



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CRIMINAL APPEAL NO. 34 OF 2008

STEPHEN GICHU WANJIKU APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case Number 545 of 2006 in the Chief Magistrate's Court at Thika - L. Gicheha (SRM) on 5th February 2008)

JUDGMENT

The appellant, Steven Gichu Wanjiku was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code in count one and in the alternative he was charged with the offence of handling stolen goods contrary to Section 322 (2) of the Penal Code. In count two, he was charged with the offence of being in possession of imitation firearm contrary to Section 34(1) of the Firearms Act Cap 114 Laws of Kenya.

After the full trial, he was convicted of the main count of robbery with violence and acquitted of count two. Upon the said conviction, he was sentenced to death as provided by law, and it is from the said conviction and sentence that he has lodged this appeal.

In his amended memorandum of appeal, he has faulted the learned trial magistrate for not finding that the charges were Deffective and could not sustain a conviction. It is also his case, that the learned trial magistrate erred in law and fact in accepting the evidence of purported visual identification which was not free from error or mistake. Further, the learned trial magistrate erred in law and fact when she relied on conflicting testimonies which were incredible.

He has also faulted the learned trial magistrate for accepting the evidence relating to recovery of exhibits when the same was not in compliance with Section 19 of the Police Act. Finally, he complains that his defence was rejected for very weak reasons yet it was formidable and plausible.

As the first appellate court, it is our duty to re-evaluate and assess all the evidence adduced before the trial court and make our own independent findings and conclusions.

PW1, Nancy Njoki was at her home on the night of the alleged robbery alongside PW2, Isaack Kamande Mbatha who was their houseboy. Also present was their son known as K. They were all in the sitting room when they heard a knock at their gate. PW2, the houseboy took a torch and went out to open when he encountered a group of people who forced him into the house.

In the house, there was light from a gas lamp which was placed on the table. It is the evidence of PW1 that when she heard a knock at the gate, she thought it was her husband who had come home, only to be

confronted by strangers. She saw three people, one of whom was holding a gun. This person ordered her to lie down. They demanded money and she complied by giving them Ksh. 250/-. She also handed them her phone and then went to another room where they tied her up.

PW2 was also tied up and the assailants then took all the property listed in the charge sheet. After the robbers had left, their son Ken helped in untying them. Her husband came later in the night and on the following day, the matter was reported at Ruiru police station. At the police station both PW1 and PW2 did not give the description of the people who robbed them but said they could identify them if they saw them. Later, PW1 and PW2 were called to the police station where they participated in an identification parade and picked the appellant as one of the people who robbed them. PW1 was also able to identify a knife which was one of the items stolen from her house. She was able to do so because the knife had been inscribed with a name of a hotel that they ran before.

PW3, PC David Kyengo is a police officer who was in an operation at a place called Gituamba. In the course of their operation, they entered some premises and found the appellant. On searching, they found a knife and a toy pistol hidden under the cushion. The appellant did not give any explanation and therefore he was arrested. He was taken to Gituamba AP Post and then Ruiru police station. At the police post, there had been a report of robbery with violence and one of the items stolen was the knife which they recovered and was identified by PW1.

PW5, Inspector Gitari Pius was requested to carry out an identification parade whereat the appellant was identified by both PW1 and PW2. It is his evidence however, that the appellant complained that he was not satisfied with the parade on the ground that he suspected he had been pointed out to the witnesses before the parade.

The appellant in his defence told the court that he had gone for a funeral vigil of his brother and that on the morning he was arrested, he was on his way home. He met police officers who ordered him to stop. He was searched and the police alleged that he was the thief. He was then taken to the police station and subjected to an identification parade where he was identified by people he did not know. Although the police said he had been arrested with an exhibit, there was nothing that he was arrested with. He denied the offence.

The learned trial magistrate was satisfied that the prosecution had proved the case against the appellant beyond reasonable doubt and proceeded to convict him. In so doing, she considered the defence of the appellant and concluded that it was far fetched. On our part, after going through the evidence, we note that there was sufficient lighting in the house of PW1 where the robbery took place. The appellant is said to have talked to both PW1 and PW2 first by asking PW2 questions as to the presence of the husband to PW1 and secondly by demanding money from PW1. This interaction could not have taken place without the appellant facing both PW1 and PW2.

There is also evidence that both PW1 and PW2 were tied and this is attributed to the appellant. The action of tying these two witnesses must have entailed close contact. In such a case, identification would be obvious. Further, there is evidence that the robbery took about 30 minutes according to PW1 and PW2. The identification parade held soon thereafter confirmed that the appellant was one of the robbers after he was positively identified by both PW1 and PW2.

The knife recovered by the police in the house of the appellant was identified by the complainant PW1 by the name of their hotel inscribed thereon. This being one of the items stolen from her house, places the appellant at the scene of the robbery. The appellant has alleged that the knife and the toy pistol have not been produced as exhibits in court. This may be true. The evidence on record however, is that the two items were identified in court by PW3 and marked for identification. The appellant cross examined both PW1 and PW4 on these items. We have also looked at Section 19 of the Police Act Cap 84 cited by the appellant and seen no relevance thereto.

The fact that they were not produced as exhibits does not diminish their evidential value in the prosecution case. Even if that evidence were to be discounted, the identification of the appellant in the

house by PW1 and PW2 and also at the identification parade taken together implicates the appellant.

The evidence adduced by the prosecution was corroborative and consistent. It is not necessary that the weapon used be specifically mentioned in the charge sheet. And so the fact that the pistol was not mentioned in this case does not make the charge defective.

The prosecution proved that there was a robbery in the house of PW1 and that the robbery was conducted by more than one person and one of those people is the appellant herein. The tying of PW1 and PW2 satisfied the requirement of violence as contemplated in Section 296(2) of the Penal Code.

We have come to the conclusion that the offence of robbery with violence was proved beyond any reasonable doubt and therefore uphold the conviction and sentence by the learned trial magistrate.

This appeal is therefore dismissed.

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

A. MBOGHOLI MSAGHA

FRED A. OCHIENG

JUDGE

JUDGE