



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 150 OF 2013

BENARD GITAU KAHIGA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

**(Being an appeal against conviction and sentence in Murang'a Senior Resident Magistrate's Court
Criminal Case No. 40339 of 2009 (Hon. J.Gathuku) on 28th September, 2010)**

JUDGMENT

The appellant was charged with the offence of preparing to commit a felony contrary to **section 308 (1)** of the **Penal Code**. It was alleged that on the 27th day of November 2009 at about midnight (0050 50 Hrs) at Mjini village, Murang'a district within Central province, jointly with another not before court, the appellant was found armed with offensive weapon namely a toy pistol in circumstances that indicated that they were so armed with an intent to commit a felony namely robbery with violence.

The learned magistrate held the appellant guilty of the offence with which he was charged and convicted him accordingly; he sentenced him to seven years imprisonment. The appellant appealed against the conviction and the sentence and amongst the grounds he raised in his petition, the appellant faulted the learned magistrate for failing to consider that the appellant was detained in custody for longer than the law allowed before he was charged; that the learned magistrate erred in law and in fact in failing to take note of the fact that the prosecution evidence was doubtful and inconsistent and that the basic ingredients of the offence with which he was charged were not proved. The appellant contented that the learned magistrate ought to have analysed the evidence in its entirety and considered his defence that there was a grudge between him and the police as a result of which the police had maliciously prosecuted him.

As always, as the first appellate court, it is necessary to relook at the evidence analyse it and arrive at independent conclusions without forgetting that the trial court had the advantage, which this court in its appellate capacity does not have, of seeing and hearing the witness. See the case of **Dinkerrai Ramkrishan Pandya versus Republic (1957) E.A. 336** and that of **Okeno versus Republic (1972) EA 32** where at page 36 the court said:

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

The prosecution case was made up evidence of three police officers one of whom was the investigating officer while the other two arrested the appellant.

Police constable **Julius Muthika** who testified as the first prosecution witness told the court that on 26th November 2009 at midnight he was on a night patrol together with his colleagues, constable **Isaac Tekan (PW2)** and constable **Kimutai** within Mjini village in Murang'a when they saw the appellant with another person off a road. According to this witness there was electricity light from "Makavilla" and a nearby Petrol Station. It is not clear from the evidence what "Makavilla" was. When these officers approached the appellant with his companion, the latter disappeared while the police managed to arrest the appellant who was alleged to have been carrying a blue paper bag. The bag is said to have been hanging around the appellant's neck. Constable Tekan is alleged to have recovered a toy pistol from that bag. The officers formed the opinion that the appellant and his friend must have been waiting to waylay and rob unsuspecting members of the public and therefore they arrested the appellant and subsequently charged him.

Upon cross-examination, this witness denied ever knowing the appellant before; he also denied that he had been at the appellant's house or that he was aware that the appellant had filed any case against the officers. The officer admitted, however, that they did not interrogate the appellant at the police station.

Isaac Tekan (PW 2) who was said to have been in the company of constable Muthika when the appellant was arrested said that indeed it is true that on the night of 26th and 27th November 2009, he was in the company of constable Mithuka and constable Kimutai at Mjini area when they saw two men one of whom was the appellant. He corroborated **Muthika (PW1's)** testimony that the appellant's companion managed to escape but that they arrested the appellant with a blue bag in which he had kept a toy pistol.

The investigations officer was police constable **Kazungu Binle**. According to his evidence, on the 27th November, 2009 at 8 am, he was at the report office when he noted in the Occurrence Book that constables Muthika, Kimutai and Tekan had arrested the appellant who had been booked on 26th November 2009. This officer confirmed that he knew the appellant and that he had previously been charged with the same offence. He however denied any knowledge of a pending case between the appellant and the police officers. He also denied being aware that the police were looking for the appellant before the arrest. In examination in chief, the witness said that he took statements before he charged the appellant; however, when the appellant cross-examined him he admitted that he did not take the appellant's statement before he charged him.

In his sworn statement, the appellant testified that at the time material to the case against him, he was in the business of selling second hand goods at Mukuyu and that on 26th November, 2009 he had come to Murang'a from Nairobi to see his advocate, Mr Kimwere who was representing him in a case he had filed against certain police officers. He had a bag in which he had kept a pair of shoes, a trouser, a belt and a jacket. When he arrived at 3.30 pm he went to see a Mr Mwangi Njenga, to whom he was to give some clothes and a jacket. He did not find Mr Mwangi but found one Maina who informed him that he did not know where Mwangi was. He left Mwangi's clothes with Maina with instructions that he should give them to Mwangi. As he was going home at around 4.30 pm he met four officers who called him by his name and when he stopped, they handcuffed him and took him to Murang'a police station. At the station he met an officer whom he identified as Ndivo who slapped him, took his bag and told him that he would not book him. The appellant also gave this officer his phone and Kshs. 650 for which he was issued with a receipt. He was then locked in the cells without having been booked. When the head count of inmates was undertaken at midnight, it was found that the appellant's name was not in the occurrence book, it is then that the appellant was booked by the officers who were then on duty. As he went out he found his wife Zubeda Wangari who told him that she had also been arrested. On the 27th November, 2009, the appellant was removed from the cells by a police constable whom he identified as corporal Kiboi. The shoes and the belt in his bag had been removed and replaced with a toy pistol.

The issue of the appellant's shoes and belt had also arisen earlier in the proceedings. The appellant reported to court that a police officer at the report desk whom he identified as Ndivo had taken these

items from him. As a result of the appellant's complaint, the court ordered that Ndivo who it emerged was a police constable attends court to answer to the allegations raised against him. When he finally appeared in court police constable Ndivo denied having been at the report desk when the appellant was booked. With this denial, the appellant then asked for production of the Occurrence Book of 26th November, 2009 which apparently would show who was on duty at the material time; when the relevant register was availed in court, it showed that the constable Ndivo had been on duty from 4 pm to 11.50 pm; the prosecution case was that as at 12.50 am when the appellant was booked, constable Ndivo had left and the officers who were on duty were police constable Chania and police constable Chirchir and with this evidence, the court chose to believe the prosecution and dismissed the appellant's allegations as untrue.

The appellant produced evidence in court that he had sued some police officers together with the chief for Muna location in Civil Case No. 1872 of 2009 for malicious prosecution. According to the appellant the grudge against him by the police arose out of this case. In support of this allegation, the appellant testified that the officers he had sued removed him from the cells on 29th November, 2009, and asked him to withdraw his case against them; it is after he declined to give in to their demands that they charged him with the offence for which he was convicted. During cross-examination the appellant named the officers he had sued as Muna who apparently was the chief of Mjini location and Sergeant Muriuki who was an administration police officer. These officers were among the people that arrested him on 27th November, 2009. He also told the court that his wife was arrested while in the house.

The appellant called one Michael Mwangi Chege as his witness; as at that time this witness had been imprisoned for the offence of possessing illicit brew and so the appellant applied for a production order for him to attend court and testify on his behalf. When he appeared in court, this witness testified that he knew that appellant and the he knew that he owned a business at Mukuyu where he sold second hand clothes. He testified that in the afternoon of 27th November, 2009 he was at his home when the appellant came and found him near his house. As they were talking four people in plainclothes came and asked the appellant if he was Gitau. When he answered in the affirmative, they arrested him. On cross-examination, this witness confirmed that the appellant had told him that he had arrived from Nairobi. He also confirmed having seen the appellant with a blue bag but he could not tell its contents.

In analysing the evidence by both the prosecution and the defence against the offence for which the appellant was charged and convicted critical issues that come to the fore are the timing of the appellant's arrest; his booking at the police station; proof of the contents of his bag; and the civil case against the police officers.

According to the charge sheet three officers are alleged to have arrested the appellant at midnight on 27th November, 2009; however, in their evidence, two of those officers said that the arrest was made on midnight of 26th November, 2009. On his part the appellant said that he was arrested during the day at about 4.30 pm while in the company of Michael Mwangi Chege whom he called and indeed corroborated the appellant's evidence that the appellant was arrested on a road near his house in the afternoon and not at night or in the wee hours of the day. What happened after the arrest sheds more light on whether the appellant was arrested at midnight as the police alleged or he was apprehended during the day.

The appellant testified that he was handed to police constable Ndivo by the arresting officers; on this point I would believe the appellant because the prosecution did not provide any evidence as to how the appellant would have known constable Ndivo other than by meeting him, as the report desk officer, when he was brought to the police station where he was held in the police cells. According to the evidence from the police officers themselves, constable Ndivo was on duty from 5 pm to 11.50 pm; if this is true, then it is also true that when the appellant was brought at the station at 5 pm, the officer he met at the report desk was none other than constable Ndivo. It is logical that if the appellant was brought at the station at 12.50 am, an hour after the constable Ndivo had left, as the prosecution claimed, there is no way he would have known who constable Ndivo was and whether he had been at the report desk that day. The appellant's explanation, which was given on oath, that he was arrested and brought to the station at 5 pm but was not booked until midnight when the roll call was taken appears to me to be more plausible than the prosecution's story. The officers who took over from constable Ndivo were named as constable Chirchir

and constable Chania who supposedly booked the appellant at the station; wouldn't it have been proper, if not for anything else, to clear doubts as to the circumstances under which the appellant was booked, to summon them or either of them to testify, considering the importance attached to the time the appellant was arrested in proving the offence with which the appellant was charged and convicted? The prosecution's evidence is cast in doubt as to whether the appellant was arrested in the middle of the night and had the learned magistrate considered the prosecution evidence from this perspective, he would have given the appellant the benefit of this doubt.

In the face of this inconsistency from the prosecution witnesses, their credibility as witnesses and the truthfulness of their evidence was uncertain. If they could swear that they arrested the appellant at midnight when in fact they arrested him during the day it is quite likely that they could have planted the toy pistol on the appellant. I am not persuaded by their evidence that the appellant was walking around in the night with a toy pistol, hanging around his neck in preparation to commit a felony.

One other issue that merits mention in this appeal is the appellant's defence that his prosecution was probably laced with malice. The appellant gave evidence including a civil case number in which he had sued the police for maliciously prosecuting him in an earlier criminal case. I have noted from the probation officer's report which was prepared at the court's direction that the probation officer made a reference to the case against the police officers. Even without this report, it was up to the prosecution to remove any doubt by proof non-existence of that case; if the case existed as the appellant testified in his defence then doubt would certainly arise as to whether the charges against the appellant were instituted in good faith. In my view this doubt was not cleared to the required standard and it would not be safe to convict in its midst.

The appellant complained that he was kept in custody for more time than the law allowed before he was finally charged. I have noted from the 2009 calendar that 27th November, 2009 when he was arrested was a Friday; he was arraigned in court on 30th November, 2009 which was a Monday. It would not have been possible to arraign him in court on any of the two days that fell in between and to that extent this ground of appeal does not hold water. In any event, such a ground, assuming it was merited, would not lead to an acquittal; it can only be a ground for a claim in damages in a civil suit. (See the decision of the court of appeal in **Criminal Appeal No. 50 of 2008 (Nairobi) Julius Kamau Mbugua versus Republic**).

For the reasons I have stated I would allow the appellant's appeal, quash the conviction and set aside the sentence. The appellant is therefore set at liberty unless he is lawfully held under a separate warrant.

Dated, signed and delivered in open court on 17th March, 2014

Ngaah Jairus

JUDGE