REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CR. APPEAL NO. 139 OF 2012

(CONSOLIDATED WITH 138 OF 2012)

KINGOO MUENDO…..……..…1ST APPELLANT

JOSEPH KIOKO MWINZI..…….....…….....2ND APPELLANT

VERSUS

REPUBLIC……..…...……RESPONDENT

(An Appeal from the conviction and sentence in Criminal Case No. 428/2011 in the Principal Magistrate's Court at Makueni (Hon. J. Karanja, PM))

Judgment

1. Kingoo Muendo (the "1st Appellant") and Joseph Kioko Mwinzi (the "2nd Appellant") bring this appeal after they were convicted by the Learned Honourable Josphat Karanja, Principal Magistrate, on three counts of robbery with violence. The Learned Trial Magistrate then sentenced them to death on account of the convictions. The Appellants are aggrieved and have appealed against both convictions and sentence. We will shortly summarize the Appellant's main grounds of appeal. We will first outline the Prosecution case.
2. On the night of September 17th to 18th 2011 at about 2:00 am, a gang of four men attacked MPC Kalawa Church and Kalawa Health Center. They first accosted Onesmus Manthi Mutuvi, who testified as PW1 ("Onesmus") as he left an outhouse toilet. Onesmus was a guard at the Church which neighbours the Health Center. At first, the four intruders pretended that they had a patient who needed treatment but ended up tying up Onesmus and gagging him so that he would not scream. They left him in a classroom within the Church compound and took off with his flashlight.
3. The gang then made its way into the Health Center where three of them confronted the guard there, Mutiso Ngove ("Mutiso"). They, again, pretended that they needed to see a doctor and Mutiso offered to take them to the house of the nurse who was on call within the compound. They made their way to the house of Patrick Mutinda Makau, the nurse ("Patrick"), who lived about 100 metres away. On reaching the house, they called out for Patrick to come out, this time announcing that they were Police Officers. It is unclear at what time Mutiso noticed, but by this time, he had also noticed that the three men were in military fatigues.
4. When Patrick opened the door to his house, he thought the callers outside were Police Officers. That belief quickly changed when the three men escorted him and Mutiso to the labour ward, took keys to the safe and his house and tied them up using sisal ropes to immobilize them. Also tied up with the Mutiso and Patrick was Peter Kitao Mwikavi ("Peter"). Peter was in the Labour Ward with his wife who was in labour.

5. After tying up the three hapless victims, the thugs stole Patrick's phone which was on his person as well as Kshs. 50/= from Mutiso. It was later discovered that they had stolen Kshs. 16,000 from the Health Center. At Patrick's house, they made away with his laptop computer.
6. After their thieving spree, the gang left one of them guarding the three tied up victims at the Labour Ward – or at least they made the victims so believe before fleeing. Convinced that the thugs had left, Mutiso and Peter were able to roll into each other and somewhat untie themselves loosely enough for Peter to reach a pair of scissors on a table in the Labour Ward. He used the pair of scissors to cut through the rope. Peter then stealthily crawled out of the Labour Ward, and, through the barbed wire fence separating the Church and the Health Center, into the Church compound. There, he found Onesmus still tied up. He helped untie him and together they went and called the pastor who called the Police to the scene.
7. The Police arrived on the scene shortly thereafter and began investigations. Later that morning, at around 7:30 am, Corporal Gary Mwasaa, who is attached to Mukuku AP Post in Mbooni East, received a call from a member of the public that two suspicious people were passing by Ngakaa Market carrying luggage. The member of the public informed Corporal Mwasaa that the two people were heading towards Ngoluni. Corporal Mwasaa, then, asked another Police Officer to accompany him to find out if any crime had been committed. They intercepted the two "suspicious" men near Nguluku Secondary School. One of the two men was carrying a black bag; the other was carrying a racksack bag. Corporal Mwasaa and his colleague stopped the two men and conducted a search.
8. Upon search, inside the black bag carried by one of the men, they discovered a laptop of the make Dell. Inside the bag carried by the second man, they found a large hammer and a pair of pliers. They proceeded to arrest the two men.
9. The two men so arrested are the Appellants. The 2nd Appellant was carrying the black bag where the laptop was found; the 1st Appellant the bag where the hammer and pliers were found. It turned out later that the laptop was the self-same one that had been stolen from Patrick's house. That discovery led, inevitably, to charges being preferred against the Appellants.
10. This, in short, was the evidence marshaled on behalf of the Prosecution. By and large, it remained unshaken on cross-examination by the Appellants although they both mounted a vigorous defence, under sworn testimony, where they denied the circumstances of their arrest. In particular, they both denied being arrested with the items Corporal Mwasaa claimed they were arrested with. Each of the Appellants gave an account that they were at a different place when the robbery took place and were only framed up. The 1st Appellant testified that he had slept at Tawa on September 17, 2011 and was heading to his place of work at Ngoluni Market the following morning when a vehicle suddenly stopped behind him and two people jumped out and arrested him after asking him to produce his Identity Card and he could not. Similarly, the 2nd Appellant testified that he had gone to the Ngoluni Market to collect money owed to him by some customers to whom he had sold shoes when a vehicle pulled up behind him and two officers jumped out and ultimately arrested him.
11. Faced with these two accounts, the Learned Trial Magistrate dismissed the Appellants' versions of the story as "mere denials" and proceeded to find that the charges against them were proved beyond reasonable doubt.
12. On appeal, the 1st Appellant has raised eight grounds of appeal and the 2nd Appellant, on the other hand, has raised four grounds of appeal. However, we have concentrated on two main grounds as enumerated below.
13. As a first appellate Court, we have an opportunity and a duty to re-evaluate afresh the evidence adduced during the trial and determine for ourselves whether the evidence can sustain the conviction. We draw our matching orders in this regard from the case of ***Okeno v Republic*** **[1973] E.A. 32** where the predecessor to the Court of Appeal instructed:

