



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA.

HIGH COURT CRIMINAL APPEAL NO. 37 OF 2011.

BENSON OTIENO WARINDAAPPELLANT

VERSUS

REPUBLICRESPONDENT.

(BEING AN APPEAL ON CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 1719 OF 2009 IN BUSIA CHIEF MAGISTRATE'S COURT- HON. E. H.KEAGO, SRM)

J U D G M E N T.

The Appellant, Benson Otieno Warinda, was arraigned before the Lower Court on 2.11.2009 and charged with the offence of robbery with violence contrary to section 296 (2) of the Penal code. The Particulars set out in the charge sheet are that on the 30th September, 2009 at about 3.00 am at Western Cycle Mart area, in Busia County, with another not before court, robbed Patrick Taabu Simoro of two blocks of TVS motor cycle, three head lamps of Bajaj motor cycle, four TVS motor cycles all valued Kshs.362,000/= and immediately after the time of such robbery wounded Patrick Taabu Simoro who was acting at that time as a watchman for Robert Juma. The Appellant also faced a second charge of having suspected stolen property contrary to section 323 of Penal Code in that on the 13.10.2009 at about 12.15 pm in Busia County having been detained by NO.79935 Cpl. John Onyango, a police officer in exercise of powers conferred by section 26 of the Criminal Procedure Code, was found in possession of one Nokia mobile phone make 2720 valued at Kshs.6,000/= believed to have been stolen or unlawfully obtained. The Appellant entered a plea of not guilty to both the counts.

At the conclusion of the hearing during which the prosecution called seven witnesses and the Appellant gave a sworn statement, the Appellant was found guilty on both counts and convicted. The trial Magistrate sentenced the Appellant on 1st April, 2011 to death on count 1 and left the sentence on count 2 in obedience. The Appellant being dissatisfied with the conviction and sentence filed this appeal on 7.4.2011 setting out seven grounds which are summarized into three for purposes of the judgment as follows:-

1. That the learned trial Magistrate misdirected himself in law and fact by basing the conviction on insufficient evidence.
2. The learned trial Magistrate misdirected himself in law and fact by relying on identification parade result which had not been conducted in compliance of the rules.
3. That the learned trial Magistrate misdirected himself in law and fact by failing to make a finding on the fact that the Appellant's rights had been violated by being incarcerated in the police cells for 20 days from 7.10.2009 to 29.10.2009.

During the hearing, the Appellant indicated that he was relying on the grounds on his petition

while Mr. Obiri, the learned counsel appeared for the state and made his submissions in opposition to the appeal as summarized below;-

1. That the complainant, PW 1, was guarding the premises he was employed to guard on 30.9.2009 when at about 3.00 am he was attacked by a gang of four men armed with pangas. They tied him and PW 5 who was guarding a neighbouring shop to their bicycles using ropes.
2. That three of the four robbers broke into Western Cycle Mart shop as the fourth one guarded PW 1 and PW 5.
3. That the moonlight and security lights enabled PW 1 and PW 5 to see the fourth attacker who was guarding them and later picked him out in an identification parade arranged by PW 7.
4. That PW 1 was injured during the robbery as confirmed by PW3.
5. That after the robbers had left, PW1 untied himself and reported the incident to the police who visited the scene. Thereafter the Appellant was arrested, positively identified, charged, prosecuted and convicted.
6. That the delay in arraigning Appellant to court should not affect the conviction and referred the court to the Court of Appeal decision in Julius Kamau Mbugua –vs- Republic C.A. Cr. Appeal No. 50 of 2008, where the court stated it was not the duty of the Appellate court to go beyond the scope of Criminal trial to adjudicate on the violations of the right to personal liberty which happened before the Criminal court assumed jurisdiction over the accused.

The Appellant submitted in reply to the state's submissions as follows;-

1. That it was not clear whether PW 3 treated PW 1, or only filled his P3 form.
2. That the proceedings at page 35 shows some of the people in the identification parade had been with him in the cells. That he had asked for the cells register to be availed during the hearing but it was not.
3. That the mobile found with him was his and pointed out that it was not among the items said to have been robbed from the complainant.

This being the first appeal, this court has to re-evaluate the evidence, assess it afresh and make its own conclusions, while remembering it neither saw nor heard the witnesses. The case of **Okeno –vs- Republic (1972) E.A page 32** is relevant.

