



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

Criminal Appeal 239 of 2008

**JULIUS MWANGI**

**KAMAU.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

*(Appeal arising from the Chief Magistrate's court at Nyeri in Criminal Case No. 3090 of 2007)*

**JUDGMENT**

The appellant Julius Mwangi Kamau was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on 31st August 2007 at Muthua Estate in Nyeri District within Central Province jointly with others not before the court while armed with pangas, rungas, metal bars robbed Purity Gacheri Kaburu a mobile phone Nokia 2600 worth Ksh. 4500/- and cash Ksh. 1200/- all valued at Ksh. 5,700/= and at or immediately before or after the time of such robbery used actual violence to the said PURITY GACHERI KABURU.

He faced an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code the particulars of which were that on 31st August 2007 at Muthua Estate road in Nyeri within Central Province otherwise than in the course of stealing dishonestly received or retained a mobile phone make Nokia 2600 serial No. 355669001882334 knowing or having reason to believe it to be stolen.

He was tried convicted and sentenced to suffer death.

Being dissatisfied with the said conviction and sentence the appellant filed the appeal herein and during the trial the same filed supplementary grounds of appeal together with written submissions.

In his supplementary ground of appeal the the same for the purpose of this trial can be summarized as follows:

1. ***The learned trial magistrate passed sentence which is inconsistent with the court constitution.***
2. ***The charge sheet was defective***
3. ***There was no corroboration of evidence of P.W.1.***

This appeal was opposed by Miss Maundu for the state who submitted that the charge sheet was not defective and that the trial court warned itself of the danger of convicting on the evidence of one identifying witness and that P.W.1 recognized the appellant and that the serial number of the phones matched.

She submitted that the defence of the appellant was considered and properly rejected by the court and that the sentence of death was lawfully.

We have seen it fit to deal with the appellant first ground of appeal since the same is a constitutional issue. The appellant has submitted that he was sentenced to death which is now unlawful because the constitution upholds right to life. This court has pointed out before and we state again that the death sentence is still very lawful and constitutional. It should be noted that the court of appeal has held that though it is lawful it is not the only sentence that can be given. We therefore find no merit on this ground of appeal.

It has also been submitted by the appellant that his right under article 50(2) of the constitution was violated since he was denied witness statement. We have noted from the proceedings that on 28th January 2008 the appellant made a request for witness statements and the court made an order that the appellant use the prison welfare to send for his people if he is serious that he receives witness statements before he proceeds with the matter otherwise the court will not adjourn the matter on the reason of lack of witness statement. We have noted that there is no confirmation from the proceedings whether the appellant was ever issued with the witness statement and therefore agree with the appellant that his right were violated but hold that that it did not render the trial void as he was able to cross examine the witnesses.

We therefore proceed to analyse the evidence tendered before the trial court to enable us deal with the appellant's other grounds of appeal.

PW.1 PURITY GACHERI KABURU testified that she was a bar maid and that on the material day together with other bar maids they called the watchman who normally escorts them, on the way they met some four men who told them that it was safe and that as they walked the four men chased them and demanded that they pay the watchman, the men pounced on them and she was robbed of her Nokia valued at Kshs. 4500/- and Ksh. 1200/- in cash. That she stayed with the appellant for 30 minutes and that he was drunk. He was armed with a panga.

That on 14th January 2007 she went to the flying squad office and was told that the mobile phone had been recovered. That on 21st July 2007 she attended identification parade and was able to identify the appellant. She stated that at the place where she was with the accused person there was security lights and that she stayed with the accused for 30 minutes. The accused had ordered her to undress and lie down but she refused and that they struggled and the taxi driver came and saved her from the appellant.

Under cross examination the witness denied that she had cohabited with the appellant since she is married with a child. She stated that it took her ten days to go to the police since her boss refused to give her off.

P.W.2 p.c. EVANS AGUMBA KAGUDE testified that on 12th September 2007 they got a tip off that the notorious robbers were having drinks at Nyakio bar. They went there and found Joseph Kagume and Julius Mwangi the appellant. When they searched the two they recovered mobile phones from the appellant and he latter learn t that the phone was robbed from P.W.1.

P.W.3 CIP Rogers Bosire testified that he conducted the identification parade that when he called the witness the appellant was totally uneasy and that P.W.1 identified the appellant by touching him. He said that the complainant knew him and there was no need for the parade and that after the parade the appellant refused to sign the parade forms.

P.W.4 Nancy Wanjiku Kibigu testified that she was with P.W.1 when they were attacked by four men who took each one of them and that she was unable to identify her attackers since it was dark and that after the attack each of them went their separate way.

P.W.5 p.c. Richard Lokale Ekutan testified that the complainant reported on 1st September 2007 that she was robbed by a gang of four men on 31st August 2007 while walking home. That she was dragged away by a tall brown man and that while undertaking investigation two men were arrested from Nyakio bar and when the appellant was searched mobile phone

Nokia 2600 was recovered from him and when the complainant came to the police station she was unable to identify the phone at first but when she brought the receipt the serial number matched. Under cross examination he confirms that the appellant had been charged with another case of robbery with violence.

When put on defence the appellant gave sworn evidence and stated that the complainant was his lover for 3 months and that is why he refused to sign the parade forms and that when he was in court for the other case the prosecution applied that he be remanded at Karatina where the said identification was done. That the police had asked for Ksh. 5000/- to enable the finalize the matter but he did not have the money.

He testified that the complainant was his lover and that on 28th August 2007 his wife telephoned while he was in the bathroom and that she talked to the complainant that he later decided to go to mweiga the following day. He had Ksh. 11,000/- under the mattress and he took 2000/= leaving left 9000/= when he returned from Karatina the following day he did not find the money and that when he asked her for the same she gave him her phone as security and that when he was arrested she had not refunded the money.

It is upon this evidence that the appellant was convicted. The major issue for us to determine in this appeal is whether the complainant was able to identify the appellant at the time of the attack.

We noted from the evidence of P.W.2 that she was not able to identify the attackers since the place was dark. If they were attacked at the same time then this evidence contradict the evidence of P.W.1 in material facts as she stated that the place was well lit. we therefore agree with the appellant's submission on ground four of his grounds of appeal that the conditions prevailing were not favourable for the identification of the attackers.

We have also noted that the appellant was arrested on the ground that known robbers were seen at a bar and that upon search the appellant was found with a phone which was allegedly stolen from the P.W.1.

We have noted that two very vital witnesses were not called by the prosecution that is the watchman who was allegedly escorting the complainant home and the tax driver who allegedly saved her from the appellant.

From the evidence of P.W.1 we note that she alleged that the appellant had asked her to remove her cloth but she refused and note that the court should have had this in mind while dismissing the appellant's defence herein .

We have noted that the only link the court found between the appellant and the alleged robbery was the possession of the phone allegedly stolen from the complainant but note that the appellant gave an account of how he came to possession of the same. The mere fact that the appellant is a known robber does not mean that he was involved in this particular robbery.

We therefore find that the prosecution did not prove its case against the appellant beyond reasonable doubt and hold that the conviction of the appellant herein was not very safe.

We therefore allow the appeal herein quash the conviction and set aside the sentence. The appellant should be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 4th day of October 2012.

**J.K. SERGON**  
**JUDGE**

**J. WAKIAGA**  
**JUDGE.**

Julius Mwangi Kamau  
Miss Kitoto for the state.