



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 210 OF 2010

LESIT, J.

JOSEPH ONYIKWA NYARIKI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. L. Gicheha (Mrs.) SRM dated 31st March, 2010 in Thika Chief Magistrate's Court, Criminal Case No. 1098 of 2008)

JUDGMENT

1. The Appellant's **JOSEPH ONYIKWA NYARIKI** was charged with two Counts of was **Robbery with violence** contrary to **section 296(2)** of the **Penal Code**.

The particulars of the two offences were as follows:

“Count I:

On the 27th day of October 2007 at Kimbo area Ruiru in Thika District within Central Province, jointly with others not before court while armed with dangerous weapons namely pistols robbed LUCY MUTHONI MUGO of her motor vehicle registration No. KAY 538U Toyota Platz valued KShs. 700,000/=, a mobile phone make Samsung C300 valued 4,700/=, and cash 17,000/= all valued at KShs.721,000/= and at the time of such robbery threatened to use actual violence to the said LUCY MUTHONI MUGO.”

Count II

“On the 27th day of October 2007 at Kimbo area Ruiru in Thika District within Central Province, jointly with others not before court while armed with dangerous weapons robbed RICKY MBOGO MUREITHI a mobile phone make Motorola L6 valued 6,000/= and cash 2,000/= all valued KSh.8,500/= and at the time of such robbery threatened to use actual violence to the said RICKY MBOGO MUREITHI.”

2. The brief facts of the case were that the complainant in count I, PW1 was driving her motor vehicle KAY 538U in company of the complainant in count 2, PW2. They went to Equity Bank ATM Thika branch where PW1 withdrew 15,000/= in cash. The two proceeded to a shopping Centre where PW2 collected her clothes. They then drove back to the main road in Thika where they were confronted by two men armed with pistols.

3. The two men ordered them to hand over the keys to the vehicle. PW1 was pushed to co-driver's seat while PW2 was pushed to the back seat. The two men joined them in the car, one taking over the driver's seat. The one who drove was identified as the Appellant. He drove off the main road as they robbed the complainants of their phones and money. After a short distance, the assailants ordered PW2 to take over and they jumped out of the vehicle.

4. As PW1 and PW2 drove along the main road they came across a police barrier manned by police officers. These are the ones they drove back towards where they left the assailants. As they drove, a person started running. PW3 chased the person on foot and managed to arrest him in a nearby bush, assisted by his colleagues whom PW1 went for at the police barrier. He is the Appellant in this appeal. He was found in possession of KShs. 3,000/=, PW1's phone and an Equity ATM receipt. PW1 later produced the receipt for the mobile phone stolen from

her and it corresponded with the recovered mobile phone.

5. When the Appellant was placed on his defence, on the date set for his defence on March 3rd 2010, the Appellant stated that he had nothing to say because PW1 was not re-called.

6. The learned trial Magistrate convicted the Appellant in both counts and sentenced him to death. It is against the conviction and sentence he now appeals to this court.

7. Before delving into this appeal, I want to mention that the Appellant's appeal was heard by a bench comprising two judges from the Employment and Labour Relations Court. The Court of Appeal on 17th September, 2019 declared the judgement of the two judges a nullity, set it aside and ordered for a re-hearing by the High Court, thus these proceedings.

8. The Appellant filed a Petition of Appeal dated 12th April 2010, and supplementary grounds of appeal annexed to it. In summary the Appellant contends that the conviction was an error on grounds he was a victim of mistaken identity, that the mobile phone was not recovered in his possession and that he was denied justice when the court declined to re-call PW1.

9. In the Supplementary grounds the Appellant contends the provisions of **section 214** of the **Criminal Procedure Code** were violated resulting in a defective charge; that **section 77 (1)** of the **Old Constitution** and **Articles 50(1)** and **(2)(c)** of current **Constitution** were violated resulting in an unfair trial; failure to invoke **section 309** and **section 150** of the **Criminal Procedure Code** as he was unrepresented; failure to observe **section 213** of **Criminal Procedure Code** before acting on incomplete and unsustainable evidence and failing to find evidence of PW3 the arresting officer was impeachable under **section 163(c)** of the **Evidence Act**.

10. In his oral submissions the Appellant urged that the names of the complainants, PW1 and 2 were inconsistent with the names given in the particulars of the charge. The Appellant contended that even the arresting officer, PW3 testified that he did not recover any of the stolen items from him.