The main prosecution witnesses, Patrick Taabu Simolo and William Emusugutu Chogeya testified as PW 1 and PW 5 respectively. Patrick (PW 1) was guarding a Wines and Spirit shop, while William (PW 5) was guarding Western Cycle Mart shop on 30.9.2009. The two businesses are next to each other. About 2.00 am William went to where Patrick was and at about 3.00 am they were attacked by four men armed with pangas. The security lights were on and they were able to see the four men. They were ordered to lie down and tied with ropes. Two of the men were left guarding them as the two others broke into Western Cycle Mart shop. Patrick was hit on the right shoulder and right knee with a club and cut on the face by one of the two men guarding them. The two watchmen saw the robbers take away four motor cycles. Patrick managed to untie himself, after which he went to police station and reported. Police started investigations and arrested both Patrick and William. PW 2, the proprietor of Western Cycle Mart and his employee, PW 3, gave particulars of the items they found missing from the shop. Dr. Zachariah Njau who is also indicated to have testified as PW 3, but should have been PW 4, as he was the fourth witness, produced the P3 form and treatment notes on PW 1 indicating PW 1 had suffered harm. The investigating officer, Cpl. John Onyango, testified as PW 6. He told the court how he visited the scene of the robbery and found PW 2, who confirmed the items that had been stolen. He also interrogated William who was the watchman of PW 2's business and he told him he saw the four robbers and could identify them. He issued Patrick with a P3 form which was filled after treatment. Later he detained the Appellant and found him with a new Nokia 2720 which he suspected to have been stolen and arrested him. An identification parade was arranged by PW 7 during which both Patrick and William identified the Appellant as one of the robbers. He then charged the Appellant. PW 7 told how he conducted the identification parade on 30.10.2009 where the suspect, who is the Appellant was in the cells. He got ten members of the parade from the cells and others from outside the cells. He called Patrick and William at different times and each picked the Appellant from the parade. He said

the Appellant indicated he was not satisfied as the witnesses and himself had been in the same cell.

The evidence availed before the trial court shows that Patrick and William were guarding their respective employer's businesses which are next to each other, on 30.9.2009, when at about 3 am they were attacked by four men armed with pangas. In the course of the attack PW 1 sustained injuries which were classified by Dr. Zachary Njau (PW 4) as harm. The four men broke into PW 2 business premises namely, Western Cycle Mart, which was being guarded by William and stole from therein the items listed in the particulars of count 1. The attackers were more than one and were armed with pangas which are dangerous weapons. They also injured Patrick who was guarding a neighbour's business. The evidence adduced therefore established that an offence of robbery with violence was committed by four armed men who attacked Patrick and William on 30.9.2009 at about 3.00 am and stole the listed items from the shop of PW 2. Patrick was injured in the process of the said robbery. The learned trial Magistrate, after considering the evidence presented before him came to a similar conclusion when he found at page 46 line 21;

“ In this case there is no dispute that the complainant, Robert Juma Wapogana (PW 2) lost property and for the property to be stolen, the night watchman was attacked and injured and threatened with fatal injuries.”

The learned trial Magistrate correctly identified the main issue that the court needed to settle in the case, especially in relation to count 1, when he stated at page 46 line 23;

“what this court should consider is whether accused has been properly identified and was linked with therobbery.”

The other issue that the trial court needed to settle relates to count 2 and is whether circumstances existed to make the court conclude that the Nokia 2720 found on Appellant at the time of arrest had been stolen or unlawfully obtained. Starting with this last issue , the only evidence availed was that of PW 6 who was both the arresting and investigating officer in respect of count 2. The evidence is that he suspected the phone he found on Appellant was stolen as he did not have anything to show that the phone was his. The Appellant in his sworn defence said he had been given the phone by his brother. In his submission before this court he insisted the phone was his. The learned trial Magistrate in his judgment at page 46 line 20 observed;

“ As regards count 11, the accused was found with a Nokia 2720 at the time of arrest, which he was not able to account for. At the time of the arrest it appears that he didn't give an account for it which could have cleared the speculation by investigation. His explanation before court also is wanting. He stated that the phone was given to him by hisbrother who he didn't identify and whom he said that he will not call as a witness.”

It is important to remember that the prosecution had the duty to prove their case against the Appellant beyond reasonable doubt. The responsibility never shifted to the Appellant as the learned Magistrate appeared to suggest in the portion of the judgment reproduced hereinabove. For the last couple of years, many Kenyans from all walks of life move around with mobile phones and very few of them, if any, carry the documents of purchase of the mobiles they carry. PW 6 placed the values of the Nokia 2720 he found with the Appellant at Kshs.6,000/= . There was no materials placed before the trial court to show why PW 6 suspected or believed the phone was stolen or unlawfully obtained. If possession of the Nokia 2720 is the only thing that made PW 6 arrest the Appellant, and there is no other reason given, then Kenyans have a reason to fear as many may find themselves arrested and charged for possessing mobile phones and other valuables if they do not carry with them documents of ownership. As the Nokia 2720 was not among the items stolen from PW 2 business premises or from the two watchmen Patrick and William, the defence offered by Appellant that the phone was his as it had been given to him by his brother whose name he gave as Stephene Ouma to use was in our view sufficient explanation. The prosecution had not availed evidence to dispute or rebut that explanation offered by the Appellant. We find that the learned trial Magistrate erred in law by shifting the burden of proof from the prosecution to the defence in relation to the charge in count 2. The conviction on count 2 was not based

on sound evidence and is unsafe.

Going back to issue of identification of the robbers it is important to note that Patrick and William said they had not recognized the robbers. They were not persons known to them before. Their evidence is that they saw them through the security lights and told PW 6, the investigating officer that they could identify the robbers if they were to see them again. Patrick and William do not seem to have given PW 6 or the court any descriptive details of the robbers they saw during the robbery, that could have enabled PW 6 to arrest the Appellant as one of the suspects. Patrick and William did not also disclose how bright the light from the security lights at the scene were at the time of the robbery and at what distance the robbers were when they saw them. This omission, coupled with their failure to give descriptive details of the robbers they saw that could reasonably have assisted the investigators look for the suspects, casts doubts on the results of the identification parade. This is especially so when it is noted that the Appellant complained about the conduct of the parade saying he had been with Patrick and William in the cells. He had asked the court to avail the cells register immediately after PW 7 testified on 25.2.2011. The record shows the court granted his request and ordered PW 6 to avail the cells register for 31.10.2009. There is however nothing on record to show that the cells register was produced. PW 6 had admitted that Patrick and William had been arrested and remanded. There is no evidence to rebut the Appellant's claim that they had been in the same cells with the parade witnesses before the parade was arranged. We are of the view that the results of the identification parade were unreliable and deficient and would be unsafe to be the basis of a conviction in respect of count 1. In the case of **Vincent Omondi Obeto & another –vs- Republic (2005)** eKLR, the Court of Appeal dealt with a similar case where they found the identification parade conducted by the police was deficient in view of the fact that the description of the robbers was not made to the police when the initial reports of the robberies were made. The court therefore held that the prosecution did not establish beyond reasonable doubt that the witnesses had positively identified the Appellants

We see no other evidence on which the learned trial Magistrate could have based the conviction as shown in the following portion of the judgment;

“ Although the accused in the identification parade he protested that the witnesses were with him in the police cells, there was no evidence produced to that effect.I therefore find that the ID parade was properly done. Having concluded as such, I find that the complainant lost property and in the cause of the robbery, the nightwatchman was injured and threatened with fatal injuries. I further find that the robbers were armed with dangerous weapons. The accused also has been properly linked to the charge of robbery with violence

The responsibility to rebut Appellant's contention lay with the prosecution, who in any case, had the responsibility to prove their case beyond reasonable doubt.

On the contention by Appellant that the prosecution violated his constitutional rights by incarcerating him for 20 days before taking him to court and that for this reason the charge should have been rejected, the Court of Appeal in the case of **Julius Kamau Mbugua –vs- Republic C.A. Cr. Appeal No. 50 of 2008** held that such a breach gives rise to Civil remedies unless it is shown that the incarceration had a link or effect on the Criminal trial resulting to a prejudice to the Appellant. We find that the 20 days incarceration alleged by the Appellant did not cause any prejudice to the trial process in this case and his remedy if any, lies in a Civil Claim.

Though not raised by Appellant and the state, we notice from the particulars of the charge in count 1 that the person robbed is stated to be Patrick Taabu Simolo, who is said to have been acting as the watchman for Robert Juma. When Patrick testified as PW 1 before the Lower court, he indicated he was a watchman for Biloma Wines and Spirit shop. Robert Juma testified as PW 2 and stated that his shop, which had been broken into, deals with motor cycles and other related items. The person who was the watchman of PW 2 for that business was William Emusugutu Chogeya who testified as PW 5 and not PW 1. The person who was therefore robbed was William Emusugutu Chogeya as he was the one acting as the watchman for Robert Juma, the proprietor of Western Cycle mart shop. In the process of the said robbery, Patrick Taabu Simoro was wounded. This confusion may have called for the charge to be

challenged for being defective.

Having found as above, we find the conviction of the Appellant on both charges was based on evidence that fell short of the legal requirements of proof beyond reasonable doubt. The convictions are unsafe on both counts. The appeal is upheld, convictions on both charges and the sentence set aside. The Appellant should be released forthwith unless otherwise lawfully held.

DATED,SIGNED AND DELIVERED AT BUSIA THIS 13TH DAY OF NOVEMBER, 2013.

F. TUIYOTT

S. M. KIBUNJA

JUDGE

JUDGE.

IN THE PRESENCE OF;

GEORGE OMGUNGACOURT CLERK.

..... **APPELLANT**

..... **RESPONDENT**