



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 186 OF 2010

JOHN THUITA NJARI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original conviction and sentence in Criminal Case 4565 of 2007 in the Chief Magistrate's Court at Kibera – Kidula)

JUDGEMENT OF THE COURT

The charge –

1. John Thuita Njari (the Appellant) was charged with robbery with violence contrary to section 296(2) of the Penal Code and an alternative charge of handling stolen property contrary to section 322(2) of the Penal Code. After a full trial, the appellant was found guilty of the offence of robbery with violence and was convicted and sentenced to death and made no finding on the alternative charge. The particulars of this charge read that on unknown dates between 27th June 2007 and 1st July 2007 in Kiserian township in Kajiado district of the Rift Valley province, jointly with another not before court, while armed with crude weapons namely metal bars robbed DAVID KINYANJUI KAGIRI 6 sofa sweaters, 1 bed, 1 mattress, 2 mobile phones make Nokia, 1 cap, 3 television sets, 3 radios, 4 tables, 4 stool, assorted cloths, 1 gas cooker, 5 pillows, 8 blankets, a flower stand, 3 wall clocks, 3 mosquito nets, 2 speakers, a canvas, a bedcover, 1 mirror, assorted kitchen ware, a kiondo, a jerrican, 2 dolly, 2 baskets, a bag, 4 artificial flowers, 1 remote control, 3 jacks, 3 sunglasses and carpet all valued at kshs.450,000/= and at or immediately before or immediately after the time of such robbery killed DAVID KINYANJUI KAGIRI.

2.The alternative charge particulars were that on 2nd day of July 2007 at Naromoru village in Kiserian township in Kajiado district of the rift valley province, otherwise than in the cause of stealing, dishonestly assisted in the retention of 6 sofa seaters, 1 bed, a mattress, 2 television sets, 4 coffee tables, 1 flower stand, 2 stools, 3 radios, 2 comforters stools, one gas cooker, 5 pillows, 2 speakers, 3 mosquito nets, 4 suits, 2 coats, one carpet, 10 shirts, a t-shirt, a pillow, 5 ties, a godfather hat, 8 blankets, 4 curtains, 2 jackets, a bed cover, 2 wall clocks, 1 tent, 18 plates, 2 sufurias, 2 hotpots, 2 pairs of shoes, 31 folk spoons, 13 knives, 8 tea spoons, a wall unit mirror, 30 spoons, 2 trays, one brush, 1 frying pan, 3 jacks, 1 thermos, 1 bag, 2 blankets, 1 kiondo, 1 jerrican, 3 sunglasses, 4 artificial flowers, 1 clock, 2 cats dolly, 1 remote control, 7 cups and one mobile phone make nokia 2310 for the benefit of himself, knowing or having reasons to believe it to be stolen goods.

Facts

3. Rebecca Wangare Mwaura (PW1) a teacher at Kibwezi was the wife of David Kinyanjui Kagiri (the

deceased) who was resident at Kiserian. PW1 lived away from her husband and would occasionally visit her at kibwezi or she would visit him at kiserian. At kiserian there was their home and a farm with cows and goats and the house had many household goods for a family. On 30th June 2007, PW1 arrived at kiserian and outside the fence to the farm found two Maasai men who asked her if she was the owner of the house and that they had bought some cows and goats from the son from this farm but on finding out who the owner was they had decided to get their money back as they did not believe an owner of such cattle would sell them. PW1 told the two men that she had no son and would go in and look for her husband. PW1 entered the compound and found the door to the house locked with a strange padlock, she called out to her husband but there was no response. She broke the padlock with a stone and entered the house. The house was empty and there were no household goods in the sitting room, in the bedrooms and everywhere. There was only 3 seater sofa and a one seater as everything else was gone. She called her husband on his cell phone but there was no answer. PW1 called one of her stepdaughter and told her that she had arrived from kibwezi and could not get her husband and the house was empty and asked her to come over to the farm. The daughter told her that since it was late she could come over the following day. By this time it was late and dark and PW1 went to a neighbour's house and slept there. The next morning on 1st July 2007 she went back to the farm and as she went by the gate to the house she saw at a distance, a young man with a green paper bag. He saw her and ducked behind a wall. She called out to him wanting to know who he was, he said he was John and on further asking where the man of the house was, he said that Mzee had gone on safari. PW1 went to a neighbour's shamba boy to come and help her cut grass for the cows that appeared not to have been fed and while cutting grass, they came across her husband's body covered with her lessa which was floating in a ditch that they had dug to make it into a borehole. PW1 run off screaming and met her neighbour at the gate and together went back to the house and while there two of her stepdaughters arrived. They called the police who took photographs of the body and took the corpse to the mortuary.

4. Later, PW1 learnt that the appellant had been arrested by the police and led the police to where the household goods were. She went and identified both the household goods and the appellant. Also arrested was the young man she had seen with a green paper bag who was found wearing her husband's jacket. She identified him on a parade and also the jacket he wore as belonging to her husband.

5. Millicent Wangare Kinyanjui (PW2) the deceased daughter was on 30th June 2007 preparing to go and visit her father when her stepmother, PW1 called her with information that there were things missing from the house. She decided to go to her older sister and shared information given by their stepmother and both decided to go to Kiserian the following morning. The following morning they arrived at Kiserian and found many people at their father's home and learnt that their father's body was discovered in some water in a well. She saw the body and noted that the house was empty. She knew the appellant well as he was the farm worker and when he was arrested, she recognised him well.

6. Julius Maina Githii (PW3) ran a kiosk in the neighbourhood of the deceased's farm and knew the appellant well as a worker in the deceased farm. He saw the deceased last on 27th June 2007 when he went to his kiosk to buy a few items. On 30th June 2007 the appellant went to his kiosk and wanted a scratch card for his phone, he sold to him Ksh.50/= credit card and the appellant asked him to put [load] the credit for him which he did and saw that the phone was the same as that which the deceased had been using, he asked the appellant about it to which they said that the deceased had gone on safari for two weeks and had left the phone with him so that he could keep him informed of the situation at the farm. The appellant also asked him to delete a message from the phone as he did not know how to delete messages and then he left PW3. On 1st July 2007 PW3 while at his kiosk saw a police car at the gate of the deceased farm and a neighbour told him that mzee Kinyanjui (the deceased) had been killed. PW3 went to see what was happening, he found PW2 whom he knew well and asked him to help them trace the appellant and he promised to help trace him as he knew him well. On this same day, PW3 saw the appellant and wanted to know what was going on at his former place of work to which PW3 told the appellant that he should be the one telling him what had happened since he worked there. The appellant was in the company of another man Njoroge, who came up with a ploy that they should all walk to the stage and then go have some tea while he went to buy some airtime. The appellant refused to join them in the kiosk for tea and left using a footpath. Njoroge came back and told PW3 that he had called the OCS

and that they should wait and he pointed to the path the appellant had taken. Njoroge also enlisted the help of some young men to help track the appellant and when the police came, they followed the route the appellant had taken and later came back with him under arrest; they called the deceased daughter who came and identified him.

7. Joel Shapara (PW4) is a cattle trader with his partner Simon Iriesi (PW5). On 30th June 2007 PW4 received a call from Kasino that he had a herd of cattle being sold near St. Patrick's school at a price of Kshs.22, 000/- he decided to go and check, he met Kasino and together went to the farm and the appellant came and showed them the cattle that were on sale. There was one cow with its calf and 7 sheep and kids about 12. He paid Kshs.12, 600/- of the agreed price, he was to go to Kiserian to get more money and Kasino was to pay the appellant. Simoom came along and wanted to know where the cattle were and PW4 pointed to the deceased home. That Simon knew the owner and was concerned that the owner could never sell his cattle at such a low price. They decided to call Kasino wanting to get the appellant's number so that they could speak to the deceased but that he did not have it. PW4 and Simon directed Kasino to get back the money they had paid but the appellant had already left. While waiting outside the homestead near the gate, PW1 came along and enquired if she knew the owner of the home and if she was aware that the cattle were on sale but she was not aware. They shared phone numbers and left.

8. Dr. Diangui (PW7) performed the post-mortem examination on the deceased body and formed the opinion that the cause of death was brain laceration and haemorrhages due to head injury due to blunt trauma on the head and produced the report. Marcus Wameyo (PW8) together with pc Joseph Kamau were directed to go to Kiserian after the robbery and death of deceased was reported to the Kiserian police station, following information given to them, they arrested the appellant and found him wearing a hat that was said to belong to the deceased, he was searched and was found in possession of a phone that was later identified as belonging to the deceased. The two officers interrogated the appellant and were removed from the cells where he led them to the house where the household goods were discovered and later identified to belong to the deceased, these were removed and an inventory made. Scene of crime officers took photographs. The appellant led them to arrest another person whom he said was part of the robbery.

9. In his defence, the appellant gave his sworn statement that he was a tout on Isinya route and on 2nd July 2007 the police arrested him and taken to court and charged with offences he knew nothing about.

10. The trial magistrate considered all the materials placed before the court at the trial of the appellant, was convinced that the offence of robbery with violence took place. The defence of the appellant was rejected on the basis that PW1, PW2 and PW3 had positively identified the appellant as a person they knew well before the and thus proceeded to convict the appellant and sentenced him to death as prescribed by law for the offences under section 296(2) of the Penal Code. The appellant being dissatisfied with the conviction and sentence preferred this appeal.

Grounds of appeal

11. On 30th March 2010, the appellant filed five (5) grounds of appeal; he amended his grounds of appeal and upon our scrutiny we note these are essentially seven (7) grounds of appeal. the appellant was is aggrieved that the trial court convicted him without considering that the circumstances prevailing to his recognition were not favourable and the charge was defective, that the household goods recovered were not found in the possession of the appellant, the phone was not recovered from him, that he was held in custody for over 28 days before being charged, that the court relied on hostile witnesses and their evidence was not conclusive, that crucial witnesses did not testify and that the trial court erred in not taking the appellant's defence into account.

Submissions

12. In submissions the appellant with leave of the court submitted his written submissions and made an oral presentation and supported his appeal that the only evidence the trial magistrate relied on to convict the appellant was that of recovery of items, alleged recovery of phone, selling of cattle and that the

appellant was an employee in the homestead and hence the culprit and that all this evidence on recovery was not proved beyond reasonable doubt to place him at the scene of the crime. That the charges against the appellant are defective in that the offence of robbery with violence took place between 27th June to 1st July 2007 while the alternative charge is that he was found in possession of stolen property on 2nd July 2007 and his arrest is stated to have been on 12th July 2007. The alleged exhibits were therefore recovered before he was arrested and therefore he cannot be linked to the recovery of the stolen property.

13. The appellant also submitted that the case Against him was not proved beyond reasonable doubt as vital witnesses were never called and declined to testify especially that PW1 said that when she arrived at the deceased home she found it in a mess and decided to spend the night at the neighbours house but this neighbour was never called to testify and that PW4 was led to the appellant by Kasino but this person was never called as a witness. That the neighbour shame boy discovered the body of the deceased while cutting grass but he was never called which imply that his evidence was crucial but missing.

14. That section 200 of the Criminal Procedure Code was not complied with, when the trial court failed to start the trial afresh. That when the witnesses were recalled, the appellant was only allowed to cross-examine them and was hence prejudiced as the court favoured one side.

15. The appellant further submitted that some vital witnesses were never called and those presented contradicted themselves. That during trial in the lower court, the co-accused to the appellant was said to have been arrested while wearing the jacket and hat that belonged to the deceased and that the place when the household goods were recovered from and that although there was an inventory of these goods, it is not clear from where they were recovered from. That his defence was not taken into account since he indicated that he used to work for the deceased but had left and that some witnesses confirmed to have seen him last in April and May 2007 an indication that he had long left the employ of the deceased.

16. Mr. Omirera for the state also submitted that the appellant had a unique relationship with the deceased as they lived together at Kiserian while the wife who lived in Kibwezi vocationally visited them at kiserian and hence this relationship led to the robbery and death. He was an employee of the deceased and PW1 the wife made an impromptu visit to the farm on 30th June 2007 and found it deserted and the house locked with a different padlock and used a stone to break the door and was shocked to find the house empty. She slept at the neighbour's house and the next morning while cutting grass with a neighbour's shamba boy discovered the body of her husband in a well. PW1 had met PW4 and PW5 who were buying cattle from the appellant and had come to trace him since they were concerned the price was too low and since PW5 knew the deceased well, he was aware that the sale price could not have been from him. PW2 and PW6 evidence corroborate the evidence of robbery and violence as they knew the appellant well, PW3 had seen the deceased on 27th June 2007 and PW4 stated the appellant had agreed to sell some cattle to them and paid some amount and when PW5 discovered that PW4 had met the wife (PW1) of the deceased, he suggested that they meet her to confirm as to whether the cattle were on sale and the actual price. PW3 sold airtime to the appellant and since he did not know how to load it to the phone he had, he asked him for help to do so and PW3 noted that the phone was similar to the one the deceased used and asked the appellant about it who said that the deceased had gone on safari and left his phone so as to help in updating him. The appellant also asked PW3 to help him delete some message from this phone. Following a tip off, the appellant was arrested; he was recognised by PW2, PW3 PW6, Ann Njeri Maina as people who knew him well and was also identified by PW4 and PW5 as somebody who had sold cattle to them.

Determination of the issues

16. On whether the charge as drawn is defective on the basis that the robbery is said to have occurred between 27th June to 1st June 2007 when the deceased body was discovered and that the stolen property was not recovered until 2nd July 2007 whereas the appellant was only arrested on 12th July 2007. We have carefully considered this mater and noted that contents of section 296(2) which reads;

If the offender is armed with any dangerous or offensive weapon or instrument, or in

company with one or more other persons or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

17. Our view is that in an ideal situation, a properly drawn charge should include and state all the particulars which form the substance of the charge and be as specific as possible. However, in addressing the substance of the charge and without application of technicalities, the charge as drawn, must in its form and substance bring out all the sufficient ingredients of the offence and what the court has to consider is whether the appellant has been prejudiced. We have correctly considered all these aspects. Our understanding of section 296(2) of the Penal Code is that a charge drawn under this part should disclose an offence if the following key elements and brought out thus;

- i. *The offender is armed with any dangerous or offensive weapon or instrument, or*
- ii. *The offender is in the company with one or more other person or persons, or*
- iii. *If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.*

17. We have satisfied ourselves that the particulars of the charge meet the criteria set out above as they specify that the appellant was with another person, was armed with blunt objects and a metal bar was discovered near the scene of crime and this was a home environment where it was possible to use various items to cause the fatal injuries on the deceased and that there was use personal violence. We are alert to the requirements that proof of any one of the ingredients of robbery with violence is enough to base a conviction under section 296(2) of the Penal Code and Court of Appeal decision in **David Othiambo et al versus Republic, Criminal Appeal No. 5 of 2005.**

