



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 76 OF 2014**

**CHARLES MUIGA KIBATA..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

(Appeal from the judgment of the Hon. C.M.Wekesa Ag.Senior Resident Magistrate's Court, Nyeri delivered on 23<sup>rd</sup> September, 2014 in Criminal Case No. 261 of 2013)

**JUDGMENT**

**FACTS**

1. The appellant, **Charles Muiga Kibata**, was charged with three counts of Robbery contrary to **Section 296(2)** of the **Penal Code**.
2. The particulars of the charge are that on the 16<sup>th</sup> day of March, 2012 at around 22.30 hours at Ruirii Village in Kieni West District within Nyeri County, jointly with others and being armed with dangerous weapons namely metal bars robbed **Robert Muturi** of Kshs.1000/-, Nokia phone 2630, National Star TV Set, two (2) batteries, three (3) pieces solar panels and one Sonitec Radio all valued at Kshs.73,000/- and immediately before or after the time of such robbery used actual violence to the said **Robert Muturi** and killed one boran cow, two sheep and three chicken.
3. The facts of the case as recorded by the trial court are; that on the night of 16/03/2012 at 10.30pm the complainant (**PW1**) was home alone; he switched off the TV and DVD and put on the lights and took his phone, torch and panga and proceeded to sleep; he then heard knocking on the door; whoever was outside asked him for his Identity Card; he asked them whether they were the police; but instead the door was smashed open with a large stone; the appellant who is **PW1s'** younger step-brother entered with two others and they were all armed with metal bars; the appellant had a panga and one of the other robbers was also armed with a knife; they pulled him outside and beat him and left him for dead;
4. The appellant was tried and convicted and was sentenced to the mandatory death sentence.
5. Being aggrieved by the conviction and sentence, the appellant filed a Petition of Appeal and the Grounds of Appeal are as summarized hereunder:-
  - (i) The appellant was not accorded a fair trial;
  - (ii) The conviction was based on identification by a single identifying witness;

(iii) The Charges were not proved to the required standard;

(iv) The trial court rejected the appellants' statement of defence.

6. At the hearing hereof the appellant relied on his written submissions whereas Prosecuting Counsel for the State Ms Gicheha made oral presentations; hereunder is the summary of their respective submissions;

### **APPELLANT'S SUBMISSIONS**

7. On the 27/11/2013 the prosecution in the course of the trial applied to amend the Charge to include the correct total value of the property that was stolen; that the application to amend was allowed by the trial court; the appellant contends that after amending the Charge Sheet the trial court failed to comply with the provisions of Section 214 (1) of the Criminal Procedure Code; that the trial court failed to read out the new charge to him and that the trial proceeded without a fresh plea being taken;

8. That the evidence adduced on identification was hinged on recognition and that it wasn't free from error or mistake; that the complainant when making the first report did not name or give a description of the appellant to the rescuer nor did he implicate the appellant as being among the group that attacked him on that fateful night;

9. That the investigations were not properly conducted as no DNA test was done on the blood stains found inside and outside the house and the prosecution failed to prove its case to the desired threshold;

10. That the trial court did not give his defence adequate consideration, it did not take into consideration the bad relationships he had with his brothers who did not like as he was born out of wedlock and therefore were conspiring to frame him up so as to disinherit him; the appellant relied on the case of **SENTALE vs UGANDA (1968) EACA 365**.

11. He prayed that the evidence be re-evaluated and re-assessed and that a just decision be arrived at; and prayed that his appeal be allowed; the conviction be quashed and the sentence be set aside.