11. Ms Akunja, Learned Prosecution Counsel opposed this appeal. Counsel urged the court to find that the prosecution had proved that the Appellant robbed the complainants at gun point, in company with another. Counsel urged that the complainants found PW3 and other police officers at a road block whom they drove back to the scene and who managed to arrest the Appellant. That the Appellant had in his possession PW1's phone.

12. Ms Akunja urged that the doctrine of recent possession applied to this case and urged court to find PW3's evidence was that the Appellant had the phone in his possession when he was arrested. In regard to inconsistencies in the names of the complainants, Ms Akunja urged the court to confirm the correct names from the handwritten record of the trial court.

13. This is a first appellate court. The duties of a first appellate court are now well settled. I am guided by the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic**, Criminal Appeal No. 272 of 2005 where the Court of Appeal stated as follows:

“In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There is now a myriad of case law on this but the well-known case of *Okeno vs Republic [1972] EA 32* will suffice. In this case, the predecessor of this court stated:

‘The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.’ ”

14. Regarding the names of both complainants, I have checked the handwritten notes of the trial magistrate. PW1 gave her names as Lucy Mugo which is in tandem with the name given in the charge sheet. PW2 gave his name as Ricky Mbogo which is also in tandem with the name given in the charge. The typed proceedings had topographical errors in the spellings of the names of both complainants.

15. This position is also pronounced in another land mark case of **OKENO VS. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of the first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

16. Regarding the Appellant being a victim of mistaken identity, and not being found in possession of any stolen property. The evidence of PW1 and 2 are clear that soon after the assailants abandoned PW1's vehicle and ordered PW2 to take over the driving, they drove a short distance and came across a manned police road block. The two complainants drove back to the place they left the two assailants. All 3

witnesses, PW1, 2 and 3 testified that as soon as they reached the place they saw someone running away into a compound with houses. PW1 and 2 went to more police officers to reinforce PW3 and as soon as they came, the Appellant was flushed out of vegetation where he was hiding.

17. A quick search of Appellant's person yielded three items, the mobile phone, KShs. 3000/= and the ATM receipt which PW1 had received after withdrawing money. Later PW1 produced the receipt she was issued when she bought the mobile phone recovered from the Appellant. It corresponded with the phone.

18. Is this a case of mistaken identity? The reason for the Appellant's arrest was the fact he started running when he saw PW1's vehicle being driven back towards him. His conduct of running away confirmed a guilty mind and was circumstantial evidence against him.

19. After he was arrested, he was found in possession of complainant, PW1's mobile phone, together with the ATM receipt for a withdrawal the same day. This was within a short time after the time of the robbery, and within the area that PW1 and 2 were released to drive off by the assailants.

20. I have considered the evidence of Appellant's arrest, search and recovery of the complainant's recently stolen property, especially the mobile phone. I have also considered the evidence of PW1 and 2 and the ATM receipt recovered from the Appellant, together with the receipt PW1 produced to prove purchase of the mobile phone stolen from her all establish beyond any reasonable doubt that the phone found with the Appellant was the one that was stolen from PW1 and further that it was her property.

21. Is this a case of recent possession? I will quote from a South African in the case of **S v Manamela & Another (Director - General of Justice intervening) [2000] ZACC 5; 2000 (3) SA 1 (CC)** O'Regan J and Cameron AJ in a minority judgment summarised the legal position on recent possession as follows:

"6. Where an accused is caught in possession of stolen goods, their mere possession may, by itself, give rise to an inference that the accused is criminally connected with the unlawful removal or receipt of the goods. If the accused is caught soon after the goods are stolen, common sense may lead to the conclusion that the only reasonable inference is that he or she stole them or participated in their theft. 7. If the period between theft and apprehension is longer, in the absence of a satisfactory explanation the appropriate inference may be that the accused is guilty of the common-law offence of receiving stolen property knowing it to be stolen, 8. the closer the proximity in time between theft and possession, the more easily the State will be able to rely upon an inference of criminal conduct on the part of the accused. In all these cases, however, the conviction of theft or criminal receiving depends upon the State being able to establish the requisites of the crime beyond reasonable doubt: an inferential probability does not suffice. Where the time lapse is so great that an inference of theft or related criminal conduct or knowing receipt cannot be drawn at all, the State's predicament is great. The accused can in these cases with relative ease advance a trumped-up story relating to the acquisition of the goods with little risk that the State will be able to rebut it to the requisite degree of proof."

22. The Supreme Court of Appeal in South Africa has recently, in **Naude & another v S (488/10) [2010] ZASCA 138 (16 November 2010)** affirmed **S v Van der Meyden 1999 (1) SACR 447 (W)**, where the following was stated by Nugent J:

"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

23. The evidence before the trial court was that the Appellant was found in possession of PW1's phone and ATM withdrawal receipt shortly after the robbery. The accused was caught soon after the phone and receipt were stolen. I find that in the circumstances the court could safely come to the conclusion that the only reasonable inference is that he stole the complainant or participated in the theft. The period between theft and apprehension was very short. Besides the Appellant denied being found in possession of both items. In the absence of any satisfactory explanation, the appropriate inference should have been that the accused is guilty of robbery for having in his possession goods that were so recently stolen as to be the thief rather than the recipient of the stolen properties. I find that the learned trial Magistrate conclusion that the Appellant was the thief cannot be faulted.

24. The Appellant annexed written submissions to expound on the technical issues he had raised in this appeal. I have considered the submissions. The very first argument is that the learned trial Magistrate violated **section 214** of the **Criminal Procedure Code** because the value of the stolen phone was given as KShs.4,700/= in the charge but KShs.8,500/= in the receipt produced by PW1. The Appellant urged the learned trial Magistrate should have invoked **section 214** of **Criminal Procedure Code** and ordered an amendment to correct the inconsistency.

25. **Section 214** of the **CPC** gives a trial court power to order the prosecution to amend the charge if it is defective, at any time before the close of the prosecution case. I agree there is a variation in the value given of the Samsung phone in the particulars of the charge and in the evidence of PW1, and the court may have exercised its power under that section to have it amended. The disparity is however small. As prescribed under **Section 137 (c) (1)** of the **Criminal Procedure Code**, as long as the charge has indicated with reasonable clarity the property referred to, it was not necessary to state its value. That section means that even if a value is not given, so long as property is described with clarity, the charge would still stand.

26. I have considered the values given of the phone in PW1's evidence, the phone's receipt and in the charge and find that the disparity in the value, being a difference of Kshs. 4,200/ was not significant and could not render the charge to be fatally defective. Nothing turns on this

ground.

27. The Appellant raised a technical point that **section 77(1) of the Constitution Article 50(2) (c)** of the current **Constitution** were violated as he was denied a fair trial by denying him time to prepare for his case. He cites pages 15, 16 and 17 of the proceedings where the Appellant adjournment and more time to prepare for his case.

28. I have looked at the record of the proceedings and find that both the Appellant and Prosecution asked for numerous adjournments which were granted. These were on 9th May 2008, 20th June 2018, 4th July 2008, 21st October 2008, 7th May 2009, 24th September 2009.

29. On the part of the Appellant he successfully sought adjournments on 2nd September 2008 and 9th October 2008. In the latter case, the Appellant cross-examined PW1 at length after her evidence in-chief but sought adjournment, which was granted before he cross-examined PW2 after his testimony. The case was adjourned to 21st October 2008 when the Appellant sought adjournment saying he needed more time to prepare.

30. On 17th March 2009 when the case came up again for hearing, the Appellant informed the court that he had no faith with the court for taking too long to finalize the trial. The trial court sent the file to the Chief Magistrate for re-allocation to another court. However, the Chief Magistrate referred the case back to the same trial magistrate on 17th March, 2009 with directions she concludes the trial. This she eventually did.

31. The Appellant caused another adjournment on 19th June 2009 despite the prosecution having all its witnesses in court. On 5th November 2009, the Appellant sought adjournment to prepare his defence which was granted, and defence hearing set for 3rd December 2009.

32. On the resumed hearing of 3rd December 2009 the Appellant sought further adjournment which was granted, and hearing set for 26th January 2010. The Appellant applied for adjournment on that date and the date of 11th March 2010 set as the defence hearing. On 11th March 2010 the trial court adjourned defence to the next day with no reasons given. On 12th March 2010 the Appellant made a statement after giving his names in compliance with **section 211 of the Criminal Procedure Code**. In his address he stated that he had nothing to say as PW1 was not re-called.

33. The record bears witness that on 5th November 2009, the Appellant insisted on the prosecution being ordered to close its case when it sought adjournment to avail PW1 according to the Appellant's request. The Appellant cannot turn around and say that he had nothing to say in defence because PW1 was not re-called, yet he was the one who insisted that the prosecution should be ordered to close its case before availing PW1 for further cross examination. Neither can he try to gain an advantage and accuse the court of violating his rights under the law cited, when he was in fact the one who insisted that the prosecution should close its case despite not having availed PW1 for further cross-examination as per his request.

