REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. E006 OF 2020

JAPHETH NJAGI CHABARI..APPELLANT

-VERSUS-

REPUBLIC ....RESPONDENT

J U D G M E N T

1. This is an appeal against the judgment which was delivered on 21st November 2018 in Marimanti ***Senior Principal Magistrate's Courts in Criminal Case No. 546 of 2017***. The Appellant was charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on 15th December 2017 at Nkondi Location in Tharaka South sub-county, the Appellant being armed with an offensive weapon namely a sword robbed Purity Kendi Nyaga her mobile phone make Itel valued at Ksh. 1,200/- and at the time of such robbery threatened to cut the said Purity Nyaga Kendi with the sword.

2. The Appellant pleaded not guilty to the charge. After full trial, the Appellant was found guilty, convicted and sentenced to life imprisonment.

3. Dissatisfied with the verdict, the Appellant lodged this appeal vide an undated petition of appeal that was filed on 2nd October 2020. The main grounds raised in the appeal are as follows:-

> **i. THAT the learned trial magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.**
>
> **ii. THAT the trial magistrate erred in matters of law and fact by failing to note that the evidence adduced by PW2 is frame-up.**
>
> **iii. THAT the trial magistrate erred in matters of law and fact by failing to note that the exhibit adduced before court was not found in the possession of the Appellant.**
>
> **iv. THAT the trial magistrate flouted in matters of fact and law by convicting the Appellant on evidence that lacked requisite standard of beyond reasonable doubt.**
>
> **v. THAT the trial magistrate erred in matters of law and fact by failing to note that the vital witnesses were not called to prove the allegation of the complainant, that is, arresting officer.**
>
> **vi. THAT the learned trial magistrate erred in both law and fact by failing to note that no medical report was adduced by the prosecution to support the allegation of the complainant.**
>
> **vii. THAT the learned trial magistrate erred in both law and fact by rejecting the Appellant defence without giving cogent reasons.**

The Appellant thus urges this court to allow the appeal, the sentence be set aside and he be set at liberty.

4. On 25th February 2020, this court ordered that the appeal be canvassed by way of written submission. The Appellant filed his submission on 6th April 2021 while the Respondent filed their submissions on 22nd June 2021.

Appellant's Submissions

5. From his submissions, it is the Appellant's contention that the prosecution's case was marred with so many inconsistencies. He further contended that the failure by the prosecution to call the two AP officers from Nkodi or any of the members of public who arrested the Appellant weakened the prosecution's case. He also questioned the chain of custody of the exhibit and finally submitted that the prosecution failed to prove its case to the required standard of beyond reasonable doubts.

Respondent's Submissions

6. The Respondent on its part submitted that the prosecution's case was solid as the witnesses were consistent and corroborated their evidence. On the issue of exhibits, the Respondents submitted that the complainant's phone and the sword the Appellant used to threaten the complainant were both recovered in the Appellant's possession. The Respondent submitted that there was no evidence to prove the Appellant's contention that PW2 was framing him and that the trial court did consider the Appellant's submissions. It was thus the Respondent's final submission that the ingredients of robbery with violence were proved beyond reasonable doubt and that as such, the appeal should be dismissed.

Issue for determination

7. The main issue for determination by this court is whether the prosecution proved the charge against the Appellant beyond any reasonable doubts.

Analysis

8. This is a first appeal. The law is well settled that the first appellate court has a duty to re-evaluate the evidence adduced before the trial court, analyse it and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses to assess their demeanour. In **Kiilu & Another vs. Republic [2005] 1KLR 174** the Court of Appeal stated that:

> "**1. An Appellant on 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 on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and 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 seeing the witnesses.**"

See also **Okeno vs. Republic [1972] EA 32 on the same subject.**

9. In this case, the trial magistrate found that the prosecution had proved the charge of robbery with violence against the Appellant beyond any reasonable doubt. This court is therefore called upon to consider afresh the evidence on record while considering the issues raised in this appeal. I therefore proceed to analyse the evidence that was adduced before the trial court against the grounds of appeal raised by the Appellant.

Whether the prosecution proved the charge against the Respondent

10. The Appellant was charged under **Section 296(2)** of the **Penal Code. Section 296** of the Penal Code provides for both the offences of robbery and aggravated robbery under sub-sections (1) and (2) respectively. The said section provides as follows:

> "**(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.**
>
> **(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

11. The ingredients of the offence of robbery with violence were as deduced from the above provision were clearly set out by the Court of Appeal in the case of **OLUOCH –VS – REPUBLIC [1985] KLR** where it was held that:

> "**Robbery with violence is committed in any of the following circumstances:**
>
> > **a. The offender is armed with any dangerous and offensive weapon or instrument; or**
> >
> > **b. The offender is in company with one or more person or persons; or**
> >
> > **c. 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 …"**

12. The use of the word "or" in the above definition means that proof of **one** of the above circumstancecs is sufficient to establish an offence under **Section 296(2)** of the **Penal Code**. In this case the complainant (PW1) testified that she was walking with PW3 and she (PW1) was

holding her phone. PW3 was ahead of her. PW1 then met the Appellant who held her left hand took her mobile phone and twisted her hand. She screamed in pain. The Appellant then pulled a sword from his waist and told her that he must have sex with her. PW1 and PW3 continued screaming and the Appellant then ran towards a farm where PW2 was working. PW3 also raised an alarm and several villagers responded and gave a chase. The villagers caught up with the Appellant, arrested him and took him to Nkondi AP Camp. PW1's testimony was well corroborated by the testimonies of PW2 and PW3. The complainant's phone and the sword the Appellant used to threaten the complainant were recovered and produced in evidence as P.Exh 1 and P. Exh 2 respectively.

13. PW4 was the investigating officer. He testified that on 05/12/2015, two (2) AP officers from Nkondi AP Camp escorted PW1 and the Appellant to Marimanti Police Station when PW1 booked a report of the incident. The AP Officers handed over an Itel mobile phone and a sword as exhibits recovered by members of public who had pursued the Appellant as he escaped from the scene of the crime.

14. The evidence adduced point to the fact that the Appellant was armed with a sword and robbed PW1 of her phone. In the circumstance I find that the prosecution did prove one of the circumstances of robbery with violence as contemplated under **Section 296(2) of the Penal Code,** which is the fact that the Appellant was armed with a dangerous and offensive weapon or instrument. This I find it sufficient to prove the offence. The fact that he was armed with the sword was well corroborated by the testimonies of PW1, 2 and 3.

Section 295 of the Penal Code defines robbery as follows:-

> **" Any person who steals anything, and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or to prevent or overcome resistance to it being stolen or retained, is guilty of the felony termed robbery."**

The section sets out two sets of circumstances which constitute the offence of robbery.

These are:

> **(i) The act of stealing anything from a victim. Or**
>
> **(ii) Use of threat or actual violence to any person or property immediately before or immediately after stealing in order to retain or obtain the stolen item or prevent or overcome resistance.**

These ingridients were well articulated by the testimonies of the three witnesses.

PW1 stated that ***"I was holding my phone as I walked. I met Njagi. He held my left hand and twisted it. I felt pain. I screamed. He then pulled a sword from his waist and told me he must sex with me.................. I called Jerimiah to help me recover my phone from appellant, the appellant threatened him with a sword."*** This was confirmed by PW3 Purity Kendi. As for PW2 he confirmed that he heard screams and on checking he met the appellant and PW1 and PW3 behind the appellant and PW1 pleaded with him to assist her recover her phone from the appellant. The evidence is constistent and devoid of any inconsistencies, contradictions or confilicing testimonies. The witnesses confirmed that there was use of violence (twisted hand), threat of violence (threat to use rape which is a form of violence) and stealing. It was safe to rely on the testimonis of PW1, 2 & 3 and the trial magistrate cannot be faulted for relying on the evidence to convict.

15. In **Keter versus Republic [2007] 1EA135** the court was categorical that:-

> **"The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."**

The law requires that facts be proved by evidence, however no particular number of witnesses is required to proof a fact unless a provision in the law requires that a certain number of witnesses be called. **Section 143 of the Evidence Act** (Cap 80 Laws of Kenya) provides as follows:-

> **"No particular number of witnesses shall in the absence of any provison of law to the contrary be rewuired for the proof of any fact."**

In criminal trials, the burden to proof the charge beyond any reasonable doubts never leaves the prosecution's backyard. It behoves the prosecution to call witnesses to establish the facts beyond any reasonable doubts and discharge that burden. It follows that it is the prosecution who determines the numbe of witnesses it will call in support of its case and present it before court. The court will only fault the prosecution if it has failed to call a witness or witnesses through dishonesty, some ulterior motive or some bad faith. This has not been alleged by the appellant.

16. In my view, the Appellant's contention that the prosecution ought to have called the AP officers who escorted him to the police station or any of the members of public who arrested him is not well founded. The Appellant was properly identified by PW1, PW2 and PW3 as the perpetrator of the crime and their evidence was consistent and explained the circumstances of the Appellant's arrest. As stated in the case of **Keter** *(supra)*, I hold the view that the witnesses called were sufficient to prove the case against the Appellant. It was not necessary to call every person who saw what happened to come and give evidence.

17. As regards the contention by the Appellant that PW2 was framing him, it amounts to a mere allegation which was not put to the witness when he was cross-examined. The appellant is holding on straws. This ground must therefore fail.

18. The Appellant also contended that the trial court dismissed his defence without giving cogent reasons. At pages 44-45 of the Record of Appeal, the trial court did give due consideration to the Appellant's defence which he found to be unworthy and subsequently dismissed it.

The trial magistrarte cannot faulted for arriving at that finding. He had the opportunity not only to hear the defence but also to assess the demeanor of the appellant. The trial magistrate found that prosecution witnesses were trustworthy, a fact which this court cannot disapprove. In any case, having considered the evidence of the witnesses, I am satisfied that the finding was well founded. The ground is without merits.

19. In the circumstances, I find that the prosecution did prove its case to the requisite standard that of beyond any reasonable doubts and as such, the trial magistrate was correct in imposing a conviction under **section 296(2) of the Penal Code.**

On the issue of the exhibits, that is mobile phone and sword. There was evidence that they were recovered from the appellant and handed over to PW4. There was no contradiction and failure to call the AP officers did not prejudice the prosecution case. The offence was committed in broad day light and the witnesses were candid as to what transpired upto the recovery of the mobile phone and the sword.

Conclusion

20. Noting this appeal was only against the conviction, it is my view that the appeal lacks merit and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 18TH DAY OF AUGUST, 2021

L.W. GITARI

JUDGE

18/8/2021

The Judgment has been read out in open court virtually.

L.W GITARI

JUDGE

18/8/2021