

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CRIMINAL APPEAL CASE NO.E035 OF 2022

PAUL GACHIGI KING'ORI.....ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant herein **PAUL GACHIGI KING'ORI** has filed this appeal challenging his conviction and sentence in the chief Magistrates Court.
2. The Appellant had been arraigned in Lower Court on **14th December 2021** facing a charge of **ROBBERY CONTRARY TO SECTION 296 (1) OF THE PENAL CODE**. The particulars of the charge were that:-

“On the 5th day of December 2021 at about 17:45 hrs at KIMATHI Village in Nyeri Central Sub-County within Nyeri County you stole from **KELVIN KIPKORIR ISAACK** a mobile phone make Samsung valued at Kshs. 15,000/= the property of **KELVIN KIPKORIR ISAACK** and immediately after the

time of stealing you threatened to use violence against the said **KELVIN KIPKORIR ISAACK.**"

3. The Appellant entered a Plea of '**Not Guilty**' to the charge and his trial commenced before the Lower Court on **31st March 2022**. The prosecution called a total of four (4) witnesses in support of their case.
4. The complainant **Kelvin Kipkorir** told the Court that he was at the material time a student at the **Dedan Kimathi University**. That on **5th December 2021**, the complainant was walking towards Ngandu on his way to visit a friend. He met with the Appellant who was coming from the opposite direction. They chatted briefly.
5. The Appellant had in his hand his phone make **Samsung A25**. He states that the Appellant grabbed his phone and ran into the nearby forest. The complainant gave chase and after fifty (50) metres he caught the appellant. The two men wrestled briefly but the appellant managed to overpower the complainant and made off with the phone. The complainant then went and reported the theft at Kabiruini Police Station.

6. Later on **7th December 2021** the complainant went to Nyaribo where he spotted the appellant sitting outside a shop selling second-hand phones. The complainant rushed to the police station and returned to the scene with three (3) police officers. Upon returning with police to Nyaribo the appellant ran away. The officers told the complainant that they knew the appellant and would arrest him.
7. On **20th December 2021** the complainant was called to Nyeri Police station. Upon arrival he found a lady and a man whom he did not know. The police told the complainant that a Samsung phone had been recovered from the lady. The complainant identified the phone as his. He even had the receipt for the phone. The lady whose name was '**Lucy Lesit**' told police that the phone had been given to her as a gift by the Appellant. She later led police to the home of the appellant, where he was arrested and later on was charged with the offence of Robbery.
8. **PW2 PC BONIFACE KOECH** and **PW3 PC OSCAR KOSKEI** told the court that the suspect called '**Lucy**' told police that the Samsung phone she had in her possession had been given to

her by the Appellant. The said '**Lucy**' led them to Nyaribo and pointed out the home of the Appellant, where the officers arrested the appellant and took him to the police station.

9. **PW4 PC ALEX THEU** told the court that on **9th December 2021**, he

was informed that a lady was selling a suspected stolen **phone** at Viceroy Bar. **PW4** went to the said bar and met one '**Lucy Lesit**' who had two phones including a **Samsung A25**. They arrested the said '**Lucy**' and a man and took them to the police station. The police went through the phones contacts and called the complainants brother.

10. **PW5 SERGEANT JACKSON MUSYOKA** is one of the officers who

accompanied the complainant to Nyaribo market. The complainant pointed out the appellant as the man who had stolen his phone. When the appellant saw the police he ran away. **PW4** recognised the appellant as a man whom worked in a quarry close to the police station.

11. At the close of the prosecution case the appellant was found to have

a case to answer and was put to his defence. The appellant gave a sworn defence in which he denied the charge of theft.

12. On **16th August 2022 HON M OKUCHE, PRINCIPAL MAGISTRATE** delivered a judgment in which he convicted the appellant of the offence of Robbery with Violence. Following his conviction the appellant was allowed an opportunity to mitigate after which he was sentenced to serve **ten (10) years** imprisonment.

13. Being aggrieved by his conviction and sentence the appellant filed this appeal. The petition of Appeal which was filed in court on 7th September 2022 was premised upon the following grounds:-

- “1. THAT, the trial court erred both in law and fact when convicting and failed to notice that the purported exhibit was not found in my possession thus occasioned a miscarriage of justice.**
- 2. THAT, the trial magistrate erred both in law and fact when convicting and failed to notice**

that the person that was in possession of the alleged exhibit was released by the police at the police station without supportive reasons. She was either be charged or be reserved as the prosecution witness if at all there was a conflict to be resolved.

- 3. THAT, the trial court continued to error both in law and fact when convicting and failed to realize that failure by the prosecution to either charge or summon the alleged persons as a witness was a violation of section 144, 145, 146 and 147 of the C.P.C. The same to a violation of Article 25 (c) and 50(2) of the Constitution of Kenya hence seeking your intervention.”**

ANALYSIS AND DETERMINATION

14. I have carefully considered the appeal before this court, the record of the trial before the Lower Court as well as the written submissions filed by both parties.

15. This is a first appeal in which the duty of the Court is to re-examine

and re-analyse the evidence adduced before the lower court and to draw its own conclusions on the same. In the case of **OKENO -VS- REPUBLIC [1972] EA 32** the court set out the duties of the appellate court as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic (1957) EA 336 and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v R (1957) EA 570) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had

the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post [1958] EA 424.*” (See also *Kiilu & Another v Republic [2005] KLR 174*).

16. Similarly in the case of **DAVID NJUGUNA WAIRIMU -vs- REPUBLIC [2010 eKLR]** the Court of Appeal stated as follows:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on

the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

17. The complainant told the court that on the evening of **5th**

December

2021 he was robbed of his mobile phone make **Samsung A25**. The complainant narrated how he chased the robber into a nearby forest where they struggled but the robber overpowered him and escaped with the phone.

18. There would be no reason to doubt the complainants narration of

events. The complainant would have no reason to say that his mobile phone if that was not the truth. The complainant reported the incident to police.

19. It is clear that actual evidence was used in the theft of the phone which

made the incident a robbery as defined by **Section 296 (1)** of the

Penal Code.

20. The complainants stolen phone was recovered a few days after said

robbery. The phone make **Samsung A25** was produced in court as an exhibit **Pexb1**. The complainant was called to the police station where he positively identified his stolen phone. The complainant had the receipt for purchase of the phone. A copy of that receipt Serial No. **1604** dated **16th August 2021** issued by Divine Enterprises was produced as an exhibit **Pexb 2**.

21. Although **PW5** told the Court that the **IMEI** number on the receipt

corresponded with that on the phone itself. The learned trial magistrate did not appear to have herself made a comparison of the IMEI number as she made no record of this. Further I do note that even to the naked eye the IMEI number on the receipt has clearly been altered using a different pen. The court is not told who made that alteration or why. The said alteration has not been initialled. In the circumstances this court harbours doubts as to whether this receipt truly related to the complainants stolen phone.

22. Secondly there is the issue of identification. The complainant identified

the appellant as the man who robbed him. The complainant was in effect the only eye witness to the incident. It is trite that court must exercise with caution when relying on the evidence of a single identifying witness. Therefore the evidence of a single witness must be tested carefully. Such evidence must be cogent and ought to be corroborated by other material evidence.

23. In the case of **MUCHIRI -VS- REPUBLIC [1982] KLR** it was held

that

“It is dangerous to convict an accused person on single Evidence without corroboration in material/particular facts.”

24. The appellant was at the material time a stranger to the complainant.

In the circumstances the police ought to have mounted an identification parade to confirm the complainant's identification of the appellant. This was not done. No reason was given for their omission.

25. The complainant stated that he chased his attacker and wrestled with

him thus presumably he had the opportunity to see him well. However although the charge sheet indicates that the incident occurred at **17:45 hours**, the complainant himself did not in his evidence state what time the incident occurred. Neither did the complainant state what kind of light was available at the scene to enable him see and identify his attacker.

26. In her judgment the learned trial magistrate did not warn herself of

the dangers of relying on the evidence of a single identifying witness. The trial court appeared to place greater reliance on the evidence linking the appellant to one '**Lucy Lesit**' who was allegedly found in possession of the stolen phone.

27. The evidence of the police was that they apprehended a lady called

'**Lucy Lesit**' who had in possession a Samsung phone believed to be the phone which was stolen from the complainant. This '**Lucy Lesit**' told police that the appellant

had given her the phone as a gift and on **9th December 2021** she led police to the house of the appellant from where he was arrested.

28. From the evidence this '**Lucy Lesit**' was a critical witness as it was she

who effectively linked the appellant to the stolen phone. Yet the lady

was not called as a prosecution witness. The record indicates that

on **9th May 2022** the **PW5 Sergeant Jackson Musyoka** the investigating officers told the court that they would be calling **Lucy Lesit** as a witness for the prosecution. **PW5** confirmed that he had recorded the statement of this witness and confirmed that he had bonded her to come to court.

29. Surprisingly on **4th July 2022** the record shows that when the matter

came up for hearing the prosecution informed the court that the said **Lucy Lesit** could not be traced and closed their case.

30. Firstly it is curious why a person who was allegedly found in possession

of a stolen phone was not herself charged in any criminal offence.

31. Secondly it is not believable that this critical witness suddenly vanished

into thin air. Did the police not take her contacts. Surely the Kenya Police Service with all the resources at its disposal could not have been unable to trace this civilian witness if they really wanted to. In the case of **BUKENYA -VS- UGANDA [1977] E.A 549** the Court held that:-

“The prosecution must call all material witnesses to prove its case. Failure to call crucial witnesses gives rise to the presumption that their evidence would have been adverse to the prosecution case.” [Own emphasis]

32. The deliberate failure to call this **Lucy Lesit** as a prosecution witness

gives rise to the presumption that if she had been called her evidence would have been unfavourable to the prosecution

case. The failure to call this witness is a serious if not fatal blow to the prosecution case given that she was the only witness who could link the appellant to the stolen phone.

33. The court is entitled to draw an adverse inference from the failure to

call this critical witness. Could the failure to call her despite assurance by the investigating officer that she would testify, have been due to the fear that her evidence may not corroborate the prosecution case?

34. I find that the failure to call this critical witness breaks the chain of

evidence. Without her testimony there is nothing to link the appellant to the recovered phone. All in all I find that the prosecution case was weak with several gaps leading to a lot of doubt regarding the guilt of the appellant. The benefit of such doubt must be settled in favour of the Appellant. I find that in the face of the dearth of evidence, questions on identification and failure to call a key witness the trial court erred in convicting the Appellant.

35. Finally I find merit in this appeal and the same is hereby allowed. The

conviction of the Appellant is quashed and his sentence is set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nyeri this 8th day of May 2026.

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MAUREEN A. ODERO
JUDGE