



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 28 OF 2010

(LESIT AND MAKAU, JJ)

GITAHU NDEGWA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

*(Being an appeal from the judgment/Conviction and sentence of Hon. S. N. K. Andriessen, PM in
CMCR.Case No. 964 of 2010 delivered on 15th June, 2011)*

J U D G M E N T

The Appellant GITAHU NDEGWA was charged with two counts. The first count was robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on the 27th day of July, 2010 at around 10.00 a.m. at Kambakia village, Meru County, robbed Peninah Nkatha of cash, Kshs.6,500/-, a handbag, ID Card and three cheque books all valued at kshs.10,000/- and at the time of such robbery wounded the said Peninah Nkatha. The second count was of grievous harm contrary to Section 254 of the Penal Code. The particulars were that on the 27th day of July, 2010 in Kambakia village in Imenti North, Meru District of Meru County with others not before court unlawfully did grievous harm to TITUS KABERIA SOLOMON.

After full trial the Appellant was convicted of the offences and sentenced to death in Count 1 and on Count II to life imprisonment whichever shall come before the other.

The Appellant being aggrieved by the conviction and sentences preferred this appeal setting out 8 grounds of appeal in the petition of appeal dated 28th June, 2011 as follows:-

1. *The learned trial Magistrate erred in law and fact by proceeding to convict and sentence the Appellant in a case where the prosecution did not prove its case to the required standards i.e. beyond reasonable doubt.*
2. *The Hon. trial Magistrate erred in law and fact by proceeding to convict the Appellant on Count I when the material ingredients of the offence were not proved.*
3. *The learned trial Magistrate erred in law by proceeding on wrong principles in her appreciation*

- of the evidence on record thus arriving at an wholly unsustainable conviction.*
4. *The learned trial Magistrate erred in law by relying on evidence which is materially not corroborated.*
 5. *That the conviction of the Appellant on Count II of the charge sheet is erroneous and unlawful as the evidence tendered does not prove the offence U/S 234 of the Penal Code.*
 6. *The sentence meted out is harsh, unjustified and untenable in law.*
 7. *The learned trial Magistrate erred in law and fact by failing to take into consideration the circumstances surrounding the alleged offence and the possibility of the case being a frame up.*
 8. *The learned trial Magistrate erred in law, due to the nature of the offence in failing to appreciate the mental status of the accused during the alleged offence and during the hearing especially when it emerged in mitigation that he could be suffering some mental infirmity.*

When this appeal came for hearing Mr. Mokuu, Advocate appeared for the Appellant. The State was represented by Mr. Makori, learned State Counsel.

We are the first appellate court and as expected of us we have subjected the entire evidence adduced before the lower court to a fresh evaluation and analysis while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance. We are guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are ably set out in the case of ISAAC NG'ANG'A KAHIGA ALIAS PETER NG'ANG'A KAHIGA VS REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005 as follows:-

“in the same way, a court hearing a first appeal(i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO – V- REPUBLIC(1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

“. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters V. Sunday Post, (1958) EA 424).”

The facts of the prosecution case are simple. The complainants PW1 and PW2 on 27/7/2010 at 10.00 a.m were at Kambakia to pick some items they had left behind at Appellant's home. These were a wheelbarrow, cement and others. PW1, PW2 and PW3 found the Appellant at his home and on being asked to give the items left behind by the complainants he told them nothing had been left behind. That the complainants left and after about 50 metres the Appellant called the complainants to go for their items as he had seen them. That as PW2 was taking the items out the Appellant stood outside armed with a panga and made to cut PW1 with it. PW1 moved aside and the Appellant took PW1's handbag which had PW1's ID Card, 3 cheque books for National Bank, an Order of work and Kshs.6,500/- . PW1 then ran away as the Appellant chased her as she ran to a nearby home. The Appellant was joined by two people who attacked PW2. PW1 sought help from a nearby home but they told her that the Appellant was a bad man. PW1 used a taxi which had brought a woman to that home and made a report at Meru Police Station. PW1 stated that PW2 was rescued by boys from a nearby home. That when PW1 returned with Police Officers she found her handbag outside the Appellant's home. PW1 stated that she lost Kshs.6,500/- that was in the handbag.

The Appellant had meanwhile proceeded to the Police Station and reported he had killed someone at his home. PW2 testified that he saw Appellant grab PW1's handbag and subsequently took a weapon and

charged at him. PW2 stated that he met two people with clubs who blocked his way. That they beat him with rungas as Appellant cut him with a panga before people came to his rescue.

PW2 was subsequently taken to Meru Hospital where he was admitted for 1 week. He was treated and issued with a P3 form. He stated that he was not sure what was stolen from the handbag.

PW3 confirmed that on 27/7/2010 at around 10.00 a.m. he was in the company of PW1 and PW2 when they went for their tools from the Appellant. PW3 heard screams from PW1 and left to check what was happening. PW3 went to the Appellant's home and found him cutting PW2 with a panga.

PW3 was chased by two other people who were with the Appellant. PW3 screamed for help and neighbours responded. They then picked PW2 and took him to Meru Hospital through Police Station. He stated that he used to see Appellant sit near where they were building culverts.

PW4, Dr. Isaac Macharia produced medical report, P3 in respect of PW1 as exhibit 6 showing the degree of injury as harm and P3 in respect of PW2 as exhibit B5 showing the degree of injury as maim.

PW5 No.61266 Cpl. Naomi Nderitu testified that she received complaint from PW1 and PW2 and booked the report in O.B and gave treatment note to PW1 and PW2. That PW5 in the company of PC Abura and PC Ngetich proceeded to the scene and on arrival they found the handbag with the Appellant. PW5 found 3 cheque books, Local Service Order, one ID card and brown handbag. She got a panga with blood stains.

The Appellant in his defence testified that the complainant's people asked him to keep their tools at his place and he agreed. That when the contract ended they said they would come for their items. That the complainant went for items with others and said the items were not the same. The Appellant stated he took PW1's handbag, logbook and money and reported to the police he stated he was not caught with logbook and money. During cross-examination the Appellant stated that he did not know who cut PW2. He stated he chase to stay there alone but that there were people at a distance. He demonstrated the distances being similar to that from dock to court 6 in Meru Law Courts.

Mr. Mokua, learned Advocate for the Appellant in his submission urged that the Appellant was convicted on inadequate, contradictory and inconsistent evidence. He urged that the material ingredients of robbery were not proved as evidence of PW1 and other witnesses did not support the charges of robbery with violence. He urged that the evidence of PW1 is that the Appellant snatched her handbag and attempted to cut her with a panga. That the handbag was found at Appellant's compound. He submitted that it was possible the complainant dropped the handbag as she ran away.

He submitted the medical report on PW1 never showed she had been assaulted. He submitted the doctrine of recent possession did not apply in this case as Appellant was not found in possession of the handbag.

On Count II Mr. Mokua, submitted that the same was not proved. He urged that the complainant was attacked by 2 people and no effort was made to arrest them. He urged that the panga produced was without test analysis.

He stated that the judgment started by stating the accused is charged with an amended plaint dated 17th November, 2010. He submitted the trial Magistrate was absent minded.

On ground No.8 he submitted that the mental status of the Appellant was not taken into account. Counsel urged that the appellant made it clear in his mitigation when he stated as follows:- ***"I fall down and I buy medicine"***

He submitted that the court ought to have called for medical report as the Appellant was mentally sick. Mr. Mokua, learned Advocate, referred to Appellant's conduct and courts observation.

Mr. Makori learned State Counsel opposed the appeal and stated the evidence against the appellant was overwhelming. He submitted PW1, PW2 and PW3 explained how the Appellant attacked PW1 and PW2. He urged that the complainant's evidence established the Appellant's guilty mind. He urged that the evidence supported the offence of robbery with violence. He referred us to the case of **ERIC KIPKURUI V R(2006)** eKLR on the definition of robbery with violence. He submitted that the handbag was recovered from Appellant's home with some items missing.

On the Appellant's mental status, Mr. Makori, learned State Counsel submitted that this was new evidence and that the Appellant's Counsel should have applied for the taking of new evidence under Section 358 of the Criminal Procedure Code.

Mr. Mokuu, learned Advocate responded by submitting that there was no new evidence before court as the issue of mental infirmity of the Appellant is all over the lower court proceedings. He urged that the trial court ought to have investigated the Appellant's mental capacity. He concluded by praying that if appeal is not allowed we consider to order a retrial.

We have carefully considered the evidence before the trial court. What constitutes an offence of robbery with violence?

The offence of robbery with violence is defined under Section 295 and 296 of the Penal Code as committed in any of the following circumstances:-

- 1. If the offender is armed with any dangerous weapon or instrument or**
- 2. If the offender is in the company with one or more other person or persons or**
- 3. At or immediately before or immediately after the time of robbery, the offender, wounds, beats, strikes or uses any other personal violence to any person.**
- 4. That something is stolen.**

In the evidence of PW1, she stated that the Appellant made to cut her and took her handbag. That when she returned with the police she found her handbag within the Appellant's compound. She stated that she had lost Kshs.6,500/-. PW2 stated he saw Appellant grabbing PW1's handbag. PW5, testified that on return they found Appellant with PW1's handbag. PW1 stated that on return they did not find Appellant at home. PW5 contradicted PW1 in regard to who was found with the handbag. Further we note PW5 never mentioned PW1 mentioning to her that in the handbag there was Kshs.6,500/- and the same was stolen.

We do not believe that anything was stolen from PW1's handbag and had that been the case PW5 would have been told so by PW1 and she would have given such evidence. The first report by PW1 was to PW5. PW1's mind was very fresh after the attack. If indeed there was any money in her hand bag, she ought to have remembered.

We find that the PW1's handbag was found intact with all items. The Appellant, we find had not stolen anything nor did he have the intention to steal from PW1. Infact we find it is possible that the handbag fell from PW1 as she was running away from the appellant and the same was never snatched from PW1 by the appellant.

In the circumstances we find that the ingredient of robbery with violence was not established in the case.

In regard to the attack on PW2 we find that the evidence exonerates the appellant. PW2 was attacked by others. There was no evidence to show those others and the appellant were together and therefore whether they had one common intention to commit the offence against PW2, that charge was not proved against the appellant at all.

The Appellant in this case was represented at the lower court by Mr. Muriuki upto the giving of evidence in chief when at 3.00 p.m on 6/12/2010 the trial court stated and we quote:-

“It is 3p.m. Cannot wait indefinitely for Counsel. Further hearing on 20/12/2010.”

That the court records show that the Appellant thereafter proceeded without the services of his Counsel. That the Appellant cross-examined PW2, PW3 but not PW4 and PW5. The trial Magistrate did not record the language in which the trial was conducted nor did she bother to indicate whether there was any translation of the proceedings to the Appellant.

Under Article 50(1),(2) (c) (g), (h),(j),(M) of the Constitution of Kenya, 2010 it is provided:-

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which

Includes the right—

(a).....

(b).....

(c) To have adequate time and facilities to prepare a defence;

(d).....

(e).....

(f).....

(g) To choose, and be represented by, an advocate, and to be informed of this right promptly;

(h).....

(i).....

(m) To have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

We have carefully examined the proceedings by the trial Magistrate and we find that the Appellant’s constitutional rights to be represented by an Advocate of his choice and to be informed of his rights were violated. Further we find that the trial court violated the Appellant’s rights to have assistance of an interpreter and further by failing to record the language in which the proceedings were conducted at the trial. We also noted that the Appellant was not informed in advance of the evidence the prosecution intended to rely on, nor was the evidence availed to the appellant.

We find that the trial was in complete violation of the Appellant’s Constitutional rights and was not fair. We find that the trial was defective.

On the issue of the Appellant’s mental status, we note there was no medical report but in view of the Appellant’s conduct at the time of the alleged offence, before the trial court and after mitigation, the trial court ought to have investigated the Appellant’s mental status to determine whether he was possessed with sufficient capacity to plead to the charge.

We have carefully considered the evidence against the Appellant and have doubts whether the Appellant was possessed of mens rea to be capable to commit the offences with which he was charged with.

Further we note that the trial Magistrate had not sufficiently addressed herself to the nature of the offence before her as noted in the judgment, in which the trial Magistrate talked of an amended plaint in a Criminal case. We doubt whether the court had seriously considered the issues before it before it reached its judgment.

We have in our judgment held that the Appellant's Constitutional rights as to the fair trial were violated and infringed in the way the trial court conducted the case against the Appellant. We do note, Appellant has been in custody for 2 years and 10 months, and retrial wont prejudice him. Since the appellant's mental status was not investigated and his constitutional rights were breached and that he did not have a fair trial, we find that it will be in the interest of justice to order a retrial.

We therefore allow the appeal, quash the convictions and set aside the sentences in respect of both Count 1 and II. We order that the Appellant should stand retrial before another magistrate other than Hon. S. N. K. Andreessen.

DATED, SIGNED AND DELIVERED AT MERU THIS 20th DAY OF JUNE, 2013.

J. LESIIT

J. MAKAU

JUDGE

JUDGE

Delivered in open court in presence of:

Mr. Mokuia for the Appellant

Mr. Makori for the State

Appellant– present

J. LESIIT

J. MAKAU

JUDGE

JUDGE