



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

Criminal Appeal 448 of 2001

GEORGE NJUGUNA KARANDO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

The appellant, George Njuguna, was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence are that on the 10th of May 2001 at 11.00 a.m. at Kinungi Trading Centre, Naivasha in Nakuru District the appellant robbed Rahab Wambui of two blankets, four sufurias, six plates, five cups, three dresses all valued at Kshs.980 and immediately before or immediately after the time of such robbery assaulted the said Rahab Wambui. The appellant pleaded not guilty to the charge. After a full trial the appellant was convicted as charged. He was sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

The appellant raised four grounds of appeal in his petition of appeal. He was aggrieved that he had been convicted on the sole evidence of the complainant (PW 1).

He faulted the trial Magistrate for convicting him for the offence whereas the exhibits which were produced in court were not booked in the appellant's name. The appellant was aggrieved that he had been convicted of the serious offence of robbery with violence yet the evidence on record reveal that the appellant ought to have been convicted for the charge of house breaking. The appellant finally faulted the trial magistrate for convicting him without putting into consideration the evidence that he had adduced on his defence to the effect that there existed a grudge between the complainant and the appellant. At the hearing of the appeal, we heard the oral submissions made by the appellant who urged this court to allow his appeal, quash his conviction and set aside the sentence imposed to him. Mr Koech, learned State Counsel conceded to the appeal. He submitted that the conviction of the appellant on the charge of robbery with violence was unsafe in view of the evidence which was adduced by the complainant. He submitted that the appeal filed by the appellant ought to be allowed. We shall consider the arguments made in this appeal after setting out the facts of this case albeit briefly.

The complainant in this case Rahab Wangui Kuhia (PW 1) testified that she was in her farm on the 10th of May 2001 at about 11.00 a.m. when she saw the appellant break into her house. She testified that the appellant was armed with an iron bar and a machete.

The complainant went to her house and confronted the appellant. She testified that the appellant assaulted her then ran away abandoning the household goods which he had stacked in a sack. The items which the complainant claimed were stolen from her house and left behind by the appellant were produced in evidence as exhibits. The said items included blankets, cups, bed sheets, saucepans and one padlock. The

complainant testified that she knew the appellant due to the fact that he was a neighbour. It was her testimony that the appellant assaulted her after the complainant has found him emerging from her house. It was her testimony that the appellant held her neck and wrestled her to the ground. After the incident, the complainant raised alarm by screaming for help from members of the public. The complainant denied that she harboured any grudge against the appellant. PW 3 Purity Karimi Kamau heard the screams of the complainant. She went to her rescue. She did not find anyone other than the complainant. The complainant told her that she had been assaulted by the appellant. PW 2 saw a sack which was full of household goods which the complainant informed her had been abandoned by the appellant when the complainant confronted him. PW 2 testified that the appellant was chased by the members of the public who apprehended him and later handed him to PW 2 Yusuf Musa, an Administration Police officer. PW 2 arrested the appellant and took him to Naivasha police station where PW 4 police constable Milka Njeri re-arrested the appellant, investigated the case and later charged the appellant with the offence of robbery with violence. PW 5 George Kariuki Kahura, a clinical officer attached to Naivasha District Hospital testified that the complainant was examined on the 10th of May 2001 by Dr Musalia who filled a P3 form indicating the injuries that the complainant had sustained. He testified that the complainant had sustained a swelling and bruising of the frontal region of the head. Furthermore there was a small cut on the parietal region and bruising on the left side of the face. There was further tenderness of the right forearm. The probable weapon used was blunt. The degree of injury was assessed as harm. The P3 form duly filled by Dr Musalia was produced in evidence by the prosecution.

When the appellant was put on his defence, he denied that he was involved in the robbery. He testified that while he was at home on the material date members of the public called him outside and beat him up until he became unconscious. He was thereafter taken to the police and charged with the offence. He testified that he had no grudge against the complainant.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced before the trial magistrate before reaching 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. (See Njoroge – versus – Republic [1987] KLR 19).

Having heard the submissions made on this appeal and also re-evaluated the evidence adduced by the witnesses in this case, the issue for determination by this court is whether the prosecution has established its case against the appellant to the required standard of proof beyond reasonable doubt.

The first aspect which this court has to consider on this appeal is whether the charge brought against the appellant was competent. The particulars of the charge as drafted and as pleaded to by the appellant stated as follows: -

“On the 10th day of May 2001 at 11.00 a.m. at Kinungi Trading Centre in Naivasha, Nakuru District [the appellant] robbed Rahab Wambui of two blankets, 4 sufurias, six plates, 5 cups, 3 dresses all valued at Kshs.980 and immediately before or immediately after the time of such robbery assaulted the said Rahab Wambui.” These particulars do not disclose an offence for the charge of robbery with violence under Section 292(2) of the Penal Code. It is a requirement of the said Section of the Penal Code that an essential ingredient of the charge is that the accused person must have been armed with a dangerous or offensive weapon. As was held by the Court of Appeal in David Odhiambo & Anor –versus- Republic Cr.A. No.5 of 2005 (Mombasa) (Unreported) at page 4:

“Johana Ndungu –Vs- Republic Criminal Appeal No. 116 of 1995 (unreported) explained the various elements or ingredients which must be proved under Section 296(2) of the Penal Code and any of which, if proved, then would be no discretion on the part of the trial court but to convict under Section 296(2). The court took the matter further in the case of Juma –Vs- Republic [2003] of R.A 471 where it held that where the prosecution is relying on an element or ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument which the appellant was armed was a dangerous or offensive one.”

In the instant appeal, the particulars of the charge does not state that the appellant was armed with a

dangerous or offensive weapon. Neither does it state what offensive or dangerous weapon that the appellant was armed with. The failure by the prosecution to state the fact that the appellant was armed with a dangerous or offensive weapon renders the charge against the appellant for the offence of robbery with violence contrary to Section 296(2) of the Penal Code to be defective. An essential ingredient of the charge of robbery with violence was not stated in the particulars. For this reason alone we would allow the appeal. But for the completion of record we would re-evaluate the evidence adduced and reach a determination on the facts of this case.

We have carefully re-evaluated the evidence adduced by the prosecution witnesses, and especially the evidence adduced by the complainant. The complainant caught the appellant red-handed having broken into her house and stolen her household goods. The complainant confronted the appellant near the entrance to her house. The appellant held the complainant by the neck and wrestled her to the ground. The appellant then abandoned the household goods which he had put in a sack and which he intended to steal from the house of the complainant. The complainant screamed and PW 3 came to her help. The first thing that the complainant told PW 3 is that she had been assaulted by the appellant. The complainant and the appellant were known to each other prior to the robbery incident. Although the complainant claims that the appellant was armed with an iron bar and a machete, there is no evidence that the appellant was so armed. The injuries that the complainant sustained as exhibited in the P3 form were consistent with a blow administered by a blunt object in this case by the bare hands of the appellant. The prosecution's evidence clearly points to the fact that the appellant was alone when he broke into and entered the house of the complainant.

In our re-evaluation of the evidence, it is clear that the charge of robbery with violence contrary to Section 296(2) of the Penal Code was not proved. The offence that was disclosed is that of house breaking and stealing contrary to Section 304 as read with Section 279(b) of the Penal Code. The appellant therefore ought to have been charged with the above offence and not with the offence of robbery with violence. In the circumstances of this case and for the reasons stated, we do hold that the appeal filed by the appellant must succeed. It is allowed. The conviction is quashed and the sentence imposed set aside.

We could have substituted the charge as stated above and sentenced the appellant appropriately were it not for the fact that the appellant has been in lawful custody for a period of over four years. In the circumstances therefore was hereby ordered that he be set at liberty and released from Prison unless otherwise lawfully held.

DATED at NAKURU this 25th day of November 2005.

M. APONDI

JUDGE

L. KIMARU

JUDGE