18. We have gone ahead to carefully scrutinised the proceedings of the lower court and are satisfied that the appellant was not prejudiced on account of the manner the charge was drawn. The charge covered the time period when the deceased was last seen by PW3 and when he was discovered dead by PW1. These two witnesses did not witness the appellant commit the crime of robbery with violence against the deceased but the circumstances of the case led all evidence towards the appellant, noting that upon PW1 discovery of the body, she alerted her neighbours and in the process PW3 noted that he last saw the deceased at his kiosk on 27th June 2007 and soon thereafter, the appellant went to his kiosk to buy airtime and was in possession on the deceased phone which he was able to note belonged to the deceased and upon enquiry about it from the appellant, the appellant was emphatic that the deceased (Mzee) had gone on safari and had left the phone with him so as to keep him updated. This recent possession of the phone that belonged to the deceased creates an inference that from 27th June 2007 when PW3 saw the deceased, the appellant was in contract with the deceased and being in possession of his phone meant that he had taken possession of it through unlawful means or in the cause of committing unlawful act and thus with the discovery of the deceased's body within this same period placed the appellant directly as the person who committed the offence or knew about the offences committed against the deceased, otherwise he had no other way on knowing the deceased to have supposedly gone on safari and be in possession of his phone. This evidence is corroborated by PW4 and PW5 who were on 30th June 2007 buying cattle from the appellant, PW4 paid part of the money and was to pay the balance through Kasino but upon PW5 enquiry and concern that he knew the deceased and was aware that he could not sell his cattle at such a price, this then made them seek out the appellant to get back their money and hence came across PW1 who told them that the deceased had no son selling cattle. The two witnesses were independent people making transactions with the appellant not knowing that the deceased was already dead and had no reason to doubt that indeed the appellant was authorised to sell the cattle drawing the inference that, for the appellant to have the confidence to sell the deceased cattle, he was already aware the deceased was nowhere to challenge his actions.

19. The recovered goods stolen from the deceased homestead was possible due to the assistance given by the appellant. In evidence, PW10, Chief Inspector Philip Mwanja stated;

They brought the worker to the office. The one they brought was the 1st accused. He was brought to me. He was searched and a phone was recovered. It was identified by the son of the deceased.

It was a Nokia phone. This is the one now shown to me as MF18. It had these earphones MF113. ...The 1st accused was further interrogated and was later removed from the cells temporarily. He led the police to a house from where household goods later identified to have been removed from the deceased house were recovered. ...

Page 97 -98 of the proceedings.

20. The appellant had chance to cross examine PW9, he did not challenge these course of events at all. In the appellants defence he did not offer any explanation as to why the deceased phone was found in his possession soon after he disappeared and later found dead. He also did not challenge the fact that he led the police towards the recovery of the stolen goods. We have reviewed all the evidence and are satisfied that the trial magistrate made a correct finding that the appellant was guilty of the offence of robbery with violence that led to the death of the deceased.

21. On whether the trial magistrate made a correct finding in view of the fact that vital witnesses were never called, we note in the case of ***Bukenya and others versus Uganda (19720 EA 549***, the court of Appeal for East Africa stated;

It is well established that the Director has the discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call and make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tendered to be advance to the prosecution case.

22. We, with respect share the view of the lower court on the finding that the witnesses called by the prosecution before the court, sufficiently established that the appellant was the person on duty at the residential house of the complainants, a robbery took place and he failed to prevent it or make a report, he disappeared immediately after the robbery and was only traced many months later.

23. On whether Section 200 CPC was properly applied, we have evaluated the proceedings, upon the appellant application that the matter should start *de novo* the trial court made provision for this and several witnesses were recalled for cross-examination by the appellant. We find that the trial Magistrate correctly applied the provisions of section 200 of the CPC when PW1, PW2, PW3, PW4, PW5, PW6 were all recalled immediately after the application by the appellant was made and before trial could proceed with any other presentation of new witnesses. Once there was a new trial magistrate conducting the trial, all the witnesses previously before court were recalled. We are therefore satisfied that the provisions of section 200 CPC were dully complied with and that the appellant suffered no prejudice.

24. In conclusion, having carefully analysed and determined all issues raised, we are of the view that the appellant was correctly sentenced by the trial court. On our part, we have examined all the evidence afresh and satisfied that the grounds of appeal raised by the appellant have no basis. We therefore reject this appeal, uphold the conviction and sentence. It is so ordered.

Signed dated and delivered this 19th Day of November 2013.

M. Mbaru

J. Rik

Judge

Judge