



**REPPULIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NOS. 177 AND 179 OF 2012**

*(Appeal against conviction and sentence arising from*

*judgment of [M.I.G. MORANGA, MRS. P.M.) dated 24.7.12 in*

*the Chief Magistrate’s Court at Kakamega in Criminal Case No. 1408 of 2011)*

**CHARLES ODHIAMBO alias OMERA ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**J U D G M E N T**

The appellants were charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence were that the appellants *on the 18.5.2011 at Kakamega Township in Kakamega Central District within Western Province, jointly with others not before court while armed with dangerous weapons namely pangas robbed Wangai Samuel Njunge John, of a mobile phone make Vodafone valued at KShs.1000/= and immediately after the time of such robbery used actual violence to the said WANGAI SAMUEL NJUNGE JOHN.*

The 2<sup>nd</sup> appellant **CHARLES ODHIAMBO alias OMERA** was charged with an alternative count of handling stolen property contrary to **section 322(2)** of the **Penal Code**. The particulars of the offence were that the 2<sup>nd</sup> appellant *on the 24<sup>th</sup> May 2011 at Kakamega Township in Kakamega Central District within Western Province, otherwise in course of stealing dishonestly handled one mobile phone make Vodafone knowing or having reason to believe it to be a stolen property.*

The appellants were found guilty on the main count and sentenced to death. The grounds of appeal for the 1<sup>st</sup> appellant are that the identification was by recognition yet an identification parade was conducted, that PW2 in his first report did not give the physical appearance or description of the appellant, that no exhibits were found with him, that his sworn defence was overlooked, that essential witnesses were availed for clarity and that the prosecution evidence was full of material irregularity. The 1<sup>st</sup> appellant filed written submissions which expound on the above grounds. The appellant contends that the charge sheet does not indicate the time the alleged incident occurred. PW1 testified that he knew the

appellant and yet there was an identification parade done where he was identified. No description of the physical appearance of the robbers was given to the police.

The grounds of appeal for the 2<sup>nd</sup> appellant are that he pleaded not guilty to the charge, PW2 exonerated him from being at the scene, there was no proof of ownership of the stolen phone, no first report to the police, the investigating officer exonerated him from the offence, the sentence is too harsh, that his alibi defence was not considered and that the identification was by recognition which could have been a case of mistaken identity.

Mr. Orinda, State Counsel, submitted that the evidence against the 1<sup>st</sup> appellant is not conclusive. It is alleged that he was found with a gun but it was not connected to the offence. The 2<sup>nd</sup> appellant was found with recently stolen mobile phone that was positively identified by PW1. The 2<sup>nd</sup> appellant did not give sufficient information on how he got the phone.

The record of the trial court shows that 7 witnesses testified for the prosecution. **PW1, SAMUEL WANGAI NJUNGE JOHN** was the complainant. His evidence was that on the 18.5.2011 at about 10.45 p.m. he was watching football in his house with friends. When it was half time he went out to make a call. When he was through with his call somebody asked him for the phone. He saw two people one was short and the other one was tall. He through the phone behind the two hoping that they would take it and leave him alone. He was attacked with a panga and was able to see them as there was security lights that were using electricity. The robbers followed him to the door and he was able to see their faces clearly. He had not known them before. He was hit on his left hand finger and forehead. The short robber was the 1<sup>st</sup> appellant while the taller one was the 2<sup>nd</sup> appellant. A neighbor also saw the robbers. Once the robbers left they tried to trace them but they disappeared. On the 21.5.2011 at about 5.30 p.m. he attended an identification parade and was able to identify the 1<sup>st</sup> appellant. On the 24.5.2011 he got information that the 2<sup>nd</sup> appellant had been found with his stolen phone and he sent his two cousins to go and find out. The 2<sup>nd</sup> appellant was arrested and he was able to identify his phone. According to PW1 the 1<sup>st</sup> appellant was wearing a green sweater with yellow sections on the upper arm, blue jeans trouser and white shoes. The 2<sup>nd</sup> one had a black jacket, a woolen cap and brown shoes.

**PW2, SAMUEL KAMAU NJONJO** was with PW1 that evening. He heard PW1 screaming outside and he looked through the window and saw two people. He saw the 1<sup>st</sup> appellant with a panga and torch. There was security light outside the house. The 1<sup>st</sup> appellant had white shoes and a black jacket. The two robbers were pushing PW1 towards a dark area but PW1 was resisting. PW1 was bleeding and he screamed. He went out of the house and the robbers escaped. Some people went to the scene and they tried to trace the robbers. Someone indicated that he knew the 1<sup>st</sup> appellant's house. The matter was reported to the police. They went to the 1<sup>st</sup> appellant's house the following day at about 2.00 p.m. and they arrested him. The appellant was found with a gun and PW2 saw his jacket and boots. The 1<sup>st</sup> appellant was handed over to the police. PW2 knew the 1<sup>st</sup> appellant as he used to see him at Masingo area. It is PW2's further evidence that he described the 1<sup>st</sup> appellant to the police.

**CHARLES WANGAI** was **PW3**. He was with PW1 and PW2 that evening. On the 24.5.2011 at about 11.00 a.m. he met people who were gambling. He saw the 2<sup>nd</sup> appellant amongst those people. Since the 2<sup>nd</sup> appellant was a suspect PW3 went to report at the Kakamega police station. The police went and arrested the 2<sup>nd</sup> appellant and took him to Kakamega police station. A mobile phone was recovered from the pocket of the 2<sup>nd</sup> appellant and PW1 identified it to be his. PW3 was aware that the police were looking for the 2<sup>nd</sup> appellant.

**PW4**, was **CPL CHARLES KARAKACHA** who was based at the Kakamega police station. On the 24.5.2011 at about 11.00 a.m. PW3 went to report that he had seen one of the suspects who had robbed PW1. Together with a colleague he went to a stage at Kakamega and arrested the 2<sup>nd</sup> appellant. The 2<sup>nd</sup> appellant was taken to Kakamega police station and when he was searched a mobile phone was recovered

from his pockets. The owner identified the phone. **PW5 IP SAM SEREM** was the officer in charge of crime at the Kakamega police station. On the 27.5.2011 at about 5.12 p.m. he conducted an identification parade. One of the witnesses was **WANGAI SAMUEL NJUKA** who identified the 1<sup>st</sup> appellant. Another witness was SYLVIA ISAYI who also identified the appellant as well as one CAREN OUMA who also identified the 1<sup>st</sup> appellant.

**PC MICHAEL KIPRONO** was **PW6** and investigated the case. He found the 1<sup>st</sup> appellant arrested at the Kakamega police station. The 1<sup>st</sup> appellant took them to a house belonging to one Bernard Khayega who was a suspect in another case and he ran away. They searched the house which included the white shoes. This was on the 19.5.2011. On 24.5.2011 the 2<sup>nd</sup> appellant was arrested with a Vodafone belonging to the complainant. The complainant identified the phone to be his. It is the evidence of PW6 that the 1<sup>st</sup> appellant was arrested by members of the public.

**PW7 DR. JEREMIAH KINUTHIA**, attended to PW1's injuries and produced a P3 form. According to him PW1 suffered cuts on the left middle and ring fingers and a cut on the left forearm. Bruises on the right forearm. He classified the injuries as harm.

The appellant's were put on their defence. The 1<sup>st</sup> appellant in his sworn evidence testified that he was 15 years old and on the 19.5.2011 he was visiting his sister at Mumias and went to the Joyland stage in Kakamega. Three people went to arrest him and asked him whether he knew a person by the name Mr. Ben. He denied knowing Mr. Ben and he was beaten. A crowd gathered and he was taken to the police station. He was later forced to sign some papers that were produced in court as evidence. He does not know the 2<sup>nd</sup> appellant.

The 2<sup>nd</sup> appellant gave sworn evidence. He testified that he is a business man who sell mandazi in Kakamega town and comes from Lurambi area. On the 24.5.2011 at about 11.00 a.m. he was sent by his boss to collect a luggage and on the way met a group of people playing cards. He shortly saw them disperse and run away. Two civilians arrested him and asked him whether he knew a Mr. Ben. He was handcuffed. The civilians were police officers and they collected all the items including mobile phones that had been left by the group that was gambling. He was taken to the police station and was questioned about Mr. Ben. It is his evidence that he knows Charles Wangai very well as he sells to him mandazi nicknamed kaungumu at the market where the 2<sup>nd</sup> appellant conducts his business. He does not know the 1<sup>st</sup> appellant. He knows Charles Wangai hawks mandazi on a motorcycle but does not know where he leaves.

The evidence on record does prove that PW1 was robbed of his mobile phone on the evening of 18<sup>th</sup> May 2011. The main issue for determination is whether it is the two appellants who robbed him the phone. The evidence for the prosecution is based around identification and recovery of recently stolen item. The complainant's evidence is that he identified the two robbers using electricity light. PW2 also informed the court that he was inside the house and saw the two robbers struggling with the complainant.

The evidence does not show how long the incident occurred. Although two witnesses testified to the effect that they identified the robber, it is quite doubtful as to whether the identification is full-proof. The evidence has to be analyzed in totality. PW1 informed the court that he did not know the robbers. On his part, the 2<sup>nd</sup> appellant in his sworn defence informed the court that he does business with the complainant and he knows him.

With regard to the evidence against the 1<sup>st</sup> appellant, we do find that the evidence is not strong enough to sustain a conviction. PW2 alleged that a gun was recovered from the 1<sup>st</sup> appellant. The investigating officer did not mention anything about it. There are some other witnesses who are alleged to have identified the 1<sup>st</sup> appellant at an identification parade but they did not testify. It is not clear whether the white shoes that were recovered were found in the 1<sup>st</sup> appellant's house or in someone else's house. According to PW6, the investigating officer, the 1<sup>st</sup> appellant was arrested by members of the public.

PW1, the complainant was not present when the appellants were arrested and thus his first report to the police was of no help. We do agree with the submissions by Mr. Orinda that the evidence against the 1<sup>st</sup> appellant is not strong enough to sustain a conviction.

With regard to the 2<sup>nd</sup> appellant, the evidence is that he was found in possession of the phone that was robbed from PW1. The 2<sup>nd</sup> appellant was arrested on 24.5.2011. This was about one week after the robbery. A phone is an item that is capable of being disposed of soon after it is stolen. Although the 2<sup>nd</sup> appellant gave evidence to the effect that the phone was left by the gamblers, we are satisfied that it was found with the 2<sup>nd</sup> appellant. We do find that the 2<sup>nd</sup> appellant was found with the phone and is guilty of handling stolen property contrary to **section 322(2)** of the **Penal Code** as per the alternative charge and shall be convicted of that offence.

In the end, we do find that the appeal by the 1<sup>st</sup> appellant is merited and the same is allowed. The 1<sup>st</sup> appellant shall be set at liberty unless otherwise lawfully held. The appeal on conviction and sentence on the count of robbery with violence for the 2<sup>nd</sup> appellant is hereby set aside. The 2<sup>nd</sup> appellant is found guilty of the offence of handling stolen property as per the alternative charge. The 2<sup>nd</sup> appellant is sentenced to serve five (5) years imprisonment. The sentence shall run from the date of his conviction by the trial court.

**Delivered, dated and signed at Kakamega this 9<sup>th</sup> day of October 2013**

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**SAID J. CHITEMBWE**

**JUDGE**

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**GEORGE DULU**

**JUDGE**