REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R MWONGO, J

CRIMINAL APPEAL NO. 39 OF 2014

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 252 of 2012 in the Chief Magistrate's Court, Naivasha, (E. Boke – PM)

CAROLYNE WANGARE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The appellant was convicted for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. Summarised, the particulars were that on 12th January, 2012, at Gilgil town, the accused jointly with others not before the court, and armed with an offensive weapon being a timber, she violently wounded and robbed Anthony Ngugi of Kshs 14,000/- and a Samsung mobile phone model B1200.

2. Briefly the evidence was that the complainant, an architect, was heading home in Gilgil at about 10.00pm. He had just had a few drinks after seeing a contractor who had paid him some Kshs12,000/-. As he passed through a corridor, he met the appellant – whom he knew – with two female companions. He asked the appellant and her companions whether she knew where his friend Wamboi was, but they had no idea. He went on his way, but he noticed that they followed behind him. He then met his friend George (PW2) and they walked together briefly, before George branched off to buy a cigarette.

3. After a short while and before he got home, he felt that he was hit with what he says was a wooden plank. The charge sheet records it as a "timber". He fell down and felt his phone and money being taken from his pockets. He became unconscious. On gaining consciousness, his friend PW2, was assisting him, and told him that he saw all that had happened. George offered to escort the complainant home, but he declined and moved on towards his house. Getting there, he collapsed and fainted until 4.00am, when he entered his house and took some painkillers. After he regained consciousness, he went to report the incident to the police. And so, the case was filed and accused arraigned.

4. The appellant is aggrieved by the lower court's judgment and appeals on the following grounds (amended from her original grounds), which I summarise as follows:

> *a. That crucial and critical witnesses were not called to testify gravely prejudicing the accused*
>
> *b. That the prosecution case depended exclusively on circumstantial evidence which did not irresistibly point to the appellant's guilt and thus the prosecution did not prove the case beyond reasonable doubt*

5. The appellant was unrepresented at the trial and on appeal. She nevertheless filed written submissions which she relied upon. In her conclusion, she pleads:

> ***"Your Lordship, the legal issues to be determined as above point unerringly to no proof and no complicity of the appellant. The issues raised by the trial Magistrate in the judgment were obviously not well ventilated..…the legal issues I have raised clearly shows the weakness in the prosecution's case. The same calls for redress by this court and kindly submit that there was insufficient and inconclusive evidence to prove the allegations and urge this hon. Court to remedy the situation appropriately and acquit the appellant"***

The prosecution made oral submissions at the hearing.

6. The duty and role of the court on a first appeal is as well stated in the Court of Appeal case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 Of 2005** as follows:-

> ***"…In the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-***
>
> ***The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)'***

7. Further, in **Shantilal M Ruwala v R** (cited above) the Court of Appeal of East Africa analysed the case of **D.R Pandya v R 1957(EA) 336** and stated:

> ***"The judgment of the learned magistrate dealing with the evidence showed that he had overlooked the real weaknesses of the Crown's case….***
>
> ***In Pandya's case the second proposition was that the first appellate court had failed to appreciate its duty in this respect and had in consequence given a merely formal approval of the learned magistrate's findings, instead of a considered evaluation of the facts in light of the defects shown to exist in the evidence "***

8. In light of the guidance in the **Isaac Nganga, Shantilal Ruwala** and **Pandya cases (supra)** I have perused the proceedings and material in the lower court's file in this matter and analysed and re-evaluated the evidence afresh. I state my findings herein, taking into account the unrepresented appellant's issues.

The Proceedings

9. In the lower court, the accused was unrepresented. The state was represented by Inspector of Police Mohamed.

10. Upon reading the proceedings and judgment, I was immediately struck by the paucity of prosecutorial information and alacrity. I immediately sensed that certain things did not add up.

11. According to the proceedings, at the outset of the trial on 26th Jan 2012, when the charge was read to her, the accused pleaded not guilty, and asserted that the accused was her lover. She said:

"Not true, Anthony was my lover"

That raised my antennae. Might there be something deeper but salient about this case?

12. At the next mention on 23rd February, 2012 the accused is recorded to have told the court as follows:

> ***"Accused: Complainant and I have talked and he is in court to withdraw the complaint;***
>
> ***Complainant: I wish to withdraw complaint"***

However, the prosecution declined the withdrawal, ostensibly in the public interest. True, there is no obligation on the prosecution to withdraw a case simply because the complainant and accused have agreed to do so.

13. PW1 testified that after he parted with the accused and her friends, who he had met on his way home, he met his friend George who walked with him for a while before George branched off to buy cigarettes. PW1 however noticed that the accused and her friends followed behind him but he thought nothing of it *"because I had no idea that women could rob someone"*.

