accused, we recovered two sticks that resembled those that had been picked at the robbery scene.”** Upon cross-examination by the 1st Appellant he stated that **“[t]he sticks found in your house were cross-checked with the one found at the scene.”**

54. PW7 talked of a stick found at the scene. He then says: -

“In the house we found the 2nd piece of the stick which broke from the scene”(sic).

55. PW9 stated that when they went to the house of the 1st Appellant they found **“a kijiti and some clothes with blood.”**

56. PW12 insisted that he did not participate in the arrest of the 1st and 2nd appellants but the OCS took them to the station with **“2 sticks one which matched the one I had picked.”** PW12 told the court that he recovered a stick with a nail from the scene.

57. PW7 and PW9 also talked of recovery of sticks both at the scene and in the house of the 1st Appellant. The 1st and 2nd appellants were arrested from the house of the 1st Appellant. Bloodstained clothes were also recovered from the house of the 2nd Appellant.

58. There is therefore strong evidence that a piece of a bloodstained stick recovered from the scene of crime was found in the house of the 1st Appellant. No explanation was offered by the appellants in respect to the bloodstained stick and clothes recovered from their houses. The sticks which were used to attack the deceased links the 1st and 2nd appellants to the robbery.

59. As for the 1st and 2nd appellants’ defence, I note that although they denied being arrested from the house of the 1st Appellant there is overwhelming evidence on record as to the place of their arrest and the recoveries made during their arrest. Their claim that they were arrested on 8th July, 2014 before the crime was committed is also contrary to the evidence that was adduced by the prosecution witnesses. Additionally, the charge sheet shows that they were arrested on 9th July, 2017. The Investigations Diary which they called for clearly shows that they were arrested on 9th July, 2014 and booked in at 3.25 p.m. The trial magistrate was therefore correct in rejecting the defence put forward by each of these appellants as the same could not be believed.

60. There is the statement by the 2nd Appellant that the trial magistrate stage-managed the case by allowing witnesses who recorded statements after the trial had commenced to testify. The 2nd Appellant is indeed correct that some of the prosecution witnesses may have recorded statements after the trial had started. However, there is no evidence that those witnesses had listened to the testimony of the other prosecution witnesses before recording their statements. This allegation was never brought to the attention of the trial court. It is therefore difficult to agree with the 2nd Appellant that the witnesses who recorded statements later were in court when the other witnesses testified.

61. On the other hand, the action by the prosecution of recording statements from more witnesses after the commencement of the trial was not illegal. Section 150 of the Criminal Procedure Code envisages the calling of other witnesses after the trial has gotten under way. However, the practice of taking statements from new witnesses as the trial proceeds should not be encouraged. It gives the impression that the prosecution is building its case as the trial proceeds. Such a scenario also denies an accused person the opportunity of knowing in advance the entire evidence in support of the case against him. The witnesses who record statements later may say things that the accused may have wanted to cross-check with those who have already testified. In such a case the accused person is entitled to have the witnesses who have already testified recalled for further cross-examination thus delaying the trial. The ideal situation is to start the trial after all statements and copies of exhibits have been supplied to the accused person. This is the only way of ensuring that an accused person’s right to a fair trial is fully protected. Having said so, I find that the appellants were not prejudiced by the prosecution’s actions. I therefore find this ground of appeal unmerited and reject it.

62. In conclusion, I find that the trial Court reached the correct decision on the guilt of the 1st and 2nd appellants. The appeals of the 1st Appellant (Benson Ochieng Oloo) and the 2nd Appellant (Evans Oduor Ochieng) are therefore without merit. The appeal by each one of them fails and is dismissed.

63. As for the 3rd Appellant his conviction was based on the doctrine of recent possession. In **Richard**

Oduor Adera v Republic [2010] eKLR, the Court of Appeal cited **Isaac Nenga & Kahinga alias Peter Kahinga v Republic, Criminal Appeal No. 272 of 2005** where the applicability of the doctrine of recent possession was stated thus: -

“It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses.”

64. That the doctrine of recent possession can be used to convict for any offence was noted by the Court of Appeal in **Mukiria & another v Republic [2005] eKLR** when it stated that: -

“The submission by Mr. Githui to the effect that the doctrine of recent possession could not be a basis for a conviction on a charge of robbery with violence was novel but lacking in merit. The doctrine of recent possession may be relied upon not only to prove a charge of theft but other offences like robbery with violence, manslaughter, murder etc.”

65. In the case at hand there is no evidence that the stolen mobile phone was recovered from the 3rd Appellant. The evidence available is that the same was recovered from PW8 who allegedly bought it from the 3rd Appellant. The question therefore is whether PW4 and PW8 were credible witnesses. PW8 could be said to be an accomplice. She was even arrested and faced the alternative charge of handling suspected stolen property. The rule applicable to the treatment of the evidence of an accomplice ought to have engaged in her case. The trial magistrate ought to have borne in mind that though a conviction based on the uncorroborated evidence of an accomplice is not illegal, prudence demands that it is not safe to rely on such evidence if it is uncorroborated. There is no evidence on record showing that she cautioned herself before proceeding to convict the 3rd Appellant on the strength of the evidence of PW8.

66. Indeed there was sufficient reason to doubt the evidence of PW8. She told the court that A3 and the 3rd Appellant sold the phone to her on 9th July, 2014 very early in the morning. She further stated that shortly thereafter she received a call from the police. It is not clear whether she received the said call on the same day. It is, however, clear that the mobile phone was recovered on 13th July, 2014.

67. Another jarring factor is that there was no explanation as to the identity of Anastasia Kiragu whose sim card for line number 0710155042 was used on the handset from 10th July, 2014 at 1.24 p.m. to 13th July, 2014 at 7.50 p.m. when the same was presumably recovered by the police. PW8 clearly stated in her evidence that her number was 0718072264. No attempt was made by the prosecution to reconcile the technical evidence showing the use of the stolen handset by the number of another person and the evidence of PW8 in which she admitted using the phone. The contradictions exposed by this evidence ought to have benefited the 3rd Appellant.

68. It is also important to remember that PW4 only recorded her statement after her mother (PW8) was arrested. Could the action have been motivated by the urge to save her mother who was at that time an accused person (A5)? Why didn't she record her statement immediately her mother was arrested? There are no answers on record to these disturbing questions. It was necessary for the trial court to treat the evidence of PW4 with caution.

69. There is also the pertinent issue raised by the 3rd Appellant about his identification. The evidence of PW4 and PW8 is clear that they knew A3. As for the 3rd Appellant they said they only knew him by appearance. It is noted that it is A3 and not any of these two witnesses who led to the arrest of the 3rd Appellant. In light of that evidence the prosecutor ought to have prodded further in order to establish if the recognition was indeed sufficient to dispatch this Appellant to the gallows. A3 is indeed correct that

the circumstances surrounding his alleged interaction with the witnesses required an identification parade in order for the court to confidently reach the conclusion that he was the one who sold the stolen phone to PW8.

70. I therefore agree with the 3rd Appellant that it was risky to convict him on the strength of the evidence adduced by the prosecution. He ought to have been given the benefit of doubt. In the circumstances I find that his appeal succeeds. The conviction against the 3rd Appellant (Chrispin Victor Otieno) is quashed and the sentence set aside. He is thus set at liberty unless otherwise lawfully held.

71. In summary, the outcome of this appeal is that the appeals by the 1st and 2nd appellants fail and they are accordingly dismissed. However, the appeal by the 3rd Appellant succeeds. His conviction is quashed and the sentence set aside. He is set at liberty unless otherwise lawfully held.

Dated and signed at Malindi this 27th day of June, 2017

**W.
JUDGE OF THE HIGH COURT**

KORIR,

Dated, signed and delivered at Busia this 12th day of July, 2017

**K.W.
JUDGE OF THE HIGH COURT**

KIARIE,