



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CRIMINAL APPEAL NO. 8 OF 2018**

**CHARLES KAMAU MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An appeal against conviction and sentence delivered on 28<sup>th</sup> December 2017***

***(Hon Okuche, SRM) in criminal case No.2008 of 2015 at Loitokitok)***

**JUDGMENT**

1. The appellant was charge with robbery with violence contrary to section 196(2) of the penal code. Particulars were that on the 12<sup>th</sup> November, 2015 at Machakos Town in Machakos County with others not before court, he robbed Jeremiah Nduati Kimani of his motor vehicle KBU 013A Mitsubishi FH, valued Kshs. 5.2 million, mobile phone make Itel 1353 valued Kshs 4000 and cash Kshs. 23,000, all valued at Kshs, 5,277,000 and immediately before or immediately after the time of such robbery used actual force to Jeremiah Nduati Kimani.

2. The appellant pleaded not guilty to the charge and after a trial in which the prosecution called 9 witnesses and his defence, the trial court convicted him and sentenced him to twenty five years imprisonment.

3. He was aggrieved with both conviction and sentence and filed this appeal raising the following grounds of appeal, namely:

***1. That the trial Magistrate erred in law by failing to evaluate the evidence and observe that the prosecution did not prove its case beyond reasonable doubt.***

***2. That the trial Magistrate erred in law in failing to consider his defence.***

***3. That the trial Magistrate erred in law by convicting him on identification evidence that was not free from error.***

***4. That the trial court erred in law by shifting the burden of proof to him.***

4. During the hearing the appellant who was unrepresented relied on his written submissions filed on 22<sup>nd</sup> October, 2019. He also filed supplementary grounds of appeal stating that;

***1. That learned Magistrate erred in convicting him on a fatally defective charge.***

***2. That the trial court erred by convicting him on a charge that was not known to law.***

***3. That the learned Magistrate erred in convicting him despite the fact that the prosecution violated Article 49 (f) (1).***

***4. That the trial Magistrate erred in convicting him without regard to the fact that the prosecution disregarded Article 50(2) (c) (1) of the constitution.***

***5. That the trial court erred in convicting him on a wrong charge.***

**6. That the trial court erred in convicting him when the ingredients of the offence were not proved.**

5. In his written submissions, the appellant argued that he was charged and tried on a charge not known to law. According to him the charge he faced was robbery with violence contrary to section 196 (2) of the penal code. This, he argued made the charge fatally defective. He relied on section 214 (1) of the Criminal Procedure Code arguing that the section under which he was charged did not accord with the offence. He relied on State of Uganda v Wagara [1964] EA para. 368 for the submissions that the charge being defective it could not be cured even by an amendment.

6. The appellant further argued that sections 134 and 137 of code which provide what a charge should contain and how it should be stated were violated, He relied on Sigilai v Republic [2004] eKLR for the submission that an accused should be charged with an offence known in law and it should be stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand.

7. Next, he submitted that he was arrested on 12<sup>th</sup> November, 2014 but was taken to court on 16<sup>th</sup> November, 2015 in violation of Article 49 (f) (i) of the Constitution. He relied on Albanus Mwasia Muta v Republic (Criminal Appeal No. 120 of 2004) for the submission that an accused should be produced in court as required or the prosecution explain why he was not produced in court timeously.

8. The appellant further argued that his right to fair hearing was violated. He relied on Thomas Patrick Gilbert Cholmondeley v Republic[2008] eKLR for the submission that the prosecution should disclose to the defence all relevant material evidence it intended to use during the trial. He also relied on the Canadian case of Republic v Stinchcombe [1992] LRC (Cri) 68 for the submission that in criminal trials the crown had a duty to disclose relevant information to the defence.

9. Finally, the appellant argued that the trial court erred in convicting him for the offence of robbery with violence where there was no evidence of the offence. In other words, he argued that the ingredients of the offence were not proved.

10. Mr. Njeru, learned Assistant Prosecution Counsel, opposed the appeal, supported the conviction and sentence. He admitted that there was an error on the section of the offence in that the charge sheet stated that he had been charged under section 196 (2) of the penal code. However, the particulars of the offence were clear that it was a charge of robbery with violence. According to counsel, the error is curable under section 382 of the Criminal Procedure Code because the error did not go to the root of the case and did not occasion injustice to the appellant.