### **RESPONDENT'S SUBMISSIONS**

12. The appeal was opposed by the State; that the Charge Sheet was amended in the course of the trial; that the amendment was on the value of the stolen items; this did not affect the main charge of robbery with violence; after amendment the appellant was given an option to start de-novo or continue and he opted to continue with the trial; that **PW1, PW2** and **PW3** were recalled for cross-examination by the appellant; that the contention of non-compliance is a ploy and cannot stand as a ground for quashing the conviction or setting aside the sentence;

13. The appellant contented that recognition was by a single witness and that it was not free from error or mistake; Counsel submitted that the issue of identification by the complainant was clear and that there was no mistake in identification; there was lighting when the appellant entered the complainants house; that he wore a cap and his face was not covered like his accomplices: that the appellant even identified himself by name; that the complainant was a step-brother to the appellant and well known to each other;

14. On the issue of the investigations being faulty; Counsel submitted that the investigations were properly done; the police visited the complainants home to verify what was stolen and also took pictures of the butchered animals; that the investigations carried out led to the arrest and arraignment of the appellant; that the P3Form was not faulty because it did not mention robbery; and that a P3Form cannot substitute a Charge Sheet; its purpose is to show the injuries sustained by the complainant;

15. That the neighbor was not found to be a crucial witness was not called to testify as the role he played was only to call the complainants brother (**PW2**) to take him to hospital; that this ground of appeal is unfounded and cannot quash the conviction nor set aside the sentence;

16. The trial court considered the bad relationship between the complainant and the appellant which the appellant contended led to him being charged; the trial court analyzed the existence of a grudge and the defence together with the prosecutions' case which enabled it to arrive at its finding that it did not dislodge the prosecutions;

17. Counsel prayed that the conviction and sentence be upheld.

### **ISSUES FOR DETERMINATION**

18. After taking into consideration the submissions made by the appellant and those of the Counsel for the State, this court has framed the following issues for determination;

(i) Whether there was a procedural flaw in the proceedings and the appellant was not accorded a fair trial;

(ii) Whether the conviction of the appellant was based on identification by a single witness; whether the appellant was positively identified;

(iii) Whether the prosecution failed to call crucial witnesses;

(iv) Whether the prosecution proved its case to the desired threshold;

(v) Whether the trial court gave valid reasons for rejecting the appellants' defence of alibi.

### **ANALYSIS**

19. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA**.

#### **Whether there was a procedural flaw and whether the appellant was not accorded a fair trial;**

20. The appellant contends that there was a procedural flaw during the original trial; that the Charge Sheet was amended yet he was not called to take a fresh plea;

21. Upon perusing the court record it is noted that indeed the prosecution requested to amend the Charge Sheet and was allowed to do so by the trial court; all the amendment did was to introduce a correction to the total value of the stolen and damaged property; that it did not introduce a new or fresh element or ingredient to the main charge; there was therefore no need to take a fresh plea; the trial court invited the appellant to elect whether to continue with the trial or start de-novo; the record shows that he chose the former; it is observed that the trial court complied with the provisions of Section 214 of the Criminal Procedure Code and correctly allowed the recalling of the prosecution witnesses who had testified that is **PW1**, **PW2** and **PW3** for further cross-examination by the appellant;

22. This court is satisfied that although the appellant was not called to take a fresh plea he had sufficient information to enable him to understand the charge and that his ability to defend himself is found not to have been impaired; and finds the appellant was accorded a fair trial and further finds that there were no procedural flaw during the original trial;

23. This ground of appeal is found lacking in merit and is disallowed.

#### **Whether the conviction of the appellant was based on identification by a single witness and; whether the appellant was positively identified;**

24. The record shows that the trial court made an observation that the only reliable evidence on identification of the appellant was that of **PW1** the complainant; it cautioned itself on the dangers of

relying on the evidence of a single identifying witness especially when the conditions favouring a correct identification were difficult; and cited the case of **Maitanyi vs Republic (1986) KLR 198**;

25. After cautioning itself severally the trial court stated as follows;

**“.....PW1 stated that he was only able to identify the accused as the light was on and that the accused who is his brother even spoke to him as he entered the house and said “...it is me I want you to give me all the money you have together with the phone....”**

**I however find that the conditions favoring the accused identification were not difficult in the circumstances and further that being a brother to the accused herein the identification was that of recognition.”**

26. The trial court went further and examined other circumstantial evidence to justify the inference of the guilt of the appellant; the trial court considered the conduct of the appellant soon after the offence was committed; that the appellant disappeared from the vicinity for a period of one (1) year; that a presumption could be made to the effect that he was guilty and was evading the consequences of his actions; the trial court relied on the case of **Mwangi vs Republic (1983) KLR 327**.

