REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 24 OF 2018

(FORMERLY MURANGA HCCR 354 OF 2013)

PATRICK KAMAU WANJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Thika Chief Magistrate's Court Criminal Case No. 869 of 2009 (Hon. C. Meoli, CM) dated 27th August 2009.)

JUDGMENT

1. The appellant, Patrick Kamau Wanjiru, was 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 the 23rd day of February 2009 at Gaitara village in Gatundu District of the Central Province jointly with another not before court, armed with a wire, robbed Lucy Wanja Njuguna cash Kshs. 400/= and a mobile phone make Motorolla C117 all valued at Kshs. 2700 and immediately at the time of such robbery used actual violence to the said Lucy Wanja Njuguna.

2. In the judgment dated 27th August 2009, the trial court (Hon. C. Meoli, CM, (as she then was) found the appellant guilty as charged and sentenced him to death.

3. The appellant filed his appeal before the High Court in Nairobi in 2009. It was thereafter transferred to the High Court in Murang'a as HCCR 354 of 2013. Finally, it was transferred to this court in March 2018 for hearing and determination.

4. In his Amended Grounds of Appeal filed with his submissions on 20th September 2018, the appellant raises the following grounds of appeal:

> ***1. THAT, the learned trial Magistrate erred matters of law and facts by failing to find that the elements of recent possession were not conclusively proved to warrant a conviction.***
>
> ***2. THAT, the learned trial Magistrate erred in both law and fact by basing the conviction on contradictory evidence.***
>
> ***3. THAT, the learned trial Magistrate erred fact by failing to find that there was misdirection on the appellant's wish to make unsworn defense.***
>
> ***4. THAT, the learned trial Magistrate erred in law and act by failing to find that there was misdirection and that the sentence was erroneous.***
>
> ***5. THAT, in default of an acquittal invoke the recent decision by the supreme court in Francis Karioko Muruatetu & Wilson Thirimbu Mwangi, Petitions No. 15 and No. 16 of 2015***

4. The appellant urges the court to set aside both conviction and sentence or make such other order as it may deem fit and just.

5. This is a first appeal. Accordingly, I am under a duty to re-evaluate the evidence before the trial court and reach my own conclusion. In doing so, I bear in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing-see **Okeno v R (1972) EA 32**.

6. PW1, Lucy Wanja Njuguna, was the complainant. On 22nd February 2009, she was going home from Gatukuyu market at around 7.30 p.m. She met three men near her home and they put a wire around her neck, and she had a mark around her neck from the wire at the time she testified before the court. The three men demanded money and a phone from her and when she screamed, they strangled her more with the wire. The men took her phone, a Motorolla C117 and money, Kshs. 400/= and fled. The phone and her muddy clothes were produced in evidence. She had sustained injuries on her neck and was taken to hospital.

7. On 26th February 2009, her son Fredrick Chari Njuguna (PW2) informed her that he had seen someone selling her phone. The police were also informed, and the two men were arrested. The two men were the appellant and his co-accused, one Raphael Waweru Wanjiku. PW1 stated that she could not identify the assailants as they attacked her after they passed each other.

8. PW2, Fredrick Chari Njuguna, the son of PW1, learned on 23rd February 2009 that his mother had been attacked by robbers on her way home and had lost her phone. He asked his friends to listen and let him know in case anyone was trying to sell a phone. He was informed that two people were trying to sell a phone, a Motorola C117, which was like his mother's. He went and started negotiating with the two men for the phone then noted that it had a top button that was defective and confirmed that it was his mother's. He informed the police and the two men were arrested.

9. PW3, Margaret Wambui, a sister in-law of PW1, confirmed that PW1 had been injured when she returned home on the day she was robbed. She had injuries on her face and blood on her neckline. Her clothes were muddy and dirty. They had taken her to hospital.

10. PW4, No. 2003056 APC Wilson Mwangi, had been at the AP camp at Gatukuyu when PW2 informed him and his colleague, Sergeant Karanja, that he had found people trying to sell his mother's phone. PW4 and Sgt. Karanja had gone with PW2 and found the men with the phone. He produced the phone which the appellant had, and which PW1 identified as belonging to her.

