



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CRIMINAL APPEAL NO. 318 OF 2011**

**BETWEEN**

**SAMUEL GICHUKI WAHOME ..... 1<sup>ST</sup> APPELLANT**

**JOHN NDIRANGU KAMAU..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Nyeri (Sergon & Wakiaga, JJ.) dated 16<sup>th</sup> December, 2011***

**in**

**H.C.CR. A. NO. 62 OF 2008)**

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**JUDGMENT OF THE COURT**

1. **Samuel Gichuki Wahome**, the 1<sup>st</sup> appellant herein, and **John Ndirangu Kamau**, the 2<sup>nd</sup> appellant herein, were charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code, Chapter 63 of the Laws of Kenya, in the Chief Magistrate's Court at Nyeri. The particulars of the offence were that on 2<sup>nd</sup> December, 2006 at Kiahungu Market in Nyeri District within the then Central Province, the appellants jointly with others not before the court, robbed David Kimathi Wanjau of a motor vehicle registration number KAT 485B Toyota Corolla saloon, and a cellphone make Motorola C117 S/No. 359185005344078 all valued at Kshs. 302, 480/= and at or immediately before or immediately after the time of such robbery, killed the said David Kimathi Wanjau.
2. The prosecution called a total of 11 witnesses. It was the prosecution's case that David Kimathi Wanjau (deceased) operated a taxi business within Mukurweini. On 1<sup>st</sup> December, 2006 while at the taxi terminus in Mukurweini the deceased was hired by two young men who instructed him to drive them to Ishamara. PW1, Moses Muthui Kingori (Moses), who was at the terminus with the deceased recognized one of the young men as the 2<sup>nd</sup> appellant; the 2<sup>nd</sup> appellant used to work as a lorry loader. Moses testified that the deceased took the young men to Ishamara and returned to the terminus after 30 minutes.

3. On 2<sup>nd</sup> December, 2012 at around 9:00 p.m., PW2, Festus Kabar (Festus), a taxi driver, while at the Mukurweini taxi terminus received a call from one Mwangi Kaende, a shop keeper, who informed him that the deceased who was driving his vehicle registration number KAT 485B had been car-jacked within Kiahungu Market in Mukurweini. Festus testified that Mwangi Kaende had been informed of the car-jacking by a matatu driver known as Julius. Festus informed the other taxi drivers who operated within the area about the car-jacking; Festus, Moses and other taxi drivers decided to trace the deceased's vehicle. Festus gave evidence that when they arrived at Kiahungu Market they were informed that the deceased's car had been seen heading towards Murang'a. They decided to go to Murang'a.
4. On 2<sup>nd</sup> December, 2006 at around 10:00 p.m. PW11, CPL Lameck Njeru (CPL Lameck), while on duty at the Mukurweini police station received information from the OCS of Mukurweini that motor vehicle registration number KAT 485D had been car-jacked within Kiahungu Market; and that it was being driven along Mukurweini- Kabuta- Muranga road. The Nyeri police control room was requested to circulate the details of the vehicle to all the police stations in the area. CPL Lameck, the OCS of Mukurweini and other officers left the police station to trace the vehicle.
5. At around 11:30 p.m. while PW3, IP Absolom Kiamalwa (IP Absolom), and PW10, CPL Abdinassir Mohamed (CPL Abdinassir), from Muranga Police Station, were on patrol they met the appellants at Kiriani- Muranga road. The appellants were acting suspiciously and were walking towards Muranga. They stopped the appellants and inquired where they were going. The appellants informed them that they were going to Thika. CPL Abdinassir testified that he and IP Absolom grew more suspicious when the appellants failed to produce their National Identification Cards upon request. They arrested the appellants. Upon searching the appellants, CPL Abdinassir found on the 1<sup>st</sup> appellant Kshs. 1,000/= note and Korean currency. He also noticed blood stains inside the left side of the 1<sup>st</sup> appellant's coat. The 1<sup>st</sup> appellant was unable to account for the blood stains. A mobile phone make Motorola C117 was found on the 2<sup>nd</sup> appellant. The appellants were placed into the police Land Rover and they headed back to Muranga Police Station. A few metres from where they had arrested the appellants, IP Absolom and CPL Abdinassir saw a stationery vehicle near Mathioya bridge. They stopped near the vehicle and noticed it was empty. The vehicle was a Toyota Corolla Saloon registration number KAT 485D. They searched it and discovered blood stains in the boot. IP Absolom called the Nyeri police control room and gave details of the vehicle that they had found. He was informed that a report had been received from the OCS of Mukurweini that the vehicle he described had been car-jacked.
6. Thereafter, police men from Mukurweini Police Station and the taxi drivers who were searching for the deceased's vehicle arrived at the scene where the vehicle had been found. Moses identified one of men who had been arrested, the 2<sup>nd</sup> appellant, as the person who had on the previous day hired the services of the deceased. The appellants were handed over to the police officers from Mukurweini Police Station. While the police officers and the group of taxi drivers were heading back to Mukurweini, they decided to stop at Mahuaini Village because of the smell of diesel in the area. After searching the area they discovered the deceased's body in a trench. The deceased was dead. They noticed that the deceased had a rope tied around his neck and also discovered that diesel had been poured on his body.
7. PW6, Joyce Muchiri Kimathi (Joyce), the deceased's wife, testified that on 2<sup>nd</sup> December, 2006 she gave the deceased, who had misplaced his mobile phone, her mobile phone make Motorola C117 to use while at work. The deceased left the house and promised Joyce to return from work at around 10:00 p.m. to have supper. PW5, James Kariuki Gathua (James), testified that he owns a retail shop and that on 2<sup>nd</sup> December, 2006, the 2<sup>nd</sup> appellant bought two ropes from him. PW8, Dr. Peter Munyua (Dr. Munyua), produced a post mortem report which indicated that the cause of the deceased's death was asphyxia due to strangulation. PW9, Stephen Matinde Joel (Stephen), a Government Analyst, testified that he was given samples of blood by the police to determine whether they matched with the blood stains on the 1<sup>st</sup> appellant's coat. He found that the blood on the 1<sup>st</sup> appellant's coat matched with the deceased's blood group.
8. At the trial, Joyce identified the mobile phone found on the 2<sup>nd</sup> appellant as the one she had given deceased on 2<sup>nd</sup> December, 2006. She identified the mobile phone using the anti radiation ear guard she had placed on the phone. She also produced a receipt of purchase of the said mobile

- phone. Based on the foregoing the appellants were charged with the offence of robbery with violence.
9. In their defence, the 1<sup>st</sup> and 2<sup>nd</sup> appellants gave unsworn statements. They testified that on the material day they had been invited for a pre-wedding party at Blue Post Hotel in Thika; after leaving their houses which were near Muranga Provincial Hospital, to board the matatu they had hired, they met a police Land Rover at the junction of Muranga and Kiriani; police officers in the Land Rover stopped them and asked them where they were going; the appellants told the police officers they were going to Thika; and that they were arrested and ordered into the back of the Land Rover. The 1<sup>st</sup> appellant contended that he was shocked that instead of being taken to the police station which was 100 metres away from where they were arrested, the police officers took the route to Kiriani. After travelling for a distance the Land Rover was stopped and the appellants heard the police saying that there was an abandoned vehicle on the road. Thereafter, the police men searched the appellants. The appellants gave the police officers their National Identification Cards and the money they had. They stayed at the scene for 3 hours until another police Land Rover from Mukurweini Police Station came.
  10. The appellants were transferred into the back of the second Land Rover. After travelling for about 12 kilometres the 1<sup>st</sup> appellant saw vehicles that were behind signalling the police to stop the Land Rover they were in. The vehicle was stopped and the appellants saw a dead body in a trench. The appellants were forced to put the body in the police vehicle. They were taken to Mukurweini Police Station where they stayed in custody for 3 days. They further stated that their blood samples were taken without consent. The 2<sup>nd</sup> appellant contended that he was beaten by the police while being questioned about the mobile phone. The appellants denied committing the offence they were charged with. The 1<sup>st</sup> appellant denied owning the coat that had blood stains. The 2<sup>nd</sup> appellant maintained that he only saw the mobile phone which was alleged to have been found on him, for the first time when it was produced by the prosecution.
  11. Being satisfied that the prosecution had proved its case against the appellants, the trial court convicted and sentenced the appellants to death. Aggrieved with the conviction and sentence made by the trial court, the appellants filed an appeal in the High Court which was subsequently dismissed vide a judgment dated 16<sup>th</sup> December, 2011. It is against that decision that the appellants have filed this current appeal based on a number of grounds. We are of the view that the grounds of appeal can be consolidated into one issue; whether the High Court exercised its jurisdiction as a first appellate court properly by subjecting the evidence to a fresh and exhaustive examination in determining whether the findings of the trial court were correct.
  12. Mr. Muhoho Gichimu, learned counsel for the appellants, submitted that the High Court (Sergon & Wakiaga, JJ.) did not subject the evidence that was before the trial court to a fresh examination so as to arrive at its own conclusion. He contended that the learned Judges in the said judgment, merely outlined the facts of the case, listed the grounds of appeal and simply concluded that the appeal had no merit. He maintained that had the learned Judges exercised their jurisdiction properly they would have arrived at a different conclusion. This is because according to Mr. Gichimu, the appellants conviction was based on recent possession of the deceased's mobile phone, yet no proof was adduced to show that the serial number of the mobile phone was checked to establish that the phone before the trial court was actually the one alleged to have belonged to the deceased. He submitted that the prosecution had not proved that the mobile phone belonged to the deceased.
  13. Mr. Gichimu contended that the 2<sup>nd</sup> appellant's defence was not considered in the High Court judgment. He contended that the High Court did not address the issue of the fact that the sample of the 1<sup>st</sup> appellant's blood was irregularly taken by the police. He further submitted that there was no actual evidence of the time when the deceased was robbed. He urged this Court to allow the appeal.
  14. Mr. J. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal submitted that the circumstantial evidence against the appellants was overwhelming and that the doctrine of recent possession was applicable in this case. He stated that the appellants were found in possession of the deceased's mobile phone which was positively identified by the deceased's wife; the appellants were found near the deceased's abandoned vehicle; and that the appellants did not offer a reasonable explanation for being in possession of the mobile phone.

15. Mr. Kaigai maintained that the High Court analysed the evidence in its judgment. He contended that the test relating to the comparison of blood samples was done procedurally; and finally submitted that there was no reason for this Court to interfere with the concurrent findings of the two lower courts.
16. This being a second appeal and by dint of **Section 361(1)** of the **Criminal Procedure Code**, Chapter 75, laws of Kenya, this Court's jurisdiction is limited to matters of law only. In ***Chemagong vs. Republic* (1984) KLR 213** at page 219 this Court held,

*'A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)'*

17. The High Court being the first appellate court was under an obligation to re-evaluate and re-analyze the facts and evidence which resulted in the decision of trial court. In ***Okeno V. Republic* [1972] E.A. 32** it was held:-

*"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. R. [1957] E.A. 336) and to 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] E.A. 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 findings and conclusions; it must make its own findings and draw its own 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] E.A. 424."*

Therefore, did the High Court subject the evidence to a fresh and exhaustive examination? We have perused the judgment dated 16<sup>th</sup> December, 2011 and are satisfied that it did so. The High Court did explain the issues of law that arose from the evidence that formed the basis of its decision. This is clearly evident from the following finding by the High Court :-

*'This being a first appeal, we have had the chance to review and re-evaluate the evidence adduced at the lower court and have looked and evaluated the submissions of the appellants and are of the considered opinion that the appellants' appeal herein has no merit. The appellants were found with the possession of the deceased's (mobile phone) and were arrested about 150 metres from the scene where the motor vehicle and the deceased were found. PW5 testified that he had sold to the second appellant a rope similar to the one which was found tied on the neck of the deceased and the appellants were according to the evidence of PW7 seen together shortly before the deceased was car-jacked and that the 2<sup>nd</sup> appellant as known to him. We therefore dismiss the appellants' appeal on condition.'*

18. The conviction of the appellants was based on both circumstantial evidence and the doctrine of recent possession. The circumstantial evidence that was adduced by the prosecution is that the appellants were arrested a few metres away from where the deceased's car was found; the 1<sup>st</sup> appellant's coat had blood stains which matched the deceased's blood group; the appellants were seen by PW7, John Mwaniki, on the material day at around 8:00 p.m. entering Central Pub in Mukurweini; that on the material day at around 5:00 pm the 2<sup>nd</sup> appellant bought two ropes from James; and that the deceased was strangled using a rope. We find that additional corroborative evidence is required to warrant the conviction of the appellants. In ***Sawe -vs- R* (2003) KLR 364** this Court at page 372 held ,

*'In order to justify, on circumstantial evidence the inference of guilt, the inculpatory*

***facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt .There must be no other co-existing circumstances weakening the chain of circumstances relied on. '***

19.The corroborative evidence is found in PW6's testimony. It was the prosecution's case that the 2<sup>nd</sup> appellant was found in possession of a mobile phone make Motorola C117 belonging to the deceased a few metres from where his car had been abandoned. Taking into account the evidence on record and the appellants defence we are of the considered view that the prosecution did prove that the mobile phone was found on the 2<sup>nd</sup> appellant on the same day that the deceased had been car-jacked; and that the appellants had been arrested a few metres from where the deceased's car had been abandoned. We further find that PW6, Joyce Muchiri Kimathi, the deceased's wife, positively identified the said mobile phone as the one which she had given the deceased using the anti- radiation ear guard she had placed on the phone; and that she had produced a receipt of purchase of the mobile phone. In In Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic - Criminal Appeal No. 272 of 2005, this court held,

***'....It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.'***

The 2<sup>nd</sup> appellant offered no reasonable explanation of being in possession of the deceased's mobile phone. Based on the foregoing, we agree with the trial court's findings that the doctrine of recent possession applied in this case. We find that the evidence of recent possession provided material corroboration to the circumstantial evidence that was adduced.

20. We find that the appellants conviction was based on sound evidence. Accordingly, the appeal herein has no merit and is hereby dismissed.

**Dated and delivered at Nyeri this 18<sup>th</sup> day of July, 2013**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

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**JUDGE OF APPEAL**

**J. OTIENO- ODEK**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**