27. On re- evaluation of the evidence; the incident is found to have occurred at night and there was evidence adduced on the source of the light which was electric; the appellant had not even bothered to cover or hide his face; the appellant was a brother of the complainant and was well known to him; it is this court’s considered view that the lighting greatly enhanced the quality of recognition.

28. The other evidence that is a pointer to the inference to appellants guilt are the words uttered by the appellant to **PW2**; the evidence of **PW2** was that he used a different cell number to call the appellant to inform him of what had befallen his step-brother (**PW1**) and that the retort he got from the appellant was **“hiyo ni kionjo”**; this remark was not rebutted by the appellant and it not only incriminates the appellant but also justifies the inference of his guilt.

29. From the evidence adduced this court is satisfied that the evidence of recognition can be relied upon to form the basis of a conviction; and is guided by the case of **Wamunga vs R (1989) KLR** where it was held that ;

**“.... A trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from any possibility of error before it can safely make it a basis of a conviction”**

30. This court finds no reason to interfere with the trial courts finding on identification; and is satisfied that the appellant was positively identified;

31. This ground of appeal that the trial magistrate erred in relying on the evidence of a single identifying witness is without merit and is disallowed.

**Whether the prosecution failed to call crucial witnesses;**

32. The appellant in his submissions contends that the prosecution ought to have called the neighbor who was the very first person to receive a report and attend to the complainant; that in the absence of his testimony there was no proper evidence regarding identification.

33. It is trite law that a first report is usually given to a person in authority in this case it would have been the police at Nairutia Police Station; and that this neighbor cannot be described as a person in authority;

34. It is this courts considered view that it is not always the case that a witness who is not called to testify would have given adverse evidence; Reference is made to the Court of Appeal decision in the case of **Columbus Dindi Okoth vs Republic Criminal Appeal No.287 of 2005**;

35. The evidence of **PW1** indicates that this neighbor whom he referred to as **Baba Njeri** reflects that all that he did was give the complainant clothes to wear and call his brother (**PW2**) to inform him that the complainant was gravely injured and needed to be taken to hospital;

36. This so called crucial witness it is noted from the evidence adduced by **PW1** did not witness the robbery; in this instance the prosecution found that this witness' evidence would not have added any probative value to the prosecutions' case and this court is satisfied that failure to call him as a witness was not fatal to the prosecutions' case.

37. This ground of appeal is found lacking in merit and is hereby disallowed.

**Whether the prosecution proved its case to the desired threshold;**

38. Section 296(2) of the Penal Code sets out clearly the essential ingredients of the offence of robbery with violence and the trial court in its judgment specifically elaborated and captured them in detail; it gave the following narrative;

**“The essential ingredients of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or after in the act of stealing. Thereafter the existence of the afore-described ingredient constituting robbery are presupposed in three sets of circumstances prescribed in Section 296(2) ....and any one of which proved will constitute that offence under subsection;**

- **if the offender(s) is armed with any dangerous or offensive weapon or instrument.**
- **if he is in company with one or more other person or persons**
- **if at or immediately before or immediately after the time of robbery wounds beats, strikes or uses any other violence to any person**

**Regarding the evidence in this case it has been demonstrated that the accused herein was in the company of two other people.....the accused was wielding a panga the other two had a metal bar and a knife respectively that they forced their way into the house by breaking the door using a huge stone.....”**

39. From the evidence adduced by **PW1** this court is satisfied that the prosecution tendered evidence to prove the crucial ingredients of the offence; that the appellant was in the company of other robbers who helped the appellant to rob **PW1** and ferry the stolen property; there was also proof of actual violence inflicted upon the **PW1** before, during and after the robbery; that the complainants evidence on the injuries he sustained was corroborated by the evidence of **PW4** a medical officer from Nyeri PGH who examined him after the incident; and confirmed that the complainant had deep cut wounds on the head; and minor cuts on the left hand and left leg; she assessed the injuries as harm and tendered into court the P3Form as '**PExb.7**';

40. The appellant contends that the P3Form was obtained falsely and in a suspicious manner with the aim of misleading the court and that **PW1** conspired to obtain the document with a view of utilizing it to frame up the case;

41. It goes without saying that there must be two or more parties for there to be a conspiracy; this court notes that during the original trial the appellant had the opportunity to cross-examine the complainant on the issue of conspiracy and on the authenticity of the P3Form but failed to do so; and from the evidence adduced there is no indication as to who it was exactly that the complainant conspired with to obtain this document so as to frame the appellant; in the absence of evidence challenging the authenticity of the P3Form the document is found to be valid and properly before the court.

42. This court is satisfied that the prosecution proved all the key ingredients of the main charge to the desired threshold; that this ground of appeal has no merit and is disallowed.

**Whether the trial court gave valid reasons for rejecting the appellants' defence of alibi.**

43. The appellant contends that the trial court did not consider the existing bad relations between the appellant and his half-brothers; and that their desire was to eliminate him and disinherit him; that the trial court also rejected his defence of alibi;

44. In the judgment the trial court considered the defence of alibi raised by the appellant and rejected it as the appellant had not put forward the defence of alibi at an early stage to prevent any suggestion that it was an afterthought; and found that the same did not cast any doubt in the prosecutions' case; the trial court stated further that the existence of a grudge did not dislodge the prosecutions' case; that there is no doubt that the offence was committed by the appellant.

45. Upon re-evaluating the defence of alibi put forward by the appellant this court notes that he gave sworn evidence and stated as follows;

**“I wish to state that on the alleged month I was said to have committed the offence in March. I was in Nairobi working I worked till the year 2013 in February I came to Nyeri .....**”

46. The trial court made the observation that the appellant;

**“...in his alibi he states categorically that in the month of March 2012 he was away in Nairobi he never mentioned the date ie 16/03/2012 in which the offence was committed he was evasive”**

47. Even though the appellant gave no notice of the defence of alibi during the trial this court notes that it was vague and not specific to the material date when the incident occurred that is on the 16/03/2012; that it therefore can only be described as a mere statement in defence and finds that it did not dislodge the evidence adduced by the prosecution..

48. The record reflects that the trial court also considered the existence of the grudge and made the following findings;

**“Similarly although it is evident that both parties herein have differences especially with regard to the family property I find the defence raised on the existence of a grudge not to dislodge prosecutions' case given the overwhelming evidence on record.”**

49. It is noted that during the original trial the appellant when cross-examining **PW1** brought forth the issue of the existence of a grudge but **PW1** denied the such existence and responded as follows;

**“You're the one who usually interfere with us and you've vowed to kill us.**

**Its not a grudge you usually steal from us and run away”**

50. **PW2** was also a brother to the appellant and the complainant; but the record shows that the appellant did not put forward this issue to **PW2** during cross-examination; the record also shows that the appellant categorically stated in his defence that the enmity that existed was as between his father and himself and he elaborated by giving specific facts;

51. Further the appellant did elaborate in his defence on any specific incidences as between him and **PW1** and **PW2** that would have been a basis of the existence of a grudge between the his step-brothers and himself; therefore this ground is unfounded and this court is satisfied that the appellant has not demonstrated that there existed a grudge as between **PW1** and himself that would have displaced the prosecutions' case.

52. This court is satisfied that the trial court analyzed the appellants' statement of defence and had good grounds for rejecting it as it did not raise any doubts in the prosecutions' case.

53. This ground of appeal is found lacking in merit and is hereby disallowed.

### **FINDINGS**

54. In the light of the forgoing this court makes the following findings;

- (i) The appellant was positively identified; and the conviction is found to be safe.
- (ii) The so called crucial witness evidence would not have added any value to the prosecutions' case and failure to call this witness was not fatal to its case.
- (iii) The prosecution proved the charges to the desired threshold ;
- (iv) The trial magistrate gave good reasons for rejecting the appellants' defence.

### **DETERMINATION**

55. The appeal is found lacking in merit and is hereby dismissed.

56. The conviction and sentence is hereby affirmed.

It is so Ordered.

**Dated, Signed and Delivered** at Nyeri this 29<sup>th</sup> day of September, 2016.

**HON. A. MSHILA**

**JUDGE**