REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 52 OF 2010

DAVID MUCHIRI GAKUYA..APPELLANT

versus

REPUBLIC..RESPONDENT

(arising from the judgment of Hon. L. Mbugua Ag. Principal

Magistrate Karatina in Criminal Case No. 65 of 2008)

JUDGMENT

1. The Appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on the 30th day of January 2008 at Gatondo Village in Nyeri District within Central Province jointly with another not before the court while armed with dangerous weapons namely metal bars robbed FRANCIS MATHENGE WAMAE of a mobile phone make Nokia 3310 serial Number 35946000385042 valued at Ksh. 8500/- and Cash Ksh. 300/- and immediately before or immediately after the time of such robbery used actual violence to the said FRANCIS MATHENGE WAMAE.

2. He pleaded not guilty, was tried convicted and sentenced to death. Being dissatisfied with the said conviction and sentence filed this appeal and in his home made grounds of appeal raised the following issues.

a. ***The doctrine of recent possession was not proved against him.***

b. ***The confession was not admissible.***

c. ***His defence was not taken into account.***

3. When the appeal came up for hearing before us Miss Mwai appeared for the Appellant while Mr. Makunja appeared for the state and opposed the appeal.

SUBMISSIONS

4. Miss Mwai for the Appellant submitted that the charge was defective and that the Appellant ought not to have been convicted on the same. She further submitted that the evidence tendered disclosed a lesser offence of robbery.

5. It was further submitted on behalf of the Appellant that under section 296(2) it is only the sentence that is provided for and not the particular of the offence and therefore the Appellant ought to have been charged under section 296(1) as read together with section 296(2) which gives the sentence. It was therefore submitted that this was a defect that could not be cured.

6. It was further submitted that the offence disclosed is under section 298 of assault with intent to steal as there was no evidence of any dangerous weapon and the the Appellant was alone and that any injuries occasioned to the complainant was only to facilitate the stealing.

7. Mr. Makunja for the state submitted that the issue of charge sheet was a more technicality which should not affect substantial justice and that the Appellant told P.W.2 what had happened and further that he had a phone which he wanted to sell while P.W.6 described the injuries sustained as grievous harm.

EVIDENCE

8. This being a first appeal the court is expected to to reevaluate the evidence tendered and to come to its own decision though taking into account the fact that it does not have the advantage of hearing and seeing witnesses which we hereby do.

9. The prosecution case was that P.W.1 FRANCIS MATHENGE WAMAE on 30th January 2008 met the Appellant and another co-worker at a pub called starehe and left them after 30 minutes when he was hit on the left ear and left cheek with a sharp object and that as he tried to go back to the road he fell down and was hit once more on the face with something like a metal and someone stepped on his chest with his foot and in the process removed his Nokia 3310 phone and Ksh. 300/- from his pocket. He heard one of the attacker telling another that he was through with “Kulman” referring to his nickname.

10. After 30 minutes P.W.2 went back to the pub and was told that the suspect was David Muchiri who had gone ahead of him and he denied being involved. At that stage one Miano gave the name of the Appellant to in the presence of the sub chief from whom the complainant's phone was found.

11. P.W.2 BENARD MIANO WANGUI's evidence was that the Appellant had left him in the bar and when he came back after 30 minutes he told him that they should leave for home and on the way he removed Nokia phone from his pocket and confessed that he had snatched the phone from P.W.1. He therefore decided to go back to the bar where he found the complainant bleeding and thereafter assisted in having the Appellant arrested.

12. P.W.3 ROBERT MWANGI MUNDI testified that on the material night the Appellant went to his place and told him that he had a phone to sell and that he declined to buy the same and the appellant subsequently requested to be allowed to sleep there and was subsequently arrested and the mobile phone recovered. This evidence was confirmed by P.W.5 JOSEPH MUHORO MATHENGE the Assistant Chief who arrested the Appellant.

13. P.W.6 MAINA NDIRANGU a clinical officer produced P3 from which confirmed that the complainant sustained bruises on the face, inter part of the mouth and fractured 3rd and 4th left fingers with the degree of injury classified as grievous harm.

14. When put on his defence the Appellant gave unsworn evidence that on 30th January 2008 he had stepped in for one Joakim Stakwa at his bar and worked until 11 pm when he closed the bar and went to sleep at Mwangi's place since it was late and at 2.00 am the door was knocked and Mwangi came out when he heard someone saying he is the sub chief who wanted the phone sold to him. He was thereafter arrested together with Benard Miano and Mwangi the owner of the house.

15. D.W.2 Joakim Waire Stakwa testified that on 30th January 2008 he had asked the Appellant to open him bar as he was going for a family gathering. The Appellant called him at 11.00 pm and told him to stop at Mwangi's place.

16. From the evidence tendered and the submissions We have identified the following issues for determination.

a. Whether the charge sheet was defective

b. Whether the prosecution proved the case against the appellant on a charge of robbery with violence.

17. On the issue of charge sheet it is clear that section 296(2) of the Penal code provides for both the offence and the sentence and therefore the charge against the Appellant under section 296(2) was a valid charge.

18. On the issue of the offence of robbery with violence the same is committed in any of the following circumstances.

a. The offender is armed with any dangerous and offensive weapon or instrument or

b. The offender is accompanied with one or more person or persons or

c. At or immediately before or immediately after the time of robbery the offender wounds beats or uses other personal violence to any person.

18. In the case of OLUCHI v R(1985) KLR the court held that the use of "or" in the definition of the offence means that proof of any one of the above ingredients is sufficient to establish the offence of robbery with violence.

19. From the evidence tendered by P.W.1 and P.W.6 it is clear that the complainant suffered grievous harm during the said robbery and therefore the prosecution was able to prove the element of violence in the definition of robbery with violence. We are thereafter unable to agree with the submission by Miss Mwai that a lesser offence was proved.

20. . It is clear from the evidence tendered that the mobile phone was recovered from the Appellant who had informed P.W.2 that he had snatched the same from the complainant and P.W.3 that he wanted to sell the same. We find that the Appellant was properly connected to this robbery and therefore his conviction was safe.

21. We therefore find no merit on the appeal herein and dismiss the same.

Dated, signed and delivered at Nyeri this 4th day of April 2014.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE

Mr. Muhoho for Miss Mwai

Mr. Esaboke for the state.

Court: Read in open court in the presence of the above.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE