



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO. 126 OF 2004

(From the original conviction and sentence in the Criminal case No. 2109 of 2003 of the Senior Resident Magistrate's court at Kwale L. N. Mbatia (PM))

MWEMBEGA ALFAN MWANJIMBOAPPELLANT

CHIGUZO ALFANI MWAJIMBO

VERSUS

REPUBLICRESPONDENT

JUDGMENT

MWAMBEGA ALFAN MWAJIMBO (referred to as “the appellant” herein- after) was jointly charged with another with the offence of ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.

The particulars of the charge are as follows;

On the 11th day of September, 2003 at Chongomungu village, Kinango location in Kwale District within Coast Province, the appellant jointly with another and while armed with rungu and stones robbed CHARELS MWERO MWACHITI of his bicycle make African Mamba valued at ksh 4,000/= and a short trouser valued at Ksh 500/=, all valued at ksh 4,500/= and immediately before and immediately after the time of such robbery injured the said CHARLES MWERO MWACHITI.

The Appellant was also charged with an alternative charge of HANDLING STOLEN PROPERTY contrary to section 322 (1) of the PENAL CODE.

The Appellant pleaded NOT GUILTY to both charges. They were tried and the appellant convicted and sentenced to suffer death.

The appellant was aggrieved and he has appealed against both the conviction and sentence.

During the hearing, the prosecution called a total of four (4) witnesses to support their case. The brief facts of the case were that on 11th September , 2003, at about 8.00pm, the complainant herein (Pw1) CHARLES MWERO MWACHITI was cycling home from Kinango when he came across two men at Chongomungu. That the men were going in the same direction as he was and he went past them. However, shortly after this, the complainant was hit on the head with a stick and he fell down from the bicycle. That one of the men took the bicycle and rode off very fast as the other ran 2 after him. Pw1 said that the bicycle had a pair of his shorts on it. The complainant went to Kinango police station, where he

reported the matter and was referred to hospital for treatment. He was issued with a p3 form which was filled by a doctor after he had been treated.

It was the evidence of pw1, the complainant, that on 17th October, 2003 at about 11.00am, he saw someone (herein after referred to as Pw2, JUMA THOMAS) riding his bicycle. He confronted the man and on interrogating him, pw2 told him that the bicycle belonged to another by the name CHIGUZO, who was the 2nd accused in this case and he had sent him to buy cigarettes. The complainant and Pw2 went to Kinango police station and reported the matter. Pw2 then led the police to Timboni where he identified to them the owner of the bicycle, being the 2nd appellant. On being interrogated about the bicycle, Pw2 told the police that it was his brother, the Appellant who had given him the bicycle. The appellant and his co-accused were arrested and when the police searched the 1st Appellant's house, they recovered a pair of shorts which he was found wearing inside. The complainant identified the shorts as the ones he had been robbed off on the day he was attacked and robbed of his bicycle. The complainant identified a number of parts such as handle bars of the bicycle which had been dismantled. The Appellant and his co-accused were escorted to Kinango police station where they were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal code.

At the close of the prosecution case, the trial magistrate found the appellant and his co-accused had a case to answer and placed them on defence. They each opted to give unsworn statements in which they denied the charges against them.

The appellant, MWAMBEGA ALFAN MWAJIMBO testified that on 17.10.2003, his brother, the 2nd appellant borrowed from him a bicycle that he had bought from one Joseph. That at 1.00pm, his brother went to his home with police officers and said that the bicycle had been stolen. They arrested and took him to Kinango police station. He said that he told the police that the owner of the bicycle was to go for it after paying his money. The 1st appellant also alleged that he had bought the pair of shorts which were produced before the court.

The 2nd accused CHIGUZO ALFAN MWAJIMBO told court that on 16.10.2003, he went to his home from Chongomungu where he works. He found his brother, the 1st accused with a bicycle which he told him that he had brought. The 2nd accused borrowed bicycle the following day and he gave it to Juma Thomas to go and bring him cigarettes. That Juma came with police officers who said that they had arrested Pw2 because the bicycle was stolen. 2nd accused then led the police to his brother (1st appellant) and he too was arrested.

The judgment was delivered by the trial magistrate on 27th day of May, 2004, in which she convicted the appellant of the offence of robbery with violence contrary to section 296(2) of the Penal Code. The trial magistrate in finding the appellant guilty, had this to say;

“clearly, the 1st accused was involved in the robbery. He was and I have absolutely no doubt, one of the two men who attacked and injured the complainant herein before robbing him of this bicycle and shorts”

She went on to say;

“The fact that both the bicycle and shorts were recovered from the 1st accused shows that he was not a mere handler. He was one of those who robbed the complainant”.

The 2nd accused was acquitted of the offence charged in accordance with section 215 of the Criminal Procedure code on the ground that the evidence against him was insufficient and his testimony led the police to the truth.

In appealing against the conviction and sentence, the appellant raised the following grounds, that the learned trial magistrate erred in law and facts by ;

1. finding the conviction and sentence without considering that the charge as preferred against the appellant by the prosecution was fatal and incurably defective for the word dangerous or offensive weapon being the material words when charging a person with robbery with violence were not included in the charge sheet;

by convicting and sentencing the appellant to death by considering that he was found in possession of the complainant's pair of shorts without seeing that the same was not proved beyond any reasonable doubt to be the property of the complainant;

3. 2.by convicting and sentencing the appellant to suffer death without considering that the same was unsafe for the evidence made by the prosecution witnesses concerning the recovery of the alleged bicycle proved the offence of handling stolen property contrary to section 322 of the Penal Code but not robbery with violence as he was charged;

4. by convicting and sentencing the appellant without seeing that the prosecution did not prove the case to the required standard of law hence the same was unsafe.

5. by failing to consider his reasonable defence statement.

As a first appellate court, my duty is to re-evaluate the evidence a fresh and draw my own conclusion, taking into account that I did not benefit from the demeanor of the witnesses (see the case of OKENO VS REPUBLIC (1972) E. A. L. R 32, wherein it was held that;

“ it is the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”

I have re-evaluated the evidence as expected of the 1st appellate court.

With regard to the first ground where the appellant claims that the charge preferred against him was fatal and incurably defective since the words dangerous and offensive weapon, which he said were material words in a charge of robbery with violence, were not included in the charge.

The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the penal code.

The particulars being that

“On the 11th day of September, 2003 at Chongomungu village, Kinango location in Kwale District within Coast Province, the appellant jointly with another and while armed with rungun and stones robbed CHARLES MWERO MWACHITI of his bicycle make African Mamba valued at Ksh 4,000/= and a short trouser valued at ksh 500/= all valued at Ksh 45000/= and immediately before or immediately after the time of such robbery seriously injured the said CHARLES MWERO MWACHITI”.

It is true that the words “dangerous or offensive weapon” are not included in the particulars of the charge.

Section 296(2) of the penal code under which the appellant was charged provides;

“if an offender is armed with any dangerous or offensive weapon or instrument or is in the 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 o uses any violence to any persons, he shall be sentenced to death”.

Clearly, the section prescribes three sets of circumstances, being;

1. if the offender is armed with any dangerous or offensive weapon or instrument;

2if he is in the company with one or more other person or persons;

3. 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.

In the case of JOHN NDUNGU Vs REPUBLIC, CRIMINAL APPEAL NO. 116 of 1995, a Mombasa, the court of appeal said that the presence of a single one of these circumstances is sufficient to sustain a conviction under section 292 (2) of the Penal Code. It said

“Analyzing the first set of circumstances the essential ingredient, t a part from the ingredients including the use or threat to use actual violence constituting the offence of robbery is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is, needed to be proved. Thus if the facts show that at the time of commission of the offence or robbery as defined in section 295 of the Penal Code. The offender is armed in a name afore described, then he is guilty of the offence under sub section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances, if it is shown and accepted by the court that at the time of robbery the offender is in company with one or more person or persons, then the offence under sub-section (2) is proved and a conviction there- under must follow. The court is not required to look for the presence of either of the other two sets of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients if the court finds that at or immediately before or immediately after the time of robbery the offender wounds , beats, strikes or uses any other violence to any person (may be a watchman and not neccessarily the complainant or victim of theft) then it must find the offence under sub section (2) proved and convict accordingly”.

From the particulars of the charge in the instant case, I find that there was the mention of “the appellant being armed with runigus and stones” which depending on how they were used fit in as either offensive or dangerous weapons.

The particulars of the charge also included the second and third sets of circumstances prescribed in the provisions of section 296 (2) of the Penal Code.

It was the evidence of the complainant, Pw1, that he was riding home when he came across two men who were going in the same direction as him. That, shortly after he went past them, he was hit with a stick on his scalp and he fell down, upon which one of the men rode off on his bicycle . This evidence was not challenged and hence the ingredients of robbery with violence contrary to section 296(2) of the Penal code were proved.

In view of that, I find that the failure by the prosecution to include the words dangerous or offensive weapon in the particulars of the charge was not fatal and therefore does not render the charge against the appellant defective. The charge was properly drafted in accordance with the provisions of section 137 of the Criminal Procedure Code which provides for the rules for the framing of charges and information. This ground of appeal is baseless and therefore dismissed.

In dealing with ground 2 to 5, I will consolidate them into one ground, being, whether the prosecution’s evidence proved the case beyond reasonable doubt, and whether the defence evidence cast doubt whose benefit would be granted to the appellant.

In analyzing the evidence to established whether the prosecution proved their case against the appellant beyond reasonable doubt, I find the issues for determination being;

(a) Was the complainant violently robbed of his bicycle and pair of shorts? And if so,

(b) Was the appellant the culprit?

In his evidence, the complainant (Pw1) told court that he was riding to his home in Bura from Kinango when he came across two men at Chongomungu area . That as he passed the two men, he was suddenly hit on the head and he fell down, and one of the men then rode off on his bicycle which had his pair of shorts and the other one also ran away.

There was no evidence to rebut the complainant's evidence that he was attacked and injured by one of the two men he met on his way home and robbed of his bicycle and pair of shorts. I find that the prosecution in their evidence, were able to satisfy the ingredients of robbery with violence as prescribed under section 296 (2) of the Penal Code.

As for whether the appellant was the culprit, it is clear that the complainant did not identify his assailants as he had no time to observe or see who they were. He did not anticipate the attack on him as he cycled past them and therefore did not pay keen attention on them.

The question then becomes, how then was the appellant, who was not placed at the scene of crime by the complainant or any other witness linked to the offence herein?

It was the evidence of Pw1, the complainant, that on 17.10.2013, which is a month after he was attacked and robbed of his bicycle and pair of shorts (Exhibit P2 and 3), he saw a man, (later identified as Pw2 herein) coming from a shop with the bicycle he identified as his. That he asked the man who the bicycle he was having belonged to and Pw2 told him that it belonged to a man from Timboni. They went and left the bicycle at the police station and Pw2 led the police to Timboni where he showed them the 2nd accused, Chigudzo as the owner of the bicycle. And on being interrogated about the bicycle, the 2nd accused said that it belonged to his brother , the appellant, who was then living at Kifyonzo. The 2nd accused person Chigudzo then led the police to the appellant and he was also arrested.

According to Pw3 PC Charles Otieno Oyoo, who was the investigating officer, he conducted a search on the appellant upon arresting him and found he was wearing a pair of shorts which the complainant identified as his and being the one which was on the bicycle when it was robbed from him.

There was also evidence by Pw1 and 3 that two iron bars were recovered which Pw1 identified as having been removed from his said bicycle (exhibit P1)

An analysis of the evidence that was adduced before the trial court clearly shows that the complainant (Pw1) positively identified the bicycle (exhibit P2) as his. He instantly recognized and identified the bicycle when he saw it with Pw2. He also distinguished the marks and repairs on the bicycle which were personal to him. In his evidence on page 6 at line 27 to 31, he stated;

“This is my bicycle (mf1-2) and the shirts (mf1,3) The brake pedals (shown to court) I fixed myself and the chain. I also welded some parts and painted it (all shown to court) the

front iron bars had been removed when I recovered the bicycle. Later police recovered them from one of the houses. They searched when I saw the inn bars. I identified them as mine. (mf14)”

Pw2 admitted that he was found with the bicycle which had been given to him by the 2nd accused to facilitate an errand. The 2nd accused person on the other hand told court in his defence that he had borrowed the bicycle from his brother, the appellant which he had found him with on 16.10.2013. That his said brother, the appellant herein, told him that he had bought the same.

The complainant also identified the pair of shorts (exhibit P3) which he said had been on the bicycle when it was robbed from him. And although the appellant tried to challenge him that clothes resemble, the evidence of the complainant was consistent that he had a pair of shorts on the bicycle which he was

robbed of and he instantly identified it when the appellant was arrested.

An analysis of the evidence that was adduced before the trial court, reveals a chain of clear evidence which was consistent and unbroken.

And while the appellant was not placed at the scene of crime by any of the witnesses in this case, he was found with the complainants stolen bicycle and pair of shorts, just a month after these items were robbed from him. This is the only apparent connection between the appellant and the crime of robbery with violence herein.

In the case of R vs Loughin 35 Cr. App R 69, the Lord Chief Justice of England said;

“ If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the house breaker or shop breaker”

This relates to the doctrine of recent possession, which is what made the appellant culpable. The time lag between the date of robbery and the recovery of the said bicycle and pair of shorts (Exhibits P2 and 3) being a month, was not so much for an item such as the bicycle. It is therefore reasonable to conclude that the appellant participated in the robbery against the complainant. The trial magistrate noted this at page 3 line 30-31 and pages 41 line 1.

“the facts that both bicycle and shirts were recovered from 1st accused shows that he was not a mere handler. He was one of those who robbed the complainant”

The appellant gave an unsworn defence in which in one breath he said that the bicycle had been sold to him by one Joseph. In another instance, the appellant said that he told the police at Kinango that the owner of the bicycle was supposed to come for it after paying his money. There is clear contradiction in the appellant's defence by himself, that I find him not credible. In fact the trial magistrate cannot be said to have failed to consider the appellants defence which in his grounds of appeal, refers to as “reasonable defence” She had this to say of the said defence.

“The 1st accused alleged that he had bought the bicycle. This is also what he told his brother, 2nd accused. But in his own evidence, he contradicts himself and says that the owner of the bicycle was to go for it after paying his (1st accused's) money. This technically would mean that the 1st accused was keeping it as security. Keeping something as security and buying something are two totally different things and I do not see why 1st accused would contradict himself on such an issue if he was telling the truth. The upshot is that this court finds that he was lying.”

It is worth- noting that the appellant did not call the said Njoroge to corroborate the appellant's evidence that he sold him the bicycle.

There is also undisputed evidence that the said bicycle was dismantled and parts of it removed from the appellants house, it would not be a misconception to find that the dismantling of the bicycle was an attempt to disguise or alter its appearance.

I am satisfied that the doctrine of recent possession applies in the case and the trial magistrate was right in finding the appellant guilty of the offence of robbery with violence contrary to section 292(2) of the Penal Code.

In the circumstance, I find the conviction of the appellant good in law and uphold the same.

The appellant was sentenced by the trial magistrate to suffer death, which is the only lawful sentence for the offence of robbery with violence contrary to section 296(2) of the penal code. I therefore, upon

confirming the conviction, also confirm the death sentence imposed upon the appellant.

The appeal is hereby dismissed in its entirety.

Judgment is delivered, dated and signed this 18th day of November 2016.

D. O. CHEPKWONY

JUDGE

In the presence of

Mr Ayondo for the state

Applicant in person

C/clerk- Kiarie