



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.160 OF 2015

WAITHE MWANGANGIAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Onginjo CM delivered on 18th September 2015 in Kibera CM CR. Case No. 3508 of 2012)

JUDGMENT

The Appellant, Waithe Mwangangi was charged in the 1st count with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 23rd July 2012 at South C within Nairobi County, the Appellant, jointly with others not before court, while armed with a dangerous weapon, namely a pistol robbed Elizabeth Nyokabi of Safaricom credit cards valued at Ksh.10,340/- and cash Ksh.2,000/- all valued at Ksh.12,340/- and at the time of such robbery threatened to use actual violence to the said Elizabeth Nyokabi.

The Appellant was charged in the 2nd count with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 23rd July 2012 at South C within Nairobi County, the Appellant, jointly with others not before court, while armed with a dangerous weapon, namely a pistol robbed Sairabanu Mohamed Farook Aziz of a bag valued at Ksh.1,000/-, 2kg of grain flour valued at Ksh.300/-, 250g of cumin seeds valued at Ksh.200/-, 100g of black pepper valued at Ksh.110/-, two mobile phones make Samsung star valued at Ksh.10,000/- and Nokia 3200 valued at Ksh.5,000/-, cash of Ksh.2,500/-, a key holder, Equity Bank ATM card, Barclays Bank ATM card, Nakumatt card, Uchumi card and 31 business cards all valued at Ksh.19,110/- and at the time of such robbery threatened to use actual violence to the said Sairabanu Mohamed Farook Aziz .

The Appellant was charged in the 3rd count with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 23rd July 2012 at South C within Nairobi County, the Appellant, jointly with others not before court, while armed with a dangerous weapon, namely a pistol robbed Nadiya Farook Aziz of a bag valued at Ksh.2,000/-, three tops valued at Ksh.4,000/-, ear phones valued at Ksh.5,000/- and bangles valued at Ksh.250/- all valued at Ksh.11,250/- and at the time of such robbery threatened to use actual violence to the said Nadiya Farook Aziz.

The Appellant was charged in the 4th count with the offence of being in possession of imitation of a firearm contrary to Section 34(3) as read with Section 1 of the Firearm Act. The particulars of the offence were that on 23rd July 2012 at South B within Nairobi County, the Appellant was found in possession of an imitation of a firearm namely a toy pistol without a licence. In the alternative, the Appellant was charged with handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code. The particulars of the offence were that on 23rd July 2012 at South B in Madaraka District within Nairobi County, otherwise than in the course of stealing, the Appellant dishonestly handled one bag, one packet of 2kg grain flour, 250g of cumin seeds, one Equity Bank ATM card, one Barclays Bank Card, one Nakumatt Card, One Uchumi Card, 31 business cards, one key holder and cash of Ksh.392/- having reasons to believe them to be stolen.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to all the charges. After full trial, he was convicted as charged in the 2nd, 3rd and 4th Counts. He was sentenced to death in respect of the 2nd and 3rd Counts. He was sentenced to serve a custodial sentence of seven (7) years in respect of the 4th Count. The sentences in 3rd and 4th Counts were held in abeyance. The Appellant was aggrieved by his conviction and sentence. He 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 faulted the trial court for overlooking the first report made by the complainants to the police, as the same failed to provide a description of their assailants. He was aggrieved that the trial court improperly relied on the evidence of the doctrine of recent possession to convict him in contravention of Section 119 of the Evidence Act. He asserted that the trial magistrate failed to acknowledge that the prosecution failed to call crucial witnesses to

give evidence during trial. He took issue with the trial court's reliance on the prosecution evidence stating that the same was full of contradictions. He complained that the trial court failed to consider his defence in arriving at its decision. He was of the view that the prosecution failed to prove their case to the required standard of proof beyond any reasonable doubt. 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 submitted that the Appellant, in the company of others, robbed several complainants. The Appellant was armed with a toy pistol. Several complainants narrated to court how the Appellant robbed them at gun point. She stated that PW4 was informed that members of the public were being terrorized by robbers. He managed to apprehend the Appellant. Learned State Counsel averred that the Appellant was found in possession of a toy pistol. A handbag with cards belonging to PW2 was also recovered from him. She submitted that the Appellant was apprehended at the scene of the robbery. It was therefore not necessary to conduct an identification parade. She asserted that the ingredients of the charge were established by the prosecution to the required standard of proof beyond any reasonable doubt. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1 Nadia Aziza was one of the complainants. She stated that on 3rd July 2012 at about 5.03 p.m., she was driving home with her mother, PW2 Sairabanu Aziz. When they got to Mama Ngina Children's Home, three men jumped in front of the car. They were pointing guns at them. They demanded money and their phones. They ordered her to get out of the car. She got out and went to where PW2 was. The robbers started ransacking the vehicle for valuables. PW1 and PW2 decided to run to a nearby estate. They came back after a few minutes. They found their car abandoned. The robbers were not at the scene. They had stolen their valuables from the car. They reported the robbery the following day at Nairobi West Police Station. While at the station, they learnt that a suspect had been arrested in possession of PW2's handbag. Her cards and some items they had earlier bought from the supermarket were still in the bag. Her phones and money were however missing. PW2 was able to identify the hand bag and its contents as some of the items that were stolen from her.

PW3 Alice Kamanu worked as a shop assistant at a shop in South C. The shop was owned by PW7 Jane Wanjiru Gitanga. She was on duty on the material day of 23rd July 2012, together with her colleague, Elizabeth. At about 5.00 p.m., three men entered the shop. They picked bottles of water and started drinking the same. Suddenly one of them produced a gun. He ordered her to lie down. The remaining two men approached the counter where Elizabeth was. They took money and Safaricom airtime cards from the counter. She managed to run out of the shop. She was screaming 'thief! thief!'. She watched as the men walked away. The men came across a car. She saw the three men pull two ladies out of the car. She informed PW7 of the robbery. PW7 stated that she made a call to the police at Langata. She then proceeded to the shop. Police officers arrived at the shop some minutes later. They informed them that one of the suspects had been arrested at South B. PW3 proceeded to the police station to identify the said suspect.

PW4 PC Paul Mboloi Laru was one of the arresting officers. He stated that he was on patrol at Nairobi West Area with two of his colleagues. One of them was PW6 CPL Abdi Shakananda, the investigating officer in this case. They were informed that a gang of three armed men were robbing people in South C. When they got to Mama Ngina Children's Home, they got information that the suspects were on their way to South B. Members of the public were pursuing them. When they got to South B, near Kenya Institute of Mass Communication, they found the Appellant surrounded by an irate mob. They rescued the Appellant from the mob and apprehended him. They searched the Appellant. They recovered a toy pistol tucked in his underwear. They also found money in his right trouser pocket. He was also in possession of a lady's handbag which contained cumin, gram flour, ATM cards from Barclays Bank and Equity Bank, Nakumatt and Uchumi supermarkets' cards and several business cards. They escorted the Appellant to Nairobi West Police Station.

This case was investigated by PW6. He was also one of the officers who arrested the Appellant. He corroborated to the court the events of that material day as narrated by PW4. After the Appellant was apprehended, he visited the scene of the robbery near Mama Ngina Children's Home. He learnt that the gang comprised of three men. They robbed a shop and a barbershop. They also stopped a vehicle and robbed two ladies who were in the said car. He stated that the two ladies who were at the shop gave him a description of the robbers. PW3 accompanied him to the police station where she identified the Appellant as one of the robbers. The following day, PW1 and PW2 came to the police station to report the robbery. PW2 identified her stolen items that were recovered from the Appellant when he was apprehended.

When the Appellant was put to his defence, he testified that he was a fruits vendor. On the material day, he was at work from 9.00 a.m. to 4.00 p.m. He thereafter closed his business and proceeded to the bus stop near Kenya Institute of Mass Communication. He saw a crowd of people at the bus stop. Police officers arrived in a vehicle and arrested everyone who was at the bus stop. They took them to Nairobi West Police Post. They demanded Ksh.3,000/- from each person to facilitate their release. Everyone who was arrested paid the said amount. They were released. He was however not able to raise the Ksh.3,000/-. He was thereafter charged with the present offences. He stated that the police officers framed him. He denied robbing the complainants.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination, whether or not to uphold the decision of the said court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and can therefore not make comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32). In the present appeal, the issue for determination is whether the prosecution proved its case on the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the rival submission made by the parties to this appeal. It was clear from the evidence adduced that the Appellant was convicted on the basis of the evidence of the application of the doctrine of recent possession. As regard the evidence of identification, the trial court correctly observed that the evidence of identification was not watertight as the police failed to conduct an identification parade after the Appellant was arrested. According to the prosecution's evidence, the Appellant was arrested a few minutes after the robbery occurred. PW4 and PW6 were informed that three armed men were robbing people in South C. When they got to Mama Ngina Children's Home, they got information that the suspects were on their way to South B. Members of the public were in hot pursuit. They proceeded to South B, next to Kenya Institute of Mass Communication.

They found the Appellant surrounded by an irate mob. They rescued the Appellant from a mob and apprehended him. They searched the Appellant. They recovered a toy pistol tucked in his underwear. They also found money in his right trouser pocket. He was also in possession

of a lady's handbag which contained cumin seeds, gram flour, ATM cards from Barclays Bank and Equity Bank, Nakumatt and Uchumi supermarkets' smart cards and several business cards. PW1 and PW2 went to the police station the following day to report the robbery. PW2 was able to identify the items recovered from the Appellant as the items that were stolen from her the previous evening. She identified her handbag together with all the contents mentioned above. PW1 confirmed that the recovered items belonged to her mother, PW2.

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. **PW4 and PW6**, who arrested the Appellant minutes after the robbery incident, confirmed that they recovered PW2's handbag with all its contents in the Appellant's possession when they apprehended him. The complainant positively identified the recovered handbag that was stolen from her. **The ATM and supermarket smart cards bore her name. PW1 also confirmed that the recovered handbag belonged to PW2. It therefore follows that the doctrine of recent possession applied to this case. There was no doubt that the Appellant was found in possession of the items belonging to PW2 after he was arrested immediately after the robbery occurred. The recovery of the stolen items a few minutes after the robbery incident therefore connected the Appellant to the robbery. He was one of the three assailants who robbed the complainants. The Appellant did not give a reasonable explanation as to how he came to be in possession of the stolen items a few minutes after the robbery incident. This court came to the conclusion that the defence put forward by the Appellant was a mere diversion and did not dent the otherwise strong and cogent evidence that was adduced by the prosecution witnesses.**

The ingredients of the aggravated offence of robbery were established by the prosecution. The Appellant was in the company of two others when he robbed the complainants. He was also found in possession of a toy pistol when he was arrested. He used the toy pistol to threaten the victims when he robbed them. PW5, a firearm examiner, examined the toy gun. He stated that its features were consistent with the features of a conventional gun. The victim of the robbery could not have been in a position to know if the pistol was real or not. In the premises therefore, the Appellant's appeal against conviction with regard to the robbery with violence charges in 2nd and 3rd Counts must fail. His conviction in the charge of being in possession of an imitation of a firearm in the 4th Count is also hereby affirmed.

The upshot of the above reasons is that the Appellant's appeal on conviction lacks merit and is hereby dismissed.

As regards sentence, following the recent decision by 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, now that the mandatory death sentence has been declared unconstitutional. In the present appeal, the Appellant robbed the complainants after subduing them using an imitation of a firearm. This court has considered the Appellant's mitigation. It has also taken into account that the Appellant had been in lawful custody for a period of seven (7) years. In the premises, this court sets aside the death sentence meted by the trial court in the 2nd and 3rd Counts. The same is substituted by an order of this court sentencing the Appellant to serve five (5) years imprisonment in respect of the charge in 2nd Count. He is also sentenced to serve five (5) years imprisonment with regard to the charge in the 3rd Count. The period the Appellant has been in prison is sufficient punishment with respect to the charge in the 4th Count. The sentences in the 2nd and 3rd Counts are to run concurrently with effect from the date of this judgment. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF JUNE 2019

L. KIMARU

JUDGE