



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO.48 OF 2014

JAMES NGUNJIRI MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and Sentence by the Chief Magistrate Hon. W.A. Juma at Nyeri Chief Magistrate's Court dated 17th June, 2014 in Criminal Case No.624 of 2012.)

JUDGMENT

1. **James Ngunjiri Maina** hereinafter referred to as the Appellant was charged alongside two others with the offence of Robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars being that the Appellant and others ***“On the 7th day of July, 2012 at Ruringu Market in Nyeri County jointly with others not before the Court while armed with crude weapons namely rungus and pieces of timers robbed JAMES MACHARIA THEURI of a mobile phone make ideos valued at Kshs.8, 000 cash Kshs. 6,000 and wallet all valued at Kshs. 14,000/= and at or immediately before or immediately after the said robbery injured JAMES MACHARIA THEURI.”***

2. The case proceeded to full hearing with the prosecution calling a total of seven (7) witnesses. He was found guilty and convicted and sentenced to death.

3. Being aggrieved by the judgment he filed this appeal against both conviction and sentence on the following grounds;

1. THAT, the learned trial magistrate erred in both law and fact while convicting him on reliance to the circumstantial evidence that wasn't cogent enough to point to his guilt.

2. THAT, the learned trial magistrate erred in both law and fact while convicting him on reliance to my mode of arrest of which the same had no nexus to link him to the crime at hand.

3. THAT, the learned trial magistrate erred in both law and fact while convicting him on charges that weren't proved to the required standard as per law requires in sec 50 (2) (a) of the constitution.

4. THAT, the learned trial magistrate erred in both law and fact while rejecting my defence and his defence witnesses that wasn't challenged by the prosecution side as per requisite of in section 22 of the cpc cap 75 law of Kenya.

4. The Prosecution case is that the Complainant **James Macharia Theuri** (PW1) was going home from Outspan Hotel on 7th July, 2012 at 12.45am. He was driving motor vehicle registration no. KBA 629B Toyota Corolla. Reaching Ruringu a few metres before where he parks he found three men standing on the road. They had a motor bike.

5. They claimed he wanted to kill them but he denied. He drove to the parking and they followed him and they started boxing him, through his open window. He opened the door and ran towards the saw mill. He had drunk liquor and so could not run fast. They caught him, lifted him high and placed him on a bench at a vegetable stall. They hit him with a piece of timber (EXB1) from the Posho Mill. While there one of them removed his purse from the pocket (EXB2 – brown purse). They said the purse had several documents and cards (EXB2a-f) but not money.

6. From his suit was Kshs.6, 000 an ideos phone which were stolen. He lost consciousness during the process. He was taken to Nyeri Provincial Hospital where he was admitted for two days. A P3 form was later filled for him (EXB3). He did not identify any of the attackers. Three days later he found the phone placed on his vehicle.

7. PW2 **PC Meshack Kiroi** a police dog handler was with a colleague **P.C Njoro** (PW4) in Ruringu area on 7th July, 2012 at 2.00am. They were at diplomat bar heading towards Meeting point. They were on foot patrol. They heard a whistle blowing towards Salama Hotel. They moved in the said direction and saw four (4) men shaking a motor vehicle while holding its boot. The people took off, some on foot and others on a Motorbike. They found the door to the motor vehicle open and the key inside.

8. While there one by the name of Ngunjiri Maina arrived and told them the motor vehicle had hit a motorbike. People had started streaming in. A motorbike was brought. While still there a person emerged from the saw mill and was bleeding from the forehead. Those present identified the bleeding person as the one who had hit the motorbike.

9. The injured man told them he had lost the purse, money and wallet. Ngunjiri called Duncan Wamaguru who brought the wallet without money. The wallet had several cards EXB (2(i) -vi) Ngunjiri and Wamaguru were arrested and taken to the Station. They impounded the Motorbike whose photos were produced in Court as EXB 4a&b.

10. PW3 **Dr. Elizabeth Arua** produced a P3 form (EXB3) showing the injuries suffered by PW1. PW4 **PC Michael Njogu** said he was on patrol with PC Kirui (PW2) on 7th July, 2012 at 2.00am he generally gave similar evidence to that of PW2. PW5 **Francis Njuguna Wanjiru** is the owner of the motorbike KMCP 590H which had been impounded (EXB4a&b). PW6 **PC David Ali** was the re-arresting officer. PW7 **Sgt. Fredrick Simiyu Sirengo** is an officer from scenes of crime and operates under Authority No. 5853 of 2001. He was the one who photographed the Motorbike No. KMCP 590H (EXB4a & 4b).

11. The Appellant in his sworn defence denied the charge. He stated that on 6th July, 2012 at 1.30am he was at Homage waiting for a customer (Christine Nyawira) who testified as DW1. She came and he took her home at Jacaranda. On arrival he found many people there with Motorbikes. He stopped to find out what the problem was. He learnt that there had been an accident involving a motor vehicle and a motorbike. Police officers were there and he told them not to be one sided.

12. He was arrested but was not told why. In cross-examination he said he did not see the accident vehicle or motorbike. He denied knowing any of his co-accused. His witness (DW1) supported his evidence.

