



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 1093 of 2002

AGGREY MBAYI INJAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant **AGGREY MBAYI INJAGA** was convicted for the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death as mandatorily provided in the law. Being aggrieved by the conviction and, by implication, the sentence he lodged this appeal.

In brief the facts of the case were that on 11th November 2000 at 10.45 a.m. the Complainant in this case **CHANDRIKA, (PW1)** was confronted by four men at her house in Riverside Drive. She was robbed of cash, jewellery, rings and a watch. PW2, **DAVID**, a security guard in the neighbouring plot saw the assailants as they fled after robbing the Complainant. He was able to apprehend the Appellant and to recover a black paper bag from him. The Appellant was eventually charged. In his defence, the Appellant denied the charge and claimed that he was walking by the area when he heard a commotion behind him. That he was then arrested for this offence.

The Appellant raised five grounds of appeal. However after considering them we find that they are repetitive. We have summarized those grounds into three as follows: -

1. That the learned trial magistrate erred in law and fact in convicting the Appellant on a defective charge.
2. That the learned trial magistrate erred in law and fact in convicting the appellant on identification evidence that was insufficient to sustain a conviction.
3. That the learned trial magistrate shifted the burden of proof to the Appellant.

On the issue of the charge being defective, it was the Appellant's contention, in his written submissions, that the charge omitted to make mention of any weapons, whether dangerous or offensive. In support of his submission the Appellant relied on cases, copies of which he did not supply to the court. We were unable to obtain them.

The particulars of the charge were as follows;

“On the 11th day of November 2000 along Riverside Lane off Riverside drive in Kileleshwa within Nairobi Area Province, jointly with others not before court, robbed CHANDRIKA BHUPENDRA PATEL of her seventeen gold bangles, two diamond rings, six gold rings, three radio watches, cash Kshs.320,000/- and at or immediately before or immediately after the time of such robbery threatened to use violence to the said CHANDRIKA.”

We agree with the Appellant that the particulars of the charge made no reference to weapons used in the alleged robbery. Does that render the charge defective? In OLUOCH vs. REPUBLIC 1985 KLR 549, CHESONI, NYARANGI and PLATT JJA, stated thus in their obiter remarks;

“Robbery with violence is committed in any of the following circumstances,

- (a) The offender is armed with any dangerous and offensive weapon or instrument; or***
- (b) The offender is in company with one or more other person or persons; or***
- (c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes, or uses other personal violence to any person.”***

We therefore hold that the offence of robbery with violence is committed when the prosecution adduces evidence to prove any of the three circumstances. In the instant case, the prosecution relied only on two of these circumstances; one, that the Appellant was in company with others, some who were his co-accused in the case, and two, that at or immediately before or immediately after the time of the robbery, the Appellant used personal violence on someone. From the evidence adduced, it is clear that the prosecution case established that the offence was committed by more than one person and that the offenders were armed with a knife. The prosecution in the particulars of the charge set out to rely on two ingredients of the charge. One offender being in company with others and two, using personal violence. However, of the two, they were only able to prove one ingredient namely, that the Appellant was in company with others. The legal position is that the prosecution had the right to rely on only one of the ingredients in the particulars of the charge and by so doing, the charge would not be rendered defective. In MUIRU KARANJA and JOSEPH ONYANGO vs. REPUBLIC C.A. NO. 271 of 2002, OMOLO, O’KUBASU and GITHINJI JJA, held;

“Normally the prosecution would be required to and must chose which of these modes (referring to S.296(2) of the Penal Code) they wish to pursue against an accused person and combining the three modes all in one count may well have made the charge duplex... The particulars of the charge clearly brought the case within category (6) which we have set out herein, namely, when the offender is in company of one or more persons. The issue of the charge being defective must accordingly fail.”

From the case cited herein above, it is quite clear that all three ingredients of the charge need not be quoted in the particulars of the charge. Further, by establishing only one of these ingredients of the offence does not render the charge defective so long as the mode established in evidence is included in the particulars of the charge. In the instant case the mode established in evidence was included in the particulars of the charge. The first point of law raised by the Appellant must therefore fail.

The second issue raised was that of identification. It was the Appellant’s submission that identification whether by day or night must be subjected to microscopic evaluation before being used to base a conviction in a capital offence. He quoted from the case of JOHN SIRO KALUME vs. REPUBLIC CA No. 41 of 1998 at page 152 thus;

“Some persons may have difficulty in distinguishing between different persons of any moderately similar appearance and many witnesses to crime are able to see the perpetrators only fleetingly, often in very stressed circumstances.”

We will now also deal with the inconsistencies raised by the Appellant in regard to the evidence of PW1, the Complainant herein. The first one raised is the Complainant’s evidence in chief, that the

Appellant was armed with a knife during the incident and that she did not see any pistol during the robbery. The Appellant pointed out the Complainant's answers to cross-examination by him, in which she said that a toy pistol fell from the pocket of one of the assailants as he reached out for things to steal in her wardrobe. We see no inconsistency in that evidence. The Complainant was clear that no pistol was used during the robbery and that a toy pistol fell off the pockets of one of the assailants. The Appellant also took issue with the Complainant's change of evidence from saying that she also saw the Appellant's second co-accused being arrested but in cross-examination denying it. Having considered the Complainant's evidence on the latter point, we agree there is an inconsistency. However, the same only touches on the Appellant's co-accuseds.

The Appellant challenged the evidence of PW2 and PW3 in relation to what he was carrying at the time of arrest. We have considered that aspect in relation to the positions at which each of these witnesses saw the Appellant. PW2 was the guard on duty at the Complainant's neighbour's place. It was to that place that the Complainant ran as she alerted them of the presence of thieves in her place. At that point, two of the robbers had entered her vehicle and were passing through the gate as one of them, identified as the Appellant, together with another ran through the gate after the ones in the vehicle. The vehicle never stopped. The Appellant and the accomplice ran out of the gate, and it was as they did so that PW2 saw the Appellant carrying a black bag. PW2 followed the Appellant and as people gathered he helped apprehend the Appellant and take away the paper bag and toy pistol which fell from then Appellant's inside pocket. PW2 gave the paper bag and toy pistol to Securicor Car Alarm guards, who came in answer to the distress call raised by him (PW2). PW1 said he saw the guards who came searching the Appellant and taking away the paper bag he was carrying but he was unable to identify which of those guards took the paper bag.

On PW3's part, he was the driver of the Securicor Alarm vehicle which arrived first at the scene where the Appellant was being held by PW2 and others. He sat in the vehicle and from that point, we would not be surprised if he was unable to see in details what was happening outside the vehicle. He saw the Appellant at the time he was put at the back of the vehicle he was driving. By that time, from the evidence of PW2 among others, the Appellant had already been searched and whatever he was carrying had been taken away from him. In the circumstances we do not find the variation in the evidence of PW2 and PW3 to be a contradiction. In that regard we also dismiss **MRS. TOIGAT'S** submission to the effect that the evidence of PW3 contradicted that of PW2.

The Appellant also raised other issues relating to recovery of rings, watches, golden chains and cash, arguing that since the recovered items were not all included in the charge the inconsistency was material to the prosecution case. We find the omissions raised in that regard very minor and of no material importance. The fact the particulars of charge read 17 golden bangles, two diamond rings, 6 gold rings, three rado watches and cash Kshs.320,000/- were stolen and yet only 4 gold chains, 2 gold rings, one wrist watch, one Kodak film, one Indian rupee and Ksh. 26,000/- cash were recovered is of no significance to the charge. We hold so bearing in mind that apart from the Kodak film which was omitted altogether from the charge, the rest were included. Further, what was recovered was far less than what had been stolen according to the charge. Bearing in mind that some two robbers escaped after the robbery, it is explicable where the missing items may have ended. In our view nothing turns on that issue.

MRS. TOIGAT in her submission, while conceding to the appeal, stated that the prosecution case raised doubts. It was her submission that none of the witnesses called to testify gave a clear sequence of events leading to the Appellant's arrest. The Appellant in his submissions contended that there was a break in the line of the evidence of identification by PW2, PW3 and also accused 4. We have already dealt with the evidence of PW2 and PW3. PW2 saw the Appellant as he ran out of the Complainant's house and he ran after him until the point where he apprehended him. PW2 was able to identify the toy pistol and paper bag recovered from the Appellant. PW3 saw the Appellant after PW2 had handed him over to guards. There is no break in the line of evidence, in our view and neither is there any contradiction in their evidence. We have also taken into consideration that part of the things recovered from the Appellant was money. It was recovered by PW4, one of the guards who came to the scene. PW4 gave it to the 4th accused still in a paper bag, (Exhibit 6) before counting it. PW4 went away to call

