



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CRIMINAL APPEALS 555 and 556 OF 2009

BENARD MUNYAU NDUNGE1ST APPELLANT

FRANCIS NJOGU KABUCHO2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of A. Ongeri SPM in Criminal Case No. 345 of 2009 delivered on 27th November 2009 in the Chief Magistrate's Court at Kiambu)

JUDGMENT

The 1st and 2nd Appellants were charged with three offences of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the first offence were that on the 21st day of December 2008 at Ngecha Trading Centre in Ngecha location in Kiambu West District within Central Province, jointly with others not before the court, and being armed with dangerous weapons namely a pistol, pangas and iron bars, robbed Fredrick Njane Gatuha of a Nokia mobile phone model 3310, S/No 350992/10/905634/5 valued at Kshs 6,000/=, and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said Fredrick Njane Gatuha.

The particulars of the second offence were that on the 21st day of December 2008 at Ngecha Trading Centre in Ngecha location in Kiambu West District within Central Province, jointly with others not before the court, and being armed with dangerous weapons namely a pistol, pangas and iron bars, robbed Ann Wanjiku Gatuha of a sonny Erickson, S/No 354271021637433 Model No. K 8001, a handbag and cash of Kshs 1,600 all valued at Kshs 14,100/=, and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said Ann Wanjiku Gatuha.

The third offence's particulars were that on the 21st day of December 2008 at Ngecha Trading Centre in Ngecha location in Kiambu West District within Central Province, jointly with others not before the court, and being armed with dangerous weapons namely a pistol, pangas and iron bars, robbed Margaret Njeri of a Minolta camera body no 13228596 lens No 404283553 valued at Kshs 10,700/=, and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said Margaret Njeri.

The 2nd Appellant was also charged with a fourth offence of escape from lawful custody contrary to section 123 of the Penal Code. The particulars of the offence were that on the 2nd day of December 2008 at Ngecha's Chief's camp, Ngecha location in Kiambu West District within Central Province, while under the custody of no. 88069711 APC Jerry Oganda and No. 994023537 APC Kiprono Cheruiyot being charged for the offence of robbery with violence escaped from the custody of the said police officers.

The 1st Appellant was in addition charged with the alternative offence of handling stolen property contrary to section 322(2) of the Penal Code. The particulars of the offence were that on the 22nd day of December 2008 at Ngecha Trading Centre in Ngecha location in Kiambu West District within Central Province, otherwise than in the course of stealing dishonestly handled one Sony Erickson mobile phone model K 8001 Serial Number 354271021637433, knowing or having reasons to believe it to be a stolen good.

The 1st Appellant pleaded not guilty to all the charges against him. The 2nd Appellant pleaded not guilty to the offences of robbery with violence and guilty to the offence of escape from lawful custody contrary to section 123 of the Penal Code. The Appellants were tried and convicted of the three offences of robbery with violence and sentenced to death. The sentence for the 2nd Appellant for the offence of escape from lawful custody was held in abeyance.

The Appellants being aggrieved by the judgment of the trial magistrate appealed both their conviction and sentence. The 1st Appellant appeared in person and relied on written and oral submissions. His main ground of appeal was that he was not positively identified. He submitted in this regard that PW1, PW2 and PW3 relied on lighting from torches to identify him during the first attack, and on lights from a passing motor vehicle during the second attack. Further, that the said circumstances were not favourable for a positive identification as both attacks happened at night. His second ground of appeal was that the trial court convicted him on insufficient evidence, and he submitted in this regard that the red jacket used to identify him during the attack was not produced in evidence, and that there were doubts as to the circumstances in which the police recovered the stolen mobile phone from his house and yet he was not present in the said house.

The 2nd Appellant was represented by counsel, Ms Betty Rashid who submitted that the said Appellant's grounds of appeal were that there was no positive identification of the 2nd Appellant, and that the trial court relied on single witness identification made in difficult circumstances. The counsel further submitted in this regard that PW3 testified that she saw the 2nd Appellant using a flashlight at night in the first attack, and using the headlights of a moving vehicle in the second attack. The counsel also submitted that no evidence was tendered to show that the house from which the stolen camera was recovered belonged to the 2nd Appellant, and that contradictory evidence was given by PW5 and PW6 as to who opened the door to the house for the police. Lastly, the counsel also submitted that the trial magistrate erred in law and fact in convicting the 2nd Appellant for the offence of escape from lawful custody, and yet the 2nd Appellant did not plead guilty to the said charge.

Mr Karuri for the State opposed the appeals and submitted that the complainants who were PW1, PW2 and PW3 were attacked twice on the same night by the Appellants and robbed of their goods. He submitted that in the first attack all the three complainants were able to identify the 1st Appellant using moonlight, and in the second attack by the headlights of a passing car, and that they also identified him through a red jacket he had been seen wearing earlier that day. Further, that one of the stolen mobile phones belonging to PW3 was found in his possession the next day after the complainants gave his name to the police.

With regard to the 2nd Appellant, Mr. Karuri submitted that the said Appellant was known to the complainants, and PW3 stated that she had known him for 6 years. Further, that the 2nd Appellant led the police to recover the camera which was found in his house although there was a woman staying there. Mr Karuri conceded that the record did not show that the accused pleaded guilty to the offence of escape

from lawful custody, but that PW5 did testify that the 2nd Appellant escaped from police custody.

A brief summary of the evidence adduced before the magistrate's court is as follows. The prosecution called seven witnesses. PW1 was Fredrick Njane Gatuha who stated that he lives in Ngecha area, and that on 21.12.2008 at 9.p.m in the night he was walking home with PW2 and PW3 after attending his aunt's funeral. He testified that they were then accosted by four men who had guns, and he was robbed of his mobile phone. He stated that he was able to recognise the 2nd Appellant, whom he knew from before as Njogu, from the lights of the torches that the assailants had. He also stated that one of the assailants wore a red jacket.

PW1 further testified that they reported the incident at the chief's office, and that the chief offered to take them home in his car. He stated that on their way home they were again attacked by the same assailants and that he saw the 2nd Appellant and 1st Appellant using the headlights of the car. PW1 stated that the next day he saw a person wearing a red jacket, and upon closer examination recognised him as one of the assailants. He thereupon informed the police who arrested the 1st Appellant.

PW2 was Margeret Njeri Mwaniki who gave similar testimony to that of PW1. She stated that she was robbed of a camera, mobile phone and Kshs 1,600/=. She stated that she did not know the assailants before the robbery incident, and was able to identify the 1st Appellant having seen him using the lights from the motor vehicle. She was also with PW1 when they saw the 1st Appellant the next day and informed the police.

PW3 was Ann Wanjiku Gatuha who also gave similar account of the events of the night of 21/12/2008 to that of PW1. She stated that her mobile phone and a bag with her documents and Kshs 1600 were stolen from her during the robbery incident. She further testified that she was able to recognise the 2nd Appellant whom she had known for six years using the moonlight and light from the torches the assailants had, and that she identified the 1st Appellant from the clothes he was wearing and from the headlights of the vehicle. She also testified that she was told her phone had been recovered and later identified it at Tigoni Police Station.

PW4 was Joseph Chege Nganga who testified that on 21/12/2008 at around 10m he was returning a phone that had been left to charge at his shop in Ngecha town to a corporal in the chief's office, whereat he met PW3 who informed him of the robbery incident. He offered to take PW1, PW2 and PW3 home using his car, and on the way they told him that they had seen the assailants. Upon stopping at the gate to PW3's house the assailants came to the car and robbed him of Kshs 800/=. He was not able to identify any of the assailants.

PW5 was Corporal Niccasau Njeru, who testified that he was attached to the Ngecha AP Camp, and that on 21/12/2008 PW1, PW2 and PW3 reported that they had been robbed by armed assailants. Further, that on 22/12/2008 the complainants reported that they had seen the assailants being the 1st and 2nd Appellants, and that he then arrested the two in a bar at Ngecha town. PW5 testified that they left the 1st Appellant in custody and went with the 2nd Appellant to his house, whereupon they found a camera after a search.

Further, that they were also informed by members of the public that the 1st Appellant was selling a mobile phone, and they went to his house and recovered a mobile phone after a search. They also recovered a mobile phone that he had sold to a member of the public. PW5 also testified that the 2nd Appellant escaped from the cells and was later re-arrested on 16/1/2009.

PW6 was APC Jerry Owino Ogonda who testified that he is attached to Homabay District and previously worked at Ngecha Chief's Camp. He testified that on 21/12/2008 four people reported a robbery incident in which they were robbed by four assailants armed with a panga, iron bar and pistol. He stated that the complainants said they could identify two of the assailants, and that on the next day they reported that they had seen the two assailants who were then arrested. He stated that the two assailants who were

arrested were the 1st and 2nd Appellants, and that he knew the 2nd Appellant from before.

PW6 further testified that the 2nd Appellant took them to his house the next day where they recovered a camera, and that they also recovered one mobile phone from the 1st Appellant, and one which he had sold to a buyer. PW6 also testified on the escape by 2nd Appellant from custody and his subsequent re-arrest.

The last prosecution witness was PW7, Corporal John Kajara, who testified that he was attached to Tigoni Police Station, and that on 22/12/2008 at about 5.30 pm when he received a report about the robbery incident and the arrest of the 1st Appellant. He testified that he then visited the scene of the robbery and charged the 1st and 2nd Appellants with robbery with violence. He further testified that he was given the camera and mobile phones that had been recovered from the Appellants, and he produced them in court as exhibits, together with the original receipts given to him by the complainants which showed the serial numbers that were the same as those on the recovered items.

After the close of the prosecution case the trial magistrate found that the Appellants had a case to answer and complied with sections 210 and 211 of the Criminal Procedure Code. Both Appellants gave unsworn evidence and did not call any witnesses.

The 1st Appellant testified that he is a matatu driver at Wangige, and that on 22/12/2008 he was looking for a matatu to drive and was told that there was one whose owner was at Ngecha. Further, that he went to Ngecha and while there, he was arrested by plainclothes police officers who took him to Ngecha Chief's Camp and later to Tigoni Police station, where he was informed that he had committed a robbery. The 1st Appellant also testified that on 9/1/2009 he was taken to Limuru Court and charged with the offence, and later to Kiambu Court. He denied committing the robbery.

The 2nd Appellant testified that he is a sand broker and that on 22/12/2008 he was waiting for a lorry to take him to the quarry when he was told by a Corporal Njeru to go the Chief's camp. Further, that when he arrived at the chief's camp he was locked up in the cells, and he admitted escaping therefrom. He was arrested on 16/1/2008 and then taken to Tigoni Police station the next day before being charged with the offences at Limuru Court. He denied committing the offences.

We have considered the arguments made by the Appellants and the State. Our duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, we are alive to the fact that we do not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR 21** and **Kimeu v/s Republic (2003) 1 KLR 756**.

We accordingly find that there are three issues for determination in this appeal. The first is whether there was a positive identification of the 1st and 2nd Appellants; secondly, whether there was sufficient evidence to convict the 1st and 2nd Appellants for the offences of robbery with violence; and lastly, whether a plea of guilty for the offence of escape from lawful custody contrary was properly taken and recorded with respect to the 2nd Appellant.

On the issue raised of the positive identification of the Appellant, we have reminded ourselves of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, *inter alia*, that:

“In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light”.

In addition it has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal

knowledge of the assailant in some form or other.

In the present appeal the robbery took place at night, and PW1, PW2 and PW3 testified that they were able to identify the Appellants on two occasions using lights from torches and from the headlights of a motor vehicle. It is our view that there was thus ample opportunity for the witnesses to identify the Appellant. This was also not a case of single witness identification as all three witnesses identified the Appellants. In addition PW1 and PW3 recognized the 2nd Appellant whom they stated that they had known for 6 years. We therefore find that there was no mistake in the 1st and 2nd Appellants' recognition and identification.

On the issue of whether there was sufficient evidence to convict the Appellants for the offence of robbery with violence, evidence was given by PW5, PW6 and PW7 of the recovery of the stolen camera from the 2nd Appellant and the stolen mobile phone from the 1st Appellant, which items were also produced as exhibits in court. The doctrine of recent possession as explained in the case of **Malingi vs Republic (1989) KLR 227** therefore applies to circumstances of this appeal, as the Appellants was found in possession of the stolen items the next day after the robbery. The Appellants' possession of the stolen items also corroborated the evidence of their recognition and participation in the robbery.

We are alive to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**. We are in this respect also guided by the decision in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** which sets out what constitutes robbery with violence under section 296(2) of the Penal Code as follows:

- 1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
- 2. If he is in the company with one or more other person or persons, or**
- 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.**

We have already found that the Appellants were identified and recognised at the scene of the crime by PW1, PW2 and PW3, who also testified that they were armed with guns. It is thus our finding that from the evidence adduced in the trial court the ingredients of the offence of robbery with violence were proved with respect to the Appellants, and there was sufficient evidence to convict him of the offence.

Lastly, on the issue of whether the 2nd Appellant entered a plea of guilty for the offence of escape from lawful custody pages 9-10 of the appeal record of the trial court shows that substituted charges were read and explained to the accused persons on 6/7/2009 before Hon. A. Ongeru, and that the 2nd Appellant with respect to count (iv) stated that it is true, and the court then entered a plea of guilty on count (iv) with respect to the 2nd Appellant, and stated that facts were to await trial.

The issue that therefore arises for determination is whether the 2nd Appellant's plea of guilty was unequivocal, and if not, the consequences of the same. The steps to be followed by any trial court taking a plea of guilty were set out in **Adan –vs- Republic [1973] EA 445**, and these are:-

- 1. The charge and all the ingredients of the offence should be explained to the accused in his language or in a language he understands;**
- 2. The accused's own words should be recorded and if they are on admission, a plea of guilty should be recorded;**
- 3. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
- 4. If the accused does not agree the facts or raises any question of his guilt, his reply must be recorded and change of plea entered;**
- 5. If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.**

Further, the use of the words “**it is true**” when answering to the charge and the facts has been found to be inadequate as such words do not bring out to the court whether the charge and the facts as read are indeed true. In the **Adan case (supra)**, the court observed that in cases where an accused is unrepresented as was the case herein, and because of the possibility of certain English words having no real equivalent in the vernacular language of an accused, it is important for the trial court to satisfy itself that an accused person has truly understood the content and context of his answers.

In the present case not only were the words “it is true” used to record a plea of guilty, in addition the facts were not explained to the 2nd Appellant after the recording of the plea of guilty to enable him dispute them or have them explained further. In the circumstances therefore, we find the conviction of the 2nd Appellant for the offence of escape from lawful custody contrary to section 123 of the Penal Code to be null and void. We however do not find it necessary to order a retrial in light of the 2nd Appellant’s conviction for the offence of robbery with violence which we find to be safe.

We accordingly uphold the conviction of the 1st and 2nd Appellants for the charges of attempted robbery with violence contrary to Section 297(2) of the Penal Code, and the sentences for these convictions are found to be legal. We however quash the conviction of the 2nd Appellant for the offence of escape from lawful custody contrary to section 123 of the Penal Code.

Orders accordingly.

DATED AT NAIROBI THIS 28TH DAY OF JANUARY 2014.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE