REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 4 OF 2016

EVANS MASOGO ONDIEKI ALIAS JUSTUS

MOGONDO MAGETO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an Appeal against the Judgement and Decree of Hon. J. Macharia – SRM delivered on 15th May 2013 in Keroka SRM Court Criminal Case No. 883 of 2012]

JUDGEMENT

The appellant was charged with Robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the charge were that on 23rd June 2012 at Nyaronde village, Borabu District within Nyamira County, jointly with others not before court, while armed with AK47 Rifle, crude metal, Somali sword and a panga robbed Anne Nyamusi Nyamache, motor vehicle Registration No. KAX 148B, Toyota Corolla, Sony Radio with two speakers, Sony DVD, two pairs of sports shoes, Nokia E63 maroon in colour, two 1100 Nokia phones, Sony car stereo radio, car speakers, cash Kshs. 2,500/= and a black umbrella all valued at Kshs. 600,000/= and immediately before or immediately after the time of such robbery wounded the said Anne Nyamusi Nyamache.

The appellant faced two alternative counts of Handling stolen property contrary to Section 322 (1) (2) of the Penal Code.

In the first alternative count, it was alleged that on 2nd July 2012 at Kisii Township in Kisii County jointly with another at large otherwise than in the course of stealing the appellant dishonestly handled a Nokia E63 cell phone – IMEI 3561836029,420327 the property of Anne Nyamusi Nyamache knowing or having reason to believe it was stolen or unlawfully obtained.

In the second alternative charge, it was alleged that on 3rd July 2012 at Enamba Center in Manga District within Nyamira County otherwise than in the course of stealing the appellant dishonestly handled the cover of a Sony car radio the property of Ann Nyamusi Nyamache knowing or having reason to believe it to be stolen or unlawfully obtained.

The appellant also faced a separate charge (count II) of Possession of Public Stores contrary to Section 324 (3) as read with Section 36 of the Penal Code whose particulars were that on 3rd July 2012 at Enamba centre in Manga District, within Nyamira Count he kept a pair of handcuffs – Hiaffs 1960, the property of Kenya Police such property being reasonably suspected of having been stolen or unlawfully obtained.

In count III, the appellant was charged with Possession of a Firearm contrary to Section 89 (1) o the Penal Code and the particulars were that on 23rd June 2012 at Nyaronde village in Borabu District jointly with others not before court, without reasonable excuse had in his possession an AK47 Rifle S/No. UE7534-1998 in the circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.

Count IV charged him with Possession of Ammunitions contrary to Section 89 (1) of the Penal Code in that on 23rd June 2012 at Nyaronde village jointly with others not before court, without reasonable excuse had in his possession two rounds of 7.6mm ammunitions, in circumstances which raised reasonable presumption that the said ammunition was intended to be used in a manner prejudicial to public order.

He was further charged in count V with Giving false information to a person employed in the Public Service contrary Section 129 (a) of the Penal Code. In this count the particulars were that on 3rd July 2012 at Kisii Town, in Kisii Central District, Kisii County he informed No.

65761 Corporal Japheth Ngetich, a police officer, that his real name was Evans Masogo Ondieki information he knew to be false, intending thereby to cause the said police officer to omit his real name Justus Mogondo Mageto in the charge sheet which he would not have committed if the true state of facts respecting which such information was given had been known to him.

The appellant pleaded not guilty to all the charges. The prosecution then called eight (8) witnesses. After considering the evidence of the eight witnesses the court found the appellant had a case to answer. He testified on oath and maintained he was innocent but after evaluating the evidence by both sides the court found the accused guilty and convicted him on the charges of Robbery with violence, Possession of Ammunition and also Giving false information to a police office. The court then heard the appellant's plea in mitigation before sentencing him as follows: -

1. Count I (Robbery with violence) – life imprisonment.

2. Count II (Possession of Public stores) – 1-year imprisonment.

3. Count III (Possession of a Firearm) – 10 years' imprisonment.

4. Count IV (Possession of Ammunition) – 3 years' imprisonment.

5. Count V (Giving false information) – 1-year imprisonment.

The sentences were to run concurrently.

Being aggrieved by the conviction and sentences, the appellant preferred this appeal. In his Petition of Appeal, he states: -

"1. THAT, the learned trial magistrate erred in both law and facts by recording the eviidence of PW1, PW2 and PW3 which was not well colloborated (sic).

2. THAT the identification parade done was not sufficient since the complainant had seen the accused inn police station before the parade.

3. THAT, the learned trial magistrate erred in law and facts by accepting the contradicting evidence of PW1, Pw2 and Pw3 on the said light used for recognition.

4. THAT, the learned magistrate failed to establish that the forenstic evidence D.N.A samples purportedly found on exhibits were not proved i.e dusting of the alleged vehicle and gun wether the appellant had handled the same.

5. THAT, the learned magistrate erred in law and facts by accepting exhibits which were not recovered from the accused.

6. THAT, the laying down of the charge under section 296 (2) of the penal code was improper in terms of the definition, interpretation and application of the section of the law here of.

