



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL NO.38 OF 2007

PETER WANJOHI MBOGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment in the Chief Magistrate's Court at Nyeri

in Criminal Case No.2202 of 2004 by E.J. OSORO – SRM)

J U D G M E N T

The appellant was charged with five counts of Robbery with Violence contrary to Section 296(2) of the Penal Code.

The particulars of the 1st count were that on the 10th day of March 2004 at Mathaithi estate in Nyeri District of the Central Province, jointly with others not before court while armed with offensive or dangerous weapons namely Axes, Rungus, Pangas and claw Bars robbed **Charity Wangu Wahiire** of a radio cassette make National, mobile phone make Motorola T 192, cash Kshs.3000/=, one video camera, 14 tapes all to the value of Kshs.22,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Charity Wangu Wahiire**.

The 2nd count read that on the 10th day of March 2004 at Mathaithi estate in Nyeri District of the Central Province, jointly with others not before court while armed with offensive or dangerous weapons namely Axes, Rungus, Pangas and claw Bars robbed **Charles Karumba Mutura** of a radio cassette make National, one telephone cordless receiver, mobile phone make Nokia 3310, cash Kshs.3000/= all to the value of Kshs.18,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Charles Karumba Mutura**.

The 3rd count read that on the 10th day of March 2004 at Mathaithi estate in Nyeri District of the Central Province, jointly with others not before court while armed with offensive or dangerous weapons namely Axes, Rungus, Pangas and claw Bars robbed **Mary Njeri Karumba** of three wrist watches make Seiko, Monalisa and another, a pair of spectacles, driving licence, National identity card, mobile phone make Motorola T 192, Co-operative bank card, cash Kshs.1,800/= all valued at Kshs.36,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Mary Njeri Karumba**.

The 4th count was that on the 10th day of March 2004 at Mathaithi estate in Nyeri District of the Central Province, jointly with others not before court while armed with offensive or dangerous weapons namely

Axes, Rungus, Pangas and claw Bars robbed **CWG** of a radio cassette make National star model rx-ct 840 serial number 26158, mobile phone make Siemens A 35, eight table clothes two torches, cash Kshs.200/= and a wrist watch all valued at Kshs.14,600/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **CWG**.

Lastly that on the 10th day of March 2004 at Mathaithi estate in Nyeri District of the Central Province, jointly with others not before court while armed with offensive or dangerous weapons namely Axes, Rungus, Pangas and claw Bars robbed **RWW** of one hand bag, one compact, one wrist watch, one mobile phone make motorolla T 190 and cash Kshs.300/= all valued at kshs.7,950/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **RWW**.

He was also charged with the alternative offence of handling stolen goods contrary to Section 322 (2) of the penal code.

The particulars of this charge were that on the 23rd day of May 2004 at Kiamwangi estate in Nyeri District of the Central Province, otherwise than in the course of stealing dishonestly received or retained one wrist watch make seiko5 knowing or having reasons to believe it to be stolen goods.

He was also charged with one count of Rape contrary to Section 140 of the penal code. The particulars of the charge were the on the 10th day of March 2004 at Mathaithi estate in Nyeri District of the Central Province, had carnal knowledge of **CWG** without her consent.

The alternative charge was indecent assault to a female contrary to section 144 (1) of the penal code.

PW1, **CWG** a teacher by profession recalled that on 10/3/2004 she left school at 4 pm and went home where she found her daughter and stayed until 9.00 pm before retiring to bed and left her daughter studying. At 10pm, she heard the dog barking continuously. She lit all the lights outside and peeped out but could not see anything.

At 4.00pm she heard the sound of the chain of the gate and when she peeped out she saw three people enter the compound. They smashed the windows and one entered through the window and opened the door for others.

They beat them demanding for money and were given Kshs.200, her mobile phone valued at Kshs.6,000/=, her daughter's mobile phone, a National star radio with a compact, a bag, 2 torches and table clothes. One of the thugs spoke Kirinyaga dialect when he asked PW1 to go to the table room and open the wall unit. The lights were on hence she saw him well as he took her to her bedroom and raped her for 6 minutes. Her daughter was also raped by two people. The lights were on hence she was able to see the 1st accused. This was the first time she was seeing the appellant. The police arrived and took PW1 and her daughter to hospital She never saw them again until the day they went to court. She identified the radio cassette National star and produced the receipt and licence for the same. She also identified the compact that belonged to her daughter.

