



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO.41 OF 2013

ANTHONY KINYUA MBOGO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case number 423 of 2009 in the Principal Magistrate's Court at Gichugu –HON. B.J. Ndeda – (S.R.M.)

JUDGMENT

The appellant **ANTHONY KINYUA MBOGO** was tried and convicted on a charge of robbery contrary to **Section 296(1) of the Penal Code**. The particulars supporting the charge alleged that on 23rd April 2009 at Kirima location in Kirinyaga District within central province, the appellant robbed **SUSAN MUTHONI WARUI** of cash ksh.8,000 and a mobile phone make Vodafone 125 valued at ksh.1,600.

The value of the property stolen was stated to be ksh.9,600.

Following his conviction, the appellant was sentenced to five(5) years imprisonment.

Being dissatisfied with the conviction and sentence, he filed this appeal raising several grounds which can be summarised as follows;-

1. That the trial magistrate erred in law and in fact by convicting him on the basis of insufficient evidence and specifically that he failed to warn himself of the dangers of relying on the evidence of a single identifying witness.
2. That the learned trial magistrate erred in law and in fact by not considering his defense which was not shaken by the prosecution.

When prosecuting his appeal, the appellant relied on written submissions which he submitted to the court.

The state through M/S Macharia learned state counsel did not oppose the appeal.

She submitted that the appellants conviction was unsafe as it was based on the uncorroborated evidence of the complainant regarding her alleged identification of the appellant as the person who robbed her of her mobile phone and ksh.8,000 at the time alleged.

In addition, she contended that the trial magistrate erred in his judgment when he failed to warn himself of the dangers of convicting the appellant on the basis of a single identifying witness.

This being the first appellate court, it has the duty of re-evaluating the evidence tendered before the lower court in order to satisfy itself that the conviction was sufficiently supported by the evidence on record. This is of course taking into account that unlike the trial magistrate, I did not have the opportunity of seeing or hearing the witnesses and did not therefore have the advantage of observing their demeanor.

Looking at the particulars supporting the charge and the evidence on record, I find that there is a discrepancy regarding the date on which the offence was allegedly committed.

The particulars aver that the offence was committed on the 23rd day of April 2009 which is the same date stated by PW2 in his evidence. The complainant however gave a different date in her evidence. She testified that the robbery occurred on the night of 24th April 2009.

This discrepancy in my view though relevant was immaterial and did not adversely affect the prosecution's case since the allegations levelled against the appellant were clear and nothing turned on the date the offence was allegedly committed.

Turning now to the evidence adduced in support of the charge, PW1 the complainant testified that she was a bar maid in a certain bar and on 24th April 2009 she closed the bar at around 10.30 p.m. and went home. On arrival home, she decided to go for a short call. The record is not clear where she went for the short call but it appears to have been in the open because in her evidence, she claims that just as she was preparing to relieve herself, somebody held her from behind and on turning, she saw through moonlight that it was Kinyua the appellant herein.

He held her neck and knocked her down. He also ransacked the right pocket of her skirt from where he removed ksh.8,000, and her mobile phone make Vodafone 125. That the appellant released her and ran away with the items on seeing one Mr Mwangi. The said Mr Mwangi testified as PW2. He claimed that on 23rd April 2009 at around 10.30 p.m. as he was walking home from Mugumo bar, he heard a woman shouting and on rushing to the place where the shouts were coming from, he saw a boy running away.

He approached the lady who was shouting who turned out to be PW1 and she told him that it was Kinyua the appellant who had robbed her. This is when PW2 decided that it was the appellant he had seen running away from the scene not just an un identified "boy"

The matter was reported to the police and the appellant was subsequently arrested. Nothing was recovered from him.

In his defence, the appellant gave a sworn statement in which he denied having committed the offence as alleged.

Having analysed the evidence on record, it is my finding that the evidence fell short of establishing the offence of robbery contrary to **Section 296(1)** of the **Penal Code**.

Section 295 of the Penal Code defines the offence of robbery and sets out its essential ingredients.

It is clear from that definition that for the offence of robbery to be committed, the prosecution must prove by evidence that the person accused of the offence stole some property and at or immediately before or after the time of such theft, used or threatened to use actual violence to any person or property in order to obtain or retain the things stolen or to prevent or overcome resistance to it being stolen.

In this case, whether or not the appellant was identified as the person who allegedly stole from the complainant, I find that the evidence on record does not prove that the person who stole from the complainant used or threatened to use any violence on her either before or immediately after the theft.

Merely grabbing the complainant's neck and knocking her down cannot obviously amount to an act of violence as contemplated in the definition of robbery. The circumstances would have been different if it

had been proved that the culprit had gone further to strangle the complainant or inflicted harm on her person in order to facilitate the robbery.

In view of the foregoing, it is my finding that the evidence adduced did not support the offence with which the appellant was charged. There was therefore no evidence upon which a conviction could be validly founded. The learned trial magistrate erred in not properly interrogating the evidence and in failing to appreciate that the evidence adduced did not establish the offence of robbery.

It is also my view that the evidence regarding the alleged identification of the appellant as the person who had stolen from the complainant left a lot to be desired.

Though the learned trial magistrate accepted PW2's evidence that he had seen and identified the appellant through moonlight as the "boy" he had seen running away from the complainant and that his evidence collaborated PW1's evidence on identification of the appellant. It is not clear how PW2 had seen and recognized the appellant if he had seen him as he ran away from the scene meaning that he had his back to him. And if he had actually identified and or recognized the appellant why did he refer to him as a "boy" he saw running away from the scene instead of giving out his name? I agree with the learned state counsel that PW2 appears to have relied on what he was told by the complainant.

It is interesting to note that both witnesses claimed that they had seen the appellant during the day and that they recognized him that night because he was still wearing the same clothes he had worn during the day. But none of them described the clothes the appellant had worn in order to buttress their claim that they had also recognized him through the clothes he had worn. It would have been helpful if they had described how the appellant had been dressed for instance by stating the kind of clothes he had worn and their colours. Such evidence if available would have eliminated any doubt that they had in fact seen him during the day and would have lent credence to their claim that he was the same person they saw committing the offence later that night. It is also worth noting that the two witnesses claimed that they had seen and identified the appellant through moon light but none of them described the intensity of the moonlight that aided their alleged recognition.

Taking everything into account, I am not satisfied that the evidence on identification of the appellant as the person who accosted and stole from the complainant at the time alleged was credible and cogent. I am of the view that the evidence on record was not sufficient to prove beyond any doubt that the appellant was positively and properly identified as the complainant's assailant at the material time.

For the foregoing reasons, I have come to the conclusion that the appellant's conviction in this case was not safe and the learned state counsel was prudent in not supporting the conviction. I accordingly allow the appeal, quash the conviction and set aside the sentence.

The appellant is to be set at liberty forthwith unless otherwise lawfully held.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED at KERUGOYA THIS 17TH DAY OF JANUARY 2014 in the presence of:-

The appellant

Mr Sitati for the state

Martin court clerk