



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 139 OF 2010

PAUL NARUMBE NAPAROL.....APPELLANT

VERSUS

REPUBLICSTATE

(Appeal from the Sentence of the Chief Magistrate's Court at Nyahururu Hon. A. B. Mongare - Senior Resident Magistrate delivered on the 28th April, 2010 in CMCR Case No. 1148 of 2009)

JUDGEMENT

The appellant herein **PAUL NARUMBE NAPAROL** has filed this appeal challenging his conviction by the learned Senior Resident Magistrate sitting at the Nyahururu Law Courts. The appellant was arraigned before the trial court on 11/5/2009 facing two (2) counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the two offences were as follows:-

COUNT No. ONE

*“On the 7th day of May, 2009 at Tandare Area in Laikipia West District within the Rift Valley Province jointly with another not before court, while armed with dangerous weapons namely rungu's panga and simis, robbed **FREDRICK MWAURA NGIGI** of cash Ksh 1,800/= and immediately before the time of such robbery threatened to use actual violence to the said **FREDRICK MWAURA NGIGI**”*

COUNT No. TWO

*“On the 7th day of May, 2009 at Tandare Area in Laikipia West District within Rift Valley Province, jointly with another not before court, while armed with dangerous weapons namely runqus, panga and simis robbed **KENSTEVE MUNIU THAA** of one mobile phone make Nokia 2600, valued at Ksh 4,000/= and immediately after time of such robbery used actual violence to the said **KENSTEVE MUNIU THAA**”*

The appellant also faced an alternative charge of **HANDLING STOLEN GOODS CONTRAY TO SECTION 322(2) OF THE PENAL CODE**.

The appellant pleaded 'Not Guilty' to all three counts and his trial commenced on 16/7/2009. The initial trial magistrate, **Hon. M. T. Kariuki** Ag. Senior Resident Magistrate heard the evidence of six (6)

witnesses. The said trial magistrate was then transferred and **Hon. A. B. Mongare** Senior Resident Magistrate took over the case. The appellant in exercise of his rights under Section 200(3) of the Criminal Procedure Code demanded that the trial begin *de novo*. On 18/2/2010 the court gave orders that the trial begin a fresh before the incoming magistrate. In this second trial the prosecution led by **CHIEF INSPECTOR RUTTO** called a total of seven (7) witnesses in support of their case.

PW3 SAMSON THAA MWATHI told the court that on the evening in question he went to the room of **PW1** in order to collect some books. Upon arrival **PW3** found the house was open and the lights were on. The farm worker opened the door to let him in.

As **PW3** entered the room two men emerged and held him. The two men were both armed with pangas. They forced **PW3** to sit on the bed. He found one Mwaura tied with ropes shortly thereafter **PW2** arrived.

PW2 KEN STEVE MUNIU THAA told the court that on 27/5/2009 at about 7.30pm he went to the house where he sleeps with his brother and the farm worker. As he neared the house **PW2** called out to his brother and the worker responded telling him to enter the room. Upon entering found two men armed with pangas. One held a panga to his neck and demanded money. **PW2** noticed that his brother **SAMSON THAA** was also in the room tied up with ropes.

The robbers stole a mobile phone Nokia make 2600 from **PW2**. In the process he was cut on the fingers.

After robbing the two men the thugs locked them inside their room and forced **PW1** to take them to the house where his mother slept.

PW4 CATHERINE MUTHONI MUCHAI told the court that on the evening in question she was inside her kitchen. She heard the sound of people running outside her house. She also heard the voice of her son (**PW1**) talking outside. Two men armed with pangas were pushed into the house. **PW1** was pushed by 2 armed men into his mother's house and the door was locked behind him. **PW1** screamed for help. The men demanded money from the sale of her cow. **PW4** told them she had no money. She later pretended to be searching for her keys and hid behind her door. The thugs then cut the mabati roof and escaped.

Thereafter the matter was reported to police. The accused person was later arrested by police. After conclusion of police investigations the appellant was charged with the present offences.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He gave sworn defence in which he denied any involvement in the robbery in question.

On 28/4/2010 the learned trial magistrate delivered his judgment in which he convicted the appellant of the offence of Robbery with Violence and thereafter sentenced him to death. Being aggrieved the appellant filed this present appeal.

This being a first appeal this court is obliged to re-evaluate the prosecution case and draw its own conclusions. In the case of **AJODE Vs REPUBLIC [2004] 2 KLR** the Court of Appeal held that

“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions, but bearing in mind always that it has neither seen nor heard the witness and make allowance for that”

In this case all the victims of the robbery incident being **PW2**, **PW3** and **PW4** testify that they were accosted by two men both of whom were armed with pangas. The witnesses were harassed and threatened and in the case of **PW2** he was assaulted and cut on the fingers.

PW1 HARRISON NJOROGE is the clinical officer who examined **PW2**. He confirmed that the witness had injuries to the first finger and the right middle finger, which injuries were probably caused by a sharp object e.g a panga. **PW1** filled and signed the P3 form which he produced as an exhibit. **P exb 1**.

The offence of Robbery with Violence is deemed to have been committed in any one of the following circumstances

1. There is more than one perpetrator
2. The perpetrators are armed with dangerous or offensive weapons
3. The victim is either threatened or physically harmed in furtherance of the theft.

In this case there were two perpetrators both armed with pangas which they used to threaten the victims? **PW2** was physically injured in furtherance of that robbery. I am satisfied that this incident did indeed amount to a Robbery with Violence as envisaged by Section 296(2) of the Penal Code.

The next issue for determination is that of identification. All the witnesses state that the incident occurred at about 7.30pm. No doubt it was dark as night had fallen. However all the witnesses testify that there were electric lights which enabled them to see and identify their attackers.

PW2 states under cross-examination at page 39 line 2

“You attacked me at 7.00pm. There was enough light from security lights. I was attacked in the house. I saw you with aid of electricity lights.....”

On his part **PW3** states at Page 40 line 5

“The house was opened and there was some light inside the house”

PW4 in her evidence at page 42 line 12 says

“The lights were on. They entered in the sitting room”

Under cross-examination

PW4 says at Page 43 line 4

“I was attacked at around 7.00pm. There were lights in my house. I was with thieves for 10 minutes.....”

All the witnesses are unanimous that there was sufficient light from the electric light inside the houses. This enabled them to see and identify their assailants. The robbers spent several minutes with their victims. They spoke to them making various demands. None of the robbers had covered or otherwise disguised their faces. I am satisfied that in the circumstances the three witnesses were able to get a clear and unobstructed view of the appellant. All three positively identified the appellant in court.

PW7 SERGEANT HIRAM WANJOHI told the court that on 9/5/2009 he conducted an identification parade at Ngarua Police Station. The appellant willingly participated in the parade. At that parade **PW4** and one Mwaura positively identified the appellant. The parade forms were duly produced in court as an exhibit **P.exb 3**. The appellant signed the parade form and commented thus

“Nimetosheka na vile wamenichagua”

‘I am satisfied with the manner in which they have identified me’. It is clear that the parade was properly conducted and it further confirms the identification of the appellant by the witnesses.

Aside from visual identification there exists evidence of recovery. **PW2** told the court that he was robbed of his mobile phone a Nokia 2600. **PW6 PC OBADIAH ARANI** told the court that he was amongst the team of officers who arrested the appellant. Upon arrest the appellant was searched and **PW6** stated that

they recovered on him a mobile phone make Nokia 2600. This mobile phone was presented before the court as an exhibit.

PW2 identified the said Nokia 2600 mobile phone as the very phone which was stolen from him during court of the robbery. **PW2** was able to identify his phone due to certain specific marks and alterations he had made on it. **PW2** states at Page 38 line 12

“I had been robbed of my mobile phone make Nokia 2600. It is before court. I had changed the cover from black to orange. I also identified the phone as mine from the battery – it had a scratch. The speaker was broken”

The learned trial magistrate who saw the phone in question confirmed that indeed the speaker was broken. Although the Nokia 2600 is a common type of phone which undoubtedly many Kenyans own or possess **PW2** has identified specific marks exclusive to his phone which set it apart from any other mobile phone of similar model or make. **PW4** the mother of **PW2** who lived with him also identifies the mobile phone exhibited in court as the phone belonging to her son. **PW4** states at Page 42 line 18

‘My son lost a mobile phone. This is the phone. The case was changed from black to orange by my son’

PW4 was the mother to **PW2**. They lived in the same compound. I have no doubt that she saw his mobile phone often and was familiar with it.

The doctrine of ‘**recent possession**’ squarely applies in the above circumstances. In the case of **ERICK OTIENO ARUM Vs REPUBLIC 2006eKLR** the Court of Appeal held that

***“In our view before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words there must be positive proof, first, that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant*”**

The above conditions have all been met in this present case. The appellant was arrested and found in possession of the mobile phone. **PW2** has positively identified the recovered phone as the one stolen from him during a robbery on the night of 7/5/2009. The robbery occurred on 7/5/2009 and the phone was recovered the very next day on 8/5/2009. This clearly amounts to recent possession.

In his defence the appellant denied that the stolen phone was recovered on him. However there would be no reason why **PW6** an officer who did not know the appellant before and who had no grudge against him would fabricate evidence against the appellant. **PW6** who was merely an arresting officer would have no reason to do this. I therefore reject this aspect of the defence. I am satisfied that the appellant was found in possession of the phone stolen from **PW2** barely 24 hours after the robbery occurred. The only logical conclusion that can be drawn from this set of facts is that the appellant was a participant in that robbery.

In his written submissions the appellant raised as a ground of appeal the allegation that he was forced to proceed with the hearing despite the fact that he was not served with witness statements in the matter. I find this not only to be a ‘**red herring**’, but it is also a blatant lie designed to mislead the court. The record at Page 41 clearly indicates that on 3/2/2010 the appellant made the following application in court.

“Accused - may we stop. I need time to look at [the] other statements”

The court in allowing this application stated as follows

“Order - it is 4.30pm, accused person says he needs time to look at the statements. Once again matter is adjourned to 17/2/2010”

It is clear from this exchange that the appellant already had the statement in his possession. He was not seeking to be supplied with the statements – he was merely asking to be allowed time to peruse the statements he had in his possession. One cannot ask to peruse what one does not have. I find that the record shows that the appellant was supplied with witness statements and he was also granted time at his request to peruse them. There is no basis to this ground of the appeal and the same is hereby dismissed.

I now move to the appellant's defence. In his defence the appellant claims that he was arrested in a busaa den. He claims that he was framed in this matter due to a disagreement he had with some administration police officer over a woman.

Firstly the appellant has not named this officer with whom he had disagreed. He does not claim that this disagreement involved any of the officers who testified in this matter.

Secondly this alleged disagreement had nothing to do with **PW1**, **PW2**, **PW3** and **PW4**. These witnesses would have had no reason or motive to frame the accused. Finally the appellant did not raise this issue of an alleged disagreement over a woman to any of the police officers **PW5**, **PW6** and **PW7** who testified in the case during cross-examination. This defence was clearly an afterthought. It had no merit and the trial court was right to dismiss it as such.

From the evidence which was adduced before the trial court, I am satisfied that the prosecution did prove its case beyond reasonable doubt. The appellant's conviction was in my view sound and I do uphold that conviction.

After conviction the appellant was allowed an opportunity to mitigate and thereafter he was sentenced to death. This is the only lawful and mandatory sentence for a conviction for the offence of Robbery with Violence. I therefore confirm that sentence. The upshot is that this appeal fails and is hereby dismissed in its entirety.

Dated and Delivered in Nakuru this 31st day of March, 2017

Appellant in person

Mr. Motende for State

Maureen A. Odero

Judge