



REPUBLIC OF KENYA

IN THE HIGH COURT OF KAKAMEGA

HCRA NO. 141 OF 2015

GEOFFREY NELIMA JUMA :::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

REPUBLIC :::::::::::::::::::::::::::::::::::RESPONDENT

(Arising from the judgment of Hon. S.K. Ngetich in Criminal case No.378 of 2015 at Senior Principal Magistrate's court Mumias)

J U D G M E N T

1. **Geoffrey Nelima Juma** the appellant herein was charged with the offence of robbery with violence contrary section 296(2) of the Penal Code .

The particulars were that the appellant on the 28th day of November, 2014 at Emubere village Lusheya location in Mumia Sub County within Kakamega County while armed with a Panga robbed **Sandra Everlyne Luale** of her mobile phone make LG TTL Valued at Kshs. 4,000/= and cash Kshs. 2500/= all valued at Kshs. 6,500/- and at the time of such robbery you threatened to use actual violence to the said **Sandra Everlyne Lubale**.

2. He denied the charges and the case proceeded to full hearing , with the prosecution calling five (5) witnesses . the appellant gave a sworn statement for his defence and called no witness .

He was found guilty, convicted and sentenced to suffer death. Being aggrieved by the Judgment he filed this appeal citing the following grounds:

- i. THAT the trial court erred both in law and fact in convicting him yet the evidence on record was uncorroborated , fabricated , discredited and farfetched .
- ii. THAT the trial court shifted the burden of proof on him the appellant herein
- iii. THAT the trial court did not consider that the bag that was alleged to have been stolen was not brought to court as an exhibit to corroborate the evidence .
- iv. THAT the trial court did not consider that this was a scheme that was maliciously crafted to implicate him with this crime .
- v. THAT the trial court did not consider that the principal witnesses did not raise alarm if indeed I did commit this alleged crime .

vi. THAT the sentence meted was very harsh in the circumstance.

3. When the appeal came for hearing the appellant relied on his written submissions, which were that there was a contradiction in the evidence by the prosecution witnesses. That there was malice on the side of the prosecution and when he requested for the case to be transferred to Chief Magistrate's Court Kakamega, the trial Court rejected the plea. He further argued that the recovered exhibits were not produced before the court.

That his defence was never considered. He finally submitted that the case was fabricated because of land which they are fighting over.

4. The appeal was opposed by the State, which relied on the evidence on record. Mr. Juma submitted that the issue of the land case has no bearing on this case.

5. A summary of the case before the Court is that on 28th November, 2014, 7.30 am PW1 was in her house with a lady visitor Roseline Okumu (PW2) who had come to see her husband. While there a man called Asman the appellant came and asked if her husband was in. She answered in the negative. He pretended to be checking out on someone and then entered the house and picked her mobile phone (LG DTL) from the table and put it in his pocket.

6. He went back to the door. He looked around again and removed a panga from his waist. He swung it towards her threatening to finish her. When she screamed he threatened to cut her. Finally he picked her handbag from the chair, and told her to tell the Chief (her husband) to go for it. Inside her handbag was cash Kshs. 2510/- plus documents. Her phone was valued at Kshs. 4000/-. The appellant then went away.

7. She borrowed a phone from one Nancy Lutta and called her husband. After twenty minutes a boy came with her handbag and a panga.

On inspecting the handbag she found everything intact save for the money. Later she went with the husband to report at the Police Station.

8. PW2 **Roseline Mukabana** who was in PW1's house that morning of incident gave similar evidence to that of PW1.

Pw3 **Diana Maende** testified that on the date in question at 7.30 am she was outside their house when she saw the appellant coming from the direction of PW1's house. He laid down a black handbag and a panga. He called to her to take the bag. She went and took them to PW1's house.

She had heard PW1, telling her step mother Nancy that the appellant had stolen her handbag and phone. She identified the panga (EXB1) as the one she had taken to PW1.

9. Pw4 **Nancy Omutabi** told the court that PW1 had borrowed her phone to make a call to her husband on 28th November 2014 8 am. She was crying and she told her that the appellant a neighbour had robbed her of her wallet (with money) and a mobile phone.

PW5 P.C **Juma Munyao** is the investigating officer. His evidence was that the appellant presented himself at the Mumias Police Station on 22/5/15. He was then arrested. He said the mobile phone and money were never recovered. He produced the purchase receipt for PW1's mobile phone.

10. In his sworn statement of defence the appellant stated that there was a land dispute between his family and the chief **Justus Malal Okumu**. Before he left for Busia to see his mother on 12th May, 2014 the said chief had arrested all his brothers and placed them in cells. Only his step mother Margaret Juma was left. His brother died in cells and when he came for the funeral he heard the chief say that one person was remaining, and that was him.

11. In April ,2015 he was arrested in Uganda by FBI and brought to Busia Police Station . He was brought home but later he was accused of being an Alshaabab and he was placed in cells at Mumias Police Station . He stated that this case was fabricated on him and he was not identified in any Identification parade.

12. This being a first appeal the Court has a duty to re evaluate the evidence and come to its own conclusion.I must also bear in mind that it did not have the chance of seeing or hearing the witnesses .

The Court of Appeal in the case of **Kiilu and another vs R (2005) 1 KLR 174** stated the following of the duty of the first appellant court

“2. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts own decision on the evidence. The first appellate court must weigh conflicting evidence and draw its own conclusions.

3.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 courts’ findings and conclusions; it must make its own findings and draw its own conclusion 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”.

13. I have now considered the evidence on record , grounds and appeal together with the submissions by both parties .

The offence of robbery with violence under section 296 (2) has the following ingredients;

i. Stealing

ii. The offender must have been armed with a dangerous weapon or weapons OR was in the company of another or others OR wounds , beats, strikes or uses any other personal violence to any person.

14. PW1 and PW2 have told the Court that on the morning of 28th November ,2014 the appellant who was known to both of them came to PW1 ‘s house , where PW2 had come to see the assistant chief who is PW1’s husband . He took PW1’s mobile phone which had been placed on the table .

This phone has not been seen again. PW1 produced the receipt of purchase of the phone from Agabe electronics (EXB2).The phone was valued at kshs. 4000/=.

15. It was the further evidence of PW1 and PW2 that the appellant had removed a panga from his waist and+ threatened them with it. It was then that PW2 handed over PW1’s handbag to him and he left. After a while a boy child brought the handbag .PW1 added that the boy also brought a panga . Everything else save for the money was found intact in the handbag. A report was then made and the appellant was arrested.

16. **PW3 Diana Maende** testified as the one who was given the handbag and panga by the appellant to take to PW1. This witness is a girl and not a boy as was alluded to by PW1 and PW2.She is also a niece to the chief who is the husband to PW1.She was 11 years old when she testified . PW4 a neighbour and stepmother to PW3 denied hearing any noises from PW1’s house , though naturally she could have heard .She however confirmed that PW1 had come to her that morning for her to assist her call the chief, since the appellant had taken her phone.

17. It was PW2’s evidence that when the appellant was issuing threats to the appellant **he told her he’s finish her and then the chief** .In his defence the which was sworn, the appellant alluded to an issue of a dispute over land between the chief and appellant’s family . That the chief had caused a lot of suffering

to the family by having them placed in cells. This evidence was not rebutted by the prosecution .

18. The issue of the threats by the appellant while armed with a panga are sketchy and yet this is the main reason for his being charged with robbery with violence . The scene was at the home of a chief ,and not just an ordinary person.

Pw1 and PW2 claimed that the appellant removed a panga from his waist . The panga had a black handle . Nothing much has been said about this panga . PW2 said it was a double edged panga .

I want to take it that it was an ordinary panga . Could such a panga be tucked in a person's waist ? Can it really fit ? Was it a panga or a sword that was double edged?

19. I am curious about this panga still because when it was allegedly returned PW2 was still at PW1'S house . She did not see the panga and only saw the handbag .

In any event according to PW1 and PW2 this panga had been tucked in the appellant's waist .

It was therefore his panga . Why would he give it to PW3 to take it to PW1 together with her handbag ? Yes , the handbag was PW1's but the panga was not hers .

20. Still on the issue of its recovery its clear from the evidence of PW1 and PW2 that the person who was allegedly given the handbag and the panga was a boy child. The one who testified as PW3 is a girl child , and a step daughter to PW4 .The husband of PW4 is a brother to the chief . It is therefore clear that if anyone was given any handbag and panga to bring to PW1 it was obviously not PW3. The close family tie is a bit worrying.

21. I am however satisfied that inspite of their land disputes , the appellant was at the chief's home that morning and picked PW1's phone from the table as stated by PW1 and PW2. According to PW1 and PW2 he took a handbag but PW5 (the investigating officer) says it was a wallet .

Whatever it was , its alleged to have contained shs. 2500/= which was found missing. I am satisfied that a theft was committed by the appellant .

22. Following my finding above on the issue of the panga , I further find that the violence anticipated under section 296(1) Penal Code was not proved. Infact the appellant was initially charged with the offence of robbery under section 296(1) of the Penal Code until later after two witnesses had testified that the prosecution amended the charge .The reasons for this amendment are obvious .

To my mind the amendment was not justified at all. What has been of proved is a simple robbery.

23. I therefore allow the appeal and set aside the conviction and sentence . I substitute the conviction with a conviction for robbery contrary section 296(1) of the Penal Code. He will serve four (4) years imprisonment from 10th December, 2015 when he was convicted.

Orders accordingly

Delivered, signed and dated this 31st day of August, 2017 at Kakamega

H.I. ONG'UDI

JUDGE