



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 210 OF 2010

JOSEPH ONYIKWA NYARIKI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from original conviction and sentence in Criminal Case 1098 of 2008 in the Chief Magistrate's Court at Thika – L. Gicheha)

JUDGEMENT OF THE COURT

The charge –

1. Joseph Onyikwa Nyariki (the Appellant) faced two counts of robbery with violence, was tried, convicted and sentenced to death for the two counts. The charges facing the Appellant were: Robbery with violence contrary to section 296(2) of the Penal Code. The particulars of this charge read that on 27th day of October 2007 at Kimbo area Ruiru in Thika District within Central Province, jointly with others not before court while armed with dangerous weapons namely pistols robbed Lucy Muthoni Mugo of her motor vehicle reg. No. KAY 536U Toyota Platz valued at Kshs.700, 000/=, a mobile phone make Samsung C300 valued 4,700/=, and cash 17,000/= all valued at Kshs.721, 000/= and at the time of such robbery threatened to use actual violence to the said Lucy Muthoni Mugo.
2. The second count was: on the 27th day of October 2007 at Kimbo area Ruiru in Thika District within Central Province, jointly with others not before court while armed with dangerous weapons namely pistols robbed Ricky Mbogo Mureithi a mobile phone make Motorola L6 valued at Ksh.6, 000/= and cash 2,000/= all valued at ksh.8, 500/= and at the time of such robbery threatened to use actual violence to the said Lucy Muthoni Mugo.

Facts

3. Lucy Muthoni Mugo (PW1) and Ricky Mbogo Mureithi (PW2) are related in that PW1 is the aunty of PW2 who was visiting him at her Kahawa Sukari home. On 27th October 2007 they were on their way to Thika to withdraw some money from an Equity Bank ATM. They were both travelling with PW1 vehicle registration KAY 538U. At the bank they withdrew Kshs.15, 000/= and on their way back passed through a shopping centre where PW1 wanted to collect her clothes. They took an earth road off the main road. As they drove back to the main road two people came to towards them and ordered PW1 to surrender the car keys. They then pushed her to the co-drivers seat and PW2 to the rear seat. They robbed them off phones and money. They then drove

them for a short while and released them and ordered PW2 to take over the motor vehicle. PW2 drove towards the main road and reached a police barrier where they found a cooperative police officer PW3 who immediately asked to be taken to the scene of the robbery and as they were driving PW1 saw the appellant crossing the road who noted the motor vehicle and started running. PW3 gave chase while PW1 drove back to the barrier to seek more reinforcement and together with PW3 chased the robber until they reached some houses and in one compound which had bushes they saw shoes peeping out of a pile of grass. This was the appellant who was arrested by the police officers and on him recovered PW1 phone and 3,000/= in 1,000/= notes. The firearm was not recovered. The appellant was thus arrested in connection with the robbery. The recovered phone was tendered in evidence as an exhibit. In defence before the trial court the appellant gave his unsworn statement and indicated that he was nothing to state at the court failed to recall PW1.

4. The trial magistrate considered all the materials placed before the court at the trial of the appellant, was convinced that the offences took place. The defence of the appellant was rejected on the basis that PW2 had been recalled and the Magistrate having warned herself established that the appellant was positively identified by PW1 and PW2 and also invoked the doctrine of recent possession to convict 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

5. The appellant initially filed six (6) grounds of appeal; these were amended when he filed his Supplementary Grounds of Appeal with seven (7) more grounds of appeal. A keen look at the initial grounds of appeal, the appellant was craving indigence and what comprises his grounds of appeal all are outlined in the Supplementary record. These grounds as outlined by the appellant challenge the process of trial, compliance with the law and observance of procedure but not the substantive charges, the conviction or sentence. With leave of the court, the appellant filed his written submissions. The supplementary grounds of appeal can be summarised as follows:
 - i. *The charge is defective for failure to observe the provisions of section 214 of the CPC*
 - ii. *The trial was unfair contrary to section 77 of the Constitution [repealed] and Article 50(1) and 2(c) of the Constitution*
 - iii. *There was no justice contrary to section 309 of CPC*
 - iv. *The court failed to observe section 150 and 213 of CPC in that the evidence before it was incomplete*
 - v. *That essential witnesses were not availed to prove mode of arrest*
 - vi. *Failing to observe that PW3, the arresting officer evidence was impeachable as per section 163 (c) of the Evidence Act.*

Submissions

6. In submissions the appellant supported his appeal that the charge is defective because the value of PW1 phone is stated to be Kshs.4, 700/= whereas in evidence she produced a receipt to indicate that the actual cost was Kshs.8, 500/= and thus the charge related to a different phone as against what PW1 said was her phone. That during his defence he was sick and was not given adequate time to prepare himself with the trial court being haste directives that a witness was being threatened and without proof found the appellant culpable. That the appellant application to be issued with the charge sheet, witness statements and the OB report were never considered by the court. That effort to have the trial court changed was not considered. That the appellant application to have PW1 recalled so that he could re-examine this witness was not allowed hence compromising his defence and thus his right to address the court were not granted. That his arrest by PW3 was not corroborated to confirm recovery of stolen good in that PW3 while arresting him said that he was found in possession of PW1 phone and this was in the presence of PW2 which the appellant disputes in that the people present while he was being arrested, a shamba boy and a house help were never called in evidence. That the evidence of PW3 is not credible as he contradicted PW1 and PW2 in that when the appellant was arrested he was not booked at Ruiru

- Police Station as he said he did not book the appellant rather he handed him over to the investigating officer. He asked the court to allow his the appeal and acquit him.
7. The learned state counsel opposed the appeal and submitted that the trial court correctly relied on the doctrine of recent possession and the appellant did not indicate how he came into possession of PW1 phone in that he robbed PW1 of her car, phone and money while armed with a pistol as she was driving. The appellant was together with others not arrested, they were on the road where PW1 was driving in the company of PW2, they blocked the road and drew a pistol and for 2 hours drove her around and in the process robbed both of them their property. That these events took place in broad day light, PW1 was able to see the faces of her assailants and positively identified the appellant when she saw him crossing the road while in the company of PW3. That PW2 corroborated the evidence of PW1 during the identification parade and by his voice PW2 positively identified the appellant. That the appellant committed the offence of robbery with violence and the identification parade was properly done by PW4 where he was positively identified. That the appeal should be dismissed.
 8. We are aware of the requirement that this court sitting on first appeal is under a duty to examine and evaluate afresh all the evidence adduced at the lower court with a view to arriving at its own independent conclusions whether or not to uphold the judgement of the lower court. The court is also alert to the fact that it did not have the advantage of observing the witnesses as to form an opinion of their demeanour. These we well laid down principles in the case of **Mohamed Rama Alfani and Another versus Republic, Criminal Appeal No.22 of 2002.**

Determination of the issues

9. On whether the charge is defective; the appellant was charged under section 296(2) of the Penal Code. The appellant ground that the charge was defective since the value of PW1 phone as stated was different with what she said in evidence, we have carefully considered this matter 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.

10. 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. 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 as to 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.*

11. 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 a pistol and used 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. Our decision in **David Othiambo et al versus Republic, Criminal Appeal No. 5 of 2005**, a decision that was quoted with authority in a case with similar facts as this appeal in **Criminal Appeal No. 6 of 2011, Abdirahman Ali et al versus Republic, paragraph 11.**
12. 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.
13. Further to the above, on whether the doctrine of recent possession applies with regard to the

appellant, this is analysed together with the ground that PW3 evidence is impeachable and incredible. With regard to the grounds that PW3 evidence was impeachable, it was this officer who arrested the appellant and on him PW1 phone was recovered together with Ksh.3,000/=. The appellant stated that PW3 evidence was that when he recovered the phone from him, there was a shamba boy and a house girl who were never called. To this evidence and the recovery of PW1 phone, upon recovery of it by PW3, soon after PW2 arrived and PW1 was able to positively identify her phone, which evidence is not contradicted by the appellant and does not explain how he got into possession of PW1 phone and in reiterating the decision in **David Othiambo et al versus Republic**, proof of any one of the ingredients under section 296(2) of the Penal Code is enough to safely base a conviction on.

14. Further evidence by PW4 is that upon the arrest of the appellant by PW3, he took over the report, did an identification parade where PW2 positively identified him and he filed a report on the case. This is not challenged and thus corroborates what PW3 said on the sequence of events from the arrest of the appellant, the recovery of the stolen goods and eventual charging him with the offence of robbery with violence. This thus satisfied the doctrine of recent possession in that the stolen property was found on the suspect, the appellant, the property was positively identified by the complainant, PW1, the property was recently stolen from the complainant these being ingredients set out in **Criminal Appeal No. 85 of 2005, Arum versus Republic**.
15. Our reading and analysis of this evidence leaves no doubt in our minds that the appellant is the one who together with others violently took over PW1 motor vehicle, robbed her as well as PW2. The stolen items were positively identified by PW1 and tendered in evidence and the documentary evidence that she had withdrawn Ksh.15, 000/= from an ATM at Equity Bank, Thika
16. The grounds that the appellant was not given enough time to organise his defence, his application to be heard by a different court was not granted and that he was not allowed to recall PW1, these we analyse together. On 17th March 2009 the appellant applied in the lower court as follows;

I have no faith in this court. This case stated on 2/4/08 and had taken long. I have suffered. I request my file be placed before court 1.

Page 22, par.15

17. The court granted the application and appellant was taken before court 1 [C. Meoli], the learned magistrate upon the appellant making the same application directed;

Let hearing proceed in court no.2. Accused to go back there today to be given a hearing date.

Page 23, para.8

18. Thus the learned trial magistrate in court no.2 having granted the appellant his request, the matter was returned before the same court for hearing. Subsequent to this, the appellant state that he was not allowed time to organise his defence, that on 9th October 2008 he was not given enough time to cross-examine prosecution witnesses. We have evaluated the proceedings in this regard, on 9th October 2008, PW1 gave her evidence, she was extensively cross-examined by the appellant and when her evidence closed, PW2 gave his evidence in-chief but the appellant stated that he was not feeling well and could not cross-examine him and the learned trial magistrate granted this request and directed trial to proceed two months later on 21st October 2008. The prosecution had objected to this adjournment on the basis that PW2 was a student and needed to be back in school, but the court granted what the appellant had sought in the lower court. On the subsequent hearing the appellant applied to have witness statements and the OB report and the trial magistrate on 7th May 2009 directed that the appellant be remanded at Ruiru Police Station and CID Ruiru to make available these records. On 19th June 2009, when the matter came up for hearing when the prosecution had PW3, PW4 and PW2, the appellant said;

Accused: I am not ready to proceed. I request for an adjournment. I do not have my notes

Prosecution: we are set to proceed. My witnesses have never failed to attend court. It is the accused to cross examine if he is not willing to be cross examined. It shall be held that he does not want to be cross examined.

Court: I have considered the accused has been stubborn and not willing to proceed with the witness who is now in court. It is very unfortunate. I will give him a final adjournment.

Page 27, par. 1 to 12.

19. On the issue of his defence, the appellant on 5th November 2009 had PW2 for his cross-examination after the learned trial magistrate being aware that it had taken time to have this witness back in court, restated the evidence PW2 had given earlier. He stated;

Prosecution: the accused had requested for PW1. She is not present. I apply for adjournment.

Accused: the case has taken long. I am suffering. I pray prosecution to close their case.

Prosecutor: I wish to close prosecution case

Court: ruling on 11/11/09.

Page 38, para.1 to 10.

20. This is then how the persecution case closed upon the insistence of the appellant that his trial had taken long and he wished the prosecution to close its case without the recall of PW1. We have gone back to the evidence of PW1, and noted that the appellant had a good chance to extensively cross examine PW1, PW2 was led in his evidence and only then did the appellant state that he was unwell and could not cross-examine him which the trial magistrate took seriously and allowed adjournment and this witness was called back for his cross-examination. On 3rd December 2009 when the matter came for defence hearing, the appellant applied to have the adjourned to enable him file an application to the High Court and this was granted. A subsequent date taken for his defence was 26th January 2010 when he said he was not ready with his defence. On 11th March 2010 the appellant opted to give his unsworn evidence and then stated that **'...I have nothing to say as PW1 was not recalled'**.

21. With regard to these grounds, we note the issue of an appellant's defence, the Court of Appeal has gone into it in-depth in the case of **David Njoroge Macharia versus Republic, Criminal Appeal No.497 of 2007** on the application of section 77 of the repealed Constitution and Article 50 of the Constitution. Our understanding of the application of the same in this case is that under the repealed Constitution at section 77;

If a person charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent court established by law.

(2) Every person who is charged with a criminal offence-

...

(c) Shall be given adequate time and facilities for the preparation o his defence;

(d) Shall be permitted to defend himself before the court in person or by a legal representative of his own choice

...

Article 50 of the Constitution on the other hand provides;

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body

(2) Every accused person has the right to a fair trial, which includes the right-

...

(c) To have adequate time and facilities to prepare a defence.

...

22. We have addressed ourselves to the submissions of the appellant and in our evaluation of the proceeding before the learned trial magistrate established that the hearing was adjourned severally to allow the appellant time and chance to have time to cross examine the witnesses presented by the prosecution. He extensively cross-examined PW1 and when adjournment was sought by the prosecution to have her recalled for his further examination, the appellant opted not to have this witness recalled to expedite his case. This cannot then be found that he was denied time to prepare his defence and that his constitutional rights as under section 77 of the repealed Constitution and Article 50 of the Constitution were violated.

23. We have carefully analysed the evidence and are satisfied without doubt that there was a robbery with violence against PW1 and PW2 by the appellant and that he stole property of PW1, a phone that was recovered from him. The appellant has not offered any explanation as to how he came by the stolen phone. In defence the appellant opted to give his unsworn statement and due to what he termed a violation of his right to recall a witness failed to give any explanation. As outlined in this judgement, we have found there was no violation to the appellant's right to give his defence. He had the time and facilities to be at CID Ruiru to review all the evidence material to his case.

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 at Nairobi this 20th Day of December 2013.

M. Mbaru

J. Rika

Judge

Judge

In the presence of

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