11. Paul Kimani (PW5) was a clinical officer at Igegania sub-district hospital. He had attended to PW1 who had a torn blouse and had said that some 3 people had attacked her. She had swelling on both cheeks and bruises on the neck. PW5 produced the P3 form on PW1.

12. It was to PW6, No. 57604 Cpl. Suxon Dafuta attached to Mimea Police Post in Gatundu that PW1 reported the robbery on 23rd February 2009. PW1 had reported that she had been strangled with a wire by 3 men. The appellant and his co-accused had been arrested on 26th February 2009 trying to sell the phone stolen from the complainant. PW5 produced the phone and the complainant's clothes.

13. When placed on his defence, the appellant said that the phone in question was his. He had a receipt but had given it to the investigating officer. He alleged that he had given the phone to one Njuguna to go and sell. The said Njuguna had brought back 500/=. The appellant had been arrested as he waited for the phone. I note that though he had stated that he wished to make an unsworn statement, he was sworn and cross-examined by the prosecutor. In cross-examination, he stated that his phone was a C17 Samsung which he had bought in 2008. It was not a Motorola. He had no receipt for the phone.

14. From the submissions of the parties as set out in the appellant's written submissions and the oral submissions by Ms. Muthoni, Prosecution Counsel, for the state, four issues arise for determination.

1. ***Whether the doctrine of recent possession was properly applied.***

2. ***Whether there was contradictory evidence relied on by the trial court.***

3. ***Whether there was misdirection of the appellant's wish to make an unsworn statement.***

4. ***Whether the sentence was erroneous.***

Recent Possession

15. The appellant argues that all the elements of recent possession were not established in the case. He submits that since the complainant did not report the robbery on the day it occurred, there was no robbery, and that there was no proof beyond reasonable doubt that the phone had been stolen. He argues further that the item stolen was a phone, stolen 4 days before its recovery and it could have changed hand many times in even a single day. He contends that he had tried to explain how he came into possession of the phone, that he had a receipt for it which he had given to the investigating officer, but his explanation was ignored.

16. The appellant argues that the prosecution did not prove that the phone belonged to the appellant, and she did not produce a receipt as proof of ownership.

17. The response from the state is that the phone was proved to be stolen, that it was stolen from the complainant in the course of the robbery, and that it was the appellant who was in possession of the stolen phone.

18. I have considered past decisions with respect to the application of the doctrine of recent possession. The factors to be considered before a court can convict on the basis of the doctrine were set out by the Court of Appeal in the case of I**saac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v. Republic Cr App. No. 272 of 2005. In that case, the court stated as follows:**

> "***It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.***

In other words, there must be positive proof:

i). that the property was found with the suspect;

ii). that the property is positively the property of the complainant;

iii). that the property was stolen from the complainant;

iv). that the property was recently stolen from the complainant.

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

19. See also the decision of the Court of Appeal in **David Mugo Kimunge v Republic [2015] eKLR.**

20. The appellant in this case was found in possession of the phone stolen from the complainant 4 days after it was stolen in a robbery. Contrary to his assertion, the complainant was able to identify her phone, as was her son, PW2, who had found the appellant trying to sell the phone. They had identified the phone by a top button that was defective. It was not the appellant's case that the phone had been sold or handed over to him by another person. His case as set out in his unsworn statement in his defence was that the phone was his, yet he confirmed that his phone was a Samsung C17, not a Motorola. I am unable to find that the court erred in arriving at the conclusion that the appellant was in recent possession of the complainant's phone, a Motorola C117, which had been stolen in the course of the robbery perpetrated against the complainant by three men.

Contradictory Evidence

21. The appellant states that there was contradictory prosecution evidence. He alleges that the contradiction was in that PW4 said it was the appellant who was in possession of the phone while PW6, the investigating officer, did not say who had the phone and why he decided to charge the appellant with robbery with violence.

22. I have considered the prosecution evidence on the possession of the phone after the robbery. I note that PW4 did testify that it was the appellant who had the phone, while PW6 did not testify with respect to who had the phone. I do not therefore find that there was contradiction with respect to the evidence on possession of the phone.

