



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal No. 278 of 2003

JACOB GACHERU.....
.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Jacob Gacheru was charged with offence of **robbery with violence contrary to Section 296(1) of the Penal Code**. The particulars of the offence were that on the 6th of January 2001 at Moto Farm Molo, Nakuru District the appellant jointly with others not before court robbed Simon Kariuki Muchiri of his radio cassette, one panga, a pen knife and Kshs 2,070/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Simon Muchiri. The appellant pleaded not guilty to the charge and after a full trial, was found guilty and convicted as charged. He was sentenced to serve ten years imprisonment. He was also placed under police supervision for a period of five years after the completion of his sentence. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted for the offence of robbery yet no stolen item was recovered in his possession. He was aggrieved that the trial magistrate had not considered that the prosecution had failed to adduce the evidence of the first report made to the police after the said robbery and thus reached an erroneous decision convicting him on the evidence of identification. He was aggrieved that the trial magistrate had failed to consider that the prosecution witnesses had adduced insufficient evidence on identification and therefore ought not to have convicted him based on such evidence. He faulted the trial magistrate for convicting him after failing to consider his alibi defence. He was further aggrieved that the trial magistrate had failed to consider the proceedings in respect of criminal case number 2218 of 2001 which evidence could have exonerated the appellant from the charge of the robbery facing him. He was finally aggrieved that the trial magistrate had convicted him in the absence of evidence which would have proved the case against him to the required standard of proof beyond reasonable doubt.

At the hearing of the appeal, the appellant made oral submissions urging this court to allow his appeal. Mr Gumo for the State urged this court to uphold the conviction and the sentence imposed on the appellant by the trial magistrate. He submitted that the prosecution had proved its case against the appellant to the required standard. He urged the court to dismiss the appeal. I will consider the submissions made after briefly setting out the facts of this case.

On the 6th of January 2001, PW1 Margaret Wambui Karime and PW3 Simon Kariuki Muchiri, a husband and wife, were asleep in their house at Moto Farm Molo. At about midnight, they were attacked by

robbers. According to PW1, the robbers broke into their house and threatened to kill them. They stole from them a sufuria, one seat cloth, a kettle, a radio cassette, a panga and a torch. They also stole the sum of Kshs 2,000/= from PW3. PW1 and PW3 testified that they were able to identify the appellant as being among the gang of robbers who attacked them on the material night. The two of them testified that that they were able to identify the appellant by the light of the torch which was in the possession of the robbers.

PW3 testified that the robbers also stole a pen knife from him. PW1 and PW3 testified that they had recognized the appellant as being among the robbers because they had known him prior to the robbery incident. According to them, the appellant was a neighbour. PW3 testified that the day following the robbery incident, he investigated the robbery by making inquiries in the neighbourhood. On the 8th of January 2001, he learnt that the appellant had attempted to sell a radio cassette to PW5 Margaret Wairimu Mwangi. PW5 testified that the appellant had attempted to sell a radio cassette to her but she could not buy it because she had no money. PW3 then made a report to the police and were accompanied by PW2 Police Constable Vincent Ndiwa to the house of the appellant where a pen knife which was stolen from the house of PW3 was recovered. PW2 testified that the appellant escaped and disappeared to a maize plantation when he saw them going to his house.

PW6 Police Constable Augustine Cheruiyot was at Molo Police Station with Police Constable Kirui when the appellant was taken to the police station by members of the public who claimed that the appellant had stolen potatoes from one Muchiri. PW6 re-arrested the appellant and charged with the offence of theft of farm produce. The appellant was taken to the police station on the 15th of August 2001. Later PW6 learnt that a complaint had earlier been made against the appellant to the effect that he had committed a robbery eight months earlier. PW6 handed over the matter to the officer-in-charge of crime to deal with it. PW4 Inspector Henry Simiyu recorded a charge and cautionary statement from the appellant. In the said statement, the appellant confessed to robbing the complainants in this case. Although the appellant retracted the statement during trial, the said statement was admitted in evidence after a trial within a trial.

When the appellant was put on his defence he denied that he had robbed the complainants. He testified that on the 5th of January 2001, he had traveled to Kijabe after he had been informed that his sister had died. When he received this information, he did not have money and had therefore sought to sell his radio cassette to PW5 in order to raise the money to travel to his sister's funeral. PW5 however did not have any money. The appellant was able to raise money from his friends and according to his evidence, he was away from the Molo area from the 5th of January 2001 to the 12th of January 2001 when he returned to Molo. He testified that his family buried his sister on the 10th of January 2001. He denied that he had robbed the complainants. The appellant testified that the statement which was adduced in evidence by the prosecution was obtained from him after he had been tortured. He called two witnesses, DW2 Gerald Ngeru Karili who corroborated his evidence that he was at Limuru attending his sister's funeral during the material night of the robbery incident. DW3 Hiram Karime Hunja testified that the appellant was beaten by the police on the 25th of August 2001 when he was at the police station. DW3 testified that he had seen the appellant with injuries on his body.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses (*See Njoroge -vs- Republic [1987] KLR 19*). The issue for determination by this court is whether the prosecution proved its case against the appellant on the charge of robbery to the required standard of proof beyond reasonable doubt. I have carefully considered the submissions made by the appellant and by Mr Gumo on behalf of the State. I have also re-evaluated the evidence which was adduced by the prosecution to secure the conviction of the appellant.

Pieces of evidence was adduced by the prosecution to establish its case against the appellant. The first piece of evidence is that of identification. PW1 and PW3 testified that they were able to identify the appellant as being among the robbers who robbed them on the material night. The two witnesses testified

that they were able to identify the appellant by the light of the torches that were being held by the robbers. They testified that they recognized the appellant because he was known to them prior to the robbery incident. PW1 and PW3 however did not make the report to the police immediately after the robbery that they had recognized the appellant as being one of the people who robbed them. Two days later on the 8th of January 2001, PW3 upon conducting inquiries in the neighbourhood, learnt that the appellant had attempted to sell a radio cassette to PW5. It is after obtaining this information from PW5 that PW3 made the report to the police.

Having evaluated the evidence of identification, this court is doubtful whether indeed the complainants identified the appellant as being among the robbers who robbed them on the material night. If indeed the complainants had identified the appellant, what prevented them from making the report to the police immediately thereafter that they were able to identify one of the robbers? The circumstances in which the said identification was made were difficult. It was at night. Several robbers had broken into the house of the complainant. The complainants had been threatened with violence. PW3 was told to lie under the bed while PW1 was told to lie on top of the bed. There was no light which could have enabled the complainants to identify the appellant.

In the hectic circumstances of the robbery it was therefore improbable that the complainants could have identified the appellant. The light of the torches which were in the possession of the robbers in the circumstances of this case could not have enabled the complainants to identify the appellant. The prosecution did not adduce evidence as to the distance of the complainants in relation to the appellant when the said identification is said to have been made. In the circumstances of this case this court cannot with certainty reach a conclusion that the complainants had identified the appellant. I will disallow this evidence on identification.

The second piece of evidence that was relied on by the prosecution was that of the recovery of the pen knife from the house of the appellant. The said pen knife was produced in evidence as an exhibit. PW3 identified it as a pen knife which was stolen from his house on the night of the robbery. PW2 testified that he was taken to a house which was alleged to belong to the appellant by PW3 and the son of PW5. However PW2 was directed to the wrong house and while he was trying to get to the right house belonging to the appellant, he saw the appellant ran away from the house into a maize plantation. PW2 then went into the house where the appellant emerged from and found the pen knife which was identified by PW3.

Having re-evaluated this evidence and the submission by the appellant that it had not been established that he was in sole and exclusive control of the house where the pen knife was found, I do hold that the evidence of the recovery of the pen knife does not in the circumstances of this case connect the appellant to the robbery. No evidence was adduced by the prosecution that indeed the house where the pen knife was recovered belonged to the appellant or was rented by him. In this regard, the evidence of a neighbour or the landlord would have sufficed to connect the appellant to the house. In the instant appeal, the appellant has raised reasonable doubt that the pen knife was not recovered in his possession or in a house where he had exclusive and sole control. I will therefore hold that this evidence cannot sustain the conviction of the appellant.

The third piece of evidence is that of the retracted confession. As was held by the Court of Appeal in the case of **Tuwamoi –vs- Uganda [1967] EA 84**, the court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied in all the circumstances of the case that the confession is true. In the instant case, there is evidence that the appellant had injuries when he recorded the charge and cautionary statement before PW4. Although the prosecution attempted to explain that the said injuries were caused by the members of the public who arrested the appellant when he had attempted to escape from lawful custody, the allegations made by the appellant that he was beaten by the police and therefore had written the said statement under duress cannot be dismissed offhand. In the circumstances of this case, reasonable doubt has been raised as to whether the statement which the appellant allegedly made was indeed made voluntarily. Taking into account the totality of the evidence adduced by the prosecution and the fact that the appellant was arrested eight months after the alleged robbery incident on an unrelated offence to which he was convicted by the

trial magistrate, this court is not prepared to consider the said confession to be truth. In the absence of any other supporting evidence, the alibi defence raised by the appellant could well be plausible.

In the circumstances of this case and considering the submissions made before me, I do hold that the prosecution failed to prove its case against the appellant to the required standard of proof beyond reasonable doubt. The doubts raised by the appellant in this appeal will of necessity be resolved in his favour. The appeal filed by the appellant is therefore allowed. His conviction is quashed. The sentence imposed set aside. The appellant is ordered acquitted. The appellant is ordered released from prison and set at liberty unless otherwise lawfully held.

DATED at NAKURU this 9th day of March 2006.

L. KIMARU

JUDGE