



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 502 OF 2010

*(From Original Conviction and Sentence in Criminal Case No. 4006 of 2009 of the Chief Magistrate’s Court at Mombasa: **R. Ondieki – S.R.M.**)*

JOHN NJERU IRERI
..... APPELLANT

=VERSUS=

REPUBLIC
RESPONDENT

JUDGEMENT

The Appellant namely **JOHN NJERU IRERI** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Mombasa Law Courts. The Appellant together with three (3) other accused persons was first arraigned in court on 14th February 2009 facing two (2) counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The Appellant entered a plea of ‘*Not Guilty*’ to both counts and his trial commenced on 21st January 2010. The prosecution led by **INSPECTOR NGOMO** called a total of eight (8) witnesses in support of their case.

The prosecution case revolved around a robbery incident which occurred on 26th November 2009 at about 12 noon at a mobile shop situated at the Lebanon Roundabout in Mombasa. **PW2 SAID ABDALLAH** and **PW3 ELISHA SADUNA WAGONGO** both testified that they were on duty in the shop busy working on the material date and time. At about noon, five armed men burst into the said shop. The men beat them up together with their customers and robbed them of both cash, and mobile phones as well as airtime scratch cards. After collecting the loot the robbers fled into a nearby matatu and escaped. **PW2** who sells phones electronics and airtime told the court that he was robbed of cash Kshs.15,000/- mobile phones, including dummy phones on display in his shop and airtime cards all valued at kshs.57,000/-. On his part **PW3** who operates his business in the same shop told the court that he was robbed of cash kshs.3,000/- and six (6) mobile phones. The matter was reported to police. The following day police arrested the Appellant inside his house at Tudor slums and recovered two (2) dummy phones which were identified as amongst the items stolen from the shop. The Appellant then led police to the homes of the other three accused persons who were also arrested. Upon completion of police investigations all four accuseds were brought to court and charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave a sworn defence in which he denied any and all involvement in the robberies in question. On 18th November 2010 the learned trial magistrate delivered his judgement in which he convicted the Appellant on both counts of Robbery with Violence and thereafter sentenced him to death. The other three accused persons were acquitted of all charges. Being aggrieved by both his conviction and sentence the Appellant filed this present appeal. The Appellant who acted in person during his appeal chose to rely entirely upon his written submissions which with the leave of the court had been duly filed. **MR. JAMI** learned State Counsel who appeared for the Respondent State opposed the appeal. Being a court of first appeal we are duty bound to re-examine and re-evaluate all the evidence adduced before the trial court and to draw our own conclusions on the same [see **AJODE –VS- REPUBLIC [2004]2 KLR**]. Having carefully perused the written submissions filed by the Appellant in this case we note that he raised the following grounds for his appeal:

- (1) Defective charge sheet
- (2) Identification
- (3) Recent possession and
- (4) Failure to consider his Defence

We shall now proceed to consider each ground of this appeal individually. On the first ground the Appellant submits that the charge sheet as framed was defective as it failed to give an accurate description of the stolen property. He argues that the time when the offence was allegedly committed was not indicated in the charge sheet and that there was absence of details like make and colour of the mobile phones alleged to have been stolen. We have ourselves anxiously perused the said charge sheet bearing in mind Section 137(a)(ii) of the Criminal Procedure Code which provides:

“(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence”

A charge sheet is meant to be put a brief synopsis of the evidence to be adduced. As such it is not required to state in great detail all the elements of the offence. A brief summary will suffice. In our view the failure to indicate the time of offence is not a fatal defect in the charge sheet. All the specific details of the incident are expected to be adduced through the evidence of the witnesses. In our view this charge sheet complied properly with Section 137(a)(ii). It gives reasonably clear information on the offence. We found in it no fatal defect and thus we do dismiss this ground of the appeal.

Before proceeding to consider the remaining grounds raised by the Appellant in his appeal we will at this point consider an issue raised by the Appellant during his oral submissions to court. The Appellant sought leave (which leave was duly granted) to adduce additional evidence being OB No. 7 of 20th November 2009 of Makupa Police station. A certified copy of the said OB extract was produced in court. The Appellant's contention is that whereas the reference on the charge sheet is OB No. 7, the said OB No. 7 has no connection to the charge against him. It is quite correct that the extract produced in court being OB No. 7 of 26th November 2009 relates to a visit to a scene and indeed appears to have no connection with the arrest of and/or the charges against the Appellant or this robbery incident at all. However, we do agree with the learned state Counsel that this was probably the result of a clerical error and failure to quote the correct OB number on the charge sheet. The OB is not evidence and cannot be deemed to be proof of any fact in issue. The misquoting of an OB number on a charge sheet does not prejudice the Appellant in any way. By his own defence the Appellant conceded that he was arrested by police and taken to Makupa Police Station thus there is no controversy over the fact of his arrest. In our view the issue of the OB number is a non-issue and is certainly not a valid ground of appeal. We hereby dismiss this particular ground.

The next ground of appeal raised by the Appellant was that of identification. The robbery incident occurred at 12.00 noon. It was broad daylight. Both complainants tell the court that they were able to see and identify the Appellant as one of the robbers who invaded the shop. **PW2** states at page 5 line 8:

“Five people entered armed including the 1st accused [the appellant herein]. The 1st accused jumped over the display and ordered me to sit on the floor. The 1st accused then took money from the drawer. I stood less than 1 meter from him. He had a pistol. He had no mask on. There were enough lights. He had a hat on and wore safari boots. There was electrical lights and daylight. He kicked me on the left ribs. He threatened to shoot me. I surrendered ...”

The witness here has given a very detailed account of the role which the Appellant played in the robbery. Obviously **PW2** must have had a clear and unhindered view of events to enable him gives such a graphic account of the events. He told the court that the Appellant stood less than one meter away and even spoke to him giving him ample opportunity to see him well. **PW3** further clarified that although the four other robbers had covered their faces the Appellant who he said appeared to be the leader did not cover his face. He remained unmasked throughout giving a clear view of his facial features.

The evidence of **PW2** with respect to identification is corroborated by **PW3** ‘*Elisha Saduna*’ who also fell victim to the same robbers in the same shop. **PW3** in his evidence at page 7 line 24 stated:

“There was enough lights. There was one who was incharge, the 1st accused [the Appellant herein]. The rest had masks on the face. I was unable to identify them. I was able to identify the 1st accused person. I identified the 1st accused by appearance”

Under cross-examination by the Appellant **PW3** reiterates his testimony saying at page 7 line 30:

“You had a pistol and I identified you. I saw you threaten a customer and you ordered us to release whatever we had in our possession You did not cover your face. You were in charge and you moved from here and there. So I had enough time to identify you. You were moving around the shop giving commands ...”

Thus **PW3** just as **PW2** did testify that the Appellant made no attempt to cover his face. He spoke to both witnesses and both **PW2** and **PW3** told the court that the Appellant appeared to be the leader of the whole operation. Both witnesses state that the Appellant’s features were distinct and distinguishable as they both say that he ***“looked like a Somali”***. This fact was also referred to by **PW4 PC ZAKHAYO CHIRCHIR** the arresting officer who stated at page 10 lien 30:

“You resemble a Somali”

Where three (3) witnesses have noted the same thing about the Appellant’s features there can be no possibility of a mistaken identity.

From our own analysis this evidence on identification was overwhelming. The daylight, the lights in the shop and the close proximity the two eyewitnesses had to the Appellant all indicate that the circumstances were conducive to a clear and positive identification. We note that although the police did mount an identification parade the Appellant declined to participate in the same saying that the police already had photographs of him. Even if as Appellant claims the police had his photograph there is no evidence and indeed no allegation that these photographs were ever shown to **PW2** or **PW3**. We are satisfied that the two witnesses have positively identified the Appellant as one of the men who robbed their shop on the material day. Their evidence squarely places the Appellant at the ***‘locus in quo’***.

At this point we feel it is instructive to consider whether the incident described by the two witnesses amounted to a Robbery with Violence as provided by Section 296(2) of the Penal Code. In the case of **OLUOCH –VS- REPUBLIC [1985] KLR 549** the Court of Appeal set out the three key ingredients required to establish the charge under this provision of the law. These are :

- (1) That two or more persons are involved in the incident
- (2) That the perpetrators are armed with dangerous and/or offensive weapons
- (3) That the robbery is accompanied by the use of actual violence or the threat of actual violence against the victim.

The law provides that proof of **any one** of the above ingredients will suffice to prove a charge of Robbery with Violence. In this case the appellant was accompanied by four (4) other men. There is evidence that they were armed with pistols and AK-47 rifles. Therefore at least two (2) of the laid down ingredients have been satisfied. Thirdly **PW2** told court that they were beaten, kicked and roughed up. The robbers aimed their guns at them and commanded them to comply or face certain death. On the whole we find that this incident did amount to a robbery with violence as envisaged by S. 296(2) of the Penal Code.

As a third ground of appeal, the appellant faulted the evidence of the recovery of some of the stolen items inside his residence. **PW2** told the court that during the robbery a number of dummy phones which were displayed in his shop were stolen (no doubt the robbers mistakenly believed that these were real mobile phones). **PW1 ELIZABETH OULU**, a marketer with Nokia company, told the court in her evidence that she did supply to **PW2** dummy phones of different models. **PW4 PC ZAKAYO CHIRCHIR** gave evidence that on 29th November 2009 acting on a tip-off from an informer he and other officers went to Migadini and arrested the accused inside his house. Upon searching the house police recovered two dummy phones hidden under the bed. The two phones recovered by the police were produced as exhibits **Pexb1** and **Pexb2**. **PW2** later went to the police station and identified the two dummy phones as the ones which had been stolen from his shop. Similarly **PW1** who supplied the phones to **PW2** was able to identify one of the dummy phones **Pexb1** as amongst those she had supplied to **PW2**. The Appellant did in his defence concede that he was arrested from his residence. However he makes no attempt to explain his possession of the two dummy phones. Why would the Appellant be having in his house dummy phones? There is no allegation that he sells phones. The recovery was made on 29th November 2009 three (3) days after the robbery occurred. Appellant gave no explanation for his possession of the stolen property so soon after the theft had occurred. In **R –VS- LOUGH IN 35 CR APP R69** it was held by the Lord chief Justice of England as follows:

“If it is proved that premises have been broken into and certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury [or the court] can infer that he is the housebreaker or shop breaker”

A similar analogy would apply here. The doctrine of **‘recent possession’** squarely applies. The only way the Appellant could have had in his possession the dummy phones stolen from the shop of **PW2** barely three (3) days after the theft occurred is because he was an active party in the theft. This evidence of recent possession serves to buttress the evidence of identification discussed earlier.

Still on this point the accused raised issue with the fact that **PW4** the arresting officer when re-called to testify at the instance of the Appellant was not re-sworn. The appellant submits that this omission constituted an infringement of his right to a fair trial. We have perused the record closely and note that **PW4** first testified on 25th March 2010. The appellant applied that the witness be stepped down in order to avail the OB and Cell Register from Makupa Police Station. This request was allowed and **PW5** was duly stepped down. On 6th May 2010 **PW5** returned to testify. As correctly pointed out by the Appellant the said witness was not sworn but proceeded to be cross-examined by the Appellant. Did this omission so prejudice the trial as to render it a nullity? We think not. In our view this was a minor omission which did not affect the validity of the trial. The Appellant did proceed to cross-examine the witness who we note in any event did not produce the OB or Cell Register. The issue of the arrest of the Appellant is not in any dispute. As a court we are mindful of the provisions of Article 159(2)(d) of our Constitution which exhorts the courts to administer justice without undue regard to technicalities. This omission did not prejudice the Appellant at all and we therefore dismiss this ground of the appeal.

The final ground of appeal raised by the Appellant is that the trial court failed to consider his defence. We have looked at the judgement and find that this is not correct. At page 35 line 3 of his judgement the learned trial magistrate in dismissing the Appellant's defence stated as follows:

“The 1st accused [the appellant herein] attempted to raise an issue of bad blood between him and Joseph Mwita but we are not told why the 1st accused was not arrested on 29th November 2009 at the bar by Mwita as alleged by the 1st accused. The court is not told the role Mwita played to connect the 1st accused with the robbery. This is a failed attempt to distract the court's mind to the issue of bad blood which does not exist.

Finally the first accused has avoided the 26th November 2009 [the date of the robbery]. He does not neither [sic] deny having been at the scene or somewhere else. So the prosecution evidence on the robbery having taken place on 26th November 2009 involving the 1st accused and four others is not rebutted”

It is clear here that the trial magistrate did duly consider the Appellant's defence but dismissed the same as unworthy of consideration. On our part we have no reason to disagree with this finding.

The remaining issues raised by the Appellant is that the informer who led police to arrest him was not identified or called as a witness. Firstly this omission does not negate the fact of the arrest of the Appellant. Secondly the police are at liberty to protect their informers and have no obligation to reveal their identities. Based on the foregoing we are satisfied that the prosecution did mount an overwhelming case against the Appellant. We find that the two (2) charges of robbery were proved beyond a reasonable doubt and we have no hesitation in confirming the convictions meted out by the trial court.

After conviction the Appellant was allowed an opportunity to mitigate. Thereafter he was sentenced to death. This is the lawful sentence provided for by S. 296(2) of the Penal Code. As discussed earlier we are satisfied that this incident did amount to a Robbery with Violence. We therefore uphold the death penalty on Count No. 1 and the sentence for Count No. 2 is held in abeyance. This appeal therefore fails in its entirety.

Dated and Delivered in Mombasa this 22nd day of June 2012.

.....
M. ODERO
JUDGE

.....
G. NZIOKA
JUDGE

In the presence of:

Mr. Tanui for State

Appellant in person