REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL CASE NO. 16 OF 2014

JAMLICK KINYUA KITHAKA…...…………..…………APPELLANT

AND

REPUBLIC……………………………..…………..….RESPONDENT

BEING AN APPEAL FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT (B. M. OCHOI), WANGURU CRIMINAL CASE NUMBER 723 OF 2011 DELIVERED ON 22ND FEBRUARY , 2012)

JUDGMENT

The appellant herein, **Jamlick Kinyua Kithaka** was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** before Principal Magistrates Court at Wanguru Criminal Case No. 723 of 2011. He faced the said charge together with one Stephen Murimi Nyaga a co-accused and 2nd accused at the trial. The particulars of the charge were that on 4th day of October, 2011 at Bahati Estate within Kirinyaga County jointly robbed Edith Njoki Murage, the complainant of Kshs.2,000/= and a headscarf all valued at Kshs.2,800/= and at the time of such robbery used a larbuta (Baruti) or an improvised explosive device on the said complainant. The appellant also faced an alternative charge of handling stolen property contrary to **Section 322 (2)** of the **Penal Code**. The two denied the offence but after trial the court found the Appellant guilty of the main charge, convicted him and sentenced him to serve death sentence. The 2nd accused was found not guilty and acquitted.

1. The record of proceedings shows that the state called four witnesses in support of their case against the Appellant which was majorly circumstantial and based on the principle of recent possession. The brief evidence concerning the case indicated that Edith Njoki Murage (P.W.1) the complainant was in her house on 4th October, 2011 resting when at around 9.30 p.m. someone tricked her into opening her door after which a struggle ensued and in the process she was hit in the mouth and she heard a loud bang outside. She told the trial court that the robber then snatched a wallet containing Kshs.2000 and a scarf he was trying to use to block her mouth to stop her from screaming. The robbers then ran away as she screamed for help. The Police were later called but the robbers had already left. The following day on 5th October, 2011 at around 4.00 a.m., the Appellant was arrested with the scarf that had been stolen from the complainant. The complainant was called to Wanguru Police Station where she gave a description of the headscarf and on being shown the scarf she identified it. Before she went to the Police Station, she had also recovered the improvised explosion device which had been used the previous night by the robbers in a bid to scare her. The Appellant and the co-accused who was arrested at a later stage were charged with the offence. The Policemen (P.W. 2 and P.W. 3) who arrested the Appellant told the trial court that the Appellant named the co-accused – as the person who had assisted him in the robbery incident.

2. When put on their defence the Appellant on his part denied that he was involved in the said robbery incident and in unsworn defence told the trial court that the Police had previously approached him to assist them in tracing people associated with the outlawed Mungiki sect. It was his defence that his reluctance to assist the Police created a grudge between them and him and that he was going about his business in the early hours of 5th October, 2011 when he was arrested and charged with the offence.

The co-accused also defended himself and denied being involved in the robbery. The trial court found no evidence linking the 2nd accused and acquitted him. However, the learned trial magistrate found the Appellant guilty after dismissing his defence observing that the story given was not credible and that what he alleged he was going to do was at that hour not convincing. The learned magistrate found that the prosecution had proven their case and that the evidence tendered on recent possession of the scarf recovered from him inferred that he was one of the two men who had robbed the complainant.

3. The Appellant felt aggrieved by that decision and filed this appeal citing seven (7) grounds and later with leave of this Court added seven other additional grounds. The grounds are summarized as follows:

> ***i. That the learned trial magistrate erred in law in finding a conviction based on evidence of a single witness who failed to pick out the appellant on the identification parade.***
>
> ***ii. That the learned trial magistrate erred in law and fact by failing to find that the charge sheet was defective in the sense that it omitted essential ingredients of the offence.***
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> ***iii. That the learned magistrate erred in law in finding a conviction based on contradicting and inconsistent evidence that created doubts that could not sustain a conviction.***
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> ***iv. That the learned trial magistrate erred in law by rejecting the Appellant's defence without good reasons.***
>
> ***v. That the learned magistrate erred by failing to note that his constitutional right under Section 77 as read with Section 150 of the Criminal Procedure Code were violated.***
>
> ***vi. That the trial court erred by shifting the burden of proof to the Appellant.***

4. The Appellant in his written submission contended that the charge sheet produced at his trial was defective as it did not contain essential ingredients of armed robbery and in his view the charge sheet should have included words in the particulars of the charge "…….armed with dangerous or offensive weapons." He submitted that under a charge under **Section 296 (2)** of the **Penal Code** must state that an accused was armed with dangerous or offensive weapon or was in the company of one or more persons and immediately after the robbery wounds, beats or strikes the victim or uses any other form of violence. He cited the cases of **(i) Erick Macharia Mugo and Ano -Vs- R (unreported Cr. A. No. 32 of 2014 C.A. at Nyeri, (ii) Juma -Vs- R. (2003) 2 E.A. 471** and **(iii) George Omondi -Vs- R. unreported (CR. A. NO. 5 of 2005)** to buttress that position.

5. The Appellant also submitted that the offence took place at around 10.00 p.m. and that in view of the fact that it was dark, the complainant could not have seen the robber snatch her purse that contained Kshs.2,000/=. He contended that if it was dark the robber would not have been able to pick up the headscarf as well. He also pointed out that the Appellant was arrested with the headscarf around his head while another one said the head scarf was around his neck. He further pointed out that P.W. 2 told the trial court that the Appellant was arrested in the early morning of 5th June, 2011 while P.W. 3 told the trial court that the Appellant was arrested on 5th October, 2011. In his view the two witnesses were in the same group of officers who arrested the Appellant and because they gave contradictory and inconsistent dates of arrest their credibility was questionable and that the trial court ought to have given the benefit of doubt to the Appellant. He also pointed out that P.W. 2 told the court that the robbery took place on 6th April, 2011 while P.W. 1 stated that she was robbed on 4th October, 2011.

6. The Appellant faulted the trial court for shifting the burden of proof by observing in his judgment that the Appellant had not given a credible story to convince him that he was going to do some work. He further submitted that his defence that the Police had a grudge against him was not considered and cited a case where it was decided that it was wrong to convict a person simply because the defence is weak.

7. The Appellant also pointed out that there was no evidence that any money stolen was recovered from the Appellant pointing out that even the scarf recovered did not have proof that it belonged to the Appellant. He further stated that the report booked on the Occurrence Book showed the name of the complainant as Edith Njoki Philip while the complainant testified that her name was Edith Njoki Murage. It was contended that there was no evidence tendered to prove the two names belonged to one and the same person.

8. The Respondent through the office of Director of Public Prosecution represented by Mr. Sitati opposed this appeal and supported both the conviction and the sentence meted out against the Appellant. Mr. Sitati denied the Appellant's contention that the charge was defective and contended that even if it was defective the evidence tendered in the trial court was overwhelming and conviction could still stand notwithstanding.

9. Mr. Sitati conceded that the prosecution case against the Appellant was hinged on circumstantial evidence and the doctrine of recent possession applied as the Appellant was arrested a few hours after the robbery with a headscarf belonging to the Appellant which had been stolen during the robbery.

10. Mr. Sitati denied that the prosecution case was marked with contradictions and inconsistencies. He explained that the offence took place on 4th October, 2011 and there was no possibility of the Appellant being arrested on 5th June, 2011 for an offence that was committed on 4th October, 2011. He submitted that the date of 5th June, 2011 indicated in the proceedings was a typographical error or error in the handwriting on the part of the learned trial magistrate which did not go to the root of the prosecution case.

11. The Respondent submitted that the circumstantial evidence tendered especially the recovery of the headscarf and the corroborating evidence by the arresting officers was strong and sufficient evidence to support the conviction. In his view all the necessary ingredients of the offence were established and proved by the prosecution case.

12. This appeal raises the following issues for determination:-

i. Whether the charge sheet is defective;

ii. Whether the doctrine of recent possession applied in the case against the Appellant;

iii. Whether the prosecution case had contradictions and inconsistencies and if yes how significant were they.

iv. Whether the prosecution discharged their burden of proof and if the trial court shifted the burden to the Appellant.

13. **(i) Whether the Charge Sheet was defective**

The Appellant contended that the Charge Sheet omitted important words to constitute an offence under **Section 296 (2)** of the **Penal Code** in view of the fact that the charge did not contain the word "armed with dangerous or offensive weapon" and that that without those words the Charge Sheet was fatally defective. The law provides for what constitutes an offence under **Section 296 (2)** of the **Penal Code** and **Section 295** of the **Penal Code** defines robbery as follows:

> ***"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is***

guilty of the felony termed robbery."

The Appellant was charged with robbery with violence contrary to **Section 296 (2)** of the **Penal Code** which provides as follows:

> ***"If the offender is armed with any dangerous or offensive or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person he shall be sentenced to death."***

The use of the conjunctive word "or" means that any of the situations described in the above section will suffice to create an offensive whether on their own or in the combination of any of the circumstances. Now going back to the particulars in the Charge Sheet presented to the trial court against the Appellant, they were as follows:

> ***"On the 4th day of October, 2011 at Bahati Estate within Kirinyaga County jointly robbed Edith Njoki Murage cash Kshs.2000, one purse and one headscarf all valued at Kshs.2,800/= and at the time of such robbery used a larbuta (Baruti) on the said Edith Njoki Murage"***. (emphasis added).

The above particulars clearly bring out two elements or ingredients to the offence of robbery under **Section 296 (2)** of the Penal Code. The two elements as indicated are the fact that the Appellant acted jointly with another person who in the case was the 2nd accused. Secondly the use of the improvised explosive device described locally as "larbuta" ("Baruti") during the robbery brought in the element of violence or threat to violence or use of offensive weapon or instrument that was aimed at overcoming resistance that the complainant had mounted. In my view the ingredients of the offence under the above quoted section were well captured and Charge Sheet was therefore not defective. It was proper and competent. It was not necessary for the Charge Sheet to contain the words "armed with dangerous or offensive weapons" for it to be competent. In the case of **Shadrack Karanja Nyambura -Vs- Republic [2006] eKLR** a two judge bench sitting in **Nairobi Criminal Appeal No. 119 of 2005** made the following observations;

> ***"As already stated there are three ingredients, any one of which is sufficient to constitute the offence of robbery with violence under Sections 296(2) of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument that would be sufficient to constitute the offence too. And lastly if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person that would be yet another set to constitute the offence.***
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> ***Where the prosecution is relying on one or the other ingredients or elements to prove its case, then the omission of the words "dangerous" or offensive" is not fatal to a charge of robbery with violence under Section 296 (2) of the Penal Code."***
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> (See also **Hassan Mohammed Naswiba -Vs- R 2014 eKLR**, and **Peter Nganga Nduta -Vs- R 2014 eKLR).**

14. **(ii) Doctrine of recent possession**.

There is no doubt that the prosecution case against the Appellant was circumstantial and hinged on the fact that the Appellant was arrested a few hours with a headscarf that was stolen from the complainant during the robbery incident. The Complainant told the trial court that she was called to Wanguru Police Station where the accused had been detained and on reaching the station she was asked to give a description of the headscarf stolen. She described that it was pink and flowery and had acid stains on it. When she was shown she identified it as hers. The same item was produced as an exhibit during trial and there was no doubt that the scarf belonged to the complainant. The Appellant did not claim it nor did he offer an explanation on how he came across it even in his defence. The headscarf was recovered just

about 5 hours after the robbery and he Court of Appeal in the case of **Erick Otieno Arum -Vs- R, (2006) eKLR** made the following observation concerning applicability of the doctrine of recent possession.

> ***"In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case the possession must be positively proved. In other words there must be positive proof first that the property was found with the suspect, secondly that, the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly that the property was recently stolen from the complainant.."***

15. The prosecution witnesses (P.W. 2 and P.W. 3) the Police officers who arrested the Appellant at around 4.00 a.m. on 5th October, 2011 a few hours after the robbery incident told the trial court that the Appellant looked suspicious and had the headscarf that was later identified by the complainant. The Appellant submitted that the evidence of the two officers were inconsistent in that one said that the headscarf was tied on his head while the other said the headscarf was on his shoulder. However the evidence tendered by the two witnesses were in tandem. They both stated that the headscarf was tied on the suspect's head.

