



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 637 OF 2007

(An Appeal arising out of the conviction and sentence of S. MUKETI - SPM delivered on 12th October 2007 in Nairobi CMC. CR. Case No.477 of 2006)

JUMA ANTONY KAKAI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Juma Antony Kakai was charged with two others who were acquitted with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 13th February 2006 at Loresho Ridge Gigiri, Nairobi, the Appellant, jointly with others not before court, while armed with dangerous weapons namely Somali swords, pangas and iron bars robbed Timothy Mugambi Muthaura of Kshs.93,500/-, motor vehicle Registration Number KAQ 260V Nissan Sunny, Sony Television Set, a computer, Panasonic digital camera, Sony video player, scanner, one printer, Seiko 5 wrist watch, gas cylinder with regulator, 3 Nokia mobile phones, car radio cassette and a CD player and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Timothy Mugambi Muthaura. The Appellant was charged with two other offences which he was however acquitted. When the Appellant was arraigned before the trial magistrate's court he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to death as is mandatorily provided by the law. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial magistrate had failed to take into consideration the fact that there existed a grudge between him and the complainant and one of the witnesses. He faulted the trial magistrate for failing to take into consideration the totality of the evidence adduced which in his view exonerated him from the crime. He was aggrieved that the trial magistrate had not taken into consideration the fact that the police had failed to dust the weapons that were recovered for fingerprints which in his view would have shown who the real culprits were. He faulted the trial magistrate for failing to take into consideration the fact that the prosecution had failed to avail crucial witnesses who would have adduced evidence that would have raised reasonable doubts in the prosecution's case. He was aggrieved that the trial magistrate had failed to take into consideration his defence which was cogent and plausible and which had displaced the prosecution's case. He was of the view that the evidence adduced by the prosecution witnesses did not in actual fact establish his guilt to the required standard of proof beyond any reasonable doubt. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant was represented by Mr. Wanyonyi. The State was

represented by Miss Matiru. Mr. Wanyonyi submitted that the prosecution had not established the charge to the required standard of proof beyond reasonable doubt. He explained that the assailants who were armed with crude weapons entered the house of the complainant. There was no evidence connecting the Appellant with the entry into the house and the attendant robbery. He submitted that no CCTV footage was produced by the prosecution to establish that it was indeed the Appellant who had used the ATM card of the complainant to withdraw cash from the complainant's bank account. He submitted that the complainant did not produce any receipt to establish that indeed the items which were allegedly robbed from him belonged to him. He further stated that there was no evidence which was adduced to establish how the motor vehicle which was allegedly robbed from the complainant was recovered. He took issue with the manner the trial court analyzed the evidence adduced by the prosecution witness to convict the Appellant. He explained that by the time the robbery took place, the Appellant had ceased to work for the complainant. It was the Appellant's case that there was no evidence to support the testimony of the complainant that it was the Appellant who opened the gate for him on the material night of the robbery.

Learned counsel was of the view that the evidence of the complainant and his wife was not corroborated by that of the house help. He urged the court to discount the testimony of the house help because it was not clear who had the duty of releasing the dogs on the night of the robbery. The Appellant denied authoring the note which allegedly warned the house help to keep off the house because there was going to be a robbery. He submitted that the court should not read too much on the evidence adduced by the complainant which was to the effect that one of the robbers had demanded to be availed a copy of the Appellant's identity card. This was because even if such demand was made, the Appellant had already left the complainant's employment at the time of the robbery. He accused the trial court of not testing the evidence that the Appellant had adduced in form of an alibi defence. He submitted that there was contradiction between the evidence of the complainant, his wife and the house help. He was of the view that the said evidence was concocted to implicate the Appellant in the crime because of an existing grudge. He submitted that the reason why the Appellant was implicated in the crime was because the complainant did not want to pay him his outstanding three (3) months' salary. He submitted that the house help had a grudge against the Appellant due to a love triangle. He urged the court to investigate the circumstances of the arrest of the Appellant. This was because the Appellant was arrested sometime after the alleged commission of the crime. He urged the court to allow the appeal.

Miss Matiru for the State opposed the appeal. She submitted that the Appellant was present in the compound when the robbery took place. In fact, it was the prosecution's case that it was the Appellant who opened the gate for the robbers. The Appellant was employed as a watchman at the material time. She submitted that when the complainant arrived home, he noticed that the dogs had not been released from their kennels. The Appellant did not tell the complainant that there was a problem in his house. When the Appellant entered the house, he was confronted by a gang of robbers who proceeded to rob him. His wife and children had been held hostage. After the robbery, the Appellant went underground. He was arrested when the complainant learnt of his new place of employment. Miss Matiru submitted that the prosecution had established to the required standard of proof that indeed the Appellant participated in the robbery of his employer. She urged the court to discount the submission made on behalf of the Appellant which was to the effect that there existed a grudge between the Appellant and the complainant or that there was a love triangle between the Appellant, the house help and the house maid. She urged the appeal to be dismissed.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellant on the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

In the present appeal, we have re-evaluated the evidence adduced before the trial court. We have also considered the grounds of appeal put forward by the Appellant and the submission made by learned counsel during the hearing of the appeal. The Appellant was convicted essentially on the basis of the evidence adduced by PW1 Timothy Mugambi Muthaura (the complainant), PW2 Jane Wanja Muthaura and PW5 Victor Barasa Wamalwa. According to the complainant, on 13th February 2006, as he was heading home after finishing his evening studies at the Chiromo Campus of the University of Nairobi, he saw several missed calls. The reason he had not taken the calls earlier was because while studying he had put his phone on silent mode. The missed calls were from his wife PW2 Jane Wanja Muthaura and PW5 Victor Barasa Wamalwa who was his caretaker/gardener. It was about 8.00 p.m. at the time. He called PW5. PW5 told him that while he was preparing to go to his home for the day, he found a piece of paper with a short message at the gate. The message had been left for him by the Appellant. The Appellant was at the time employed by the complainant as his watchman. According to PW5, the message in the note read thus:

“Dear Bavo, unapo ondoka jioni beba kila kitu chako, iwe nguo iwe kiatu, uende. Leo kutakua kubaya.”

This note was produced as a prosecution’s exhibit during trial. PW5 was concerned and called complainant. Upon receiving the information, the complainant decided to call the then OCS of Spring Valley Police Station. He was called Mr. Lumatete. Mr. Lumatete informed him that he had been transferred from the station.

The complainant decided to go home. When he reached his house, the Appellant opened the gate for him. The complainant asked the Appellant if everything was okay. The Appellant answered in the affirmative. The complainant parked the car in the garage. He noticed that the dogs had not been released. He went to the front door and tried to enter the house. The house was locked. He knocked at the door. The door was opened by three men holding pangas. They told him to surrender his mobile phone and his money. He complied. He was robbed of Kshs.10,600/-. They demanded that he gives more money that he kept in the house. He told them that he did not have any money in the house. He was then escorted into the sitting room. He found his wife, three children and the housegirl tied with ropes. There were two more robbers inside the house. They demanded to be given his ATM card including the password. He complied. One of the robbers demanded that he gives them the keys to his car. He complied. They took the car and went to his bank where they managed to withdraw Kshs.16,000/- from the account. After their return, they took away electronic items from his house such as the television set, the radio, DVD and digital camera. They also took his gas cylinder and vandalized the motor vehicle by removing the DVD player and speakers. They also took a computer and a scanner. They robbed his wife of her two mobile phones. They took all these items in motor vehicle Registration Number KAQ 260V which was later recovered by the police near Kencom House in the CBD.

After the robbery, the Appellant was nowhere to be seen. The complainant testified that as they were waiting for the return of the robbers who had gone to get money from the bank using his ATM card, one of the remaining robbers asked him to return the photocopy of the identity card of the Appellant which he had kept on employing the Appellant. The complainant complied and handed over the photocopy of the identity card of the Appellant. The complainant further testified that it was the duty of the Appellant to release the dogs to roam around the compound at night. On the material night, the Appellant had not released the dogs. PW5 PC Josiah Nyabera arrested the Appellant in South B when he received information that the Appellant was there training with a security group known as Eveready. He arrested the Appellant. After concluding investigations, he charged him with the present offence.

When he was put on his defence, the Appellant testified that he was framed by the complainant because he did not want to pay him the sum of Kshs.12,000/- which was his four months’ salary arrears. He told

the court that he left employment on his own volition long before the robbery incident. He was employed by Eveready on 10th November 2005. He was surprised when he was arrested on 3rd March 2006 on allegation that he had robbed the complainant. He denied the charge. He requested the court not to consider the evidence adduced by PW5 because PW5 had a grudge with him because he was not happy that the house maid called Wawira was his girlfriend. It was his case that the entire case was framed upon him.

Upon re-evaluating the evidence adduced, it was clear to us that indeed the prosecution proved, to the required standard of proof beyond any reasonable doubt, that the Appellant participated in the robbery. The prosecution adduced evidence which established the following: first, that the Appellant prior to the robbery warned PW5 (a man from his home district) of the impending robbery. He wrote him a note warning him to stay away from the compound because of what was going to take place that night. The Appellant was required to release the dogs for the night. This was for the purposes of enhancing security during the night. He did not release the dogs as was his duty. When the complainant reached home, the Appellant did not inform the complainant that there were robbers inside the house. After the robbery, the Appellant disappeared from the scene.

In our re-evaluation of the evidence, it was clear from the prosecution's evidence that it was the Appellant who granted access to the complainant's compound to the robbers. It was instructive that the robbers were especially interested in the photocopy of the identity card of the Appellant. This clearly proved that the Appellant was part and parcel of the robbery. Although none of the prosecution witnesses adduced evidence to the effect that the Appellant participated in the robbery itself, in our view, **Section 20(1)(b)** of the **Penal Code** applies. The said **Section** provides as follows:

“Where an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –

a. ...

b. ***every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence.***“

Try as we may, we are unable to disagree with the finding made by the trial court at page 3 of its judgment when it stated as follows:

“With regard to the 3rd Accused (the Appellant) the court finds as follows, there was evidence of opportunity that places him at the scene. He worked as a watchman for the complainant. He reported on duty on the material day and opened the gate and let the complainant in. This evidence places the accused person at the scene. His conduct cannot be said to be consistent with innocence. He does not on that day set the dogs on the loose as he usually does. He disappears from his place of work immediately after the robbery. This is conduct that is not consistent with innocence. He also leaves a note to the shamba boy for whom he secured a job for in the complainant's premises warning him to leave the complainant's place.”

It is clear from the foregoing that the Appellant's appeal lacks merit and is hereby dismissed. We have considered his defence and it does not raise any issues that would otherwise dent the strong evidence adduced against him by the prosecution witnesses. The conviction and the sentence of the trial court is upheld. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF DECEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE