REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 24 of 2009

PETER MUCHANGI JACOB..…….....…..... APPELLANT

VERSUS

REPUBLIC…….....…..…..RESPONDENT

From original conviction and sentence in Cr. Case No. 493 of 2008 at the Senior Principal Magistrate's Court at Runyenjes by D.O. Onyango – Senior Resident Magistrate

JUDGMENT

The Appellant **PETER MUCHANGI JACOB** was charged with three counts of offences. In count 1 he was charged with Robbery with Violence contrary to section 296(2) of the Penal Code.

In count 2 the Appellant faced an Alternative count of Handling Stolen Property contrary to section 322(2) of the Penal Code. In count 3 he faced a charge of Assault causing Actual Bodily Harm contrary to section 251 of the Penal Code. The Appellant was convicted in counts 1 and 3 after a full trial. He was sentenced to death in the first count and to 3 years imprisonment in count 3. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. He has eight grounds of appeal as follows;

1. That the learned trial Magistrate erred in both law and fact to convict the Appellant without putting due consideration that he pleaded not guilty to the charge.

2. That the learned trial Magistrate erred in law and fact by placing reliance on evidence adduced by PW1 that she identified the Appellant through electricity light and the same was not conducive for identification as pertained by the evidence.

3. That the learned trial Magistrate erred in law and fact in relying on evidence adduced by PW1, PW2, PW3 which was surrounded with a lot of doubts.

4. That the learned trial Magistrate erred in law and fact by failing to bring vital witness to testify in Court to clear the doubts.

5. That the learned trial Magistrate erred in law and fact in convicting and sentencing the Appellant to suffer death by failing to consider that there was no report given about him to reinforce the Prosecution.

6. That the learned trial Magistrate erred in law and fact in convicting the Appellant putting

reliance on evidence adduced by PW2 (complainant) which was uncolloborated by the evidence of PW4.

7. That the learned trial Magistrate erred in law and fact by convicting the Appellant whereas the complainant (PW1) identified the Appellant at police cell other than the alleged scene of crime.

8. That the learned Magistrate erred in law and fact by rejecting the Appellant's defence without sufficient reasons.

The facts of the case are that the complainant in count 1 and 2 was going home at about 7pm with another when a person came, punched her on the forehead after grabbing her and turning her around. Her friend ran away, leaving the complainant to struggle with the man. The man grabbed the complainant's handbag. The complainant struggled with him over the bag until the straps cut and the man took it away. He ran away. The complainant screamed to join her lady friend who had ran away screaming. PW2 the complainant in count 3 came out of his house to check what was happening. PW2 saw Appellant running and he chased and held him tightly despite being stabbed on his left hand. PW3 who had also come out of his house to check helped PW2 tie up the Appellant. They got a handbag. They were joined by PW5 who identified the bag as PW1's property. PW1 was his mother. PW2 eventually went for treatment. He was examined by Dr. Masali PW6 who also filled the P3 form. She assessed the injury as harm. The Appellant was eventually charged by PW7 the investigating officer after completing his work.

The Appellant gave an unsworn defence in which he denied the charge. He said the charge was a frame up by people who met him on the way and accused and blamed him of stabbing a man.

We have carefully considered the appeal. We also subjected the evidence adduced before the trial court to a fresh analysis and evaluation and have drawn our own conclusions while bearing in mind that we neither saw nor heard any of the witnesses. We have given due allowance for the same. We are guided by the Court of Appeal case of ***OKENO -V- REPUBLIC [1972] EA 32*** where the Court 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 weigh conflicting evidence and draw its own conclusions (*SHANTITAL M. RUWALA-VS- REPUBLIC [1957] EA 570).*

The Appellant was unrepresented. We have considered his filed written submissions and his address in Court.

The State was represented by Ms Ing'ahizu, learned State Counsel. The learned State Counsel opposed the appeal. We have considered her submissions.

Before we took submission by the Appellant and Respondent, we took evidence from the OCS Runyenjes police station CIP Fanuel who produced OB NOS.35, 36 and 37 of 5th August 2008, which related to this case.

The Appellant's main contention is that there was a contradiction between the report made to the police, the particulars of the charges preferred against him and the evidence adduced in Court. It is the Appellant's contention that as per the O.B's produced in Court, the first Report to the police made by PW5, son of the complainant PW1 was that he saw two people struggling with his mother. That one went away with the complainant's bag while the other was apprehended and taken to the police. The Appellant contends that the particulars of the count of robbery with violence were defective as it alleged that the Appellant committed the offence alone. The Appellant also contends that the handling charge in which it is alleged he was found with the complainant's property was defective and unsustainable.

Ms Ing'ahizu submitted that the Appellant was recognized by the complainant PW1 who saw him under lights from her house and bars nearby. Counsel argued that the complainant's evidence was

corroborated by PW1, PW3, PW4 and PW5. Learned Counsel argued that the complainant knew Appellant before and therefore the evidence of identification was that of recognition. The learned State Counsel argued that the Appellant was found in possession of the complainant's handbag and other properties produced as Prosecution exhibits 1 to 6, and that in the circumstances the doctrine of recent possession applied.

We have perused the judgment of the learned trial Magistrate. Is what he observed relevant to the identification of the accused person?

"Though the offence is said to have occurred at around 7pm when visibility is not very clear and identification may be a problem I am convinced that the witness positively identified the accused. Infact PW1 testified that there was enough light not only from her home but from bars known as Cock Robin and Shefiff that enabled her to identify the accused. PW1 actually recognized the accused to be a person she knew very well including his names. She knew that the accused is a brother of a person she called Blacky. Other than this, I find that the chain of events from the time PW1 was robbed to when the accused was arrested remained largely uninterrupted. The accused was arrested after being chased while carrying a handbag which PW1 has positively identified to be hers. The accused was arrested while running from the direction where PW1 had been robbed. Even if PW1 had not identified his attacker the fact that the accused was arrested a few minutes thereafter carrying PW1's handbag while running from the scene would be evidence enough that he was actually the one who attacked PW1. This is particularly so as there is no explanation whatsoever from the accused as to how he came to be in possession of PW1's handbag a few minutes after she was attacked and robbed of the same".

The way to test the evidence of identification is well settled. In ***REPUBLIC -VS- ERIA SEBWATO 1960 EA 174*** it was held;

"Where the evidence alleged to implicate an accused in entirely of identification, that evidence must be absolutely watertight to justify a conviction".

The evidence of identification was that of PW1 in respect of counts 1 and 2. The learned trial Magistrate subjected the evidence of the complainant to the proper scrutiny and arrived at the correct conclusion. The complainant knew the Appellant before and even knew his mother. She saw him with the aid of surrounding electricity lights on only 10 meteres from her house. That evidence was not the only evidence against the Appellant. In a strong way, the complainant's evidence was corroborated by the fact that Appellant was arrested soon after stealing her handbag and contents, still carrying them on his person.

We are satisfied that from the evidence adduced before the trial Court, the Appellant was caught few minutes after the theft. He was more the thief than the handler. Even though the learned trial Magistrate made no reactions of the Alternative count, he was clear in his mind that the evidence adduced could not support that count.

The Appellant's contention was that the particulars of the charge and the evidence adduced before Court were at variance with reports made at the police station. In ***YONGO -VS- REPUBLIC [1983] KLR 319*** the Court considered the circumstances that would render a charge defective. The Court held as follows;

1. A charge is defective under section 214(1) of the Criminal Procedure code (cap.75) where;

a) It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses;

b) It does not, for such reasons, accord with the evidence given at the trial; or

c) it gives a misdescription of the alleged offence in the particulars.

2. Where the charge is defective either by misdescription or at variance with the evidence at the trial, the Court has the power to order an amendment or alteration of the charge provided;

a) the Court shall call upon the accused to plead to the altered charge and,

b) the Court shall permit the accused, if he so requests, to re-examine and recall witnesses.

It is a mandatory requirement that the court must not only comply with the above conditions, but it shall record that it has so complied. The trial Magistrate failed in not recording whether there had been compliance with the proviso to section 214 of the Criminal Procedure Code (cap.75).

It is clear that what a Court should consider is not the reports made to the police but the evidence adduced before the Court and the particulars set out in the charge. The evidence adduced in this case was consistent with the particulars of the charge as framed. The inconsistency complained of may be an error on the part of the officer who took the report. We are satisfied that from the evidence that was before Court there was no inconsistency or contradiction between the evidence of witnesses and particulars of the charge.

We now turn to the issue of the main Count of robbery with violence contrary to section 296(2) of Penal Code and whether the evidence adduced before Court supports the charge. The facts of the case are that the Appellant had a knife at the time he attacked the complainant. He did not use it on her. He took the complainant's handbag after pulling it and struggling with the complainant to retain it.

In ***OLUOCH -VS- REPUBLIC [1985] KLR 549 and 550, Cheson, Nyarangi and Platt Ag JJA*** observed;

It is not the decree of actual violence that differentiates the offence of robbery and robbery with violence. Robbery with violence 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 in company with one or more other person or persons

c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes, or uses other personal violence to any person. The ingredients of the offence of robbery under Section 296(1) of the Penal Code are;

i) stealing anything

ii) at or immediately before or immediately after time of stealing

iii)*using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or prevent or to overcome resistance to its being stolen or retained.*

Having subjected the evidence adduced before Court to the ingredients that should be established to prove the offence charged, we find that the evidence adduced did not support the charge. The Appellant was alone. He stole a bag from the complainant. He had a knife which he did not use against the complainant. We find that the offence proved at most was robbery contrary to section 296(1) of the Penal Code.

The Appellant was convicted of assault as against PW2. The evidence in support of that charge is watertight. The Prosecution established that the Appellant caused the complainant in count 3 harm and adduced medical evidence to support same. We find that conviction safe.

Having considered this appeal, we have come to the conclusion that the conviction for the charge of assault contrary to section 251 of Penal Code was safe. We find that the appeal against this conviction has no merit and is accordingly dismissed.

In regard to the conviction on the main count we allow the appeal in part by setting aside the conviction for robbery with violence contrary to section 296(2) of the Penal Code and the sentence of death and substituting it with a conviction on the charge of robbery contrary to section 296(1) of the Penal Code.

As for sentence in counts 1 and 3 we have considered that the Appellant was sentenced on 16th February 2009. He has served four years and two months imprisonment so far. We have considered that the complainant's property was recovered. The injury inflicted on the complainant in count 3 was harm and he recovered from his injury.

Taking all these factors into consideration, we are of the view that the Appellant has served sufficient punishment for the offence charged. Accordingly we substitute his sentence of death in count 1 and three years imprisonment in count 3 and direct that same is substituted with imprisonment for the period already served.

The Appellant should be set free unless he is otherwise lawfully held. Those are our orders.

SIGNED AND DATED THIS 17TH 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;

…..... for State
Appellant

Njue – C/c