16. It is true as submitted by the Appellant that the complainant did not pick him out during the identification parade but the complainant told the trial court that lights were off and could not identify the assailant but that in my view did not negate the applicability of the doctrine of the recent possession in the case. The Appellant identified the headscarf by its colour, print and the acid stains on it. In his unsworn defence the Appellant offered no explanation on how he came across the stolen item. He told the trial court that he was going to pack tomatoes to be taken to the market but did not say whose tomatoes it was where it was located, and the reasons for carrying out the work at such hour. It was therefore plausible to find the story by the Appellant incredible. It was not convincing and I do not find it convincing either upon re-evaluation. It is also important to note that once a suspect is caught with stolen goods that have been positively identified by the owner, the burden shifts to the suspect to give an explanation on how he came across the stolen goods otherwise an inference will be made that he was among the offenders who took part in the theft or the robbery. The Appellant in this case cannot therefore fault the trial magistrate for making an inference against him in the case facing him.

17. **(iii) Inconsistencies and contradictions**

I have already ruled out the Appellant on whether the prosecution witnesses contradicted themselves on where the headscarf was located. The evidence tendered by the arresting officers was consistent that the headscarf was tied on his head. The other issue pointed out was the date of the offence. It was pointed out that while the other prosecution witnesses told the trial court that the offence took place on 4th October, 2011, P.W.2 told the trial court under cross-examination the incident took place on 6th April, 2011. I have checked at the proceedings including the handwritten proceedings and I have noted that indeed P.W. 2 – P.C. Stephen Mutua, told the trial court both in chief and under cross-examination that the robbery incident took place on 6th June, 2011 and 6th April, 2011 respectively and arrested the Appellant on the same date. However, I consider the discrepancy on the dates to be minor and insignificant as it did not affect the probative value of the evidence of the witness. It is given that the incident took place on 4th October, 2011 and the evidence of the other prosecution witnesses were positive on this. The discrepancy was in my view minor and perhaps that is why it escaped the attention of both the prosecution and the trial court. In the case of **DANIEL NJOROGE MBUGUA -VS- R [2014]** the Court of Appeal when faced with similar circumstances observed as follows:

> ***"From the record, we find that the evidence of P.W.1 and P.W.2 was consistent and their testimonies corroborative. Any discrepancies or inconsistencies in the evidence adduced by the prosecution were minor and did not weaken the probative value of the evidence on record."***

This Court further finds that during the trial the date of the offence was not an issue because the Appellant was aware that he was defending himself against an incident that had taken place on the 4th October, 2011. The charge sheet clearly indicated that the offence took place on the 4th October, 2011 and I agree

with the Respondent that the Appellant could not have possibly been arrested in June for an offence that was to be committed in October the same year.

18. Whether the prosecution proved their case beyond doubt

The Appellant has contended that the prosecution did not prove their case to the required standard in law and that the trial court should have given him the benefit of doubts in the case. He pointed out that the complainant told the trial court that a purse containing Kshs.2000/= was snatched from the table by the robber but that it was dark at the time and so the complainant could not see the purse being snatched and similarly the robber could not have been able to see the purse. He also contended that not a single coin was recovered from him. I have looked at the basis of conviction which in my view was not based on the stolen purse or Kshs.2000/=. It was based on the fact that the Complainant's head scarf was stolen during the robbery and a few hours after the incident the Appellant was caught looking suspicious and on being arrested he was found with a headscarf that was clearly identified by the complainant as hers. The Police officers who arrested the Appellant had prior knowledge that the item had been stolen among other items. In my view in robbery incident for example where 10 items are stolen, and if one of the ten items is recovered from a suspect and positively identified by the owner, it is sufficient to sustain a conviction irrespective of the fact that the other items are not recovered. In this case, the prosecution proved its case at the trial beyond reasonable doubt. The points pointed out by the Appellant in my view could not create any doubt in the mind of the trial magistrate given the evidence tendered as a whole by the prosecution witnesses even if the evidence of P.W. 2 was to be discarded. The entire evidence on record in my view left no doubt that it was the Appellant who had robbed the complainant in the manner described. The trial court considered all the evidence presented and the defence and having done so came to the right inevitable conclusion. The Appellant was guilty of the offence as charged.

In the premises this Court finds no merit in this appeal. The same is dismissed, the conviction and the sentence is affirmed.

Dated and delivered at Kerugoya this 28th day of July, 2016.

R. K. LIMO

JUDGE

28.7.2016

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Appellant present

Interpretation English Kiswahili

Sitati for respondent present

Appellant in person.

COURT: Judgment signed, dated and delivered in the open court in presence of Jamlick Kinyua Kithaka.

R. K. LIMO

JUDGE

28.7.2016