An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] E.A. 386 and to the appellate Court's own decision on the evidence. The first appellate Court must itself weight conflicting evidence and draw its own conclusions. It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions. It must make its own findings and draw its own conclusions. Only then can it

decide whether the magistrate's Court's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.

14. With the *Okeno* admonition in mind, we now proceed with the task. We note from the evidence adduced at trial that none of the Prosecution Witnesses testified to identifying the assailants during the robbery. Indeed, each of the victims was quite categorical that they could not identify the assailants because the lighting conditions were not favourable and because the assailants had taken the trouble to cover their faces with marvin hats. As such, it follows that the only evidence through which the Prosecution sought to link the Appellants to the counts of robbery was through recent possession of the stolen laptop computer and its bag as well as implements and tools which arguably were used to commit part of the offence. We say "arguably" because none of the eye witnesses to the crime actually saw the two items recovered on the Appellants – hammer and a pair of pliers – during the robbery.
15. Before analyzing the evidence of recent possession, we turn to the first major complaint that the 2nd Appellant raised – that the charge sheet was fatally defective because, he argued, the evidence adduced on trial was at variance with the particulars in the charge sheet. In particular, the 2nd Appellant argued that the charge sheet spoke particularly about the use of a rifle as an offensive weapon during the robbery yet none of the witnesses ever saw a rifle. He relies on ***Yongo v Republic*** 1983 KLR 319. In that case, the Court of Appeal held:

A charge is defective under section 214(1) of the Criminal Procedure Code (cap75 where:

a. ***It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or***
b. ***It does not, for such reasons, accord with the evidence given at the trial; or***
c. ***It gives a misdescription of the alleged offence in the particulars.***

16. The particulars of the offences with which the Appellants were charged with and pleaded not guilty to at their first arraignment in the Court below were as follows:

Robbery with Violence Contrary to Section 296(2) of the Penal Code.

Count 1: 1. Kingoo Muendo 2. Joseph Kioko Mwinzi: On the 18th September, 2001, at ABC Church Kalawa in Mbooni East District within Makueni County, jointly with others not before the court being armed with dangerous weapons namely rifles and ropes robbed Mr. Manthi Mutuvi of a torch valued at Kshs. 200/= and at the time of such robbery threatened to use personal violence on the said Manthi Mutuvi.

Count 2: 1. Kingoo Muendo 2. Joseph Kioko Mwinzi: On the 18th September, 2001, at ABC Church Kalawa in Mbooni East District within Makueni County, jointly with others not before the court being armed with dangerous weapons namely rifles and ropes robbed Mr. Patrick Mutinda Mutua of one laptop make dell, a laptop bag, a mobile phone make Nokia 6070 and Kshs. 16,000 all valued at Kshs. 51,000/= and at the time of such robbery threatened to use personal violence on the said Patrick Mutinda Mutua.

17. After the trial had started and two Prosecution witnesses had testified, the State applied to amend the charge sheet and add a third count. The application was duly granted and, on 3rd January, 2012, the Prosecution introduced an amended charge sheet which contained a third count thus:

1. Kingoo Muendo 2. Joseph Kioko Mwinzi: On the 18th September, 2001, at ABC Church Kalawa in Mbooni East District within Makueni County, jointly with others not before the court being armed with dangerous weapons namely rifles and ropes robbed Mr. Mutiso Ngone of

Kshs. 50/= and at the time of such robbery threatened to use personal violence on the said Mutiso Ngone.

18. The 2nd Appellant argues that although the charge sheet is predicated on the use of a rifle during the robbery, the evidence adduced did not prove the existence of any rifle during the alleged robbery. Hence, the 2nd Appellant argues, the evidence produced is at variance with the charge sheet and cannot prove the offence charged.
19. It is true that combing through the evidence, none of the witnesses confesses to seeing a rifle. The only witness who came close to testifying about seeing a rifle was Peter who testified that he saw a "man entering the room carrying something long in one arm…" (page 30 of the Typed Proceedings). Patrick testified that: "The three men had big jungle jackets and we could not see what they were holding…" It is also true that Mutiso and Peter testified that the robbers threatened that if they did not comply with their instructions they would shoot them. The bottom line is that none of the eye witnesses saw a rifle. Can it then be said that the charge sheet was accurate in particularizing that the Appellants were carrying offensive weapons namely a rifle and ropes?
20. We think not. As analyzed above, we come to the conclusion that there was no evidence presented that proved that the assailants were armed with a rifle. There was no evidence that the assailants were armed with rifles makes the charge sheet defective for being at variance with the evidence produced. The reason our case law insists that the Prosecution proves with particularity the specifics of the facts included in the charge sheet is so as to give the accused person a fair opportunity to defend himself on all issues presented. It would be unfair for a charge sheet to state some facts or elements of an offence and then for the Prosecution to prove others at trial even if what is proved are alternative elements of the charged offence. The purpose of the charge sheet is to put the criminal defendant on notice about the evidence that he will face at trial so that he can adequately prepare for his defence. If the charge sheet is drawn in such a way that it gives the impression that the evidence will be on a particular element or ingredient of the offence and then something else is proved, that would amount to an unfair trial.
21. In this case, the mention of a rifle as an offensive weapon meant that the Appellants concentrated their defence on being armed as the necessary ingredient to the offences they were charged with. However, that element was not proved in evidence. Instead, for conviction, one would have to rely on the fact that there was more than one assailant – another sufficient ingredient of the offence of robbery with violence. However, as we have remarked above, that would amount to an unfair trial.
22. Our holding in this regard is buttressed by the fact that we would hold the charge sheet defective for another reason as urged by the 2nd Appellant: it was amended midstream during the trial and the Appellants were not given an opportunity to recall the earlier witnesses to cross examine them.
23. The law, at section 214 of the Criminal Procedure Code permits a trial court to amend a charge sheet on this terms:

(1) Where, at any stage of a trial before the close of the case the prosecution, it appears to the court that the charge is defective, either in substance of in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that-

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross – examined by the accused or his advocate, and, in the last- mentioned event, the prosecution shall have the right to re- examine the witnesses on matters arising out of further cross – examination.

24. Our case law has interpreted this provision to require the trial Court to explain to the accused person their right to elect whether or not to recall witnesses who may have testified in the case once a charge is amended or substituted. See ***Yongo v R*** (*supra*). Our case law further provides that the trial Court must not only mandatorily comply with these conditions but it must record that it has so complied.
25. In this case, the Learned Trial Magistrate gave the Appellants an opportunity to plead afresh to the substituted charges but did not inform them of their right to elect to recall the witness who had already been heard. This renders the trial fatally defective.
26. In the ordinary circumstances we would go into an analysis of whether we should remand the case for retrial. In this case, however, in view of our findings above about the variance of the evidence produced and the charge sheet, it would be unfair to do so since it would be to give the Prosecution a second bite at the cherry; an opportunity to correct its mistakes. We, therefore, cannot order a retrial in the circumstances. Our case law is quite clear that a retrial should be refused where it is likely to cause injustice or prejudice to the Appellant. See ***Ahmed Suman v Republic*** **(1964) EA 481**. It should also not be granted where the appeal succeeds even in part due to lack of sufficient evidence as that will give the prosecution an opportunity to fill its gaps. See ***Merali v Republic*** **(1071) EA 221**.
27. Consequently, we find the appeals meritorious. We allow the appeal, sets aside the conviction and sentence imposed. We hereby order that the Appellant shall be set at liberty forthwith unless otherwise lawfully held. Those, then, are the orders of this Court.

DATED, SIGNED AND DELIVERED this 10th day of December 2013.

JOEL NGUGI, Judge

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B. T. JADEN, Judge

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