REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 53 of 2011

CHARLES MURITHI KAVUTHA……..…. APPELLANT

VERSUS

REPUBLIC …….……..…..……RESPONDENT

(Being an appeal from the judgment/Conviction and sentence of Mr. M. Githinji, Principal Magistrate in Nkubu Criminal Case No.583 of 2009)

J U D G M E N T

The appellant was charged with five counts of robbery with violence contrary to Section 296(2) of the Penal Code.

COUNT ONE:- ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.

On the 27th day of 7th March, 2009 at Kinoro sub-location in Imenti South District within Eastern Province, jointly with others not before court being armed with dangerous weapons namely pangas and rungus robbed SAMWEL KABURU CHABARI of cash kshs.1100/-, mobile phone make Samsung and one radio cassette make Royal all valued at Kshs.22,000/- and or immediately before or immediately after the time of such robbery used violence to the said SAMWEL KABURU CHABARI.

COUNT TWO: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 29692) OF THE PENAL CODE

On the 27th day of March, 2009 at Kinoro sub location in Imenti south District within Eastern Province, jointly with others not before court being armed with dangerous weapons namely pangas and rungus robbed DINAH MUKWANJERU KABURU cash kshs.4000/-, one mobile phone make Nokia 2300 and brown leather handbag all valued at Kshs.1100/- and or immediately before or immediately after the time of such robbery used violence to the said DINAH MUKWANJERU KABURU.

COUNT THREE: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE:

On the 28th day of March, 2009 at Kinoro sub-location in Imenti South District within Eastern Province, jointly with others not before court robbed CHARITY KINANU KENNEDY cash Kshs.4,850/-, Nokia 1200 and open leather shoes all valued at Kshs.9,050/-.

COUNT FOUR: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE

PENAL CODE:

On the 28th day of March, 2009 at Kinoro sub-location in Imenti South District within Eastern Province, jointly with others not before court robbed ALFRED RIMBERIA of cash kshs.1000/- and one mobile phone make Nokia 1100/- all valued at Kshs.2100/-

COUNT FIVE: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE:-

On the 28th day of March, 2009 at Kinoro sub-location in Imenti South District of Eastern province, jointly with others not before court robbed DOUGLAS THURANIRA of cash Kshs.15,000/- and one mobile phone Nokia 1100 all valued at Kshs.20,000/=

After full trial the appellant was convicted of Count 1, 2 and 3 he was sentenced to death in count 1 and sentences on the other two counts put in abeyance. The appellant being aggrieved by the conviction and sentence preferred this appeal setting out 8 grounds of appeal however during the hearing of the appeal the appellant relied on amended grounds of appeal as follows:-

1. That the learned trial Magistrate erred in law and facts in convicting me and sentencing me to death in Count 1, 2 and 3 upon evidence of identification yet the complainants failed to identify the attackers.

2. That he further erred in law and facts in convicting me in the 3 counts without considering that the presentation of the exhibited items fell short of the standard required in law and the alleged jacket was planted on me on mere suspicion.

3. The learned trial magistrate erred in law and fact in not finding there was no direct or any strong circumstantial evidence that could be relied upon to support conviction and death sentence in this case.

4. That the trial magistrate dismissed my defence story which was on oath, hence truthful, strong and cogent enough to displace the prosecution case.

The facts of the case are that on 27/3/2009 at 11.30 p.m. the complainant, PW1 was in the sitting room with his wife, Dinah Mukwanjeru Kaburu, PW7. PW1 went for his mobile phone in another room leaving his wife in the sitting room. He heard his wife, PW7 screaming and decided to go and check what was the matter. Electricity light was on and PW1 was able to see a group of people at the door. The people prevented PW1 from going out and as they had picked keys from the door and locked PW1 from outside. The people were about 4 or 5. They shouted at PW1 demanding money or they would kill him. After some struggle the attackers broke a glass of the door and cut PW1 with a sharp object on the side of the head, cheek and left hand. The attackers threatened to kill complainant's wife unless he opened the door. PW1 opened the door, gave them his wallet which had between Kshs.7,000/= to Kshs.11,000/=.

The attackers took the complainant to his bedroom and made him to kneel down. They carried out search for 30 minutes. The attackers had taken from complainant his torch and his Samsung mobile phone worth Kshs.3000/=. The attackers took many keys of the complainant's home and car keys. The attackers drove off in complainant's car, a Toyota Corolla Saloon Reg. No.KSZ 984. The attackers took a number of personal properties of PW1 and PW7.

The neighbours who had heard screams had meanwhile called Police Officers from Kinoro police post. Police went to complainant's home and the complainant was able to make his report. The complainant(PW1) and his wife PW7 who had been injured were rushed to Chogoria Hospital. They were treated and discharged at 6.00 a.m. Police called complainant to identify his vehicle which had been recovered. Some of the items had also been recovered including items which did not belong to the complainant. PW1 and PW7 were issued with P3 forms which were later filled at Kanyakine Sub-District hospital.

During the time of robbery some of the robbers were masked but PW1 was able to see one who was tall and slim as his face was not covered who used to come to PW1 severally asking him **"Mwalimu, you are still there?"**

The appellant in his defence denied committing the offence and stated that on 28th March, 2009 he had been given a lift by DW2 Jason Muriera Ituro to Ntharene Market to see Robert Kinyua who he used to supply miraa to sell at Ntharene market. That on arrival at Ntharene market before he saw Robert Kinyua, one Kennedy Mutwiri PW4 approached him. He told him that he was a visitor and people from Meru were stealing from that place.

The appellant got to Kennedy Mutwiri's vehicle and was taken to a scene of robbery. Kennedy Mutwiri(PW4) told the victims that the appellant was the one who had committed the offence. That members of public took appellant to the road and produced a jacket which they said would be the exhibit in this case.

The appellant, during the hearing of this appeal, produced written submissions in support of his appeal. He submitted that the conditions at the time of commission of the offence were not conducive to positive identification and that the complainant did not in his evidence identify the attackers. The appellant also submitted that presentation of exhibited items fell short of the standards required in law and that the jacket was planted on him on mere suspicion. The Appellant submitted further that there was no direct or any strong circumstantial evidence that could be relied upon to support the conviction and death sentence in this case. That his defence was dismissed without cogent reasons.

Mr. Mungai learned State Counsel who represented the State opposed this appeal. The learned State Counsel urged that the appellant was identified at the scene of crime by the complainant. That the appellant had no mask on the face and the robbery took between 10-15minutes and that the appellant talked to the complainant calling him "***Mwalimu***". That the evidence of PW4 connected the appellant with the robbery in that he was arrested wearing jacket exhibit No.8. That the complainant identified the jacket as his own.

Being the first appellate court, we have the duty to re-analyze and re-evaluate the evidence which was adduced in the trial court before we make our own independent conclusion. In addition to the above, we also do appreciate and are alive to the fact that we never saw nor heard the witnesses during the trial and have given due allowance for that. Those are some of the basic principles which were set out in the case of **Gabriel Kamau Njoroge –v-Republic (1982-88) IKAR 1134.**

This case rests on the evidence of identification by a single prosecution witness, PW1. There was also circumstantial evidence which was given by PW4. Regarding the evidence of a single witness in the case of **ABDALLAH BIN WENDO & ANOTHER –V-REPUBLIC (1953) EACA 166** the court stated as follows:-

"There was a need for testing with the greatest care the evidence of a single witness respecting identification, especially when it was known that the conditions favouring a correct identification were difficult. In such circumstances what is needed was other evidence, whether it be circumstantial or direct, pointing guilt, from which a Judge or Jury could reasonably conclude that the evidence of identification, although based on the testimony of a single witnesses, can safely be accepted as free from the possibility of error."

Further in the case of **FRANCIS KARIUKI NJIRU & 7 OTHERS –V-REPUBLIC Criminal Appeal No.6 of 2001**(UR) the Court stated as follows:-

"The evidence relating to identification had to be scrutinized carefully, and was only to be accepted and acted upon if the court was satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances had to be considered and among the factors the court was required to consider was whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."

PW1 in his evidence said that when he got to the door, the electricity light were on, and he saw a group of people at the door. They were about 4 or 5 men. PW1 went on to say:-

"Some men were masked but I saw one who was tall and slim. He seemed to be the captain. His face was not covered. He used to come to me severally asking me, "Mwalimu, you are still there?". His accent of Tigania and not South Imenti. He is the one at the dock. I had not known him before then. I saw him while they were at the gate facing me. I saw him for about 10, 20, 15 minutes while struggling to open the door. In the main bedroom where he came severally I could peep while lying down and saw him. Since the robbery I saw him again in court while attending this case."

PW1 identified one of the assailant who was tall and slim and said he had not known him before then. That he saw him while they were at the gate facing each other. That he also saw him for about 10,20,or 15 minutes while struggling to open the door and in the main bedroom while lying on the ground. PW1 recorded statement with police but did not describe the appellant. His statement to the police was not similar to the one given in court.

The trial Magistrate did not give a careful and cautious consideration of the evidence of identification. The trial Magistrate did not consider the type of electricity bulb that was in use, the intensity of light and how far PW1 was from his assailant and the position he was on at the time identification was made. It is important for court to consider exactly how the identification came to be made considering at one time assailants were outside the house and PW1 inside the house and whilst the assailants were inside the PW1's bedroom he was lying down.

There was lack of detail in PW1's evidence and it is difficult to test the evidence of identification with such scanty identification. When he made his statement to police PW1 did not give description of his attackers to police nor did he give the name of any of his attackers. In cross-examination of PW1 by the appellant, he admitted that in his statement to the Police he did not describe the attackers.

PW8 in his evidence said PW1 and PW7 told them they were robbed by persons armed with pangas and clubs. PW2, PW3, PW4, PW5 and PW6 did not identify their attackers. PW7, wife to PW1 said electricity was on and PW1 had come to the house after the thieves had left. This means at the time of robbery PW1 and PW7 were not in the same room. PW7 said she could not identify anyone.

We are not satisfied that the conditions were favourable for positive identification of the appellant. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt of the accused from which a Judge could reasonably conclude that the evidence of identification although based on testimony of a single witness, can safely be accepted as free from possibility of error.

The circumstantial evidence against the appellant was by PW4 and it was to the effect that he saw appellant on 28th March, 2009 wearing his jacket. PW4 stated as follows:-

"***I met the strange person I had earlier on met, at Kithangene. He was in my jacket. I screamed. Neighbours came. I arrested him. His clothes were muddy and it had not rained. I took him to the Chief's camp. My jacket was black and had a mark on the left chest written "Franchen". It was also torn on the lower left pocket. The right pocket was also torn but had been stitched using a white thread. Using those marks I identified it. The suspect was taken to the police station."***

PW4 described the jacket as his because it was black and had a mark on left area written "**Franchen**". It was also torn in the lower left pocket and the right pocket was also torn but had been stitched using a white thread.

Regarding the identification of the jacket the learned trial Magistrate found:-

'On circumstantial evidence the most crucial evidence is of PW4. At dawn, following the alleged robberies at night, he arrested the accused person at Kithangone, in suspicious circumstance, wearing his jacket(Exhibit-8) of which was among the robbed items from his house. . He clearly pointed out

convincing marks of which leaves no doubt that the jacket was his. This was only hours after the robberies had taken place. The accused in his evidence did not give a reasonable explanation on how he got possession of the said jacket."

The mark in question is "fran**c**hen" on a black jacket which was torn as described by PW4. We have gone through the proceedings and have found nothing to show that the colour and mark which enabled PW4 to identify the recovered jacket as his property were unique or special in any way and exclusively reserved for PW4. In order for identification of recovered exhibit to be established the court must be satisfied that the identification marks are so unique as to lead to a conclusion that there is no possibility of error that they were made by the person identifying the marks and that they were so unique as to give assurance that they were exclusively made by the person identifying them. There was no evidence before court. That the mark "**franchen**" was made by PW4 and was reserved for exclusive use by PW4 to lead to the conclusion that there was no possibility of the same having been made by any other person.

The appellant gave explanation to the effect that the jacket was planted on him by PW4 and said he was taken to the Chief who was not called to give evidence. The trial court did not consider the appellants defence save that the court repeated what the appellant said and made no decision on the same.

The trial Magistrate applied the doctrine of recent possession and stated that the court had deduced that the accused took part in the robbery in Count 3 and that is how he acquired the said jacket.

In applying the doctrine of recent possession the court must consider certain facts. The court must first consider how proximate in time in relation to the date of the robbery was the jacket found in possession of the appellant. In the instant case the robbery took place on 27th March, 2009 one day after the robbery. The Appellant was found with the jacket on 28th March, 2009. The appellant denied that he was found with the jacket and said it was planted on him by PW4. He said he was taken by PW4 before Chief who was not called as a witness. He said at time of arrest PW4 and others brought a jacket and said it would be used as exhibit. Significantly PW4 was not amongst the complainants. The chief to whom PW4 took the appellant to was not called as a witness to shed light on the PW4's and appellant's contention as whether at time of the arrest the appellant had PW4's jacket or it was planted on him later. The Chief's evidence was essential in this case on whether the appellant was in possession of the questioned jacket. We find though the appellant was allegedly found with a jacket one day after the robbery, there was no prove the jacket in question was indeed property of PW4 and was found in appellants' possession.

Given those circumstances and the fact the evidence of possession is contested the learned trial Magistrate ought to have inquired into and/or given more weight to the appellant's allegation of the jacket being planted on him by PW4. This is because the only nexus between the appellant and the recovered jacket is PW4. In such circumstances what was required is other material evidence to implicate the appellant or provide a nexus to the jacket. We have evaluated the evidence and find no such corroborating evidence.

We think we have said enough in this appeal. The evidence of identification of the appellant by PW1 was not safe. There is doubt whether the appellant was found with the jacket and we have found that PW4 did not prove to the required standard that the jacket was his.

The evidence connecting appellant with jacket was also contentious. We think that the doctrine of recent possession could not apply since the controversy with the evidence against the appellant was not resolved. For those reasons we find that the conviction entered against the appellant was unsafe.

We accordingly allow this appeal, quash the conviction and set aside the sentence. The appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 29th DAY OF NOVEMBER, 2012.

J. LESIIT **J. MAKAU**

JUDGE **JUDGE**

Delivered in open court in presence of:

Mr. Mungai State Counsel-State

Appellant in person - present

J. LESIIT **J. MAKAU**

JUDGE **JUDGE**