REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 15 OF 2017

CORAM: S. M. GITHINJI

(*From original conviction and sentence in criminal case number 278 of 2017 of the Principal Magistrate's Court at Kapenguria*)

ANLAR ROTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant herein, one Anlar Rotich was initially charged with four other suspects with the case of **Malicious Damage to Property, contrary to section 339(1) of the Penal code.**

The particulars of this case being that on the 5th day of March, 2017 at Sigor Trading Centre, of Weiwei Location in Pokot Central Sub-County, within West Pokot, the suspects willfully and unlawfully jointly destroyed seven glasses and two plastic chairs, all valued at kshs.2,100/-, the property of Benjamin Lokada.

The prosecution on 3.4.2017 applied to enhance the charge to that of **Robbery, contrary to section 296(1) of the Penal Code,** an application of which was allowed by the court.

The facts of this offence are that on the 5th day of March, 2017 at Sigor Trading Centre, of Weiwei Location in Pokot Central Sub-County, within West Pokot County, the accused persons jointly robbed Charles Otieno of Mobile Phone make Huawei, valued at Kshs.12,000/- and cash kshs.1,500/- and at the time of such robbery used actual violence to the said Charles Otieno.

The initial offence of malicious damage to property was not done away with but was held as an offence in count two.

After the complainant gave his evidence-in-chief, the court observed that the suspects were visibly young persons aged less than 18 years. The court stood the witness down and ordered for age assessment for the suspects.

On 6.4.2017 the state prosecutor informed court that age assessment was done, and one was a major while the rest were minors. I have seen the reports in the original file, the age were determined by radiograph examination. The appellant herein was said to be 19 years (approximately) while the rest were below 18.

The court, given the report ordered that other than the second accused person, the rest can be assigned an advocate on pro-bono basis.

On 17.5.2017 the state prosecutor requested to amend the charge for the section in count one to read **296(2)** instead of **296(1)**. Ms. Opondo, an advocate did not object to it. The application was allowed and the charge was subsequently amended.

PW-1 was recalled, reintroduced himself, adduced some further evidence and was cross-examined by Ms. Opondo. PW-2 gave evidence on the same day and was as well cross-examined by Ms. Opondo. On 14.6.2017 Mr. Magal held brief for Mrs Opondo and from that point took charge of the defence case. On 11.7.2017 the state prosecutor applied to submit an amended charge sheet to reflect changes done on 16.5.2017 on the section under which they were charged. Mr. Magal did not object. The court indicated that the amendment application was allowed as it was within time allowed in law. New charge sheet was submitted of **Robbery with Violence, Contrary to section 296(2) of the Penal Code.**

The particulars of this offence being that on the 5th day of March, 2017 at Sigor Trading Centre of Weiwei Location in Pokot Central Sub-county, within West Pokot County, the accused being armed with offensive weapons namely broken bottles jointly robbed Charles Otieno of

his mobile phone make Huawei, valued at kshs.12,000/- and cash kshs.1,500/- and at the time of such robbery used actual violence to the said Charles Otieno.

The court indicated that amended charge and its particulars were read to the accused who were called to respond to it. They all pleaded not guilty.

Mr. Magal applied that since evidence had been heard on the previous charge, the defence would be prejudiced. The state prosecutor indicated they amended charge on 16.5.2017 by only changing **subsection (1) for (2)** and proceeding of 11.7.2017 was just a formality.

Mr. Magal did not object and indicated he'll proceed, but expressed his wish to plea bargain on behalf of accused 1, 3, 4 and 5. PW-3 and PW-4 were heard on that date and cross-examined by Mr. Magal. The prosecution closed their case. Ruling was on 24.7.2017 when the court found that all the accused persons had a case to answer. They were placed on their defence. Mr. Magal informed the court at that point that prior to the ruling they had agreed to a plea-bargaining with the state prosecutor. Mr. Thuo, the state prosecutor stated the 4 accused persons had agreed to take plea to a lesser charge of malicious damage to property. He further indicated they could have the charge stated to them on 25.7.2017. Meanwhile the 2nd accused offered his defence and the case was placed for judgment on 22.8.2017.

On 25.7.2017 the reduced charge was read to the other 4 accused persons who all pleaded guilty to it and on 28.7.2017 were placed on probation for a period of 24 months.

The evidence against the appellant is that on 5.3.2017 at about 10.00pm PW-2 who's a student at Weiwei Secondary School in form 3, was at home. His mother called him and asked him to take food at California Bar in Sigor Centre. He did so and closed the bar. Shortly after he was called again by the mother who asked him to open it for Otieno. The said Otieno is the complainant and the PW-1 in this case. He's an Inspector of Police (IP) No. 49456 and his full name is Charles Otieno. He said on the material day he was with H/T Runo, David Kadoso and a lady in California Bar. While there a group of persons who included Chumba (Accused 1) and Rotich (Accused 2) got into the said Bar. He knew the appellant well as his mother had a hotel in the centre and Chumba was mostly in his company. The rest he used to see them in company of the other two whom he recognized very well. There was a solar powered light in the bar which enabled him to see. The appellant approached him and requested to be bought a drink. The complainant bought him a drink known as Sparkler. He drunk it and before long the complainant heard sheets being disturbed from outside. Within no time, the appellant took a bottle and hit it hard against the wall. It broke and a piece hit the complainant on the left eye lid. The appellant snatched the mobile phone the complainant had with him, a Huawei, valued at kshs.12,000/-. He also had 1,500/- of which the appellant picked from the pocket. Complainant escaped from the bar and rushed home.

PW-2 who is the other only eye witness stated when the complainant got into the bar, the appellant in company of 4 others followed him therein. Of them he knew the appellant as he used to see him walk around town. The appellant ignited fracas in the bar. They broke 12 bottles, crates, two plastic chairs, made way with the best whisky beers, and a phone and money for the customer. He saw the appellant pick the phone from the pocket of the complainant. He was however told about the money the following day. He got an opportunity to shut the door and ran away.

On 6.3.2017 at 7.00am, Benjamin Lokada made a complaint at Sigor Police Post to PW-4. He alleged the previous night while in his sister's bar he was invaded and attacked by young men whom he knew. They broke one crate, glasses and plastic chairs, all valued at Kshs.7,000/-. PW-4 recorded the statement and proceeded to the Bar. There were broken bottles everywhere inside it. The suspects were all drunk and asleep outside the Bar. She arrested accused 1 to 4 and took them to the police post. The appellant had a phone in his pocket. She took it as suspect's property. The complainant (Benjamin Lokada) then went and recorded a statement. 5th accused passed nearby the Police Post. The complainant (Benjamin Lokada) recognized him as one of the suspects and was also arrested. Shortly later, IP Charles Otieno went and made a report. His statement was recorded. He said he had lost a phone in the process and he recognized the one seized from the appellant as his. He was able to open it using its code. He was issued with a P-3 form of which was filled on 13.3.2017 at Sigor Sub-County Hospital by PW-3. She noted that he had haematoma on the left eyebrow. The degree of injury was assessed as harm.

The appellant on his defence stated that he was not 19 years old. On 5.3.2017 he was at home. In the morning he woke up and proceeded to the market where he met with police officers who arrested him. He did not commit the offence charged with.

The trial court evaluated the evidence, found him guilty of the offences in both counts, convicted him, and sentenced him in count one to death and count 2 to serve 3 months imprisonment; jail term to run concurrently.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that:-

1. **He pleaded not guilty at the trial.**

2. **He was convicted in absence of evidence of crucial witnesses.**

3. **His fundamental rights were violated by the prosecution.**

4. **His defence was rejected without cogent reasons.**

5. **Prosecution case is contradictory and could not sustain a conviction.**

6. **His request for the case to start de-novo was ignored.**

7. **The case was not proved beyond reasonable doubt.**

8. It was an error to convict him of the offence of robbery with violence after his co-accused pleaded guilty to a lesser charge of malicious damage to properly.

I've weighed the evidence in the file, considered the charges, procedure followed by the trial court, judgment, grounds of appeal and submission by both sides.

The state prosecutor conceded to the appeal on the ground that when the court had an advocate appointed to represent the minors co-accused and the appellant was left out, he was not given a chance to cross-examine the witnesses. The plea-bargain shows it was a case of malicious damage to property and not robbery with violence. She prayed for retrial.

Ms. Opondo however prayed for the appellant to be set free to avoid double jeopardy which may be occasioned by an order for retrial.

In deciding on this matter I have noted that this case had several twist and turns during the hearing of which did not mostly comply with the law.

Article 50(2)(h) of the Constitution states that;

"Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;"

The right to an advocate should not only be accorded to minor offenders but even adults. In this case the trial court having found the need to have the minors represented should not have discriminated against the appellant who was a co-accused. There was no good reason for doing that. When the advocate came on record to represent the said minors the appellant was not given a chance to cross-examine all the 4 prosecution witnesses of which was in contravention of his right **under section 302 of the CPC**. Plea bargain of which is not only an entitlement of children, was not considered for the appellant. When Mr. Magal advanced the option for his clients, for fairness sake the appellant through the prosecution should have been offered the option to accept or reject it on his part. Accused persons charged jointly with an offence are equal in the eyes of the law unless where the law stipulates otherwise, and therefore deserves equal treatment.

The state prosecutor also unfairly played with the mind of the court and of the advocate for the four minors when he amended the section in the charge sheet for a simple robbery to that of robbery with violence; that is from **section 296(1) to section 296(2),** without making any other change in the charge sheet, on 17.5.2017. This obviously made the charge defective. He was aware of the fact because on 11.7.2017 he hoodwinked the court to believe he was availing another charge to reflect the changes allowed on amendment of the section on 17/5/2017, only to bring in a new charge of a more serious offence of **Robbery with Violence, contrary to section 296(2) of the Penal Code**. Mr. Magal had the sense of the right procedure when he suggested the evidence be heard afresh. However the state prosecutor once more hoodwinked both when he said in response that the proceeding was just a formality to effect changes of 17.5.2017. This was not true as the previous charge was of simple robbery. When he alleged he had brought it under the wrong section he was allowed to on 17.5.2017 as he said other particulars were to remain the same. He changed the section from that of simple robbery to robbery with violence by use of a pen. On 11.7.2017 he substituted the charge sheet and brought in now the correct offence under the corrected **section 296(2), of Robbery with Violence**. It looks like it was a calculated deceitful move. Two witnesses had offered evidence when the offence was of simple robbery. When the offence was substituted by availing a new charge sheet, and the accused persons asked to plead to it afresh, **under section 214(1)(ii)** the accused should have been given an option of having the witness give evidence afresh or be recalled for further cross-examination. This is what Mr. Magal was alluding to, but was not "**properly**" heard.

When the suspects, save for the appellant, plea bargained and were convicted of a lesser offence in count 2, the charge of Robbery with Violence as it were, where the appellant was charged jointly with the other four could not obtain without an amendment to the effect that he committed the offence alone. The appellant was in that regard, convicted on a defective charge sheet.

When the appellant was convicted of both counts the trial court sentenced him to death on the first count and 3 months imprisonment on the second count. He then expressed that sentences are to run concurrently. Surely, a death sentence cannot run concurrently with an imprisonment sentence. He should have probably indicated that death sentence be executed upon service of 3 months imprisonment; or that 3 months imprisonment be effected if for one reason or the other the death sentence is invalid.

As submitted by state prosecutor the procedure adopted in this case violated the appellant's rights to a fair trial. The appeal is merited. It's allowed. Conviction and sentences are quashed. Ordering retrial will subject him to double jeopardy. He is set free unless otherwise lawfully held.

Judgment is read and signed in open court in presence of the state prosecutor, the appellant and Madam Opondo, this 15th day of March, 2018.

S. M. GITHINJI

JUDGE

15.3.2018