



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO. 498 OF 2002
SAMUEL KAMAU KARIUKI 1ST APPELLANT
PAUL JANUARY KARIUKI 2ND APPELLANT
VERSUS
REPUBLICRESPONDENT

(From the conviction and sentence of Ezra O. Awino S.R.M.

in Limuru SRM Cr. Case No. 5254 of 2002)

JUDGMENT OF COURT

The two appellants, Samuel Kamau Kariuki and Paul January Kariuki were charged jointly with a third person not convicted, with the offence of Robbery with violence contrary to section 296(2) of the Penal Code. They were both convicted under section 296 (1) Penal Code and sentenced to imprisonment for 3 years with police supervision for 5 years. They each appealed in criminal appeals number 498 of 2002 and 534 of 2002. During the prosecution of the appeals, consolidation of the two was sought and obtained. In that consolidation the 2nd accused in the lower court became the 1st appellant and the 3rd accused became the 2nd appellant herein while both appeals were ordered to be argued under Appeal No. 498 of 2002. The appellant's appeal is against both conviction and sentence.

The appellants sought to argue their appeal by presenting some written submissions and appeared to be in difficulty in effectively arguing their appeals orally. I accordingly allowed them to put in their written submissions on several grounds. First, the appellant's written submissions were based on the grounds of appeal in the petition. Secondly, the appellants found it easier to put across to the court clearer and better arguments. Thirdly, the State Counsel did not appear to have any objections to the method. Fourthly, I saw no specific rule of law that forbade the method although the court of Appeal has sometimes frowned on the method. However, I was also encouraged to accept the method because it is faster in dealing with appeals especially now when we have a big backlog of pending criminal appeals. And finally, I noticed that the court of Appeal sitting at Kisumu in Criminal Appeal No. 56 of 2001, CHAOL ROTIL ANGELA Vs REPUBLIC, appears to have given a nod to the method adopted in this appeal where the appellant argued his appeal by handing over written submission, their Lordships, B. Chunga, the then Chief justice, A.A Lakha Judge of Appeal and E. Owuor, Judge of Appeal stated at page 12, bottom of their judgment as follows: -

“Additionally, at the hearing of the appeal, the appellant handed to us, his own handwritten notes to form part of the appeal. We have perused the notes and we are satisfied that they are based on the

seven grounds of appeal which he filed while in prison.”

In my view the Court of Appeal tacitly accepted the abovedescribed method, especially in respect to unrepresented appellants.

The prosecution facts were that on 13.9.2001 at 7.00 p.m., the complainant was walking home from work after alighting from a matatu at Kiboko Hotel Stage. He was attacked by three people who struggled with him to overcome him. They felled him down and ripped off his pockets. They in the process stole from him Kshs.6,000/-, a wrist watch of the make called “Metal Giant” labeled “E.W.”, and a driving license and an identity card. The initials “E.W” stood for his name, Emanuel Waiganjo. The driving licence and the identity card were recovered later. During this process the attackers threatened to stab him. Soon thereafter, the complainant made a report at Mutarakwa Police Post and to the local vigilante group. The latter went to the scene and after some search they recovered the licence and the I.D. The group was led by PW2, Moses Gatuthu Ndirangu. It is in evidence, that when the complainant reported to the said local village vigilante group, he gave the names of the two appellants, January and “Juha” as the people who attacked him. The vigilante group started to look for the appellants. After three days or so, there was an information given to the group that what looked like the complainant’s stolen watch had been seen being worn by someone known as Samson Gaithi Mwangi who was later to be charged as the first accused. The latter was tracked down and arrested by the vigilante group. He was taken to Mutarakwa police post. His explanation was that the watch was given to him by a person called “Juha” who had gone to Samson Gaithi Mwangi’s Hotel, ate food and because he had no money to pay, pledged the watch with a view to recovering it later when he would bring the money. The said “Juha” was later arrested. Later, January was also arrested. “Juha” who turned out to be Samuel Kamau Kariuki, was jointly charged together with Paul January Kariuki with this offence along with one Samson Gaithi Mwangi as the first accused. PW3, No. 56511, P.C. Richard Rasiene was a police witness at Tigoni and he helped, in company of others, to arrest the 3rd accused, who is the 2nd appellant herein.

On being put on their defence the 1st accused in the lower court confirmed in an unsworn statement that he got the watch at his hotel when the 1st appellant ate food and was unable to pay. As a result the 1st appellant surrendered the watch to the 1st accused as security for the money until he would come to pay it. The 1st accused was later arrested for being found with the watch, which was a stolen property. He thus denied the offence both of robbery and handling.

