



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL 324 OF 2013**

**JOSEPH MUTETI KIN'GOO..... APPELLANT**

**VERSUS**

**REPUBLIC.....**

**RESPONDENT**

**(An appeal arising out of the judgment and sentence of Hon. P. N. Gesora SPM in Criminal [Case No. 4820 of 2004](#), delivered on 26<sup>th</sup> September 2013 at the Chief Magistrate's Court at Machakos)**

**JUDGMENT**

The Appellant herein was the first of two accused persons who were charged with three counts of offences in the trial Court. The first Count was robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that the Appellant on the night of 12<sup>th</sup> and 13<sup>th</sup> October, 2004 at Ikalyoni centre Kee location in Makueni county jointly with others not before court, and while armed with offensive weapons namely pangas, iron bars and rungus robbed Musiu Muambi of two radio cassettes make national and Sony, four dozens of eveready dry cells, three dozens of Eveready batteries AA size, four dozens of Carcal dry cells D size, one bundle of white flour, one bundle of maize flour (Jimbi), three dozens of tea leaves, two dozens of exercise books, six kilograms of sugar, one dozen of cooking fat (Kasuku ½ kg), four parcels of zebra match boxes, two packets of Panadol tablets, one packet of Maramoja tablets, one packet of headaches, one packet of sweets, one dozen of Rexona soaps, one carton of Tuzo milk, one packet of bic pen, four cell tapes, 15 packets of sportsman, twelve packets of S.M. Cigarettes, 8 Packets of Roster cigarettes, cash of KShs. 5,300/- all valued at KShs. 31,000/- and at or immediately after the time of such robbery killed the said Musiu Muambi.

The second count was breaking into a building and committing a felony contrary to section 30 (a) of the Penal Code. Particulars were that on the night of 12<sup>th</sup> -13<sup>th</sup> October, 2004 at Ikalyeni trading centre, Kee location in Makueni district within the East Province jointly with others not before court, the Appellant broke and entered into a shop of David Musembi Musau with intent to steal from therein and did steal one radio make Osaka, one solar panel, 4 compacts, 8 bottles of soda, one packet of sweets, one dozen of 5mgs of tea leaves, 2 packets of Royco, one packet of cosmo tablets, one packet of elmo tablet, one packet of methomine tablet, one packet of soda mint, eight loaves of bread, 6kgs of sugar, one packet of Maxadol, one packet of Ibucos, one bundle of Jimbi flour, one packet of Eveready cells (blue), cash KShs. 7,500/-, 8 packets of sportsman cigarettes, 8 packets of Supermatch cigarettes and twelve packets of roster cigarettes all valued at KShs. 21,638/- the property of the said David Musembi Musau.

The third count was stealing contrary to section 275 of the Penal Code. Particulars were that the Appellant and Paul Kimuyu King'oo on the night of 12<sup>th</sup> -13<sup>th</sup> October, 2004 at Ikalyeni trading centre, Kee location in Makueni district within the Eastern Province, stole one solar panel make PV module

BSR' OF 1+2 valued at KShs. 5,000/- the property of David Kimeu.

There were also alternative counts to the first and second charges against the Appellant. The alternative to count 1 was handling stolen goods contrary to section 322 (2) of the Penal Code. That the Appellant on 16<sup>th</sup> day of October, 2004 at Kilome market, Mukaa location in Makueni District of the Eastern Province, otherwise than in that course of stealing dishonestly handled one radio cassette make national, 18 packets of different cigarettes, 3 dozens of zebra matchboxes, 15 pairs carcal dry cells D size, 27 pairs of Eveready dry cells D size, 25 pairs of Eveready dry cells AA size, 6 ½ parcels of tea leaves knowing or having reason to believe them to have been stolen or unlawfully obtained.

The alternative charge to count two was handling stolen goods contrary to section 322 (2) of the Penal Code. The particulars were that the Appellant on 15<sup>th</sup> October, 2004 at Nthingu village Kilome sub location, Mukaa location in Makueni District of Eastern Province, otherwise that in the course of stealing dishonestly handles one solar panel, 5 packets of Methomine tab, 1 packet of Tumbocide, 1 packet of Ibucos knowing or having reason to believe them to have been stolen or unlawfully obtained.

The trial court found the Appellant guilty and convicted him of all the main counts and sentenced him to suffer death for count I, 2 years imprisonment for count II and 1 year imprisonment for Count III

Aggrieved by the trial court's conviction and sentence, the Appellant filed this appeal. His grounds of appeal and submissions are in the Petition and Memorandum of Appeal he filed in Court on 23<sup>rd</sup> October 2013, and in Amended Grounds of Appeal and written submissions dated 8<sup>th</sup> June 2016 and Supplementary Grounds of Appeal dated 24<sup>th</sup> July 2017 that he availed to the Court.

The grounds of appeal are as follows:

- a) That the trial magistrate erred in law and facts in convicting the Appellant whereas the Appellant's constitutional right to a fair hearing enshrined in section 77 (1) (2) of the Constitution and Article 50 (2) ( f) (g) (h) and (k) of the Constitution were flouted and violated.
- b) That the learned trial magistrate erred in law and facts in failing to comply with the clear provision of section 211 of the Criminal Procedure Code.
- c) That the trial magistrate erred in law and fact in failing to comply with the clear provision of section 200 (3) of the Criminal Procedure Code.
- d) That the trial magistrate erred in law and fact in failing to comply with the provisions of section 177 of the Criminal Procedure Code.
- e) That the trial magistrate erred in law and fact by convicting him on a defective charge in capital counts.

It was the appellant's submissions that the trial court deprived him of his right to ownership of property where sufficient evidence had not been tendered. Further, that his right to fair trial was infringed. On this issue he cited **Funali Akhuya v. Republic (2003) KLR** where the court held that it was mandatory in terms of section 77 (2) that an accused person be tried in his presence. Further, that the trial magistrate proceeded to hear witnesses without complying with section 200 (3) of the Criminal Procedure Code, and he was convicted on a defective charge which was duplex.

Ms. Mogoi Lilian, the learned Prosecution counsel, filed submissions in response to the Appellant's appeal dated 27<sup>th</sup> February 2017, wherein it was argued that that whereas it is the Appellant's right to be heard, the said right is not absolute bearing in mind that the Appellant stormed out of court. That it was clear from the prosecution evidence that an offence of robbery with violence had been committed to which the Appellant did not give his defence. It was also submitted that all the ingredients of robbery with violence had been satisfied by the prosecution.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The prosecution called eight witnesses, Richard Kialyulo Kiten'ge (PW1), Francis Kyule Kimeu (PW2), David Musembi Musau (PW3), David Kimeu (PW4) and Mike Kathiaka David (PW5) who were the complainants, and they recounted the events of the morning of 13<sup>th</sup> October 2013 when they woke up to find their shops and/or bars broken into and goods stolen. Ag. I.P. Thomas Odenyo (PW6) testified as to the arrest of the Appellant. The evidence of these key witnesses will be detailed out and analysed later on in this judgment.

Dr. Emmanuel Loiposha (PW7) produced a post mortem report by showing the cause of death of a night watchman who was found dead at the scene of the offences, which he testified to be severe head trauma. PW8 was Chief Inspector Robert Kinyua's whose testimony was similar to that of PW6.

I have considered the arguments made by the Appellant and Prosecution and evidence in the trial Court. There are three issues raised by the Appellant which are firstly, whether the Appellant's right to fair hearing was infringed; secondly, whether the trial magistrate contravened section 200 (3) of the Criminal Procedure Code, and thirdly, whether or not the charge sheet was defective.

On the issue of the breach of the Appellant's right to a fair trial the relevant law is Article 50 (2)(f) of the Constitution which provides as follows :-

**“Every accused person shall have the right to a fair trial which includes the right:-**

**(f) to be present when being tried unless the conduct of the accused person makes it impossible for the trial to proceed.”**

In addition, section 194 of the Criminal Procedure Code provides as follows as regards the attendance of an accused person during trial:-

**Except as otherwise expressly provided, all evidence taken in a trial under this Code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any).**

In the present appeal, on 31<sup>st</sup> March 2013 after the Appellant had been asking for exhibits to be produced in the trial Court before the hearing, and the trial Court and this Court ruled on revision that the hearing proceeds without the said exhibits, the Appellant stated as follows:

**“I will not participate in the proceedings herein.”**

The trial magistrate then recorded as follows:

**“Accused 1 walks out, matter to proceed in his absence”**

The record shows that the hearing proceeded that day and thereafter in the Appellant's absence, who therefore did not cross-examine any of the witnesses or present his defence before judgment was delivered.

The Court of appeal in the case of **Aggrey Mbae Injaga vs Republic, [2014] eKLR** which involved similar facts held as follows as to whether the right of the accused person were thereby violated:-

**“The trial court then noted that as the accused had left the court of his own accord, it was impracticable to proceed with the hearing in his presence, and therefore ordered that the trial do proceed in his absence. We concur with Mrs. Murungi that the appellant had conducted himself in a manner to render the continuance of the proceedings impracticable by requesting**

**for numerous adjournments whenever the trial court sought to proceed with the matter and by walking out of court and refusing to participate in the proceedings.**

**We therefore find no merit in the assertion that the appellant was denied a fair hearing.”**

The Appellant in this appeal also voluntarily chose not to participate in his trial hearing and he cannot now allege violations of his right to a fair trial. In any event the Constitution in Article 50 (2) (f) of the Constitution does recognise and allow for the trial to proceed in such circumstances.

On the second issue as to non-compliance with section 200(3) of the Criminal Procedure Code, after perusal of the trial Court record, it is indeed the case that there is no record that Hon. P.N. Gesora complied with the section after taking over the hearing of the trial on 21/03/2012, and after reading the charges afresh to the Appellant. The trial had previously been heard until the close of the prosecution case, when a ruling was given on case to answer on 9<sup>th</sup> May 2008. Directions were thereafter then taken before Hon. Omange PM on 31<sup>st</sup> March 2011 that the trial starts *de novo* and PW1 had started giving his evidence, before the trial again started afresh before Hon. P.N. Gesora on 13<sup>th</sup> March 2013.

Section 200(3) of the Criminal Procedure Code in this respect provides as follows:

**“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”**

The Court of Appeal has emphasized on the importance of complying with the provisions of Section 200 of the Criminal Procedure Code in **Ndegwa vs Republic (1985)e KLR 534** and in **Richard Charo Mbole vs Republic, Criminal Appeal No. 135 of 2004**, and noted that failure to comply with Section 200 of the Criminal Procedure Code would in appropriate cases render the trial a nullity. There was thus an irregularity in the trial Court’s proceedings that is capable of disposing of this appeal.

I will nevertheless proceed to consider the last issue on whether the Appellant was convicted on the basis of a defective charge, for the record. The Appellant submitted that the charges in the capital counts were brought under Section 295 as read with Section 296(2) of the Penal Code. However, a perusal of the charge sheet in the trial Court shows that Count I on the offence of robbery with violence was brought pursuant to section 296(2) of the Criminal Procedure Act, and there was thus no duplicity.

This finding notwithstanding, it is notable that one of the ways a charge may be defective is when it is not supported by the evidence that is adduced in support thereof. The Court of Appeal in **Yongo vs Republic [1983] KLR, 319** did hold that a charge that is not disclosed by evidence is defective and stated as follows in this regard:

**“In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:**

**(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or**

**(b) it does not, for such reasons, accord with the evidence given at the trial; or**

**(c) it gives a misdescription of the alleged offence in its particulars.”**

This holding was explaining the circumstances when a charge is considered to be defective in substance, so as to guide a court when it is altering the said charge.

In the present appeal, it necessary to reproduce the evidence adduced in the trial Court to understand the import of this issue. The testimonies were as follows: Richard Kialyulo Kiten'ge (PW1) testified that when he had gone to his shop at Ikalioni market at about 6.30 am on 13<sup>th</sup> October 2004, he found both front metal door and wooden door which he said he had securely locked the previous night wide open. From outside, he saw the items in the shop were scattered on the floor. The drawer in which he had kept KShs. 5,000/- was lying outside the shop empty. On entering he found his radio cassette make national missing together with other shop goods. The said missing items were blue band, batteries, tea leaves, maize and wheat flour, exercise books, tapes and cooking fat worth Kshs 20,000/=.

That 15 minutes later, the other shop keeper Lydia Dominic arrived and asked whether his shop had been broken into. When he confirmed, she informed him that a night watchman one Muambi had been murdered and his body was lying beside her shop. He went to the scene and confirmed that the body was the guard's. He then reported the matter to Kilome police station after which the police visited the scene.

PW1 testified that the police called them to identify some items which had been recovered as stolen. The Appellant was then taken from the police cells and led PW1 and police officers to his kiosk at Kilome market. From the kiosk PW1 identified his radio cassette make national from among other items that were at the kiosk. He stated that he was able to identify it due to a repair that had been done on its handle which had broken. He pointed to a wire which he said also helped him identify his radio. He also identified packets of tea leaves, packets of match boxes, and dry cells which were recovered from the kiosk shop as his.

Francis Kyule Kimeu (PW2) stated that on the morning of 13<sup>th</sup> October 2004, he was informed that his bar had been broken into. He reported the crime, and in company of police officers from Kilome police station went to his bar. Thereupon, he found that 4 crates of beer, a radio make Sanyo, and assorted cigarettes and five packets of S.M. Cigarettes were missing. On 16<sup>th</sup> October, 2004 he was told some goods had been recovered and went to the Appellant's shop where he saw some cigarettes, but that he could not link them to his shop.

David Musembi Musau (PW3) testified that when he went to his shop and bar on 13<sup>th</sup> October, 2004 at about 7.00 am , and found the front door damaged and merchandise were scattered on the floor. That he lost flour, cigarettes, beer, tea leaves, Metamin tablets, and cash of KShs. 7,500/- which had been stolen. He reported the matter to Kilome police station. On 16<sup>th</sup> October, 2004, he recorded his statement and was thereafter asked to identify his items from those that had been recovered by police. He identified his solar panel. The Appellant was thereafter taken from the cells and led him and the police to his kiosk where PW3 identified some tablets.

David Kimeu (PW4) testified that on 13<sup>th</sup> October 2004, he went to open his shop at about 7.00 am and found a crowd. On inquiring what was going on, he was informed that there had been a robbery and a night guard by the name Musiu Mwambi had been killed. He was later informed by his son that his shop had been broken into and a solar panel had been stolen from the roof of the shop. On 18<sup>th</sup> October 2004 he went to Kilome police station and identified his panel.

Mike Kathiaka David (PW5) recounted that as he was on his way to school on 13<sup>th</sup> October, 2004 when he saw people beside a shop on both sides of the road. Later, that evening he went to his father's shop and found that the solar panel frame was open. On getting closer he realized it was missing. On 21<sup>st</sup> October, 2004 he was summoned to Kilome police station where he identified the solar panel.

Ag. I.P. Thomas Odenyo (PW6) stated that he received a tip off on 14<sup>th</sup> October, 2004 that a group of young men had been involved in robberies, and together with his colleagues proceeded to the Appellant's kiosk where they found the appellant, Paul Kingoo and Ngei Kikumu. They arrested the three and went the Appellant's home where they recovered 2 solar panels. When they got back to the police station they got reports of robberies on the night of 12<sup>th</sup> and 13<sup>th</sup> October 2004 from two shops and a bar that had been broken into, and decided to take the owners to the Appellant's shop where they identified some of their goods. He produced some of the goods as exhibits. PW6 admitted that not all the stolen goods were

before the court since they had gotten lost in an accident.

It is notable and evident from the evidence tendered by the Prosecution that that none of the key witnesses being PW1, PW2, PW3, PW4, PW5 and PW6 placed the Appellant at the scene of all the offences, nor identified him as the person who committed the offences he was charged with. Indeed, none of the witnesses were present at the scene of the crimes at the time of commission.

In addition, no evidence of critical elements of the offence of robbery with violence and the particulars in the charge sheet was adduced. In particular, no evidence of the dangerous and offensive weapon either found with or used by the Appellant was tendered. There was also lack of eye witness accounts that the Appellant was in company of one or more other person or persons during the commission of the alleged offences.

Furthermore, **there was no evidence linking the Appellant to the deceased guard who was found at the scene of the crimes, nor of how the Appellant is alleged to have caused the said death.** It is notable that PW5 in this respect testified that he arrested the Appellant in his kiosk the next day, on a tip-off from informer. The informer was not called to testify as to the source of their information.

In addition, no evidence of the complainants' ownership or possession of the stolen goods alleged to have been recovered from the Appellant was brought by PW1, PW2, PW3, PW4, and PW5, who on the contrary identified them as their property by various marks on the goods while giving evidence at the dock, with some of the witnesses indicating the goods recovered were similar to their stolen goods. Proof of ownership of the stolen goods is a central element of theft both in **the offence of robbery with violence and stealing.**

**In the same vein, the doctrine of recent possession cannot be held to apply to the Appellant, as this presumption only arises once the conditions of ownership by the complainant of the article in question, theft of the article from the complainant and its recent possession by the accused person are proved, as held by the Court of Appeal in Arum vs Republic (2006) I KLR 233**

**The alternative charges against the Appellant of handling stolen property cannot also stand in the absence of proof of ownership of the said goods.**

**I therefore find that the offences of robbery with violence, breaking into a building and committing a felony, and stealing were not proved beyond reasonable doubt, and the charge sheet was therefore defective to the extent that the evidence adduced by the Prosecution did not disclose the offences therein.**

I accordingly hereby quash the conviction of the Appellant for the count of robbery with violence contrary to section 296(2) of the Penal Code, and set aside the sentence of death imposed upon the Appellant for this conviction. I also quash the conviction of the Appellant for the count of breaking into a building and committing a felony contrary to section 30 (a) of the Penal Code, and set aside the sentence of 2 years imprisonment imposed upon the Appellant for this conviction. Lastly, I quash the conviction of the Appellant for the count of stealing and set aside the sentence of 1 years imprisonment imposed upon the Appellant for this conviction.

I hereby order that the Appellant be released from custody forthwith unless otherwise lawfully held.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 21<sup>ST</sup> SEPTEMBER 2017.**

**P. NYAMWEYA**

**JUDGE**