14. He said that his assailants attacked him shortly thereafter and he lost consciousness. He testified that he was hit with a wooden plank, which cannot be ascertained because he did not see what he had been hit with, yet the charge sheet records that he was hit with a timber. The judgment of the trial Magistrate also recites his evidence that he was hit with a plank without questioning how he knew what had hit him. He also said that his friend George, PW2 helped him up when he regained consciousness, and PW2 told him he saw everything. That George offered to escort him home but he declined, which is unusual because he said his home was just nearby. Anyway, he proceeded home but fell at the verandah and fainted until 4am. When came to, entered the house and took some pain killers, before losing consciousness again.

15. Despite the trial magistrate stating in her judgment that PW1 reported the incident to the police the following day, there is no record of when PW1 made his report. Further, he did not state when it was that he reported at the police station, other than saying that it was after he gained consciousness.

16. PC Davis Mailu (PW3) was the Investigating Officer. He testified that on 16th January, 2012 whilst at the police station he perused the OB and found that the matter had been minuted to him to investigate by his superior. On some date thereafter he recorded the complainant's statement. He said in cross examination that he couldn't recall the date, but asserted that he knew the complainant George Ndichu. There is no indication of when the matter was reported as the OB was not produced.

17. The Charge sheet shows the date of the crime as 12th January, 2012. However, both PW1 and PW2, the only eyewitnesses who gave evidence, testified that the robbery was on 13th January, 2012. This is a big discrepancy which apparently was not noticed by any party, and although nothing is made of this inconsistency in the date described in the charge sheet by the prosecution, still no correction was offered at any stage of the proceedings or upon appeal. There was no suggestion, either, that the date was an error, and it appears to have gone entirely unnoticed.

18. The evidence concerning the identification of the accused is also rather un-assuring. PW1 in his evidence in chief on 25/6/2012 testified that:

> ***"On my way I met Wangare with others along one of the corridors……Wangare is accused person at the dock and I had known her well and her companions…."***

Later he said:

> ***"It was 10pm when accused and her colleagues attacked me. There was street light and moonlight and that was sufficient light to enable me see and recognize accused person and her colleagues…***
>
> ***I am a resident of Gigil and I had been seeing accused person for the last two years in Gilgil"***

19. In cross-examination by the accused PW1 stated concerning the incident that:

> ***"You were with Njeri and Betty…I gave out your names to the officer who was recording statement for me. I don't know why he did not record the names. I had known the three of you well and I recognized you people that night…"***

20. From these exchanges, it is clear that PW1 knew the accused for two years and knew her name as Wangare. He knew her colleagues as Njeri and Betty. Further that he saw and recognized them in good street light and moonlight that night.

21. When PW1 was recalled on 6/9/2012 for further cross examination it transpired that PW1 did not really know the three girls as well as he had earlier stated, after all, but the trial Magistrate did not pick this up. PW1said when cross examined afresh:

> ***"I know the three girls I met physically but not by names….You then followed us….I know you very well though not by names…"***

22. In my view, this inconsistent evidence falls short of compelling. It begs the question: did PW1 really know and recognize the girls or not? It gives pause to credibility and raises a good measure of doubt. On its own, it does not satisfy the necessary threshold beyond reasonable doubt.

23. Was there corroborating evidence in support of the story as told by PW1? The only other witness was PW2, George Ndichu Waithera, the complainant's friend. His evidence mirrored that of PW1. I would have readily accepted it as corroborative except for the fact that the record of proceedings at page 9 has the following statement on 25/6/2012 when it appeared that after the evidence of PW1 a second witness was to testify:

> ***"Accused: I had prepared myself for the evidence of PW1. I was not aware of this second witness. I ask for more time to prepare for the next witness***
>
> ***Prosecutor: No objection***
>
> ***Court: The next witness George Ndichu has been in court when PW1 was testifying"*** (Emphasis supplied).

24. In other words, the evidence of PW1 was given in the presence and full hearing of PW2. It is no wonder that PW2 replicated the same, with an uncanny degree of similarity.

Failure by prosecution to call crucial and critical witnesses

25. The appellant argues that the contractor who the complainant met on the night of the incident was not called to testify. Further, that the medical report produced in evidence by the prosecution was not produced by the doctor who examined PW1.

26. The appellant relies on the case of **Naomi Bonareri Angasa v Republic [2018]eKLR** where it was stated:

> ***"In this case the prosecution did not lay any basis for admission of the document. PW4 only testified for doctor and did not***

vouch for his qualification or even confirm that he was familiar with his handwriting or signature. He only stated that the doctor who prepared the report had left public service. The medical evidence was therefore inadmissible"

27. On the failure to call the contractor, nothing arises as there is no evidence which the contractor could have availed that would corroborate the robbery, as he was not there. The only useful evidence he might have given is confirmation that the complainant visited him that evening and that he paid the complainant some money.

Evidence of PW2

28. PW2, George Waithera is the person who was present near the scene and witnessed some of the action that occurred at the scene. He testified as follows:

"I recall 13/1/12 at around 10.30pm I was coming from work to home. …..I met with my friend Tony talking to three (3) women. I asked him if I could accompany him as I was going to look for supper, since we use the same road home. We proceeded but I branched to a shop to buy airtime and left him proceeding with journey. When I got out of the shop I saw him a few steps ahead of me and those three women were between him and me.

I continued following them from behind, but suddenly, I saw the three ladies attack him. They hit him and Tony fell down. I tried to reach Tony and assist him, but I was still far and the ladies ransacked him and ran away. I reached and him and found him bleeding from the ear. I asked him what they had taken and he told me it was money and phone…..

I assisted him up but he told me that he was okay and advised me to continue to the hotel to look for food, and I did so.

I was able to recognize the ladies but not well. I was able to recognize them by appearance since I didn't know them by names. I used to see her often along the corridors as I was passing. I recognized them by face as I could see them at the veranda as I pass…

There was moonlight and electricity light in that area.

29. In cross examination by the appellant he said:

"I don't know if Tony identified them too because I did not ask him….. I helped him and he told me he was a few steps to his house and that he could be able to walk on his own to the house…I saw and recognized you being one of the three ladies who were talking with the complainant. I saw you clearly…"

30. Although this is clear eyewitness evidence of how the incident occurred, I am hesitant to perceive of it as real and unadulterated evidence on account of the fact that PW2 was present in court during the testimony of PW1. There are a number of other issues that give me pause in accepting the evidence wholesale as truthful, realistic and corroborative.

31. First, it surprising that PW2 did not see with what the assailants knocked down PW1, despite the fact that he testified that he was just a few steps behind PW1 and the alleged lady-assailants were between the two of them.

32. Secondly, it is clear from the evidence of PW2 that there were lights and there was moonlight in the area, so that he saw the three ladies and recognized them by appearance. He particularly recalled the lady he met Tony talking with who he says in cross examination he saw clearly. This amplifies his nearness to the assailants, who were between him and Tony. One would have therefore reasonably expected him to rush to fight off the assailants who were less than *"a few steps ahead"* of him. It is also therefore contradictory that he says that after Tony was hit he *"tried to reach him but he was [so] far"* that the ladies had time to not only knock him down, but also to ransack his pockets, take his money and phone and ran away before he could reach them. This does not all seem to hold water rationally. If the ladies were between him and Tony, and Tony was himself a few steps away.

33. Thirdly, it beggars belief that PW2 who was just a few steps behind PW1 and who had seen everything in good moonlight and electric light, and both of them knowing the accused, did not either naturally chase after any one of the assailants, or even discuss with his friend anything concerning the incident immediately it occurred. For example, they seem not to have agreed together that it was the same three ladies that they had been together with that robbed PW1. Further, PW2 appears to have decided not to insist on escorting PW1 home when he had been told by PW1 that is was just *"a few steps to his house"*. It would have been reasonable to expect one friend to ensure his friend was safely home, when that home was a few steps away. One would also expect the friends to settle at Tony's home after such an incident and relive or recount the event.

34. On all these grounds I am unable to readily accept, the evidence of the eyewitness as credible on a beyond reasonable doubt basis. Accordingly, I reject the same as not i

35. With regard to the medical evidence complained of by the appellant, the proceedings and also the judgment of the lower court show that the P3 form could not be adduced as evidence because the doctor who prepared it was not available. The prosecution told the court that the subsequent officers were unfamiliar with the doctor's handwriting. Accordingly, there was no evidence of the injuries suffered by the complainant.

36. Be that as it may, the trial Magistrate found as follows:

> ***"However, in the fact that the ingredients of robbery with violence has been proved in this case because the 1st accused was with others. And even if wounding of PW1 has not been proved by failing to produce P3 form, actual force or threat to use actual violence on him has been proved by felling or knocking PW1 down"***

37. I agree with the trial Magistrate that injury is only one of the ingredients of robbery with violence, and that it is sufficient that there is proof that the complainant was struck or knocked down or subjected to any other personal violence. The ingredients of robbery with violence are identified in **section 296(2)** of the **Penal Code** which provides:

> ***"(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 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."***

38. In conclusion, I agree with the appellant that, overall, the evidence does not ring true, and does not carry such weight, the acceptance of which would lead to a conviction and sentence of death.

Disposition

39. Having considered all the appellant's grounds of appeal, and also having carefully reviewed the evidence on record, I find that the learned magistrate was in error in convicting the appellant on the available evidence.

40. Under different circumstances, it would have been apt to treat the case as a mistrial and have it tried afresh. In the circumstances, however, and particularly given the paucity of witnesses and the time already elapsed since the commencement of the trial, a retrial will not achieve the ends of justice.

41. Accordingly, the appeal succeeds and I set aside the conviction. I order that the appellant is set free forthwith unless otherwise lawfully held.

42. Orders accordingly.

Dated and Delivered at Naivasha this 18th Day of October, 2018

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Catherine Wangare for the Appellant

2. Mr. Koima for the State

3. Court Clerk – Quinter Ogutu