13. When the appeal came for hearing Mr. Njuguna Kimani who represented the Appellant argued all the four (4) grounds of appeal together. He first submitted that the evidence of PW1 revealed an offence under **Section 298** and not **296 (2)** of the **Penal Code**. That the circumstances revealed were;

(i) Assaulting

(ii) Beating and Stealing from the Complainant.

14. He further asked the Court to compare the evidence of PW1 with that of PW2, PW4 and PW6 as it was totally at variance. He pointed out the areas of contradiction as;

(i) Money

(ii) Wooden plunk

(iii) Who led PW6 to the scene.

15. He also submitted that it was not clear how many motor cycles were involved in this scenario. Further that the person who brought the motorbike was unknown. One **Geoffrey Maina Wangari** who had hired the motorbike was not called as a witness.

16. That the appellant was not identified at the scene and he was not found with anything. The watchman who blew the whistle was not called as a witness. He referred the Court to **Juma Ngodia V R (1982-88)1 KLR.** On the Appellant's defence he said the same was not considered yet that of his co-accused (A2) was believed.

17. He submitted that the Appellant was convicted on suspicion. On this he referred to **Sawe V R (2003) KLR 364.** Further that this was a case of circumstantial evidence and should have been treated as held in **Nzivo V R (2005)1KLR 69.** Finally he submitted that at page 64 of the record the learned trial Magistrate wondered why the Police did not confiscate the two phones of the accused persons to confirm if there was any communication between them.

18. Mr. Njue for the State opposed the appeal. He said PW1 was assaulted and injured and lost some items. He submitted that Robbery with violence contrary to **Section 296 (2) of the Penal Code** was proved.

19. On the identity of the assailants he said the evidence linked the Appellant to the incident, as was him who called his co-accused to bring the wallet. He submitted that this being circumstantial evidence the inculpatory facts pointed to the guilt of the Appellant.

20. He admitted that there were some contradictions in relation to money stolen, motorcycle and how the assailants left the scene, but he did not find these to be material. He finally submitted that the defence by the Appellant was given due diligence and was rightly rejected by the learned trial Magistrate.

21. This is a first appeal and this Court is enjoined to re-evaluate and reconsider the evidence and arrive at its own conclusion.

We take note of the fact that we did not see nor hear the witnesses and we have to give an allowance for it. In the case of **Mwangi V R (2004)2 KLR 28** the Court of Appeal stated the following on first Appeals;

1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.

3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings 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 trial court

had the advantage of hearing and seeing the witness.

22. We have considered the evidence on record together with the grounds of appeal, submissions by both the Appellant's Counsel and the State Counsel.

23. From the evidence on record it is clear that an offence of Robbery with violence contrary to **Section 296 (2)** of the **Penal Code** was committed. The attackers were three (3), they assaulted PW1 and stole from him an iPhone and cash money.

24. It is also clear from the evidence that PW1 did not identify any of the people who robbed him. The issue for determination is whether the circumstantial evidence on record points to the Appellant as one of the robbers.

25. The evidence of PW2 and PW4 was that they were attached to the police dog unit Nyeri Police Station. On this night they were on patrol in Ruringu. It's not clear if they had a police dog or dogs with them. They heard a whistle blowing. They went in the direction of the whistle and saw four men shaking a motor vehicle while holding its boot. The four men ran away.

26. These two witnesses were police officers and were at the scene at the same time. Their evidence must be consistent for the Court to rely on it. According to PW1 he was badly injured such that he became unconscious. He did not even know how he was returned to the scene.

27. PW2 on his part states that as they were at the scene the 1st person to arrive there was the Appellant claiming that his motorbike had been hit by the motor vehicle at the scene. As his friends went for the motorbike, PW1 appeared from the saw mill and he had injuries.

28. PW4 on the other hand says the 1st person to arrive there was PW1 who was bleeding and he explained to them what had happened to him. Thereafter the Appellant arrived claiming his motorbike had been knocked by the car.

29. From the narrative above it's not clear whether the unconscious PW1 is the same one who walked to the scene and even explained what had happened to him. Secondly, it's not clear who between PW1 and the Appellant was the first to arrive at the scene.

30. A piece of wood (EXB1) was produced by PW6. It is said to be the one that was used to assault PW1. It is nowhere indicated how this EXB1 was recovered. PW2 was categorical that he never saw EXB1 at the scene. PW4 who was at the scene with him did not make mention of the piece of wood (EXB1). PW6 who produced it said it was given to him by the arresting officer. PW2 and PW4 were the arresting officers and none knew anything about the plunk of wood (EXB1).

31. When the Appellant came to the scene he did not come with a motorbike. This can be discerned from the evidence of PW2 and PW4. PW2 at page 29 lines 21-24 stated:

“While there one person called Ngunjiri Maina came there and said the motor vehicle had hit the motorbike, we asked him where it was, and why he had removed it. People had started coming there. We held him and his friends went for motorbike.”

32. On the other hand PW4 stated the following at page 33 lines 23-page 34 line1;

“Another man came there and claimed he was the one knocked by the car. He said he was James Ngunjiri Maina, who became our first suspect. There was no motorbike at the scene. The motorbike was later brought, I do not know who brought it.”