34. The Appellant relied on the case of **Albanus Mwasii Mutua vs. Republic C.A. No. 120 of 2004** where the court held:

“... In view of the above violation of the constitutional right and section of the law, the nature and strength of the evidence brought by the prosecution in support did not really matter...”

35. The Applicant cannot benefit from the above decision. The violation referred to in **Mutua case**, supra, was in regard to prolonged detention in police stations before the accused was presented to court and charged. The police took 8 months after his arrest to take the accused to court. This case is distinguishable from the instant case. The violation the Appellant alleges is in the course of his trial of not being given adjournments and enough time to prepare for his case. The *recidendi* does not apply. Besides, the Appellant's contention that he was not given sufficient time is not merited. I have demonstrated in this judgment the number of adjournments caused by the Appellant. They were numerous adjournments. He also caused the prosecution to close its case before re-calling PW1 for him to further cross-examine her. By challenging failure of the court to allow him adjournments, yet having caused so many in the case, the Appellant is reprobating and approbating at the same time. I find that the Appellant was granted more than sufficient time to prepare and present his defence.

36. Furthermore, Appellant's action not to allow the prosecution time to avail PW1, after he indicated he required to further cross examine her, was a waiver on his part to further cross-examine this witness. He cannot be heard to say his right to fair trial was violated by it. Nothing turns on this ground.

37. The Appellant contends that since PW3 did not write in his statement that he recovered anything stolen from him, his evidence violated **section 163(1) of the Evidence Act**. **Section 163 (1) of the Evidence Act** provides the manner in which the evidence of a witness can be impeached, which includes inconsistency between the witness written or oral evidence. The Appellant is making heavy weather of this point. PW3's evidence was that he chased the Appellant from the road to the point where he entered a compound to a home. He then waited for police reinforcement. When they arrived he and his colleagues flushed out the Appellant from vegetation within that home where he ran to.

38. It is clear PW3 was present and actively participated in the Appellant's arrest. He said he did not himself recover the phone but was present when it was recovered from the Appellant's pocket, together with the case and ATM cash withdrawal receipt. All were exhibits 1, 2 and 3 for the prosecution. PW3 took over the exhibits and handed them over to the investigating officer PW4 who confirmed it.

39. I find that the evidence of PW3 was clear and consistent. It was not impeached either through his written statement or oral evidence in court. **Section 163(1) of the Evidence Act** does not aid the Appellant.

40. The Appellant complains of the fact PW3 first arrested him before booking the report at the police station. PW3 was at the area where

the robbery had taken place and where the Appellant was arrested. It would not have been useful or wise for PW3 to leave the scene to record the incident at the Police Station before finding the assailants, just in order to record the report. He did the reasonable thing in the circumstances. Nothing turns on this point.

41. I have carefully considered this appeal and have subjected the entire evidence to a fresh evaluation and analysis. I have drawn my own conclusions. I find that the learned trial magistrate came to the correct finding that the prosecution had proved the case against the Appellant beyond any reasonable doubt.

42. I find that the conviction was safe. The Appellant was arrested with the complainant's (PW1's) phone, ATM receipt and some money. The complainant produced a receipt for the phone which proved her claim to the ownership of the phone before the robbery. I find that the Appellant had recent possession of the complainant's stolen phone and ATM receipt. The KShs. 3,000/= must also have been part of the proceeds of the robbery being part of the KShs.17, 000/= PW1 had withdrawn from her account.

43. In the result, I find that the conviction was safe and I accordingly uphold it.

44. In regard to sentence, the Appellant has urged this court to consider the case of **Francis Muruatetu & Anor vs. Republic Supreme Court case No. 15 of 2015** and give a term sentence.

45. The Appellant had been sentenced to death. The Supreme Court, in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** cited by Mr. Swaka and Ms. Onunga herein, held:

“[43] Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency.

[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.

[112] Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:

a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.”

46. I have considered the manner in which the robbery with violence was executed by the Appellant and his co-accused. He and his accomplice had pistols. This is an aggravating factor to the offence the fact they were armed with dangerous weapons. Granted they did no harm physically to either of the two complainants. However, the sight of a pistol is enough to cause psychological trauma.

47. Having considered these factors, and the fact the Appellant has been in prison since 2007, I will set aside the death sentence and in substitution thereof order an imprisonment for a period of 20 years from the date of arraignment in court which is April 2, 2008.

DELIVERED THROUGH TEAMS THIS 13TH DAY OF JULY, 2020.

LESIT, J.

JUDGE