



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO. 284 OF 2008

BEN MACHARIA MWANGI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in Capital Offense Number 9 of 2007 in the Chief Magistrate's Court at Kikuyu - S.N. Karani (SRM) on 13th August 2008)

JUDGMENT

The appellant Ben Macharia Mwangi was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. It was alleged in the particulars of the charge that on 22nd April 2007 at Kabete Rehab School in Kiambu District jointly with others not before the court while armed with offensive weapons, namely, pangas and rungus, they robbed Dominic Mbogo Nganga of property set out in the particulars of the charge.

Having denied the charge, he was subjected to a trial where the prosecution called four witnesses and after the full trial, he was convicted and sentenced to death. This appeal follows the said conviction and sentence.

As the first appellate court, it is our duty to consider all the evidence adduced before the trial court, re-evaluate the same and come to independent conclusions.

The complainant was asleep in his house between 1 and 2 a.m. when his window was shattered with a big stone. He took a torch but before he could direct it to the window, he realized someone had come in. This person was holding a panga in his hand and ordered him to switch off the torch. This person then moved to the sitting room of the complainant's house, opened the door and at this stage he heard many people come in. The man who was holding the panga came back to the bedroom and demanded some money. The complainant says he was able to recognize his voice. There was a lantern which was on and with the aid of its light he was able to see the person come back. He, the complainant, told the intruder that the only money he had was in the three piece suit which he had hanged near the bed. The intruder then took the entire three piece suit and asked for his mobile phone. He directed him where it was and he took it.

At some stage these people left the house whereupon the complainant went to the sitting room and found the door open. He went out to check on his children in a house 20 metres away and found their door locked from outside. He then opened for them and all came to the main house and started checking on what had been stolen. It is at that stage that the property mentioned in the charge sheet was found missing.

On the same night, the incident was reported to the police. It is PW4 who received this information. It was a rainy night and therefore on the following day, footsteps leading from the complainant's house ended at the house in the next village occupied by the appellant. When the complainant and the police got there, they found the appellant still sleeping and when the search was conducted the property in the charge sheet was recovered.

Some of the property was inside the house on a sofa set and some near the door.

When the appellant was asked about the radio, he said he was a radio repairer but other than the complainant's radio there was no other radio. The radio was positively identified by PW2, the son of the complainant who had earlier on taken a loan from Equity Bank and pledged the radio as security. The document he had contained the serial number which matched the ones on the radio that was recovered.

In his defence, the appellant said he was a casual labourer and on the day he was arrested he was asleep when his wife called and told him that some people were asking for him. He was confronted by some police officers and when he asked why he was told he would know later. He was brought to the police station and that it is his case that no exhibit was recovered on him or in his house and was surprised when they were produced in court.

In his petition of appeal, the appellant faulted the learned trial magistrate for applying the doctrine of recent possession and relying on impeachable evidence in contravention of Section 163 of the Evidence Act. He also complained that the learned trial magistrate did not comply with Section 169 of the Criminal Procedure Code in that the judgment was based on scanty evidence. Finally, that his defence was not given adequate consideration.

On our part, we note that the offence was committed at night and the circumstances prevailing did not allow for positive visual identification. Indeed, the complainant said as much in his evidence. In our view that enhances his credibility in these proceedings.

The footsteps that led the complainant and the police to the house of the complainant could have led to any other house. However, it is at the house of the appellant that the complainant's property was found which in our view was positively identified.

The appellant was not able to give any or any reasonable explanation as to his possession of the property which did not belong to him. The property was recovered within hours of the robbery. This is not coincidental and the only irresistible conclusion is that he was one of the people who stormed into the house of the complainant and robbed him of the property set out in the charge sheet.

Circumstantial evidence in this particular case led to only one destination and this was the house of the appellant. He had wet clothing and muddy shoes. The only conclusion is that he was one of the people who robbed the complainant.

The people who stormed into the house of the complainant were armed with dangerous weapons. The complainant sighted a panga in the process and a panga was also recovered from the house of the appellant. It was not only the appellant who was involved because uncontroverted evidence by the complainant showed that several people entered into his house. The ingredients of Section 296(2) of the Penal Code were met. The defence of the appellant was considered by the learned trial magistrate and appropriately rejected.

We have seen no relevance to the reference to Section 163 of the Evidence Act cited by the appellant.

The learned trial magistrate also gave the facts, evidence and reasons for arriving at the conclusions that he did, and therefore met the requirements of Section 169 of the Criminal Procedure Code.

The offence was proved beyond any reasonable doubt and we therefore agree with the learned trial magistrate in arriving at the conviction of the appellant.

This appeal is therefore dismissed.

Orders accordingly.

Dated and delivered at Nairobi this 25th Day of July, 2013.

A. MBOGHOLI MSAGHA

FRED A. OCHIENG

JUDGE

JUDGE