On cross-examination, she stated that she could identify the persons who attacked them. She identified the appellant as one of the robbers who was very brutal and was wielding a torch and another club with an anvil the size of a torch. She was hit by the appellant on the shoulders and the back of her head. she stated that she was able to identify the appellant because of his beards and was the one who demanded money from the complainants.

PW2, **Charles Karumba Mutura** a peasant farmer and a retired teacher stated that while sleeping in the company of his wife, he was attacked by the thugs at 2.45 am who were many in number wielding axes, pangas, hack saw and clubs. They knocked out the security lights. They managed to steal his mobile phone, his wife's watch, his wife's mobile phone, Kshs.3000/= from PW2 and Kshs.1800/= from his wife. none of them were injured. He was not able to identify the robbers but was called to identify his panasonic cordless receiver phone which he had had for 10 years with his initials inscribed on the same and did identify the same and three wrist watches that belonged to his wife.

PW3, **RWW** a student, as she then was, at Moi University Chepkoilel campus taking a bachelors degree in tourism management recalled that on 9/3/2004, she retired to bed at 10.00 am and while asleep at 3 am she heard funny noises from outside and the barking of dogs. Suddenly she heard windows being shattered and within 10 minutes many thugs entered the house armed with axes, pangas and clubs and torches. They robbed her of a Motorola phone T 190. She heard them beating her mother and asking for her phone Siemens A 35. She was hit on the tooth by the 1st accused and raped by both 1st accused and the appellant when the lights were on.

The robbers left with Kshs.300, her campus bag, radio national star and a compact of Congolese music with initials ROWA meaning (RW). They were treated at the hospital and discharged. During cross-examination she insisted that she was raped by the appellant and saw him clearly on the night of the robbery however, no identification parade was conducted.

PW4, **Mary Njeri Karumba** used to be a lecturer but now she is retired and stays at Kiandigi village at Mathaithi. On the 10th March 2004 at around 2.45 am she was in her house and heard people banging her windows telling her to open. They asked for money and managed to get in. They demanded for Kshs.100,000 and threatened to kill her husband with weapons but they did not. They managed to steal her Kshs.1800/=, her husband's Kshs.3000/= and 3 wrist watches, one swiss make Monalisa and 2 phones left by her children and a cordless receiver. She identified the seiko5 watch and the cordless receiver. She also identified the orientex watch and two mobile phones, Motorola valued at Kshs.4000/= and her husband's mobile phone Nokia valued at Kshs.6000/=. The men who entered their house were between 6 – 8 but outside they were many. They were armed with axes, pangas and rungas and stayed in the house for about 20 minutes. She was not able to identify the thugs as they had big hats and big coats and none looked at her.

Later after two weeks officers from Karatina police station told them that their items had been recovered. she went to the police station and was able to identify some items stolen from them because they had inscribed their names on the said specific items.

PW5, **Dr. Duncan Kilingo** a medical officer at Karatina District Hospital recalled that on the 10/3/2004 he saw CW who had a history of being raped by people unknown to her who broke her house at about 3.30 am. They had been assaulted and her daughter was injured on the mouth.

He also examined RW who has alleged to have been raped and hit with a blunt object that caused the ejection of one of her incisor. She had been bleeding on the face from the mouth and had a blood stain on her inner wear and a white discharge noted. The degree of injury was grievous harm.

PW6, **Corporal David Kamande** was attached to the flying squad Nakuru at the time of testimony. However, at the time of robbery he was attached to the flying squad Karatina and was partly the investigating officer of the robbery case.

On 23/5/2004 at about 6 am while in his office at Karatina he received information that there were two individuals living in Kiamwangi area who were suspected to be robbers in Karatina town. He in company of others proceeded to Kiamwangi where they entered into a house and conducted a search and recovered a watch from Peter Wanjih Mbogo the appellant.

PW7, **P.C Peter Kingau** then attached to flying squad Karatina was at the time of testimony attached to flying squad Mombasa. He was the investigating officer in this case.

On the 17/3/2004 he was with his colleagues when he received information that there was a person living in Mathira who was involved in criminal activities. PW7 stated that they went to Kiamwangi estate with two officers and arrested the 1st accused. They went to the house of the appellant and 3rd accused searched the same and recovered a wrist watch produced in court as Pex9. The appellant refused to participate in the identification parade because he had big wound on the neck that could have had him identified easily. They investigated and found that he had been burnt by sulfuric acid in one of the robberies.

The item recovered from the appellant by the police in respect of this case was a seiko5 wrist watch that was robbed and that was positively identified by the owner and his wife because of a mark. The wrist watch was one of the properties stolen from the complainants.

The Honourable trial magistrate found the appellant with a case to answer and put him to his defence. The appellant chose to make a sworn statement. According to the appellant, on the 21/5/2004 he was at his house at Kiamwathi village asleep when he heard a knock at his door. His brother opened the door and was told to lie down while the appellant was still in bed. P.C Kariuki entered and told him not to get up from bed and to lie on his stomach and later to dress up. They searched the house and took his seiko5 watch and radio Panasonic. He testified that he had given P.C Kariuki the permit for the radio and receipt. He further claimed that P.C Kariuki had previously arrested him for allegedly possessing chang'aa and had demanded for Kshs.3000/= which he did not have hence was arraigned in court and fined Kshs.4000/= in default to serve 3 months.

When he was arrested in respect of this case, he was taken to Karatina police station and arraigned in court. He claimed that PW1 did not give any description of the robbers. Moreover that PW3 testified that she was raped in darkness and did not give the description of the robbers. He complained that he was not able to participate in the hearing when some witnesses testified among them PW4, PW5, PW6, PW7, PW8 and PW9. He claims that CPL Kamande demanded for Kshs.80,000/= to help him but he could not afford.

No identification parade was done and no forms were produced to show that there was an identification parade. He testified that the Seiko5 watch Pex9 was his and had possessed it for 3 years. He had been given the same by his deceased cousin and did not have any mark.

On cross-examination, he admitted that he did not have any evidence that the watch was his. He claims that P.C Kariuki had a grudge against him.

The trial court found that both PW1 and PW3 identified the appellant at the scene. The lights were on at PW1's house. The court was convinced that the appellant was positively identified at the scene.

On the issue of rape the court was convinced that PW1 and PW3 had sufficient opportunity to identify the attackers because there was enough light in the house. Moreover, the police received information and went to the house of the appellant and recovered Pex9 a Seiko 5 watch which was positively identified by PW2 and PW4.

The appellant was ultimately found guilty as charged in counts III, IV, V, VIII and was accordingly convicted and sentenced to death for robbery with violence, however the appellant was not sentenced in count VIII as the same was left in abeyance.

In the amended petition, the appellant appeals on the following grounds **namely** that the trial court erred in law and facts by failing to make a finding that Article 72(3) of the former Constitution of Kenya was not complied with **secondly** that the trial court erred in law and facts by failing to hold the purported complainants never identified their alleged attackers **and** that the trial court erred in law and facts by failing to hold that the alleged possession of a wrist watch was never proved beyond reasonable doubts **and lastly** that the trial court erred in law and facts by failing to consider by testimony.

On the first ground, this court is obliged to weigh the rights of the appellants against the nature of the offence committed. The appellant was arrested on 23/4/2004 and arraigned in court on 24/6/2004 about two months after arrest. This was extreme violation of their rights as enshrined in the Constitution of Kenya as it then was however, the remedy available to the appellant is to seek for damages for violation of his rights but the said violation cannot be used as a defence for robbery with violence. Furthermore though the delay in charging the appellant was inordinate, the same did not prejudice his defence.

On the issue of lack of identification parade, this court finds that though there was no identification parade conducted in respect of the appellant, failure to do so was not fatal to the prosecutions case as the

evidence against the appellant was overwhelming since PW1 and PW3 positively identified the appellant at the scene. The electric lights were on hence making the surrounding conducive for identification.

Moreover, this evidence does not stand alone as it is corroborated by the evidence that the appellant was found with a wrist watch belonging to the PW2 that was positively identified by the owner because of a mark on the same. Though no receipt was produced by PW2, an identification mark was enough to prove ownership. This court finds that the doctrine of recent possession was properly applied by the trial court in finding that the appellant did not properly explain how he got in possession of the wrist watch Seiko 5.

The upshot of the above is that the appeal is dismissed, conviction upheld and sentence confirmed. Orders accordingly.

Dated, signed and delivered at Nyeri this 18th day of February 2014

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE

Judgment is read in the presence of the appellant and Mr. Cheboi for the state.

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE