



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO.366 OF 2007

SAMUEL MBUGUA MBURUAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 1273 of 2006 of the Chief Magistrate's Court at Nairobi by T. W. C. Wamae - Ag. Principal Magistrate)

JUDGEMENT

The appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code and an alternative count of handling stolen goods contrary to section 322 (2) of the Penal Code. the particulars in the main charge are that on 19.5.06 at Bondeni in Ngong township Kajiado within Rift Valley Province, accused and others not before court robbed Kimani Mwangi of cash 8,8000/= and a mobile phone Nokia 2650 S/No IMEI 355377003430629 valued at 9,500/= and at or immediate before or immediately after such robbery killed the said Kimanhi Mwangi.

The particulars of the alternative count are that on 19.5.06 at Bondeni in Ngong Township Kajiado within Rift Valley Province, accused handled a mobile phone Nokia 26540 S/No IMEI 355377004340629 the property of Kimani Mwangi knowing or having reason to believe that it was stolen. The prosecution called 9 witnesses while the appellant gave un-sworn testimony to discount the evidence tendered by the prosecution.

It is clear from the evidence tendered by the prosecution that the complainant in this case was killed in the course of the robbery and his mobile phone stolen during the time of the robbery. It was the evidence of PW3 and PW5 that 8 days after the robbery, as they were gambling with the appellant he offered for sale a phone which was later discovered to have been stolen from the deceased. PW9 obtained the deceased's phone number from his wife and went to Safaricom and obtained a print-out. He later called a line belonging to PW3. A report was then made to the police leading to the arrest of PW3 who led police to the house of the appellant.

PW9 recovered a *Sim* card from the appellant and discovered that it was used on the date the deceased was killed. The appellant was taken to PW7 who recorded a confession detailing the event and the circumstances leading to the recovery of the phone belonging to the deceased. From the confession recorded by PW7, the appellant stated that he strangled the deceased during the time of the robbery.

PW8 carried out a post-mortem examination and confirmed that the deceased's cause of death was strangulation.

In his unsworn defence, the appellant denied offence and stated that he was arrested on 6th July 2006 and taken to Ngong Police Station. He confirmed that he found PW3 and PW5 in the cells and that they are the ones who implicated him in the alleged robbery. It is the evidence of the appellant that he was tortured by PW9 and other police officers for several days at Ngong forest for denying that he had killed the complainant. He also denied that he signed a valid confession before a magistrate.

In convicting the appellant the trial court relied on the evidence of PW1, PW3, PW5, PW7, PW8 and PW9. It is the decision of the trial court that the evidence by PW3, PW5 and PW7 is overwhelming to sustain the conviction of the appellant. It is also the decision of the trial court that the prosecution proved its case beyond reasonable doubt that the appellant was the one who caused the death of the deceased before undertaking the mission of stealing and committing a robbery against him.

This is a first appeal and it is our duty to re-evaluate and analyze the evidence afresh. In our understanding there are two pieces of evidence that were tendered by the prosecution in support of the charge against the appellant. The first piece is that on 27th May 2006 PW3, PW5 and the appellant were playing cards which were in the form of gambling. As they were playing the appellant exhausted all his money but pledged to use a mobile phone for Kshs.3,000/=. PW3 gave the appellant Kshs.1,000/= for him to continue playing the game of gambling between themselves. It is the evidence of PW3 that he gave the balance of Kshs.2,000/= the following day. In lieu the appellant gave PW3 a mobile phone Nokia 2650.

On 6th July 2006 PW3 found a missed call and when he called back the caller informed him that they were in possession of a letter sent on a speed post and that he was required at the post office. On reaching the agreed scene, he was arrested and taken into police custody. It is then that PW3 disclosed that the mobile phone was given to him by the appellant. On information given by PW3, the appellant was arrested and taken into police custody.

PW5 confirmed and corroborated the evidence given by PW3. He stated that as they were playing cards, the appellant exhausted his money but offered a mobile phone for sale for Kshs.3,000/=. He confirmed that PW3 gave the appellant Kshs.1,000/= in his presence after the appellant handed over his phone to him.

The second piece of evidence is that on 11th July 2006 the appellant was taken before Kibera court where he recorded a confession before Hon. Hellen Wasilwa Principal Magistrate. The evidence by the honourable magistrate is that she read out the particulars of the charge facing the appellant and warned him that he was not obliged to say anything and that whatever he said would be recorded and used as evidence against him. The honourable magistrate then asked the appellant if he wished to say anything and thereafter he volunteered to give a detailed confession. The appellant confessed how he confronted the deceased who refused to pay for Kshs.2,500/= borrowed earlier from him. It is indicated that the appellant held the deceased by the neck and strangled him to death. It is indicated in the confession made before PW7 that the appellant put his hand in the pocket of the deceased and took a mobile phone Nokia and Kshs.8,800/=. The appellant confessed that he did not know that the deceased would die but confirmed that he sold the phone belonging to the appellant and spent the money. The appellant then signed the statement voluntarily without any threats or offer of any reward. PW7 then signed the statement and a certificate showing that the confession was recorded by the appellant in a proper manner.

It is on the basis of those two sets of evidence that the appellant was convicted. It is clear in our mind that PW3 and PW5 were the ones who gave direct evidence against the appellant. They confirmed that it is the appellant who sold a mobile phone stolen from the complainant after he exhausted his money during a gambling game. The evidence of PW3 was well corroborated by PW5 who confirmed that it is the appellant who offered his mobile phone to PW3 after he exhausted his money in a gambling process. The phone that was given to PW3 belonged to the deceased and was stolen during the time of robbery. It is therefore clear the evidence of PW3 and PW5 is a direct evidence which places the appellant as the one who robbed and killed the deceased. The strength of the evidence tendered by PW3 and PW5 creates no doubt in our mind that the appellant is the one who committed the subject

robbery. The appellant was under legal obligation to explain how and why he was found in possession of a mobile phone stolen from the deceased.

In giving an explanation, the appellant recorded a confession before PW7. In his confession, the appellant stated that the deceased owed him Kshs.2,500/= which he was reluctant to pay. He confronted him and strangle him to death. After ensuring that the deceased was no more, he took his mobile phone and kshs.8,800/= from his pockets. Later the mobile phone was found in possession of PW3. It was then when confronted why he was in possession of a phone stolen from the deceased, PW3 gave a plausible explanation as to how the phone came to his possession. The explanation linked or connected the appellant to the robbery and the murder against the complainant. After he was arrested, the appellant gave comprehensive and detailed confession explaining the circumstances and the reasons for killing the deceased. We are therefore satisfied that the case against the appellant was proved beyond reasonable doubt.

As was rightly pointed out by the trial court, it was the appellant who sold to PW3 a mobile phone belonging to the deceased. That evidence was corroborated by PW5. The only conclusion that can be drawn from the possession and the lack of explanation is that the appellant robbed and killed the deceased. It is therefore our findings that the trial court committed no misdirection or error in convicting the appellant. The evidence on record proves beyond reasonable doubt that it is the appellant who committed the robbery subject of this appeal.

In the premises we are satisfied that the appellant was correctly charged with robbery with violence contrary to section 296(2) and convicted for the robbery that was committed against the deceased Kimani Mwangi. It means the main charge of robbery with violence was proved beyond reasonable doubt. We sustain the conviction and uphold the sentence meted out by the trial court. The appeal fails in its entirety.

Dated, signed and delivered at Nairobi this 11th day of October 2010.

J. KHAMINWA
JUDGE

M. WARSAME
JUDGE