



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.228 OF 2011

(An Appeal arising out of the conviction and sentence of Mrs. Nyakundi – PM delivered on 2nd September 2011 in Kibera CM. CR. Case No.5269 of 2009)

IBRAHIM MAKOKHA WANDERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Ibrahim Makokha Wandera, was 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 8th November 2009 at Abantu Development along Mbaazi Road in Nairobi County, the Appellant, jointly with others not before court while armed with dangerous weapons namely pistols and knives robbed David Makokha Were of a TV set make Sony, one DVD machine make LG, two mobile phones make 1202 and Kabambe, one brown jacket and a pair of shoes all valued at Kshs.33,300/- and at the time of the robbery used actual violence on the said David Makokha Were. The Appellant was further charged with the offence of **office breaking and committing a felony** contrary to **Section 306 (A)** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellant, jointly with others not before court broke and entered into the office of Abantu Development and therein committed a felony namely stealing and did steal three 3 copiers, CPU, six computer desktops, two orange scratch cards, one scanner, two laptops, one server, one Sony camera Serial No.1981974, three Standard Chartered Bank cheque books, cash Kshs.50,000/- and one handbag all valued at Kshs.366,700/- the property of the said Abantu Development. He was in the alternative charged with the offence of **handling suspected stolen property** contrary to **Section 322 (2)** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellant otherwise than in the course of stealing, dishonestly retained one Sony camera, two orange scratch cards, three Standard Chartered Bank cheque books and one handbag knowing or having reason to believe them to be stolen goods. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charges. After full trial, he was convicted on the two main counts of **robbery with violence** and of **office breaking and committing a felony**. He was sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for failing to make a finding that the prosecution failed to adduce

evidence linking him to the offence. He took issue with the fact that crucial witnesses had not been called to testify in the case. The Appellant was also aggrieved that he had been convicted yet his defence had been ignored. In his amended grounds of appeal filed without leave of court (this court will however consider them) the Appellant was aggrieved that the trial court erred in relying on the contradictory and insufficient evidence of PW1 and PW3. He faulted the trial magistrate for shifting the burden of proof and thereby finding him guilty. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He further made oral submission in further support of his appeal. In his submission, the Appellant denied committing the offences. Nonetheless, he informed the court that during the period of his incarceration, he had learnt a trade. He is now skilled in carpentry and upholstery. He therefore urged the court to acquit him. Ms. Aluda for the State opposed the appeal. She made submissions to the effect that the prosecution had established its case on the charges against the Appellant to the required standard of proof. She submitted that the prosecution had proved that the Appellant staged a robbery at his place of work and was therefore an accomplice in the robbery. Ms. Aluda further submitted that the prosecution had adduced evidence to show that the Appellant failed to raise alarm as the robbery incident took place despite having been requested to do so by PW3. She also submitted that the Appellant further attempted to run away following the incident but was apprehended by guards manning the neighbouring premises. She submitted that at the time of his arrest, the Appellant was found in possession of several stolen items. It is on the basis of the above facts that the State urged the court to find the appeal without merit and dismiss it.

The facts of the case as presented in evidence by the prosecution are as follows: The Appellant at the material time was employed by Spar Security Services Limited. It was his duty to provide security at Abantu Development, a non - governmental organization situated along Mbaazi Avenue in Lavington area within Nairobi County. PW1 David Makokha Were, an employee of the organization together with his son PW3 Titus Wasike Wanjala lived in separate residential houses within the same compound. During the early morning of 8th November 2009, a robbery took place at the organization's premises. At the time, the Appellant was on duty. PW1 testified that on the material day at about 6.30 a.m, he was in his house with a guest when he heard the Appellant calling out his name. The Appellant was telling him that he had visitors. He opened his door and found the Appellant in the company of three men. PW1 testified that one of the men got hold of him and gagged his mouth before shoving him back into the house. They made him lie on the floor before blindfolding and tying him up. They also did the same to his guest. PW1 testified that the men were armed with a pistol and a knife. They asked him to hand over the office and car keys together with any money in his possession. PW1 complied and gave them the office keys. He told them that he did have the vehicle's ignition key. PW1 testified that two of the men proceeded to the office leaving the one with a pistol behind to guard them. He testified that they could hear the robbers moving items from the offices. He testified that the robbery was executed for about three hours. When it became silent, they surmised that the robbers had finally left. They managed to untie themselves and rushed outside where they saw the robbers talking to the Appellant at the gate. PW1 testified that they began screaming. The robbers ran away through the gate. The Appellant also followed them. The screams attracted their neighbour's attention including the security guards manning the adjacent premises. They all came out to see what was happening. They pursued the robbers and managed to arrest the Appellant. The Appellant was found with two vehicle number plate registration numbers KBA 644T. They were contained in a brown envelope. He also had two orange scratch cards and a Sony digital camera.

The evidence of PW3 was that on that material day he saw the Appellant together with the three men standing outside PW1's house. He testified that he became suspicious of the men when he saw them shove his father into the house. He testified that he went to the gate to inquire from the Appellant the identity of the men. PW3 testified that he told the Appellant that he was apprehensive about the men and asked him to escort him back to his house so that he could call for help. He testified that the men saw him as he went back to the house. He ran back to the gate. He asked the Appellant to open the gate to let him escape but the Appellant refused. By this time, two of the men had arrived at the gate. They got hold of him and took him back to his house where they blindfolded him. They also tied him before leaving the

house. He testified that after a few hours, he heard his father screaming for help. He lost his mobile phone during the incident. The police were called to the scene. PW5 Cpl. Dominic Musambi went to the scene and found the Appellant had been arrested. He was shown the two vehicle number plates that had been recovered from the Appellant. They proceeded to the organization's premises and upon inspecting it, he confirmed that the offices had been broken into and several items ranging from electronic equipment and cash had been stolen. PW1 also reported that he had lost several items including electronics, a mobile phone, a jacket and a pair of shoes.

PW5 testified that they recovered television sets and a generator outside the office. They also found, the Appellant's uniform, and a black laptop bag containing three cheque books from Standard Chartered Bank, a Sony digital Camera, and two orange scratch cards in the Appellant's sentry. They also recovered a sword within the premises. Photographs of the scene were taken and were presented to court during trial. PW6 PC Josephat Muriuki was assigned to investigate the case. Through the evidence of PW2 Peter Mulati Wasike, an Operations Manager at Spar Security Services, it was confirmed that the Appellant was indeed an employee of the company. Ownership of vehicle registration number KBA 644T was traced to PW4 Tilesh Shah Hindu who presented the original registration plates for the vehicle. After concluding his investigations, PW6 formed the opinion that a case had indeed been made for the Appellant to be charged with the offences for which he was convicted.

When he was put on his defence, the Appellant testified that he arrived at work at about 6.00 a.m. He testified that he heard a knock on the gate when he was about to put on his uniform. The Appellant testified that on opening the gate, he saw someone pointing a pistol at him. Immediately thereafter about six people entered the compound. They ordered him to convince PW1 to open his door and threatened to shoot him if he refused. The Appellant testified that he feared for his life and therefore did as he was instructed. He stated that the three men managed to enter into PW1's house when he opened it. A fourth man took him back to the gate where he ordered him to remain there and not let anyone through the gate. He stated that the man who was armed also remained at the gate. He testified that he could not let PW3 through the gate when he attempted to leave the premises. He explained that he had to lie to PW3 that the men were PW1's guests since the armed man was hiding behind him. The Appellant testified that he became confused when he heard PW1 and his guest scream. He saw the robbers coming towards him. He also started following them. He testified that he was stopped by the owner of a nearby kiosk who took him back to his place of work. He denied committing the offences.

This being a first appeal, it is the duty of the 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 the fact 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 charge brought against the Appellant on the charge 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 re-evaluated the evidence adduced before the trial court. It has also considered the submission made before this court. From the evidence adduced, it was apparent that the Appellant was convicted based on direct evidence adduced by PW1 and PW3. According to the two witnesses, on the material day of the robbery, the Appellant (who was well known to them because he had been employed as a security guard at the premises) escorted three men to the house of PW1. PW1 was in the house with a guest. The Appellant requested him to open the door as he had guests who had visited him. Trusting the Appellant, PW1 opened the door only to be confronted by a man armed with a pistol. He was shoved into the house, tied up and blindfolded. He was ordered to surrender the keys of the offices. He complied with the order. Two of the robbers went to the nearby office. One robber remained behind to guard PW1.

Meanwhile, the Appellant went back to the gate. He met with PW3 who inquired from him what the three suspicious men were doing in their house. He too was subdued and escorted into the house. The robbery was executed for a period of three hours. The items listed in the charge sheet were stolen from the office. Some items were stolen from PW1. PW3 lost his mobile phone. After the robbery, the robbers

accompanied by the Appellant, made good their escape. PW1 and PW3 raised alarm. The Appellant was apprehended by neighbours. He was found in possession of registration number plates of a car which were in a brown envelop. He was also found in possession of two Orange scratch cards and a Sony camera which was established to have been stolen from the office. He was escorted to Kilimani Police Station where he was re-arrested and later charged.

In this appeal, the Appellant complained that the prosecution did not establish the charges brought against him to the required standard of proof beyond reasonable doubt. As regard the charge of robbery, he explained that he was also a victim of the robbery in a similar manner to PW1 and PW3. He explained that he was under duress at the time he escorted the three robbers to PW1's house. He stated that he closed the gate and prevented PW3 from seeking help because there was a fourth robber who was at his back. The robber was armed with a pistol.

This court, on careful analysis of the evidence formed the view that indeed the prosecution had established its case on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The Appellant was known to PW1 and PW2 before the material day of the robbery. He was employed as security guard. It was his duty to guard the premises. It was clear from the evidence adduced that instead of guarding the premises, the Appellant allowed the robbers access to the premises. From the testimony of PW1 and PW3, it was apparent that the Appellant was not under any form of duress when he escorted the three robbers to PW1's house. Infact, it was clear that he actively aided them to achieve their objective of robbing the offices.

The role played by the Appellant during the entire period of the robbery clearly points to the fact that he was an accomplice in the robbery. He was under no duress. There was no fourth robber. While the three other robbers were busy robbing PW1 and the complainant's premises, the Appellant was alone at the gate. If he was not part of the robbery, he would have taken the opportunity to raise alarm when the robbers were out of the sight. What is clear from the evidence adduced by the prosecution witnesses was that the Appellant aided the robbers with the intelligence of who had the keys to the office and what the robbers could find in the office. Furthermore, the Appellant obstructed PW3 from seeking help while the robbery was still in progress.

If there was any doubt that the Appellant participated in the robbery, that doubt was removed when the Appellant escaped with the robbers. He was under no compulsion to follow the robbers. He was arrested with some of the stolen items that were robbed from the offices. The doctrine of recent possession applied in his case. The Appellant's case is that of a person who was given a position of trust. The Appellant betrayed this trust and instead enabled robbers to gain access to the premises that he was guarding. To disguise his role, he pretended that he too was a victim of the robbery. The prosecution debunked this story by adducing cogent, consistent, credible and corroborated evidence that placed the Appellant at the centre of the robbery.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and hereby dismissed. The conviction and sentence of the trial court is hereby confirmed. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF JULY 2016

L. KIMARU

JUDGE