



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 129 OF 2012

JACKSON MISERA SAMSON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Maina (CM)

delivered on 26th April 2012 in Nairobi CM Cr.Case No. 1098 of 2011)

JUDGMENT

The Appellant, Jackson Misera Samson 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 11th August 2011 at about 10.30p.m at Uhuru Highway/ Haile Sellasie Avenue junction in Nairobi within Nairobi county, jointly with others not before court, the Appellant robbed Kevin Karani Mureithi of his mobile phone make blackberry, cash Ksh.600/-, one wallet, two ATM cards and an electors card all valued at Ksh.20,000/-. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to life imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that his conviction was based on a defective charge sheet. He took issue with how the trial was conducted and asserted that he was subjected to an unfair hearing, as the same did not comply with constitutional requirements. He was of the opinion that the prosecution had not proved its case to the required standard of proof. He complained that the trial magistrate did not consider his defence. In the premises therefore, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. Ms. Akunja for the State opposed the appeal. She made oral submission to the effect that the prosecution had established its case on the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt. She submitted that when the Appellant was arrested he was found in possession of the complainant's wallet. She stated that the complainant, Kevin Karani Mureithi (PW1), did not lose sight of the Appellant when he attempted to run away. She stated that police officers on patrol (PW2) and (PW3) arrested the Appellant 50 meters from where the robbery incident occurred. She submitted that when placed on his defence, the Appellant failed to explain how he was found in possession of the said wallet. Learned State Counsel argued that no identification parade was conducted because the Appellant was arrested at the scene of the crime. She submitted that the charge sheet was not defective and that the errors on the dates brought out by the Appellant were rectifiable under the law.

The facts of the case according to the prosecution are as follows: The complainant was on his way from work on 11th August 2011 at about 10.30p.m. The motor vehicle he was travelling in got a mechanical problem near the junction at Uhuru Park opposite Railways Club. He decided to alight and walk to town. At the roundabout of Uhuru Highway and Haile Sellasie Avenue, he met three men who were walking towards him. The three men ordered him to stop. The Appellant, who was among them, ordered him to surrender all his valuables. Two of the men stood behind him. The Appellant was facing him. The complainant stated that he could not identify the other two men who were behind him but he was able to identify the Appellant since he was facing him. He testified that the place where the incident took place was well lit with security lights as well as a light emanating from a nearby advertisement billboard. He stated that the two men who were behind him took his blackberry phone while the Appellant took his wallet, which was brown in colour and contained passport size photos, ATM card, a voting card and Ksh.600/-. He said that immediately thereafter, police officers who saw what was happening alighted from a police Landover and came running towards the scene. Upon seeing the police, the three men started running. Two of them managed to escape but the Appellant was arrested about 80 meters from the scene. The complainant maintains that he did not lose sight of the Appellant as he attempted to run away before he was caught by the police officers (PW2) and (PW3). He stated that his wallet with all the stated contents was

recovered from the Appellant upon his arrest.

It was the evidence of PW2 (PC Silas Githinji) that he was directed by his superior to check out information that he had received, that there was a group of people terrorizing members of the public along Haile Sellasie Avenue. Together with another police officer (PW3), they proceeded to Uhuru Highway/Haile Sellasie Avenue roundabout. They stopped the motor vehicle after spotting a group of four people opposite Railways Club. PW2 stated that when they alighted three of those people started fleeing. They chased after them and managed to arrest the Appellant while the other two made good their escape. He asserted that the scene was well lit since there was a bright security light. He said that he did not lose sight of the Appellant who was fleeing before they apprehended him. He testified that they recovered a wallet with Ksh.600/-, 2 ATM cards, an elector's card and passport photos from the Appellant's trouser pocket. The passport photos were of the complainant and the ATM cards as well as elector's card bore the complainant's name.

The testimony of PW3 (PC Washington Mwamu) corroborated events as narrated by PW2. He confirmed that they recovered the complainant's wallet from the Appellant when they arrested him at the scene of the robbery. He added that the complainant identified the Appellant as one of the men who had robbed him.

When the Appellant was put to his defence, he testified that on the material day, he went to work as usual at Minto Hotel located at Muthurua Market. He was employed as a cook. He left work at 10.00p.m and proceeded to railways bus station to board a bus to Kibera, but changed his mind when he was informed the bus fare was Ksh.70/-. He said that he decided to walk home and was arrested along Uhuru Highway at about 10.00pm. He averred that the officer who arrested him told him that it was the wrong time for him to be walking in the area. He denied having any knowledge of the robbery as narrated by the complainant.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanor of the witnesses (See Okeno vs Republic [1972] EA 32). In the present appeal, the issue for determination is 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.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification, the arrest of the Appellant and recovery of the stolen items from him to secure the conviction of the Appellant. As regards evidence of identification, PW1, PW2 and PW3 testified that they were able to positively identify the Appellant during the night of the robbery. They stated that the scene of the robbery was well lit due to presence of security lights as well as a light emanating from an advertisement billboard. It is important to note that the court takes judicial notice of the fact that at that time of the night there are normally not a lot of people walking about in the area. They were therefore able to see the Appellant. PW1 stated that the Appellant was facing him during the robbery hence he was able to identify him. He said that as the Appellant was fleeing the scene when PW2 and PW3 arrived, he did not lose sight of the Appellant until he was apprehended by the said police officers.

PW2 and PW3 testified that they saw a group of four people and as they approached them, three of the said people started fleeing from the scene. PW2 and PW3 added that they started chasing after them and were able to apprehend the Appellant who was among them, but the other two people managed to escape. They maintained that they did not lose sight of the Appellant as he was running away until they apprehended him about 80 meters from the first scene where he had been seen. This was a short distance and the Appellant could have very well remained in the sight of PW1, PW2 and PW3 before he was apprehended. After the Appellant was arrested, it was the evidence of PW3 that the complainant positively identified him as one of the people who had robbed him. In addition, the Appellant was apprehended a few minutes after the robbery incident. This court is of the view that circumstances favouring identification were present in this case, and that the Appellant was positively identified and placed on the scene of crime.

As stated earlier, the Appellant was arrested a few minutes after the robbery. The Appellant in his testimony confirmed that he was arrested near the scene of the robbery at about 10.00p.m, which is about the same time the robbery was said to have occurred. The stolen wallet was recovered in his possession. The complainant identified it as his wallet as it contained passport photographs bearing his image as well as ATM cards and an elector's card bearing his name. PW2 and PW3 testified that the said wallet was recovered from the Appellant's trouser pocket. In the case of Arum -Vs - Republic [2006] 2 EA 10 the Court stated as follows:-

“Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. There must be positive proof; first that the property was found with the suspect; second that the property is positively identified as the property of the complainant; thirdly that the property was recently stolen from the complainant.

In the present appeal, it is evident that all these three ingredients were proved. PC Silas Githinji (PW2) and PC Washington Mwamu (PW3), who arrested the Appellant minutes after the robbery happened, confirmed that they recovered the wallet from the Appellant's trouser pocket. The complainant positively identified the wallet as one of the items that was stolen from him. These three witnesses confirmed the recovered wallet contained passport photographs bearing the complainant's image as well as ATM cards and an elector's card in his name. It therefore follows that the doctrine of recent possession applies in this case. There was no doubt that the Appellant was found in possession of the wallet belonging to the complainant after he was arrested, so soon after the robbery occurred.

The Appellant argued that particulars of the offence provided did not match the charge brought against him. He was charged with robbery with violence contrary to Section 296(2) of the Penal Code. He submitted that there was no indication that the complainant was occasioned any actual violence or suffered any bodily harm. The aggravated offence of robbery as described under Section 296 (2) of the Penal Code may be complete with use of violence or no use of violence as long as there has been a robbery and the offenders are either armed with offensive weapons or the offenders are more than one. (See Oluoch v Republic [1985] KLR 549). In the present appeal, the particulars of the charge are very clear. The Appellant was in the company of two other people not before the court at the time the robbery was committed. This court therefore holds that the particulars of the offence provided in this case match the charge preferred upon

the Appellant.

The Appellant also contended that the charge sheet in the trial court was fatally defective. He submitted that the heading on the charge sheet was “KENYA POLICE” instead of “NATIONAL POLICE SERVICE”. He also added that he was charged with an offence reported and booked six months prior to his arrest. The Occurrence Book entry indicated (OB/15/08/02/2011) while the particulars of the offence on the charge sheet claimed the offence occurred on 11th August 2011. To that extent, there is a discrepancy. But what is material are the particulars of the charge sheet. The particulars in this case are not at variance with the charge or evidence adduced. This court therefore finds that those discrepancies are not material as to affect the finding reached by the trial court and which is also the verdict of this court that the prosecution proved its case on the charge to the required standard of proof beyond any reasonable doubt.

From the above analysis of the evidence, this court is of the view that the prosecution has established its case on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof. The upshot of the above reasons is that the appeal against conviction lacks merit and is hereby dismissed.

On sentence, following the recent decision of the Supreme Court in **Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR**, this court has discretion to re-sentence the Appellant on the basis of severity of the offence. In the present case, it was clear that whereas it was established that the Appellant robbed the complainant, the complainant was not injured. The robbed items were recovered a few minutes after the robbery when the Appellant was arrested. The circumstances of this case calls for a sentence of ten (10) years imprisonment. This court has taken into consideration the entire period that the Appellant has been in lawful custody. It was clear to the court that the Appellant has been sufficiently punished. His custodial sentence is commuted to the period served. He is ordered set at liberty forthwith and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF JANUARY 2019.

L. KIMARU

JUDGE