7. THOSE, I pray to be supplied with the court proceedings to enable me add more grounds."

The appeal was canvassed partly through written submissions and partly through oral submissions. In his submissions the appellant pointed out that he perceives to be inconsistencies and contradictions in the evidence of the prosecution witnesses and faulted the trial magistrate for basing the convicting on that evidence. He submitted that the identification parade was not fair and stated that prior to the parade an officer had taken his photographs using a mobile phone. He stated that he noticed the complainant who alleges to have pointed at him at the parade kept referring to her phone. He also stated that the evidence that the parade comprised 9 members was false as they were 12. He urged this court not to rely on evidence based on the parade because in addition the members were not dressed in jungle forms like the attackers in the robbery. He wondered how the complainant could have identified him at the parade if he was not dressed in the same apparel as the attackers. He also stated that he did not sign the parade form. About the exhibits, he submitted that none was recovered from him and that there was no evidence to the exhibits to him. He denied that he had a phone at the time of his arrest and stated that the evidence of the prosecution is that he was implicated by one Riro. He also denied that he cheated about his real name to the police. He submitted that he gave the police his name but they instead chose to believe what they were told by Riro. Referring to a case against Riro in Nyamira Court, the appellant submitted that the evidence of the complainant concerning her phone raises doubt that the phone Nokia E63 was recovered from him and what model the complainant's alleged stolen phone really was. He invited this court to consider the evidence in the case against Riro. He submitted that all the evidence used against him in the Keroka Court was also used against Riro in the case at Nyamira yet Riro was acquitted for lack of evidence. Finally, he submitted that no OB report was produced meaning that the complainant never reported the matter to the police nor did she record a statement. He also submitted that no inventory of the recovered items was produced and wondered how without it the trial court could have come to the conclusion that he was involved in the robbery. He urged this court to find merit in the appeal and allow it.

On his part, Learned Principal Counsel for the Prosecution submitted that the charges against the appellant were proved beyond reasonable doubt. He submitted that the appellant did not give a satisfactory explanation concerning the phone found in his possession. He contended that it was not necessary to subject the recovered items to a forensic examination. With regard to the legality of the search he submitted that the High Court had pronounced itself on that issue in **Joseph Kaberia Kahiga & 11 others V- The Attorney General [2016] eKLR**. He urged this court to dismiss this appeal.

In reply, the appellant submitted that he was not the owner of the house where the search was conducted and the ID of Riro recovered. He reiterated that nothing that connects him to the robbery was found in that house. Regarding the parade, he stated that the investigating officer photographed him and although he told the trial court that it was not considered. He contended that he even objected to taking part in the parade but his plea was ignored. He urged this court to consider his submissions.

I have considered the above submissions carefully but more importantly I have as the first appellate court evaluated the evidence in the court below so as to reach my own conclusion whether the cases against the appellant were proved beyond reasonable doubt. I have done so bearing in mind that I neither heard nor saw the witnesses give evidence. The complainant in this case testified that she had just driven to her compound and gone back to the gate and was having a chat with her worker when gangsters struck. It was her evidence, which was corroborated by two other witnesses, that the compound was well lit with electricity. When the gangsters struck they immediately ordered her worker to lie down and the commotion there attracted her. When she went to investigate she too was ordered to lie down. Thereafter she and the worker who had opened the gate were led to the house where they joined her house help with whom she had been chatting. She was then taken to the bedroom and ordered to give the gangsters money. The gangsters then took several items including phones and ordered her to go start the car for them. All the while the electricity was on.

It is my finding that the circumstances prevailing at the scene of the robbery were sufficient for a positive identification. Unlike her workers, the complainant spent a considerable period of time with the gangsters and since there was good lighting, I am convinced beyond reasonable doubt that she identified the appellant as one of her attackers. This is corroborated by her picking him at the identification parade which in my view was conducted in accordance with the rules. In his testimony the appellant admitted that the complainant pointed him out at the parade. His allegation that she had probably been shown photographs taken by the investigating officer before the parade was not raised at the trial; either in cross examination or in his testimony. It is therefore my finding that the same was an afterthought.

There was also evidence which I find credible and reliable that the phone found in his possession belonged to the complainant and had been stolen from her during the robbery. He referred this court to evidence adduced in the case against Rori but did not avail the proceedings of that case to this court. The phone was positively identified by the complainant. She was also emphatic that it was one of the items that were stolen during the robbery. It is my finding that there is more than sufficient evidence to place the appellant at the scene of the robbery. The complainant sustained injuries during the robbery and this was confirmed by Dr. Joel Ongaro (Pw IV). The appellant was not alone but was in the company of several other accomplices and all the ingredients of robbery with violence were therefore proved. I am not persuaded that the evidence of the prosecution witnesses was contradictory. Pw II and Pw III told the court that they did not identify the attackers. That does not mean that the complainant could not have identified the attackers. She saw them when she went to the gate to find out why the guard was screaming, she also spent a considerable period of time with the thugs in the bedroom and when she went to start the car for them and hence had more opportunity than Pw II and Pw III to see them. Apart from the phone the police also recovered the face of a car radio stolen from the complainant in a house inhabited by the appellant and another person. The real name of the appellant was confirmed by Oscar Chrispus Opiyo (Pw V) a finger prints officer at Bomas Headquarters in Nairobi. This contrary to the name which the appellant had given the police. The car stolen from the complainant was recovered the same night by police officers attached to Matutu Patrol Base who had been informed of the robbery that had taken place in the complainant's home. The officers among them Corporal Joseph Chirchir (Pw VIII) spotted the car and pursued it and when they fired at it its occupants fired back. They pursued it relentlessly until it rammed into a tree. According to Pw VIII the occupants abandoned it and fled on foot leaving all the items stolen from the complainant's house during the robbery save for her maroon phone which was to be recovered later in the house of the appellant and his accomplice. The mavin which the appellant was wearing during the robbery was also found in that house. The police also found a police jacket, an AK47, 2 rounds of ammunition and 4 used cartridges in the car. The complainant positively identified the mavin found in the car as the one the appellant wore during the robbery thereby connecting him to the other exhibits found in the car including the AK47 Rifle and ammunitions. I am satisfied that his involvement in the robbery was proved beyond reasonable doubt. The appeal has no merit and as the sentences imposed were within the law and are not illegal this appeal is dismissed and the conviction and sentences are upheld.

It is so ordered.

Signed, dated and delivered in open court this 31st day of October, 2018.

E. N. MAINA

JUDGE