REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 43 OF 2011

PETER CHERUIYOT RUGUTT *alias* CHERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the convict and sentence of Hon. J. Kwenah, Principal Magistrate, Kericho dated 7th September 2011)

JUDGMENT

The Appellant, **Peter Cheruiyot Rugut**, *alias* **Cheru**, was convicted on a charge of robbery with violence and sentenced to death. The prosecution case was that on 17th day 2009 at Chepkolon Estate in Kericho, jointly with others not before court, while armed with offensive weapons, namely iron bars and pangas, robbed **Tirop Vincent Yatich** of a mobile phone make Blackberry 8750 -T serial number IMEI 35780001817033, valued at Kshs.17,000, one bag containing seven (7) trousers, eight (8) shirts, two (2) t-shirts, five (5) underpants, a driving licence, two (2) mobile phone chargers, 100 marble balls, one ladies leather bag, and a wallet containing Kshs.100, three (3) ATM cards, a national identity card, all valued at Kshs.35,900 and at or immediately before or immediately after the time of such robbery, used actual violence on the named **Yatich**.

The Appellant had denied the charge and prosecution called a total of ten (10) witnesses.

On 17/08/09 at 9.00pm **Vincent Tirop Ngetich** (P.W.1) had alighted from a bus, at Chepkolon area along Kisumu-Kericho road, and was walking to his home which was about 400 metres away, as he was descending the slope, he heard footsteps behind him, and someone rushed past him then stood infront of him. The person blocked his way and demanded to know where he was going to. When P.W.1 did not respond, the person made some noise, and two people closed in from behind. P.W.1 had a handset on one hand, and a bag with clothes on the other. The person who was infront of him snatched the handset from him while the one behind tried to snatch the bag, but P.W.1 held on to it. One person hit him on the back and took away the bag; while someone else fished out his wallet from the pocket. Finally, someone hit him on the chest, using an iron bar, then they all fled off. PW1 walked home, and was eventually taken to hospital for treatment. Yego Kirwa who examined P.W.1 established that he had a tender neck and chest with bruises caused by a blunt object.

Since P.W.1's phone had a tracking gadget on the mouth piece which made it impossible for one to use the phone without repair, he set out to trace the phone by checking with telephone repairers, certain that whoever had taken the phone would not be able to use it without first having it repaired. He approached various telephone repairers stalls just behind Ukwala supermarket at Bethsaida building. He spotted his stolen phone, make blackberry, whose mouth-piece was being repaired. He relayed the information to his mother who called the police and the repairer was arrested. He was able to identify the

mobile phone make Blackberry T Mobile 8750 because it had a padded keyboard and a scratch to the left which was left on it after it fell and P.W.1 stepped on it.

A P3 form was produced to confirm that the appellant suffered injuries during the attack.

On cross-examination P.W.1 stated he was able to see the appellant very well as he looked at him keenly when the appellant stood before him, and that there was security light at a canteen which was 15 metres away. Consequently, when an identification parade was conducted on 24/08/09, P.W.1 identified the appellant as the person who had stopped him on the night of the attack.

Peninah Kemunto (P.W.2) confirmed to the trial court that she had sent her worker named Mwangi, to take the claimed phone for repairs. The phone had been offered to her on 19/08/09 by the appellant who said he was selling it and he had given her to use it. She had already given appellant Kshs.1,000 but when she tried to use it and she realised it was not working.

Helton Ochako Mike (P.W.4) was the phone repairer from whom the phone was recovered. He confirmed that the same had been presented to him by one Mwangi initially on 19/08/09, as it had a problem with the mouth-piece he repaired it at a fee of Kshs.500 and issued a receipt. Two days later, Mwangi was back with the phone, complaining of the same problem he retained the phone for repairs. While carrying out repairs P.W.1 arrived, looked at the phone and said it was his phone which had earlier been robbed off him. So P.W.4 on being arrested, led police to Mwangi.

P.W.5 **Samuel Njoroge Muiruri** is the husband to P.W.2, and it was his evidence that the appellant was a regular customer at a Shebeen where his wife sold changaa. On 19/8/09, he saw the appellant call his wife aside and they talked a bit, then P.W.2 informed him that the appellant had a Blackberry phone which he wished to pawn for a litre of changaa. P.W.5 approved, so P.W.2 received the phone, the next day the appellant returned and said he wanted to sell the phone. P.W.2 tried to use it but it seemed to be defective, so P.W.5 instructed his brother to take the phone for repairs. The next thing he saw was his brother accompanied by police, who arrested P.W.2.

Samuel Mwangi (P.W.8) confirmed that his sister in law Peninah Kemunto sent him to take her mobile phone for repair as it had a problem with the mouth piece. He confirmed taking the phone to one Mike within a span of two days concerning the same problem. When he next went to collect the phone, he was arrested.

PC. Kipkurgat Langat (P.W.9) and **Sgt. Idris** (P.W.10) received a report about the incident and PC. Kipkurgat was able to trace the various persons who had handled the phone until it stopped at the "original source" – the Appellant. An identification parade was conducted by IP. Reuben Onoka (PW7). PW1 picked him out as the person who had attacked him.

In his unsworn defence, the Appellant only described events related to his arrested on 22nd August 2009; that while on his way home from town, he met two police officers who beat him, placed him in cells then charged him in court.

In her judgment, the trial magistrate noted that PW1 was able to identify his phone because of the distinct physical marks he had made on the phone, and his own technology which he had used to lock the mouth piece.

The trial magistrate further noted that the phone was recovered within 5 days after the robbery, from a repairer who was trying to undo the lock technology on the mouth piece. The trial magistrate also noted the flowing sequence of the phone's movement to the Appellant who apparently had the phone a day after the robbery. The trial magistrate remarked that:-

> **"Accused was in possession of recently stolen property, and hence this court infers the doctrine that he is presumed the thief (sic)"**

As regards identification, the trial magistrate noted that PW1 was able to identify the Appellant during the attack, and at the identification parade which was conducted 2 weeks after the robbery. This identification compared with the evidence of the other prosecution witnesses persuaded the trial magistrate that Appellant was in the company of others who jointly robbed PW1 of his property, among them the mobile phone which was later recovered.

The trial magistrate was also satisfied that the Appellant was injured using an iron bar during the robbery and the ingredient of robbery with violence had been satisfied.

The appeal is on grounds that:

1. **The plea was taken in breach of Appellant's Constitutional rights**
2. **The plea was not unequivocal**
3. **The charge was defective**
4. **The evidence was contradictory**
5. **The trial magistrate wrote judgment based in evidence taken by another magistrate without following the laid down procedures**
6. **Appellant was denied a chance to complete his defence and the court proceeded with trial in his absence.**
7. **The trial magistrate took over the Appellant's case, and considered extraneous matters while writing the judgment**
8. **The sentence was illegal.**

The Appellant argued his appeal by way of written submission in which he described all the prosecution witnesses as untruthful, inconsistent to the extent of creating doubts in the prosecution case. He also faulted identification by a single witness, saying the complainant had claimed that he had been robbed by three masked men – so that his evidence that he identified the Appellant during the robbery was an afterthought. He faulted the identification parade saying it offended Order 46 paragraph 6(IV) (d) o the Force Standing Orders as the parade members were people of different physical appearances. He poked holes at the trial magistrate's findings saying there was nothing to prove that he sold the phone to PW2 as there was no sale agreement. We have re-evaluated and analyzed the evidence; the issues that arise for determination are:

1. **Was a charge of robbery proved?**
2. **Was there contradiction in the evidence of prosecution witnesses?**
3. **Was there sufficient evidence on identification?**

Section 295 of the **Penal Code** defines robbery as a situation where a person steals anything, and at or immediately before or immediately after the time of stealing, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to it being stolen.

Section 296 (2) further clarifies that:

> **"(2) if the offender is armed with any dangerous or offensive weapon or instrument or, is in company with one or more persons; or if, at or immediately before or immediately after the time of robbery he wounds, beats, strikes, or uses any other personal violence, he shall be sentenced to death."**

PW1's evidence that he was beaten using an iron bar in an attempt to cause him to surrender his property is compiled by the P3 form produced by the Clinical Officer (PW6) who also confirmed that the probable weapon used to inflict the injury was a blunt object. PW1 was certain in his evidence that he was attacked by three people who forcefully took away his property.

We are satisfied that the ingredients of robbery were proved. With regard to identification, the evidence on record is the incident took place at 9.00 p.m. and PW1 was the only identifying witness. We

are keenly aware of the holding in Charles O. Maitanyi vs Republic (1986) KLR Pg.198 regarding identification by a single witness under difficult condition to the effect that:

> **(a)Although it is trite law that a fact may be proved by testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions following a convict identification were difficult.**
>
> **(b)When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.**

We note that the witness was clear regarding the opportunity for identification that there was electricity light illuminating the scene from a building which was about 15 metres away. Further, their encounter was not just a sudden fleeting glance, as the attacker blocked his way, stood in front of him, asking him where he was going. We are satisfied that there was adequate opportunity for identification and there were favourable conditions existing for positive identification.

Mr. Mutahi, on behalf of the State submitted that the basis for the conviction was not so much the issue of identification of the attacker, though it was on the basis of the doctrine of recent possessions where the evidence established that he Appellant was in possession of recently stolen property.

Just apart from the positive identification of the phone by PW1, the chain of events in relation to the phone's movement was traced one common truth – the Appellant. The doctrine of recent possess as was discussed in the case of Hassan vs R (2005) KLR Pg 5 to the effect that:

> **"where a person is found in possession of readily stolen property in the absence of any reasonable explanation to account for the possession, a ....of fact arises that, he is either the thief or a receiver."**

The appellant offered no explanation as to how he came to have the phone, just within two days of the robbery, alongside that was his quick desire to dispose off the phone, which act only deminished a guilty mind.

The totality of the evidence indeed leads us to the same conclusion which the trial magistrate reached that the appellant was the thief who along with others violently robbed the complainant of his property, among them being the recovered mobile phone.

We have taken into consideration the evidence of P.W.5 which the appellant described as unpredicting. The information we get is that P.W.5 was inclined is a bit of exaggeration, but

> **(a) the contradiction did not affect the material particulars**
>
> **(b) this was not the sole evidence as all the material evidence was that the appellant was the one who had offered the phone to P.W.2 for sale. We thus resolve that "seeing" contradiction in favour of the prosecution.**

It is not clear to us what the appellant's complaint was regarding the plea not being unequivocal, as the record clearly shows he entered a plea of not guilty and the matter proceeded to full hearing.

The lament about the trial magistrate failing to comply with **Section 200(3)** of the **Criminal Procedure Code** is also off at a target because the record shows where trial form hearing of P.W.1 to conclusion of the judgment was by one magistrate, J.Kwena. The upshot is that the appeal has no merit and we uphold, the conviction and confirm the sentence, which is legal under **Section 296(2)** of the **Penal Code**. The appeal is dismissed.

Dated, signed and delivered in open court this 17th day of July, 2014.

….....

J.K.SERGON

JUDGE

….....

H.A.OMONDI

JUDGE