



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO.187 OF 2005

MARK SIMIYU NAKITAREAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeals from original conviction and sentence in Nakuru C.M.CR.C.NO.399/2005 by Hon M. Wambani, Senior Magistrate, dated 21st December, 2005]

JUDGMENT

The appellant **Mark Nakitare Simiyu** was tried by the court below on two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**, and one count of **being in possession of a firearm** contrary to **Section 34(1) of the Firearms Act**. In the alternative, he was charged with **handling stolen goods** contrary to **Section 322(2)** of the **Penal Code**

According to the particulars of the charge sheet laid before the trial court, it was alleged that on 1st February, 2005 at Comply Industries Limited in Nakuru, while armed with a pistol, the appellant robbed Marappy Santha Bhushana and Lakshana Reddy (the complainants) of Kshs.6,000 and two mobile phones and that at or immediately before or immediately after the time of such robbery threatened to use actual violence to the complainants.

It was further alleged that on 5th February, 2005 at Kona Mbaya in Lugari District, the appellant was found in possession of one imitation firearm (home made pistol) without firearms certificate. Regarding the alternative charge, it was the prosecution case that on 5th February, 2005 at Kona Mbaya in Lugari District otherwise than in the course of stealing the appellant dishonestly received or retained one mobile phone make Sonny Ericson T 620 knowing or having reason to believe it to be stolen property. The appellant was acquitted of the offence in count II but upon being convicted for the offences charged in counts 1 and III, the trial magistrate sentenced him to suffer death in count 1 and a conditional discharge in count III.

Dissatisfied with the conviction and sentence, the appellant has brought this appeal on eight (8) grounds which can be distilled as follows:

- i) that the evidence of identification was insufficient;

- ii) that some of the essential witnesses were not called to testify in the case;
- iii) that the complainant in count 1 did not prove ownership of the mobile phone;
- iv) that the prosecution evidence was contradictory;
- v) that the charge sheet did not disclose the offence under **Section 296(2)** of the **Penal Code**;
- vi) that the appellant's defence was not considered by the trial magistrate.

Before we embark on the consideration of these grounds, being the first appellate court, it is imperative that we re-evaluate afresh the evidence on record in order to arrive at our own independent conclusion. As we do so, we appreciate that we have neither seen nor heard the witnesses.

It was the prosecution case that the appellant who had been employed by Comply Industries Limited as a cook was seen at the company premises on the day of the robbery by **P.W.3, Stephen Chege Kehumba** at 2.15p.m. and later at 6.30p.m. even though at this time, he had ceased to work for the company.

A few hours later at about 6 or 7p.m., according to **P.W.1, Marappy Santha Bhushana** (the complainant), the appellant walked in his (the complainant's) house, exchanged greetings and asked if the complainant could let him cook for him. The complainant declined the offer prompting the appellant to draw a gun and ordered the complainant who was in the company of Lakshana Reddy (Reddy) to surrender their mobile phones and cash.

The two promptly complied by giving the appellant their mobile phones. The complainant also placed on the table as directed by the appellant Kshs.4,000 in cash while Reddy gave Kshs.2000/=. There was an interruption when someone knocked on the complainant's door. The appellant ordered Reddy to find out who it was. Reddy opened the door and ran outside. On seeing this, the appellant panicked and attempted to escape through the window. When that failed, he ran out of the house through the main door and out of the compound through the gate. As he ran away, **P.W.2 George Alfastan Nyakimari (George)** the officer in charge of security at the company was alerted by the guard that the appellant had robbed the complainant and Reddy.

On reaching the gate, George saw the appellant some 100m running away. The matter was reported to the police and investigations launched. One week later, the appellant was traced in Lugari. The police officers from the local police station arrested the appellant and recovered two mobile phones, one having been sold to one Lazarus Musangi by a written agreement. Also recovered was a toy (or home-made) pistol. The appellant was transferred to Nakuru and charged.

In his sworn defence, the appellant denied involvement in the robbery and attributed his arrest and subsequent arraignment in court to a grudge nursed by the complainant against him. He explained that between 3rd January and 5th February, 2005 he was in Mombasa where he had gone to enroll for a course. He returned to Lugari and on 6th February, 2005. While entertaining himself at Kona Mbaya Market in Makuti 2000 Bar, a fight broke out between his friend and some revelers. He intervened to pacify the situation only to be arrested. His friend was released that night while the appellant was detained on allegations that he had been involved in a robbery at the company.

While admitting having worked for the company for four (4) years, the appellant was categorical that the evidence of the complainant and the other prosecution witnesses was a fabrication.

We have considered the evidence presented in the court below, the grounds of appeal as well as submissions by the appellant and by learned counsel for the respondent.

It is common ground that the appellant was an employee of the company until he left it in circumstances that were not explained by either the appellant or the prosecution witnesses. It is also not in doubt that the complainant was robbed of cash and a mobile phone; that the robbery was between 6-7p.m.; that it was

committed by a lone ranger. The only broad question that fell for determination in the court below and which is the crux of this appeal is whether the robbery was committed by the appellant.

The evidence of the actual robbery was presented by the complainant alone as Reddy who was with him was not called to testify. It is therefore evidence of a single witness. It is now settled that there is no provision in law for the need for a particular number of witnesses to the commission of a crime before finding a conviction on it. See **Section 143** of the **Evidence Act**.

In **Ogeto Vs. Republic**, (2004) 1 KLR 14, the Court of Appeal reiterated the law thus:

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such witness especially when it is shown that conditions favouring a correct identification are difficult.”

The time of the robbery was given variously as 5.30p.m., 6p.m and 7p.m. At the time, in the house (room) were only the complainant and Reddy. The complainant and the uninvited guest, who the complainant identified as the appellant exchanged greetings before they talked about the appellant cooking for the complainant.

The complainant estimated that they spent nearly one hour together. At some point, the appellant ordered the complainant to put the money in his side pocket. But of greatest relevance is the fact that the appellant had worked for the complainant as a cook and doing other household chores in his house for nearly one month. It was therefore a case of recognition. Again as has been stated in a long line of cases, the need for extra care when dealing with cases of recognition as opposed to identification is not reduced simply because the suspect and the witness know each other. In such circumstances, as is the case in cases of identification, the court needs to see if there is other evidence to lend assurance as to the guilt of the suspect before it, before it can enter a conviction. See **Abdala bin Wendo and Another Vs. Republic** (193) 20 EACA 166.

Having so warned ourselves, we hold that in the circumstances enumerated in the above paragraph, the conditions for identification were not difficult. It is our considered view that there was no mistake in the recognition of the appellant. As a matter of fact the complainant gave the name of the appellant to the police a few hours after the robbery.

Besides, the appellant was seen at the company premises by other witnesses even though he had ceased working there. After the robbery, **Stephen Chege Kehumba (P.W.3)** confirmed that he called two phone numbers (the complainant’s and Reddy’s) and more than four times, the appellant would answer. Having worked with the appellant for nearly seven (7) months, we have no doubt that the witness knew and recognized the appellant’s voice.

The prosecution is also relying on the evidence that the appellant was in possession of recently stolen goods; that the two stolen phones were recovered from the appellant. This evidence, we find is short of the criminal standard of proof. We cannot agree with the learned trial magistrate that the complainant was able to positively identify, at least, his phone. He did not point out any unique features on the phone. Secondly, it was said that the second phone had been sold to one Lazarus Mushangi. The said Lazarus Mushangi was not a prosecution witness.

We come to the conclusion on the question whether the appellant committed **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**, that although he was alone, he was armed with a pistol (as the complainant was convinced it was) and then stole from his victims. The offence was proved by the overwhelming prosecution evidence which displaced the appellant’s defence.

The appellant executed the most reckless robbery in the recent times. Robbing his former employer when it is not dark, spending considerable period of time with the former employer and even after robbing him, continued to receive telephone calls on the stolen phones. We however, hold that without evidence of

ballistic expert, the learned trial magistrate erred in convicting the appellant in count III. To that extent, the appeal is allowed, conviction quashed and conditional sentence set aside.

However, the appeal against the conviction and death sentence imposed in count 1 is dismissed.

Dated, Delivered and Signed at Nakuru this 11th day of February, 2011.

**R. P. V. WENDOH
JUDGE**

**W. OUKO
JUDGE**