



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CR. APPEAL NO. 49 OF 2016

(From Original Conviction and Sentence in Criminal Case No. 233 of 2016

of the Principal Magistrate's Court at Baricho.

PETER WACHIRA MUGO.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant Peter Wachira Mugo (to be referred to as the appellant), was convicted by the Principal Magistrate at Baricho for the following offences:-

a) Robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that on 24/2/2016 at about 8.00 am at Kerugoya Township while armed with a dangerous weapon to wit a butcher's knife and plastic cable wire robbed Juliet Atema Kasam of her motor vehicle registration Number KBS 892E Toyota Mark X valued at Kshs 1.2 Million, National Bank ATM Visa Card valued at Kshs 500/- and One KCB ATM Card valued at Kshs 500/- all valued at Kshs 1,201,000/- and at the time of such robbery threatened to use actual violence to the said Juliet Atema Kasam.

b) Attempted kidnapping/Abduction with intent to confine contrary to Section 259 as read with Section 388(1) & 389 of the Penal Code. It was alleged that on 24/2/2016 at about 8.00 am at Kerugoya Township with intent to cause Juliet Atema Kasam to be secretly and wrongfully confined, attempted to kidnap, abduct the said Juliet Atema Kasam.

c) Demanding money with menaces contrary to Section 302 of the Penal Code.

2. The particulars are that on 24/2/2016 at about 8.00 am at the residence of Juliet Atema Kasam in Kerugoya Township the appellant demanded Kshs 50,000/- from Juliet Atema Kasam with menaces.

3. The appellant was sentenced to death on the 1st count, 5 years imprisonment on the 2nd count and Seven years imprisonment on the 3rd Count.

4. The appellant was dissatisfied with both conviction and sentence and filed this appeal which initially raised Eight grounds. The appellant filed amended grounds appeal together with the submissions and raises the following grounds:-

- Prosecution did not prove the charges beyond any reasonable doubts.
- There were contradictions on the identification of the exhibits by the prosecution witnesses.
- The defence that he had no intention to commit the offence was not considered.
- The State opposed the appeal.

5. The appellant opted to canvass the appeal by way of written submissions. The appellant filed his submissions while those of the State were filed by Mr. Geoffrey Obiri Ass. Director of Prosecution.

6. I have considered the appeal. The duty of the 1st appellate court is to analyse the evidence, evaluate it and come up with its own independent finding but give room for the fact that it had no opportunity to see the witnesses when they testified and assess their demeanour then leave room for that.

7. The brief facts of the case are that the complainant PW-1- is a Judicial Officer who was at that material time attached to Kerugoya Law Courts. On 24/2/16 she was leaving her compound to go to work. She opened the door of her car and put her bag inside. She then went and opened the gate. She then proceeded back to her car and got inside. She was suddenly accosted by the accused who was at the back seat. The appellant demanded money and threatened to kill the complainant with a butcher's knife which he was armed with. The complainant said she had no money and offered to give appellant her ATM Cards and the Pin to go and get the money from the bank. The appellant tied the complainant with clothe material on her hands. As the appellant looked for ATM Cards, the complainant raised an alarm and neighbours were alerted. They rescued the complainant and arrested the appellant who was still inside the complainant's car. Police were called and the appellant was escorted to the Police Station where he was charged with these offences.

8. I have considered the grounds of appeal and the evidence which was tendered before the trial Magistrate and also evaluated it. I will proceed to consider the grounds of appeal.

1. That the evidence of the complainant was contradicted by the evidence of the rest of the prosecution witnesses.

9. I have considered this ground. I find that the prosecution has a duty to prove the charge beyond any reasonable doubts. Such prove must be based on cogent evidence. Where there are contradictions on material particulars, they will cast doubts on the prosecution case. On the other hand minor contradictions which do not raise doubts and are not on material particulars are ignored.

10. The contradictions which will be fatal to the prosecution case are those contradictions which case doubts on the credibility of witnesses. This issue of contradictions and inconsistencies has been considered by the Court of Appeal in the case of **Erick Onyango Ondeng –v- R (2014) eKLR** where the court stated that not every contradiction would cause the evidence of witnesses to be rejected. There would need to be more to the contradictions. The Court of Appeal cited with approval the Court of Appeal in Uganda in the case of **Twehangane Alfred – v- Uganda Cr. Appeal No. 139/2001 (2003) UGC.A** where it stated:-

“As noted in the Uganda Court of Appeal in Twehangane –v- Uganda Crim. App.No. 139/2001(2003) UGCA 6 it is not every contradiction that warrants rejection of evidence. As the court put it.

With regard to contradictions in the prosecution case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained, will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness, or if they do not affect the main substance of the prosecution's case.”

11. The appellant has submitted that since complainant stated that she went to her car threw in her bag and went and opened the gate. Then returned back to the car and was accosted by somebody who was in the car behind the drivers seat, she could not have failed to realise there was somebody in the car. The evidence of the complainant was not self-contradictory. PW-2- Boniface Rujeri Obungu testified that he heard screams from a lady then heard the sound of a car reversing. He peeped into the compound and saw somebody in the car with her hands tied. The car alarm was still on. My evaluation of the evidence of PW1 & 2 is that the evidence is cogent and not contradictory. PW-2- was clear that the vehicle he heard was that of PW-1-.

12. The complainant testified that she was tied with a cloth string. All the witnesses identified Exhibit -3- as the cloth string which had tied the complainant. PW-7- testified that he went to the home of accused and conducted a search. He recovered a piece of cable which was similar to the one which had been used to tie the complainant. There was no contradiction on the evidence regarding what had been used to tie the complainant. I find that the ground is without merits. There is no contradiction. The matters raised do not point to any deliberate untruthfulness on the part of the witnesses. I find that the evidence tendered by the witnesses was cogent and truthful. The appellant was arrested at the scene and there were witnesses who saw him inside the complainant's car apart from PW-7- who arrived at the scene later. Find that the ground is without merits.

13 The appellant submits that there was no robbery. The appellant was charged with robbery with violence contrary to **Section 296(2) of the Penal Code. Section 295 of the Penal Code** gives a definition of robbery. It states:-

“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 retain the thing stolen or to prevent or to overcome resistance to its being stolen or retained is guilty of the felony termed robbery.”

14. This defines what is termed as robbery and these ingredients must be present in order for the offence of robbery to be complete. **Section 296 of the Penal Code** makes a distinction between simple robbery and robbery with violence.

Section 296(1) & (2) of the Penal Code provides:-

“(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.”

The ingredients of robbery with violence are:-

- **Whether the offender is armed with a dangerous or offensive weapon or instrument.**
- **Is in company of one or more other person or persons.**
- **If at the time or immediately before or immediately after the time of robbery he –**

Wounds, beats or uses any other personal violence to any person.

15. The question for determination is therefore whether based on the evidence tendered the appellant committed the offence of robbery with violence. The complainant (PW-1-) in her testimony told the court that she opened her car and put her bag inside. She then went and opened the gate. She returned to her car, got inside and started it. She was suddenly accosted by a person who was already inside her car behind the driver's seat. The person who is the appellant, attacked her. She screamed but the appellant threatened her not to scream. He held her on the mouth and showed her a knife. The appellant told her that if she screams he was going to kill her. The complainant identified the knife as exhibit –2-. The appellant demanded Kshs 200,000/-. The appellant had tied the complainant on both hands with a cloth string. The appellant took two ATM Cards.

16. This evidence shows that the appellant was armed with a knife which I find is a dangerous weapon. The prosecution therefore proved that the accused was armed with a dangerous weapon.

17. The appellant was also identified as the person who attacked the complainant. The offence was committed at 8.00 a.m in the morning and there was therefore no impediment to positive identification. The appellant does not deny that he was at the scene in his submissions he has stated:-

“Considering how those four witnesses testified in regards to how the complainant was been (sic) tied up her hands and how herself testified, it is clear indication there was no robbery between the complainant and the appellant herein but that they were just friends sitting inside the complainant's car but just at sudden (sic) their discussion turned to a quarrel and she screamed which attracted PW-2- & 3 and after the arrival of PW-4-, 6 & 7 the complainant changed the story that there was no friendship between her and the appellant, but that it was a robbery.”

18. The appellant places himself at the scene and there can be no doubt that he is the one who committed the offence. I however find that there is no truth in the allegation that the appellant and the complainant were friends. This allegation was not put to the complainant when she was cross-examined the 1st time and the 2nd time when she was recalled from cross-examination. In any case why would a friend arm himself with a knife and tie her hands. The allegation is an outright lie. I find that the appellant was positively identified.

19. On the use of violence, the complainant testified that her hands were tied, the appellant threatened her with a knife. This were acts of use of violence.

20. The issue then is whether the charge was proved beyond any reasonable doubts. The appellant is alleged to have robbed the complainant of her motor vehicle registration Number KBS 892e Toyota Mark X valued at Kshs 1.2 Million, One National Bank ATM Visa Card valued at Kshs 500/-, one KCB ATM Card valued at Kshs 500/- all valued at Kshs 1,201,000/-.

21. It is trite that the charge and all the particulars must be proved beyond any reasonable doubts.

Section 134 of the Criminal Procedure Code provides:-

“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.”

22. Those particulars must be proved beyond any reasonable doubts. In **Republic –v- Derrick Waswa Kulob (2005) Eklr.** It was held that:-

“The burden of the prosecution is to establish the charge beyond any reasonable doubts.”

23. There is a question as to whether the particulars of the items robbed from the complainant were proved beyond any reasonable doubts. The prosecution had the burden to prove that the accused robbed the complainant all the items listed on the particulars of the charge. The definition of robbery which I have quoted above states that ***‘any person who steals’***. The definition of stealing given under **Section 268 of the Penal Code** implies that the person takes something capable of being stolen. Stealing is not complete if a person does not take the thing which it is alleged he has stolen.

24. In this case the accused is alleged to have stolen a motor vehicle KBS 892E Toyota Mark X belonging to the complainant and other items.

25. The evidence by the complainant is that the appellant who had already gained entry in the vehicle attacked her and tied her hands. He then demanded money and she gave him the two ATM Cards. PW-1- never tendered evidence to prove that the appellant stole the said

motor vehicle. There is no evidence that the appellant demanded the car keys or even attempted to drive the vehicle. There is no evidence that the appellant robbed the complainant of her motor vehicle. The prosecution exaggerated the charge by including the motor vehicle as on the items stolen. The trial Magistrate found that the two ATMs were recovered from the custody of the intruder, Page 33 of the record. The trial Magistrate erred when he stated that the appellant took charge of the motor vehicle ---- page 33 line 28 when it was not supported by any evidence. I find that the particulars of the charge that the appellant stole the said motor vehicle was not proved beyond any reasonable doubts. Failure to prove all the particulars of the charge is fatal to the prosecution case. The charge and all the particulars in the charge or robbery with violence are not proved beyond any reasonable doubts. The charge must fail.

26. On the 2nd ground, the appellant raises the issue that the charges were not adequately proved. In this regard I have already dealt with the 1st count. On the 2nd count the appellant is alleged to have attempted to kidnap the complainant. The submissions by the appellant on this ground are not relevant. The evidence on record is that the appellant tied her on both hands and started looking for a handkerchief to block her mouth. The trial Magistrate found that the appellant had an intention to abduct the complainant as he had tied the complainant. The trial Magistrate found that the appellant did not deny that he had tied the complainant. I find no reason to interfere with the finding of the trial Magistrate who had a chance to see the witnesses and found that the testimony was credible. The appellant in his submissions has stated that what happened was not robbery. He did admit that he was at the scene. I find that he had an intention to kidnap and or abduct the complainant but it was a bad day for him as he was caught.

27. On the 3rd count the complainant testified that the accused demanded money while threatening her with a knife. The evidence was not challenged. The trial Magistrate found that indeed the accused had demanded money from the complainant after instilling fear on her and threatening her with a knife. The finding by the trial Magistrate was based on cogent evidence. The ATMs cards which the complainant gave to the appellant so that he could go and withdraw money which he was demanding were recovered from the appellant. The trial Magistrate found that the charge of demanding money with menaces was proved.

28. The offence of demanding money with menaces is defined in **Section 302 of the Penal Code** as follows:-

“Any person with intent to steal any valuable thing, demands it from any person with menaces or force is guilty of a felony and is liable to imprisonment for Ten years.”

29. This definition is clear that the offence is complete when a demand is made. Whether money is given or not is not material. In addition to the demand there must be a use of menace, threat or force capable of instilling fear. Where a person demands with menaces, he commits an offence. I find that the prosecution proved that the accused demanded money from the complainant after threatening to cause harm on her using a knife. The offence was completed as there was a demand for money accompanied with menaces. The trial Magistrate was right to find that the appellant demanded money with menaces. The finding was based on cogent evidence and I find no reason to interfere with the finding. I find that the prosecution proved the 2nd & 3rd counts against the appellant beyond any reasonable doubts.

30. Finally, the 3rd ground is that the defence of the appellant was not considered. From the record, the appellant gave unsworn defence. Page 22-24 of the record. Unsworn statement of defence is a statutory statement. It is strictly not evidence as it is not given on oath. **In May -v- Republic C. A, 24/1979 (1981) KLR** the court held that:-

“unsworn statement is not strictly speaking evidence but it should be considered in relation to the whole of the evidence.”

31. The trial Magistrate considered the defence of the appellant at Page 34 line 34 to page 35 line -7- of the record. The appellant in his defence admitted that he was at the scene at the material time. He admitted that the complainant opened her car and he entered. The complainant started screaming and told her to shut up. He further stated that he did not know what he was doing and that he did what he did because he was bewitched. The defence amounts to admitting the offence. The complainant stated that she did not know the appellant before and that was her first encounter with him. Based on the testimony of the complainant the trial Magistrate was entitled to reach the finding that he did. I find that I have no reason to interfere with the finding by the trial Magistrate on the 2nd & 3rd count. The trial Magistrate analysed the evidence and arrived at the inevitable conclusion, that of guilt of the accused.

32. **In conclusion:**

I find that the 1st count of robbery with violence was not proved beyond any reasonable doubts. I acquit the accused on the 1st count and set aside the sentence. The 2nd & 3rd counts were proved to the required standard. In view of the circumstances of this case, I will not interfere with the sentence on the 2nd and 3rd counts. The sentence was kept in abeyance. From the record, the appellant was remanded from 25-2-2016 to 10-10-2016. **Under Section 333 of the Criminal Procedure Code**, this period must be considered when computing sentence.

33. I order that the sentence on the 2nd & 3rd count will run concurrently and be reduced with the period the appellant was in custody. The appeal on the 2nd & 3rd Counts is dismissed.

Dated at Kerugoya this 24th day of April 2020.

L. W. GITARI

JUDGE