



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

HCCRA NO. 38 OF 2016

(CORAM: J.A. MAKAU – J.)

JULIUS WAWERU MUCHIRA 1ST APPELLANT

MARTIN NJOROGE WAMBUI 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence dated 22.4.2016 in Criminal Case No. 257 of 2015 in Ukwala Law Court before Hon. R.M. Oanda – SRM)

JUDGMENT

1. The Appellants JULIUS WAWERU MUCHIRI, hereinafter the 1st Appellant and MARTIN NJOROGE WAMBUI, the 2nd Appellant, were the first and the second accused in the lower court. They were charged with one count of Robbery with Violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence are that on the 9th day of June 2015, at Got Osimbo area in Ugunja District within Siaya County, jointly with others not before court robbed ROMAN OPUDO ODWESO of cash KShs.80,000/= and a mobile phone make Samsung and immediately at the time of that robbery used actual violence to the said ROMAN OPUDO ODWESO.

2. After full trial they were found guilty, convicted and sentenced to suffer death.

3. The conviction and sentence provoked each of the appellant to file separate appeals which appeals have now been consolidated and heard together as it arose out of the same trial.

4. The first appellant's amended grounds of appeal are as follows:-

(a) That the appellant was charged and sentenced on a defective charge sheet contrary to Section 214 (1) of the CPC.

(b) That the trial magistrate erred in law and facts by relying on the agreement over the alleged car hire to convict me which its evidence exonerated the appellant from the offence.

(c) That the prosecution's evidence was marred with contradictions which made them unreliable witnesses.

(d) That the prosecution's case was not adequately proved beyond reasonable doubt especially on

the mode of my arrest and the issue of the alleged motor vehicle.

(e) That the appellants defence evidence was not given a due consideration and yet it was cogent enough to award me an acquittal.

5. The Second appellant's amended grounds of appeal are as follows:-

(a) That the trial magistrate erroneously convicted the appellant on a defective charge sheet contrary to Section 214 (1) of the CPC.

(b) That the trial magistrate erred in law and in facts to convict the appellant by relying on his mode of arrest without considering that the same cannot hold water due to failure by the prosecution to prove their case beyond reasonable doubts.

(c) That the trial magistrate erred in its findings by convicting the appellant on circumstantial evidence whereas the same was tainted with other co-existing circumstances to weaken the inference of guilt.

(d) That the defence of the appellant was not given due consideration.

6. At the hearing of the appeals the first and second appellants appeared in person, they each relied on the written submissions and made oral submission whereas M/s. M. Odumba Learned State Prosecutor, appeared for the State and strongly opposed the appeal.

7. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by The Court of Appeal case Okeno V. R. (1972) E.A. 32 where the Court set out the duties of a first appellate court thus:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434)”

8. The prosecution's case forms part of the record of appeal and I need not reproduce the same, however I purpose to summarize the prosecution's case and the defence.

9. The prosecution's case is as follows:- That PW1, Roman Opundo Odwesa, from Mumias, a businessman who was an M-pesa and a Boda Boda operator on 9.6.2015 he withdrew money for float at Ugunja Township. On his way back at Got Osimbo, a customer stopped him in front of him there was a black vehicle which stopped and slide door opened. Three people came out of the vehicle and told him he was carrying a stolen phone forcing him into the vehicle. PW1 was handcuffed as his assailants brandished a pistol at him. He was robbed of his phone and KShs.80,000/=, the vehicle took a U-turn and dropped him after sometime from where he had left his motorcycle. PW1 stated the 2nd accused was the person who took his KShs 80,000/=. The second accused was arrested, after a chase and after the vehicle got stuck in mud and taken to Sigomere Police Station, PW1 stated the first accused was also in the vehicle. Identification parade were organized but PW1 was unable to identify anyone. The vehicle was extensively damaged by irate mob of public and was later handed over to the owner, who had hired the vehicle to the first appellant. The first appellant was arrested on 9.6.2016 at Nairobi after the owner of the vehicle tracked the vehicle along Kisumu-Busia Road on 9.6.2016 and reported to Central Police

Station at Nairobi and her way she saw the first appellant at Nairobi. The first appellant and the third appellant were subsequently charged with the offence.

10. The first appellant denied the offence and gave a defence of alibi. The first appellant stated that on 3.6.2015 a customer, Dominic Kivuva Mwambi, asked him to assist him hire a vehicle as he wanted to go to Kapsabet. He called Margaret Njeri Waweru, (PW3) who offered to hire her vehicle. That she brought the vehicle and the first appellant called Dominic and she asked the first appellant to do an agreement on behalf of Dominic which he did. That the vehicle was handed over to Margaret on 7.6.2015. That on 9.6.2015 at 6.00 p.m. Margaret told the first appellant her vehicle had a problem and she wanted him to pay her in order to repair it. That she later came with Police from Kamukunji Police Station and the first appellant was arrested on 11.6.2015. The first appellant accompanied Police Officer and the owner of the vehicle, came to Ukwala Police Station and he was later charged with this offence. That identification parade was conducted but he was not identified. He produced an agreement dated 7.6.2015 – exhibit D1 and parade Form exhibit D2.

11. The second appellant denied the charge stating that he is a businessman based at Luanda Township. That on 9.6.2015 he proceeded to Ugunja Market and as one of the lady who was at work was unwell after they had raised money for her he was tasked to go and see her. That he left for Musanda, to the home the lady was there at 9.00 a.m., and at 11.00 a.m. he left for Ugunja using a motorcycle but on the way he met many people on the road who were asking people where they came from and when he told them his name and where he was from, they started searching him and one of them said the 2nd accused is a Kikuyu and they started beating him. That Police came and rescued him. That he was taken to Sigomere Police Station, then to Court and later to Ukwala C.I.D. Office, and later charged with this offence.

12. The appellant in their amended grounds of appeal urge that the trial court erred in convicting them on a defective charge. The appellants urge the charge is defective because in the particulars of the offence it did not illustrate the words “dangerous or offensive weapons” yet PW1 mentioned that the attackers were armed with a pistol, which was not included in the particulars of the charge, that the serial number of the alleged stolen Samsung phone was not indicated in the charge and the value of the phone was not disclosed. That no medical evidence was produced in the court to prove that the complainant sustained injuries since the complainant in his evidence alleged that actual violence was used and no amendments were done to the said charges as required by law under **Section 214 of the C.P.C.** The appellants urged the charge was further defective as the evidence adduced at the trial did not accord with the particulars of the charge. The Appellants urged they were therefore prejudiced.

13. In the case of **Martin Mungathia V R. [2015] eKLR** the Court of Appeal sitting at Nyeri, quoted with approval from the case of **Johana Ndungu V R Criminal Appeal No. 116 of 1995**, what the ingredients for a charge of robbery with Violence are. In the said case, the ingredients of a charge of Robbery with Violence were stated to be:

(i) the offender is armed with a dangerous or offensive weapon or instrument or dangerous or offensive weapon or instrument or

(ii) If he is in company with one or more than other person or persons or

(iii) If, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.

14. I note the particulars of the charge do not state that the robbers were armed with dangerous or offensive weapons and that there is no mention of their being armed with a pistol, nor is there serial numbers of the Samsung cell phone, that is mentioned in the charge sheet nor its value, nor was a medical expert called to produce to the court evidence on injury sustained, by the complainant, however, in the offences of robbery with violence the failure to state the robbers were armed with dangerous or offensive weapon, nor failure to give serial numbers of such items and their value or failure to produce medical report fatal to the prosecution’s case. These are not the ingredients of an offence of robbery with

violence. The ingredients of an offence of robbery with violence are as stated in the case of **Johana Ndungu V R (supra)**. It is enough for the prosecution to prove at least one of the three ingredients if not all. In the instant case PW1 testified that the people came out of the vehicle told him he was carrying a stolen phone. They were armed with a pistol and handcuffed him. PW2, got information the gang of four men were on board in motor vehicle and had robbed a motor cyclist. The prosecution witnesses' evidence, PW1 and PW2 satisfied the condition that the robbers were more than one and were armed. On the issue of the evidence being at variance with particulars of the charge, I find that the variance as regards to the robbers being armed with a pistol are not significant to warrant the charge being declared defective in anyway. I therefore find and hold that the charge was proper and not defective as contented by the appellants. This ground of appeal is dismissed.

15. The first appellant under ground No. 2 of his appeal urge that the trial magistrate erred in law and fact by relying on the agreement over the alleged car hire to connect the first appellant, with the commission of the offence which evidence the first appellant urged exonerated him from the offence. In convicting the first appellant on the issue of car hire, the trial magistrate stated as follows:

“Accused I hired the vehicle that was involved in this. He actively, by this act alone, participated and/or facilitated the commission of the offence. He was thus an active participant and is guilty as charge.”

PW3, Margaret Njeri Waweru's, evidence is that on 3.6.2015 she met the 1st accused (appellant), who hired the vehicle for 3 days and made the first contract MFI P2. He was given a vehicle to go to Kapsabet but he returned the car. He gave copies of his passport MFI P3 (a), Licence, MFI P3 (b) and identification card MFI P3 (c). He also gave telephone number of his wife. On the 7th June 2015, the 1st appellant in company of two others picked the car KBP 117X as per MFI P4. On 9.6.2015 PW3 spotted the vehicle at Kisumu-Busia Road, through tracking device and reported to the Police as the vehicle was supposed to have been returned on 7.6.2015. The first appellant urged the evidence of PW3 was in contrast with evidence of PW2, thus the vehicle hired was KBB 117X which was used in robbery. He urged the vehicle he hired was KBP 117X and he returned the same on 7.6.2015 and as such he could not be linked with robbery of 9.6.2015. He urged the allegation that he returned the vehicle on 13.6.2015 exonerates him as he was already in custody.

16. Whether the first appellant was in possession of the motor vehicle KBP 117X as of 9th June 2015 at Got Osimbo area in Ugunja District, when the offence of robbery was committed? PW3, Margaret Njeri Waweru, according to MFI – P2 the 1st Appellant hired a vehicle to go to Kapsabet on 3.6.2015, paid KShs.12,000/= for motor vehicle Registration No. KBP 117X but he did not take possession of the vehicle. On 7.6.2015, the 1st Appellant picked the vehicle KBP 117X and paid a deposit of KShs.28,000/= as per agreement MFI P4. The vehicle was to be returned on 7.6.2016, strange enough MFI – P4 on the right side top time out is not indicated, but time in is indicated at 11.30 a.m. on 13th June 2015. The appellant in his defence produced exhibit D1 which is photocopy of exhibit MFI P4. The two documents are therefore similar. The appellant stated he hired the motor vehicle from PW3 on 3.6.2015 for a customer, Dominic Kivuwa Mwambi and the same was returned on 7.6.2015 in his presence MFI P4 relied upon by the prosecution and exhibit D1 relied upon by the first appellant are similar in contents and in both exhibits there is no mention of the vehicle having been hired to the first appellant on 3rd June 2015. The agreement which was made 3.6.2015 is MFI P2. PW3 stated that the first appellant did not pick the vehicle on 3rd June 2015 but on 7th June 2015. The vehicle was to be returned on the same day. PW3 stated vehicle was not returned on 7.6.2015. The first appellant's document exhibit D1 at the right corner indicates the day when vehicle was returned was on 13th June 2015. PW3 and the first appellant did not explain the discrepancy on the dates. The first appellant's document do not support his assertion that the vehicle was returned on 7th June 2015 and if it was, why it is in his document the date returned indicated as 13th June 2015. I therefore find that as from 7th June 2015 and at the time of robbery 9th June 2015, when PW3 spotted the vehicle at Kisumu-Busia Road, through tracking device and during which date the vehicle was involved in a robbery, and when PW3 reported the matter to Central Police Station and when on her way to the stage, she met the first appellant along Ronald Ngala Street, in

Nairobi, caused his arrest and took him to Kamukunji Police Station, though the first appellant was not physically in possession of the vehicle, by virtue of the car Hire agreement between himself and PW3, I find he was in possession of the vehicle though he might not have been in control of its use but the people inside the vehicle were his agents. The first appellant might have not been liable for any criminal acts that his agents might have committed while using the vehicle with his authority unless it is proved that he was part of the conspiracy to commit the offence of robbery with violence.

17. In the evidence of PW3 what turns to is that the first appellant, though had hired the vehicle on 7.6.2015 he was not one of the people in the vehicle when she spotted it along Kisumu-Busia Road for she immediately proceeded to report to Central Police Station Nairobi and on her way to the stage she met the first appellant along Ronald Ngala Road, Nairobi. The first appellant was arrested immediately and taken to Kamukunji Police Station. PW3 was not aware of any robbery then but was concerned with the failure to return her vehicle by 7.6.2015. The distance between the site of robbery thus in Ugunja, Siaya and Nairobi and time it takes one to travel from Ugunja to Nairobi using a fastest vehicle and without stopping is several hours, more than 9 hours and there is no way from the time PW3 spotted the vehicle along Kisumu-Busia Road and the time she spotted the first appellant who was immediately arrested, the first appellant would have committed the robbery and at the same time travel back to Nairobi. I find that though the first appellant was in possession or control of the vehicle he was not physically in control or possession of the vehicle at the time it was used to commit robbery and that it is not possible that he was one of the robbers. That if the first appellant committed any offence it is a different offence other than robbery with violence and in criminal law therefore the first appellant cannot be held liable for an offence of robbery committed by his agents or people who he might have released the hired vehicle to I find that had the matter been seriously investigated the first appellant would have been charged with a different offence other than robbery with violence. I find no evidence to substitute the charge against the 1st appellant or on evidence of commission of a lesser offence which I can substitute for the offence of robbery with violence.

18. In the instant case the evidence against the appellants was circumstantial. In **Sawe V Republic (2013) KLR 364** the Court of Appeal held:-

“As we have already point out, the evidence in this case was entirely circumstantial. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of the innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

19. The trial court in convicting the appellants relied on evidence of PW1, PW2 and PW4. The trial court held:-

“Two people came out of it and told him that he was carrying a stolen phone. They then forcefully asked him to enter into the vehicle. He was handcuffed. They brandished a pistol at him, took his phone and made a U-turn and dropped him after sometime. They were pursued and one of them was arrested.”

20. PW1, according to his evidence was stopped by a customer and as he passed motor vehicle Registration No. KBP 117 X it stopped and sliding door opened and two people came out and forced him to enter the vehicle, while outside the vehicle they removed a pistol. PW1 raised alarm calling people and he was later-dropped. That people came and chased and apprehended one of the attackers as the vehicle had gotten stuck in the mud. PW1, in his first report to the police he did not give description of the people who accosted him. That though he testified the 1st and the 2nd Appellant were in the vehicle which was used in the robbery. That identification parade was conducted but PW1 was unable to identify any of the two appellants proving he had not clearly seen and identified the attackers either because either offence was committed too fast and when he was under shock as he stated at such time was senses were not normal. PW2 testified he got information that a gang of four members in motor vehicle Toyota Voxy

registration number KBB 117X robbed PW1 at 12.40 hours. That the police officers pursued the vehicle which got stuck in the mud and gang fled on foot. The 2nd Appellant was arrested about 30 metres from the vehicle. PW3 evidence is that she hired motor Vehicle KPB 117X Noah Vehicle. PW4 testified he witnessed PW1 being put into the vehicle and ran after the vehicle screaming and reported the matter at Ugunja Police Station. PW4 was not able to see the people and could not tell how many people were in the vehicle. PW5 testified he was told the vehicle KBP 117X had five gangsters and it was Toyota Noah. The 2nd appellant had been arrested within Sigomere area whereas the 1st appellant was arrested on 11.6.2015 whereas according to PW3, the 1st appellant was arrested on 9th June 2015. According to the first Appellant he was arrested on 9.6.2015.

21. In the case **Morris Gikundi Kamunde V R (2015) eKLR** the Court of Appeal at Nyeri Stated:-

“It’s own considered view that failure by Pw1 and PW3 to give a description of the appellant or mention his name or to state they were attacked by a person they knew weakens them testimony. PW1 and PW3 should have given the name or description of the appellants as was stated in the cases of Moses Munyua Mucheru V R Criminal Appeal No. 63 of 1987 and Juma Ngodia V Criminal Appeal No. 13 of 1983 and Peter Njogu Kihika & Another V R Criminal Appeal No. 141 of 1986

22. PW1, and PW4 did not give description of the occupants of the motor vehicle KBP 117X nor could PW1 identify any of the purported attackers in the identification parade. The offence occurred during broad day time yet PW1 could not identify any of the attackers as he stated he was not in his normal senses. PW2 was given different motor registration Number KBB 117X to that was given to PW5. PW1 stated his KShs.80,000/= was taken from him by the 2nd appellant who according to PW5 was arrested at the scene. The Appellant according to PW2 was arrested 30 metres from the scene of the crime and yet he was not found with the KShs.80,000/=. I find it inconceivable if the 2nd appellant was one of the robbers who robbed complainant KShs.80,000/= on his immediate arrest he was not found with any money. I find that the fact that the members of public arrested the 2nd appellant on the material day within the area where motor vehicle KBP 117X was stuck was not enough to infer guilt on his part. I note that PW1 during cross-examination stated he did not identify anybody. It was prosecution case that PW1 saw the 1st appellant and the 2nd appellant at the scene of robbery, so if complainant saw the appellants why did he not in his first Report give their descriptions and why was he unable to identify them at the identification parade. The evidence of PW1 was scanty and ambiguous if he saw his attackers. His evidence on identification is shaky and doubtful.

23. Therefore, what was left of PW1’s evidence was mere suspicion. Mere suspicion in my view cannot be used to justify the conviction. In **Mary Wanjiko Gachira V Republic Criminal Appeal No. 17 of 1998**, the Court of Appeal held that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

24. Whether the appellants defence were considered? The appellants gave a defence of alibi. The first appellant defence is that by 9.6.2015 he was at Nairobi and not at the scene of crime. That he had returned the motor vehicle KBP 117X to PW3. That he did not commit robbery on 9.6.2015. The defence of the 2nd Appellant is that on 9.6.2015 he was taking some money which they had raised for a sick friend who was at Musanda, that he arrived at their friend’s home at 9.00 a.m. and at 11.00 a.m. he left for Ugunja on a motor cycle. That on the way he met people on the road who asked him where he had come from and on informing them they started to search him and one of them said he was as Kikuyu. They then started to beat him that police came for his rescue. He was taken to Sigomere Police Station and later charged with this offence. I have very carefully perused the trial court’s judgment which in rejecting the appellant’s defence stated as follows:-

“Both accused persons did not call any witness to support their side of the story.”

25. In cases where a defence of alibi is raised the accused person does not assume the burden of proving the defence of alibi. In criminal cases the burden lies squarely on the prosecution, except in those cases

under the Section creating the offences specifically places some evidential burden on the accused to establish a fact or rebut a presumption or prove a defence of a particular kind. It is the duty of the prosecution to disapprove of alibi defence an accused puts forward unless it appears to the court that the alibi cannot be sustained or was raised at the time which did not give room for the prosecution to check it out and disapprove it (see the case of **Njuki & 4 Others V R (2002) 1 KLR 771**).

26. I have very carefully, evaluated the appellant's defences of alibi and I have found that the prosecution did not disapprove of any of the appellant's alibi defence. I find the trial court in dismissing the appellants defences shifted the burden of proof to the appellants and erred in dismissing the appellant's defence of alibi.

27. Having come to the conclusion I have of this case, I find that the prosecution failed to prove the charge of robbery with violence against the Appellants to the required standard of proof beyond any reasonable doubt. I find the appeals have merits and should be allowed. Accordingly, I allow the appellants appeals, I quash the convictions and set aside the sentences. I order the appellants be set at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 14TH DAY OF DECEMBER, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 14TH DAY OF DECEMBER, 2016

IN THE PRESENCE OF:

THE 1ST APPELLANT IN PERSON – PRESENT

THE 2ND APPELLANT IN PERSON – PRESENT

M/S. ODUMBA – FOR THE STATE:

COURT ASSISTANTS:

1. K. ODHIAMBO

2. L. ATIKA

J. A. MAKAU

JUDGE