



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

CRIMINAL APPEAL NO. 60 OF 2011.

GEORGE WABWIRE ARENDE APPELLANT

VERSUS

REPUBLIC OF KENYA..... RESPONDENT.

(BEING AN APPEAL ON CONVICTION AND SENTENCE FROM ORIGINAL CRIMINAL CASE NO. 1614 OF 2010 IN BUSIA SPM'S COURTS – (HON. W.N. NYARIMA, SPM).

J U D G M E N T.

The Appellant, George Wabwire Arende, was arraigned with a Charge of robbery with violence contrary to section 296 (2) of Penal Code before the trial court on 1st December, 2010. The particulars set out in the charge sheet were that, on 8th October, 2010 at Busia Township jointly with others not before the court robbed Kevin Kirathe of Kshs.12,000/= and at or immediately after the time of such robbery threatened to use actual violence to the said Kevin Kirathe. The Appellant entered a plea of not guilty. The prosecution lined up four witnesses and the Appellant made a sworn statement in his defence. The learned trial Magistrate after considering the evidence presented found the Appellant guilty as charged and convicted him. After receiving a report on Appellants antecedents and his mitigation, the learned trial Magistrate sentenced him to death.

The Appellant, being dissatisfied with both the conviction and sentence, filed an appeal on 5th July, 2011 setting out twelve grounds which are condensed into three grounds as below;

1. That the incident giving rise to the charge occurred in Uganda and hence outside the jurisdiction of this court.
2. That the complainant is a police officer and did not lodge any complaint with the Police until after a week and when the Appellant went to lodge his complaint he was arrested and remanded for four days.
3. That the learned trial Magistrate erred in Law and fact by not considering his defence and relying on circumstantial evidence to convict him.

During the hearing, Mr. Jumba and Mr. Obiri appeared for the Appellant and the state respectively. The Appellant filed written submissions. In his oral speech, Mr. Jumba for the Appellant condensed the grounds into four and submitted as follows;-

1. That though the incident occurred on 8th October, 2010 and the charge sheet indicates it was brought to court on 28th July, 2011 there is no explanation given as to why Appellant was not presented to court before 30th November, 2011.
2. That the incident between the Appellant and complainant was at Sophia estate in Uganda, yet

the complainant claimed he made a report at Kericho police station before taking a Kalita bus to his rural home.

3. That the Lower court did not consider the defence offered by Appellant in the judgment.
4. That the learned trial Magistrate did not explain how the death sentence was to be carried out .

Mr. Obiri for the state opposed the appeal and submitted as below;-

1. That the robbery occurred at St. Kizito which is near Mombasa Hotel. That the scene was within Kenya and hence this court has jurisdiction.
2. That Appellant was recognized by PW 1, PW 2 and PW 3 as they knew him even before. The robbery occurred during the day time.
3. That the learned trial Magistrate considered the Appellant defence as shown at page 24 line 9 of the judgment.
4. That section 296 (2) of Penal Code does not oblige the court to give details of how the death sentence would be carried out and that the failure to give such details does not prejudice the Appellant.

As usual in first appeals, this court is obligated to re-evaluate and assess afresh the evidence adduced before the trial court and come to its conclusion. While doing so, we have warned ourselves to remember that we never saw or heard the witnesses give evidence. This has been discussed in several decided cases including the case of **Okeno –vs- Republic (1972) E.A 32, Pandya –vs- Republic (1957) E.A 336 and Shantilal M. Ruwala –vs- Republic (1957) E.A 570**

The evidence adduced before the trial court by the complainant, A.P.C. Kevin Mutulisi Karaithe, who testified as PW 1, is that on 8th October, 2010 he came from Uganda through Sophia estate. While at Kizito hotel, which is near the Kenyan side of "No Mans Land" and Mombasa Hotel, three men who had been following him ordered him to stop. It was about 6.30 pm and he stopped and noted among the three men was one he knew physically as he used to give him the newspaper to read while on duty at the border. The three men started searching his pockets and he resisted and during the struggle PW 2 and PW 3 arrived. They had come from the Kenya side and were heading to the Ugandan border. They said they knew the three people who were attacking PW 1 as Ombiji, Mike and Onyango and asked them what they were doing. Mike and Onyango left and Ombiji took some 1,000/= notes from PW 1 shirt pocket. PW 1 said the amount taken was Kshs.12,000/=. After taking the notes, Ombiji followed Mike and Onyango. PW 1, PW 2 and PW 3 went to police station and reported the incident and two days later, PW 2 and PW 3 recorded their statements. PW 4 who was given the case to investigate, said he had known the person called Ombiji, for about two years and when he was later arrested in a different matter, he re-arrested him and charged him in this case. PW 2 and PW 3 confirmed the man they called Ombiji, and who they found attacking PW 1 on 8th October, 2010 with Mike and Onyango is the Appellant herein. They had known him even before. PW 1 also confirmed that Appellant was one of the three men who attacked him and whose names he learnt from PW 2 and PW 3 as Ombiji. The evidence adduced clearly shows the incident occurred in Kenya, at St. Kizito Hotel which is near Mombasa Hotel and the Kenyan side of the "No Mans Land". There may have been a possibility Appellant and PW 1 had met in Uganda and quarreled over a girl as Appellant states. In any case PW 1 had come from Uganda where he had done some shopping. The provision of **section 6 of the Penal Code** is relevant and states as follows;

“ When an act which, if wholly done within the jurisdiction of the court, would be an offence against this code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this code in the same manner as if such act had been done wholly within the jurisdiction.”

However the robbery did not occur in Uganda but in Kenya and the Appellant may likely have followed PW 1 with his colleagues named Mike and Onyango. The Appellant attacked PW 1 and the attack was witnessed by PW 2 and PW 3. However, Mike and Onyango had left the scene before the Appellant robbed PW 1 of his money. There is therefore no evidence to suggest that Mike and Onyango or any other person participated in the robbery except the Appellant herein.

The complainant did not report to have suffered any injuries. The Appellant was also not armed with any weapon. The learned Trial Magistrate after analyzing the evidence adduced made the following observations:-

“ The evidence of PW 2 and PW 3 does corroborate what the complainant told the court. The demeanor of the two witnesses was positive. The incident happened during the day and the witness told the court that they could see and recognize the robbers. Firstly, the complainant and the accused knew each other and both told the court they had interacted before. The complainant and PW 2 and PW 3 all knew the accused. PW 2 and PW 3 also knew the other suspects. They could not have mistaken the accused for anybody else. They described his clothes well. The accused’s defence is to the effect that he disagreed with the complainant in Uganda that day. Even if that is accepted, it does not discount the fact that he was seen struggling and taking money from the complainant at 6.30 pm. I find no reason why PW 2 and PW 3 who initially did not know the complainant but knew the accused would give false testimony against the accused person. My finding is that the accused was with two other people and that they stole from the complainant cash after exercising force and violence on him. The accused was positively identified and recognized by the complainant, PW 2 and PW 3. The time was 6 pm – 6.30 pm when conditions for positive identification were favourable. The eye witness the accused and saw him pull out cash in Kshs.1,000/= notes denominations from the complainant’s breast pocket. It is apparent the accused stole cash money from the complainant and used actual violence to the complainant in order to obtain and retain the money and thwarted the complainant’s resistance by overcoming him.”

We agree with the learned trial Magistrate’s finding that the Appellant, who was known to PW 1, PW 2 and PW 3 previously, was the one who attacked PW 1 on 8th October, 2010 and robbed him of Kshs.12,000/=. The trial court considered the Appellant defence and correctly rejected it as he was placed at the scene by PW 2 and PW 3 who knew him quite well. The learned trial Magistrate however, erred in finding that the elements of the offence under section 296 (2) of Penal Code had been established beyond reasonable doubt as the evidence shows that Mike and Onyango had not played any role in the robbery. They were not at the scene when the Appellant removed the 1,000/= notes from PW 1 breast pocket. The robbery was therefore committed by the Appellant only. He was not armed and PW 1 did not sustain any injuries.

The evidence adduced before the Lower Court only established the offence of robbery contrary to section 296(1) of Penal Code and the court should have convicted the Appellant for the offence proved in accordance with the provisions of section 179 (1) of Criminal Procedure Code, which states as follows:-

“ When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.”

We in exercise of powers granted under section 354 of Criminal Procedure Code therefore set aside the Appellant’s conviction for the offence under section 296 (2) of the Penal Code and vacate the sentence given thereof, and in its place substitute a conviction for the offence of robbery contrary to section 296(1) of the Penal Code which was proved on the evidence on record beyond reasonable doubt.

We have considered the mitigation plea given by the Appellant before the trial court, the antecedent report given by the prosecution that the appellant was a 1st offender and the fact that he has been in prison since 22nd June, 2011 when he was sentenced to death. We now sentence the Appellant to five (5) years imprisonment for the offence of robbery contrary to section 296 (1) of the Penal Code. The sentence will commence from 22nd June, 2011 which is the date he first sentenced by the trial court.

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

F. TUIYOTT

S. M. KIBUNJA,

JUDGE

JUDGE.

IN THE PRESENCE OF;

GEORGE OMGUNGACOURT CLERK.

.....APPELLANT

.....RESPONDENT.