



**Githuku v Republic (Criminal Appeal 123 of 2009)
[2011] KECA 94 (KLR) (1 December 2011) (Judgment)**

John Kamau Githuku v Republic [2011] eKLR

Neutral citation: [2011] KECA 94 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 123 OF 2009
EO O'KUBASU, JWO OTIENO & JG NYAMU, JJA
DECEMBER 1, 2011**

BETWEEN

JOHN KAMAU GITHUKU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nyeri (Kasango, Makbandia, JJ) dated 11th May, 2009 in H.C.CR.A. NOS. 67 & 69 OF 2008)

JUDGMENT

1. The record of this appeal raises fairly disturbing aspects of the administration of justice by certain courts of this country. It would appear, with respect, that both the subordinate court and the High Court did not find it necessary to carefully consider the written law when dealing with this case notwithstanding that an opportunity availed itself at least to the High Court, when the learned state counsel raised flag and conceded the appeal in that court.
2. The appellant John Kamau Githuku, was charged together with three others with eight offences each of robbery with violence contrary to Section 296(2) of the Penal Code and the appellant further faced one alternative charge of handling stolen goods contrary to Section 322(2) of the Penal Code. Two of his colleagues were also each charged with handling charges. They pleaded not guilty and a hearing ensued in which the prosecution called a total of ten witnesses. At the close of prosecution case, the learned Senior Resident Magistrate (T.W. Murigi) in a lengthy ruling pursuant to the provisions of Section 210 of the Criminal Procedure Code found that the prosecution had not established a prima facie case against the appellant and others in respect of all the robbery with violence charges except one as against the appellant. He acquitted the appellant and others in respect of all the other robbery charges but found a case to answer had been established against the appellant in respect of the third



count (at times referred to in this record as count 2). The appellant was also found with a case to answer in respect of the handling charge which, we note was an alternative charge to robbery charges. The third and fourth accused persons were also put on their defence in respect of the alternative charges of handling stolen properties. In acquitting them under Section 210 of the Criminal Procedure Code, the learned Senior Resident Magistrate stated inter alia, as follows:-

“The above complainants testified that they were not able to identify their attackers with the exception of Faith Ngenia who testified that she was able to identify the 1st accused.

2. That being the case I find that it would be in vain to put the accused persons on their defence.
3. However, I find that the 1st accused person has a case to answer in count III and alternative charge of handling stolen goods contrary to Section 322(2) of the Penal Code. I also find that the 3rd and 4th accused have a case to answer to the alternative charge of handling stolen goods contrary to section 2(sic). The upshot of the foregoing is that I find that:

(1) The 1st accused is acquitted on counts 1,2,4,5,6,7,8 under section 210 CPC. He has a case to answer on count 2(sic) and the alternative charge.”

4. That was the offence and its alternative to which the appellant offered sworn evidence in defence and in respect of which the learned Senior Resident Magistrate convicted him, and that was clearly after he had been acquitted of all the other charges whether rightly or not. After his defence, the learned Senior Resident Magistrate, in a lengthy judgment which we may say with respect, was not coherent and was repetitive, found the appellant guilty, convicted him and sentenced him to death. As the conviction in respect of the alternative charge of handling stolen goods is no longer relevant, we reproduce here below the particulars of count III in respect of which he was convicted. These were that:-

“On 15th day of May, 2005 at Gitathi in Murang’a District within the central province, jointly with others not before court, while armed with dangerous weapons namely pangas, axes and an imitation of a gun, robbed Faith Ngenia Wanjohi of cash Kshs.100/- and a mobile phone make Motorola T.192 valued at Kshs.2,800/- all to the total value of Kshs.2,900/= and at immediately before or immediately after the time of such robbery threatened to use actual violence to the said Faith Ngenia Wanjohi.”

5. As we have said, the appellant was convicted of the above offence together with its alternative charge of handling stolen goods. That was bad enough, for one would have expected the learned magistrate to know that once the appellant was convicted of the main charge, the alternative charge which was no more than a fall-back position for prosecution could no longer be considered. However, that error was corrected by the first appellate court as the appellant felt dissatisfied with his conviction on both the main charge of robbery with violence and its alternative charge of handling stolen property together with the sentence of death imposed in respect of the robbery with violence charge.
6. On the first appeal, matters got worse for him. Although his appeal was conceded by the learned state counsel who conducted the appeal on behalf of the State, and although the appellant appealed only against his conviction in respect of only one count in which he was convicted, and the conviction for alternative charge, the learned judges of the High Court (Kasango and Makhandia, JJ) who heard the appeal ended up “convicting” the appellant in respect of counts, 2,3,4,5,6,7 and 8 in respect of which he had been acquitted on no case to answer and confirmed the conviction and sentence on count 3. That court however, allowed the appeal against conviction in respect of the alternative charge. The appellant naturally felt still dissatisfied with that decision and hence this appeal premised on four grounds in the



supplementary memorandum of appeal which was relied upon by Ms. Gichuhi, the learned counsel for the appellant, and which are:-

- “1. That learned judges erred in law in relying on identification evidence which was not satisfactory in the circumstances.
 2. That learned judges erred in law in relying on evidence of an identification parade which parade was not confirmed by any police officer to have taken place.
 3. That the learned judges erred in law in confirming the conviction on count III and further convicted the appellant on counts II to VIII despite the fact that none of the complainants in those counts identified the appellant.
 4. That the learned judges in (sic) failing to look at the whole evidence adduced before the trial court afresh, re-evaluate and re-assess the evidence before passing judgment thus occasioning a miscarriage of justice.”
7. In her address to us, Mrs. Gichuhi, the learned counsel for the appellant raised mainly three matters. These were, first that the learned judges of the High Court erred in law in reversing acquittals pronounced in favour of the appellant by the trial court and secondly, that both courts erred in accepting that the appellant was properly identified whereas there was no evidence by the prosecution to demonstrate that indeed any identification parade was conducted for purposes of identifying the appellant. She referred us to our decision in the case of Simiyu and Another Vs. Republic (2005) KLR 192, the principles of which we shall refer hereafter in this judgment and thirdly that the principle of being in possession of recently stolen property was not properly applied. Mr. Kaigai, the Acting Senior Principal State Counsel, on the other hand conceded the appeal stating that the case against the appellant was not proved beyond reasonable doubt as recovery of the alleged stolen properties was also not proper such that even the charge of handling could not hold. He urged us to allow the appeal.
8. As we have stated above, ten (10) prosecution witnesses gave evidence at the trial that gave rise to this appeal. Together with those, the appellant and two of his colleagues, namely the third and fourth accused in the subordinate court also gave their defence. The appellant who was the first accused in that case gave evidence on oath as we have said above. The other two gave unsworn statements. The hearing commenced but had to be started de novo twice. For reasons that will be clear later in this judgment, we prefer to set out in this judgment, only the facts that were in support of count III, the particulars of which we have set out above. Although Faith Ngenia Wanjohi (PW1) said she and her father Felix Wanjohi Mwandia were attacked by robbers on 15th October, 2005, and the first appellate court also used that as the date of attack on Faith, we think the correct date is 15th May, 2005 which the trial court accepted in its summary of evidence in the judgment. We say so because later in her evidence she said she was summoned by police to attend identification parade in respect of that robbery on 6th June, 2005 and further Felix Wanjohi (PW2) also said the attack was on the 15th May, 2005. Thus we treat the date 15th October, 2005 as a typographical error and we attach no importance to it. Faith and her parents Felix Wanjohi and Eunice Wanjiru Wanjohi (PW3) were in their house at about 12.55 a.m. She heard a knock on the gate and people talking, and the chain of the gate being cut down. She then heard them talking and “calling each other dogs and goats”. She realized they were robbers. She then called her parents. They went to the sitting room and robbers started breaking windows and banging the doors. Felix told them to stop breaking the windows as he would open the door for them. He opened the door as Eunice screamed and was warned never to do so again. As soon as the door was opened, twenty men got into the house. They were armed with pangas, axes and runguns. They ordered Felix



to lie on the floor and Faith to go to her bedroom. Later Felix and Eunice were taken and locked in another bedroom. They demanded money from Faith, and Felix. Faith gave them Kshs.100/- and they ordered her to kneel down. She complied and they demanded her mobile phone but she told them she did not have one. They then went for Felix and Eunice and started assaulting them. Felix gave them Kshs.4,200/- and they took his mobile phone make Nokia 3310, clothes, plates, bedsheets and Eunice lost her watch. They further took Faith's phone motorolla T.192. Faith was injured on her left leg. She identified one of the robbers as that robber stood near her and the torches used by the other robbers were flashed on to that robber. That robber, according to Faith was the appellant. Felix and Eunice were unable to identify any of their assailants. The assailants left and Felix reported the incident at Kangema police station. The record shows that on that same night of 15th May, 2005, one Leonard Githinji was also allegedly attacked and robbed of Kshs.600, mobile phone and other items, and that was the subject of count VIII but the record shows he never gave evidence at the trial of the appellant. Thus of the four counts of robbery that allegedly took place on 15th May, 2005, three of them were in respect of one transaction where Felix, Eunice and Faith were the complainants and the fourth was in respect of count VIII where Leonard Githinji was the complainant. Three robberies in respect of count V, VI and VII took place on 29th May, 2005. In respect of count V, the complainant was Genson Irungu Kibeu who did not give evidence. That left counts VI and VII where the complainants were Loise Njoki Kangu and Ernest Gachingo Mwangi, respectively. These complainants could not identify their assailants. Count IV was in respect of a robbery with violence that took place on the night of 11th and 12th February, 2005 at Kirogo village. The complainant in respect of that count was John Wainaina Gicheru who gave evidence but could not identify the attackers. We have set out these aspects to indicate how intricate the matter was before the first appellate court and to what extent it was necessary, particularly for the first appellate court whose duty was to revisit the evidence afresh, analyse it, evaluate it and make its own independent decision on it but always aware that the trial court did see and heard the witnesses and to give room for that, to approach that duty with dedication rather than giving it lip service as we feel, with respect, happened here. Corporal Dan Kagembo (PW8) was detailed by one Chief Inspector Kimathi to take over the investigation of the robbery reported by Felix. Cpl. Kagembo was assisted by PC Irungu, PC Githinji and PC Njuki. They were headed by the DCIO Chief Inspector Kinuthia as it was alleged that on the night of 15th May, 2005, there had been a spate of robberies in that area.

9. On 1st June, 2005 Corporal Kagembo said the police team were given the appellant's name by an informer. At night they went to appellant's home, knocked and after identifying themselves they searched the house. They recovered different types of new clothes, jackets, pullovers and trousers, eight different makes of mobile phones and several watches. They put them into a landrover and took them to the police station. As the clothes were many, the landrover made three trips. A home-made gun was also recovered. Police then called Felix and Eunice and Felix identified a mobile Nokia 3310 as the one stolen from him, and Eunice picked a watch as one of the items stolen from her. The appellant was arrested on the spot and later charged with the offence together with other offences as we have stated hereinabove. We need to add here that in cross-examination Cpl. Kagembo stated:-

I did not arrest you with the mobile and wrist watch on that date. I later took you to your house and recovered the same.”

10. Further, Acting Inspector Kinoti Githinji (PW9) summarized the prosecution evidence by saying all that was recovered from appellants house were displayed and members of the public invited to identify their properties. Felix identified his mobile phone and Eunice identified her watch. This witness also



produced another court file in Criminal Case No. 1155 of 2005 and stated in his evidence in chief concerning that file:-

“On 5/06/05 we visited the 1st accused house and on conducting a thorough search some more items were recovered. Amongst them they were produced in Criminal Case No. 1155/05. I recovered the goods after he led us to his home. It was not under any duress. Criminal Case No. 115/05 (sic) was finalized and 1st and 2nd accused were sentenced to death.”He produced all the other exhibits.

11. In his defence given on oath, the appellant stated that on 15th May, 2005, he was busy in his coffee farm looking for cattle feed. On 1st June, 2005, at 4.30 a.m. police knocked at his window, introduced themselves to him. He opened the door for them. They conducted a search in his house. They took Kshs.11,450/= from one of his jackets and Cpl. Kagembo put that money in his pocket. They arrested him and took him to Muranga police station and was put into the cells. On 6th June, 2005, Cpl. Kagembo pointed him out to Faith and he was taken back to the cells and was charged in criminal case NO. 1155 of 2005 and 1158 of 2005. He denied the offences. Nothing of importance came out of his cross-examination.
12. We have considered the entire record, the judgment of both the subordinate court and the first appellate court, the grounds of appeal before us, the submissions by the learned counsel and the law. We will first discuss the final part of the High Court decision on the first appeal before it. The learned judges concluded their judgment thus:-

“We are of the view that the prosecution proved the case against the appellant on count II to VIII on the required standards. Having made that finding there cannot be any finding on the alternative count. On that score we therefore convict the appellant on count II, IV, V, VI, VII and VIII. We also confirm his conviction on count III and confirm his sentence on that count to suffer death as law provides as per the judgment of the lower court. The sentence on count II, IV, V, VI, VII and VIII shall be held in abeyance. We quash the conviction of the appellant on alternative count.”

13. We have no problem with the decision that allowed the appeal against conviction on alternative count. It was proper and that decision is not before us in any event. As to confirmation of the conviction in respect of count III, we shall discuss it at length later in this judgment. Our problem is with the conviction entered against the appellant in respect of counts II, IV, V, VI, VII and VIII. We have hereinabove reproduced part of the learned Senior Resident Magistrate’s ruling in which the appellant, together with others, were acquitted of the offences in respect of these counts and were released. The Attorney General did not file any appeal against that ruling pursuant to the provisions of Section 348A of the Criminal Procedure Code. That section states:-

“When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Attorney General may appeal to the High Court from the acquittal or order as a matter of law.”

14. Further, this matter went to the High Court by way of an appeal and not by way of a revision pursuant to Section 362 as read with Section 364 of the Criminal Procedure Code. Even if it had been before the learned Judges on revision, still under the provisions of Section 364(1)(b) the High Court could not alter or reverse an order of acquittal and in any case even under revisionary powers of the High Court, it would not make any order to the prejudice of the appellant unless he had an opportunity of being heard either personally or by an advocate in his defence. In short the High Court lacked the jurisdiction



to revisit the acquittal that had been ordered by the trial court and to reverse the same as there was no appeal before it by the Attorney General, an appeal which could only be on a matter of law and there was no application for revision and even if there was any, the order of acquittal could not be reversed. Further, and with respect, one may ask, upon what pleading was the first appellate court responding? The appeal before it was clearly against appellant's conviction and sentence in respect of count III and in respect of its alternative count. There was no appeal before it against acquittal in respect of all other counts. On what basis was the first appellate court dealing with these matters which were clearly not before it. It is no wonder that in respect of these counts, the learned Judges talked of convicting the appellant in place of dismissing his appeal or allowing his appeal. All because the learned Judges, with respect, strayed on to unfamiliar grounds. That decision is bad in law and there is no legal foundation for it.

15. Even of more importance, the appellant was found with no case to answer in respect of those counts and was acquitted at that level of the hearing. He was thus acquitted before the full trial and certainly before he offered his defence in respect of those charges. It is instructive that in his defence in the record, he only concentrated on the robberies of 15th May, 2005 which he denied. That was clearly because he had been found with no case to answer as regards the offences that allegedly took place on the night of 11th and 12th February, 2005, and on 29th May, 2005. The High Court therefore, in convicting him of three counts, condemned him unheard in his defence and that was not proper in law. We have no alternative but to set aside the convictions in respect of counts II,IV,V,VI, VII and VIII entered by the High Court as they were not supported by any legal provisions. They were illegal. His acquittals by the subordinate court in respect of those counts are hereby reinstated.
16. We now move to count III. In this count, the complainant was Faith Ngenia Wanjohi, whose evidence we have summarized hereinabove. In convicting the appellant of this count, the learned magistrate based her decision on two matters. These were first that Faith visually identified the appellant as one of the robbers as she saw him when he was near her and torch used by other robbers was flashed onto him and secondly that he was found in possession of Felix's phone Nokia 3310 which had been stolen only sixteen days earlier. The court applied the doctrine of recent possession and thus found the appellant guilty. The first appellate court confirmed the decision adding that Faith also identified her mobile phone as one of the items found in possession of the appellant.
17. On visual identification, we agree with Mrs. Gichuhi and Mr. Kaigai that although Faith said in evidence that she identified the appellant at an identification parade, there was no evidence adduced to demonstrate the existence of such a parade. The prosecution never adduced evidence to show that an identification parade was indeed held at which Faith identified the appellant. The learned trial magistrate was alive to that omission and mentioned it in her judgment but for some unknown reasons went ahead to convict the appellant on grounds, inter alia that the appellant did not rebut the evidence of the complainant that she identified him in an identification parade. It defeats reason to appreciate this argument. In the first place the learned magistrate wanted the appellant to rebut the evidence of the existence of an identification parade whereas the same magistrate had made a positive finding that "No evidence was adduced as to how and who conducted the identification parade". This was a criminal trial. The appellant was entitled in law to remain quiet. The prosecution still had the duty to prove its case that he was identified at an identification parade. He needed not rebut that allegation and particularly when no evidence of the existence of such a parade was availed. Furthermore, Faith never gave a description of the appellant to the police. One wonders on what basis she was going to identify any person at the alleged identification parade. See case of Simiyu Another Vs. Republic (2005) KLR 192. That leaves only the alleged visual identification of the appellant through torch flashes on the



