



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO 154 OF 2017

GEORGE NGUGI KUNGU.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 9 of 2015 in the Principal Magistrate's Court at Kikuyu by Hon D.N. Musyoka (PM) on 11th May 2017)

JUDGMENT

INTRODUCTION

1. The Appellant herein, George Ngugi Kungu, was jointly charged with Martin Njenga Ndungu (hereinafter referred to as his "Co-Accused person") with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya).
2. The particulars of the charge were that on the 13th day of May 2015 at Thogoto area in Kikuyu Kiambu County within Central Region, jointly while armed with dangerous weapon namely knife robbed Shiprah Wanjugu Nguyo (hereinafter referred to as "PW 1") one mobile phone make P.Samsung, cash Kshs 15,000/=, ATM Card for Barclays bank and CFC Bank, National ID Card and keys all valued at Kshs 39,000/= and immediately before the time of such robbery used actual violence to her (sic).
3. In the alternative, they were charged with handling stolen goods contrary to Section 322 (1) (2) of the Penal code.
4. Being dissatisfied with the said judgment, on 30th June 2017, the Appellant filed a Chamber Summons seeking leave to file his Appeal out of time, which application was allowed and the Petition deemed to have been duly filed. He relied on five (5) Grounds of Appeal. On 19th March 2018, he filed Amended Supplementary Grounds of Appeal and Written Submissions. This time he relied on four (4) Grounds of Appeal.
5. When the matter came up for hearing on 19th March 2018, the State tendered oral submissions.

LEGAL ANALYSIS

6. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor”.

7. Having considered the Appellant's and State's Written Submissions, this court found the following issues to have been placed before it for determination:-

- 1. Whether or not the Prosecution proved its case beyond reasonable doubt;**
- 2. Whether or not the sentence was harsh, severe and manifestly excessive warranting interference by this court.**

8. The court therefore dealt with the said issues under the distinct and separate heads shown herein below.

I. PROOF OF THE PROSECUTION'S CASE

9. Amended Ground of Appeal Nos (1), (2), (3) and (4) were dealt with under this head as they were all related.

10. The Appellant submitted that the Learned Trial Magistrate misdirected himself by relying on the doctrine of recent possession whereas no evidence was tendered by the Prosecution to prove that PW 1's phone was recovered in his house.

11. He added that although No 75714 PC Patrick Kibaru (hereinafter referred to as "PW 5") testified that his mother was present when the phone was recovered, she was never called as a witness to corroborate PW 5's assertions.

12. He was emphatic that assertions must be proved by evidence. In this regard, he placed reliance on the case of **Muiruri Njoroge vs Republic Criminal Appeal No 115 of 1982 (CA)** where it was held as follows:-

"A court of law does not act on assertions unless proved by evidence before court. Assertion as defined by Chambers 21st century Dictionary, revised Edition is a positive or strong statement or claim or the act of making such claim or statement. An assertion would need to be proved by evidence".

13. He argued that the law requires that a suspect who volunteers to lead police to any destination must first be cautioned and be made aware that anything recovered in the mission could be used against him.

14. He also placed reliance on the case of **Woolington vs The DPP [1935] AC 462** where the court therein held as follows:-

"If there is any reasonable doubt created by the evidence brought forward by the prosecution, then the case for the prosecution is not proved and the prisoner is entitled to an acquittal".

15. It was his contention that PW 1 never testified that she identified him and consequently, he urged this court to allow his Appeal as the Prosecution had not proven its case beyond reasonable doubt.

16. On its part, the State submitted that PW 1 never identified the Appellant herein because he was wearing a marvin but that she identified her phone that was recovered from his house. It pointed out that it was the Appellant's Co-Accused who led police to the Appellant at a funeral at Makaburi and he in turn led police officers to his house where the said phone was recovered.

17. It further contended that the doctrine of recent possession was applicable herein as the phone was recovered in the Appellant's house on 15th May 2015 which was two (2) days after PW 1 was robbed of her phone. It added that when the Appellant was put on his defence, he did not explain how he came to be in possession of the said phone, a fact the Appellant said he could not have explained because no phone was found in his house as had been contended by the Prosecution witnesses.

18. From the evidence that was adduced before the Trial Court, on the material date and time, PW 1 was heading home when she was attacked and robbed by two (2) men. She saw the Appellant's Co-Accused person's face but did not see the Appellant's face as it had been hidden behind a marvin. She was subsequently informed that her phone, which she identified in court, had been recovered from the Appellant's house. She added that when she went to the police station, she called out the name "Mato" because she had heard the Appellant call his Co-Accused person when she was attacked. His Co-Accused person responded to the name and came out of the cell. At the time, his Co-Accused person had been arrested for another offence.

19. A Clinical Officer attached at Wangige Timothy Kinuthia (hereinafter referred to as "PW 2") confirmed that PW 1 sustained injuries caused by blunt and sharp objects during the attack. He adduced in evidence, the Hospital Treatment Notes and P3 Form to prove the said injuries. He classified the injuries as "harm".

20. No 881034 PC Cyrus Kiptoo (hereinafter referred to as "PW 3") testified that the Appellant's Co-Accused person led them to the Appellant herein at a funeral in Makaburi who in turn took them to his house where PW 1's phone was recovered.

21. No 211319183 APC John Odhiambo (hereinafter referred to as "PW 4") told the Trial Court that on the material date, PW 1 went and reported at their AP Camp that she had been robbed by a person who was called "Mato". Thereafter, he heard the said "Mato" had been arrested by his colleagues for another offence. He was the one who called PW 1 to see if the "Mato" in the cells was the same person who had attacked her.

22. No 75714 PC Patrick Kibaru (hereinafter referred to as "PW 5") corroborated PW 3's evidence that they arrested Appellant at a funeral and he took them to his house where they recovered PW 1's phone. Apparently, save for the phone, PW 1 recovered all her other stolen items which included her bag containing her ID, NHIF Card, Barclays Bank Card and keys at the scene of the incident. PW 5 was emphatic that it was the Appellant who took them to his house.

23. From the evidence that was adduced, it was clear that PW 1 did not see the Appellant's face because his face was covered with a marvin. What connected the Appellant herein to the offence herein was the recovery of PW 1's phone in his house. His Co-Accused led the police officers to where he was and he in turn led the police officers to his house.

24. Whereas it was correct as the Appellant submitted that caution needs to be administered before relying on the evidence of a co-accused who may incriminate him to exonerate himself, it was evident in this case that the Appellant's Co-Accused did not incriminate the Appellant falsely or maliciously because PW 1's phone was indeed recovered in his house.

25. In the case of **Reuben Nyakonge Mose vs Republic [2013] eKLR**, the court rendered itself on the doctrine of recent possession as follows:-

“...We have carefully considered the totality of the evidence as relates to recent possession and are satisfied that the two courts were entitled to reject the defences offered by the appellants. The stolen items were sufficiently described and identified by PW 1, PW 2 and PW 3 and were recovered so soon after the robbery that the trial court was entitled to draw an inference that the appellants stole the items.”

26. There was therefore no doubt in the mind of this court that the evidence of PW 3, PW 4 and PW 5 was consistent and cogent in proving that PW 1's phone as recovered two (2) days after it was stolen in the Appellant's house. It was therefore not necessary for the Prosecution to have called the Appellant's mother to corroborate the evidence of PW 3, PW 4 and PW 5.

27. In addition, although the Appellant contended that he could not have explained where the phone that was recovered from his house came from because it was never recovered from his house, from the evidence that was adduced, it was clear that the burden of proof shifted to him to explain how he came to be in possession of PW 1's phone in line with Section 111 (1) of the Evidence Act Cap 80 (Laws of Kenya).

28. Section 111(1) of the Evidence Act provides as follows:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence...”

29. Notably, the Prosecution was able to demonstrate that all the ingredients in Section 296 (2) of the Penal Code obtained in this case. The same are that:-

a. the offender must be armed with any dangerous or offensive weapon or instrument; or

b. the offender must be in the company of one or more other person or persons or;

c. 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.

30. The Charge against the Appellant could be sustained if one any of the aforesaid ingredients were present. However, in this instant case, all the ingredients constituting the offence of robbery with violence were present showing the aggravated circumstances that obtained herein.

31. Indeed, the recent possession of PW 1's phone by the Appellant herein who was implicated by his Co-Accused person pointed to the two (2) of them of having been PW 1's attackers. The Appellant was in the company of his Co-Accused person and they injured PW 1 as they robbed her. Her injuries were confirmed by PW 2. The Appellant's unsworn evidence was of little and probative value and did not displace that of the Prosecution.

32. Having considered the evidence that was adduced before the Trial Court, this court came to the firm conclusion that the Prosecution proved its case beyond reasonable doubt and that the Learned Trial Magistrate arrived at the correct conclusion that the Appellant's unsworn evidence was unbelievable and that the minor inconsistencies in the Prosecution's case did not prejudice the Appellant and were not fatal to its case. The Appellant did not demonstrate that the Prosecution witnesses had an existing grudge with him necessitating them to frame him.

33. In the premises foregoing, this court found Amended Grounds of Appeal Nos (1), (2), (3) and (4) were not merited and the same are hereby dismissed.

II. SENTENCE

34. Amended Ground of Appeal No (5) was dealt with under this head.

35. Although both the Appellant and the State did not address this court on the legality or otherwise of the sentence, this court noted that in the case of **Francis Muruateru & Another vs Republic [2017] eKLR**, Supreme Court held that the mandatory death sentence under Section 296 (2) of the Penal Code was unconstitutional.

36. In the premises foregoing, this court found and held that there was merit in Amended Ground of Appeal No (5).

DISPOSITION

37. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 6th July 2017 was not merited and the same is hereby dismissed. Instead, this court hereby affirms the conviction as the same was lawful and fitting.

38. However, in view of the recent case of **Petition No 15 of 2015 Francis Muratetu & Another vs Republic** where the Supreme Court that found that the mandatory sentence under Section 296 (2) of the Penal Code was unconstitutional, this court hereby directs that this matter be referred back to the Principal Magistrates Court at Kikuyu Law Courts for re-sentencing, if need be. This matter shall be placed before the Principal Magistrate of Kikuyu Law Courts on 10th July 2018 for his and/or her further orders and/or directions.

39. It is so ordered.

DATED and DELIVERED at KIAMBU this 27th day of June 2018

J. KAMAU

JUDGE