



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 191 OF 2015

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 182 OF 2015

SAID JUMA KADHI.....1ST APPELLANT

NORBERT OCHIENG OLANDO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court

at Kibera in Cr. Case No. 1455 of 2013 delivered by Hon. Juma (SPM) on 5th October 2015).

JUDGMENT

1. The Appellants **Said Juma Kadhi** and **Norbert Ochieng Olando** were jointly charged with two counts. In Count I, they were charged with robbery with violence contrary to **Section 295** as read with **Section 296** of the **Penal Code**. The particulars thereof were that on the 4th day of May 2013 at Ongata Rongai township within Kajiado County, jointly with another not before court, being armed with an offensive weapon namely a toy pistol, robbed **Titus Bundi Kiogora** of one cell phone make Nokia 6500 valued at Kshs. 10,000/= plus cash Kshs 1,000/= and at the time of that robbery injured the said **Titus Bundi Kiogora**.

2. In Count II, they faced a charge of impersonating a public officer contrary to **Section 105(b)** of the **Penal Code**. The particulars of the same were that on the 4th day of May 2013 at Ongata Rongai Township within Kajiado County, jointly with another not before court, falsely presented themselves to be persons employed in the public service namely police officers and assumed to arrest **Titus Bundi Kiogora** and **Eunice Wambui Ngugi**.

3. The Appellants pleaded not guilty to the II counts. Upon trial they were convicted of both counts. In count 1, they were sentenced to suffer death whereas in count II, they were sentenced to serve one (1) year imprisonment. The sentence in count II was held in abeyance. Aggrieved by the conviction and sentence, they preferred separate appeals to this court. The appeals have been consolidated for purposes of this Judgment.

4. The Appellants raised similar grounds of appeal in their respective Amended Grounds of Appeal filed on 20th May, 2019. They were aggrieved that the learned trial magistrate erred both in law and fact by convicting them yet the evidence on record did not prove the offence of robbery with violence, that they were not positively identified, that they were convicted on the basis of contradictory and unreliable evidence, that the charge was a duplex, that the trial was irregular contrary to **Section 213** and **310 of the Criminal Procedure Code** and that the trial magistrate dismissed their plausible defences thereby shifting the burden of proof to them.

Evidence

5. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses. (See **Okeno v Republic (1972) EA 32**).

6. The Prosecution's case can be summarized as follows: On 4th May, 2013 at about 1.30 am, the complainant **PW1, Titus Bundi Kiogora**

and his wife **PW2, Eunice Wambui Bundi** were walking home from Legend Bar in Ongata Rongai when they were accosted by three men near Tuskys Matatu stage. The men roughed up PW1 and hit him with a blunt object on the head causing him to sustain injuries. They took his Nokia phone and cash in the process. Thereafter, one of them handcuffed his hands behind his back. PW1 and PW2 were then led to a dark blue saloon car parked nearby on the left side of the road.

7. While in the process of pushing PW2 into the car, **PW5, PC Patrick Sindano Wandava, PW6, PC Ali Salim** and one Corporal Omweri who were on patrol duties aboard a police motor vehicle arrived at the scene and intercepted the said motor vehicle. It was a dark blue Nissan Sunny registration number KBQ 895V and was parked in a well-lit area. The saloon car attempted to speed off but PW5 who was driving the police vehicle drove in front of it causing it to stop. Thereafter, the three police officers alighted and moved closer to the suspects' car. They found five occupants including PW1 who was still handcuffed. PW1 was bleeding from the right cheek and his entire face was swollen. The 1st Appellant was holding a hand set resembling a police hand set radio call wrapped in a newspaper. The officers asked the occupants to identify themselves. The 1st Appellant told them that they were flying squad officers from Pangani Police Station and were in Ongata Rongai to conduct an arrest.

8. The suspects did not have any identification documents on them to prove that they were police officers as alleged. The officers had not been notified that other officers would be coming to their jurisdiction for work which created further suspicion. They decided to take them to Ongata Rongai Police Station to confirm whether they had been sent to their area from Pangani Police Station. The 1st Appellant boarded the police vehicle together with PW5 and PW6 whereas Corporal Omweri joined PW1 and PW2 in the saloon car which was driven by the 2nd Appellant. The third suspect escaped in the process of boarding the vehicles.

9. While on their way to the police station, PW6 realized that the radio call which was in the 1st Appellant's possession was unusually quiet unlike a normal police set. He asked the 1st Appellant to hand it over to him. PW6 examined the object and discovered that it was a fake radio call. Upon reaching the police station at about 2.00 am, **PW8, Stephen Manyego** and **PW9, CPL Bernard Ndunda** searched the saloon car and recovered a toy pistol under the driver's seat. On interrogation, PW1 narrated how they met the Appellants and informed PW8 that they had robbed him of his Nokia mobile phone valued at Kshs. 10,000/= and cash money in the sum of Kshs. 1,000/=. These items were however not recovered from the Appellants. The 1st Appellant on his part told PW8 that his friend known as Lewis whom he had known as a police officer was the one who arrested PW1 and PW2 and was also the one who had alleged that he was a police officer from Pangani. The 2nd Appellant on the other hand claimed that he was just a taxi driver who had been hired. It was then that the police discovered that the Appellants were not police officers as earlier alleged and therefore detained them. PW8 then opened the handcuffs on PW1 and released him together with PW2.

10. Later on the same day, **PW7, Monica Musugu** the proprietor of Scenery Adventures Limited Company which owned the subject motor vehicle was called to Ongata Rongai Police Station to identify it. The vehicle had been hired out to one **Edward Muema Mutume** on 1st May, 2013 by **PW4, Moses Njuguna Kinyua** on behalf of the company. The lease was for two days but upon the lapse of the agreed period, the said Edward sought and paid for an extension of a further three days. PW7 produced various identification documents inter alia the log book for the subject motor vehicle, the agreement for hire, a certificate of incorporation of the company and KRA Pin.

11. PW1 sought treatment for his injuries at Saitoti Sub-District Hospital on the same day. He was later examined by **PW3, Dr. Joseph Maundu** on 6th May, 2013. He had some injuries on his face and his entire face was swollen. He also had cut wounds on his upper lips. PW3 formed the opinion that the injuries had been occasioned by a blunt object. He filled a P3 form which he produced in evidence.

12. On 17th May, 2013, one Sergeant Odhiambo, a scene of crime officer took photographs of the subject motor vehicle and prepared a report in respect thereof. Thereafter, the motor vehicle was released to PW7. **PW9, CPL Bernard Ndunda** investigated the case and produced all the exhibits in evidence.

13. Both Appellants elected to give sworn defence in which they denied any knowledge of the offences. The 1st Appellant testified that he used to work at Carbon Printers and Stationary as a casual worker and was also a student at Nirobids Computer Training in South B. He stated that on 3rd May, 2015, he attended class between 2.00 to 6.30 pm then went to his place of work to get money for school fees. His boss gave him Kshs. 65,000/= as well as Kshs. 500/= for bus fare. He left the office at 7.30 pm then went and boarded a vehicle to Rongai where he was living at the time. He got to Rongai at around 9.30-10.00pm and went to Pewa Pub hotel for a meal. As he was leaving the hotel at about 10.30 pm, he met police officers who interrogated him, searched him and took his phone as well as his school fees money.

14. Thereafter, the officers pulled him to the road side where their vehicle was parked and told him to defend himself. He was then taken to the police station and placed in the cells. After about one and half hours, he was called out and beaten up without being given an opportunity to defend himself. On 4th May, 2013, he was taken to another room for investigations. He denied recording a statement at the police station on 5th May, 2015 and stated that he was forced to sign a document at the police station which he knew nothing about. He was later arraigned in court on 6th May, 2013 and charged with strange offences.

15. The 2nd Appellant stated that he hailed from Kware village in Ongata Rongai and used to sell second hand clothes at Tuskys stage. He stated that on 3rd May, 2013, he closed work at 7.30 pm and went to his house. He later left his house around 9.00 pm and went to Jacaranda pub near his house to have some drinks. While on his way back home at about 23.20pm, he met some police officers who flashed a torch on his face and cuffed him. He tried to plead with them to pardon him but one officer named Ndunda demanded Kshs. 2,000/= from him and told him that he would be locked up if he did not have the money. Some suspects raised the amounts demanded and were released on the way to the police station.

16. Unfortunately, he and others who were unable to raise any money were driven to Tuskys stage where there was a GK vehicle and another vehicle. He saw a lady, a man and two other people as well as other police officers. One officer Maasai and Michael who had arrested him handed him over to the other officers together with the other suspects. The officers took them to Ongata Rongai police station where they were locked up. After a short while, PW1 alleged that he had been robbed by a person who looked like him yet PW1 was an arrested suspect

just like him and was also drunk. The officers told PW1 to go and sober up then make a report the following day. The next day, he was called from the cells and interrogated over his arrest. He explained that he was from a pub and had insulted police officers without knowing their identity. He denied recording any statement and stated that one of the officers' forced him to sign a document which he had not read and which document could not be admitted in court.

17. In the judgment delivered by the trial court, it was held that the prosecution had proved both offences against the Appellants herein beyond reasonable doubt. The trial court thus rejected and dismissed the Appellants alibi defences that they were arrested elsewhere other than at the scene.

Analysis and determination

18. The appeal was canvassed by both written and oral submissions. Both Appellants appeared in person and filed their respective written submissions on 20th May, 2019. They raised and argued similar issues. The Respondent was represented by the learned State Counsel, Ms. Sigei who tendered oral submissions.

19. Upon a careful reevaluation of the evidence on record and consideration of the parties' respective submissions, I find that there are only four issues for determination namely; whether the charge of robbery with violence was defective for being duplex; whether the trial court failed to comply with **Sections 213 and 310** of the **Criminal Procedure Code**; whether the prosecution proved the charges beyond a reasonable doubt; and whether the sentence imposed was legal and proper.

Whether the charge of robbery with violence was defective

20. The Appellants submitted that they the charge of robbery with violence was brought under **Section 295** as read with **Section 296(2)** of the **Penal Code**. They argued that the duplicity was meant to confuse them as they did not know the exact offence they were facing and could not therefore adequately prepare to answer to the charge.

21. **Section 295** of the **Penal Code** provides as follows:

"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 overcome resistance to its being stolen or retained, is guilty of the felony termed robbery".

22. **Section 296** of the **Penal Code** on the other hand provides as follows:

"(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 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".

23. **Section 295** of the **Penal Code** creates the offence of robbery which is different from the aggravated offence of robbery with violence created under **Section 296 (2)** of the **Penal Code**. The punishment prescribed for both offences are also different with the latter carrying a more severe sentence. Charging the Appellants under both sections is therefore duplicitous. (See **Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR**)

24. Nevertheless, the test to be applied is whether the duplicity occasioned a miscarriage of justice as was held by the Court of Appeal in the case of **Paul Katana Njuguna v Republic [2016] eKLR** thus:

*"Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the Penal Code. We observe that the offence under Section 295 and 296 (2) were not framed in the alternative.
.....*

40. In the matter before us, we are unable to detect any prejudice which the Appellant suffered. The record shows that the Appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.

41. In this appeal, the Appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the Appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code."

25. Similarly, in the instant appeal, the trial court's record shows that the Appellants were well aware of the charge they were facing and

fully participated in the proceedings by cross examining the prosecution witnesses and tendering their respective defences thereto. It is therefore clear that they were not prejudiced by the defect which is not fatal. The same is under **Section 382** of the **Criminal Procedure Code**.

Whether Sections 213 and 310 of the Criminal Procedure Code were complied with?

26. The Appellants also contended that the trial magistrate conducted an irregular trial contrary to **Sections 213 and 310** of the **Criminal Procedure Code**. In their view, the same arose when the trial magistrate allowed parties to file written submissions instead of calling upon them to address the court orally.

27. **Section 213** of the **Criminal Procedure Code** provides as follows:

“The prosecutor or his advocate and the accused and his advocate shall be entitled to address the court in the same manner and order as in a trial under this Code before the High Court.”

28. A perusal of the trial court’s proceedings reveals that upon the close of the prosecution case, the Appellants chose to tender written submissions on no case to answer. After close of the defence case, neither the prosecution nor the Appellant offered to make any final submissions. The trial court then reserved the judgment for 10th September, 2015. It is thus clear that the Appellants submission under this head have no merit. There is no requirement that the court must only be addressed orally. In fact, it was the Appellants who elected to file written submissions which in my view, is optional. I also dismiss this submission.

29. **Section 310** of the **Criminal Procedure Code** provides as follows:-

“If the accused person, or any one of several accused persons, adduces any evidence, the advocate for the prosecution shall subject to the provision of Section 161 be entitled to reply.”

30. A reading of the said provision shows that the right to reply after defence case only accrues to the prosecution and not the Appellants. The prosecution has not complained that it was denied this right. As such, nothing turns on this ground of appeal either.

Whether the prosecution proved the charges beyond reasonable doubt.

31. The court must first satisfy itself as to whether the Appellants were positively identified. The Appellants submitted that they were not positively identified as having taken part in the alleged robbery. They argued that PW1’s evidence on identification was unreliable as he was drunk at the time of the incident. They also stated that PW2 was not in a position to make positive identification because she stated that she was in a state of shock. Ms. Sigei for the Respondent argued that the identification of the Appellants was without error since it was aided by sufficient lighting from the shops nearby.

32. Although the incident happened at night around 1.30 am, PW1 and PW2 stated that were attacked in a well-lit area. There was light emanating from the street lights and security lights from the shops nearby which enabled them to see clearly. There was also consistent and cogent testimony from PW1, PW2, PW5 and PW6 that the Appellants were arrested at the scene of crime by PW5 and PW6 who were on patrol. Thereafter they were taken to the police station which was about five minutes away. While at the police station, the Appellants spent a considerable amount of time with PW1 and PW2 while awaiting interrogation by PW8. Apart from this observation, this is a case that the court can safely state that the Appellants were caught red handed. They had just hooded PW1 into a car and were arrested as they were pushing PW2 into also get into the car. Certainly, they were going to drive away the two witnesses had the police not intervened. All the same, by this time, they had already robbed PW1 and injured him. The available evidence is overwhelming against the Appellants that I completely rule out possibility of mistaken identification.

33. The Appellants submitted that PW1 was not sure about the model of the phone and amount of money lost during the incident. This was in view of PW1’s testimony that he lost a Samsung phone together with Kshs. 3,000-4,000/= which was inconsistent with the particulars of the charge sheet. They also argued that the items may have gotten lost in the hands of the police officers at Ongata Rongai Police Station in view of PW2 testimony that PW1’s mobile phone got lost at the police station.

34. On her part, Ms. Sigei for the Respondent submitted that the prosecution’s evidence was consistent and cogent thus the offence was proved to the required standard. She argued that the injuries sustained by PW1 in the incident were confirmed by PW3 who examined him and produced his P3 form in evidence. The same was further corroborated by the evidence of PW5, 6, 8 and 9.

35. In my view, this discrepancy is so minor that it does not lessen the fact that the Appellants were caught red handed in the act and that PW1 lost a mobile phone.

36. As for proof of the offence, a proof of any of the three ingredients of the offence of robbery with violence is sufficient to warrant a conviction. The ingredients are set out under **Section 296 (2)** of the **Penal Code** as:

a) The offender is armed with a dangerous or offensive weapon or instrument; or

b) The offender is in the company of one or more person or persons; or

c) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.

37. In the instant case, PW1 was accosted by three men who were armed with a blunt object which they used to hit him on the head before handcuffing him and pushing him into a saloon car parked by the roadside. He sustained injuries for which he sought treatment. The injuries were confirmed by PW3 who examined him two days after the incident and filled a P3 form which was adduced in evidence. Further, the men stole his Nokia phone and cash during the scuffle. In the circumstances, am satisfied that the evidence on record established the offence of robbery with violence.

38. As regards the offence of impersonating a public officer, **Section 105 (b)** of the **Penal Code** states as follows:

“Any person who -

(b) falsely represents himself to be a person employed in the public service, and assumes to do any act or to attend in any place for the purpose of doing any act by virtue of such employment,

is guilty of a misdemeanour and is liable to imprisonment for three years.”

39. The Appellants had handcuffs which they used to handcuff PW1’s hands before pushing him into the saloon car. Upon being intercepted by PW5 and PW6, the 1st Appellant was found in possession of a police hand set radio which was later discovered to be fake. Upon being asked to identify themselves, the 1st Appellant told PW5 and PW6 that they were flying squad officers from Pangani police station and were in Ongata Rongai to conduct an arrest. This was established to be false. These facts no doubt demonstrate that the Appellants had disguised themselves as police officers yet they were not. Their conviction for this offence was therefore safe.

40. They also faulted the trial magistrate for failing to accord any weight to their respective defences. In their view the trial court in so doing shifted the burden of proof upon them whereas the same rests with the prosecution. On her part, Miss Sigei submitted that the Appellant’s defence was mere afterthoughts. In my view, the Appellants were unable to dislodge the watertight evidence adduced by the prosecution witnesses.

41. Further to the foregoing, the Appellants faulted the prosecution for failing to charge them with possession of government stores despite producing in evidence a pair of handcuffs allegedly recovered from them. They also challenged the prosecution for failing to charge them with possession of firearms yet it was alleged that a toy pistol and toy magazine were recovered from them. In their view therefore, that raised doubt as to whether any exhibits were recovered from them during their arrest.

42. The decision to charge an accused and with what offence is solely made by the Director of Public Prosecutions. The duty of the court is only to hear the parties and the evidence they adduce and make a decision as to the guilt or otherwise of an accused. In this regard, both this court and the court below have dutifully discharged their mandate.

43. In view of the foregoing, I am satisfied that the prosecution proved two offences charged beyond reasonable doubt. The conviction of the Appellants was therefore safe and I accordingly uphold it.

44. On the issue of sentence, pursuant to the Supreme Court decision in the case of **Francis Karioko Muruatetu and Another v Republic [2017] eKLR**, this court may now impose an appropriate sentence based on the mitigation offered by the Appellants. None of the Appellants offered mitigating factors before this court. In the trial court, the 1st Appellant did not tender any mitigation as well but the 2nd Appellant stated that he is married with three children and was the sole bread winner. Having regard to the circumstances of the case which although PW1 was injured cannot be considered as so grave, I am of the view that a lesser sentence is justified.

45. I therefore set aside the death sentence imposed in count 1 and substitute it with five (5) years imprisonment for each of the Appellants. I shall not disturb the sentence of one year in count II. The two sentences shall run concurrently. The period the Appellants were in custody prior to their conviction of two years five months and six days shall be taken to constitute part of the sentence. The Appellants took plea on 6th May, 2013 which implies that they have already served the sentence. I order that they be set free unless otherwise lawfully held.

DATED and Delivered at Nairobi this 25th July, 2019.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. 1st Appellant in person.

2. 2nd Appellant in person.