11. Learned counsel submitted that the prosecution proved its case beyond reasonable doubt and that the appellant was arrested while driving the motor vehicle, the subject of the robbery. He argued therefore that the prosecution proved the ingredients of the offence; that the robbers were more than one and that the drugging of the complainant was achieved through use of violence. He urged the court to so find and if in doubt, to find that the appellant committed the offence of theft of motor vehicle contrary to section 278(a) of the Penal Code which is allowed under section 179 of Criminal procedure code. He urged the court to dismiss the appeal.

12. I have considered this appeal; submissions and the authorities relied on. I have also perused the record of the trial court and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on it. it should however bear in mind that it did not see the witnesses testify and give due allowance for that. (See Okeno v Republic [1972] EA 32)

13. In Kiilu & Another v Republic [2005]1 KLR 174, the Court of Appeal held that:

***“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. 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.”***

14. And In victor Owich Mbogo v Republic, criminal appeal No. 152 of 2015 [2020] eKLR, the same court stated:

***“It is the duty of the first appellate court to reevaluate the evidence afresh and reach its own conclusion bearing in mind that unlike the trial court, the appellate court did not have the benefit of hearing or seeing the witnesses testify.”***

15. PW1 Jeremiah Ndjuati Kimani testified that on 12<sup>th</sup> November, 2015 he was at work in Thika. At about 2.30 pm two people, a man and lady hired his vehicle to transport for them 100 bags of green beans from Machakos to Thika. They agreed a charge of KShs. 14,000/- and set off through Kithimani road. When they were about to reach Machakos, the appellant said he had forgotten keys to the store at Thika. He alighted and let him and the lady proceed to Machakos.

16. They reached Machakos and while waiting for the appellant, the lady suggested they go for a drink but he declined. She invited him for a meal but again he declined. He went to a nearby supermarket to relieve himself and as he made his way from the urinal area, he met the lady. She gave him her bag to hold for her as she also went to relieve herself. She came back with Delmonte juice which she served him in a glass she got from the vehicle. He took two glasses of juice. Soon after, he felt the urge to go for a short call. When he came back, he felt cold and went to the vehicle. The lady followed him to the vehicle. He felt impatient and the lady called the appellant who said he was about to arrive. All of a sudden he became unconscious.

17. When he regained consciousness, he found himself in a thicket. He struggled to make it to the road where he signaled a vehicle, informed

them what had happened and gave them his employer's telephone number. He called and talked to him but again lost consciousness. He woke up the next day at Emali hospital. Next to him were his employer and a police officer. They informed him that the vehicle registration Number KBU 013A had been recovered and detained at Loitokitok police station. He went to the police station where he identified the appellant and the lady. He lost Kshs. 24,000/- and his phone, make Itel black in colour.

18. In cross-examination, the witness told the court that the appellant and the lady were together when they hired the vehicle. He however did not know whether the appellant was around when the vehicle was driven away.

19. PW2 No. 235824 IP Daniel Kipruto formerly attached at Emali Petrol base, testified that on 12<sup>th</sup> November, 2015 at 11.30 pm PW1 was taken to the base in motor vehicle registration No. KCD 626 driven by Mulinge Mutuku and his turn boy Boniface Mutua. They informed him that they found PW1 on the road and assisted him to the station. He took PW1 to Kilome hospital where he was admitted for one day. He regained consciousness the next day. His employer came to the hospital and after PW1 was discharged they went to Loitokitok police station where the vehicle had been detained.

20. PW3 No. 67040 CPL Simon Chacha testified that on the night of 12<sup>th</sup>, 13<sup>th</sup> November, 2015 he was on duty at Loitokitok police station with fellow officers, PC Mwai, PC Kirui and PC Maranga, when he received a call from the OCS informing him that a stolen vehicle was on its way to Loitokitok. He gave the registration of the motor vehicle as KBU 013A Mitsubishi. The witness closed the gate and stayed at the barrier. The Lorry, KBU 013A came and stopped. He went to the driver's door while PC Maranga went to the passenger door. The driver told him that they were going to Rombo but were to spend the night at Loitokitok. The driver was with a lady in the vehicle. He cocked the gun and ordered them to alight which they did. He took them to the office while PC Maranga packed the vehicle. He identified the appellant as one of the people they arrested. They were searched and recovered an identity card, driving license, Safaricom Cards, Orange cards, cut out sensor and the vehicle from the appellant. They prepared an inventory prepared which they signed.

21. The items recovered from the appellant were recorded in the inventory which was produced as PEX 5. The appellant and the lady were detained at Loitokitok police station. The following day, PW1's statement was recorded and thereafter he was taken to hospital. In cross-examination, the witness confirmed that he arrested the appellant in the vehicle and found him with a cut out sensor in his pocket.

22. PW4 Mulinge Mutua testified that on 12<sup>th</sup> November, 2015 he was driving motor vehicle KCD 226L, a Canter carrying goods from Isinet to Mombasa. He was with his turn boy. When he reached Mbirikani, a person who was in the middle of the road stopped them and sought their assistance because he did not know where he was and appeared drunk. They assisted him with their phone to call his employer. They took him to Emali Road block where they reported the incident and then took him to Emali police station. In cross-examination, the witness told the court that PW1 had been drugged and robbed of his vehicle at Machakos.

23. PW5 Samuel Ndirangu Kinyanjui, a transport businessman testified that on 12<sup>th</sup> November, 2015, PW1 called and informed him that he had business to do at Machakos and had been paid a deposit. He later called PW1 at 7.30 but he could not be reached. He sent a text message but it was not delivered. Later at about 10.30 pm a person called and informed him that the vehicle had been stolen. He called 999 and gave the police details of the vehicle. He also tracked the vehicle to Kimana.

24. He later received a call from Emali Police Station informing him that PW1 was at the station but had been drugged. He was given the number for Loitokitok police station which he called and talked to PW1. His car tracking firm also called and informed him that the vehicle had been detained at Loitokitok police station. The OCS of Loitokitok police station also sent him a text message to that effect. The following day, he travelled to Emali where he found PW1 and they went to Loitokitok together. PW1's condition became worse and he took him to Loitokitok hospital.

25. PW6 – No. 91420 PC Collins Nyarumba of Rombo Patrol Base testified that on 12<sup>th</sup> November, 2015 he was at Loitokitok police station, the appellant and another person were arrested at the gate with a stolen motor vehicle KBU 013A. They recovered from the appellant and the other person, a driving license, national identity card, Orange card, cutout sensor, motor vehicle registration No KBU 013 A, three mobile phones two Techno and one Itel. He signed the inventory.

26. PW 7 No. 235643 IP Salim Mwafrica the Deputy OCS Loitokitok police station testified that on 14<sup>th</sup> November, 2015 he was called by the OCS and requested to conduct an identification parade in respect of two suspects who had been arrested, a man and a lady. With regard to the man, he took eight prisoners the appellant being one of them. They were of the same body structure, texture and height. He placed the appellant amongst them. He then called PW1 to the parade and he picked out the appellant by touching him. He produced the identification parade form as PEX 8. In cross-examination, the witness stated that PW1 identified the appellant among 9 persons including the appellant who was standing between the 1<sup>st</sup> and 3<sup>rd</sup> person. told the court that he conducted the parade after two days.

27. PW8 Dr. Issah Mohamed based at Kajiado West Sub County Hospital, testified that PW1 was examined at the facility and found to have slow body coordination. The neck was painful, chest cage was tender. He had multiple cuts on the fingers and the wrist was painful. The right knee had soft tissue concussion. He was probably put on anesthetic drugs. Approximate age of injuries was hours. When he went to the hospital, he had been treated. He assessed the degree of injury as harm. He signed a P3 form which he produced as PEX 4(b).

28. PW9 No. 235281 IP Wycliffe Marwa of Loitokitok police station testified that in February, 2017 the case was referred to the station and he was assigned the case for investigation. He recorded a statement from the person who found PW1 and took him for treatment at Emali; the police officer who referred PW1 to Emali hospital; received exhibits and arranged for printing of the motor vehicle photos. He produced the exhibits in court.

29. When the appellant was put on his defence, he gave a sworn testimony and told the court that on 12<sup>th</sup> November, 2015, at 10 a.m. he was at Thika when a lady requested him to send him to Rombo to get Watermelon. She gave him Kshs. 10,000/-. He travelled from Thika to Nairobi; left Nairobi at 4.30 pm and arrived at Loitokitok at 10 p.m. He booked a room and went to a bar where he had beer. On his way back to his room, he was arrested by police officers who were on a raid. He called the lady who had sent him and informed her of the

incident. He denied committing the offence.

30. In cross-examination, he denied that he knew the lady who was said to have been arrested with him. He admitted that he signed an inventory but denied seeing any person witness it. He stated that he saw PW1 for the first time in court. He admitted that PW1 identified him at the identification parade but at the same time denied that he participated at an identification parade.

31. DW2 Jane Muthoka, a business lady based at Thika, testified that on 12<sup>th</sup> November 2015 she sent the appellant to Rombo. The appellant then called her at night claiming that he had been arrested. In cross-examination, the witness told the court that she had only given the appellant fare and that he called her at 10 pm.

32. After considering the evidence of both the prosecution and the defence, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted and sentences the appellant. The trial court analyzed the evidence of both the prosecution and the defence and in particular the ingredients of the offence that must be proved.

33. The trial court concluded that first there was theft of items including motor vehicle from PW1 without his consent, and they were recovered somewhere else. The trial court then considered the fact that the appellant was in the company of a lady from Thika towards Machakos; and later when the vehicle was recovered, it was in the possession of the appellant and the lady who is said to have escaped while on bond. The court was satisfied that the offence was committed by two people and the fact that PW1 was drugged; fell within use of personal violence. On whether the appellant was criminally liable, the court concluded on the affirmative.

34. The questions that arise for determination are, whether the charge was defective, and whether the prosecution proved its case beyond reasonable doubt. The appellant has argued that he was charged with robbery with violence contrary to section 196(2) of the Penal Code which does not create such an offence. He also argued that the prosecution did not prove the ingredients of the offence and faulted the trial court for convicting him.

35. The respondent admitted that there was a mistake in the section under which the appellant was charged but argued that that was a mistake that was curable under section 382 of the Criminal Procedure Code. According to Mr. Njeru, the particulars of the offence were clear that the appellant was facing a charge of robbery with violence and particulars of the robbery were well stated in the charge sheet. He also submitted that the prosecution proved the ingredients of the offence and therefore, the case

36. There is no denial that although the appellant faced a charge of robbery with violence, the section under which he was charged was section 196(2) of the Penal Code which had nothing to do with robbery with violence. That section dealt with criminal defamation.

37. There is no doubt that although the offence was said to have been brought under a wrong provision, particulars of the offence were those of robbery with violence. The particulars stated the offence, the place where it was committed, the items robbed victim of the crime and the fact that the appellant was the perpetrator of the crime together with others not before court. The appellant pleaded to the offence went through a trial and even called a witness to testify in his favour. This was evidence of the fact that the appellant understood what he was charged with and tried for. On the basis of that no prejudice or injustice caused to the appellant.

38. In any case, section 382 of the Criminal Procedure Code provides that no finding, sentence or order passed by a court of competent jurisdiction should be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings unless the error, omission or irregularity has occasioned a failure of justice. In the premise of this case, the error did not cause failure of justice and is curable under section 382.

39. The next question for determination is whether the prosecution proved the ingredients of the offence and therefore, proved its case beyond reasonable doubt. The appellant argued that the prosecution did not while the respondent contended that the prosecution proved the case as required.

40. The law requires the prosecution to prove the case against an accused person beyond reasonable doubt. In Stephen Nguli Mulili v Republic [2014] eKLR, the Court of Appeal observed:

***“[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR.”***

41. In Miller v Ministry of Pensions, [1947] 2 All E R 372, Lord Denning stated on proof beyond reasonable doubt:

***“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”***

42. And in Bakare v State (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria, amplified on that principle stating:

***“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of***

***criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”***

43. I have reconsidered and reevaluated the evidence of both the prosecution and the defence and reanalyzed it myself. PW1 told the court that he was hired by the appellant and a lady to pick some luggage for them from Machakos. They set off for Machakos in his vehicle but just before reaching Machakos, the appellant alighted claiming that he had forgotten the keys to the store. PW1 and the lady proceeded to Machakos where they waited for the appellant, in the meantime, the lady gave PW1 juice and he soon after lost consciousness.

44. Before that, when PW1 appeared to grow restless, the lady called the appellant who told her that he was about to reach Machakos. When the appellant came to, he was in a thicket in unfamiliar territory. He was assisted by PW5 who took him to the police station from where he was taken to hospital.

45. The fact of the matter, as correctly stated by the trial court, was that the vehicle and other items were stolen from PW1. The people who committed the offence were two. They hired PW1 together set off together and therefore the scheme was conceived together. They drugged PW1 and later dropped him in the wildness after stealing from him.

46. Although the appellant alighted from the vehicle before they reached machakos. There was no doubt that they were acting as a team. PW1 and the lady were waiting for him and when he appeared to delay, the lady called him and he informed her that he was about to reach machakos. There was no doubt that the appellant and the lady were together in that scheme. He alighted in order to give the lady an opportunity to scheme how to drug and therefore immobilise PW1 to facilitate the commission of the crime.

47. Secondly, PW2, PW3, and PW4 testified that they stopped the stolen motor vehicle at Loitokitok police station roadblock and recovered the vehicle from the appellant and the lady. They also recovered PW1's cellphone from them. PW7 conducted a parade and PW1 was able to pick the appellant from the parade.

48. In his defence, the appellant stated that he was sent to get watermelon from Rombo and travelled to Loitokitok where he was to spend the night before proceeding to Rombo in the morning. He was arrested as he went to sleep. He did not tell the court how he travelled to Loitokitok and how he would have carried the Watermelon.

49. DW2, who allegedly sent the appellant, told the court that she only gave the appellant fare while the appellant told the court that she gave him Kshs. 10,000. She too did not tell the court how the appellant was to buy and transport watermelon to Thika if she only gave him fare. The appellant also denied that a parade was conducted although he also stated that PW1 picked him out in the parade.

50. PW1's evidence was that he identified the appellant at the police station. PW7 confirmed that he conducted a parade for the appellant and PW1 picked him out of 8 people, excluding the appellant, who participated in that parade. Police witnesses also testified that they arrested the appellant in the stolen vehicle and recovered PW1's cellphone from him.

51. I have perused the identification parade form PEX 8. It shows that the appellant participated in the identification parade conducted by PW7. The appellant was informed of his rights to have a friend present and gave the name of Joyce Wairimu. He also signed the form that he was satisfied with the conduct of the parade. According to PEX8, the appellant was identified by touching and he never raised any concerns. I am therefore satisfied that he was positively identified and picked out of nine people who took part in that parade.

52. The only other issue is whether the ingredient of violence was established. I have already determined as the trial court did that the offence was committed by two people which is within the meaning of section 296(2). As to violence, there is no doubt that the appellant acting in company with the lady, drugged PW1, took control of the vehicle and dumped PW1 in the wildness.

53. Section 296(2) states that 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, the offence is complete. The appellant was acting in the company of the lady when they committed the offence. They were therefore more than one. Personal violence when used may on its own meet the requirements under the section.

54. In the present case, the appellant and the lady drugged PW1 in order to interfere with his cognitive ability thus enable them to commit the offence. By drugging PW1, the appellant used some form of personal violence against him. The substance used interfered with PW1's ability to coordinate his body and the mental ability and was a threat to life.

55. Anyone who uses such means to accomplish a mission that would otherwise have required some form of violence to execute, should in my view, be deemed to have used violence against his victim. Furthermore, the medical evidence by the doctor confirmed that PW1 had injuries on his body showing that personal violence was used against him. In that respect, I am satisfied that the appellant used violence against the person of PW1.

56. Finally, on sentence the section prescribes a death sentence for the offence. The appellant was sentenced to twenty five years which was less than the sentence prescribed, but a lawful sentence.

57. In the end, having considered the appeal, submissions and the authorities relied on, I find no merit in this appeal. It is declined and dismissed. The conviction is upheld and sentence affirmed.

**Dated, signed and delivered at Kajiado this 30<sup>th</sup> day of April, 2020.**

**E.C. MWITA**

**JUDGE**