REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 197 OF 2009

(CONSOLIDATED WITH CRIMINAL APPEAL NO. 198 OF 2009)

LESIIT and MUSYOKA JJ

DENNIS MUTHABARI…………………..…1ST APPELLANT

ANTONY KIRIMI...…………………........2ND APPELLANT

VERSUS

REPUBLIC………………...……………...…RESPONDENT

(From the original conviction and sentence in Criminal case no. 491 of 2008 of the Chief Magistrate's Court Meru Hon. M. S.G. Khadambi – Principal Magistrate)

JUDGEMENT

The appellants in this matter were convicted by the Principal Magistrate in Meru Chief Magistrate's Court criminal case number 491 of 2008, on one count, that is of robbery with violence contrary to **section 296(2) the Penal Code. They** were sentenced to death. The particulars in support of the robbery with violence charge were that the appellants jointly with others not before court, being armed with dangerous weapons namely pangas, robbed Purity Gatwiri, of Kshs. 3,500.00 and immediately before or after the time of the said robbery threatened to use actual violence to the said Purity Gatwiri

They were aggrieved by the said conviction and filed the current of appeal in person. In the appeal, they have raised several grounds. They complained that section 198 of the Criminal Procedure Code was not complied with, that the prosecution failed to avail witnesses who participated in their arrest, that the prosecution's case was attended by procedural irregularities and that no regard was given to the defence statements.

At the hearing of the appeal the appellants were unrepresented. They presented hand written submissions and relied on the said submissions and their grounds of appeal. The also made oral statements to advance

their case. The state was represented by Mr Mungai, he opposed the appeal. He submitted that the appellants were arrested at the scene of the crime shortly after it happened.

Being a first appellate court, we are bound to follow the guidelines set by the Court of Appeal in ***Kinyanjui vs. Republic*** **(2004) 2 KLR 364**, where it was said that the first appellate court must look at the evidence presented before the trial court afresh and re-evaluate and re-examine the same, and thereafter reach its own conclusions. The first appellate court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The appellate court should also look at the grounds of appeal put forward by the appellant. We also bear in mind the point made in ***Buru vs. Republic*** **(2005) 2 KLR 533** and ***Republic vs. Oyier*** **(1985) KLR 353**, that a first appellate court will not normally interfere with the finding of a lower court on the credibility of witnesses unless it is shown that no reasonable tribunal could make such findings.

We have perused the record of the lower court. The picture that emerges is that the appellants were pulled out of a thicket shortly after an attack at the village. PW1, the complainant, was present when this happened. She described how she was attacked and property stolen from her. She said she did not recognise any of the appellants as the persons who had earlier attacked her. PW2, whose house was being broken into by the intruders before they were interrupted, said he did not see the persons who were breaking his door. He testified that he did not know the appellants, although he was present when they were pulled out of the thicket. Nothing was stolen from him. PW4 was also present when the appellants were fished out of the bush. The appellants gave sworn statements. The first appellant testified that he was arrested early morning on his way back to his house after escorting his employer to a bus stage to catch a bus for Nairobi. The second appellant said that he woke up early to travel back to his home at Nanyuki and as he walked to the main road he stumbled upon a crowd of people and police officers and was arrested. After hearing the rival cases, the trial court, after analysing both narratives, came to the conclusion that the appellants were the persons who robbed the complainant and accordingly convicted them.

Robbery with violence is an offence created in **section 296(2) of the Penal Code**. It is committed where the offender while committing robbery is: (a) armed with a dangerous or offensive weapon or instrument; or (b) is in company with one or more person or persons; or (c) wounds, beats, strikes or uses any other personal violence to any person at or immediately before or immediately after the time of the robbery. The *actus reus* of the offence is theft committed under the defined circumstances, that is where the offender is armed or in a gang or uses actual personal violence.

The issue that confronts this court is whether all the constituent elements of the offence of robbery with violence are established in this case against the appellants. That is theft in the circumstances envisaged in **section 296(2) of the Penal Code**. It was held in ***Johana Ndung'u vs. Republic*** **(1995) LLR 387** that only one of the three elements envisaged in **section 296(2) of the Penal Code** suffices to establish robbery with violence. In this case the appellants are said to have been in the company of more than one person at the time of the incident. This element of the offence was no doubt established

There is no evidence that any violence was visited on the complainant. Indeed, she did not tell the court that she was harassed or hustled in any way . There was not actual use of personal violence on her. There is also no evidence that she was threatened with physical harm.. Her recorded evidence of the events is as follows:

> …I heard the house being banged. 2 people then entered while armed with pangas. The house is of 2 rooms. They entered directly into the bedroom. I had locked the outside door but they broke the wooden door and entered. There was light from the torch I had and the two men had torches. They were strangers to me so I did not recognise them. They started ransacking the place upsetting the whole room. They put the mattress on the floor searching for money from the bed side drawer. I had kept Kshs. 3,500/- there. They also took my torch before leaving…'

Evidently the second element of the offence was not proved.

The third element, of being armed with dangerous or offensive weapons, was not established, although pleaded. The requirement is that the assailant be armed with a dangerous or offensive weapon. What amounts to a 'dangerous or offensive weapon' is not defined in **section 296 of the Penal Code**. The Court of Appeal in ***Kimemia and another vs. Republic*** **(2004) 1 EA 99, 2 KLR 46**, defined 'a dangerous or offensive weapon' to mean any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use. For the purposes of the appeal before it, the court held that a knife is not made or adapted for use in causing injury to a person, but it would be nevertheless a dangerous or offensive weapon for the purposes of **section 296(2) of the Penal Code** if the assailants in wielding it in the course of a robbery intend to use it for causing injury to any person. In the instant case, although the intruders were said by PW1 as having been armed with pangas, there is no evidence that they wielded the pangas to her face, nor threatened her with the pangas or physically assaulted her with them. Pangas are farm implements, they are not made or adapted for use in causing injury to a person. They were not in this case used for that purpose, and consequently they were not dangerous or offensive weapons.

Theft is the other element of robbery. Was there a theft in this case? The complainant testified that her money and torch were taken away, although the charge talks only of the money. We believe that the element of theft was properly established. There was a taking of the money; it was moved from the custody of its owner.

The central issue at the trial was whether the appellants were properly identified. The complainant told the court that she did not know nor identify her attackers as they were strangers to her, and she had not previously seen them. She was not able to positively state whether the appellants were her assailants. The other witnesses also testified to being strangers to the appellants.

The only issue for us to ponder is whether the appellants were guilty of the offence charged. It is quite evident that the only evidence linking the appellants to the offence is the torch alleged to have been recovered from them. PW1 identified it as having been taken from her. A torch is property, and it was alleged to have been taken from PW1 in circumstances which amounted to theft. It is curious that the appellants, despite being found in possession of the torch, were not charged with its theft. They were only charged with the theft of the money which was not recovered. PW1 asserted that the torch was hers as she used it every night and it had many dents on account of having fallen down many times. There is nothing really peculiar about the torch from this description. PW1 did not point to any identifying marks that she might have made on it. The dents made by the alleged falls could have been found in any other torch given that a torch is common household article of common usage.We take the view that there was insufficient evidence to connect the appellants to the offence charged.

The doctrine of recent possession was not raised by the state; neither did the trial court in its judgement allude to it. The doctrine would only arise with respect to the torch. In view of our conclusions above regarding the torch, it would be our opinion that the doctrine does not apply in this case. In any event the said torch is not listed in the charge sheet as an item stolen from the complainant.

On the evaluation of the evidence recorded by the trial court, this court forms the opinion that the offence charged was not proved to the required standard and the trial court ought to have acquitted the appellants of the same..

The appellants raised the issue of the language used at the trial in their grounds of appeal. They complained that **section 198 of the Criminal Procedure Code** was not complied with. **Section 198(1)** states that:

> 'Where any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language he understands.'

They have also cited **Article 50 of the Constitution** which reinforces **section 198 of the Criminal Procedure Code**.

The record shows that the plea was taken on 21st April 2008 in English and Kiswahili. The first appellant pleads that he is only good at Kimeru as he has only received limited education. The first appellant's difficulty appears borne out on 2nd September 2009 when he gave his defence statement. He started off in Kiswahili, but thereafter changed midstream to Kimeru. It would appear that when the prosecution witnesses testified an effort was made to provide a translation into Kimeru for his benefit. The only time there was a failure to provide such translation was on 3rd November 2008 when PW2 testified in Kiswahili. However, the said witness was extensively cross-examined by the first appellant. There is evidence that the first appellant fully participated in the trial then and there is no evidence that he was prejudiced. Overall, we are of the view that the first appellant received a satisfactory trial where translation was provided, and even where it was not the said appellant fully participated in confronting the witnesses in cross-examination in a fashion suggesting that he had no suffered prejudice.

In view of everything we have said above with respect to appellants involvement in the commission of the alleged offence, our conclusion is that the conviction cannot stand. The appellant should have been charged with committing offences under section 308 of the Penal Code. We allow the appeal, quash the conviction and set aside the sentence of death imposed on the appellants. They shall be set free from prison custody unless they are otherwise lawfully detained.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF OCTOBER, 2013.

J LESIIT

JUDGE

W MUSYOKA

JUDGE