



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 100 OF 2011

(consolidated with criminal appeal no. 101 of 2011)

(From Original Conviction and Sentence in Criminal Case No. 566 of 2009 of the Senior Resident Magistrate's Court at Taveta - C.N. Ndegwa -S.R.M.)

VICTOR MUTUA KIKAVA1ST APPELLANT

SARONI MENGO MUNENE 2ND APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGEMENT

[1] The Appellants in this case were charged with four counts. The first count was robbery contrary to section 296 (2) of the Penal Code and personating a Public Officer contrary to section 105 (b) of the Penal Code. Being in possession of an imitation of a fire arm contrary to section 34 (1) (2) of the firearm Act Cap. 114 laws of Kenya and finally being in possession of Narcotic Drugs contrary to section 3 (1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994. The particulars of those charges are set out in the charge sheet No. 20/20/12/07 annexed to the proceedings herein.

[2] The appellants were tried by the Senior Resident Magistrates Court at Taveta and were found guilty in all four counts. They were sentenced to death on the first count and three years on the 2nd, 3rd and 4th counts. Since the sentence for the first count was death, the other three counts were suspended. It is against that conviction and sentence that they have now appealed to this court.

[3] In their written submissions they relied on their amended submissions that the charge sheet was defective in that it does not indicate the exact make or type of the stolen phone and that the correct section that creates the offence is section 295 of the Penal Code and that the charge offended section 134 of the Criminal Procedure Code.

The appellant further alleged that they were not properly identified since the source of light was torch light and that since this was at night and the victims were terrified, there was fear of mistaken identity.

Saroni Mengo Munene attacked the identification parade he alleged that he was the only one with a scar on the forehead and the identification must be regarded with great care. He denied he was found with AP Uniforms.

[4] When these appeals came for hearing as appeals 100 and 101 of 2011 there were consolidated and argued as one. The State opposed the appeal. The State submitted that the charge sheet was proper and that it conformed with Section 134 of the Criminal Procedure code.

It argued that the appellants were positively identified by PW1 and PW2 and that the robbers had a torch which enabled PW1 and PW2 to see them. The state counsel argued that the 2nd application was positively identified at an identification parade. Further that PW1 knew the appellants before. The state argued that therefore the identification was proper. The state went further to say that the 1st appellant was arrested by members of the public while the 2nd respondent was arrested later. The State counsel stated that the evidence was consistent. Finally that the defence of the appellant was properly considered.

[5] As far as the charge sheet is concerned, the issue of the appellants being charged under section 296 (2) alone, the court of appeal has been dealt with this issue in the case of Joseph Njuguna Mwaura and 3 others vs Republic Criminal Appeal No. 5 of 2008. In that case, the court referred to the case of Simon Materu Munialu v Republic 2007 eKLR Criminal Appeal 302 2005. The court said

"This Court was confronted with the issue whether a charge sheet citing only section 296 (2) of the Penal Code was sufficient. This Court in that appeal considered the submission that section 295 of the Penal Code creates the offence of robbery, but held that:

. . .the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the penal code. it is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence or robbery. In short, section 296 (2) is not only a punishment section, but it is also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296 (2) of the penal code as that would not contain the ingredients that are in section 296 (2) of the penal code and might create confusion.

In or considered views, section 137 of the Criminal Procedure Code would be complied with if an accused person is charged, as the appellant was, under section 296 (2) because that section 137 requires one to be charged under the section creating the offence and in the case of robbery with violence under section 296 (2) that section creates the offence by giving it the ingredient required before one is charged under it and it also spells out punishment. We reject that ground of appeal." (emphasis added).

Similarly in Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No. 353 of 2008) the Court was again confronted with a similar situation. In that appeal, the appellants had submitted, as have the appellant in the present appeal, that section 296 (2) of the Penal Code does not create an offence but merely makes provision for the punishment for robbery with violence. The Court had this to say on the issue:

"Mr. Musomba submitted that unless the aforementioned sub-section (section 296) is read with section 295 of the Penal Code, then reliance on section 296 (2), above, without more will not disclose the commission of an offence. Section 295 of the Penal Code defines the offence of robbery. Section 296 (1) and 292 (2) of the penal code, have a common marginal note, namely "punishment of robbery". In this country marginal notes are as a general rule, read together with the section. By the ejusden (sic) generis rule, Section 296 (1) and 296 (2), have to be read together. section 291 (1), above, provides that a person who commits the felony of robbery is liable to imprisonment for fourteen years. So that when dealing with the offence under section 296 (2) of the penal code one has to read the statement of the offence as

referring to the aggravated circumstances of the offence, or the robbery provided for under section 296 (1) of the Penal Code."

The Court then stated that section 295 of the Penal Code is merely a definition section, and held that:

'Sections 296 (1) and 296 (2) of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such.' We agree that this is the correct proposition of the law. Indeed, as pointed out in *Joseph Onyango Owuor & Cliff Ochieng Oduor v R (Supra)* the standard form of a charge, contained in the second schedule of the criminal Procedure Code sets out the charge or robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person."

This therefore settles the issue of the charge. We agree with the learned State Counsel that the charge was proper.

[6] The appellant claims that their identification was not proper and that it was suspect and cannot be relied on. PW1 Ibrahim Metiaki Mukisa told the trial court that he was able to identify the appellants with the light from the torch they held and was able to see the appellants. He was able to see that the appellants had handcuffs. They searched his pockets and took Kshs. 500 from his pockets and a Nokia Phone 2310 worth Kshs. 3800/-. The witness said that he was able to identify the 1st appellant because he used to work in the same estate in the Hotel of one Maria. Infact the witness during the attack, asked the first appellant when he joined the police force. This was because he was wearing a jungle fatigue and barret of the administration police. After the attackers left the witness thought they were not police officers, he screamed and got help, they immediately followed the attackers and caught up with them, overpowered them and recovered the handcuffs, torch and the witnesses' Nokia Phone from the first appellant. The second appellant was later arrested and PW1 identified him in the identification parade. The witness said at the time of the attack the 2nd appellant was wearing a jungle jacket , a green trouser and a black barret.

[7] PW2 Erick Mwakio Mwaighoni said he was with Tobias Owuor and Juma on their way home from a funeral he met with the PW1 who said that he had just been robbed by two people and that he had identified one of them and he was sure that though they wore police uniform, the one he identified was not a policeman. They followed the robbers and caught up with them. He said they were in Administration Police uniform. They identified the first appellant as Saroni. He was wearing full Administration Police Uniform. he stated that a phone was recovered from his pockets. He averred that the 2nd accused ran way and the had a toy gun.

[8] From the foregoing, there is no doubt that the 1st appellant was identified during the robbery, a chase ensued, the complainants and members of public caught up with them, the 1st appellant was found in administration police uniform and the complainants phone. Although the 2nd appellant ran away, we have no doubt that the identification was proper and the finding of the Senior Resident Magistrate was proper.

[9] PW8 SP AP Halifa Musa Sianga told the trial court how the uniform of APC Ahmed of Challas Chief's office was stolen when his house was broken into and how he learnt that the first appellant was arrested in Administrative Police uniform and how he interrogated him and how he learnt that the first appellants accomplice was Victor Mutua who lived in Vikwatani. He went on to explain how they went to his house got a roll of bhang and how he led them to where he had hidden the AP uniform in Timboni. They recovered a jungle jacket, an AP trouser and a barret.

[10] After evaluating the evidence that was placed before the learned Senior Resident Magistrate we have come to the conclusion that the appellants were properly convicted on all the counts that they faced. We find that the grounds of appeal set out by the appellants have no merits and we dismiss them

accordingly. We further find that the conviction and sentence of death imposed on the charge of robbery with violence under Section 296 (2) of the Penal Code was proper under the law.

Dated and delivered in open court at Mombasa this 28th day of

March 2014.

M. ODERO

S. MUKUNYA

JUDGE

JUDGE