



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAROK
CRIMINAL APPEAL 65 A & 65 B OF 2016

(CORAM: F.M. GIKONYO J.)

(From the original conviction and sentence by Hon. T.A. Sitati (SRM) in Narok CMCR No. 980 of 2012 on 29th August 2013)

ISMAEL HAMISI NDIRANGU.....1ST APPELLANT

JOSEPH NGARE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Robbery with Violence

[1]. The Appellants were charged with the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence are that on 6/8/2012 at Narok Township (Nyati Bar) in Narok North district of the Rift Valley province jointly with others not before court while armed with dangerous weapons namely a knife robbed JACKLYNE MORAA KSHS. 1,850/= and immediately before or immediately after the time of such robbery threatened to use actual violence to the said JACKLYNE MORAA.

[2]. They were tried for the offence and convicted for the offence of charge of robbery with violence and sentenced to death. Having been dissatisfied with the conviction and sentence they filed these appeals (now consolidated).

[3]. The 1st and 2nd appellants set out 6 grounds as follows;

a) That they pleaded not guilty to the offence.

b) That the trial magistrate erred in law and facts by not considering that the witnesses and the evidence adduced in court were contradicting and inconsistent.

c) That the trial magistrate further erred in law and facts by overlooking the evidence adduced in court which was fabricated in fixing the appellants.

d) That the trial magistrate erred in law and facts once more by not considering 1st appellants defence and treat it as required by law.

e) That they pray that their sentence be reduced, their appeal be allowed, the conviction quashed and sentence imposed set aside as it is excess in all circumstance.

[4]. The 1st appellant filed amended grounds of appeal under section 350(3) (v) of the C.P.C. that;

a) The learned trial magistrate erred in law and in fact by believing prosecution witness no. 1 was not honest though under oath.

b) The learned trail magistrate erred in law by awarding a conviction where the evidence was contradictory, uncorroborated therefore insufficient to support a charge under Section 296 (2) of the Penal Code.

c) The learned trial magistrate erred in law by failing to note that the evidence adduced by the prosecution witnesses amounted

to creating disturbance under Section 95(b) of the Penal Code but not robbery with violence an offence proved in evidence.

d) The learned trial magistrate erred in law by failing to advance cogent reasons as to why the appellants' defense was not truthful.

[5]. The 2nd Appellant filed amended grounds of appeal under section 350(2) (v) of the C.P.C. dated 10/3/2021 that;

a) The learned trial magistrate erred in law and in fact by holding that the offence of robbery with violence was provided against the Appellant while the evidence in record is clear that no robbery took place.

b) The learned trial magistrate erred in law by misconstruing the arrest of the Appellant from a changaa den and connecting him with the robbery committed at Nyati bar to one Jackline Moraa an offence he knew not.

[6]. The 1st Appellant filed supplementary grounds of appeal under Section 350(2) (v) of the C.P.C. that;

i. The learned trial magistrate covered in law and facts by convicting the appellant under section 296 (2) of the C.P.C. and file to note that the initial report was made by the appellant vide OB NO. 97/23/00/2012.

ii. The learned trial magistrate erred in law and facts by convicting the appellant on defective charge sheet the first report indicated the complaint reported a case of creating disturbance vide OB no. 2/00/05/2012 reported at Narok police station.

[7]. The 2nd Appellant filed supplementary grounds of appeal under Section 350(2) (v) of the C.P.C. that;

a) The learned trial magistrate erred in law and facts by not considering that the Appellants was not mentioned in the first initial report made by the complainant by the police.

b) The learned trial magistrate covered in law and fact by not taking into account that the charge sheet was defective and proceed to convict the appellant on the defective charge sheet.

1st Appellant's submissions

[8]. The 1st Appellant in his submissions argued he was the first in time to report at the police station. He made an assault case report which was captured in OB no. 97/23/00/2012. The complainant later made a report of creating disturbance vide OB NO. 2/00/05/2012. That the complainant was supposed to be charged with assault while he was to be charged with creating disturbance. That the money he was demanding from the cashier was his balance. He cited the case of *Musyoki Ndothia Vs Rep Cr. App. No [2006] Eklr and Kiarie Vs Rep [1984].*

[9]. The 1st appellant submitted that PW1 did not tell PW2 that her money Kshs. 1,850 was stolen. That PW1 did not produce any medical report. Therefore, the prosecution did not prove ingredients of robbery.

[10]. That the complainant PW1 reported a case of creating disturbance vide OB NO.2/00/05/2015 at Narok police station. He submitted that the charge sheet was defective since the charges preferred against him were fabricated. He has cited the cases of *Sir Udo Udoma C.J. In Sekitoleko Vs Uganda 1967 EA 531 at Page 533* and *Terekali and another Vs Republic (1952) EA.*

[11]. The 1st appellant submitted that the evidence of pw1 was not corroborated by any other prosecution witnesses. That essential witnesses' Chacha, PW1's husband and PC Maina were not compelled to testify as provided under section 150 of the C.P.C. He cited the case of *Bukenya Vs Uganda [1973] E.A 549.*

[12]. The 1st appellant submitted that the trial court failed to analyze the defense against the prosecution evidence before coming to a conclusive decision. He relied in the case of *Oumas Vs Republic [1986] Klr.*

[13]. He therefore prayed that the court considers the evidence of the OB's as presented and placed before court by the prosecution. That this court re-evaluates the evidence and make an independent finding on both conviction and proper sentence.

2nd Appellant's submissions

[14]. The 2nd appellant submitted that he was not mentioned or described in the first initial report. That OB 2/00/05/2012 indicates the offence as creating disturbance. That OB 7/8/2012 captures the narration of events on arrest of 2nd appellant. The 2nd appellant argues that he was not informed on the reasons for the arrest or charge hence a violation of Article 50(2) of the Constitution. He cited the case of *Joseph, Maroti, Nabutu, Nauli, Michael, Mwangi and Moses Chive Vs Republic Cr-App No 139 Of 2004 Eldoret CA.*

[15]. The 2nd appellant submitted that the charge sheet was defective. That OB 2/00/05/2012 indicated that PW1 reported a case of creating disturbance. Therefore, the evidence found in the charge sheet is not corroborate that of the OB. He cited the case of *Geoffrey Mwangi Githinji v Republic [2015] eKLR* and *Joseph Ndungu Kimanyi v Republic [1979] eKLR*

[16]. The 2nd appellant submitted that ingredients of the offence of robbery with violence was not proved. That PW4 framed up the charges.

OB NO. 2/7/8/2012 does not mention robbery or loss of kshs 1,850/= that it was unsafe for the trial court to convict on the evidence of a single identifying witness(PW1). He cited the case of Mneni Ngumboo Mingi Vs Rep HCCR APP No. 141 /2005, Njoroge Vs Republic 1982 KLR 291, Matianya Vs Republic [1986].

[17]. The 2nd Appellant submitted that pw1 recorded her statement after the 2nd appellant was arrested. He cited the case of Duncan Mayodin Asenyi Vs Rep [2016] eKLR.

[18]. The 2nd Appellant submitted that his arrested was not connected to any robbery but because of a grudge that existed between PW1, the appellant and a certain Yusuf. (PW3).

Submission by the State

[19]. Ms. Koina, prosecution counsel argued that the offence of robbery is committed if any one of the ingredients set out in Section 296(2) of the Penal Code is proved. In the instant case all the ingredients of the offence of robbery with violence were proved.

[20]. She submitted that the evidence of identification tendered by the prosecution witness was that of recognition. It was cogent and consistent. That the evidence left no iota of doubt that the appellants were the perpetrators of the robbery.

[21]. The 1st appellant's defence did not dislodge the prosecution's evidence that he participated in the crime. The prosecution's evidence proved that the 1st appellants subdued the complainant with the sole aim of aiding the 2nd appellant to take cash from the complainant. The trial court took into consideration his defence and found that it did not cast any doubt on the prosecution's case.

[22]. The evidence of 2nd appellant tallied with that of the prosecution and specifically that of pw3 that the 2nd appellant was arrested at a changaa den. The 2nd appellant gave no account of the events of 6/8/2012 when the robbery occurred. The trial court took into account the 2nd appellant's defence and dismissed it as mere falsehoods. Therefore, it was her argument that the case was proved beyond reasonable doubt. She urged the court to uphold the conviction as well as the sentence as it was safe.

ANALYSIS AND DETERMINATION

Court's Duty

[23]. As first appellate court; I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses. See: **KIILU & ANOTHER vs. REPUBLIC [2005]1 KLR 174.** In this exercise, the court is not beholden or compelled to adopt any particular style. What must be avoided however is mere rehashing of evidence as was recorded or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern should be to employ judicious emphasis and alertness, have an eye and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such style insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable. I shall so proceed.

[24]. In the present appeal, the issue for determination are;

i. Whether the charge sheet was defective.

ii. Whether the prosecution established the charges of robbery with violence contrary to Section 296(2) of the Penal Code to the required standard of proof.

iii. Whether the sentence imposed is harsh or excessive in the circumstances.

Defective charge sheet

[25]. A challenge to the charge was raised; that conviction was based on a defective charge sheet. The Appellants pointed out two defects in the charge. First, the particulars thereunder were at variance with the offences reported. And Second, the evidence tendered at the trial court was equally at variance with the particulars stated.

[26]. Particulars of the offence is an integral part of the charge. See Isaac Omambia vs. R [1995] eKLR. Accordingly, the accused is entitled to be provided with all necessary details or particulars of the offence to appreciate and understand the nature of the charge(s) against him and to prepare an appropriate defence thereto. A charge devoid of such necessary details prejudices the right to a fair trial contrary to Article 50(2) (b) of the Constitution and therefore fatally defective. The requirement of Section 134 of the Criminal Procedure Code which is cast below should be seen within that constitutional reality:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

[27]. It appears the appellants have laid preponderant emphasis on the argument that the report in the occurrence book stated that the offence reported is causing disturbance while the charge sheet indicates robbery with violence. Does the anomaly render the charge defective?

[28]. The law on defective charge has experienced a leapfrog development and has formulated a substantive test as opposed to a formalistic one in determining whether a defect in the charge is fatal. The dependable test is whether the defect causes prejudice to the accused to extent that he does not understand the charges he is facing, hence, unable to mount appropriate defence thereto. The test ensures that justice is done to all; protection of the rights of the accused as well as the victims of crime.

[29]. Be that as it may, not all defects in a charge sheet will render a conviction thereunder invalid. See *JMA vs. R [2009] KLR 671*. See also, the Supreme Court of India in *Willie (William) Slaney vs. State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391]*, where it was held that: -

“Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.”

[30]. See how the test has been applied in *Isaac Nyoro Kimita & another vs. R [2014] eKLR* thus: -

“In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants “jointly” defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term “jointly” in the particulars of the charge?” [Emphasis added]

[31]. Of greater constitutional significance and relevance, therefore, is whether a defect in the charge prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence. Was this the case here?

[32]. Looking at the record and the evidence as a whole, the so called variance between the reported crime and the charge is easily reconcilable, for the evidence which was adduced supports the charge of robbery with violence. There was no variance between the evidence adduced and the charge. I should state also that; the record and the evidence adduced does not depict the Appellants did not understand that they faced a charge of robbery with violence. The manner, tenor and intensity of cross examination of the prosecution witnesses by the appellants clearly show that they understood they were accused of robbery with violence of money from the complainant. Therefore, in as much as the report in the occurrence book indicated the offence as causing disturbance, the offence disclosed by the evidence and for which the appellants were charged was robbery with violence. The DPP institutes criminal charges on the basis of the offence disclosed by the evidence. Accordingly, whereas the Offence recorded in the occurrence book was creating disturbance, such is not a bar to the DPP from instituting charges that are appropriate to the evidence. Thus, the so called variance does not render the charge sheet herein fatally defective. To hold otherwise, simply because the stated offence in the OB was not posted in the charge sheet, would be arbitrary; an affront to justice and out of touch with the evidence adduced. The following sentiments of the Supreme Court of India in the case of *Willie (William) Slaney case* hold true that:

“We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form.

To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent.”

[33]. Accordingly, the ground fails.

Elements to be proved

[34]. The prosecution must prove beyond reasonable doubt the elements of crime of robbery with violence in section 296(2) of the Penal Code. The section provides as follows: -

(1)

(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.

[35]. On examination of the record the testimony of PW1 who was also the complainant was clear that PW1 was accosted by a group of 3 people. She recognized two of them as the people who had been extorting protection fees from her for some time. She had been paying them Kshs 200/= for the said protection. The appellant demanded cash while threatening that they were mungiki and would get cash either way. The 1st appellant entered the counter and produced a knife. He ordered the complainant to crawl on her fours from the bar to there in one bar that is 300m away. The complainant was holding Kshs 1,850/= that she was counting in the counter. He placed the knife on her threatening to stab her with it. She screamed and her neighbor one Chacha responded to her distress. When Chacha entered the bar the 1st Appellant threw the knife on him but it missed. Chacha fell on the 1st Appellant and wrestled him to the ground. Clients who were in the bar joined and arrested him. Meanwhile the 2nd Appellant fled and took away cash amounting to Kshs 1,850/= that the complainant had.

[36]. When put in their defence the appellants opted to tendered unsworn testimonies. The 1st appellant testified that he was at the scene when a brawl broke out. He tried to intervene but he was hit with a bottle on his head and he became temporarily unconscious. When he got up he was bleeding. He opted to go to Narok police station where he reported the matter and he was escorted to hospital. On his way from the

hospital he was arrested. The prosecution's evidence that he participated in the crime was not controverted. The prosecution's evidence proved that the 1st appellant threatened the complainant with a knife with the sole aim of aiding the 2nd appellant to take cash from the complainant. Contrary to his submissions, the trial court took his defence into consideration in its final impression of the evidence by the prosecution in proof of the guilt of the 1st appellant.

[37]. The 2nd Appellant testified that he supplies water with a lorry dispenser. On 7/8/2012. He worked up to 3 p.m. and ran out of water. He proceeded to Majengo estate to get refreshment. He went to a changaa selling point. One Yusuf came and found him taking changaa with a woman. Yusuf demanded to know why he was with that woman. He stated that he had a grudge with Yusuf. Other revelers who were present stopped Yusuf from beating him. The evidence of the 2nd Appellant tallied with that of the prosecution and specifically that of PW3 that the 2nd Appellant was arrested at a changaa den. Nevertheless, the 2nd appellant gave no account of the events of 6/8/2012 when the robbery occurred.

[38]. The totality of the evidence by the prosecution was that the appellants and the complainant were together at the scene of crime on the material day. The 2nd Appellant merely stated that Yusuf held a grudge against him. These defences are neither here nor there and do not have any foot on which to stand. It is merely intended to infuse confusion in the case. The evidence adduced is cogent and withers such afterthought. I find no merit in the defences.

[39]. The prosecution also proved the appellants were in company of each other, were armed with a dangerous or offensive weapon or instrument, and at or immediately before or immediately after the time of the robbery, they threatened violence or to wound the complainant; and stole money from her.

[40]. At this point, I am able to tackle the appellants' claim that the court laid too much reliance on the testimony of one witness on identification. On this subject, the Court of Appeal for Eastern Africa in *ABDALLA WENDO vs. R [1953] 20 E.A.C.A 166* held that: -

“Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this 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.”

[41]. See also *RORIA vs. REPUBLIC[1]*, the Court of Appeal for East Africa held that:-

“A conviction resting entirely on identity invariably causes a degree of uneasiness,

That danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification.”

[42]. Be that as it may, this is a case of identification by recognition and circumstances were not difficult ones. PW1 positively identified the appellants as they had been extorting protection fees from her for some time. She testified that she used to pay Kshs 200/= as protection fees. PW2 narrated that he was the watchmen at Nyati Bar. He positively identified the 1st Appellant as the one who had a knife and that the 2nd Appellant as the one who picked the knife and ran away with it after being thrown by the 1st Appellant. PW3 responded to PW1's distress screams. He proceeded to the scene and found three men ordering the complainant to walk on her knees. He grabbed the 1st Appellant who had a knife. The 1st Appellant threw the knife to the 2nd Appellant. With the aid of other customers who were in the bar he arrested the 1st Appellant and the 2nd Appellant a day after the robbery. Therefore, in light of the above the trial court correctly found that there was sufficient identification of the appellants as the persons who robbed the complainant. Accordingly, I find that the Appellants was positively identified and placed on the scene of crime.

Conclusions and orders on conviction

[43]. From the above analysis of the evidence, this court finds and holds that the prosecution proved the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** against the appellants beyond reasonable doubt. No reason whatsoever has been given in law and fact for the court to interfere with the conviction of the appellants for the offence of robbery with violence.

[44]. The upshot therefor is that the appeal against conviction lacks merit and is hereby dismissed.

On sentence

[45]. I am aware that the Supreme Court has limited application of the case to cases of murder under section 203 and 204 of the Penal code. I will keep the teachings of precedent. However, the wisdom in the Supreme Court decision is that it did not proclaim a foreclosure on similar arguments from being made in respect of other law which has prescribed sentences with an element that takes away or restricts the discretion of the court in sentencing. I reap and propagate the honour of the wisdom.

[46]. The relevant penalty clause pursuant to which the appellants were sentenced is Section 296(2) of the Penal Code which provides that: -

(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

[47]. The section provides for a mandatory sentence of death upon conviction for robbery with violence. The section takes away the discretion of the court in sentencing. As empowered by the new yardstick- the Constitution- in order to bring the section into conformity with the Constitution, I will read the term "shall" to mean "may" or "liable to" in accordance with section 7 of **The Sixth Schedule (Article 262), Transitional and Consequential Provisions** of the Constitution which provides, that:

7. Existing laws

(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution

[48]. I should think that section 7 of the Transitional Provisions of the Constitution introduced read-in technique in the interpretation of existing statutes. In my view, therefore, the Constitution allowed all existing laws to continue in force only that it *shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution*. The great judicial hint here is that; it may not be always necessary to declare a provision of an existing law to be unconstitutional and remove it from the law books, if such provision may be construed in the manner directed in section 7 of the transitional provisions. Parliament should however pick up such judicial pronouncements and amend the section accordingly.

[49]. Accordingly, this court has the discretion to mete out appropriate sentence under section 296(2) of the Penal Code. I shall so proceed.

[50]. What therefore is the appropriate sentence given the circumstances of this case? The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra** at paragraph 70-71 where the court held the following on sentencing:

***“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.*”**

[51]. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the Applicant to inflict harm. What are the relevant circumstances of this case?

[52]. In the case before me, the evidence shows that PW1 was accosted by a group of 3 people and was robbed of money. The 1st appellant entered the counter and produced a knife. He ordered the complainant to crawl on her fours. He placed the knife on her threatening to stab her. The manner the offence is committed is relevant consideration. In this case it was cruel although the complainant did not suffer physical injury. The offence is also serious; a robbery with violence. And, the weapons used were also dangerous weapons; knife. In the circumstances of this case, a deterrent sentence is most appropriate.

[53]. For the above reasons, I am persuaded that there is need for a deterrent sentence but which also allows an opportunity to come back to society and be productive; life sentence commuted by the President does not serve this purpose.

[54]. Accordingly, I hereby set aside the death penalty imposed by the court as well as the life sentence imposed on the Appellants through commutation by the President and substitute it with a Prison term of 20 years. The echoes of Section 333 (2) of the Criminal Procedure Code are loud; accordingly, the sentence shall run from the date when the Appellants were first arraigned in the trial Court in Narok CMCR Cr. Case No. 980 of 2012, that is, 8/8/2012.

[55]. It is so ordered

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 30TH DAY OF SEPTEMBER, 2021.

F. GIKONYO M.

JUDGE

In the Presence of:

1. 1st and 2nd appellants

2. Mr. Kasaso CA

F. GIKONYO M.

JUDGE