Misdirection on the Appellant's wish to make unsworn statement

23. The appellant states that he wished to give unsworn evidence but was made to give sworn evidence and was cross-examined, which was prejudicial to him. I note that the appellant did say that he intended to make an unsworn statement. However, he proceeded to be sworn, and did not protest or raise the issue that he intended to make an unsworn statement. I do not find anything in the proceedings that indicates that he was under any form of compulsion to testify on oath, and he could have declined to take the oath and give an unsworn statement as he had stated he would do. In any event, I am unable to find any prejudice that he suffered as a result of giving evidence on oath and being cross-examined. I therefore find this ground to be without merit.

Sentence

24. The appellant complains that the sentence meted out on him was harsh in the circumstances. He relies on the decision in **Samson Njoroge v Republic High Court Criminal Appeal No. 150 of 2016** to ask the court to find that the sentence imposed on him was too harsh. In that case, the court considered the decision of the Supreme Court in **Francis Karioko Muruatetu v Republic (2017) eKLR** to find that the period of 6 years that the appellant had spent in custody was sufficient. The appellant urges the court, in the event that it does not find that the appeal has merit, to find that the period of time he has been in prison since his conviction in 2009 is sufficient punishment.

25. I have considered the decision in **Muruatetu** and the circumstances of this case. I note that the appellant and his accomplices, in robbing the complainant, did use violence. I have, however, considered the reasoning of Justice (Prof.) Joel Ngugi in **James Kariuki Wagana v Republic [2018] eKLR**. In that case, Justice Ngugi considered the question of sentencing in robbery and murder cases subsequent to the **Muruatetu** decision and observed as follows:

"32. The law of the land as it stands today, therefore, is that the maximum penalty for both murder and robbery with violence is the death penalty but the Court has discretion to impose any other penalty that it deems fit and just in the circumstances.

33. In light of this, I will, therefore, proceed to determine the appropriate sentence. First, it is true that all the elements for the offence of robbery with violence were proved. However, there are no truly aggravating circumstances which would lift this case to the scales of the death penalty. Death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. That is not the case here. While force was used, one cannot say here that the Appellant used excessive force; and neither did he unnecessarily injure the Complainant during the robbery. He was not armed with any offensive weapon.

34. In his mitigation, the Appellant submitted that he was a first offender and that he was youthful and had a young family to take care of. I have taken these mitigating circumstances into consideration. I, therefore, sentence the Appellant to fifteen years for the conviction for robbery with violence. Given that "simple" robbery under section 296(1) of the Penal Code attracts a

minimum sentence of fourteen years imprisonment, it seems logical that the minimum sentence for robbery with violence should begin at fifteen years imprisonment. Since there are no aggravating circumstances to take the crime here to the realm of heinous robbery with violence beyond the ingredients of the crime, it is fair and proportionate to give the minimum sentence logically possible. In my view, that is fifteen years imprisonment.

26. I agree with the views expressed by Prof. Ngugi J in the above decision. The offences of robbery with violence and murder have the death penalty as the penalty prescribed by law. However, in accordance with the binding decision of the Supreme Court in Muruatetu, the court has discretion to consider an accused persons mitigation and the circumstances of the case and impose a lesser penalty if the circumstances so warrant.

27. I note from the record in this case that though the appellant and his co-accused were afforded a chance to mitigate, they did not say anything in mitigation. With respect to the circumstances of the robbery, I note that the appellant and his accomplices did use violence on the complainant. However, I note that the level of violence, though serious-involving the use of a wire around the complainant's throat- was not so high as to merit the death penalty.

28. The penalty for simple robbery under section 296 of the Penal Code is fourteen years imprisonment. In the circumstances of this case, the offence committed by the appellant rises just above simple robbery. I accordingly set aside the penalty of death imposed on the appellant and substitute therefor imprisonment for a term of fifteen years from the 27th of August 2009.

Dated and Signed this 7th day of March 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kiambu this 10th day of April 2019

C. MEOLI

JUDGE