



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL APPEAL NO 30 OF 2020

ERICK KIBWARO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kilgoris Criminal Case No. 790 of 2016 delivered on the 17th January 2020 by Hon. R.M Oanda, PM)

JUDGMENT

1. The appellant **ERICK KIBWARO** was the 1st accused person before the lower court where he was charged with another with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63.
2. The particulars of the offence stated that on the night of 18th June 2016 at around 1:00 a.m. at Lepolosi area of Transmara West District within Narok County jointly with others not before court robbed Rhoda Shankil assorted items as per attached list valued at Kshs 50,000/- and immediately before or immediately after the time of such robbery used actual violence to the said Rhoda Shankil.
3. The appellant was charged alongside Ann Cherono but the court after considering the evidence against her held that the prosecution had failed to establish a prima facie case and acquitted her.
4. The trial magistrate after conducting a full trial against the appellant held that the prosecution had proved its case beyond reasonable doubt. The trial court convicted the appellant and sentenced him to 30 years' imprisonment.
5. The appellant dissatisfied with the conviction and the sentence and filed this appeal. The grounds of appeal are that the prosecution failed to prove its case beyond reasonable doubt. The appellant faults the trial magistrate for failing to consider his defense and challenges the 30-year imprisonment term meted by the trial court.
6. The duty of a first appellate court was stated in **Kiilu & Another vs Republic (2005) 1KLR 174** where the Court of Appeal observed that:

“An appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court to merely 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 seeking the witnesses.”

7. Rhoda Shankil (Pw1) testified that on the material day at around 9:00 p.m. she entered her room and locked herself in. She told the trial court that at around 1:30 p.m. the appellant entered her room with a sharp object. She recalled that the intruder was wearing a monkey face (wooded) and carried a panga and a knife. The appellant ordered her to remain silent, threatened to kill her if she did not comply and asked for Kshs 200,000/-. The appellant took her phone and ransacked the house. She testified that the appellant saw a cheque book and asked her to sign it. The appellant then stabbed the appellant, tied her with a blouse and ordered her to sleep. When the appellant saw that Pw1 was asleep he brought in Anne Cherono, an employee of Pw1, and ordered her to give him money. Pw1 testified that the only money that was in the house was a Kshs 200/- note and some coins. She testified that the appellant took her mobile phone, two batteries, three materials and a maxi, two maasai necklace and a bangle, a camera, TV (GLD), dvd player, decoder, charger, knife and a photocopy of her ID. Pw1 testified that the appellant then asked Anne Cherono to pack all the items in a suit case. After the appellant left, Pw1 then called her pastor who came and opened the door for them.

8. Julius Nalamai (Pw4) testified that she received a call from Pw1 and proceeded to her home. He recalled that the gate was closed but saw the appellant jump over the fence. Pw4 went into Pw1's house and found her with an injury on her arm. Pw4 testified that he followed the appellant's footsteps. Pw4 also called his wife and asked her to raise an alarm.

9. Joshua Ktungat Olemula (Pw2) recalled that on 18th June 2016 he heard screams, left his house and went by the road where he found some of his neighbours had gathered. He saw a track from a distance and took cover. He testified that he then saw the appellant holding a brief case. They questioned the appellant who identified himself as 'Ole Sipara' and informed them that he was going to Nairobi. Pw2 recalled that appellant refused to open the suitcase. Pw2 testified that he called Pw1 to come and identify the items that the appellant had. When Pw1 arrived at the scene the appellant attempted to flee. The appellant was arrested by the members of the public and the police alerted.

10. Pw1 testified that she was informed that the appellant was found on the Kisii-Kilgoris road. She went to the scene and identified her stolen items.

11. Festus Kurgat, a clinical officer at Transmara Hospital (Pw3) testified that the clothes of Pw1 were blood stained. On examination it was noted that she had bruises on the right cheek and a deep cut wound measuring 1.6 cm on the upper arm. The right small finger also had a cut that was approximately 2 cms. Pw1 wounds were sutured and she was given medication. The degree of the injury was assessed as harm.

12. Shem Lerrisho Jacob (Pw5) testified that on the material day at about 2:00 a.m. he heard some noise. He left his home to see what had transpired and found the appellant on the ground surrounded by a group of people. There was a suit case on the ground which the appellant had stolen.

