REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 47 of 2011

PHILIP MUTUA KIOKO ….....…..... APPELLANT

VERSUS

REPUBLIC…….....…….....…..…..RESPONDENT

From original conviction and sentence in Cr. Case No. 393 of 2010 at the Principal Magistrate's Court Siakago by S.M. MOKUA – Principal Magistrate on 6th April 2011

JUDGMENT

PHILIP MUTUA KIOKO the Appellant was charged with the following offences;

COUNT 1: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE:

The particulars as stated in the charge sheet were as follows;

PHILIP MUTUA KIOKO: On the 4TH day of May 2010 at Makima trading centre in Mbeere South District within the Eastern Province, while armed with a dangerous weapon namely a knife robbed UKWELI MUNENE NJAGI of his wrist watch make EMPORIO ARMANI valued at ksh.400/= and at the time, immediately before or immediately after the time of such robbery threatened to use actual violence against the said UKWELI MUNENE NJAGI.

COUNT 2: ENTERING A DWELLING HOUSE WITH INTENT TO COMMIT A FELONY CONTRARY TO SECTION 305(1) OF THE PENAL CODE.

The particulars as stated in the charge sheet were as follows;

PHILIP MUTUA KIOKO: On the 4TH day of May 2010 at Makima trading centre in Mbeere South District within the Eastern Province, entered a dwelling house of AUGUSTIN MUGENDI with intent to commit a felony namely stealing and did steal therein, one bag, one cap, and one mobile phone make Nokia 1680 S/NO.353502702203548 4 all valued at ks.4500/= the property of the said AUGUSTIN MUGENDI.

COUNT 1: ALTERNATIVE CHARGE

HANDLING STOLEN GOODS CONTRARY TO SECTION 322(2) OF THE PENAL CODE.

The particulars as stated in the charge sheet were as follows;

1. PHILIP MUTUA KIOKO: On the 5TH day of May 2010 at Makima trading centre in Mbeere South District within the Eastern Province, otherwise than in the course of stealing dishonestly retained one mobile phone make Nokia 1680 and a wrist watch make Emporio Armani knowing or having reasons to believe them to be stolen goods or unlawfully obtained.

COUNT 2: ALTERNATIVE CHARGE

HANDLING STOLEN GOODS CONTRARY TO SECTION 322(2) OF THE PENAL CODE.

The particulars as stated in the charge sheet were as follows;

2. **PHILIP MUTUA KIOKO: On the 6TH day of May 2010 at Makima trading centre in Mbeere South District within the Eastern Province, otherwise than in the course of stealing dishonestly retained one bag and a cap knowing or having reasons to believe them to be stolen goods or unlawfully obtained.**

The matter was heard and the Appellant was convicted on count 1 and count 2. He was sentenced to death on count 1 while the sentence on count 2 was held in abeyance.

The Appellant was aggrieved by the Judgment and filed an appeal against both conviction and sentence. He raised the following grounds of appeal;

1. That the learned trial Magistrate failed to consider the fact that the Appellant pleaded not guilty before the trial Court.

2. That the learned trial Magistrate erred in law and facts by relying on the hearsay evidence of the witnesses which according to the law ought to have been deemed null and void.

3. That the learned trial Magistrate erred in law and facts by not considering that the exhibits produced before the Court were not recovered on the Appellant in this case.

4. That the learned trial Magistrate erred in law and facts by not considering that the Appellant's constitutional rights were violated when he was kept in police custody for more than the 24 hours mandated by the constitution before taking him before a Court of law.

5. That the learned trial Magistrate erred in law and facts by rejecting the Appellant's defence which was the truth.

The facts of the case are that on 4/5/2010 PW1 was asleep in his house at Makima trading centre when he heard somebody opening the door. He used a torch to see him. The person then removed a knife from a bag he had and asked him for money and a phone. The person then took his wrist watch valued at ks.400/= and left. PW1 knew the person well and he was the Appellant.

PW1 knocked at PW2's door (a neighbour) and woke him up. PW2 got out and they saw the Appellant running away, with a black bag. That's when PW2 realized that his bag containing his mobile phone was missing. A report was made to Makima AP post the next morning. And in company of police officers PW1 and PW2 went to the Appellant's home and they recovered the wrist watch (EXB1), Nokia mobile phone model 1680 (EXB2), cap (EXB3), Black bag (EXB4). The Appellant was then arrested and charged. In his sworn defence the Appellant denied the charges. He said he had been arrested for damaging the property of Wilfred Murugu.

When the appeal came before us for hearing P.C. Kombe No.78035 from Kiritiri police post

produced Occurrence Book Number 13of 3/5/2010 which the Appellant had requested for. It however turned out that the said occurrence book had no relationship with the charges the Appellant had been convicted of. The subject of the said occurrence book was a traffic offence and the suspect was one Felix. The Appellant however presented an extract of occurrence book number 15 of 7/5/2010 Kiritiri police station. In it was a report of stealing by PW1. The occurrence book number 18 of 7/5/2010 showed that the suspect was to be charged with stealing and malicious damage. He elected to proceed with the appeal.

The Appellant presented us with written submissions expounding on his grounds.

The learned State Counsel M/s Ing'ahizu conceded to the appeal on the following grounds;

1. ***There was no proof of assault***

2. ***Whatever was proved did not amount to robbery with violence and not even simple robbery***

3. ***The complainants did not prove ownership of the recovered items.***

As a first appeal Court we have a duty to re-examine and reconsider the evidence on record and come to our own conclusion. We are also alive to the fact that we did not have the chance to see or hear the witnesses. In the case of ***OKENO -VS- REPUBLIC [1972] EA 32*** it was held;

"An Appellant on a 1st appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*PANDYA -VS- REPUBLIC [1957] EA 336)* and to the appellate Court's own decision on the evidence. The 1st appellate must itself way conflicting evidence and draw its own conclusions (*SHANTITAL M. RUWALA-VS- REPUBLIC [1957] EA 570)".*

And in ***NGUI -VS- REPUBLIC [1984] KR 729*** the Court of Appeal held;

"The first appellate Court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice, it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial Court's findings and conclusions".

We have considered the submissions by the Appellant and the learned State Counsel. We have equally analysed the evidence adduced by the witnesses. First of all we would wish to establish if the offence of robbery with violence was proved. **Section 296(2)** of the Penal Code defines robbery with violence as follows;

"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".

The complainant in this Count is PW1. He said the attacker produced a knife. He did not threaten or injure him with that knife. He was also alone. It is therefore clear that none of the ingredients in section 296(2) Penal Code were established by the Prosecution. Was there theft? PW1 said that his wrist watch was stolen. And that the wrist watch produced in Court as EXB1 was his. PW1 did not prove ownership of this wrist watch. There was no evidence laid before the Court to prove that the wrist watch (EXB1) belonged to PW1 and had indeed been stolen from him. We do find that this count of robbery with violence was not proved and neither was any lesser offence proved.

Coming to the 2nd count the evidence adduced is at variance with the charge and the particulars. The evidence by PW2 is that he had hang his bag containing his mobile phone near his window. When he was woken up by PW1 he found the said bag missing. There is therefore no evidence showing that the Appellant entered PW2's house. The window where the bag had been left hanging had not been closed that night.

PW1 and PW2 told the Court that they reported this incident on 5/5/2010. However the extract of the occurrence book number 15 of 7/5/2010 shows that PW1 made his report on 7/5/2010 at 11.18 hours. And at 19.02 hours the Appellant was brought to the station in respect of charges of stealing and malicious damage. It is not clear at what point the police now decided to charge the Appellant with the two different counts he faced.

The Appellant in his defence stated that he was arrested for malicious damage of the property of Wilfred Murugu. This is in line with the extract of occurrence book number 18 of 7/5/2010.

The learned State Counsel does not support the conviction and rightly so. We do find that the appeal has merit and we allow it.

The conviction on both counts is quashed and the sentence of death set aside. The Appellant shall be set free unless otherwise held under a separate lawful warrant.

SIGNED AND DATED THIS 31ST DAY OF MAY 2013 AT EMBU.

LESIIT J.
J U D G E
H.I. ONG'UDI
J U D G E
Delivered in open Court in the presence of;
Mr. …..... for State
Appellant
Njue – C/c