



**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: TUNOI, AGANYANYA & VISRAM, J.J.A.)

CRIMINAL APPEAL NO. 99 OF 2009

BETWEEN

ALI MBWANA APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from the judgment of the High Court of Kenya at Mombasa (Sergon & Azangalala, JJ.)
dated 5th May, 2009**

in

H.C.CR.A. NO. 129 OF 2006)

JUDGMENT OF THE COURT

Ali Mbwana, the appellant herein, and one **Salim Juma Abdulla**, were jointly charged in the Chief Magistrate's Court at Mombasa with the offence of robbery with violence contrary to **Section 296 (2)** of the *Penal Code*. The facts of the offence were that on 4th December, 2004 at around 5.30 p.m. at V.O.K. village in Mombasa jointly with others not before the court and while armed with dangerous weapons namely knives robbed **Monicah Mweni Muthamia** a mobile phone make Samsung and cash Kshs.250/= all valued at Kshs.9,750/= and at or immediately before or after the robbery threatened to use actual violence to the said Monicah Mweni.

The prosecution called six witnesses, and after hearing their evidence as well as the unsworn evidence of the appellant, the learned Senior Resident Magistrate (Mr. T. Mwangi) found the appellant guilty of the offence charged, and sentenced him to death. His co-accused, Salim Juma Abdullah, was acquitted. His first appeal to the superior court (Sergon and Azangalala, JJ.) was dismissed, hence this second and final appeal.

The evidence adduced by the complainant, Monicah Mweni (PW1) (Monicah) was that on 4th December, 2004 at around 5.30 p.m. she left the God's Miracle Church at Bombolulu, following a wedding ceremony at the church. She was headed home toward the V.O.K. village when she was accosted by the appellant, armed with a knife. The appellant held the knife by her neck and demanded her mobile phone. Monicah dropped the mobile phone; the appellant picked it up, and together with his other accomplices, dashed towards the V.O.K. village. Meanwhile, Monicah screamed for help, and several

other people at the church, and others who were walking out of the church at the time, came to her assistance. While Ernest Njuguna (PW4) immediately phoned the police, Silvester Mutisya (PW5), together with some other people, gave chase, caught up with the appellant, and arrested him. As members of the public began to beat the appellant, Monicah's mobile phone dropped from the appellant's pocket. Just then the police arrived. Monicah identified him as her attacker by the white shirt and grey jeans that he was wearing and also identified her phone. The appellant was re-arrested by the police, and charged with the offence stated hereinbefore.

The appellant's defence was that he was walking from his residence at V.O.K. towards the shops when he found people chasing another person, and arrested him, thinking that he was the thief.

In his memorandum of appeal dated 3rd August, 2010, and supplementary memorandum of appeal dated 5th August, 2010, filed by his learned counsel, Mr. F. M. Mwawasi, the appellant mainly complained about the defect in the charge; his identification; and the inapplicability of the doctrine of recent possession. In his submissions before us, Mr. Mwawasi abandoned the ground relating to the doctrine of recent possession.

Being a second appeal, only points of law fall for the consideration of this Court – see **Section 361 (1)** of the *Criminal Procedure Code*. On the complaint about the defect of the charge, the counsel argued that the charge stated that the appellant “*threatened*” to use actual violence, not that he actually used any violence – hence, he should have been charged with *attempted* robbery, not robbery with violence.

Mr. Muteti A. Muasya, learned Senior State Counsel, submitted that all the ingredients required for a charge under **Section 296 (2)** of the *Penal Code* were present; that the identification evidence was water-tight; and that the appellant was found in possession of the stolen mobile phone moments after his arrest.

Having considered all the ingredients required in the charge under **Section 296 (2)** of the *Penal Code*, we are satisfied that all ingredients were present in the charge facing the appellant. Both the courts below correctly found that the appellant was accompanied by other people when he held a knife to the complainant's neck, demanding her mobile phone, or he would kill her. We, therefore, find no substance to that complaint.

As regards the identification of the appellant, there were two witnesses – the complainant herself, who identified the appellant from the clothing he wore (white shirt and grey jeans) and Silvester Mutisya (PW5) who gave chase, and apprehended the appellant. Thereafter, there were two other witnesses (PW2 and PW5) who saw the mobile phone allegedly belonging to the complainant, fall off the appellant's clothing as he was being beaten by members of the public. The incident took place at about 5.30 p.m. in clear daylight and the evidence relating to identification was, indeed, safe.

Finally, we concur with the submission of the learned Senior State Counsel that the doctrine of recent possession was properly invoked. The mobile phone stolen from the complainant was recovered in possession of the appellant moments after the incident. The appellant gave absolutely no explanation about how he came to be in possession of the same. In the absence of any explanation, the inevitable inference is that he was the thief.

Accordingly, and for the reasons outlined, we find no merit in this appeal, and dismiss the same.

Dated and delivered at Mombasa this 4th day of March, 2011.

P. K. TUNOI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR