REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL 499 OF 2010

VINCENT KASYULA KIN'GOO……...……...……APPELLANT

VERSUS

REPUBLIC……..…… RESPONDENT

(An Appeal arising out of the conviction and sentence of L.W Gicheha PM in Criminal Case No. 2862 of 2009 delivered on 10th September 2010 in the Chief Magistrate's Court at Thika)

JUDGMENT

The Appellant was charged with the offences of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on the 5th June 2009 at Ekalakala Sub-location in Masinga District within Eastern Province, jointly with another not before court while being armed with dangerous weapons to wit knives, robbed Fidelis Nyamu Kyalo of a black leather wallet containing Equity Bank ATM Card, two student's identity cards, Students Identity Card and cash Kshs.4,000/=, mobile Phone Nokia 1100, black leather belt and a pair of safari boots, all valued at Kshs.12,000/=, and immediately after the time of said robbery used actual violence to the said Fidelis Nyamu Kyalo.

The Appellant was arraigned in the trial court on 16th June 2009 and he pleaded not guilty to the charge against them. He was tried, convicted of the offence of robbery with violence and sentenced to death. The Appellant being aggrieved by the judgment of the trial magistrate appealed both his conviction and sentence. He relied on written submissions availed to the court. His main grounds of appeal were firstly that the there was no evidence of his positive identification, and he submitted in this respect that the PWI who was the complainant did not report the robbery until the next day and that he was drunk at the time he purported to recognise the Appellant.

The second ground of appeal was that the trial magistrate relied on insufficient, inconsistent and circumstantial evidence and a defective charge to convict him, and did not comply with section 214 of the Criminal Procedure Code. The Appellant submitted in this regard that he denied that the stolen items were not found in his possession, and that the knife that was stated to have been used in the charge, was not recorded in the occurrence book. The last ground of appeal was that and that the trial magistrate erred by ignoring his defence and not giving her reasons contrary to section 169 of the Criminal Procedure Code.

Ms Matiru for the State opposed the appeal. She submitted that PW1 gave the reason why he was not able to report the robbery incident immediately, as he had to attend an interview. Ms Matiru also submitted that the Appellant was found in possession of the stolen items, and that both the Appellant and complainant were in the same bar and were asked by PW3 the owner of the bar to leave, and the Appellant attacked the complainant outside the bar and robbed him. Further, that all the witnesses knew

and recognised the Appellant and upon his arrest and being searched, the stolen wallet was found in his pocket, and he was not able to explain how it came to be in his possession. Ms. Matiru also stated that PW2 examined PW1 and confirmed that he had injuries, which showed that the Appellant used violence.

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called three witnesses. PW1 was Fidelis Kyalo Nyamu the complainant and he testified that on 5/6/2009 he was at Eden Rock bar and as he was leaving at 11 pm he was stopped by the Appellant and another boy whom he recognised and identified as Kamau, and that he was able to see them using the security lights. They then attacked him using a knife and robbed him of his wallet which ha d an elector's card, an ATM card and two university student identification cards, his phone, safari boots, a belt and Kshs 4,000/=.

PW1 testified that the assailants hurt his neck and that he also bled from the place where the knife was held against him. He said he reported the incident the next day at Ekalakala and went to hospital, and later reported the incident at Matuu Police Station. He was given a P3 form which he filled and produced in court, and he stated that the Appellant was arrested after two days. And he had his wallet in his possession. PW1 stated that he had known the Appellant for 3 months prior to the incident.

PW2 was Alfred Turanke, a medical officer and he testified that he examined PW1 on 6/6/2009, who claimed that he had been beaten by a person he knew. He statedthat upon examining PW1 he found that he had a cut on the lower abdomen and injuries on his left hand. Further, that he assessed his injuries as grievous harm and filled out a P3 form on 12/6/2009 which he produced in court as an exhibit.

PW3 was Christopher Nzioki Mwasa, who was the manager of the bar and he testified that he was locking up at around 11pm on 5//6/2009 when he heard someone shouting for help and upon looking out through a window, he saw the Appellant, another person he named as Kamande and the PW1, and PWI was being held by the other two people and was crying out for help. He stated that there were security lights, and that when he called the other two people by their names they ran away. He said when he saw PW1 the next day he told him he had identified the robbers, and that he should report the incident to the police.

PW4, ACP Jackson Kabue, testified that he was at Ekalakala A.P Camp on 8/6/2009 and recorded a report of the incident of robbery from PW1. Further, that on 9/6/2009 they went to the shopping centre with another officer and arrested the Appellant whom they knew before the incident, and that when they searched him they recovered a wallet which had an elector's card, ATM card ID card, an ID card of Moi University together with the Appellant's ATM card which he produced as exhibits in court. They later transferred the Appellant to Matuu Police Station.

The last witness was PW5, who was Corporal Desterio Emukale and was the investigating officer attached to Matuu Police Station. He testified that on 10/6/09 PW4 and PW1 came to his office with the Appellant, and he booked the report of the robbery incident and put the Appellant in custody. He also gave PW1 a P3 form and told him to go to hospital. PW5 denied that he knew the Appellant before the robbery incident.

After the close of the prosecution case, the trial magistrate found that a *prima facie* case had been established against the Appellant and he was placed on his defence. The Appellant gave unsworn evidence and did not call any witnesses. He stated that on 9/6/2009 he went to work until 1 pm and closed his business, and that he then met two police officers including PW4 who arrested him and took him to the AP camp where he was searched and nothing was recovered from him. He stated that he was then arrested and taken to Matuu Police Station the next day where he was charged and that he still does not know the charge. He denied having any knowledge of the items produced in court.

We have considered the arguments made by the Appellant and the State. Our duty as the first appellate court is to re-evaluate the evidence and draw independent conclusion as held in **Okeno v Republic (1972) E.A. 32**. However we are alive to the fact that we do not have the advantages enjoyed by the trial court of seeing and hearing the witnesses as observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

We accordingly find that the issues for determination in this appeal are whether there was positive identification of the 1st Appellant, whether there was sufficient evidence to convict the Appellants, whether there was non-compliance with section 214 of the Criminal Procedure Code, and whether there was non-compliance with section 169 of the Criminal Procedure Act.

On the issue raised of the positive identification of the 1st Appellant, we have reminded ourselves of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, *inter alia*, that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

In addition it has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

In the present appeal the robbery took place at night, and PW1 stated that he was able to see the Appellant from security lights that were on at the bar, and that he recognized the Appellant. PW1 still recognized the Appellant when he reported the robbery incident at the AP camp at Ekalakala, and in addition the Appellant was also recognised on the night of the robbery by PW2 who saw him using the security lights which were on. We therefore find that there was no mistake in the Appellant's recognition and identification.

On the issue of whether there was sufficient evidence to convict the Appellants for the offence of attempted robbery with violence, the Appellant has argued that the trial magistrate relied on circumstantial evidence as he was not found in possession of the stolen wallet. However direct evidence was produced in court of the recovery of the said evidence from the Appellant by PW4, and the said wallet and the items it contained were produced as exhibits in court. There was thus no reliance on any circumstantial evidence by the trial court, and the fact that the Appellant denied being in possession of the said wallet did not make PW4'S evidence circumstantial evidence.

In addition the circumstances of this appeal are those in which the doctrine of recent possession as explained in the case of **Malingi vs Republic (1989) KLR 227** properly applies, as the Appellant was found in possession of the wallet on 9/6/2009, 4 days after the robbery, which recent possession corroborated the evidence of his recognition and participation in the robbery. The Appellant did not give any explanation as to how the wallet came into his possession, and his denial was controverted by the evidence before the court.

Section 297 (2) of the Penal Code provides the ingredients of the offence of attempted robbery with violence as follows:

> **(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.**
>
> **(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 immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.**

We are guided by the decision in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** which sets out what constitutes robbery with violence under section 296(2) of the Penal

Code as follows:

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.**

We are also alive to the requirement that proof of any one of the above ingredients of robbery with violence is enough to base a conviction on under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**. It is our view that this position in law also applies to the offence of attempted robbery with violence under section 297(2), the only difference being that there is no need to prove that there were goods or items that were stolen in the offence of attempted robbery with violence.

We have already found that the Appellant was recognised as the scene of the crime and seen participating in the robbery attack by PW1 and PW2, who also testified that he was in the company of another person during the robbery. PWI also stated that a knife was used during the attack, and evidence was adduced by PW3 who produced a P3 form to show the injuries sustained by PW1 during the robbery. It is thus our finding that from the evidence adduced in the trial court the ingredients of the offence of attempted robbery with violence were proved with respect to the Appellant and there was sufficient evidence to convict him of the offence.

We will briefly deal with the two remaining issues as to whether there was non-compliance with section 214 and section 169 of the Criminal Procedure Code. Our finding in this respect is that section 214 is inapplicable as it deals with the procedure to be followed upon alteration of a charge, as we have perused the record of the trial court and find that at no time was the charge altered. The fact that the knife was indicated in the charge and not in the OB was not fatal and did not make the charge defective, as it was evidence was called as to the use of a knife during trial.

We also do not find that there was non-compliance with section 169 of the Criminal Procedure. This is for the reasons that after perusing the judgment by the trial magistrate, we find that she identified the issue as one of whether the Appellant was involved in the robbery, analysed the evidence that was adduced in this respect, analysed the Appellants defence and found that it did not raise any reasonable doubt, and found that the prosecution had proved their case and convicted the Appellant. The reasons for her findings are therefore clearly stated. The record also shows that the trial magistrate thereupon sentenced the Appellant to death according to the law.

We accordingly uphold the conviction of the Appellant for two charges of robbery with violence contrary to Section 296(2) of the Penal Code, and the sentences for these convictions are found to be legal. It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF NOVEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE