



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

CRIMINAL APPEAL NO. 279 OF 2013

(Originally Nairobi Criminal Appeal No. 350 of 2008)

MOSES KINYUA MUCHAI.....APPELLANT

v

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence by F. Nyakundi, Ag. Principal Magistrate in Thika Chief Magistrate's Court Criminal Case No. 98 of 2007 on 2 October 2008)

JUDGMENT

1. Moses Kinyua Muchai (Appellant) and Lucas Karanja Ndungu were jointly charged before the Thika Chief Magistrate's Court on 4th January 2007 with robbery with violence contrary to section 296(2) of the Penal Code.
2. The particulars of the robbery charge were that on 27th December 2006 while jointly while armed with knives robbed Patrick Muthiani Kyule of a mobile phone nokia 1110 and Kshs 1350/- all valued at Kshs 5850/- and at or immediately before such robbery wounded the said Patrick Muthiani Kyule.
3. After trial the Appellant was convicted as charged on 2nd October 2008 and sentenced to death. The co accused Lucas Karanja Ndungu was acquitted under section 215 of the Criminal Procedure Code.
4. The Appellant did not agree with the conviction and sentence and on 17th October 2008 filed a Memorandum of Appeal listing some 6 grounds of appeal. The grounds were briefly that the charge was a frame-up, contradictions in evidence of recovery of exhibits, failure of essential witnesses to testify, failure to prove case beyond reasonable doubt and failing to consider defence case.
5. When the appeal came up for hearing on 17th October 2013 the Appellant filed Amended Grounds of Appeal and written submissions. The Respondent did not object and the same were admitted.
6. The Amended Memorandum indicated that the Appellant was urging and relying on 3 grounds of appeal, namely defective charge sheet, contradictory evidence/missing witnesses and failure to consider the defence.
7. The duty of this Court in an appeal of this nature was set out in *Okeno v R* (1972) EA 32.
8. We will deal with the grounds seriatim.

Defective charge

9. The Appellant in the written submissions stated that the word '**wounded**', in the particulars given in the charge sheet went beyond the required description and that the words '**used actual violence**'

- should have been used.
10. The appellant also had issue with the fact that the particulars in the charge sheet indicated robbery of ... '**Kshs 1350/-**' while the evidence from PW 1 was that he had '**Kshs 1300/- in his pocket**'.
 11. Further, the appellant submitted that the complainant gave evidence of a **sharp object** while the charge made reference to '**jointly while armed with knives**'.
 12. The Appellant submitted that because of the foregoing there was a miscarriage of justice and he was deprived of a chance to properly represent himself and that the charge should have been amended to reflect the evidence.
 13. Mr. Naulikha for the Respondent in response submitted that the charge was not defective because the Appellant had not told the court of the defects. It appears the State Counsel had not acquainted himself with the Appellants written submissions.
 14. It is true the the charge sheet indicated that '**.....and immediately before the time of such robbery wounded the said Patrick Muthiani Kyule**'.
 15. The Appellant was charged under section 296(2) of the Penal Code and in order to resolve this ground of appeal it is necessary to set out the section in detail. The section provides

296. (1).....

(2) *If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or after the time of robbery, he wounds,beats,strikes or uses any other personal violence to any person, he shall be sentenced to death.*

16. The challenge regarding the defective charge is one essentially on the ingredients of a charge of robbery with violence contrary to section 296(2) of the Penal Code.
17. The issue has been the subject of previous judicial authority. The Court of Appeal in *Moi Ochogo Onchiri v R* (2010) eKLR made reference to the authority of *Johana Ndungu v R*, Criminal Appeal No. 116 of 1995 where the issue was discussed and it was held thus

(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute the offence under the subsection.

(1) If the offender is armed with any dangerous or offensive weapon or instrument, or

(2) If he is in the company with one or more other person or persons or (3) *If, at or immediately before or immediately after the time of the robbery, he wounds,beats,strikes or uses any other violence to any person*

18. The presence of any one of the three ingredients would in law complete the offence. To our mind the particulars in the charge sheet were clearly in tandem with the third ingredient envisaged under the decision referred to. PW 1 was robbed and the fact that he was wounded was corroborated by the evidence of PW 4 Dr. Michael Kariuki.
19. In *Fanuel Otieno Omido v R* (2011) eKLR the Court of Appeal upheld as not defective a charge in which the particulars of the charge against the Appellant made reference to *immediately after the time of such robbery wounded the said William Mwangi*.
20. On the question of the amount of money stolen and sharp object or knife, it is our view no prejudice was occasioned to the Appellant nor did it lead to a miscarriage of justice.

Contradictory evidence/failure to consider the defence

21. The Appellant urged grounds two and three together. He submitted that no evidence was led to establish that he robbed PW 1 Patrick Muthiani Kyule. There was no robbery and that only Kshs 150/- was recovered on arrest.
22. PW 1 stated that he drove both the Appellant and co accused and reached a home whereupon he was told to wait. After waiting the Appellant came back and he was stabbed and robbed. The

- attackers could not drive the tuk tuk and attempted to escape. PW 1 gave chase while screaming for help. The Appellant and co accused were chased and apprehended by members of the public within the vicinity and handed over to the police.
23. PW 1 was clear that he recovered his phone from the Appellant.
24. PW 3 Duncan Chege also heard screams and joined in the chase. Together with others they apprehended the appellant and co accused and handed them over and the recovered items to PW 2.
25. PW 2 Cpl Kilonsi Ndalya, an administration police officer within the vicinity attended to the screams and found the Appellant had been arrested. Items which had been recovered from them were surrendered to him and his colleague. Together with PW 3 they took the Appellant and co accused to Ruiru Police Station and handed them over to the police.
26. The evidence on how the Appellant was arrested was given by PW 1, PW 2 and PW 3. There is no set number of witnesses who should prove a particular fact and we find no merit in the submission by the Appellant the prosecution did not present witnesses who witnessed his arrest.
27. PW 4 Dr Michael Ngigi Kariuki was a medical practitioner who attended to PW 1. He produced the P3 medical report. He confirmed that PW 1 had been injured.
28. We have looked at the evidence afresh. There is no contradiction in the evidence on the recovery of the mobile phone. What PW 1 did was a citizen recovery. The items which were recovered were handed over to PW 2 and PW 5 APC Edward Okuta, Administration Police officers who were the first security officers to respond and they in turn caused them to be handed over to PW 6 a police officer at Ruiru Police Station.
29. The appellant gave a sworn statement and stated that he had agreed a fare of Kshs 150/- with PW 1 but he had only Kshs 100/- out of which he paid Kshs 70/- to reach Ruiru and remained with Kshs 30/- which was not enough to cover the fare to his final destination BTL. On reaching BTL, they did not agree with PW 1 on the payment of the full fare and a scuffle ensued after which he ran to a construction site half a kilometre away and was later arrested.
30. The trial court rejected the defence of the Appellant on the basis of the evidence of PW 3 who responded to PW 1's calls for help and found him chasing two people and that PW 1 had had ample time on the journey from Ruiru to identify the appellant and that the appellant was arrested a few minutes after the robbery.
31. The evidence was consistent, credible and cogent and it was sufficient to prove the charge of robbery with violence.

Conclusion and Orders

32. The upshot is that we find that the appeal does not have merit and we dismiss it and confirm and uphold the conviction and sentence imposed by the trial Court.

Delivered, dated and signed in open court in Muranga on this 29th day of November 2013.

Mboghli Msagha

Judge

Radido Stephen

Judge

Appearances

Appellant in person

Mr. Naulikha, State Counsel for Respondent