**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Criminal Appeal 172 & 173 of 2004**

**TITUS THEURI MUTHONI ……..…….. 1st APPELLANT**

**SAMSON NGUGI NGAO ……..…….....2ND APPELLANT**

***VERSUS***

**REPUBLIC ……..…….. RESPONDENT**

***[From the original conviction and sentence in Criminal Case No. 1910 of 2003 Chief***

***Magistrate's Court, Nakuru – S. MUKETI (P..M)]***

**JUDGMENT OF THE COURT**

The appellants, *Titus Theuri Muthoni*, 1st appellant and *Samson Ngugi Ngao*, 2nd appellant were charged with an offence of r**obbery with violence** contrary to **Section 292(2) of the Penal Code.**

The particulars of the charge stated that on the 28th day of August 2003 at Nakuru Township in Nakuru District within Rift Valley Province jointly with another not before court being armed with dangerous weapons namely and iron bar robbed ***Catherine Wagaki*** of her mobile phone make Nokia 3310 with line 0722-639959 valued at Kshs.8,400/- and at or immediately before or immediately after the time of such robbery used actual violence to the said ***Catherine Wagaki***.

The appellants pleaded not guilty to the charge and after a full trial before the Principal Magistrate's court at Nakuru, the appellants were found guilty as charged and were convicted and sentenced to suffer the mandatory death sentence.

Being aggrieved by the conviction and sentence, the appellants have appealed to this court and raised several grounds of appeal. During the hearing both appeals in respect of the two appellants were consolidated for purposes of hearing and determination as they arose from the same conviction.

The appellants have challenged the conviction which they contended was based on the evidence of identification by a single witness when the circumstances of such identification can be said to have been difficult and further in the absence of an identification parade. The appellants also faulted the conviction which was based on the evidence of a witness who was found in possession of the stolen item and thus there was no evidence to link the appellants with the stolen item, which was not found in their

possession. The appellants were also dissatisfied with the conviction which they argued was based on the insufficient and contradictory evidence by the prosecution's witnesses.

The appellants also faulted the trial magistrate for rejecting their defence statement which could have earned them an acquittal.

On the part of the State, the learned State Counsel ***M/s Opati*** opposed the appeal and supported the conviction and sentence which she submitted was based on the evidence of recovery of the stolen mobile phone which was positively identified by the complainant.

This being a first appeal, this court is mandated by law to reconsider and re-evaluate the entire evidence and the judgment of the trial court and arrive at its own independent determination of whether to uphold the conviction of the appellants.

In arriving at this determination, this court should bear in mind that it neither saw nor heard the witnesses as they testified and give due regard to that aspect.

(*See* the case of **Njoroge Vs Republic [1987] KLR page 19**)

We therefore briefly set out the summary of the evidence before the trial court which the trial court relied on to arrive at its judgment.

On 28th August 2003 at about 9.40 p.m. ***Catherine Gitonga***, [**PW 1**] the complainant in this case, was walking towards the bus stage, she was with another person called ***Nganga*** who was ahead of her. Suddenly she was accosted by three people, the first one squeezed her with something, she felt pain while another one removed a metal bar, she tried to struggle but they took away the mobile phone which she had personalized. **PW1** reported the matter immediately to her husband who was a police officer.

The mobile phone was recovered from ***Jeremiah Muriru***, **PW 2** who said that he had purchased it from the 1st appellant for Kshs.2,500/-. The 1st appellant was accompanied by the 2nd appellant when they sold the mobile phone to **PW 2,** who told the court that he knew both appellants.

***P.C Arthur Mwangi***, **PW 3** was the arresting officer. Following information which he said obtained from a suspect called ***Titus Omondi*** (*who was not a witness*) he was led to the 1st appellant who also led the police to **PW 2** from where the mobile phone was recovered. This is the evidence that led to the conviction, it was basically from three prosecution witnesses. The complainant said she was in the company of a person called ***Nganga*** when she was attacked, this ***Nganga*** was not called as a witness.

The robbery took place at 9.40 p.m. when the complainant was on her way to a bus stop, and the circumstances under which **PW1** identified the appellants in our view can be said to have been difficult. Moreover, there was no identification parade that was conducted. The evidence regarding the arrest of the appellants is equally scanty, the circumstances under which the appellants were arrested are not clear from the evidence and the only evidence that links the appellants with the robbery was that by **PW 2** who said he purchased the mobile phone from the 1st appellant who was accompanied by the 2nd appellant. The trial court in its judgment accepted the evidence of **PW 2** and that is the basis of the conviction.

The issue for determination is whether the prosecution proved the case of robbery with violence against the appellants to the required standard, that is, beyond reasonable doubt. As stated above, the trial court relied on the evidence of recovery of the mobile phone from **PW 2**. Both the appellants denied

having sold the mobile phone however their defence was considered by the trial court but found to have no merit.

When dealing with a conviction based on the evidence of possession of stolen items, the Court of Appeal recently held in the case of **Isaac Nganga Kahia Vs Republic C.A Cr. Appeal No. 272 of 2005 (Nyeri)** *unreported* that;

"***It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there musts be positive proof, first; that the property was found with the suspect, secondly that; that 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 another. In order to prove possession, there must be acceptable evidence of search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses***."

We find the evidence by **PW 1** regarding the identification of the of the item that was stolen was cogent because she had personalized the mobile phone with her name, besides, **PW1** produced the documents she had used to purchase the mobile phone. Our problem is the fact that the mobile phone was not found in possession of the appellants, but with **PW2.** We also find the evidence by PW1 regarding the identification of her attackers insufficient to sustain a conviction as the robbery took place at 9.40 p.m. when the circumstances for such identification can be said to have been difficult. No identification parade was carried out. **PW 1** said she was in the company of another person called ***Nganga*** who was never called as a witness.

The principles governing the identification and the standards of care which a court should take into consideration especially when dealing with the evidence of a single identifying witness were set out in the case of **Maitanyi Vs Repubic KLR [1986] page 198** in which the court reiterated the principles set out in the well known authority in the case of **Abdullah Bin Wendo and another Vs Republic [1953] 20 E.A.C.A page 166** where it was held as follows;

"***Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but his rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error***."

Having taken into consideration the totality of the evidence before the trial court, we are not satisfied that the conviction of the appellants based on the sole evidence of **PW 2** is safe to sustain the conviction. It was **PW 2**'s word against the appellants. The prosecution failed to conduct an identification parade and the dock identification can be said to have been worthless in the circumstances of this case.

The upshot of the above analysis is that we allow this appeal, quash the conviction and sentence imposed on the appellants, and order the appellants set liberty unless otherwise lawfully held.

**Judgment read and delivered at Nakuru on this 17th day of May, 2007.**

**M. KOOME**

**JUDGE**

**L. KIMARU**

**JUDGE**