



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CR. APPEAL NO. 54 OF 2012

STEPHEN MUTUKU IVOVO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the conviction and sentence in Criminal Case No. 1349/2010 in the Principal Magistrate's Court at Kajiado (Hon. W. N. Kaberia, SRM))

Judgment

1. The Appellant, Stephen Mutuku Ivovo (“Appellant”) appeals from a conviction of robbery with violence contrary to section 296(2) of the Penal Code. He argues primarily that the charge sheet was fatally defective and therefore incapable of sustaining the charge. Alternatively, he argues that it was an error for the Learned Trial Magistrate to convict him in the absence of testimony from vital witnesses namely the complainant as named in the charge sheet. The Appellant also argues that the Learned Trial Magistrate acted in error by relying on contradictory and inconsistent evidence by the Prosecution witnesses. Finally, the Appellant contends that the evidence is insufficient to establish guilt beyond a reasonable doubt. We reverse the conviction on all the four grounds.
2. On the night of 30th September, 2010, Oil Well Petrol Station in Kajiado town was attacked by a number of assailants. While the number of assailants is unknown, the destruction they wrought at the Petrol Station is well documented. According to Mohamud Shariff Ali (“Mohamud”), who is the director of the firm which operated the Petrol Station, and who testified as PW1 at the trial in the court below, the trail of destruction left behind included the following: two people dead; Kshs. 334,002 in cash stolen; Safaricom Scratch cards worth around Kshs. 115,000; Yu Scratch cards worth Kshs. 6,000; Zain cards worth Kshs. 8,500. In addition, the following properties were incurred damages: the safe worth Kshs. 81,000; Shop door worth Kshs. 12,000; Fence worth Kshs. 2,000; Window worth Kshs. 20,000; Car window worth Kshs. 12,000; Cash drawers worth Kshs. 5,000. Hence, according to PW1 goods worth Kshs. 512,296 were stolen from the Petrol Station while the total damage to the property was estimated at Kshs. 151,000.
3. As the Learned Trial Magistrate writes in his judgment, it is unclear when and how the robbery was reported to the Police. The script begins with the Police waking up Mohamud at around 5:00am on October 1st, 2010 to tell him about the mayhem at the Petrol Station. The Police quickly swing into action. Since some of the stolen items were phone scratch cards whose serial numbers could be easily traced, the Police apparently focused on this as the primary mechanism for catching the assailants or at least leading to them.
4. It was thus that the trail that apparently led to a Ben Kidua Ayumba (“Ben”). Ben testified as PW2. He says that he was digging a pit latrine on October 1st, 2010. At around 8:00 am, the Appellant approached him with an offer to sell him some Safaricom scratch cards. He purchased

- at least two. The two were serial numbers 100352988805 and 10035298809. It was when he fed the scratch cards to his Mobile phone number 0725-110456 that the investigators caught up with him. By this time, the investigators – James Kimuhu and Inspector Japheth Kilungu – had made contacts with Safaricom and could easily trace the mobile phone number in question.
5. The investigators easily persuaded Ben to report to the Police Station. There he gave his account which was enough to persuade the investigators that he was not part of the criminal gang that had attacked the Petrol Station. Instead, they would use him as an “attractive nuisance” to bait the real culprit, the Appellant. They asked Ben to make a call to the Appellant under the guise that he had found “work” which they could do together. This brought Appellant to the appointed place whereat he was arrested. According to James and Japheth, the Investigators, the Appellant confessed that he had taken part in the robbery and led them to two other people – Joseph Mulwa Mutua and Joseph Ndolo Mutua. The three were subsequently charged with the offence of robbery with violence.
 6. The Prosecution case was primarily as laid out above. Against it, the Learned Trial Magistrate put the Appellant on his defence and acquitted his co-accused. After the Appellant gave an unsworn statement and called no witnesses in his defence, the Learned Trial Magistrate proceeded to convict him and sentence him to death as mandatorily required for the conviction for the offence of robbery with violence.
 7. When the appeal came out for hearing, the Learned State Counsel, Ms. Maingi, conceded the appeal. She reported to the Court that after considering the entire case file she had formed the firm view that the evidence on record cannot sustain the conviction. In particular, she was worried about the paucity of evidence connecting the Appellant with the crime. She thought that the two scratch cards were, without more, insufficient to connect the Appellant with the heinous felony.
 8. We think that the Learned State Counsel was right to concede the Appeal for both the reason that she stated – the insufficiency of the evidence to overcome the very high burden of proof required in criminal cases – as well as the other reasons argued by the Appellant.
 9. We begin with the charge sheet. We agree with the Appellant that there was such substantial variance between the particulars in the charge sheet and the evidence adduced at trial that it was simply not tenable to convict the Appellant on the record. Against the testimony of Mohamud reproduced above, the Charge Sheet, which remained un-amended throughout the trial read as follows:

On the night of 30th September, 2010 and 1st October, 2010 at Oil Well Petrol Station in Kajiado Township in Kajiado District within Rift Valley Province, jointly with others not before court while armed with crude weapons namely axes, pangas and iron bars robbed off Peter Owiti Ogweno Kshs. 150,000 cash, 8 scratch cards of Safaricom of kshs. 20 each, 1 scratch card of Zain company of Kshs. 50, 2 scratch cards of Zain company of Kshs. 20 each, and one pair of shoes all valued at Kshs. 152,090 the property of the said Peter Owiti Ogweno and immediately before or immediately after such robbery wounded the said Peter Owiti Ogweno and killed Ntoonto Kiroka and Solomon Munywoki Kivuva.

10. We first note that the items listed on the Charge Sheet are so substantially different than those that Mohamud claimed were stolen from the Petrol Station that it is farcical to claim that they relate to the same criminal transaction. Mohamud spoke of cash in the amount of Kshs. 334,002 as stolen as opposed to the Kshs. 150,000 in the charge sheet. He also spoke of Safaricom Scratch cards worth around kshs. 115,000; Yu Scratch cards worth Kshs. 6,000; Zain cards worth Kshs. 8,500 as opposed to 8 scratch cards of Safaricom of Kshs. 20 each, 1 scratch card of Zain company of Kshs. 50, 2 scratch cards of Zain company of Kshs. 20 each appearing on the charge sheet. Mohamud did not speak of any pair of shoes. This material discrepancy, in itself, would raise reasonable doubt and entitle the Appellant to an acquittal.
11. Second, we note that the person who is named as the victim of the crime in the charge sheet, namely, Peter Owiti Ogwena, never featured anywhere in the trial. It is unclear who Peter Owiti Ogwena was; but whoever he was, it would have been impossible to prove the guilt of the Appellant without his evidence if he was, indeed, the victim.
12. Third, no evidence whatsoever was proffered to demonstrate that the assailants were armed with

the offensive weapons the Charge Sheet claims that they had. A charge sheet that is at variance with the evidence is fatally defective and cannot sustain a conviction. See *Yongo v R* 1983 EA 319.

13. In the end, therefore, the Learned State Counsel is right: the only evidence which tenuously links the Appellant with the crime is the testimony of Ben about the two scratch cards. As we have stated before, we agree with the Learned State Counsel that this is simply not enough to prove the crime of robbery with violence.
14. Consequently, this Court allows the appeal, sets aside the conviction and sentence imposed and 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 3rd day of December 2013.

JOEL NGUGI, Judge

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B. T. JADEN, Judge

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