appellant unbuttressed by any identification at an identification parade. That is dock identification. In the often quoted case of Njoroge V. Republic(1987) KLR 19, this Court stated inter alia as follows:-

"A dock identification is worthless and a court should not rely on such an identification unless it has been preceded by a properly conducted identification parade. A witness should be asked to give a description of the accused and then a fair identification parade should be arranged."

18. In our considered view, the evidence of Faith as it stood devoid of any description of the appellant given to the police prior to identification parade being arranged and unsupported by lack of evidence of the existence of identification parade, could not be relied upon to convict the appellant. The two courts below erred in relying on her evidence of the identification to convict the appellant. The second aspect was the applicability of the doctrine of recent possession. According to the learned Senior Resident Magistrate, the appellant was found in possession of phone Nokia 3310 belonging to Felix. The appellant had been acquitted in respect of robbery in which Felix was the complainant. That was count I. One of the items Felix was allegedly robbed of was the same phone Nokia 3310. The evidence of recovery of that phone is dubious. Cpl. Kagembo said that at the time the appellant was arrested they searched his house and found among others eight different makes of mobile phones but in cross-examination by the appellant he admitted that he did not arrest the appellant with the Nokia 3310 and wrist watch on that date. He claimed that he later took the appellant to his house and that is when the two items were recovered. He never stated when. One thing is certain, and that is that after the appellant was arrested and taken to police station on the date of his arrest none knew how many people could and did access his house as there was no evidence that he locked the house when he was taken away and carried with him the keys to that house and no duplicate key remained behind. Thus even if Cpl. Kagembo's evidence in cross-examination is accepted, it would not be proper to hold the appellant as the only person who could have been in possession of the stolen phone and watch. In any case, one is forced to ask why Cpl. Kagembo did not offer that evidence in chief.
19. The High Court Judges stated further that Faith's phone was also found in possession of the appellant. Whereas it is true that Faith said in evidence that her phone Motorola T.192 was taken by robbers, there is no evidence of her identifying that phone as one of the items recovered from the appellant. Throughout her evidence, she was not shown a recovered phone Motorola T192 to identify as her phone stolen from her on 15th May, 2005. In the result, we are not persuaded by the evidence on record that the appellant was identified as one of the perpetrators of the robbery upon Faith on 15th May, 2005, neither are we convinced that there was sufficient evidence to establish beyond reasonable doubt that he was in recent possession of the phone Nokia 3310 stolen from Felix nor of Motorola T 192 stolen from Faith on 15th May, 2005 to sufficiently connect him with the offence in respect of which he was convicted. We are of the view that had the first appellate court analysed the evidence on record properly as it was bound to do, it would have probably come to a different conclusion from that it came to in its judgment under consideration.
20. Before we allow this appeal as we must do, we note as reproduced above that the trial court allowed past record of the appellant to be adduced in evidence notwithstanding that the appellant never questioned the credibility of the witness who gave evidence. That evidence was given as we have indicated by Acting Inspector Kinoti Githinji and was given in his examination in chief. That was not proper. Section 57 of the Evidence Act sheds light on the issue. In this case, we do not feel the allegation that the appellant had been sentenced to death in Criminal Case No. 1155 of 2005 was relevant to the issue in court before the judgment was pronounced. If some of the items allegedly recovered from the appellant were subject of another court case, then the prosecution should have made arrangements for consolidation



of the cases long before the hearing of this case so as to avoid confusion and evidence prejudicial to the appellant being admitted.

21. To conclude, we find the appeal merited. We agree with Mr. Kaigai's concession. The appeal is allowed, conviction quashed, sentence of death in respect of count III is set aside. The appellant is set free unless otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 1ST DAY OF DECEMBER, 2011.

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

Deputy Registrar