The 1st appellant in his unsworn short statement limited himself to the facts of his arrest. He denied the charge. The 2nd appellant also in a very brief unsworn statement, denied the charge.

The 1st accused in the lower court had called a defence witness who confirmed his story and also confirmed the fact that the watch in question was left at the hotel by someone who could not pay for the food he ate.

The trial magistrate accepted that the complainant clearly recognized his attackers as being the 1st and 2nd appellants herein. He had no doubt about the said identification. He observed that there was enough light which came from a passing motor vehicle which the complainant utilized to identify the appellants. The magistrate believed the evidence that the watch in question belonged to the complainant and that the 1st accused’s assertion that he got it from the 1st appellant was true. The watch, he stated, was properly inscribed with the words “E.W.” and there was no dispute as to its ownership. He finally found no evidence against the 1st accused but found overwhelming evidence against the 1st and 2nd appellants who he convicted of the robbery charge. However, having decided that violence was not used before, during and after the robbery, the magistrate decided to convict the two of simple robbery under section 296 (1).

I have carefully considered the evidence on the record as well as the grounds of appeal. The trial magistrate’s conclusions were clearly based on the clear evidence on the record. In my view, there was sufficient evidence on the record upon which he could convict the two appellants. The complainant clearly recognized his attackers as being the two appellants. He used the light of a passing motor vehicle to do so. He immediately reported the robbery to PW2, the leader of the village vigilante group and it is

significant that the complainant at the earliest opportunity available to him named the attackers who were pursued and arrested soon thereafter. The appellants' defence was not worth much. They failed to contradict the major and material evidence against them from the complainant.

They did not even say that they were not at the scene of crime at the material time nor did they explain where they were at the material time. In my opinion, and I so hold, the trial magistrate was entitled to reach the conclusions he reached.

I am however, dismayed that the trial magistrate failed to examine the other major and material aspect of a most important evidence, which starkly lay before him. This is the issue that the complainant was robbed of his clearly marked watch. The court believed that the watch belonged to him since it carried the initials "E.W." The first accused explained that the watch came into his possession from "Juha" who we now know is the 1st appellant. The court accepted the 1st accused's innocent explanation for being in possession of a recently stolen property. It was then important to establish in his consideration of the evidence how the 1st appellant came into possession of the watch. It is not disputed, that the watch was stolen by the people who attacked the complainant and who therefore must be the robbers of the watch and the other items. In my view this piece of evidence would have been the best evidence, which if carefully considered and taken into account, would have independently led into a safe conviction. Unfortunately, the trial magistrate failed to consider it and thus failed to put into operation the legal principle of "recent possession". This court in its original and appellate Jurisdiction is therefore left with the duty of considering the said principle.

The 1st appellant having been clearly linked with the possession of the wristwatch was under a legal obligation to give an acceptable innocent explanation as to how he came into its possession. This he failed to do when he gave his defence statement. I am aware that the actual possession of the watch was with the 1st accused. However, the 1st accused's evidence and other evidence in the record established the fact that the possession was shown to constructively be with the 1st appellant who had recently left the watch in the possession of the 1st accused. It followed therefore, that failure by the 1st appellant to explain that he came into possession of the watch innocently, meant that he was the person or one of the persons who stole it from the complainant. There also was sufficient evidence on the record to prove that he was acting with the help of the 2nd appellant since the complainant identified the 2nd appellant as being present and helping the 1st appellant during the robbery. This established the required common intention as defined under section 20 of the Penal Code.

The upshot of all the above canvassing is that the appellants were properly and rightly convicted of simple robbery and this court upholds the conviction.

As to the sentence, the appellants had nothing to say during this appeal. In the lower court the 1st appellant is recorded as saying that he wanted the court to punish him as one who did not know anything. I understand this to mean that he was still denying knowing anything about the robbery and so he should be considered leniently.

The 2nd appellant said nothing in mitigation. The maximum sentence for robbery under section 296(1) is 14 years. Three years imprisonment with 5 years police supervision does not appear severe or harsh. I accordingly find that the sentence is also reasonable in the circumstances of this case. It is hereby upheld.

This appeal is therefore hereby dismissed.

Dated and delivered at Nairobi this 5th day of April 2003

D.A. ONYANCHA

JUDGE