



**REPUBLIC OF KENYA**

**COURT OF APPEAL**

**AT MALINDI**

**CRIMINAL APPEAL 225 OF 2010**

**BETWEEN**

**PAUL MWISHO KITONYI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Mombasa (Azangalala & Odero, JJ) dated 19<sup>th</sup> July, 2010**

**in**

**HCCR.A NO. 226 OF 2008)**

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**JUDGMENT OF THE COURT**

On 30<sup>th</sup> day of July 2007 at about 1.30 p.m., **MARIGA SWALE**, hereinafter referred to as “the complainant”, alighted from a Matatu at the stage and started walking to her home in Nyali area Mombasa. As she was walking along, she noticed a young man following her. After a short while, the young man accosted her, pointed a knife at her and demanded to be given all the money and other items that she was carrying. She was afraid to scream and so she complied and surrendered her mobile phone, make Nokia 8210, and Ksh. 300/= which was in her purse. She gathered some courage and requested the young man to give her back the simcard from the cell phone and also her ID card. Surprisingly, the young man complied. He then left but with a stern warning to the complainant not to dare follow him.

Another man appeared at the scene and the complainant gathered courage and started screaming while giving chase. The said man and other members of the public joined in and gave chase. The young man started running towards the roundabout nearby but unfortunately for him, but fortunately for the complainant, he was knocked down by a motor vehicle which was being driven by **GEORGE AWUOR MIDIA** (PW2). He stopped his Motor Vehicle. The incident had by now attracted many other persons who rushed to the scene. Among those who rushed to the scene was **P.C. JONATHAN PARTIMO** (PW4). He arrested the young man. That young man was the appellant herein. A quick search was conducted on him. According to the complainant, the police officer recovered the mobile phone and Ksh

60/=. According to PW2, the police officers searched the appellant and they recovered a mobile phone, a knife and some money which items, except the knife were identified by the complainant as hers. The appellant was thereafter escorted to Nyali police station where he was charged with the offence of robbery with violence contrary to section 296/2 of the Penal code.

In his defence which was unsworn, the appellant denied the offence he was charged with. He told the trial court that he was walking back to his place of work when he was knocked down by a motor vehicle. He seemed to intimate that he lost consciousness after the accident and only regained it while at Nyali Police Station.

The learned trial Magistrate after considering all this evidence presented before him found the case proved beyond any reasonable doubt and convicted him and sentenced him to death.

Being aggrieved by the said conviction and sentence, he filed an appeal before the High Court. His Appeal was dismissed and sentence confirmed. He moved to this Court on second Appeal.

Upon taking over the Appeal, learned counsel for the Appellant, Miss Abir filed two supplementary grounds of appeal which were as hereunder:-

- 1. That the learned Judge of the Superior Court erred in Law in failing to analyse and re-evaluate the whole recorded evidence.**
- 2. That the learned Judge of the Superior Court erred in Law by affirming the conviction of the Appellant while relying on contradictory evidence.**

At the hearing of this appeal, learned counsel abandoned the other grounds of appeal which had been filed by the appellant.

In her address, however, Miss Abir appears to have abandoned the first ground and concentrated on the second ground only. Our view is that she was right in so doing because the judgment of the High Court speaks for itself. The Judges of the High Court analysed and re-evaluated the trial court's evidence which was tendered before the trial court in detail as enunciated in **OKENO – VS – REPUBLIC 1972 EA 32**. The appellant's complaint that the superior court did not perform that duty is clearly without basis.

As regards the second ground, we wish to point out that this is a second appeal. That being so, by dint of **Section 361 of the Criminal Procedure Code**, only matters of law fall for consideration. It is trite law that this Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence at all or are based on a misapprehension of the evidence. See **CHEMAGONG – VS – REPUBLIC (1984) KLR 6**.

The trial and first appellate courts found as fact that both PW1 and PW2 witnessed the recovery from the appellant of the complainant's mobile phone and money. The two courts below believed the two witnesses on this aspect and also Pw4 who arrested the appellant. We have no reason ourselves to impeach the credibility of those witnesses.

Unless inconsistencies and contradictions are raised to support the submission that there was no re-evaluation or analysis of the trial court's record of evidence, which is an issue of Law, it is our view that minor contradictions and inconsistencies in evidence otherwise found sound and credible by the two courts below, would be factual issues. We have no reason to interfere with the concurrent findings of the two courts below.

Our finding therefore is that this appeal lacks merit. We dismiss the same and confirm the findings of the two courts below.

We so order.

*Dated and delivered at Mombasa this 15<sup>th</sup> day of March, 2012.*

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**