



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 19 OF 2016

VICTOR KIBET.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Appeal from the Judgment of the Chief Magistrate's Court at Molo Hon. W. Kagendo –Chief Magistrate delivered on the 28th January, 2015 in CMCR Case No. 432 of 2015)

JUDGMENT

The appellant **VICTOR KIBET** has filed this appeal challenging his conviction and sentence by the learned Chief Magistrate sitting at the Molo Law Courts. The appellant had been arraigned before the trial court on 19/2/2015 facing four counts as follows:

Count No. I

“On the 23rd day of January, 2015 at Chepseon Trading Centre within Kericho County, jointly with another not before court, robbed LITA CHEPKEMOI cash Ksh 1,000, a National Identity Card No. 26571452 and a purse all valued at Ksh 1,500 the property of LITA CHEPKEMOI”

Count No. II

“On the 23rd day of January, 2015 at Chepseon Trading Centre, Kericho County willfully obstructed No. 49019 CPL Samuel Nyaribo and No. 50968 CPL Wicliffe Ashiundu who at the time of the said obstruction were acting in due execution of their duties”

Count No. III

“On the 23rd day of January, 2015 at Chepseon Trading Centre, Kericho County, being in lawful custody of No. 49019 CPL Samuel Nyaribo and No. 50968 CPL Wicliffe Ashiundu after arrest for the offence of Robbery with Violence escaped from such lawful custody”.

Count No. IV

“On the 23rd day of January, 2015 at Chepseon Trading Centre, Kericho County, willfully and unlawfully damaged a pair of handcuffs the property of Keyna Government”.

The appellant pleaded ‘**Not Guilty**’ to all the four counts. His trial commenced on 22/6/2015. The prosecution called a total of five (5) witnesses in support of their case.

PW1 RITA CHEPKEMOI told the court that on 23/11/2015 she was on her way from Kuresoi on a motor bike. She alighted at Chepseon at about 5.40 pm and began to walk. Two men accosted her. They greeted **PW1** and she replied. Then one of the men slapped **PW1** whilst the other snatched her Safaricom purse containing Ksh 1,000/= and her I/D Card. The men then ran off. **PW1** reported the matter at Chepseon Police Station.

After making her report **PW1** returned to the scene with three (3) policemen. They searched for her assailants in the area around. Inside a

wines and spirits shop **PW1** spotted the two men who had robbed her. She pointed them out to the police. The police officers arrested the two men and began to walk with them to the police station.

PW2 CORPORAL WYCLIFFE ASHIUNDU, PW3 APC NELSON WAMANGA and **PW4 CORPORAL SAMWEL NYARIBO** were the three (3) police officers who accompanied **PW1** back to the scene. The officers all gave similar evidence. They state that they searched the area around the scene looking for the suspects. They entered a wines & Spirits shop and **PW1** identified two men as the ones who had robbed her.

The police officers handcuffed the two men and began to lead them back to the police station.

Suddenly a local MCA appeared on the scene. His appearance seemed to embolden the 2 suspects who sat down and refused to move further. They began to pelt the officers with stones. The crowd was also hostile to the officers. The appellant began to shout saying that **PW1** was his wife who merely wanted money. During this commotion the two suspects ran off into the crowd still with the handcuffs on their hands and they escaped.

The police officers returned to the police station but continued to search for the suspects.

PW5 EDWARD CHEPATAI CHERUIYOT was ex-chief of the area. He told the court that on 25/1/2015 he was on his way home at 6.00pm when he noticed a commotion at Chesende Market. **PW5** stopped his vehicle and enquired what the problem was. He was told that two young men had been arrested and one of them was his grandson called Kibet. **PW5** did not intervene in the matter but just went home. Later on 8/2/2015 his in-law came and handed to **PW4** a broken handcuff which had been left at the doorstep of the house of the appellant's mother. **PW5** took the handcuff to the police station.

Later on the appellant was arrested and was charged with the present offences.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied all the charges he faced. On 28/1/201 the learned trial magistrate delivered her judgment in which she convicted the appellant on counts Nos. 1, 2 and 3 but acquitted him on count No. 4 of the charge. Thereafter the trial magistrate sentenced the accused to death for Count No. 1. Sentences for Counts 2 and 3 were held in abeyance. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

Mr. Kobe Advocate prosecuted the appeal on behalf of the appellant. The learned State Counsel opposed the appeal.

This being a first appeal the court is obliged to re-examine and to re-evaluate the prosecution case and draw its own conclusions on the same (see **AJODE Vs REPUBLIC [2004] KLR 81**). Likewise in **MWANGI Vs REPUBLIC [2004] 2 KLR 28** it was held

“1. 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 have the appellant court’s own decision on the evidence.

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions”.

In this appeal the two main issues which arise for determination are:

- i. Identification
- ii. Did the facts as stated prove the offence of robbery with violence as envisaged by Section 296(2) of the Penal Code.

In this case **PW1** told the court that she was walking when two men accosted her. The incident occurred at 5.40 pm. It was broad daylight and she saw the two men well. The two men greeted **PW1** and she responded allowing her a greater opportunity to see and identify them. Suddenly one of the men slapped **PW1** and the other grabbed her Safaricom purse and took off. **PW1** reported the incident to police. She returned with police to the scene in order to search for her assailants. Upon entering a wines and spirits shop they found the 2 men there **PW1** pointed out the 2 to police and they were arrested and hand-cuffed. The arrest took place barely an hour after **PW1** had been robbed. The events were still very clear in her mind and she was able to recall the faces of the two men clearly.

Later on as the men were being taken to the police station in hand cuffs they suddenly sat down and refused to move. This created a commotion at the scene. **PW1** was still present and witnessed the commotion **PW1** identified the appellant as one of the two men who robbed her. The other man escaped and has not been traced to date.

I am mindful of the fact that it is only **PW1** who identified the appellant as one of the men who robbed her. Thus the evidence of identification is that of a single witness. It is trite law that a fact may indeed be proved by the evidence of a single witness. In **MAITANYI Vs REPUBLIC [1986] KLR, 198**, it was held that

“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made”.

In deciding whether or not to convict on the basis of the evidence of a single identifying witness the court must carefully interrogate the conditions under which that identification was made.

As stated earlier this robbery incident occurred at about 5.30pm. It was broad daylight and visibility was good. The witness spoke briefly with her assailants while facing them thus she had ample opportunity to see them well. I note that the witness did not only see the appellant once. She saw him a second time when she identified him in the wines and spirits shop and further saw him yet again during the commotion when appellant was refusing to be led to the police station. Thus I find that this witness saw the appellant several times. She had ample opportunity to identify him.

In the judgment the learned trial magistrate stated

“The court believed the evidence of PW1 she was honest and did not exaggerate what was stolen from her. She impressed the court as honest”.

These were the observation of the magistrate who saw and heard the witness testify. I have no reason to doubt the trial courts assessment of demeanour of PW1. In my view her identification passes muster.

Counsel raised the fact no identification parade was conducted. However given that it was PW1 who identified the appellant leading to his arrest by the police. I find that an identification parade would have been superfluous in the circumstances.

In his defence the appellant claimed that he had been framed in this matter due to a dispute he had with one of the arresting officers over a charcoal trade in which both were involved. This defence if true may explain why the police officers may have sought to frame him but it does not explain at all why PW1 would have identified the appellant as her assailant. The appellant was not known to PW1 before this incident. He makes no allegation of any pre-existing grudge between them. PW1 had no reason or motive to frame the appellant. I therefore agree with the trial court dismissal of the appellants defence. Finally this court is satisfied that the appellant was properly identified as one of the men who robbed PW1 on the date in question.

The second issue in this case requiring determination is whether the incident as described by PW1 amounted to a Robbery with Violence as envisaged by Section 296(2) of the Penal Code. I note that the learned trial magistrate did also ‘agonise’ over this question.

This court is mindful of the ingredients that constitute Robbery with Violence. These are

- i. The offences is committed by more than one person
- ii. The perpetrators are armed with dangerous or offensive weapons
- iii. The victim’s life is threatened or the victim is injured in pursuance of the robbery.

In this case only the 1st ingredient was fulfilled. The offence involved the appellant and another person. PW2 made no mention of any of the men having been armed during the incident. Aside from a slap (for which she did not need to seek medical attention), PW1 was neither threatened, harmed nor injured in pursuance of the robbery. This incident is what in common parlance is called ‘a mugging’. The value of the items stolen from PW1 was also relatively low. In my own view the proper charge ought to have been that of Robbery contrary to Section 296(1) of the Penal Code. I therefore set aside the conviction of the appellant on the charge of Robbery with Violence and instead substitute a conviction for the offence of simple Robbery contrary to Section 296(1) of the Penal Code.

On Count No. 2 and No. 3 of resisting arrest and escape from lawful custody, I am satisfied that the evidence tendered by PW2, PW3 and PW4 the officers who arrested the appellant proves these charge. The appellant was arrested and handcuffed and whilst being escorted to the police station he sat down and refused to budge. By so acting the appellant who knew that the persons who had arrested him were police officers was resisting lawful arrest. The appellant created a commotion and then utilized that opportunity to escape from the hands of the police with the handcuff still on his hands. I am satisfied that this Counts No. 2 and 3 were both proved beyond doubt and the appellant was properly convicted of the same.

Based on the foregoing I find that the appellants appeal against his convictions has no merit and are hereby dismissed.

On the question of sentence, having found the appellant liable of the lesser charge under Section 296(1) of the Penal Code. The death sentence imposed upon him by the trial court is hereby set aside. In its place I sentence the appellant to serve six (6) years imprisonment.

The trial court did not sentence the appellant for Count 2 and 3 due to the death sentence imposed for Count No. 1. I hereby impose a sentence of three (3) years for each of Counts 2 and 3. All the above sentences will be served concurrently and will run from the date of conviction in the lower court. It is so ordered.

Dated in Nakuru this 3rd day of August, 2017.

Appellant in person

Mr. Chigiti for DPP.

Maureen A. Odera

Judge