



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 97 of 2009

BENSON CHEGE .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was convicted for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge were that on 8<sup>th</sup> October 2008, at Rukuma Village in Kiambu West District within Central Province, while armed with clubs (*rungus*) he robbed Bernard Gachie Mburu of money, Ksh 4,000, a mobile phone, Nokia 2600 valued at Kshs. 3,000 and at immediately before or immediately after the time of such robbery used actual violence against the said Bernard Gachie Mburu.

2. Upon conviction, the Appellant was sentenced to death, as by law prescribed. He subsequently lodged an appeal whose amended grounds of appeal may be summarized as follows:

1. **The charge sheet was defective in that the particulars supported Section 296 (1) and not Section 296(2) of the Penal Code;**

2. **The trial Magistrate failed to comply with Section 77(1) and (2) of the former Constitution and Sections 198 and 207 of the Criminal Procedure Code especially during plea taking thus prejudicing the Appellant;**

3. **The circumstances of identification were not conducive to warrant a positive identification;**

4. **He was convicted on the evidence of a single identifying witness whose evidence contravened Section 163(c) of the Evidence Act;**

5. **The evidence was inconsistent and contradictory and that the case was not proved beyond reasonable doubt;**

6. **The trial Magistrate shifted the burden of proof to the Appellant;**

7. **The judgment was scanty and violated Section 169(1) of the Criminal Procedure Code.**

3. On the **1<sup>st</sup> ground** of appeal the Appellant submitted that the charge sheet was defective for not

including a vital ingredient of the offence, namely, “*dangerous or offensive weapon*” and “*in company with one or more other persons.*”

4. In support of this submissions, the Appellant referred us to the cases of *David Odhiambo & George Omondi Criminal Appeal No. 5 of 2005, HCCr. A No. 442 and 444 of 2002* and *Mwaura and Others vs. Republic, [1973] EA 373* where the Court in dealing with the issue as to whether a *panga* or iron bar, a wheel spanner, a king shaft, screwdriver, a stone and a chisel were “*dangerous or offensive weapons*” for the purpose of preparation to commit a felony under **Section 308** of the **Penal Code**, held that:

**“in our view, ‘dangerous or offensive weapon,’ means any article made or adapted for use for causing injury to the person such as a cash knuckleduster or revolver or any article intended by the persons found with them for use in causing injury to the person”**

5. We have examined the record of proceedings including the charge sheet. The relevant particulars in the charge sheet read as follows:

***“Benson Chege: on the 8<sup>th</sup> day of October 2008 .....while armed with clubs, robbed Bernard Gachie Mburu of .....and at or immediately before or after such robbery time of such robbery used violence to the said Bernard Gachie Mburu”***

6. The Court of Appeal in the case of *David Odhiambo & George Omondi Criminal Appeal No. 5 of 2005*, cited above held that:

***“The charge of robbery (under S. 296(2) of the Penal Code) brought against the appellants was, with respect, defective as it failed to allege a vital ingredient thereof, namely that the knife was a dangerous or offensive weapon. The conviction recorded against each appellant must accordingly be quashed...”***

7. The above position was maintained by the Court of Appeal in *Daniel Morara Mose v Republic, Criminal Appeal No. 86 of 2000*, where the particulars of the charge failed to indicate that the appellant was armed with a dangerous or offensive weapon. The court held that;

***“...the omission referred to above constituted a defect in the charge which may have embarrassed the conduct of his (the appellant’s) defence with the resultant possible failure of justice. On this account, we think that such defect is not curable under Section 382 of the Criminal Procedure Code in the sense that the particulars of the charge did not disclose an offence known to the law under Section 296(2) under which the charge was laid. Consequently we allow the appellant’s appeal, quash his conviction, set aside his death sentence and order that he be set at liberty forthwith unless held in custody for any other lawful.”***

8. In this case, it is true that the charge sheet does not describe the clubs as offensive and dangerous weapons. There is however, additional evidence that the complainant was beaten by his assailant. This fact is supported by the evidence of **PW1** who testified that he was attacked and hit by his assailant. **PW3** the father of **PW1** also testified that he found **PW1** at the scene lying down and bleeding. The doctors’ report also confirms that the complainant suffered injuries as a result of trauma from a blunt object. The offence of robbery with violence as described by **Section 296(2)** of the **Penal Code** shall be sufficiently proved if any of the three ingredients in that section are proved.

9. In view of the foregoing, we find that the charge is not defective since the case establishes one of the other elements of the offence of robbery with violence and thus, no prejudice was occasioned to the Appellant.

10. With regard to the **second ground of appeal**, the Appellant submitted that his constitutional rights under **Article 77** of the **Constitution** (repealed) was violated especially in the process of plea taking for reasons that he was not accorded interpretation. He submitted that the record of proceedings shows that the language of the Court was not indicated. He also submitted that by so doing, the Court violated

provisions of **Section 198** and **207** of the **Criminal Procedure Code** and **Section 77 (1)** and **(2)** of the repealed Constitution.

11. The Appellant referred us to the case of **Jackson Leskei vs. Republic High Court Criminal Appeal No. 313 of 2005**. In the said case the Court of Appeal held that:

*“This and several other cases we have handled before, show the grave danger inherent in the failure by the trial Court to record the essential details in proceedings before it: the name of the officer trying the case; the prosecutor and his rank; the court interpreter or clerk, and the language or languages of the proceedings; the language used by each witness; that judgment was pronounced; the date thereof, and in whose presence, etcetera. These are as important as the evidence and form part of the fair process of justice, the omission of which might affect an otherwise sound conviction.”*

12. On interpretation, the applicable provisions of the law are as follows:

**Sections 77 (2)** of the **repealed Constitution** which provided that:

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

*(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;*

*(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge,*

**Section 198 (1)** of the **Criminal Procedure Code** provides

*“Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.”*

**Section 207** of the **Criminal Procedure Code** provides for the procedure to be followed in entering the plea to the charge that an accused person is facing. Subsection 1 requires that

*“the substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement. “*

13. On perusal of the trial Court’s proceedings, we find that during the plea taking process, the Court, did not state the language used in reading the charges to the accused persons. The Appellant was not represented by Counsel at the trial. At page 1, the record reads:

*“The substance of the charge and every element thereof has been stated by the Court to the accused person, in the language that he understands who being asked whether he admits or denies the truth of the charges replies – “Not guilty”*

Thereafter the record shows that all witnesses testified in Kiswahili and were cross-examined by the Appellant. The Appellant too testified in Kiswahili.

14. The question for determination is whether the Court by recording that the charges were read, in the language that the appellant understood, without indicating the language that was used, violated the Appellant’s right to a fair trial. We are of the view that the omission did not render the trial a nullity since from the record of proceedings, it is discernible that the Appellant appreciated the nature of the charges facing him and participated in the Court proceedings by cross-examining the prosecution witnesses and giving his own defence testimony. Nonetheless, we underline the imperative duty of the trial court to indicate the language of the court at all stages of the criminal trial.

15. In the **third ground of appeal**, the Appellant challenged the circumstances of his identification.

He submitted that the trial court did not inquire into the circumstances under which the identification was made, in particular, the nature of light during the attack which enabled the witness to recognize his assailant. He submitted that in the absence of such an inquiry, the evidence of recognition could not be safely held to be free from error.

16. To support his argument, the Appellant cited the case of ***Charles O. Maitanyi vs. Republic, Cr. Appeal No. 6 of 1986, (1986) KLR***. The Appellant further submitted that according to the testimony of **PW1**, the attack was abrupt and staged from behind, thus not affording the opportunity for positive identification. Related to the issue of identification, is the production of the sweater by the prosecution to link the Appellant to the offence. The Appellant submitted that the prosecution did not prove that the sweater belonged to him.

17. **PW1** testified that he was attacked on his way home on 8<sup>th</sup> October 2008. The testimony of **PW1** on the sweater was as follows:

*‘...He removed his sweater. I fell down....The person ran away. I still held his sweater. It is yellow. It is the one in court.*

**PW2** on his part testified that

*“...The night of assault, I found a sweater and a wood/metal bar at the scene. I took the exhibit and I handed them over to the police...”*

18. The issue as to the ownership of the sweater must be looked at in the context of the whole evidence of identification. Evidence collected at the crime scene is relevant in assisting in the linking a suspect to the crime alleged. However for the clothing worn by the suspected criminal, there was need on the part of the prosecution to connect the sweater to the crime scene and the Appellant. It was not enough to say that the sweater belonged to him without showing a connection of the sweater, the Appellant and the crime scene. This is more so since the circumstances of identification of the assailant in this case were difficult; the complainant having been attacked at night and from behind. The evidence of **PW6** the investigating officer did not attempt to link the sweater, the Appellant and the scene of crime.

19. The trial court in evaluating the evidence of identification had this to say:

***“...PW1 informed his father PW3 that it was accused who had robbed him. There was moonlight during the robbery. Accused left a sweater at the scene of the robbery. Accused defense is a denial. He denied having been at the scene of the crime. He said that the sweater recovered was not his because his was still at home. PW1’s evidence is that he recognised accused whom he knew well before that day. He also retained his sweater....”***

20. The determination of this appeal largely rests on identification of the assailant by a single witness. It is not in doubt that the attack on **PW1** took place at night. The factors that the court must consider in relying on the evidence of a single identifying witness under difficult circumstances have been long laid down in various cases. In the case of ***Charles O. Maitanyi vs. Republic, Cr. Appeal No. 6 of 1986, (1986) KLR, 198***, the Court of Appeal held that

***“ although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. ...***

***When testing the evidence of a single witness, a careful inquiry ought to be made into the nature of light, available conditions and whether the witness was able to make a true impression and identification.”***

21. While the evidence of recognition is safer than the identification of a stranger, the Court must

satisfy itself as to whether such evidence meets the required standard. The Court in Charles O. Maitanyi vs. Republic, (supra) stated that,

*“it is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.*

*The need to exercise care even in cases of evidence of recognition exists, R. v. Turnbull (1976) 3 ALL ER 549, page 557, the court stated that recognition may be more reliable than identification of a stranger, but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”*

22. We find that it was unsafe for the trial court, without exercising such caution and testing the circumstances of identification by **PW1**, to enter, a conviction on the basis of such evidence.

23. The appellant also raised **another aground of appeal** in which he referred to the court to the inconsistencies in the prosecution testimony. The Appellant pointed out that while **PW1** testified that he reported an offence of assault on 8<sup>th</sup> October 2008 at midnight, this was contradicted by **PW3** who testified that they took **PW1** to the health centre and went home later. The Appellant further pointed out that **PW1** contradicted himself when he said that he had not seen the Appellant between 8<sup>th</sup> October 2008 and 10<sup>th</sup> October 2008 but later said that he met the Appellant on 09/10/08. He urged the Court to disregard this testimony as incredible on the basis of **Section 163 (c) Evidence Act**.

24. Mr. Mulati, conceded the Appeal on the ground that the prosecution evidence did not support a conviction. He admitted that **PW1** and **PW3** gave contradictory testimony regarding the arrest of the Appellant. He noted that **PW1** testified that he explained to his father who led the police to arrest the appellant, while in cross examination, **PW1** said that he was present during the arrest. **PW3**, the complainant’s father did not mention that **PW1** was present during that arrest. Learned State Counsel also noted the inconsistency in the evidence of **PW4** and **PW5**; that **PW4**, testified that he got a call from **PW5**, reporting that someone had been assaulted while **PW5** on the other hand testified that it was **PW4** who called him

25. From the record of proceedings, it is not clear if **PW1** reported the crime on the material night. His father **PW3** indicates that they went to the police the day following the attack. He reiterated this fact when he stated during cross examination that the attack was at night thus he could not go to the police to report. **PW1** indicated that they reported the crime on 8<sup>th</sup> October 2008 at midnight and **PW6** testified that the complainant and his father reported on 8<sup>th</sup> October 2008 at 3.am. **PW3** on the other hand testified that they reported to the police the following day.

26. **PW4**, the chief testified that **PW5** called him at midnight to report that someone had been beaten; yet, **PW5** indicated that the crime was reported at 3.00 a.m. We do not find an inconsistency as to the fact the **PW4** was called by **PW5**, since **PW4** indicated that **PW5** called him to inform him that someone had been beaten. **PW5** did not testify about this particular phone call. **PW5** indicated that **PW4** called him on 9<sup>th</sup> October 2008 to inform him that he had received a request to assist in the arrest of the accused. It is however, true that the **PW1** contradicted himself by testifying that the he was not present during the arrest of the Appellant and later indicated that he was present.

27. Lastly we scrutinized the record in view of the ground of appeal which questioned the legality of the judgment. It was urged that the judgment contravened the provisions of **Section 169** of the **Criminal Procedure Code**.

28. We do not find that the judgment of the trial Court failed to meet the requirements prescribed by **Section 169** of the **Criminal Procedure Code**. We however, agree with the appellant that the trial magistrate’s reasoning that,

***“Accused defence that he was at home has no supportive evidence. Neither was there evidenced to support his defence to that his sweater was at home.”***

This amounted to shifting the burden of proof on the Appellant.

**29.** From the various reasons set out above, we are satisfied that the Appeal must succeed. Therefore, the conviction is quashed, the sentence set aside, and the appellant ordered set at liberty forthwith, unless otherwise lawfully held.

**SIGNED DATED and DELIVERED** in open court this **27<sup>th</sup>** day of **February 2012**.

**FRED A. OCHIEN’G**

**L.A. ACHODE**

**JUDGE**

**JUDGE**