



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 56 OF 2016

PETER NJIRU NDWIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 48 of 2014 in the Principal Magistrate's Court at Siaya delivered by Hon. H. Wandere (PM) on 19.5.16)

JUDGMENT

1. On 19th May, 2016; appellant and another were convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code and were sentenced to suffer death. Each of them filed separate appeal. The other appellant absconded and **CRIMINAL APPEAL NO. 55 OF 2016 is still pending.**

Prosecution case

2. The prosecution called a total of 11 witnesses insupportofitscase. PW1, Caren Adoyo Owuor, the complainant recalled that on 14.1.14, she made several withdrawals and deposits of money into and from various accunst and remained with Kshs. 215,000/-. It was her evidence that she travelled to Mutumbu by a public vehicle and that when she alighted at about 11.30 am to 12.00 am, she was accosted by 4 men who were in a white saloon car. It was her evidence that one of the men was in police uniform and was being referred to as AP had a pair of handcuffs while another who was being referred to as ***mkubwa*** had a walkie talkie radio. It was her evidence that she struggled with the men who wanted to bundle her into their vehicle and when she resisted, she fell and injured her left finger and the men took off with her bag containing Kshs. 215,000/-, cheques books for KCB, Equity Bank and Cooperative Bank, a cheque for Kshs. 10,000/-, personal effects which included 5 ATM cards, pens, medicine and ID card. It was her evidence that police managed to intercept the vehicle that the suspects had used and the suspect who had been referred to as ***mkubwa*** and the one who was in police were arrested. She identified the 2 suspects, their vehicle KBS 332 L, walkie talkie radio, the green trouser, brown shirt, jacket, beret and belt that the suspect that was being referred to was wearing during the robbery, her brown pouch, cheque books for Cooperative Bank, Equity Bank and KCB that had been robbed from her. She identified appellant as the one who had a walkie talkie radio and the one that was being referred to as ***mkubwa*** and his co-accused as the one that had police uniform and who was being referred to as AP.

3. PW2, an employee at complainant's shop stated that on 14.1.15, she was at the shop when she saw complainant alight from a matatu about 10 metres from the shop. It was her evidence that she saw a white salon car stop about 10 metres from the shop and 2 men alighted and accosted the complainant. She stated that one of the men had police uniform while the other had a black trouser and white shirt. It was her evidence that the men attempted to bundle complainant into their vehicle and when she resisted, they grabbed her bag and drove away. It was her evidence that she later identified the appellant after his arrest on the same day.

4. PW4, recalled that on 14.1.14, he and Ouma and Bob were fencing a farm at Dudi. He said he left to go for lunch and it was then that he met a man was wearing black jeans, black shoes and a torn white sleeved shirt. That the man said that he had been carjacked and had lost his phone and cash. That the man asked him to lend him his yellow t-shirt because his shirt was torn and he agreed. That he escorted the man to Nyawara Trading Centre where he renewed his Mpesa line, withdrew Kshs. 5,000/- gave him Kshs. 500/- and they parted ways. That shortly thereafter, he was arrested for allegedly assisting robbers and was taken to Nyawara trading centre where he identified appellant to whom he had given his yellow t-shirt still wearing the said t-shirt.

5. PW4 APC Ann Ahenda of Nyawara AP Camp recalled that on 14.1.14 at about 11.30 am, they received information that violent robbers had escaped into their area of jurisdiction. That with the assistance of bodaboda riders, they went out to look for the robbers and it was then that appellant who was wearing a yellow t-shirt was arrested by APC Richard and APC Kibuiwhile riding on a motor cycle at Muhanda area. It was her evidence appellant was wearing a yellow t-shirt given to him by PW3who was also arrested,

6. PW5 PC Boniface Asikoyo, recalled that on the material date at about noon, he was driving M/V GK 363E along Siaya-Yala road in company of PC Bogonko and PC Raida when PC Kibui called for their assistance to track armed robbers that were allegedly driving a salon car along the same road. That shortly thereafter, a white saloon car that was being driven fast and it swerved off the road to avoid a road

block and when it stopped about 100 to 150 metres away from him and he saw 5 men escape therefrom. That a chase ensued and a suspect who identified himself as Musyoki was arrested. That the saloon car was searched and a smoke jacket, jungle shirt and jungle trouser, beret with AP insignia were recovered from its boot.

7. PW6 PC Bogonko did not know the appellant but it was his evidence that he was in company of PW5 when they arrested one suspect, Francis Mutuku who was among 5 suspects that were travelling in the robbery get-away salon car on the material date.

8. PW7, a clinical officer examined complainant and filled her P3 form PEXH. 12 which shows that she had a cut wound on the 3rd right finger.

9. PW8, Luke Ouma Wende said he is in car hire business. It was his evidence that their motor vehicle KBS 332L was leased to one Kivuva Leonard Musyoka whom he did not know. He told court that he later found the vehicle at Yala police station and was informed that it had been involved in violent robbery.

10. PW9, PC Wamalwa, a Scenes of Crime officer took 4 photographs of motor vehicle KBS 332L which he produced as PEXH. 10.

11. PW10 CPL Etyang, the investigating officer received appellant and the other suspect and after investigations charged them with the offences before court. He produced a brown pouch, cheque books for Cooperative Bank, Equity Bank and KCB yellow t-shirt smoke, a pair of handcuffs, walkie talkie, jungle jacket, jungle shirt and jungle trouser, beret with AP insignia as Exhibits.

12. PW11 arrived at the scene of Musyoka's arrest after his arrest and recovery of a smoke jacket, jungle shirt and jungle trouser, beret with AP insignia from motor vehicle KBS 332L.

13. At the close of the prosecution case, appellant and his co-accused were ruled to have a case to answer and were placed on their defence. In his sworn defence, appellant denied the charge. He said he was arrested at Muhanda Trading Center and was later charged with an offence that he did not commit. In cross-examination, he denied that he was wearing a yellow t-shirt when he was arrested. His witness Darus Mugema Sarawa stated that he was with appellant on 14.1.14 but they had parted ways around 11.30 am. That he later met appellant in prison where he is serving sentence and appellant requested him to testify on his behalf.

10. On 19.5.16, the learned trial magistrate delivered a judgment in which she convicted the appellant and his co-accused of the offence of robbery with violence and sentenced them to suffer death.

The appeal

11. Being dissatisfied with the conviction and sentence, appellant lodged the instant appeal. In his amended grounds of appeal filed on 19th February, 2018, appellant raised 5 grounds of appeal **THAT**:

1. He was convicted on a defective charge sheet

2. He was convicted on the basis of dock identification that was worthless

3. He was convicted on the basis of the doctrine of recent possession yet complainant had exonerated him

4. He was convicted on circumstantial evidence that was not proved beyond reasonable doubt

5. His defence was not considered

12. When the appeal came up for hearing on 19th February, 2018, appellant wholly relied on the amended grounds of appeal and the written submissions filed on 19.2.18. In his submission, appellant reiterated the grounds of appeal. Ms. Odumba, learned counsel for the state opposed the appeal. She submitted that the charge sheet was not defective only because the evidence on record did not establish that a pistol was involved in the robbery and that some of the exhibits produced in court were not stated in the charge sheet. It was her evidence that appellant was positively identified by complainant immediately after the robbery and that an identification parade was therefore not necessary. It was further submitted that the yellow t-shirt recovered from appellant was identified by PW3 as the one he gave appellant who had met him while wearing a torn white shirt.

Analysis

13. As this is a first appeal, this court is enjoined to consider all the evidence afresh, evaluate it independently and reach its own conclusions having regard to the fact that it neither heard nor saw the witnesses (*Okeno v Republic [1972] EA 32*).

14. I have carefully considered the grounds of appeal, written submissions made by the appellant and oral submissions on behalf of the state. In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

a. Defective charge sheet

15. Section 296 of the Penal Code defines robbery with violence in the following terms:

(2)If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or 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

16. It is not disputed that no pistol was involved in the robbery. There is also no dispute that the charge sheet shows that complainant that robbed only Kshs. 215,000/-; two mobile phones and a cheque for Kshs. 10,440/- and that the other personal effects produced as exhibits do not appear on the charge sheet. It is on record that complainant was robbed by more than one person and more particularly by 5 men. The robbers had in their possession an instrument in the form of a pair of handcuffs and complainant was injured in the course of the robbery.

17. The learned trial magistrate rightfully found that robbery with violence had been proved on the ground that a pair of handcuffs was an offensive weapon since it could be used to curtail a person's movement. She also appropriately found that the offence was committed by more than one person and that violence was used on the complainant and she was injured.

18. I am in agreement with the trial court that ingredients of a charge of robbery with violence had been proved. The inclusion of the pistol in the charge sheet and exclusion of the pair of handcuffs and complainant's personal effects from the charge sheet do not therefore render the charge sheet defective.

19. The case of *Yongo vs Republic 1983 KLR 319* cited by appellant relates to amendment of a charge sheet and is irrelevant to this appeal. Accordingly, I decline the invitation to find that the charge sheet was defective as urged by the appellant.

b. Identification of appellant

20. Complainant was robbed at about 11.30 am to 12.00 am on 14.1.14. She told court that the robbery lasted for about 15 minutes and that she had a chance to identify two of the 5 men that robbed her. She identified appellant as the one that was being referred to as *mkubwa* and who had a walkie talkie radio. PW2 also testified that the robbery occurred at about 11.30 am about 10 metres from complainant's shop where she was and that she was able to identify the appellant as the one that had a white shirt.

21. Appellant was arrested not long after the robbery. At the time of his arrest, he was wearing a yellow t-shirt given to him by PW3. PW3 told court that appellant had taken off his white torn shirt and worn the yellow t-shirt. Upon his arrest, appellant was identified by PW1 and PW2 as one of the persons that robbed the complainant. The offence was committed in broad day light and there is in my considered view no possibility of mistaken identity. Appellant's guilty mind is exhibited by his attempt to conceal his identity when he discarded his torn white shirt and wore a yellow t-shirt borrowed from PW3.

22. I wholly agree with trial court that appellant failed to explain his encounter with PW3 whose evidence was credible. I am satisfied that appellant was positively identified a few hours after the robbery and an identification parade was therefore not necessary.

c. Recent possession

23. As stated hereinabove, appellant was positively identified by PW1 and PW2 as one of the robbers that escaped in motor vehicle KBS 332L. After the robbers ran away and abandoned the vehicle, it was searched and several items among them a walkie talkie radio recovered from therein. PW1 and PW2 testified that appellant was armed with a walkie talkie during the robbery. The fact that appellant was arrested shortly after the robbery leaves the court in no doubt that the walkie talkie recovered from the robbery vehicle was the same one that he was armed with during the robbery.

24. Several other items not stated as having been robbed from the complainant were recovered from the robbery vehicle. Even if the court was to disregard the evidence relating to the exhibits not stated in the charge sheet, identification of the appellant, his attempt to conceal his identity and recovery of the walkie talkie that he had during the robbery would still be sufficient to sustain a conviction.

d. Appellant's defence

25. Appellant stated that he was arrested at Muhanda Trading Center. The evidence on record is that he was arrested on a motor cycle around Muhanda area obviously in an attempt to escape from the scene of crime after they abandoned their getaway vehicle. Appellant's witness' evidence did not add any value to the defence since the witness had parted ways with his appellant at about 11.30 am and the robbery herein took place about 11.30 am and 12 noon. The witness was also not at the scene where the robbery took place or where appellant was arrested. In any case, there is overwhelming incriminating evidence against the appellant on the basis of which the trial court appropriately considered his defence and rightfully rejected it.

Decision

26. From what is stated herein above, I find that the evidence on record discloses that appellant participated in the robbery against the complainant and he was positively identified. The appeal is thus disallowed. The conviction is affirmed and the sentence upheld. It is so ordered.

DATED AND SIGNED THIS 18th DAY OF April 2018

T. W. CHERERE

JUDGE

DATED, DELIVERED AND SIGNED AT SIAYA THIS 19th DAY OF April 2018

J.A.MAKAU

JUDGE

In the presence of-

Court Assistant - Odhiambo/Brenis

Appellant - Present translated in English

For the State - M/s. M. Odimba