



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.108 & 109 OF 2011

(An Appeal arising out of the conviction and sentence of Hon. D.O. ONYANGO (MR.) - SRM delivered on 12th April 2011 in Kibera CM. CR. Case No.5690 of 2009)

FRANCIS MAINA KAMAU.....1ST APPELLANT

SAMUEL MWAURA KINYA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The 1st Appellant, Francis Maina Kamau and the 2nd Appellant Samuel Maina Kinya stood trial together before the magistrate's court as accused number 1 and 2 respectively alongside Irene Wanjiru Wambui as accused number 3. They were jointly charged with the offence of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the night of 8th December 2009 at Ongata Rongai Township in Kajiado District within Rift Valley Province, the accused, while armed with a dangerous weapon, namely a kitchen knife, jointly robbed Robert Mwangi Mbugua of two cell phones make Nokia 2600 and Huawei all valued at Kshs.17,300 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Robert Mwangi Mbugua. They were in the alternative charged with the offence of **handing stolen goods** contrary to **Section 322 (1)** of the **Penal Code**. The particulars of the offence were that on the same night and in the same place, the accused, otherwise than in the course of the robbery, dishonestly received or retained one cell phone make Nokia 2600 knowing or having reason to believe it to be a stolen good. When they were arraigned before the trial court, the accused pleaded not guilty to the charges. The prosecution called eight (8) witnesses to prove its case against the accused. After the close of the prosecution's case, the trial court found that the 3rd accused had no case to answer and proceeded to acquit her under **Section 210** of the **Criminal Procedure Code**. After full trial, the 1st and 2nd Appellants were convicted on the main charge of **robbery with violence**. They were each sentenced to death. The Appellants were aggrieved by their conviction and sentence and have each filled a separate appeal to this court

The Appellants' petitions of appeal raised several grounds of appeal. The 1st Appellant was aggrieved that he was convicted on the basis of his identification from a flawed identification parade. He was further aggrieved that the investigating officer was irregularly recalled after the prosecution had closed its case. On his part, the 2nd Appellant faulted the trial court for convicting him yet he was not identified by the prosecution witnesses during the identification parade. They both complained that the trial court relied on

contradicted and incredible evidence of the prosecution witnesses to convict them. They were also aggrieved that they were convicted on the basis of the alleged recovered items which according to them, were not found in their possession. In their amended grounds of appeal filed without leave of court (this court will however consider them), the Appellants raised the same grounds of appeal. They were aggrieved that they had been convicted on the basis of visual identification evidence of PW1 and PW2 yet the circumstances favouring positive identification were absent. They were also aggrieved that they had been convicted on the basis of the prosecution's insufficient and inconsistent evidence. The Appellants stated that the prosecution had failed to prove its case against them to the required standard of proof beyond any reasonable doubt. They faulted the trial court for shifting the burden of proof and thereby finding them guilty. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentence that was imposed on them.

The two separate appeals were consolidated and heard together as one for the purpose of this appeal. Prior to the hearing of the appeal, the Appellants filed their respective written submission in support of their appeals. This court further heard oral submission made by the 1st Appellant urging the court to allow his appeal. A response thereto was made by Ms. Sigei on behalf of the State. The 1st Appellant submitted that the complainant could not have properly identified his assailants for several reasons. First, he submitted that the complainant testified that the robbers wore marvins to disguise their faces and secondly because the incident was said to have taken just about two minutes. He further submitted that the phone that was mentioned in the charge sheet was not the same one produced into evidence during trial. Finally, the 1st Appellant submitted that the prosecution had adduced contradictory evidence regarding the circumstances of his arrest.

On his part, the 2nd Appellant was also of the view that the conditions for identification were not favourable for positive identification and demonstrated the various unfavourable conditions at the time of the robbery. He submitted that the whole robbery incident took about two minutes which according to him was a short period to allow the witnesses sufficient opportunity to observe the Appellant. He further submitted that the evidence of the complainant was not reliable as he was said to have been lying on the seat facing down during the robbery. He also submitted that both PW1 and PW2 must have been traumatized during the robbery hence there was a possibility of mistaken identification. The 2nd Appellant further submitted that there were glaring contradictions and inconsistencies in the evidence of the prosecution witnesses hence the prosecution's case was not proved to the required standard of proof beyond any reasonable doubt. He pointed out that while it was the prosecution case that he wore sunglasses during the robbery, it was also their case that the sunglasses were recovered from the 1st Appellant. He submitted that no stolen item was recovered from him hence the doctrine of recent possession cannot apply to him. He relied on the decision in **Bende –versus- Republic [2001] eKLR** to buttress his argument. In concluding his submission the 2nd Appellant averred that the trial court ignored his defence without giving reasons thus violated **Section 169** of the **Criminal Procedure Code**.

In response, Ms. Sigei for the State submitted that the prosecution had adduced sufficient evidence which connected the Appellants with the offence they were charged with. As far as the identification of the Appellants is concerned, the Learned State Counsel stated that the 1st Appellant was positively identified by PW1 as the house was lit. He had not covered his face. She stated that PW1 knew the 1st Appellant very well. He identified him as his aunt's brother whom he had met at the aunt's house. She argued that the incriminating evidence was that the 1st Appellant was found in possession of the stolen cellphone and a marvin that he was said to have worn during the robbery. She further submitted that a knife that was said to have been used during the robbery was also recovered at the scene where the Appellants were arrested. According to the learned State Counsel, the doctrine of recent possession applied in the circumstances. She submitted that the trial court considered the Appellants defence before reaching the decision to convict them. However, it was the learned counsel for the State's submission that the Appellants failed to explain their possession of the stolen phone. In concluding her remarks, Ms. Sigei submitted that the prosecution witnesses adduced cogent, credible and consistent evidence linking the Appellants to the robbery. She therefore urged the court to dismiss the Appellants' appeals.

The facts of the case as narrated by the prosecution witnesses are as follows. On the night of 8th January 2009 at about 10.00 p.m, two men invaded and robbed the house of PW1, Robert Mwangi Mbugua in Ongata Rongai and made away with two cellphones. At the time, PW1 was with his aunt, Irene Wanjiru and his sister PW2 Catherine Ngendo Mbugua in the house. PW1 testified that his aunt sent him for drinking water. He went outside to fetch it. He testified that as he left the house, he asked his aunt to close the door to prevent mosquitoes from entering the house. When he got back, he found his aunt standing at the door. He gave her the water. They remained there chatting. As they stood at the door, two men emerged from the dark and ordered them to get inside the house and lie on the seat. PW1 testified that one of their assailants wore a marvin on his head and was armed with a knife while the other wore sunglasses. He testified that he could see their faces as the room was lit with a light bulb. PW1 testified that he was able to identify the armed assailant as his aunt's brother whom he knew very well. This was the 1st Appellant. He testified that their assailants asked them to hand over their cellphones and threatened to stab them if they failed to comply. PW1 therefore showed them a Nokia 2600 and Huawei cellphones that were on the table. He testified that the assailants took the cellphones and proceeded to the bedroom. He managed to escape and ran outside to call for help.

PW2 testified that the two assailants found her in the bedroom with her baby. She also confirmed that one of them wore a marvin on his head and was armed with a knife while the other wore sunglasses. Her evidence was that she could also see their faces as they did not cover them. PW2 testified that the armed man got on top of her on the bed and she began to scream. She testified that the assailants were in her bedroom for about two minutes before they dashed outside the house when they heard PW1 raising alarm.

The Appellants were arrested shortly thereafter by security guards along Nyutu road in Ongata Rongai. The security guards, PW3 Joseph Mwendwa, PW4 Dominic Wasakera Omari and PW5 Francis Kioko Kiilu testified that they were on duty on the material night when they heard an alarm being raised. They testified that after a short while, they saw two men running towards them. They flashed a torch at them and asked them to stop. They testified that the men tried to escape but they gave chase and caught up with them. PW3 testified that he apprehended the 1st Appellant who was wearing a marvin at the time. He testified that he punched him on his tummy and a Nokia 2600 cellphone dropped from his pocket. The 2nd Appellant was tackled and arrested by PW5.

PW6 PC Jane Wangoi testified that on the day in question whilst on duty patrolling along Nyutu road, in Ongata Rongai, she was stopped by the said security guards. They told her that they had apprehended the Appellants who had been on the run following an alarm that had been raised. She was shown a Nokia 2600 cell phone that was said to have been dropped by the 1st Appellant. A report of the incident was made to Ongata Rongai Police Station. PW7 Cpl. Gichuki Dariri and PW8 PC Erickson Nyawamwega were on duty at the police station at the time. They testified that they proceeded to the scene where they found that the Appellants had already been apprehended. PW8 testified that he conducted a search on the Appellants and recovered a marvin and sunglasses from the 1st Appellant's jacket. He testified that he was also given a Nokia 2600 cell phone that was recovered from the 1st Appellant. They testified that they were shown the home where the robbery was said to have occurred. They met with PW1. They testified that PW1 reported that the Appellants had entered their house while armed with a knife and made away with two cellphones. PW8 testified that they returned back to where the Appellants were arrested to comb the area in search of the second cellphone. They recovered the Huawei phone and a knife on the grass. PW8 produced in evidence the marvin, knife, sunglasses, Nokia 2600 and Huawei cellphones, receipts as proof of purchase of the cellphones and the Appellants' Nokia cell phones as prosecution's exhibits. According to the evidence of PW7 and PW8, the Appellants told them that the robbery had been staged by PW1's aunt, Irene Wanjiru. They testified that they were satisfied that the 1st Appellant knew PW1's aunt since he had saved her telephone details in his phone. Appellants were therefore arrested alongside the said Irene Wanjiru and charged with the present offences.

When the Appellants were put on their defence, they denied committing the offences. They both claimed that they had left work at about 9.30 p.m and were on their way home when they were arrested by the security guards. They stated that they were told that they had been arrested because an alarm had been raised. They denied any knowledge of the robbery. After the close of the defence case, the prosecution applied to the

trial court to recall PW8 to produce evidence in response to the 1st Appellant's defence and in particular to rebut the 1st Appellant's assertion that he did not read his statement made to the police following his arrest. The trial court granted the prosecution application under **Section 212** of the **Criminal Procedure Code**. The 1st Appellant statement was therefore produced into evidence as prosecution's exhibit confirming that the 1st Appellant read and understood the contents of his statement recorded at the police station.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (see Njoroge -vs- Republic [1987] KLR 19). The issue for determination by this court is whether the prosecution proved its case on the charges brought against the Appellants of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully evaluated the evidence adduced by the prosecution witnesses before the trial court. It has also considered the defence that was put forward by the Appellants. The court has also considered the grounds of appeal that the Appellants relied on in support of their respective appeals. It has also read the written submission filed by the Appellants and re-evaluated the oral submission made by both the 1st Appellant and Ms. Sigei on behalf of the State. It was evident from the facts of this appeal that the prosecution relied on direct evidence of identification, the arrest of the Appellant and the recovery of the stolen items to secure the conviction of the Appellant. As regard the evidence of identification, PW1 and PW2 testified that they were able to identify the Appellants during the robbery. This court's evaluation of the evidence of identification leads it to the conclusion that it was not possible in the hectic circumstances of the robbery for the complainants to have been positive that they identified the Appellants. The complainants testified that the robbers wore disguises during the robbery. One wore a marvin which covered his head while the other wore sunglasses. PW2 testified that the robbery took about 2 minutes. PW1 testified that after he had been threatened with a knife, he showed the robbers to the table where he had left his two mobile phones. When the robbers entered the house, PW1 made good his escape. He raised alarm and sought assistance of his neighbours to apprehend the robbers. The complainant's testimony to the effect that in this short period they were able to positively identify the Appellants as being the persons who robbed them is therefore incredible. It was clear to this court that in the short time that the robbery took place, it was improbable that the complainants were able to register the physical and facial features of the Appellants in order to be positive that they had identified them as the robbers. The circumstances in which the robbery took place i.e. at night, was not conducive to positive identification. That evidence by itself cannot sustain the conviction of the Appellants.

The prosecution further testified that in the course and immediately after the robbery, the complainants raised alarm to alert the neighbours of the robbery. PW3 and PW4 who were employed as security guards along the same road where the complainants' house was situated, responded to the alarm. They saw two men running from the direction where the alarm was being raised. They gave chase and were able to apprehend them. The two men are the Appellants. It was clear from the testimony of PW3 and PW4 that at that time of the night, there were no other persons who were in the vicinity. They were therefore able to run in hot pursuit of the Appellants with ease. The Appellants' defence to the effect that they were innocently walking along the said road at that time of the night is therefore not believable. Upon their apprehension by PW3, PW4 and PW5 who also arrived at the scene, the 1st Appellant was found wearing a marvin. This is the same marvin that the complainants had testified that one of the robbers was wearing. PW2 also recovered a Nokia 2600 mobile phone which the 1st Appellant had thrown to the ground when he was apprehended. This mobile phone was later positively identified by PW1 as the one which was robbed from him.

After the report of the robbery was made to the police based at Ongata Rongai Police Station, PW7 and PW8, police officers who were on duty at the time, accompanied the complainant to the scene of robbery. They found the Appellants already apprehended by PW3, PW4 and PW5. The Appellants were arrested. A search was conducted at the scene. A knife and a Huawei mobile phone were recovered in the grass

within the vicinity where the Appellants were apprehended. Sunglasses were also recovered from the Appellants. The fact that the Appellants were apprehended with sunglasses corroborated the testimony of the complainants which to the effect that one of the robbers was wearing sunglasses at the time of the robbery.

It was clear to this court that upon analysis of the evidence adduced by the prosecution witnesses, it was evident that the Appellants were apprehended a few minutes after the robbery incident. Although the evidence adduced by the complainants regarding their identification of the Appellants was not watertight, nevertheless, this evidence taken in addition to the evidence of the circumstances regarding the apprehension of the Appellants so soon after the robbery and the recovery of the stolen items in the Appellants' possession is sufficient evidence to the required standard of proof beyond any reasonable doubt that indeed the Appellants were the persons who robbed the complainants. The Appellants defence to the effect that they were innocent persons who were going home after work does not wash. This was because of the circumstances of their arrest. *If they were indeed innocent as they claimed, why were they running? Why didn't they stop when they were requested to do so by PW3 and PW4?* And if they are blameless, how come they were found in possession of mobile phones which had just been robbed from the complainants? Taking into consideration the totality of the evidence adduced, it is clear that the evidence adduced by the prosecution witnesses was cogent, consistent and corroborated in all material respects. The defence of the Appellants on the other hand did not dent the otherwise strong evidence that was adduced against them.

As regard whether the ingredients of the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** was established, this court holds that indeed the ingredients were established. The Appellants, being two in number, went to the homestead of the complainants, and while there, threatened the complainants with a knife, which is a dangerous and offensive weapon, after which they robbed the PW1 of his two mobile phones. The charge was therefore proved to the required standard of proof beyond any reasonable doubt.

In the premises therefore, the respective appeals lodged by the Appellants are hereby dismissed. The conviction of the Appellants by the trial magistrate's court is hereby upheld. The sentence imposed upon them is legal. It is also upheld. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF JULY 2016

L. KIMARU

JUDGE