



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO 133 OF 2017

PETER MWANGI WANJIKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number

276of 2015 in the Chief Magistrate's Court at Kiambu

by Hon J. Kituku (PM) on 18th January 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Peter Mwangi Wanjiku, was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on the 27th day of January 2015 at Njathaini Village Kasarani Division within Nairobi county jointly with another not before court, he robbed Solomon Mwangi Wairimu (hereinafter referred to as "PW 1") of his mobile phone make Alcatel valued at Kshs 1,800/= and at time of such robbery they stabbed him with a knife.
2. The Learned Trial Magistrate, Hon J. Kituku, Principal Magistrate, convicted him for the offence of robbery with violence and imposed on him the death sentence as was prescribed under the law.
3. Being dissatisfied with the said judgment, on 15th September 2016, 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) Amended Grounds of Appeal. On 20th March 2018, he filed Amended Grounds of Appeal and Written Submissions. This time he relied on nine (9) Amended Grounds of Appeal.
4. When the matter came up for hearing on 20th March 2018, the State submitted orally in court.

LEGAL ANALYSIS

5. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odiambo 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”.

6. 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 charge sheet was defective; and

2. Whether or not the Prosecution proved its case beyond reasonable doubt.

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

I. CHARGE SHEET

8. Amended Ground of Appeal No (a) was dealt with under this head.

9. The Appellant submitted that the Charge Sheet indicated that he was in the company of another person when they beat PW 1 instead of indicating that they were in possession of a dangerous weapon.

10. He referred this court to the case of **Odhiambo & Another vs Republic [2005] 2 KLR 176** where it was held that being armed with a dangerous or offensive weapon was one of the ingredients of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He also relied on several other cases where Appellants were acquitted after the Charge sheets were found to have been defective.

11. The State submitted that the Appellant was in the company of another man when they attacked and robbed PW 1. It pointed out that if two (2) of the ingredients were proven, then the offence of robbery with violence was proven.

12. A perusal of the Charge sheet shows that on the material date, time and place, the Appellant jointly with another were armed with a knife.

13. Under Section 296 (2) of the Penal Code, the ingredients of the offence of robbery with violence are as follows:-

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.

14. Indeed, the charge for robbery with violence can be sustained if any one of the aforesaid ingredient is present at the time of the commission of the offence. This is connoted by the use of the disjunctive word “or” and not the conjunctive word “and”. It is therefore not necessary that the exact weapon must be described because violence can be through beating, striking or using any other personal violence to any person.

15. Further, Section 382 of the Criminal Procedure Code provides as follows:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account

of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

16. In the absence of any demonstration by the Appellant of what prejudice he suffered, this court was not persuaded to find that the Charge Sheet as drafted was defective.

17. In the circumstances foregoing, this court did not find merit in the Amended Grounds of Appeal No (a) is hereby dismissed.

II. PROOF OF THE PROSECUTION’S CASE

18. Amended Grounds of Appeal Nos (b), (c), (d), (e), (f), (g), (h) and (i) were dealt with under this head as they were all related.

19. The Appellant argued that the Prosecution relied on a single witness to prove its case and that although Dr Maundu (hereinafter referred to as “PW 2”) was stood down after he objected to him producing the P3 Form, he was never called as a witness again. It was therefore his contention that PW 1’s evidence was not corroborated.

20. He submitted that in cases of a single witness, the prosecution must adduce water tight evidence as was held in the case of **Republic vs Eria Sebwato (1966) EA**. He stated that he applied to be furnished with and he was furnished with the First Report to establish whether PW 1 really identified him. He pointed out that in the First Report, PW 1 never gave out the name of his attacker yet he purported to have recognised him during the attack.

21. He pointed out that the Learned Trial Magistrate erred when he stated in his judgment that PW 1 was honest on the ground that even honest witnesses could be mistaken as was held in the cases of **Republic vs Turnbull & Others [1976] 3 AL ER 549** and **Cr Appeal No 133 of 1984 Ann Wanjohi Njagi vs Republic** where in the latter case, the Court of Appeal held that **“recognition must be borne out by any immediate report or identification parade”**. He also referred to several other cases to buttress his argument that witness ought to name his attacker immediately after an attack.

22. He contended that notwithstanding the provisions of Section 143 of the Evidence Act Cap 80 (Laws of Kenya), police officers, members of public who arrested him and the investigation officer ought to have been called to testify as witnesses.

23. He also referred this court to the case of **Bukenya & Others vs Uganda [1972] EA 549** where it was held that the court is entitled to draw an inference that the evidence of witnesses who are not called to testify would have been adverse to the prosecution’s case.

24. On its part, the State submitted that two (2) of the ingredients of the offence herein were present to wit that PW 1 was wounded and that the Appellant was in the company of another during the commission of the offence herein. It was emphatic that PW 1 recognised the Appellant as his attacker as they used to play pool together and there was sufficient light at the time of the attack. It pointed out that the Appellant never denied of ever having known PW 1.

25. According to PW 1, on the material date, time and place, he was transporting a passenger on his Boda Boda when two (2) persons emerged from a plot and attacked them. He recognised the Appellant who was armed with a knife at the material time. He testified that the area was well lit with electricity and bulbs so he was able to see the Appellant who used to sell miraa at a place called Njathaini. He did not,

however, recognise his accomplice who was armed with a gun.

26. The Appellant and accomplice asked him and his passenger to raise their hands which they did. He then grabbed the Appellant's accomplice and they both fell down. However, the Appellant stabbed him on the back and leg. The Appellant's accomplice hit him with the butt of the gun on the mouth and he lost one (1) tooth. They then stole his phone and money. They never took anything from his passenger. He got assistance from other Boda Boda operators to whom he gave the Appellant's name. They were led to the Appellant's house by the Appellant's landlord and arrested him.

27. In his unsworn evidence, the Appellant stated that he was in his house on 27th January 2015 when at about 10.00 am, about thirty (30) Boda Boda operators came to his house and assaulted him. He then went to report the matter to the police. Where after he was charged with the present offence.

28. It was correct as the Appellant stated that this was a case of a single witness where a court must caution itself before accepting such evidence hook, line and sinker. This court noted that the Learned Trial Magistrate cautioned himself of the dangers of relying on the evidence of a single witness and stated as much in his Judgment.

29. PW 1 was emphatic that he recognised the Appellant. He stated that the area the attack took place was well lit. The Appellant did not deny that he knew PW 1 and did not give an alibi of where he was on 27th January 2015 at 3.00 am. The lighting condition was adequate for PW 1 to have seen that the Appellant was in the company of another person who was armed with a gun he lost his tooth. Notably, the Learned Trial Magistrate noted PW 1's missing tooth during the trial. The burden lay upon him to adduce evidence to remove himself from the scene of the crime on the material date.

30. The fact that PW 1 did not give his attacker's name when he recorded the First Report was not fatal to the Prosecution's case. Indeed, the fact that a witness does not know his attacker's name would not render his evidence worthless. It was evident that PW 1 recognised the Appellant as the person who used to sell miraa at Njathaini. He was so certain who the Appellant was that he found out from the Appellant's landlord where he stayed before he mobilised boda boda operators to go to the Appellant's house and arrested him.

31. Accordingly, having analysed the evidence that was adduced in the Trial Court and the oral and written submissions by the respective parties herein, this court came to the firm conclusion that the Learned Trial Magistrate arrived at a correct finding when he found that the Prosecution proved its case.

32. In the premises foregoing, this court found and held that Amended Grounds of Appeal Nos (b), (c), (d), (e), (f), (g), (h) and (i) were not merited and the same are hereby dismissed.

DISPOSITION

33. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 15th September 2016 was not merited and the same is hereby dismissed. Instead, this court hereby affirms the conviction as the same was lawful and fitting.

34. However, in view of the holding in 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 Chief Magistrates Court at Kiambu Law Courts for re-sentencing, if need be. This matter shall be placed before the Chief Magistrate of Kiambu Law Courts on 10th July 2018 for his and/or her further orders and/or directions.

35. It is so ordered.

DATED and DELIVERED at KIAMBU this 26th day of June 2018

J. KAMAU

JUDGE