13. PC Willis Ochieng No 88095 (Pw6) testified that the complainant, who had an injury, reported that she had been robbed at night by a known person. He testified that the appellant had been an employee of the complainant but was fired due to bad behavior. He testified that there were no breakages at Pw1's house and that the appellant must have entered the house with the help of Anne Cheron. Pw6 testified that the appellant emerged from one of the rooms and demanded Kshs 200,000/- from Pw1. Since Pw1 did not have the money the appellant cut her with a knife. The appellant stole various items which were found in his possession including Pw1's Identity Card.

14. The appellant in his defense gave unsworn testimony. He testified that Pw1 had asked him to come to her home and collect money and he thus alighted at Poroko at 5:00 a.m. As he walked towards her home, he was attacked by young men and later informed that he had robbed Pw1.

15. When the appeal came up for hearing, Mr. Otieno, state counsel opposed the appeal and argued that the evidence adduced before the trial court was sufficient. He submitted that the appellant was arrested soon after the robbery with the items stolen from the complainant. He submitted that Pw1, Pw2 and Pw3 saw the appellant being beaten. He further submitted that the appellant in his defense admitted that he was within the locus in quo. The prosecution contends that the sentence of 30 years' imprisonment meted upon the appellant was appropriate considering the maximum sentence is death.

16. The appellant argued that he had been staying with the complaint from the age of 11 years and that he was given 30 acres and he grew sugar cane on 7 acres. He accused the complainant of fixing her by accusing him that he stole from her. He submitted that he had not intended doing what had been alleged. He also submitted that there was a lady who had also been arrested but later released.

DETERMINATION

17. The appellant was charged with the offence of robbery with violence and it was thus vital for the prosecution to prove the ingredients of the offence. In **Oluoch vs. Republic [1985] KLR** it was held:

“Robbery with violence is committed in any of the following circumstances:

The offender is armed with any dangerous and offensive weapon or instrument; or the offender is in company with one or more person or persons; or

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ...”

18. Pw1 testified that the appellant entered her home long after she had fallen asleep and demanded for Kshs 200,000/-. It was her testimony that the appellant threatened to kill her if the amount was not availed, but because Pw1 did not have the money the appellant stabbed her arm. The appellant then ransacked the house and took her mobile phone, two batteries, three materials and a maxi, two Maasai necklace and a bangle, a camera, TV (GLD), dvd player, decoder, charger, knife and a photocopy of her ID which he packed in a suit case. The prosecution having proved that the appellant stole the items belonging to Pw1 in the list attached to the charge sheet and that the appellant immediately before or immediately after the time of such robbery used actual violence against Pw1, it was also critical that the appellant be positively identified.

19. Although Pw1 testified that she did not see the appellant as he was wearing a mask that took the form of a monkey face, the prosecution relied on the doctrine of recent possession. In the case of **Hassan vs Republic (2005) 2 KLR 11**,

“Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver”.

20. In the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Cr App. No. 272 of 2005(UR)** the elements necessary to establish recent possession was considered thus;

“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:

- i). that the property was found with the suspect;
- ii). that the property is positively the property of the complainant;
- iii). that the property was stolen from the complainant;
- iv). 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.”

21. In this instant case, the appellant was arrested within the *locus in quo* immediately after the incident and was found to be in possession of the stolen items belonging to Pw1. The appellant did not provide any explanation how he came about such items and the only logical conclusion that can be arrived at is that the appellant was the intruder at Pw1's house and he stole the items from her.

22. The defense offered by the appellant that he was headed to Pw1's house cannot dislodge the case mounted against him by the prosecution as he failed to disclose why he was in possession of the stolen items immediately after Pw1 was robbed.

23. I now turn to consider whether the sentence meted was excessive.

24. The appellant was sentenced to 30 years' imprisonment. I have taken into account that he was not a first offender. I have also considered the grisly manner in which the appellant committed the offense. The appellant who was an ex-employee of the complainant hid in her house and waited until she was dead asleep before attacking her and subsequently stabbing her. The complainant, who was left bleeding and locked in her own house, must have suffered great trauma in the circumstance.

25. This court being satisfied that the trial court was entitled to arrive at the conclusion it did, I find no reason to disturb their finding on sentence. This appeal is therefore lacking in merit and it is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF MARCH, 2021

R. E. OUGO

JUDGE

In the presence of:

Appellant In person - Present

Mr. Otieno Senior State Counsel ODDP

Ms. Rael Court Assistant