



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURT**  
**Criminal Appeal 190 of 2008**

**JEREMIAH MAUNDU.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal Case No.1059 of 2006 of the Chief Magistrate's Court at Nairobi by T.W.C. Wamae (Mrs) – Chief Magistrate)*

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

The appellant, **JEREMIAH MAUNDU**, was convicted for the offence of Robbery with Violence **contrary to section 296 (2) of the Penal Code**. He was then sentenced to suffer death as by law prescribed.

He lodged an appeal to challenge both the conviction and sentence. In his grounds of appeal, the appellant raised seven (7) issues, which can be summarised as follows;

- (1) *The doctrine of recent possession was not proved to the required standard.***
- (2) *The prosecution witnesses gave unsatisfactory testimonies.***
- (3) *The trial was irregularly conducted, contrary to section 151 of the Criminal Procedure Code.***
- (4) *Vital witnesses were not called, contrary to section 150 of the Criminal Procedure Code.***
- (5) *The fundamental rights of the appellant were violated.***
- (6) *The evidence adduced was incredible and could not sustain conviction and sentence.***
- (7) *The Defence was plausible and formidable, and ought not to have been rejected.***

When canvassing the appeal, the appellant submitted that there was no proof that he was found in possession of the phone belonging to the deceased when he was arrested.

As far as he was concerned, if the deceased last used his phone on 12<sup>th</sup> May 2006, yet he only disappeared one week after that, (on 19<sup>th</sup> May 2006) then the deceased could not have had the phone at the time he disappeared.

In any event, the appellant believes that it is not clear which phone was being investigated as, in his understanding, the prosecution witnesses talked about eight different mobile phones. **PW 8, PW 9** and **PW 12** are said to have given the said different serial numbers, as follows;

- (a) **PW 8** – (i) 353 362 008 409 290;
- (ii) 353 362 008 709 929; and
- (iii) 353 362 002 409 290

The appellant also pointed out that two (2) different phone numbers were both marked as MFI. 10. Those were in the nature of the sim-cards for the phones number (a) 0727 587 771; and

(b) 0722 505 433.

Thirdly, the appellant contended that MFI 6 was for two different sim cards, being numbers;

- (a) 0720 404 583; and
- (b) 0722 505 433.

Because of the said differences, the appellant submitted that the prosecution evidence was contradictory, inconsistent and lacking in credibility.

In his view, that shows that the prosecution simply intended to plant evidence against him.

The appellant also submitted that the failure to have **PW 18** sworn was a violation of **section 151 of the Criminal Procedure Code**. Therefore, the whole trial was rendered a nullity, he said.

In any event, the failure to call a witness from Safaricom is said to have deprived the trial court of the evidence of an expert who would have assisted the court.

It was the contention of the appellant that the evidence adduced by a person other than the expert from whom such evidence emanated, was irregular as it contravened **section 33 of the Evidence Act and section 77 of the Criminal Procedure Code**.

In any event, when **PW 18** was seeking information from Safaricom he made reference to phone number 0720 611 388. In effect, the information which Safaricom provided was in relation to a phone number that had no relevance to the case.

As regards his fundamental rights, the appellant argued that it was wrong to have held him in custody for 15 days before bringing him to court. He also said that the failure to give him the opportunity to mitigate before being sentenced, was wrong.

To make matters worse, the appellant says that he was unwell, and therefore sought an adjournment before being sentenced. His application for an adjournment was denied. For that reason, he faults the learned trial magistrate.

Furthermore, he believes that **PW 1** ought not to have been believed when he testified that the appellant identified himself by name, over the phone, yet **PW 1** did not record the appellant's name in the statement he recorded. As far as the appellant is concerned it was important that **PW 1** should record his name in the statement as that was a vital piece of evidence.

The appellant also pointed out that whereas **PW 9** allegedly recorded the Search Certificate showing the details of the sim cards recovered from him at Mtito Andei, **PW 7** testified that the said Search Certificate was only recorded at Emali Police Post.

