



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 69 OF 2012

JACOB MWANGI MAINA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by J.N. MWANIKI Senior Resident Magistrate Baricho in Criminal Case No. 681 of 2009 on 4th June 2010)

J U D G M E N T

JACOB MWANGI MAINA the appellant was charged with the offence of **Robbery with Violence Contrary to Section 296(2) of the Penal Code.**

The particulars as stated in the Charge sheet were that *on the 27th day of July 2009 at 03.00 am at Sagana township, Ndia Division in Kirinyaga District within the Central Province jointly with another not before court robbed **RICHARD KIGUTA GITONGA** of his cell phone make Nokia 6030 valued at Kshs.9,899/= and cash*

*3,550/= and at the time of such robbery wounded the said **RICHARD KIGUTA GITONGA.***

He denied the charge and the matter proceeded to full hearing. He was eventually convicted and sentenced to death. And being dissatisfied with the judgment, he appealed against both the conviction and sentence. He has raised the following grounds:-

1. ***He pleaded not guilty.***
2. ***The learned trial magistrate erred in law and in facts by convicting him with an offence which was not reported in the police station.***
3. ***The learned trial magistrate erred in law and in facts while convicting him with the evidence adduced by PW2 which was hearsay as he was a stranger to him.***
4. ***The learned trial magistrate erred in law and in fact when he convicted him by not considering the evidence adduced by PW6 that the suspect had no exhibit while he was arrested and booked.***
5. ***The learned trial magistrate erred in law and in facts by not considering his defence which was not shaken by the prosecution side. He gave his defence starting where he was on the said date the crime was committed.***
6. ***The learned trial magistrate erred in law and in facts by not considering that the complainant who is PW1 told the court that he reported to police on 28th July while the OB clearly states the report on the alleged crime was stealing breads in the absence of the owner. They booked him as Richard Mwangi Maina but not Jacob Mwangi Maina.***

7. ***The learned magistrate erred in law and in facts by not considering that the adduced evidence of PW3 and PW4 were uncorroborated for all denied that they took the phone which was the exhibit to police station.***
8. ***The learned magistrate erred in law and in facts by not considering that there was no parade conducted.***
9. ***The learned magistrate erred in law and facts when convicting him by not considering his mitigation.***
10. ***The leaned magistrate erred in law and in facts by not considering the evidence of PW4 who said the phone was not recovered from accused but it was collected on the floor.***

The Prosecution case was that on the night of 27/7/2009, PW1 was walking along the road when he saw people from behind running towards him. He flashed his torch at them. One of them grabbed him by the collar and trousers. They struggled. A second person strangled him by the neck. His pockets were searched and Shs.3, 550/= and a mobile phone Nokia 6030 were taken away. He reported to a police officer and was escorted home. The next day he reported to his worker Mwema (PW2) that he had identified one of the attackers as a herdsboy who walked with a gait.

He produced a receipt (EXB2) for his phone and also identified the said phone (EXB1) in Court. PW3 and PW4 testified that they recovered a Nokia phone (EXB1) on the appellant after he was arrested for stealing bread. PW5 confirmed that PW1 had a painful neck and difficulty in swallowing. He produced the filled P3 Form (EXB3) and treatment notes. PW6 (PC Harun Ombaso) received the appellant at Sagana police station on 29/7/2009 on allegations of theft.

In his sworn defence the appellant denied the charge. He testified that on 29/7/2009 while on his way he was stopped by three people who demanded to talk to him. One made a call and after a while about 15 went came and beat him up seriously. His home was searched but no bread was recovered. He was then taken to the police station. He denied any knowledge of the phone produced in Court.

When the appeal came up for hearing, the appellant presented the Court with written submissions. He has raised the following issues.

- i. ***There was no proof that he was found with the phone.***
- ii. ***Had he been taken to the police station with that phone he would have been charged with an alternative count of handling which he was not charged with.***
- iii. ***He was not identified.***
- iv. ***The complainant did not make his report on 28/7/2009 as alleged.***

Mr. Amayo for the State opposed the appeal on the grounds that

- i. ***Robbery was proved. PW1 was injured.***
- ii. ***The appellant was found in recent possession.***
- iii. ***The appellant's defence was a mere denial.***

This being a first appeal, we are enjoined to re-consider and re-evaluate the evidence on record and arrive at our own conclusion. We have to consider the findings and conclusions of the trial Court. We should bear in mind that we did not see nor hear the witnesses. We refer to ***OKENO VS REPUBLIC [1972] EA 32; KINYANJUI VS REPUBLIC [2004] 2 KLR 364; SOKI VS REPUBLIC [2004] 2 KLR 21.***

We have considered the submissions by the appellant and the State plus the grounds of appeal. We have equally considered the evidence on record. PW1 said he owned a business in Sagana where he resided. He was walking along the road on the night of 27/7/2009 when he was attacked and robbed of a phone and cash money. He was strangled by the neck and medical evidence confirms he was injured (EXB3&4). He produced a receipt (EXB2) to confirm that indeed the recovered phone (EXB1) was his property which had been stolen from him.

Section 296(2) of the Penal Code sets down three (3) elements which must be proved in order to

establish the offence of robbery with violence. These are:-

- i. ***The robber must have been armed with a dangerous weapon OR***
- ii. ***He must have been in the company of one or more people, OR***
- iii. ***Immediately before or immediately after the robbery used violence or occasioned actual violence to the victim.***

In the case of ***JOHANA NDUNGU VS REPUBLIC [1995] KLR 387***, the Court of Appeal held that any of these elements was sufficient to prove a charge of robbery with violence under Section 296(2) of the Penal Code. In this case we are satisfied that a charge of robbery with violence had been established.

The next issue for determination is whether the appellant was one of the robbers. Though PW1 tried to tell the Court that he had identified the appellant and even given his name to PW2, it is clear that that was not true. PW2 said PW1 had told him that the person he had identified was a herdsboy and walked with a gait. There is no evidence on record to confirm that the appellant fitted either of the two descriptions.

PW1 also testified that after the incident, he reported the robbery to the security officers and one police officer escorted him back home. And in cross-examination, he said that he reported the incident to the police the next day. However PW6 in cross-examination stated the following at page 15 line 29-30

“Complainant herein had not before your arrest made any report. I don't know how complainant got a P3 form.”

While PW7 at page 18 lines 23-25

“The accused was already in custody. Complainant had reported about theft of his Nokia 6030 and Kshs.3, 000/= on 29/7/2009 at night.”

At page 19 lines 9-12 he further stated;

“The incident was on 27/7/2009. I first got to know about the incident on 29/7/2009. I issued complainant with a P3 form on 29/7/2009. Complainant made a report about robbery.”

This clearly shows that contrary to PW1's averments, he did not report this incident to the police on 27/7/2009. Infact by the time the appellant was arrested and taken to the police station, there was no such report concerning the robbery. Had he identified the appellant, there was nothing that stopped him from making his report to the police. Even the circumstances under which the robbery occurred were not conducive to a positive identification. We therefore find that PW1 was not able to identify those who robbed him.

The evidence we are left with is that of recent possession. The Court of Appeal in the case of ***ARUM VS REPUBLIC [2006] 1 KLR 233*** gave some guidelines on what the court should consider before relying on the doctrine of recent possession. It held thus:-

1. ***Before a Court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof ;***

(a) That the property was found with the suspect;

(b) That the property was positively the property of the complainant;

(c) That the property was stolen from the complainant;

(d) That the property was recently stolen from the complainant.

2. ***The proof as to time will depend on the easiness with which the stolen property can move from***

- one person to another.*
- 3. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot suffice, no matter from how many witnesses.*
 - 4. In case the evidence as to search and discovery is conflicting, then the Court can rely on the adduced evidence after analyzing it and accepting that it considers it to be correct and an honest version.*

The evidence of the recovery of this phone is by PW3 and PW4. The appellant was suspected of having stolen someone's crate of bread. This was PW3's evidence at page 10 lines 15-21

“I was called later by one of my customers who told me he had not got his bread. I suspected one person who had earlier been caught stealing bread. On 29/7/2009 I was called by someone who told me they had arrested a suspect. I met the suspect who told us the bread were at his mothers house where we went to no avail. The suspect was accused at the dock. We recovered a phone from him which the area elder took.”

PW4 stated in re-examination at page 12 line 10-11

“I took the phone from the crowd as accused's property and to protect it”.

The evidence of PW3 and PW4 is that the phone (EXB1) fell from the pocket of the appellant. PW4 admits having taken the phone from the crowd. Could a crowd have been having the phone and could a crowd give PW4 a phone? PW6 (PC Harun Ombaso) received the appellant at the station from members of the public. He also got a phone (EXB1) from one of the members of the public. But he again changed to say he received the phone from PW4. PW6 was of course not telling the truth on how he received the phone. PW4 in his evidence at page 11 lines 23-25 said thus:

“He also complained we had taken his phone which I handed to a young man and who in turn handed over the phone to police.”

So who took this phone to the police? This is not clear from the record. And how was this phone recovered? And how did PW1 know that his phone had been recovered in order for him to follow up the appellant to the police station to make his complaint?

What we gather from this evidence is that the appellant was arrested by members of the public for allegedly stealing bread. They beat him up. By this time PW1 had not reported any robbery. And when the appellant was arrested PW1 was nowhere near the crowd. He is not the one who caused the appellant's arrest. And having been arrested and beaten up by a crowd, It is difficult to say for certain who had possession of the phone. PW3 and PW4 claimed that it fell from the appellant's pockets. PW4 was not present when the appellant was arrested. He says at page 11 lines 18-20

“On 19/7/2009 I found a group of people having arrested accused at the dock and being beaten on allegation he had stolen bread.”

At what point did this phone fall from the appellant's pocket? In the case of ***ARUM VS REPUBLIC (Supra)*** the Court stated that the trial court must satisfy itself that the ***“THE PROPERTY WAS FOUND WITH THE SUSPECT”***. After much consideration, we find that the evidence of PW3, PW4 and PW6 is so conflicting on the issue of how and where this phone was recovered. We cannot therefore state with certainty that ***“the phone was found with the appellant”***.

And since this was the only evidence that linked the appellant with the commission of the offence, in the absence of clear evidence to prove that the phone was recovered from the appellant, we find that there is no evidence upon which a safe conviction could have been founded. The result is that the appeal is allowed. The conviction is quashed and the death sentence set aside. The appellant is to be released forthwith unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KERUGOYA THIS 21st DAY OF FEBRUARY 2014.

H.I. ONG'UDI

C.W.GITHUA

J U D G E

J U D G E

In the presence of:-

Mr Sitati for State

Appellant

Mbogo Court Clerk