REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 6 of 2011

ABDIRAHMAN ALI ANO…….....……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(From original conviction and sentence in Criminal Case No. 345 of 2011 of the Principal Magistrate's Court at Garissa - Mr. John. N. Onyiego)

JUDGEMENT

The Charge

1. Abdirahman Ali Ano (the appellant) was tried, convicted and sentenced to death for the offence of robbery with violence. The charge facing the appellant was framed thus: Robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of this charge read that on the 27th day of September 2010 at Kaloule Location, in Tana River County, jointly with another not before the court while armed with dangerous weapons, namely Panga and a knife robed one Dhidha Buya of his motor cycle registration number KMCG 278T make Bajaj valued at Kshs 85,000, cash Kshs 500, a packet of sportsman cigarettes valued at Kshs 100, a bottle of Novida beverage valued at Kshs 40 all valued at Kshs 85,640 the property of Dhidha Buya and at or immediately before or immediately after the time of the said robbery used personal violence against the said Dhidha Buya.

Facts

2. Dhidha Buya (PW1) a student at Ndula Secondary School in Hola, Tana River County at the time of the offence, was riding motor cycle registration number KMCG 278T back from a place known as Umoja where he had just dropped a passenger around 7.00pm on 27th September 2010 when he slowed down after spotting some tree branches on the road. Two men emerged from the bushes one had a panga and a knife. They took him from the road leaving the motor cycle there and assaulted him and robbed him Novida soda, packet of cigarettes and Kshs 500. They took the motor cycle keys and rode away leaving PW1 in the bush. PW1 later reported the matter to the police. The motor cycle was later traced and recovered at Adele in Madogo on 10th February 2011. The appellant was arrested in connection with the robbery and charged. The recovered motor cycle was tendered in evidence as an exhibit. In his defence before the trial court the appellant explained how he was arrested sometime in January 2011. He denied committing the offence.

3. The trial magistrate considered all the materials placed before him at the trial of the accused, was convinced that the offence took place. He rejected the defence of the appellant and invoked the doctrine of recent possession to convict the appellant and sentenced him to death as prescribed by law for offences under section 296 (2) of the Penal Code. The appellant, being dissatisfied with the conviction and sentence, preferred this appeal.

Grounds of appeal

4. The appellant had originally filed a total of ten (10) grounds of appeal but which on close scrutiny are eight grounds. Our understanding of these grounds filed on 16th November 2011 is that they are all challenging the evidence touching on the robbery, the mode of recovery of the motor cycle, identity of the people who robbed the complainant and how and where the appellant was arrested. With leave of the court, the appellant filed supplementary grounds of appeal and submissions. The supplementary grounds of appeal can be summarised as follows:

i. The charge as drawn is fatally defective for failure to quote the section of the law that defines the offence.

ii. That the offence of robbery with violence is not supported by evidence.

iii. The doctrine of recent possession does not apply in this case.

iv. The identification of the appellant as the person who committed this offence is not supported by evidence.

v. Death sentence is against the law.

Submissions for and against

5. In support of his appeal the appellant has submitted that the charge is defective because it does not quote the section of the law that defines the offence of robbery and only quoted the penalty section of the law; that there is no evidence of the description of the person who committed this offence and no identification parade was conducted; that there was no medical report to confirm that the complainant was injured during the commission of the offence; that the doctrine of recent possession of the stolen items was wrongly applied because the motor cycle was recovered two months after it was stolen and that was a long time leading to a high possibility that the motor cycle had been transferred to another person; that the motor cycle was not recovered in possession of the appellant but at a garage owned by someone else. The appellant is also challenging the death sentence as being unconstitutional. He asked the court to allow the appeal and acquit him.

6. On the other hand the learned state counsel has, in opposing the appeal, submitted that the trial court correctly relied on the doctrine of recent possession and the appellant did not explain how he came by the stolen motor cycle; that a motor cycle is difficult to dispose of and six months is not a long time to dispose of an item like a motor cycle; that there ought to have been an alternative charge of handling stolen property since there is evidence to support such a charge; that the Constitution allows deprivation of life where the law allows it.

7. We are alive to the requirement that a court sitting on first appeal is under a duty to examine and evaluate afresh all the evidence adduced at the lower court with a view to arriving at its own independent conclusions whether to or not to uphold the judgement of the lower court. In discharging that duty, the court is always alert to the fact that it did not have the advantage of observing the witnesses testify as to form an opinion of their demeanour. This requirement has been reiterated by our courts so often that it has gained notoriety and no court can be excused in failing to remind itself of that requirement.

Determination of the issues

8. We understand the issues raised in this case to be four, namely, whether the charge is fatally defective; whether the evidence discloses an offence under section 296 (2) of the Penal Code; whether the doctrine of recent possession applies in this case and the death sentence being unlawful.

9. The appellant in this case was charged under section 296 (2) of the Penal Code. He raises issue with the manner the charge is drawn that it does not disclose the nature of the offence. We have considered this matter carefully. We have noted the contents of section 296 (2) which reads thus: **"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"** (emphasis added). Our view is that in an ideal situation, a properly drawn charge should include the definition of the offence section as read with the penalty section if these sections of the law are separate. However we intent to approach this matter differently, addressing our minds to substantive justice without undue regard to technicalities. We intent to analyse the charge as drawn with regard to whether the charge brings out all the ingredients of the offence and whether the appellant has been prejudiced.

10. Our understanding of section 296 (2) of the Penal Code is that a charge brought under that section will disclose an offence if it brings out the following ingredients:

i. The offender is armed with any dangerous or offensive weapon or instrument, or

ii. The offender is in company with one or more other person or persons; or

iii. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.

11. We have satisfied ourselves that the particulars of the charge meet the criteria set out above as they specify that the appellant was with another person, was armed with panga and a knife, and used personal violence. We are alive to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction on under section 296 (2) of the Penal Code. We find and hold that the charge is not defective. In so holding we are guided by the Court of Appeal decision in **David Othiambo & Another vs. Republic Criminal Appeal No. 5 of 2005 (*Mombasa*, *unreported*).** In that case the Court stated:

"Johana Ndungu v. Republic (Cr. Appeal No. 116 of 1995) explained the various elements or ingredients which must be proved under section 296 (2) of the Penal Code and any of which, if proved, then would be no discretion on the part of the trial court but to convict under section 296 (2). The court took the matter further in the case of Juma v. Republic [2003] of R.A 471 where it held that where the prosecution is relying on an element or ingredient of being armed, it must be stated that in the particulars of the charge that the weapon or instrument which the appellant was armed was a dangerous or offensive one."

12. We have carefully scrutinized the proceedings in the lower court and we have satisfied ourselves that the appellant was not prejudiced on account of the manner in which the charge was drawn.

13. We will now turn to the twin issues of whether the evidence supports the charge and the doctrine of recent possession. We wish to discuss them together. PW1 was not able to identify the attackers because their faces were covered. He however stated there were two men and one of them was armed with a panga and a knife. He also testified that they assaulted him. There is no evidence of the nature of the injuries PW1 sustained and there is no medical evidence in support. **Silvano Jaraat Wayu (PW2)** testified that he is the one who had asked PW1 to take some passengers to their destination on 27th September 2010. PW2 told the court that the motor cycle PW1 was using belonged to PW2's father. On receiving report of robbery PW2 told the court that they went to the scene and found PW1 half naked and having been beaten and the motor cycle stolen. Although there is no medical evidence we are satisfied with this evidence and

our finding is that personal violence was used on PW1. We wish to reiterate that going by **David Odhiambo and Johanna Ndung'u cases above**, proof of any one of the ingredients under section 296 (2) of the Penal Code is enough to safely base a conviction on.

14. We have examined the proceedings of the lower court and find no evidence from the police at Hola on the efforts they made to follow up on the robbery report. It took slightly under five months, up to 9th February 2011, before information reached PW3 regarding the stolen motor cycle. It was reportedly seen at Adele in Madogo. On 10th February 2011 PW3 decided to check out that information which he said was given to him by a friend of his known as Kassim who described to him the place where the motor cycle was. PW3 confirmed where the motor cycle was and identified it as the one belonging to his father by posing as a customer interested in buying the motor cycle. He reported the matter at Madogo Police Station in whose jurisdiction the motor cycle was found.

15. Further evidence on the recovery of the motor cycle was adduced by **Ahmed Ibrahim Karawa (PW3)** who testified that he repairs motor cycles at a 'jua kali' garage. His evidence is that the appellant took a motor cycle to him for repair on 27th January 2011. He repaired it and the appellant left without paying for the services. The appellant took the motor cycle again for repair on 9th February 2011. The appellant left the motor cycle with PW3 overnight because it was late and promised to bring a spare part the following morning. Fearing for the safety of the motor cycle, PW3 took it to the home of **Saalim Kiai (PW4)** a friend who has a secure place. The following day PW3 started preparing to repair the motor cycle till the time when police found him and sought to know who the owner of the motor cycle was. PW3 told police the owner had gone to buy spare parts and police told him to call the owner which he did. The police arrested the appellant on arrival.

16. This evidence is confirmed by PW4 who testified that on 9th February 2011 at 6.30pm PW3 went to his home pushing a motor cycle and requested PW4 to keep the customer's motor cycle overnight. PW4 allowed him and PW3 went back to PW4's compound the following day and started repairing it. Police arrived and asked about the owner of the motor cycle and PW3 told them that the owner had gone to buy spare parts. PW4 further confirmed police arresting the appellant who came with spare parts. PW4 said he knew the appellant as a neighbour.

17. Further evidence by **PC Kirui Julius (PW5)** of Madogo Police Station is that on 10th February 2011 one Salim filed a report of a stolen motor cycle. In company of another office PW5 went to the place at the home of PW4 and found PW3 repairing a motor cycle. PW3 told them he was repairing it for a customer who had gone to buy spare parts. PW5 told PW3 to call the person. The person arrived and asked if his motor cycle was ready. Police arrested him and introduced themselves since they were not in uniform. It is noteworthy that PW5 did not identify the appellant as the owner of the motor cycle but we do not doubt he is the one since the evidence of other witnesses point to him.

18. Our reading and evaluation of this evidence leaves no doubts in our minds that the appellant is the one who took the motor cycle to PW3 for repair. We also have no doubts that the motor cycle recovered at the home of PW4 under repair by PW3 is the same motor cycle stolen from PW1 on 27th September 2010. It was positively identified by PW2 who tendered documentary evidence (purchase receipt and log book) to prove ownership. The issue we wish to address is whether the appellant was one of the two men who robbed PW1 of the motor cycle. There is no evidence identifying the appellant as one of the robbers. The evidence available is that the appellant was the 'owner' of the motor cycle being repaired by PW3. The trial court relied on the doctrine of recent possession to convict the appellant and he is challenging the reliance of that doctrine claiming that the motor cycle was recovered after a long time and there is possibility that it had been transferred.

19. For the court to invoke the doctrine of recent possession to convict an accused person there must be proof, as held in **Criminal Appeal No. 85 of 2005 Arum v Republic**, of the following:

i. **The property was found with the suspect**

ii. The property is positively the property of the complainant

iii. The property was stolen from the complainant

iv. The property was recently stolen from the complainant

20. We have carefully examined the evidence and are satisfied without any doubt that the motor cycle was found with the appellant. There is evidence from PW3 that the appellant took the motor cycle to him to repair first on 27th January 2011 and again on 9th February 2011; that PW3 took the motor cycle to the home of PW4 for safe keeping until the following day 10th February 2011 when PW3 was to repair the same; that on 10th February 2011 PW3 starting repairing the motor cycle while the appellant went for the spare part to fit on the motor cycle. The evidence is further corroborated by that of PW4 who allowed PW3 to keep the motor cycle at his (PW4's) home as well as by that of PW5 who told PW3 to call the owner of the motor cycle and he called the appellant who was arrested on arrival at the place where the motor cycle was being repaired. PW2's evidence too corroborates the evidence of recovery when he testified that the appellant was arrested when he went to the place where the motor cycle was being repaired.

21. We have no doubt in our minds the motor cycle belongs to PW2's father. There was documentary proof of ownership and although PW2's father was not called to testify, we have no doubt that the motor cycle was the same one stolen from PW1. On the issue or the property being recently stolen from the complainant, we have considered that the motor cycle was stolen on 27th September 2010 and recovered on 10th February 2011. We have considered that a motor cycle is not a common article that can change hands easily **(see Peter Macharia Njuguna v Republic in Criminal Appeal No. 182 of 2003).** It is a fact that a motor cycle can be sold but we consider that just like a motor vehicle, it is an item that cannot be easily disposed of because ownership of such an item requires identification documents (logbook) and any buyer would insist on these documents. In the **Arum v Republic case above**, the court of appeal's view was that proof of time will depend on the easiness with which the stolen property can move from one person to another. In our view a motor cycle is not a type of item that can easily move from one person to another and five months is recent for an item such as a motor cycle.

22. The appellant did not offer an explanation as to how he came by the motor cycle. In fact his defence had nothing to do with the motor cycle. He told the court he was arrested from hospital and maintained that he is innocent. When considered with the evidence of the prosecution witnesses PW2, PW3, PW4 AND PW5 all of who identified the appellant as the person who was arrested at the home of PW4 where the motor cycle was being repaired, we are convinced that there is no doubt that he is the person who had taken the motor cycle to PW3 to repair. In the absence of any explanation from the appellant how he came by the motor cycle it safe to draw an inference, which we hereby do, that the appellant was one of the robbers who stole the motor cycle.

23. We have addressed our minds to the issue of death sentence being against the law. We have taken into account the provisions of Article 26 (1) and (3) that guarantees every person the right to life and reassures that no one should be deprived of life intentionally except to the extent authorised by the Constitution or other written law. We have understood and appreciate that death sentence is still in our statute books, the Constitution allows deprivation of life in circumstances authorised by written law. Such law is section 296 (2) of the Penal Code which prescribes death as the sentence to impose where one is convicted of robbery with violence. We agree that death sentence is harsh but it is also mandatory. We take judicial notice that the debate is still out there on death sentence. We also hold the view that to terminate one's life does not serve the intended purpose of punishing criminals.

24. In conclusion, having carefully analysed and determined all the issues raised, we are of the view that the appellant was correctly sentenced by the trial court. On our part, we have examined all the evidence afresh and satisfied that the grounds of appeal raised by the appellant have no basis. We therefore reject this appeal, uphold the conviction and sentence. It is so ordered.

Florence N. Muchemi **Stella N. Mutuku**

Judge **Judge**

Signed, dated and delivered this 30th day of January 2013