REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 48 of 2012

SAMUEL NJUE KIMOTHO...APPELLANT

VERSUS

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

From original conviction and sentence in Cr. Case No. 2414 of 2005 at the Chief Magistrate's Court Embu by KATHOKA NGOMO – Senior Principal Magistrate on 18th December 2008

JUDGMENT

SAMUEL NJUE KIMOTHO 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;

1. SAMUEL NJUE KIMOTHO: On the 15TH day of August 2005 at about 01.00am at Gakwegori village of Embu District within Eastern Province jointly with others not before Court while armed with offensive weapons namely explosive devices and pangas robbed SAMUEL KARIUKI MUGO of cash ks.1000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said SAMUEL KARIUKI MUGO.

2. **COUNT 2**

HAVING SUSPECTED STOLEN PROPERTY CONTRARY TO SECTION 323 OF THE PENAL CODE

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

1. SAMUEL NJUE KIMOTHO: On the 20TH day of August 2005 at Kangaru village in Embu District within Eastern Province having been detained by IP JOHN MUTONGAH and other police officers as a result of the exercise of powers conferred to him by section 26 of Criminal Procedure Code, had in his possession one solar panel make unknown serial number, PBE 4134, one bicycle make Neelam serial number tempered with, one bicycle make ralley serial number 44780, one battery make Jumbo serial number 101004, one speaker make sonny serial number 81940715, one speaker make sonny serial number 5253709, one Radio Cassette make teteline serial number 799039, one black and white T.V. Set make Great wall serial number not vissible, one voters card

bearing the names of one IRERI SHADRACK NO.0597220543, one black-blue (red colour) jacket, one Green bicycle make Diamond flame number 44780 and one Hacksaw-metal reasonable suspected to have been stolen or unlawfully obtained.

ALTERNATIVE COUNT

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

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

SAMUEL NJUE KIMOTHO: On the 20TH day of August 2005 at Kangaru village in Embu District within Eastern Province otherwise than in the cause of stealing, dishonestly received or retained one bicycle knowing or having reason to believe to be stolen goods or unlawfully obtained.

This matter proceeded to full hearing and the Appellant was convicted and sentenced to death on count 1. On the 2nd and Alternative count he was sentenced to two (2) years imprisonment on each which sentences were to run concurrently.

And being aggrieved by the Judgment he has filed this appeal against conviction and sentence.

The facts of the case are that on the night of 15/8/2005, PW1 was asleep in his house when he heard people talking outside. He woke up and noted that the lights facing the Embu/Meru road were off. These are the security lights of his house. However the lights on the other side of the house were on. He looked outside through the window on the side where the lights were and was able to see his watchman (Salesio) with 3 men who had tied his hands. He alerted his wife and they started screaming. The attackers broke the door to the house and embarked on hitting the bedroom door. PW1 and his wife (PW3) continued screaming. The attackers were unable to break the bedroom door and so went to the windows and destroyed some. They demanded for money. PW3 gave them shs.1000/=. They continued to scream but no help was forthcoming as there was a light shower. An explosion was heard on the compound. Later the Police came with a police dog. Due to the wet surface the dog could not track the thieves. PW1 Indicated that he was able to identify the three (3) attackers. He identified the Appellant at an identification parade as one of the three (3)attackers. PW3 was not able to identify anybody during the attack. Salesio the watchman did not turn up in Court to testify inspite of several summons issued. PW2 whose house was broken into in his absence on the night of 5/11/2004 identified a sonny speaker saying it was one of the stolen items (EXB2). PW4 conducted the identification parade where the Appellant was identified by PW1. PW5 identified a bicycle which he says had been stolen from his house. It was not clear whether the bicycle was Nilan or phoenix make. PW6 plus other four officers accompanied by PW2 went to the Appellants house at Kangaru market aboard motor vehicle KAE 718S belonging to the C.I.D. This was on 20/8/2005 at 5.30am. They searched the house and recovered several items eg. EXB3-7. On 25/8/2005 a further search was carried out at the Appellant's home when several other items eg EXB9-15 were recovered. These had been buried under garbage. The Appellant could not explain his possession of these items. The Appellant in his defence gave a sworn statement denying the charges. He said the bicycles Nilan, Releigh and diamond were his. And that PW5 did not know the make of his bicycle. He further stated that PW2 did not report a missing speaker but a radio. He admitted that the bicycles were recovered from his home.

When the Appeal came for hearing the Appellant presented us with written submissions which expounded on his grounds of appeal.

Mr. Miiri the learned State Counsel opposed the appeal, saying the Appellant was properly identified. We have read and considered these submissions well. As a 1st appellate court our duty is to reconsider and re-evaluate the evidence adduced and arrive at our own conclusion bearing in mind we did not have the chance of seeing or hearing the witnesses.

In the case of ***NGUI -V- REPUBLIC [1984]KLR 729*** the Court of Appeal held thus;

"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".

The grounds raised by the Appellant are mainly touching on identification. We shall therefore consider them simultaneously. However we wish to address ground two (2) separately. It relates to violation of Appellant's constitutional rights in relation to section 77 of the old Constitution. This application was filed in 2008. He does not specifically state which of his rights was violated. However looking at the record the Appellant was arraigned in Court on the 11th day after his arrest. This was within the 14 days period allowed at that time for capital offences. Had it been under the 2010 Constitution dispensation, we would have found that indeed there was a violation. The first issue to determine is whether a robbery with violence was committed as stated in the 1st count.

From the evidence of PW1 and PW3 its confirmed that they were attacked by three (3) men. There was destruction of the door and windows as the attackers tried to gain entry. Some explosive also exploded on the compound. Though neither PW1 nor PW3 was injured there was real threat to violence. Even their watchman was said to have been injured. PW3 also stated that she got shs.1000/= from PW1 which she gave to the attackers. PW1 confirmed it. We are satisfied that indeed a robbery with violence contrary to section 296(2) Penal Code was committed.

The next issue to determine as relates to the 1st count is identification. In this case there is only one identifying witness whose evidence the learned trial Magistrate relied on to convict the Appellant on the 1st count. This witness is PW1. His evidence had to be scrutinized by the Court to be sure it was acting on credible evidence. In the case of ***MAKOKHA -VS- REPUBLIC [1989] KLR 238*** the Court of Appeal held thus;

1. While a defendant may be convicted on the identification of a single witness, before a conviction can be based on such evidence the Court must warn itself of the danger of doing so and should only convict if satisfied that the circumstances of identification were favourable and the evidence is reliable and free from the possibility of error.

2. ***In the instant case the trial Court did not warn itself of the danger of relying on the evidence of the police constable before convicting the Appellant. This conviction was therefore unsafe.***

PW1 in his evidence stated that when he woke up he discovered that his security lights were off. However there were lights on, on the **other side of the house**. He did not explain which this other side of the house was. Were the lights from the outside or inside of this other side? No explanation was given concerning the distance from where he was to where these lights were. There is no mention of lights inside the house. These were crucial issues which the trial Court did not address. The intensity of these lights was also not established.

When police officers came to PW1's home after the robbery he never told them that he could identify any of his attackers. Instead he went to some homesteads with the officers in the name of tracing the robbers. In one of the houses, he peeped and saw a wet jacket which jacket he was identifying in Court. In cross examination at page 58 line 13 he states;

"I did not recover a Jacket, police are the ones who recovered it on a table".

PW1 has in his evidence tried to connect this jacket with the Appellant. He said the Appellant was wearing it during the attack; he saw it wet and hanging in a house at Kangaru etc. How did he know that jacket had been recovered by the police on a table if he was not with them?

PW1 did not give any description of the three (3) men he allegedly identified. He stated that he did not know their names. So how were they arrested? At page 19 line 5-7, PW1 is said to have stated the following in his statement;

"Page 5 of my statement reads I received a telephone call that Mr. Njue was arrested and I should go to the police station".

And his wife (PW3) at page 31 line 10-11 states;

"Later police informed us that one Samuel Kimotho was arrested. I did not know him before I saw him here in Court".

With these statements from PW1 and PW3 we do find that there was too much involvement by PW1 in the investigations. PW1 went to the Itabua police station with PW3 and his watchman after they were informed that Njue/Samuel Kimotho had been arrested. This is what PW1 states at page 16 lines 14-17

"Police called me and informed me that the man had been arrested. I was told to go with my wife and my watchman. We went to Itabua police station. We were told to record statements. We told the police that we had seen the thief. Police told us they would conduct an identification parade".

From this statement it is also clear that PW1 knew who they were looking for. Secondly they saw the Appellant at the station when they went there upon being called by the police. They even told the police they had seen ***"the thief"***. Thats when they were told an identification parade would be conducted.

In this case there was no basis laid for an identification parade to be conducted in ***AJODE -V- REPUBLIC [2004]2 KLR 81*** (2nd Holding) it was held thus;

It is trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then conduct a fair identification parade.

And even when the police tried to hold an unfounded identification parade the witnesses cited the suspect at the police station. It was therefore an exercise in futility to conduct an identification parade. We therefore find the said identification parade to have been faulty and could not be relied on without any other evidence.

In the case of ***KIILU & ANOTHER -VS- REPUBLIC [2005]1 KLR 174*** the Court of Appeal is dealing with identification evidence of at single witness stated as follows;

"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but his rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the probability of error".

After due consideration of the evidence on record we are satisfied that the conditions favouring a correct identification were unclear. Secondly PW1's too much involvement with the police in the investigation of this case made him appear an unreliable witness. The identification parade conducted after the witnesses had sighted the suspect was worthless without any other supporting evidence.

The failure by the Prosecution to avail a crucial witness **Salesio Nyaga** who was also a complainant did a heavy blow to their case. It is Salesio who had been with the robbers outside and his evidence would have confirmed whether or not the Appellant was one of the people who had attacked the complainant. In the case ***JUMA NGODIA -VS- REPUBLIC [1982-88]1 KAR 454*** it was held;

"The Prosecution has in general a discretion whether to call or not call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced would, if produced have been

unfavourable to the Prosecution".

We find the above to be the case here. Failure to call Salesio Nyaga as a witness is taken to mean his evidence could have been adverse to the Prosecution case. We find no other evidence to support the charge of robbery with violence.

The 1st alternative count of Handling stolen goods is defective. It does not indicate who the owner of the alleged stolen bicycle is.

Coming to the 2nd count we have found that a number of items were recovered from the Appellant's home. In his evidence under cross-examination he admitted that the bicycles were recovered from his home. Majority of these items were dismantled, serial numbers erased and were buried in a heap of garbage. The Appellant besides claiming ownership of the same produced no documents to support that. And had they been truly his goods he would not have dismantled them and erased serial numbers and hidden them under garbage. We do find that he was properly convicted on this count.

Our finding is that the Appeal partly succeeds in that appeal on count 1 and the 1st Alternative counts succeed. The convictions on the said counts are quashed and sentences set aside. The appeal on the 2nd count is dismissed. The conviction and sentence are upheld.

The Appellant will however be released as he has already served the sentence in the 2nd count.

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

LESIIT J. **H.I. ONG'UDI**

J U D G E **J U D G E**

Delivered in open Court in the presence of;

…...................................... for State
Appellants

Njue – C/c