REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 164 of 2014

JAMES KINYOO MUSYA....................................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence

in the Chief Magistrate's court at Kibera Cr. Case 831 of 2011

delivered by Hon. B. M. Ochoi, PM on 22nd October 2014).

JUDGMENT

Background

James Kinyoo Musya, the Appellant herein was charged alongside another with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on 1st March, 2011 at Runda Estate within Nairobi County jointly with others not before the court, while armed with dangerous weapons, namely; bows and arrows, iron bars and firearms, robbed Hirani Kishori of a Macbook pro laptop valued at Kshs. 125,000/-, a Sony Bravia television valued at Kshs. 90,000/- and an Olympus camera valued at Kshs. 15,000/- and that at or immediately before or immediately after the time of such robbery used violence against Hirani Kishori Ramji.

The Appellant was arraigned before court and at the conclusion of the trial found guilty of the offence in question and sentenced to death. He was dissatisfied with both the conviction and sentence as a result of which he lodged the present appeal. In his grounds of appeal filed on 17th Jul, 2017 he was dissatisfied that the charge sheet was defective, that crucial witnesses did not testify, that investigations were shoddy and that his defence was not considered.

Submissions

The Appellant relied on written submissions filed on 17th July, 2017. His first ground of submission was that the charge sheet was defective because the person named as the complainant in the charge sheet one Hirani Kishori Ramji was not one and the same person who testified as the complainant, namely Ramji Hirani Kishor. Thus, the evidence did not support the charge sheet and vice versa. Secondly, he was of the view that crucial witnesses namely, the Diplomatic Police and KK Security guards who were the first to arrive at the scene of robbery were crucial witnesses who the prosecution did not call to testify. In

addition, one Claire Hirani who was listed as a prosecution witness did not also testify. The failure to call these witnesses, according to the Appellant, weakened the prosecution case. Thirdly, the Appellant submitted that the investigations were carried out in a shoddy manner. He pointed to the fact that the charges against his co-accused were withdrawn without any reasonable cause. In addition, the police failed to dust the scene of the robbery which fact would have established whether he was linked to the robbery. Further, the police would have taken the exhibit recovered from the scene for forensic examination so as to establish whether he was linked to the offence. Fourthly, the Appellant submitted that the fact that the P3 form of PW1 was produced by the witness himself rendered it inadmissible. Finally, he submitted that the failure by the trial magistrate to consider his defence implied that the court shifted the burden of prove upon himself which was against the rules of adduction of evidence in criminal cases.

Learned State Counsel, Miss Sigei opposed the appeal by way of oral submissions. On the issue of defective charge sheet, she submitted that it was clear that one Hirani Kishor Ramji was one and the same person as Ramji Hirani Kishor who testified as PW1. She submitted that the only difference in the name was interchanging which between the three names was written first. That being a technical error was therefore curable under **Section 382 of the Criminal Procedure Code**. On the identification of the Appellant, counsel submitted that he was caught red-handed at the scene and therefore the issue of mistaken identity could not arise. In addition, whether or not a P3 form was adduced did not negate the fact that the complainant was injured during the robbery. In addition, counsel submitted that the Appellant's defence was an afterthought and did not dislodge the strong prosecution case. It was her view, all the elements of the offence of robbery with violence were proved and urged the court to dismiss the appeal.

Evidence

The prosecution's case was that the complainant's house was attacked by robbers in the middle of the night leading to a tussle in which some of the robbers escaped with various electronics. However, they did apprehend one of the robbers, the Appellant herein.

PW1, Kishor Ramji Hirani the complainant resided in Runda. He recalled that on 1st March, 2011 he was hosting some guests at his house and as such the house had around eight occupants. At around 0300hrs while asleep in his bedroom which was on the 2nd floor he heard breakage noises from the ground floor. He woke up and as he was dressing he heard a lot of commotion from the 1st and ground floors. He also heard what sounded like gunshots and could smell smoke reminiscent of that produced by a fire cracker. He ran downstairs where he found three intruders who were fighting his two sons and his father.

He testified that when he got downstairs the Appellant arrived from outside and started hitting him and his wife with a rungu. They were at the same time raising alarm trying to alert their employees who were in the servant's quarters. Two of the servants ran out of the compound but others came to the house where they found him holding on to the Appellant with his wife's help. He testified that they subdued the Appellant after hitting him with a golf club. He tried to run after two other robbers but they threw stones at him and he retreated. He recalled that he saw about six or seven robbers who were armed with bows, arrows and metal rods.

He recalled that after his employees arrived they found some rope and tied up the Appellant. He then went to report the matter to the police at Runda Police Station who arrived 10 minutes later. He testified that there were security lights outside the house that allowed him to adequately identify the Appellant who was wearing a red cap. Further that they also found a black cap belonging to one of the other attackers. He took his wife and son to Aga Khan hospital for treatment.

In cross examination he stated that the Appellant hit him on his face, chest and right hand which sustained minor injuries.

PW2, John Kijana, was a watch man at PW1's residence. His testimony was that at about 1.00 am, he

heard some movement around the Kei apple fence and dogs barking. While approaching the dogs he was confronted by three people who escorted him into the compound through a hole they had made in the fence. They interrogated him about the state of security in PW1's compound. They then tied up his hands with shoe laces and legs with a piece of wire and gagged his mouth with a handkerchief. The attackers then got to the compound and he could hear the house windows being broken. Shortly afterwards, one of the thugs returned with a Television set and another robber with a laptop. He was able to free himself and he ran to a neighbouring compound where he informed its security guard what was happening. The said security guard one Tom then raised the police who asked him to report the matter at Runda Police Station. As he reported the matter at the police station, one of the suspects was escorted there but he could not identify him as he recalled that the robbers had worn masks.

PW3, PC Samuel Barnoo of Runda Police Station investigated the matter. He was informed about the incident by Sergeant Marwa. They both proceeded to the scene where they found the Diplomatic Police had already arrived. The Appellant was also at the scene under arrest. He confirmed that the robbers accessed PW1's compound through a hole cut through the Kei apple fence. He also confirmed that amongst the stolen items where a laptop, a camera and a television set all valued at Kshs. 199,000/=. In addition, he recovered a crowbar, two arrows, a bow, two sticks with fake exposure heads and two huts at the scene which he produced as exhibits. He re-arrested the Appellant and charged him accordingly. He also recorded relevant statements.

At the close of the prosecution case, the court ruled that the Appellant had a case to answer and was put on his defence. He gave a sworn statement of defence in which he denied his involvement in the robbery. His brief defence was that on the 29th February, 2011 he was walking towards a motor vehicle that had broken down when he met four people who confronted him and asked him whether he was part of a group he was not aware about. Before he could respond, the people beat him up and he became unconscious. When he came to, he found himself at Runda police post with serious injuries on the head and legs. He was taken to hospital on 1st March, 2011 at 10.00 a.m. and again on 2nd March, 2011. He was charged on 3rd March, 2011 and followed up on treatment while in custody.

Determination

This being the first appellate court, its duty is to re-evaluate the evidence and come up with an independent conclusion. In so doing, the court must bear in mind that it has neither seen nor heard witness and give due regard for that. **See Pandya v Republic (1957) E.A., 336.**

On summary of the evidence adduced, and the respective rival submissions, I have deduced the issues for determination to be; whether the charge sheet was defective, whether crucial witnesses were called and whether the case was proved beyond a reasonable doubt. On the issue of defective charge sheet, I have no doubt that he name Hirani Kishor Ramji named in the charge sheet refer to one and the same person as Ramji Hirani Kishor who testified as PW1. In my view, in his testimony, the witness only re-arranged the names. That alone is an error for want of form and did not render the charge sheet defective and is therefore curable under Section 382 of the Criminal Procedure Code.

Be that as it may, it is worthwhile to note that the Appellant's co-accused John Kijana Byegon testified as PW2 after the charge was withdraw against him under Section 204 of the Criminal Procedure Code. The prosecution did not consequently amend the charge sheet. The question that arises then is whether there was a misjoinder of the accused persons in the charge sheet. It also begs the question of whether the prosecution having called PW2 as its witness after the withdrawal of the charge against him rendered his accomplice evidence inadmissible. With regard to the former, I borrow the binding words by the Court of Appeal in the case of **Jason Akumu Yogo vs R [1983] eKLR** which held that:

> ***"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 the particulars."

It is clear that PW2 testified after his acquittal. Furthermore, the Appellant was clear on the charges facing him. The charge also clearly spelt out the offence in unambiguous manner. The evidence adduced also sought to establish the offence charged. Therefore, the continued existence of PW2's name in the charge sheet did not render the charge sheet defective or prejudice the Appellant. It is also a technical error curable under Section 382 of the Criminal Procedure Code.

On the issue of accomplice evidence, it is trite that the same must be subjected to the highest level of scrutiny before being relied upon because of its self-serving nature. Ordinarily, it should also be corroborated for the same reason. But in the instant case, the prosecution presented the evidence of PW2 after he had been acquitted. The witness therefore ceased to be an accomplice immediately after his acquittal. His evidence thereafter would be called by the prosecution as independent evidence. On the other hand, there lies the twist that even if PW2 was acquitted by the time he testified, he was inclined to implicate the Appellant to serve personal interest. The rationale in this case is very simple; because his acquittal was at the instigation of the complainant and was for purposes of adducing evidence for the prosecution. He was then bound to adduce evidence against the Appellant at all costs having been saved from the jaw's mouth. This being a peculiar circumstance, it is my view that PW2''s evidence calls for keen scrutiny. My analysis of the same drives me to conclude that it was not inherently self-serving because it barely presented a re-collection of the events that took place on the night of the robbery. It did not zero in on the participation of the Appellant in the robbery. The events alluded to were corroborated by the evidence of PW1. Any other material evidence relating to the identification of the Appellant and therefore as to the culpability of the Appellant was entirely adduced by PW1. Accordingly, I find and hold that the evidence of PW2 was admissible in the circumstances.

With regard to calling of crucial witnesses, the Appellant took issue with the failure to call the diplomatic police officers and KK police guards who arrived before PW3. I agree with the Appellant that probably the said witnesses would have set the ground for the evidence adduced by PW3. But critically evaluating the evidence they would have adduced, in my view, would have been repetitive of the evidence of PW3. After all, by the time the Diplomatic Police and the KK Security arrived at the scene, PW1 had already apprehended the Appellant which was the scenario as at the time PW3 arrived at the scene. Accordingly, the lack of the evidence of the said witnesses did not at all vitiate or weaken the prosecution case.

The Appellant further took issue with the fact that PW1's P3 form was not adduced by a medical expert. Indeed, a look at the evidence shows that it was adduced by the witness himself. **Section 77 (1) of the Evidence Act** provides that expert documents ought to be produced as exhibits by the makers. Under subsection (2), any other person who is presumed was conversant with the signature or hand writing of the expert document may attest to its authenticity and therefore produce it as an exhibit. For avoidance of technicalities, where the opposing party does not object to the production of the expert document by the person to whom it was issue, the court may allow its production. That is to say, notwithstanding the absence of the maker of the document, the document may be produced with the consent of the parties to a case by any other person other than the maker. The proceedings regarding the production of the P3 form were recorded as follows:

"we later went to the government doctor for taking of p3 forms, they are the ones before court. P3 form for Claire Harani is marked as Mfi – 3A dated 1/3/11.

P3 form of Claire Harani is marked as MFI 3B"

There is no evidence therefore that the P3 form was ever produced as an exhibit. The submission by the Appellant in this regard has no basis.

On whether the offence was proved beyond a reasonable doubt, I need not belabour the fact that the Appellant was caught red handed by PW1 after he accosted him and his wife. Upon subduing the Appellant, PW1 attempted to arrest other robbers but they threw stones at him and fled. There is no doubt that the robbers were armed with crow bars, bows and arrows. Further, they used actual violence against PW1 and one Claire Harani who sustained injuries. Although no medical report was adduced, the same does not negate the fact that the complainant and the said Claire Harani were injured in the cause of the robbery. Furthermore, the robbers stole a laptop, a television set and a camera. They were also more than one in number. Thus all the elements of the offence of robbery with violence were proved. The Appellant's defence just as the learned trial magistrate found was an afterthought and did not dislodge the watertight case for the prosecution. Therefore, upon my evaluation of the evidence, I find that the case was proved beyond a reasonable doubt.

In the result, I find the appeal without merit and dismiss it in its entirety. I uphold both the conviction and the sentence.

DATED AND DELIVERED THIS 20th DAY OF SEPTEMBER, 2017

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. Miss Sigei for the Respondent.