



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 164 OF 2018

(From Original Conviction and Sentence in Mumias Senior Principal Magistrate's Court Criminal Case No. 815 of 2015 (consolidated with PMCCRC No. 851 of 2017) (Hon. TA Odera, SPM) of 2nd November 2018)

RAMADHAN WAMUKOYA RAJAB.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was convicted by Hon. TA Odera, Senior Principal Magistrate, of robbery with violence, contrary to section 296(2) of the Penal Code, Cap 63, Laws of Kenya, and was accordingly sentenced to twenty years imprisonment. The particulars of the charge against him, and others, were that on 29th August 2017, at Ejinja Village, Nanyeni Sub-Location, Matungu Sub-County, Kakamega County, being armed with dangerous weapons, namely axes, he robbed Jennifer Omolo Agwanda, of Kshs. 7, 300.00, a half sack of smoked fish, mobile phone Nokia 1110 and a d-light lamp, all valued at Kshs. 73, 730.00, and that during or immediately before the robbery he threatened to use actual violence on the victim of the robbery.

2. At the trial court six witnesses testified against the appellant. PW1 and PW2 were both at home that evening when two individuals knocked at their window demanding money, with threats kill if they were not given any. They were given Kshs. 7, 300.00. They were not satisfied whereupon they broke into the house and took with them a half sack of fish, a phone and a lamp, among other items. The other witnesses were state functionaries, an Assistant Chief and police officers, who played one role or the other in the investigation of the case and arrest of the appellant. The appellant upon being put on his defence denied the offence. .

3. The appellant was aggrieved by his conviction and sentence and lodged the instant appeal. In his petition of appeal he alleged that the charge sheet was incurably defective, no identification parade had been conducted, the prosecution failed to call key witnesses and evidence, the report of the incident and statements were recorded after arrest, the items in question were recovered from another person who was acquitted, the search conducted by the authorities was carried out without a warrant, no inventory was made of the recovered items, no photographic evidence was tendered to support the state case, the evidence was farfetched fabricated disjointed uncorroborated and doubtful, and the findings by the trial court were against the weight of the evidence.

4. The appeal was argued on 17th October 2019. The case for the appellant was articulated in his written submissions, while the respondent relied on the record of the court. The appellant raised issues relating to the defectiveness of the charge, poor identification, and inadequate evidence relating to recovery of the alleged stolen items, among others.

5. Being a first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The decision of the Court of Appeal in the case of **Okeno vs. Republic (1972) EA 32** has consistently been cited on this issue. In its pertinent part, it is stated that: -

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates’ findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

6. The first ground of appeal is that the charge was defective. The appellant argues that the charge ought to have been brought under both sections 295 and 296(2) of the Penal Code, given that section 295 defines robbery and section 296(2) brings out the aggravating elements and the penalty. The charge is quite clear that the offence that the appellant faced was aggravated robbery, which is defined in section 296(2). He knew the charge that he faced, and the omission to mention section 295 was neither fatal to the prosecution’s case nor did it prejudice him. It should not even be mentioned.

7. The second ground that he raises is that no identification parade was mounted for PW1 and PW2 to pick out their assailants. The witnesses did not claim to have had identified him at the dock when they testified in court. The said witnesses had said that they did not see the faces of the persons who robbed them. The fact, therefore, that no identification parade was carried out did not prejudice the appellant at all. The prosecution's case was founded on recent possession of stolen property and no identification. In any event, it is not a requirement, of the law that an identification parade be conducted for all robbery with violence cases.
8. The other ground is that the prosecution failed to call crucial or key witnesses or to present relevant evidence. In his written submissions he did not articulate this ground. It is, therefore, not clear which witnesses he had in mind that he felt it was critical that they be called, and to prove which facts. It is also not clear which evidence he alleges ought to have been called as he has not submitted on it.
9. On the fifth ground, the appellant complains that the trial court ought to have considered that the report and statement were recorded after his arrest. Again, the written submissions have not articulated on what is meant by this. It is not clear which report is being referred to and the statement too. Several witnesses testified and I presume all of them had recorded statements, so which statement does he have in mind.
10. He further argues that he ought not to have been convicted based on suspected stolen goods allegedly recovered from his mother's house, when his mother, who was his co-accused at the trial, was acquitted. According to PW4, the Assistant Chief, who apprehended the appellant, it was the appellant who led them to his mother's house after he told them that the items they were looking for were at her house. It was from her house that they recovered the phone and the fish. After his mother was acquitted, when it was ruled that she had no case to answer, the appellant called her as his witness. She testified as DW1. Her version was different from that of PW4. She said that PW4 and his team first came to her house and removed fish from there, and thereafter they went to the quarters where the appellant slept and took the mobile phones from there.
11. The critical item here is the Nokia phone claimed by PW1. According to her, the only items stolen from her were the fish, the cash money and the lamp. The fish recovered from DW1 was not satisfactorily proved to have been the one stolen from PW1. Both PW1 and PW2 testified that the quantity of the fish presented in court was smaller than what had been stolen from them, and the bags in which it was presented in court in were also different. It became clear that DW1 was also a fishmonger. It cannot, therefore, be said with certainty that the fish recovered belonged to PW1. The money was not recovered and so was the lamp. A Nokia phone was recovered. PW1 identified it as hers, and so did PW2. PW4 said they found it in DW1's house, while DW1 said it was recovered from the appellant's house. While she identified the green phone as belonging to the appellant, she did not do so with respect to the Nokia phone. The appellant said that the green phone was his, but did not say anything about the Nokia phone. In his submissions he appears to argue that since these items were found in DW1's house, it was DW1 who ought to have accounted for them. He further appears to argue that since she was acquitted, it meant that she had given a satisfactory account, and therefore he ought to have been acquitted too as nothing was found on him.
12. I have carefully gone through the judgement of the trial court. It is clear that the Nokia phone recovered by PW4 belonged to PW1. She produced a receipt for it. The person who recovered it said that he got it from DW1's house after the appellant indicated that the stolen items were there and took PW4 there, while DW1 says it was recovered from the quarters of the appellant. I would go by the testimony of PW4, noting that DW1 had been co-accused with the appellant. Her story was no doubt intended to sanitize herself and shift blame elsewhere. I believe that the trial court made no error whatsoever in coming to the conclusion that it did come to with regard to the Nokia phone.
13. Related to that is the argument that the Nokia phone was recovered in his absence. PW4 testified that he and his team found the appellant at home and that he was the one who led them to DW1's house. Therefore, that evidence points to the appellant's presence during the recovery. When DW1 testified she stated that the appellant was not at home when she was arrested, and, therefore, when the phones were recovered. She was emphatic though that they were found in the kitchen where he slept, adding that he did not usually carry them with him whenever he went out. I have already concluded that it was PW4's evidence that was more believable over that of DW1 and, therefore, I will take it that the appellant was present when the phones were recovered from DW1's house.
14. His other argument is that he was arrested and searched by an Assistant Chief without a warrant. I have carefully gone through the record and it is not clear to me what he means by this. The only Assistant Chief who testified was PW4. His evidence was that on 1st September 2017, that he and others went to the home of the appellant and found him sleeping, he took them to the house of DW1 where they recovered the Nokia phone. The appellant then escaped from their custody as they waited for reinforcements from the police. DW1 testified that the appellant was not present when PW1 came and arrested her, and when he recovered the Nokia phone from the appellant's quarters. The appellant himself testified that he did not know when DW1 was arrested. He said that he was arrested by the police at Mayoni on 11th September 2017. He did not mention any Assistant Chief as being amongst the arresting party. The defence case, therefore, does not place any Assistant Chief in the picture at the time he was arrested, and does not mention that he was searched by any Assistant Chief at that time.
15. The argument in Ground 8 of the petition makes no sense at all. What does, infact, is to lend credence to the testimony of PW4, the Assistant Chief, that he did in fact find the appellant at home, he did a search at his and DW1's house, before the appellant escaped. It would confirm that PW4 told the truth and that the versions given by DW1 and the appellant were false. The appellant testified on oath and said PW4 did not arrest him, he cannot now turn around and say that PW4 needed an arrest and search warrant to do those things that he allegedly did.
16. In Ground 9 of the petition, he alleges that no inventory was produced with respect to the goods that PW4 allegedly recovered from DW1 and the appellant's house. The law does not make it mandatory that an inventory be prepared for recovery of items from suspects. The courts have held that the making of such an inventory is for the administrative convenience of the police officers undertaking the investigation and recovery, and that failure to make and produce an inventory is not fatal to the prosecution's case. .
17. Ground 10 is about photographic evidence. The appellant argues that the state ought to have provided pictorial evidence of the scene of the crime to demonstrate the break in, and cites section 78 of the Evidence Act, Cap 80, Laws of Kenya. For the offence of robbery with violence, photographic evidence is not mandatory. It may be relevant with respect to offences where there is an element of breaking and entry, or some element of damage. That damage occurred in this case was not central to establish robbery with violence. What was crucial was proof that items were stolen from the victims and that violence was visited on them, or threatened, at that time. If there was damage

inflicted on property to facilitate access to the victims' residence the same was not critical to establishing the principal offence, and, therefore, failure to get photographic evidence was not fatal.

18. Ground 11 is about the evidence being farfetched fanciful flimsy fabricated disjointed uncorroborated and doubtful. The appellant has not in his written submissions sought to demonstrate that the evidence presented by the state was not credible or was inadequate. PW1 and PW2 gave credible testimonies of an attack by two individuals that they were not able to identify, who threatened and robbed them of certain items. PW4 testified on receiving information which he then used to arrest DW1 and the appellant, and recover some of the items stolen. The police witnesses all gave evidence on the steps they took after receiving reports of the robbery on PW1 and PW2. The appellant has, therefore, not demonstrated that the said testimonies were not credible or believable.

19. In his written submissions he has raised the question of identification, and submitted that it is central to the offence of robbery. In this case, the state is not relying on identification, for PW1 and PW2 were not able to identify their attackers. That would explain why no identification parade was mounted. At the trial, they did not make any dock identification. The case is built on the doctrine of recent possession. The issue of identification is, therefore, not relevant to this case.

20. With regard to possession, there is overwhelming evidence that the Nokia phone belonging to PW1 was found in custody of the appellant. When he testified, the appellant did not talk about it. He did not deny being in possession of it. His witness, who is also his mother and co-accused at the trial, stated that the phones were recovered from his quarters. PW4 had earlier testified that it was the appellant who led them to DW1's house where the phone was recovered. He stated that before then the appellant had admitted being complicit in the robbery and it was on that basis that he led them to where the items stolen were. The sum total of that evidence was that the Nokia phone was in DW1's house courtesy of the appellant. He had a duty, therefore, to explain how he came to be in possession or to have custody of the same, yet it did not belong to him, and the owner had established that it had been stolen from her.

21. In the judgement, the trial court properly summarized the ingredients of the doctrine of recent possession, and supported itself with relevant case law. The court went on to properly and effectively apply the doctrine to the circumstances and facts of the instant case. I find nothing to fault in the manner the court dealt with the issue of possession.

22. Was there a robbery with violence within the meaning of section 296(2) of the Penal Code? The facts presented before the trial court established that there was a theft of money, fish, a Nokia phone and a lamp from PW1. The Nokia phone was recovered from the appellant and DW1. There was use of force or violence. PW2 talked of being hit when the Nokia phone was taken from her. PW1 talked of being threatened with death if she did not give money to her attackers. The attackers involved were more than one. As the appellant was found in custody or possession or control of the Nokia phone, the trial court rightly presumed that he was either one of the robbers or had received the Nokia phone. He did not explain himself. Consequently, he was properly convicted of the offence of robbery with violence for the court inferred that he was one among the two individuals who perpetrated the offence.

23. The trial court imposed a sentence of twenty years. The statutory penalty for the offence of robbery with violence is death. However, recent decisions by the Court of Appeal and the Supreme Court have declared mandatory sentences unconstitutional. See *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR). According to those decisions, trial courts now have the discretion to consider other sentences. The trial court did not give reasons for imposing the sentence of twenty years.

24. The record reflects that at mitigation the appellant did not express any remorse or ask for leniency. He had been previously sentenced, in Mumias SPMCCRC No. 870 of 2017, to five years imprisonment for burglary and stealing. These factors must have been prime in the mind of the trial court in determining the sentence. He appears to be a habitual criminal, for whom a deterrent sentence is appropriate. However, noting the level of violence involved and the value of the property stolen, I shall reduce the sentence to fifteen years imprisonment.

25. In the end, I find that the appeal herein is not merited. I shall accordingly uphold the conviction. On the sentence. I shall reduce the same from twenty years imprisonment to fifteen years imprisonment effective from 2nd November 2018. The appeal herein is hereby disposed of in those terms.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF DECEMBER, 2019

W. MUSYOKA

JUDGE