



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL CASE NO. 571 OF 2007

(Appeal from the judgment of Mary Murage [Chief Magistrate, Nairobi])

ERIC OUMA NDUTU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant was convicted of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** and sentenced to death. In his amended grounds of appeal, the appellant raises five (5) grounds of appeal:

1. That he was convicted on a defective charge sheet;
2. That there was no positive identification;
3. That he was denied access to important information to protect his rights contrary to **Article 35(1) (a) and (b) of the Constitution** as read together with **Section 153 of the Evidence Act**;
4. That the prosecution did not discharge the burden of proof to the standard required by the law;
5. That the evidence was riddled with consistencies and contradictions.

The grounds of appeal were expounded in the written submissions filed by the appellant.

The State opposed the appeal on grounds that the appellant was positively identified by PW2 and PW5. He was also arrested near the scene having entered in the house of someone after a chase by members of public. Police on patrol shot in the air as the attackers were running away from the scene. There was no mistake in apprehending the appellant and identification was not in doubt

The facts of the case are that the complainant PW5 was a passenger in the vehicle of PW2 registration no. KAS 608 on 28th October 2006 at around 10.00a.m. Driving along Ladhies road in Nairobi. Near BP Petrol Station they were confronted in a traffic jam by about four men around the car which had slowed down due to the traffic jam. Two men went to the left from side where PW2 sat and one at the drivers window. One of the men snatched the handbag of PW5 containing all the items named on the charge and ran away. Police on patrol shot in the air and member of public chase the attackers. The appellant was arrested while others ran away. He was brought back to the scene where PW2 and PW5 identified him. One man among the four was armed with a pistol. The hand bag and its contents was recovered from one of the attackers as they were pursued by police and members of public. PW5 identified the bag as her stolen property. The accused was taken to Kamukunji police station where he was charged with the offence.

The accused complained that he was denied witness statements. On application of the appellant,

the court made an order on 19th March 2007 that he be supplied with witness statements. The case was being mentioned on that day and hearing was scheduled for the 30th March 2007. The hearing of the case did not take off on 30th March 2007 for unknown reasons. Another hearing date was fixed on 9th May 2007. On the hearing date, the court noted that the witness statements had been availed to the appellant but he failed to photocopy. The law requires that the State avails witness statements to the accused person. It is clear in the court record that the statements were availed by the prosecution who wanted the appellant to facilitate the photocopying of the statements. The appellant failed to do so. If the appellant had any challenges with the facilitation, he ought to have informed the court so that the magistrate gives the necessary directions on the facilitation, even if it meant the court using the court's own photocopy facilities. There is nothing on record to show that the appellant had any such problem. We find the allegation that the appellant was denied the statements baseless.

It was alleged that the charged was defective for failure to indicate that the weapon the appellant was armed with was a dangerous one.

The charge reads:

“On the 28th day of October, 2006 along Ladhes road, Nairobi jointly with others not before the court, while armed with a toy pistol robbed Mary Nziza ofand immediately before, at or immediately after the robbery used actual violence to the said Mary Nzisa.”

The ingredients of the charge of robbery with violence under **Section 296(2) Penal Code** are:

- (i) that the accused was armed with a dangerous weapon; or
- (ii) that he was in the company of one or more persons;
- (iii) that immediately before, or at, or after the robbery uses actual violence on the complainant.

Upon the accused being identified as the person who robbed the complainant, the prosecution are only required to prove one of the ingredients under **Section 296(2)**. The charge has listed all the ingredients of the offence. The appellant's complain is that the pistol was not referred to as a dangerous weapon. We take judicial notice that a pistol is not only a dangerous but a lethal weapon. It is our considered opinion that the omission of the word “dangerous” does not render the charge defective since appellant's conviction was not only based on him being armed with a dangerous weapon. It was also based on the fact that he used violence during the robbery and that he was in the company of two others. We reiterate that the prosecution has a duty to prove the existence of only one of the circumstances in order to prove the offence.

The case of **Johanah Ndungu vs. Republic Criminal Appeal no. 116 of 1995** (unreported) explained the various elements or ingredients which must be proved under **Section 296(2)** of the **Penal Code**, and any one of which, if proved, there would be no discretion on the part of the trial court but to convict.

In the case of **Juma vs. Republic (2003) 2 EA 471** it was held that where the prosecution relies on the element of being armed, it must be stated in the particulars of the charge that weapon or instrument with which the appellant was armed was a dangerous or offensive one. The reason for this requirement is that a knife or a stone is not inherently a dangerous weapon and may be used under many circumstances for peaceful purposes. Even a gun or a toy pistol may not necessarily be an offensive or dangerous weapon but if put to use in robbery, it becomes a dangerous weapon.

In the case before us, the prosecution are not only relying on the ingredient of the appellant having been armed with the toy pistol. It also relies on the ingredient that the appellant was in the company of one or more persons at the time he committed the offence. This case is therefore

distinguishable from that of **Juma vs. Republic** (supra). It is our considered view that the charge was not defective for the simple reason that it did not state that the toy pistol was a dangerous or offensive weapon.

The appellant avers that he was denied a fair hearing because he was denied recalling of PW2. The appellant made the application to recall the witness. On 20th June 2007, the application was made yet before one S. Muketi Senior Principal Magistrate who was also mentioning the case. The prosecutor present was one C. I. Marete and the court granted the order. The trial magistrate continued with the hearing on 29th August 2007. Although the order was in the court file, the trial magistrate does not appear to have taken note of it. The prosecutor was one C. I. Njeru. The appellant did not bring the matter to the attention of the trial magistrate and the prosecutor who may not have been aware of the order. The appellant had a duty to alert the court that there was such an order so that it could be implemented. Before the order was made, the appellant had cross-examined PW2 and the evidence of the witness closed. In the existing circumstances, the trial magistrate cannot be blamed on failure to enforce the order which we believe she was not aware of. If the accused alerted the court of the order which was made by a different magistrate, there was no reason why the trial magistrate should have failed to enforce it. We find that the rights of the accused were not violated. It is him who sat on his rights or changed his mind as time went on.

It is one of the grounds of appeal that the prosecution's evidence was full of inconsistencies and contradictions. However, the appellant did not specifically bring out in his submissions the alleged contradictions to enable us deal with them.

Regarding identification, the appellant argued that PW2 and PW5 did not identify him positively. He said the circumstances were not conducive to positive identification for the street was busy with both traffic jam and pedestrians walking along the street. The evidence of PW2 was that one person came to his side (of the car) while two others went to the passengers side and snatched PW5's hand bag. Police on patrol chased them and shot at some of them while others ran away. PW2 said that she saw the police chase them. The appellant was immediately arrested and brought back to the scene. PW2 identified him as the man who was on his side at the material time.

The witness told the appellant in cross-examination:

“You approached us from my side. The other two went to the other side where the lady was.

And re-examination;

He ran away and was arrested and brought back to the scene. I am sure he is the one. He accosted me first.”

PW3 was a police officer attached to Kamukunji police station who was in a police vehicle with two other officers. He testified that they were driving along Ladhesh road when they heard a gunshot near Muthurwa. The driver stopped and he and another officer went out of the vehicle when they saw four men robbing a motorist. One took things from their victims as the others surrounded the vehicle. When the robbers saw police they started running away. One had a toy pistol and the other carried a hand bag. The two who ran towards Gikomba were shot. PW3 saw the appellant who was one of the four men ran towards Muthurwa Estate where he was accosted by members of public, beaten up and brought back to the scene PW3 recovered the handbag which the complainant identified as hers. The fourth man escaped and was never arrested. It is PW3 who re-arrested the appellant from the members of public and took him to Kamukunji police station.

PW5 said she and her driver PW2 were accosted by thugs in a traffic jam at Ladhes road. One banged the vehicle from behind. Two came to her window which was rolled down. One held on to the window as the other snatched her handbag which she had placed on her lap. There was a gunshot that made the thugs run away. PW5 said police shot at the man with her handbag. He threw it to one of his colleagues. PW5 said in cross-examination:

“I saw you holding a pistol. I identified you as the person who knocked the window.”

And in her evidence in chief, PW5 said:

“Accused ran and was removed from a house within 15 minutes.”

From the evidence of PW3, there is a possibility that one or two of the thugs changed their original position by moving from one side of the car to another. PW3 was watching from outside and was in a better position to see the thugs as they ran away. He described the episode of the shooting dead of two suspects who ran towards Gikomba, one who escaped while the appellant went to a different direction towards Muthurwa Estate where he hid in someone's house. The public were in hot pursuit and removed him from there bringing him back to the scene where he was identified.

In his defence, the appellant said he was going to work when he heard a gun-shot. He started running away like other people did. He entered a house where people flushed him out and assumed he was one of the robbers.

The magistrate considered this defence and found it not convincing. She dismissed it as a lie. This was after looking at it alongside the prosecution's evidence which was overwhelming. The prosecution did not call any member of public who flushed the appellant from the house where he was hiding. However PW3 saw the appellant at the scene of robbery, he saw him ran towards Muthurwa Estate with members public giving a chase. The members of public brought the accused back to the scene and handed him over to PW3 who re-arrested him. The evidence of the complainant and PW2, that of the police officer PW3 and the act of PW3 receiving the appellant from the members of the public a few minutes later forms an unbroken chain of events that works in favour of the prosecution. He was told by members of public that they had removed the appellant from a house where he ran to hide. We are opined that the chain of events from the scene to the arrest of the appellant was not broken.

The failure by the prosecution to call the members of public to testify is not fatal to the prosecution's case. The law has no requirement that a given number of witnesses must prove a fact. The magistrate in this case believed the evidence of PW2, PW4 and PW5 which was in her opinion sufficient to sustain a conviction. In the case of **Benjamin Mbugua Gitau vs. Republic (2011) eKLR** it was held:

“It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see Section 143 Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys.”

We are in agreement with the Court of Appeal in the Benjamin Gitau case that no prejudice was caused to the appellant by failure to call the members of public to testify.

The incident took place during the day at around 9.00 a.m. and visibility was good. PW5 and PW2 were able to see and identify the appellant as he robbed them, as he was chased away and

when he was brought back to the scene. PW3 gave a vivid description of how he saw four men rob a motorist and ran away, how they were chased, two killed, one escaped and how the appellant ran to a different direction but arrested by the public.

The trial magistrate put it thus:

“The offence occurred during the day and both witnesses (PW2 and PW5) saw the accused before and after the commission of the offencePW3 the police officer also saw the accused during the commission of the offence and a few minutes later when he was arrested.”

The trial magistrate in analyzing the evidence did not take cognization of the fact that the three witnesses saw the appellant as he was being chased which further boosts the evidence of identity. We do agree that the defence was not plausible. We also find that there was no possibility of error or mistake by the three witnesses. The appellant was positively identified as one of the gang which robbed the complainant of her handbag and other items at the material time. The conditions were conducive to positive identification.

The gang was armed with a pistol which was produced in evidence by PW4. It does not matter that it was found on examination not being capable of being fired. It has been proved that the appellant was in the company of two or more persons.

The ingredients of the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** were proved to the standards required in criminal cases. The magistrate reached a correct finding in convicting the appellant of the offence.

We dismiss the appeal and uphold the conviction and the sentence.

F. N. MUCHEMI

G. ODUNGA

JUDGE

JUDGE

Judgment dated and delivered on the **16th** day of **December 2013** in the presence of the appellant and the State counsel Mr. Okeyo for Mwaniki in open court.

F. N. MUCHEMI

JUDGE