



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 126 OF 2009

STEPHEN KANG'ETHE KARANUAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1820 of 2007 in the Chief Magistrate's Court at Thika – C. W. Meoli (CM) on 25th March 2009)

JUDGMENT

1. The appellant, **Stephen Kangethe Karanu** was convicted and sentenced to death by C. W. Meoli Chief Magistrate (as she then was) at Thika Chief Magistrate's court, for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.
2. The particulars of the offence were that on the 6th day of April 2007 at Laini area in Thika District within the central province, jointly with another not before court while armed with a gun, they robbed Simion Kimani Mbugua of cash Kshs.6000/= and VCD video make Artech valued Kshs.4,000/= and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence against the said Simion Kimani Mbugua.
3. In his amended grounds of appeal, the appellant argued first, that the judgment was marred with irregularities and second, that the charge sheet was defective. The rest of the grounds are essentially an attack on the prosecution evidence of identification and a complaint on the insufficiency of the entire prosecution's evidence, and that the defence statement was dismissed without plausible reason.
4. Miss Kuruga the learned state counsel who opposed the appeal on behalf of the respondent gave a brief summary of the prosecution evidence and contended that the evidence upon which the court relied on identification, was corroborative and that the identification was proper. Miss Kuruga also submitted that the essential ingredients under **Section 296(2)** of the **Penal Code** had been proved and that the learned trial magistrate had considered the appellant's defence in her judgment. She urged us to uphold both conviction and sentence.

5. This being the first appeal, we are mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach our own independent conclusion. However, we must warn ourselves that we did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour.- See **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR.**
6. The irregularity of the judgment was said to be in the failure to comply with **Section 215** of the **Criminal Procedure Code** for reasons that the learned trial magistrate did not state under what law he had convicted the appellant. In the judgment however, the learned trial magistrate did set out the charge and the relevant section under which the appellant had been tried. She then evaluated the evidence presented before her and concluded as follows:

“On the evidence tendered by the prosecution, I am satisfied that the prosecution has proved its case against the accused, beyond any reasonable doubt. I find him guilty as charged and will convict him accordingly.

The court having heard both the complainant and the appellant and their witnesses and evidence, convicted the appellant as charged under **Section 296(2)** of the **Penal Code** and sentenced him accordingly.

7. The defect in the charge sheet was said to arise out of the variance between the particulars in the charge sheet which stated that the complainant was robbed of Kshs.6000/=, and the evidence which put the stolen amount at Kshs.2000/=. He referred to the cases of **Nelson Kitesse & 2 others Cr. App. No. 162 of 2007** and **Yongo v Republic (1988) KLR**, in which it was held that a charge sheet is defective where it does not accord with the evidence given at the trial.

In the appellant’s view, the error or mistake in the charge was substantial and cannot be cured under **Section 382** of the **Criminal Procedure Code** as it occasioned failure of justice.

8. **Nelson Kitesse Maweu & 2 others v Republic 162 of 2007** (unreported), can be distinguished from the case before us because, there was an error and/or omission in the charge prepared against the appellant in respect of the complainant’s name, the amount robbed, and place of robbery. As a matter of fact, the learned state counsel in that case did not support the conviction or the sentence, which he submitted, related to a completely different case.
9. We considered whether the variance in the amount stolen from the complainant as contained in the charge sheet and in the evidence, was a material defect that prejudiced the Appellant as averred in the grounds of appeal, or was a curable defect under **Section 382** of the **Criminal Procedure Code**. The said section provides that: -

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.”

10. A scrutiny of the evidence shows that **PW1** was referring to the money stolen from his person when he mentioned the Kshs.2,000/=. There was also Kshs.4,000/= which **PW2**, who worked at the bar counter said was stolen from the till. This makes a total of Kshs.6,000/= as appears in the charge sheet. Both sums of money belonged to **PW1**. This objection was raised during cross-examination of **PW2** who clarified this point by stating as follows:

“I had Kshs.4000/= in the till. My boss had Kshs.2000/=”

11. We find that the irregularity or discrepancy between the charges and the evidence in the

circumstances, did not occasion miscarriage of justice. We found support in the decision of Githinji, Onyango-Otieno and Deverell JJA in Njoroge v Republic, in which they held that:

“The discrepancy between the charge sheet and the evidence concerning the name of the place where the robbery occurred did not go to the substance of the charge or occasion any failure of justice.”

12. The rest of the grounds of appeal pertain to the weight of the evidence and the manner in which it was evaluated by the learned trial magistrate. The evidence was said to be unreliable in so far as identification was concerned, and was also said to be contradictory and uncorroborated. That therefore, the prosecution’s case was not proved to the required standard.
13. The prosecution’s case was that on 6th April 2007 patrons were entertaining themselves at Laini bar in Thika, when two armed men burst in and ordered everyone to lie down. They frisked the patrons as well as the bar owner (**PW1**), and took a wallet containing Kshs.2,000/= and personal documents from him. They also took Kshs.4,000/= from the till and a VCD video all belonging to him. The matter was reported to police after the robbers fled with the goods.
14. The following evening the appellant and another man identified as his brother went to the bar and ordered for drinks. A bar hostess, (**PW2**), immediately identified the appellant as one of the robbers who had robbed the bar patrons the previous night. She notified the bar owner and a colleague (**PW3**), and eventually police were notified. The appellant was eventually arrested and charged.
15. In a sworn defence the appellant testified that he was a trader in Kawangware and had travelled to Thika during the material time for Easter. He was arrested while he and his brother were having drinks at Laini Bar. He denied the offence.
16. The occurrence of the robbery on 6th April 2007 and subsequent report to Gatunyu Police Post were not in dispute. We re-evaluated the testimonies of **PW2** and **PW3** who worked at Laini bar and whose evidence placed the appellant at the scene and found that they corroborated each other in so far as they told the court that the bar was well lit by electric light during the robbery, and that it was the appellant who wielded the gun and acted as sentry at the point where the two sections of the bar met. His cohort was the one who frisked the bar patrons and collected valuables from them.
17. **PW2** further testified of her own encounter with the appellant as follows:

“I went like to go out of the counter,(sic). I found this man with the gun still at the door when he saw me he came to the counter. He pointed the gun at me and told me I was hard headed. I will see. The man then left. The man who took the money had a suit. The one with the gun had a Marvin cap black in colour and a green jacket on which was written “US”.”

PW3 on the other hand had this to say in his testimony:

“The person with the gun is this appellant in the dock. (Appellant identified). I knew him in passing prior to this day. I had seen him. I know his father but I do not know if he has a house.”

18. **PW3** also identified a scar near the right eye of one of the robbers and the trial court observed that the appellant had such a scar. Before that the appellant had confronted him with a gun when they first arrived and ordered him to return to the section of the bar where he was coming from.
19. From the foregoing **PW2** and **PW3** had ample time to see and identify the appellant at close proximity and in good light. The appellant was arrested the following evening when he returned to

the scene of the robbery as a patron. His line of cross-examination seemed to suggest that if he indeed, had been one of the robbers, he would not have returned to the scene the following day. We respectfully agree with the learned trial magistrate that a robber could return to the scene of robbery for any number of reasons.

20. We carefully directed ourselves regarding the conditions prevailing at the time of identification and the length of time the witness had the appellant under observation, to exclude the possibility of error. See - **JOSEPH NGUMBAU NZALO VS. REPUBLIC (1991) 2KAR Pg 212**. Having anxiously considered all the circumstances of this case, we are satisfied that it is the prosecution witnesses who stated the facts as they occurred, and that although the appellant was under no obligation to explain his innocence, the evidence placed him squarely at the scene of the robbery. The learned trial Magistrate did therefore properly direct herself to the evidence placed before her, both by the prosecution and the appellant and also considered the law applicable.

21. The appeal is therefore lacking in merit and is dismissed.

SIGNED DATED and DELIVERED in open court this **13th day of August 2013**.

A.MBOGHOLI MSAGHA

JUDGE

L. A. ACHODE

JUDGE