33. The two police officers (PW2 and PW4) decided to arrest the Appellant as the first suspect. They received a motorbike whose photos were produced as EXB 4a&b. It's not clear what the relevance of this motorbike was. We say so because PW1 never said he was hit by a motorbike. All he said was that the

three (3) men he had met on the road had a motorbike. He did not identify any of the three men or even the motorbike.

34. The owner of this photographed motorbike was traced and he testified as PW5 **Francis Njuguna Wanjiru**. It's worth noting that PW5 gave this motorbike to one **Geoffrey Maina Wanjiru** who was to get a rider for it. PW5 did not know who the rider was. All that he was interested in was receiving the money. After a month the money stopped coming. He inquired and was then informed by Geoffrey M. Wanjiru that the motor vehicle had been seized by the Police.

35. PW5 did not also know why his motorbike had been impounded by the police. This is what he stated in his evidence at page 37 lines 17-22;

“I never got to meet the motorbike driver. I knew its rider when I went to the police station, that the motorbike had been held with the rider and its passengers. I went to the police station and was informed about the wrongs the motorbike had done. I was not shown whoever had the motorbike. I was sent for documents of the motorbike. I took it. I do not know the accused persons in the dock.”

36. From this evidence by PW5 this court finds the following to be revealed;

(i) The rider of PW5's motorbike had been arrested together with his passengers.

(ii) The motorbike rider had committed some offences.

(iii) PW5 did not know the rider but he knew him at the police station but he was not shown whoever had the motorbike.

37. The question we ask ourselves is who the rider was and who was the person with the motorbike. Besides the Appellant not having come to the scene with the suspect motorbike (EXB4a & b) we are unable to find the connection between this motorbike and the Appellant. The Court was not told who brought the motorbike to the scene. If PW1 denied having been knocked by any motorbike why was the motorbike impounded?

38. There are two persons whose evidence was material in this case. They are **Geoffrey M. Wanjiru** and the **watchman** who blew the whistle. Geoffrey would have confirmed who was the motorbike rider and if at all the motorbike was involved in any accident. The watchman could have explained why he was blowing the whistle and what he may have seen. In the case of **Juma Ngodia V R (1982-88)1 KAR** the Court of Appeal stated thus;

“1. The prosecutor has, in general, a discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution.”

39. This is one of those cases where failure to call witnesses by the prosecution would imply that their evidence would be unfavourable to them. The reason being that no other witness testified on what the Court would have expected to hear from the two witnesses stated above.

40. There is evidence by PW2 and PW4 that the Appellant called his co-accused and asked him to bring PW1's wallet, which he did. The Appellant denied this. The conversation between the Appellant and the forwarder of the wallet was on phone. In her judgment the learned trial Magistrate at page 64 lines 1-4 she states;

“He never challenged the police that he did not call the second accused, the only omission here is that police have not brought the phones the two accused persons communicated with when first accused called the second one.”

41. PW4 told the Court that the Appellant and co-accused communicated over the wallet on phone and in Kikuyu language and he heard their conversation. PW2 who was present apparently did not hear the conversation. All he says is that the Appellant called his co-accused who brought the wallet. Both the Appellant and his co-accused denied the issue of the conversation and the wallet.

42. The Court had therefore to satisfy itself that indeed the Appellant called the co-accused. Had PW1 and PW2 taken the phones of these two people and brought a data print out from the service provider/providers, the court could have satisfied itself that indeed such a conversation took place. And the learned trial Magistrate correctly observed that there was an omission in the failure by the police to avail this evidence, but she did not make any finding on the effect of this.

43. This was a case that depended on circumstantial evidence. Circumstantial evidence is very good evidence but it should fit well without any breaking of the chain in order for it to be relied on to found a conviction. In the case of **Sawe V R (2003) KLR 364** and later in **Nzivo V R (2005)1 KLR 699** the Court of Appeal had this to say on such evidence;

“5. In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.”

44. It is clear that the Appellant was arrested by PW2 and PW4 on mere suspicion. PW1 did not identify his attackers. He never said his motor vehicle had been knocked by a motorbike. The Appellant was arrested for making such a claim. The motorbike whose photos were produced in Court as EXB4a & b did not belong to the Appellant. It was not explained how he was connected with it.

45. In **Sawe V R (supra)** the Court of Appeal stated thus on suspicion;

“7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

The suspicion by PW2 and PW4 without any other independent evidence is not good enough to sustain a conviction. The omission to avail two crucial witnesses weakened the prosecution case further.

46. Upon re-evaluating the evidence on record we have found several loop holes in the prosecution case. These loop holes create a clear doubt in our minds as to whether indeed the Appellant was one of the persons who robbed PW1. He will benefit from that doubt.

47. We therefore allow the appeal and quash the conviction. The death sentence is set aside. The Appellant to be released forthwith unless otherwise held under a separate warrant.

Signed, dated and delivered in open court this 15th day of December, 2015

Hedwig Imbosa Ong’udi

Ngaah Jairus

JUDGE

JUDGE