The inconsistency in the evidence is said to demonstrate that the witnesses were not reliable.

Finally, the appellant pointed out that he was simply framed when he declined to reconcile with **PW 10** who was his former wife.

In answer to the appeal, Ms Maina, learned state counsel, submitted that the evidence on record was sufficient to sustain the conviction and sentence, as the appellant was in possession of the phone and sim card of the deceased when he was arrested. As the phone and the sim-card were stolen from the deceased only about one week before they were recovered from the appellant, the respondent submitted that the doctrine of recent possession was correctly applied by the trial court.

The respondent also pointed out the fact that the messages sent by the appellant to the deceased were retrieved, and also that the appellant led the police officers to the scene where the body of the deceased had been recovered before the appellant was arrested.

But the appellant disputed the existence of any evidence to prove that he ever led the police to the exact spot from where the body of the deceased had been recovered.

The respondent further pointed at the fact that the appellant had recorded a confession before a magistrate; and that the said confession was never retracted.

Being the first appellate court, we have re-evaluated all the evidence on record. We have then drawn our own conclusions, whilst bearing in mind the fact that we did not have the benefit of observing the witnesses when they were giving evidence.

First, it is clear that none of the witnesses saw the offence being committed. That means that all the evidence that was made available by the prosecution was circumstantial. In those circumstances, a conviction can only be founded on evidence which points only at the appellant as the person who committed the offence. There should be no co-existing facts which either dilutes the inference of guilt or which points at the possibility that the offence may have been committed by any other person or persons.

The charge sheet indicates that the offence was committed between 19<sup>th</sup> and 23<sup>rd</sup> May 2006. The place where the offence was committed is indicated as Emali Township.

The charge sheet also indicates that the offence was committed by the appellant, his co-accused (MUTINDA MUTUKU), and other persons who were not before the court.

The prosecution case was that the victim (CHARLES MWENDO LONZI) as robbed of an unknown amount of money, together with his 7200 model of a Nokia phone valued at Kshs.15,000/-; and a golden ring valued at KShs.2,250/-.

During the robbery, the victim was killed.

**PW 1** is a brother to the deceased. On 26<sup>th</sup> May 2006, he got a phone-call from his sister-in-law (**PW 8**), informing him that the victim had not been seen for one week. **PW 8** also told him that she had been phoned, and told by someone called JOSHUA MBOTE that the victim had been arrested at Loitokitok, along the Kenya/Tanzania border.

JOSHUA MBOTE informed **PW 1** that the persons who had contacted him had said that KShs.37,000/- was needed to facilitate the release of the victim. Mbote told **PW 1** that he had received the message from phone Number 0727 587 771.

When **PW 1** phoned that number, it was answered by JEREMIAH MAUNDU, who described himself as a friend to the victim. Jeremiah Maundu told **PW 1** that the victim was arrested for importing contraband things.

**PW 1** arranged to meet Maundu at Emali on the next day. **PW 1** was to deliver to Maundu KShs.40,000/-.

However, Maundu did not turn up at Emali, and his phone was switched off. That prompted **PW 1** to go to Loitokitok, where he verified from the Immigration officers that his brother (the victim) was not in their custody.

On the next day, **PW 1** learnt that a body had been recovered at Emali. Later, at the Machakos Mortuary, **PW 1** identified the body as that of his brother.

Although **PW 1** had verified that his brother was dead, he continued to call the phone number of Jeremiah Maundu. On the third day Maundu told **PW 1** that they should meet at Mtito Andei. **PW 1** went there, with policemen. Upon arrival, **PW 1** phoned Maundu, and he noted the person who answered. **PW 1** pointed out the man to the police, who then arrested him.

**PW 1** identified the appellant as the person who was arrested after he answered **PW 1**'s call.

It was the evidence of **PW 1** that the appellant then informed him that the victim was killed by a mob when he had gone to commit a robbery. The body was then dragged to a maize plantation.

Upon arrest, the appellant was found in possession of the victim's mobile phone, and sim card.

During cross-examination, **PW 1** conceded that in the statement he recorded with the police, he did not give the appellant's name. However, he emphasized that when the appellant had been arrested he (the appellant) acknowledged that he was the person who had been communicating with **PW 1** on phone.

According to **PW 1**, it is he who led the police to arrest the appellant. He did so by pointing out to the police, the person who had answered the call that **PW 1** had put through to the phone-line belonging to his brother.

**PW 2** testified that he had accompanied **PW 1** from Nairobi to Emali, where **PW 1** was supposed to hand over KShs.37,000/- to the friend of the deceased. That friend had told **PW 1** that the money was needed to secure the release of the deceased from custody.

When the alleged friend did not show up at Emali, **PW 2** accompanied **PW 1** to Loitokitok, where the police told them that the deceased had never been in their custody.

**PW 3, JOSHUA MUNYAO MULI**, received a call on his phone from somebody who identified himself as the deceased, Charles. The caller explained to **PW 3** that he needed KShs.37,000/- to pay for some goods which he had bought.

**PW 3** told the caller that his voice was not familiar. At that point the caller said that Charles was sick, and could not therefore talk to him.

**PW 3** arranged to deliver the money to the caller at Emali.

When they were at Emali, the appellant was arrested when he responded to the call from **PW 1**.

According to **PW 3**, the appellant was in possession of the sim-card for the phone belonging to the deceased.

During cross-examination, **PW 3** said that Inspector Maweu was in possession of the appellant's photograph. However, he denied having identified the appellant because of that photograph.

**PW 4, JANE NTHENYA KISILU**, was a resident of Emali. On 23<sup>rd</sup> May 2006, she went to fetch firewood from a shamba. Whilst there, she smelt a foul smell from a spot where grass had been disturbed.

**PW 4** informed her mother, **PW 6**; who then informed their neighbour **PW 5** about the smell.

**PW 5, PETER MWALOKO MOTONGI**, was led to the spot by **PW 4**, where he found the body of a dead male. The body had decomposed.

**PW 6** corroborated the evidence of **PW 4** and **PW 5**.

**PW 7, PC MICHAEL MBITHI KISINGO**, is the police officer who received a report from **PW 5**, about the deceased.

**PW 7** arranged to have the body removed from the shamba, and to have it taken to the mortuary.

Later, with the help of data from Safaricom Limited, they traced the mobile phone belonging to the deceased, to a location at Loitoktok. The person who was found in possession of the handset was Tabitha Ndunge (**PW 10**). She told the police that the handset belonged to her husband.

**PW 7** and his colleagues later arrested the appellant at Emali, and they recovered one handset from him.

During cross-examination **PW 7** confirmed that Ndunge (**PW 10**) used to be the wife to the accused. The said Ndunge was present when the appellant was being arrested, but **PW 7** denied the suggestion that the appellant was arrested because of a complaint that **PW 10** had made against the appellant.

**PW 7** said that although **PW 10** went to the Police Post with the appellant's clothes, the appellant was not arrested simply because he declined to reconcile with **PW 10**.

**PW 8, LILIAN WANJIKU MWENDO**, was the wife of the deceased. She testified that the deceased left their house at Eastleigh Nairobi, on 19<sup>th</sup> May 2006. He was scheduled to go to Makueni to buy charcoal.

That night, at about 8.00p.m. he phoned **PW 8** and told her that he would be unable to return to Nairobi, as it was late. However, even though he promised to return home on the next day, the deceased failed to show up.

On 24<sup>th</sup> May 2006, Joshua Mbote informed **PW 8** that her husband had phoned him. When **PW 8** and Joshua Mbote called back on the number from which Mbote had been called, the person who answered was not **PW 8's** husband. The person said that the deceased was unwell. Later, another person answered that phone and said that the deceased was alright, but was away.

Later still, **PW 8** identified the body of her late husband at the mortuary. The body was completely decomposed. Therefore, the identification was through his clothing.

**PW 8** also positively identified her late husband's mobile phone. She had fixed a strip to the said phone about six months before her husband was killed.

After the appellant was arrested, **PW 8** identified him as the person who had called her before, using the mobile phone belonging to her husband.

**PW 8** said that the appellant did attempt to pass-off as her husband. However, when **PW 8** asked him about their wedding anniversary, the appellant admitted having been an imposter.

**PW 9, PASKAL MWEU**, was an Inspector of Police until October 2006 when he joined the KACC.

On 29<sup>th</sup> May 2006, **PW 1** reported to **PW 9**, at the CID Headquarters, that the deceased had been missing since 19<sup>th</sup> May 2006.

**PW 9** ascertained from Safaricom that the mobile phone handset No. 0727 587 771 was registered to the deceased.

On 1<sup>st</sup> June 2006 **PW 9** used the data from Safaricom to trace **PW 10** at Loitoktok. **PW 10** had received a call from the phone No. 0727 587 771.

**PW 9** arrested **PW 10**, who then said that the caller was her former husband. Therefore, the police set out to track down the appellant. They arrested him when he answered the call which **PW 1** put through to the phone No. 0727 587 771.

**PW 9** tested the phone and it responded to the PIN Number 5524, which was provided to him by members of the deceased's family.

On 2<sup>nd</sup> June 2006, the appellant led the police to a maize plantation near Emali. After the police visited the scene, **PW 9** verified that the body of the deceased had been recovered from that exact spot, on 23<sup>rd</sup> May 2006.

**PW 10, TABITHA NDUNGE MUTISYA**, was a Business-Lady based at Loitoktok. She used to be the wife of the appellant until 2005.

Before they separated, **PW 10's** mother had given a loan to her and the appellant.

On 29<sup>th</sup> May 2006, the appellant phoned **PW 10** and told her that he had paid the sum of Kshs.15,000/- which **PW 10's** mother had given them earlier, as a loan.

It is that phone-call between the appellant and **PW 10** that led the police to arrest **PW 10**.

When the police interrogated **PW 10**, she provided them with twelve (12) photographs of the appellant.

**PW 10** denied the suggestion that the appellant was framed after he refused to reconcile with her.

**PW 11 PC FRANCIS FLODA**, was at the Sultan Hamud Police Station when the appellant and his co-accused were escorted into the station. It is **PW 11** who placed the two in custody.

**PW 12, INSPECTOR EDWARD KAMONJO**, received a report of a missing person. He then went about investigating the matter, using the services of Safaricom to trace the handset belonging to the deceased. The phone was later recovered from the appellant when he was arrested.

**PW 13, DR. GEOFFREY ZAMBEZI MOTUMA**, was a consultant pathologist. He performed the post-mortem examination on the body of the deceased. In his considered professional opinion, the cause of death was Head Injury and Manual Strangulation.

Although the doctor did not know whether the deceased was first hit on the head before being strangled, or vice versa, he concluded that the deceased died due to lack of oxygen due to strangulation.

**PW 14, DONALD GITONGA KARANI**, was a Resident Magistrate at Machakos.

On 13<sup>th</sup> June 2006, the appellant and the co-accused were taken before **PW 14**, in his chambers. The two were supposed to record their statements.

**PW 14** warned the appellant that he did not need to say anything. Thereafter, **PW 14** recorded the appellant's statement.

However, the appellant successfully blocked the admission of that statement in evidence.

**PW 15, CIP WILFRED ORENGE MOGERE**, testified about the appellant's complaint regarding his personal items.

**PW 16, CIP PRO MUMO**, was a liaison officer between the police and Safaricom. His duties entail the analysis of telecommunication data. He verified that the mobile phone handset belonging to the deceased was used to call his wife, after the demise of the deceased.

The said handset was also used to call the brother of the deceased.

The data showed that the appellant first used the handset about 9 hours after the deceased disappeared.

**PW 17 AG. IP SAMUEL NJOROGI**, testified about the appellant's complaint, regarding his property which had been allegedly taken away by the police.

Later, when he was put to his defence, the appellant attributed his arrest to his refusal to reconcile with his former wife (**PW 10**).

He denied the contention that the phone recovered from him belonged to the deceased. He insisted that the phone was his.

However, when the receipt produced by the appellant was investigated, its source was not established. In other words, the shop that had allegedly issued the receipt was not traced.

Having re-evaluated the evidence we find that the deceased was killed.

His body was then dumped into a maize plantation.

Thereafter, his phone was used in an attempt to extort money from his wife. The person using the phone tried to get money for use in either paying for some goods which the deceased had bought or for facilitating the release of the deceased from custody.

The phone was later recovered from the appellant. The sim card belonging to the deceased was also recovered from the appellant.

The recoveries were made about 12 days after the deceased disappeared. And the appellant had used the sim card of the deceased 8 days after the deceased had disappeared.

In the circumstances, the doctrine of recent possession was correctly invoked by the learned trial magistrate, when the appellant failed to explain how he came to be in possession of the phone and sim card belonging to the deceased.

Not only was the appellant found in possession of the property recently stolen from the deceased, he even led the police to the scene where the body of the deceased had recently been recovered from.

In our considered view, it did not matter whether or not the investigators had photos of the appellant before they arrested him. It is not the said photos which led to his arrest.

The reason for his arrest was that he answered the call put through to the phone number of the deceased.

It therefore did not also matter whether or not the mobile phone provider, Safaricom, had assisted the police in tracing the whereabouts of the phone belonging to the deceased. The simple truth is that the appellant was found in possession of the phone.

Had the appellant not answered when the number on the phone he had was called, it may have been necessary for the provider to adduce evidence to establish how the phone was traced. But because the appellant was nabbed when he answered the call, we find that no vital witness failed to testify at the

appellant's trial.

The record shows that **PW 18** was not sworn before he testified. That means that his evidence was received irregularly. It ought to be expunged from record.

Thereafter, the court must ascertain whether or not the exclusion of the said evidence resulted in there being gaps in the prosecution case. If the answer is in the affirmative, then an acquittal ought to follow.

In this instance, **PW 18** was called by the prosecution to rebut the appellant's defence.

As the phone had already been positively identified by the wife of the deceased, we hold that the exclusion of the evidence of **PW 18** did not create any gaps in the evidence tendered by the prosecution.

The failure to have one witness sworn cannot, of itself, render the rest of the proceedings a nullity.

As regards the delay in taking the appellant to court, we find that that too does not render the trial a nullity. In **JULIUS KAMAU MBUGUA Vs REPUBLIC, CRIMINAL APPEAL NO. 50 of 2008**, the Court of Appeal said;

***“In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused.”***

The said court proceeded further to conclude as follows;

***“Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum.”***

On the issue regarding the denial for an adjournment just before the trial court handed down the sentence, we find that the same did not prejudice the appellant.

The court was informed that the appellant was a first offender. Thereafter, the court sentenced him to suffer death as prescribed by the law.

The appellant had said that he was unwell. He has not told this court what he would have achieved if an adjournment had been granted.

A Search Certificate was produced in evidence. It contained the particulars of the sim cards that were recovered from the appellant. To our minds, it is not material whether the said certificate was executed either at Sultan Hamud or at Emali Police Post. We say so because the appellant has not disputed the accuracy of the contents of the certificate. If anything, he counter-signed the certificate, thus authenticating it.

The two sim cards were for the phone numbers 0722 505 433 and 0727 587 771. The former belonged to the deceased, whilst the later was used to call the wife and the brother of the deceased.

In the circumstances, we find that the conviction was founded upon solid evidence. We therefore uphold both conviction and sentence.

**Dated, Signed and Delivered at Nairobi, this 9<sup>th</sup> day of October, 2012.**

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**FRED A. OCHIENG**

**JUDGE**

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**LYDIA A. ACHODE**

**JUDGE**