



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

LESIT, KIMARU JJ

CRIMINAL APPEAL NO.318 OF 2012

(An Appeal arising out of the conviction and sentence of J.K. NG'ENO - CM delivered on 6th December 2012 in Makadara CM. CR. Case No.5100 of 2011)

PATRICK AYUYA KEGODE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. Patrick Ayuya Kegode, the Appellant herein 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 20th October 2011 at Alibhai Shariff & Sons store in Industrial Area, Nairobi County, the Appellant jointly with others not before court, while armed with dangerous weapons, namely a pistol and iron bars, robbed Abraham Otero Ondari assorted merchandise valued at Kshs.3 million, the property of Alibhai Shariff & Sons and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Abraham Otero Ondari. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to death as is mandatorily provided by the law. He was aggrieved by his conviction and sentence and has filed an appeal to this court.

2. In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence that did not establish his guilt to the required standard of proof. He faulted the trial magistrate for relying on the prosecution's inconsistent and contradictory evidence to convict him. He took issue with the fact that his defence had not been considered before the trial court reached the decision to convict him. In an amended grounds of appeal filed without leave of the court (the court will however consider it), the Appellant further complained that he was convicted on the basis of evidence that was at variance with the charge brought against him. He further stated that the trial magistrate had failed to appreciate the fact that the prosecution had failed to establish the existence of common intention to necessitate his conviction. He was aggrieved that the trial magistrate had relied on circumstantial evidence that did not point to his culpability. He faulted the trial magistrate for failing to make a finding to the effect that the case had not been properly investigated and therefore he could not have been convicted on the basis of the evidence that was adduced in court. He further complained that he was not availed witness' statements in advance before the trial commenced. He was of the view that he was prejudiced in the conduct of his defence by the court's failure to direct the prosecution to avail him the said statements. For the above reasons, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

3. During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He further made oral submission. It is the Appellant's appeal that the prosecution had not adduced any evidence to connect him with the crime. Ms. Ngetich for the State opposed the appeal. She submitted that the prosecution had adduced cogent, consistent and credible evidence which connected the Appellant with the offence. She urged the court to dismiss the appeal.

4. This being a first appeal, it is the duty of this 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 of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

5. The facts of the case according to the prosecution are as follows: The Appellant was an employee of a security firm known as Target Security Company. Target Security Company had been contracted by Alibhai Shariff & Sons Limited to guard their storage premises in Industrial Area, Nairobi. On the material day of 20th October 2011, the Appellant was guarding the premises with one Wilfred Masenge (Wilfred) and Abraham Otero Ondari (the complainant). The complainant testified as PW1. He testified that on the material day, he reported on duty at 5.45 a.m. to relieve the night guard one Justin Buti. His duty was to guard the premises while inside the main gate while the duty of the Appellant and Wilfred was to guard the main gate of the premises. He recalled that while on duty at about 7.30 a.m., he saw about eight (8) men enter the premises through the main gate. One had a sharp metal while the other a sack. They ordered him to lie down. They tied his hands behind his back. They escorted him to the furthest end of the premises and then bound his legs. Two of the men kept him guard. They robbed him of his mobile phone Nokia 1600. He was ordered to lie on his abdomen. Other people were brought to where he had been detained. In total, five (5) employees were brought to where he was lying. They were equally bound and told to lie down in a similar fashion. Their ordeal took more than three (3) hours. When the robbers left, they freed themselves and called their senior managers. The police were informed. They arrived at the scene. They realized that five (5) padlocks securing the premises had been cut. Property including lawn mowers and construction tools had been stolen. PW2 Christine Wanjiru Ndungu, a warehouse manager employed by Alibhai Shariff & Sons Limited told the court that on the material day of 20th October 2011 at about 11.00 a.m., she received a call from Target Security Company. They informed her that the warehouse had been broken into. She immediately went to the warehouse and saw that the padlocks had been cut. The gate was left wide open. Property worth 5.7 million had been stolen. None of the stolen property was recovered.

6. PW3 Samuel Tumbo Okiori was employed as a supervisor by Target Security Guards. On the material day at about 7.55 a.m., he went to the premises of Alibhai Shariff & Sons to check on the guards working there. He found the Appellant at the gate. Wilfred was also present. A guard by the name Kevin Onduso was absent. When he inquired from the Appellant his whereabouts, the Appellant told him that Kevin had gone to purchase mobile airtime. PW3 entered the premises and went to the washroom. He saw a hacksaw on the sink. He also realized that the Appellant and Wilfred were not dressed in their official uniform. This was unusual. He asked them to dress up in uniform. He walked back to the washroom but was surprised when he saw Wilfred emerge with five (5) men. One was armed with a pistol while the other had bolt cutters. He tried to run away but was restrained.

7. The Appellant locked the gate. PW3 was escorted to where the other men had been detained. He was robbed his mobile phone, motorcycle helmet and Kshs.9,700/-. He recalled that after the robbery incident, the Appellant and Wilfred disappeared from the premises. He was later informed the whereabouts of the Appellant. He gave the information to the police. The Appellant was arrested on 21st October 2011. PW3 denied the suggestion by the Appellant that there existed any grudge between them. He denied owing the Appellant the sum of Kshs.500/-. He denied threatening the Appellant at any time. He reiterated that it was the Appellant who locked him inside the premises when he attempted to run away. PW4 Richard M. Ong'enge, the Operations Manager of Target Security Company corroborated PW3's testimony in so far

as it related to the events that took place at the premises of Alibhai Shariff & Sons after the robbery incident. He confirmed that the Appellant had been employed by the security firm two (2) months prior to the robbery incident. He also confirmed that after the robbery incident, the Appellant did not return to work until his arrest.

8. After the report was made to the police, Corporal James Mong'are (PW5) was assigned to investigate the case. After concluding his investigation, he reached the conclusion that the Appellant had indeed participated in the robbery with others who were not in court. He produced the hacksaw and the padlocks which were damaged into evidence. He also produced a list which showed the items that had been stolen from the premises.

9. When the Appellant was put on his defence, he gave unsworn statement. He denied participating in the robbery. He testified that he was also a victim of the robbery. He explained that on the material day, he reported on duty as usual with his colleague Wilfred. Later that morning, they were attacked by a gang of robbers who subdued them by pointing a pistol at them. They were stripped of their uniforms and tied. He refuted the testimony of PW3. He testified that PW3 framed him in the crime because of a grudge that existed between them. In particular, he testified that PW3 owed him a sum of Kshs.500/- which he had refused to pay him. After the robbery incident, he explained that the robbers hijacked him and ordered him to accompany them in the two lorries that they used to ferry the goods that was robbed from the premises. He was later ordered to drink some concoction which made him lose his consciousness. He regained his consciousness and realized that he had been dumped in a game park. eH

He traced his way back to the road. He inquired where he was from a passerby. He was informed that he was in Lukenya area of Machakos County. He travelled back to his home in Nairobi. He was arrested while he was at his home. He reiterated that he had not participated in the robbery.

10. We have carefully re-evaluated the evidence that was adduced before the trial court. We have also taken into account the submission made before this court during the hearing of the appeal. We have analyzed the grounds of appeal put forward by the Appellant. It was the prosecution's case that the Appellant colluded with the others not before court to rob the premises that he was entrusted to guard by virtue of his employment. According to the prosecution, the Appellant assisted his accomplices to gain access to the business premises and carry out the robbery. Thereafter, the Appellant left the scene of the robbery with the robbers. We have considered the testimony of PW1 and PW3. PW1 was also employed as a guard in the premises. He explained the role that each of the guards was assigned on the material day. The Appellant and his colleagues from Target Security Company were assigned to guard the main gate. PW1 was assigned to man the specific warehouse of Alibhai Shariff & Sons.

11. According to PW1, on the material day, being a public holiday, the Appellant allowed a gang of robbers to gain access to the premises. The persons working in the premises were rounded up before they were tied up and told to lie down at the extreme end of the premises. It was then that the padlocks to the suit premises were cut allowing access to the robbers. The robbery took place for about three (3) hours. Goods worth more than 5 million shillings were stolen. They have not been recovered. PW1's testimony in that regard was corroborated by PW3. He is the supervisor in the security firm where the Appellant was employed. He told the court that on the material morning when he went to check on the Appellant and his colleagues, he was surprised to find that they were not in uniform. This was unusual. He ordered them to wear the uniform. He went to the washroom. He was however shocked when he was confronted by a gang of robbers who threatened him with a pistol before they similarly bound him and took him to where the others had been held hostage. PW3 recalled in particular the role played by the Appellant in the course of the robbery. It was the Appellant who prevented him from making good his escape when he saw the robbers. The Appellant locked the gate and ordered PW3 to return inside the premises.

12. From the evidence adduced by these two witnesses, it was apparent that the Appellant was a willing participant in the robbery. He is the one who allowed access to the premises to the robbers. Most probably he gave them intelligence and inside knowledge on how robbery could be successfully undertaken. He assisted the robbers to subdue PW3. It was not by accident that he did not wear his work uniform on the material day. After the robbery, the Appellant went away with the robbers. He did not ever

return to work until his arrest by the police. It was evident to us that the evidence adduced by the prosecution was cogent, consistent and corroborated in all material respects. The claim by the Appellant that he was a victim of the robbery is just but a desperate attempt by the Appellant to escape criminal liability. His claim that he had been similarly subdued by the robbers during the robbery incident is not supported by evidence. PW1 and PW3 were categorical that the Appellant was not with them when they were ordered to lie down at the extreme end of the warehouse. Indeed, PW3 testified that the Appellant actively participated in the robbery. Any doubt that the Appellant was a participant in the robbery was removed when he left the suit premises with the robbers. He did not return to work. His claim that he was hijacked by the robbers to assist them unload the stolen goods is incredible.

13. We did not believe that he was drugged as he claimed. If that were the case, he would have reported his kidnapping to the police. He did not have to wait for the police to arrest him before making the allegation. His conduct during the entire period was consistent with that of a person who was part of the criminal enterprise. The Appellant had common intention to commit the robbery with others who were not before court. We hold that the prosecution proved its case 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. The prosecution established that, the Appellant, in company of others not before court, while armed with dangerous and offensive weapons, namely a pistol and bolt cutters, subdued the complainant and other employees in the premises by threatening to physically injure them, before gaining access to the warehouse and robbing therefrom goods worth more than Kshs.5 million. The defence of the Appellant lacks credit. We dismiss it.

15. There is only one issue that remains for our determination before we conclude this judgment. The Appellant complained that he was not availed witness' statements before the trial commenced. The Appellant was entitled under **Article 50(1)(j)** of the **Constitution** "***to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence***". We have perused the proceedings of the trial court. There is nothing to suggest that the Appellant was denied the witness' statements before and during the hearing of the case. There is no evidence that the Appellant asked for the said witness' statements and was not accorded assistance by the court. This ground of appeal similarly lacks merit and is similarly disallowed.

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

DATED AT NAIROBI THIS 15TH DAY OF MAY 2015

J. LESIIT

JUDGE

L. KIMARU

JUDGE