



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL APPEAL NO. 63 OF 2019**

**CORAM: HON R.E. ABURILI J**

**VINCENT OCHIENG ONYANGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment, conviction and sentence delivered on 8<sup>th</sup> August 2019 in Siaya PM Criminal Case No 9 of 2019 by Hon T.M. Olando, SRM)*

**JUDGMENT**

**INTRODUCTION**

1. The Appellant **VINCENT OCHIENG ONYANGO** was charged before the Principal Magistrate's Court at Siaya with two counts of the offence of robbery with violence contrary to section 296 (2) of the Penal Code, the particulars of which were that on the 1<sup>st</sup> of January 2019 at Sigana Village Mur-Ngiya Sublocation in Siaya Sub county within Siaya County jointly with another not before court while armed with pangas and wipes robbed GAO one mobile phone made Itel valued at Kshs 5,000 and at or immediately before the time of such robbery threatened to use actual violence to the said GAO. In count II, the appellant faced a similar charge and the victim is SLA, of one mobile phone make Teckno and one memory card valued at Kshs 6,500 and immediately before or immediately after the time of such robbery threatened to use actual force against her.

2. The appellant also faced an alternative count of handling stolen property contrary to section 322 (2) of the Penal Code. It was alleged that otherwise than in the course of stealing, he dishonestly retained one memory card knowing or having reason to believe it to be stolen.

3. The trial magistrate, Hon. T. M. Olando, SRM after hearing the six prosecution witnesses and testimony of the appellant found that the prosecution had proved their case beyond reasonable doubt and convicted the appellant of the two offences of robbery with violence and sentenced him to serve 15 years imprisonment on each count. The sentences to run concurrently.

4. Aggrieved by the said conviction and sentence, the appellant filed this appeal vide petition of appeal on 15<sup>th</sup> August 2019 setting out the following grounds of appeal:

- a) That I pleaded not guilty charge.*
- b) The trial magistrate ignored the testimony of PW1 which exonerate me from the blame.*
- c) That the evidence adduced before court did not warrant conviction in the case.*
- d) That there was no corroboration of all the evidence adduced by PW1 to PW5.*
- e) That I was not arrested in possession of any exhibit.*
- f) That I was forced to continue with the case with an exhibit which was not reported to have been robbed from PW1.*
- g) That I pray for retrial of this case.*
- h) That I was not given statement of witnesses before the beginning of the case.*

i) *That I was not given investigation diary though I requested the trial court severally.*

## **SUBMISSIONS**

5. The appeal was disposed of by way of written submissions. The appellant filed written submissions dated 18<sup>th</sup> December 2019 whereas the Respondent filed written submissions 14/5/2020 canvassing the appeal herein. The appellant submitted that the trial Court ignored the testimony of PW1, GAO, who exonerated him from the alleged offence when she stated that she had a phone make ITEL valued at 5,000/= and explained to court how she lost the phone.

6. The appellant further submitted that PW1 testified that she had seen him after she had lost the phone and that PW1, Ms. O, did not produce any document such as a receipt to prove ownership of the alleged phone or give her mobile phone number to prove that she indeed had a phone. He thus submitted that the evidence produced before court did not warrant his conviction as PW1 confirmed to court that he was not present during the time of the alleged incident.

7. Regarding the second count, the appellant submitted that PW5, the complainant failed to reveal the phone make she had nor did she prove that she actually owned a phone and as such the evidence they adduced in court could not be substantiated.

8. He further submitted that there was no corroboration in the prosecution evidence. In addition, the appellant submitted that he was not arrested in possession of any exhibit and that whereas PW6 testified that he recovered a memory card from him, nothing was produced in court including any inventory form to confirm the alleged recovery and as such the evidence of PW6 was not corroborated by any other evidence.

9. The appellant concluded his submissions by stating that his sworn defense was not given any due consideration despite the fact that it was not displaced by the prosecution case.

10. On the part of the Respondent, it was submitted that the victim told the court that she was a schoolmate of the appellant hence she knew him very well and that she saw him in the full glare of the torchlight used by the appellant. Further, that when the complainant met the appellant in the company of his accomplices, the appellant took off and was traced and arrested later. It was also submitted that the appellant never raised the issue of the make of the phone which the complainant testified that the appellant snatched from her while armed with a panga and that when he escaped and was stopped by people, and on seeing the complainant, he ran away. Lastly, it was submitted that the appellant was found in possession of a memory card belonging to the 1<sup>st</sup> complainant, without justification. Counsel urged this court to dismiss this appeal and uphold the conviction by the trial court.

## **ANALYSIS & DETERMINATION**

11. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v. R 1975) E.A. 336 and to the appellate Court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala v. R [1957] E.A. 570. It is not the junction 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, see (Peters V Sunday Post 1978) E.A. 424.”*

12. The prosecution evidence as laid out in the trial Court was that on the 1<sup>st</sup> January 2019, **PW1 GAO** a minor aged 17 years and in Form two testified on 1/1/2019 that she was going home from church at 1am in the company of her sister S and brothers M and B when she heard noise from behind her brothers and she saw B running prompting her to begin running towards her grandmother’s home. PW1 further testified that someone followed her and hit her with a rope and began to strangle her whilst ordering her to give him the phone which she did after which the person left her.

13. It was her further testimony that she made noise and the person ran away but she was able to see her assailant’s face as he had a torch and did not switch it off. She asserted that she was able to identify the appellant as her assailant.

14. She reiterated her testimony in chief, in cross examination by the appellant.

15. **PW2, MO** testified that on 1.1.2019 they were coming from church and they saw some light and people joined them from behind and he was hit with a stick prompting him to run away. He stated that they were with G, S and B.

16. **PW3 Charles Onyango Tawo** testified that on the night of 31.12.2018 he was leading the worship in church which ended at 1 am after which G, PW1, went and told him that they were taking S home. He further testified that after some time, M, PW2 returned and informed him that they had been chased. PW3 further testified that G and M said that they could identify one of the people and they went to Ngiya Police Station and reported.

17. **PW4 Maurice Ochieng** testified that they were leaving the church to take back the chairs home when the appellant and another who were hiding in a bush began to chase him with a panga prompting him to run to the church gate where he found the pastor and other people who identified the appellant as the one who was chasing them. PW4 further testified that he was able to identify the appellant.

18. **PW5 SLA** testified and stated that on the night of 31/12/2018 they went to church with B, M and G and that on their way back home, the appellant accosted them from behind and hit Martin prompting them to run. She fell down and the appellant caught up with her and demanded for her phone and MPESA pin which she gave him after which the appellant removed a panga and told her to run away. PW5 further testified that she had her memory card in the phone which was stolen and that when the appellant was arrested, he was found with the said memory card.

19. **PW6 PC Wilson Kalama** based at Ngiya Police Patrol Base testified that on 1/1/2029 at about 6pm, the complainants reported that they were robbed of their phones by the people while they were returning from church and that they identified one Vincent Ochieng the appellant herein. That the police managed to arrest the appellant and recovered in his possession the memory card which was stolen from the complainant. He produced the memory card as an exhibit and identified the appellant as the person they arrested in connection with the reported robbery.

20. At the close of the prosecution's case, the appellant gave sworn testimony and called no witness. He testified that on the night of 31.2.2018 he was at Ngiya market at a disco and that at about 3am he heard of an accident so he went to check and found one boy with a cut on his head and the boy told them to go and look for the girl who was also injured and they went and found a girl beside the road but she could not stand or walk. That they took the girl to the police station and the police told them to take her to hospital which they did. Later he was arrested and charged with the offences. He denied attacking the complainants and robbing them.

21. In his judgment delivered on the 21<sup>st</sup> March 2019 finding the appellant guilty and convicting him, the trial magistrate Hon. T. M. Olando restated the evidence on record by the prosecution witnesses and the defence tendered by the appellant and framed the issues for determination as follows:

- a) **Were the complainants robbed?**
- b) **Were the complainants robbed by the accused?**
- c) **Is the accused guilty of the offence of robbery with violence?**

22. On the first and second issue, the trial magistrate found that the evidence of PW1 GAO was unchallenged thus proving that the complainants had been robbed and that it was the appellant who was identified as the one who robbed them.

23. The trial court further found that the appellant had been positively identified by both PW1 GAO and PW5 SA. Hon. T.M. Olando stated that he believed the evidence of PW1 and PW5 the Complainants and found no reason to doubt the same as the complainants were consistent in their evidence and further that the appellant did not give any reason why the complainants would frame him with such a serious offence.

24. On the final issue, the trial court found that the complainants testified that the people were armed with pangas, which were used to threaten the complainants during the robbery.

## **DETERMINATION**

25. Having carefully considered the appellant's grounds of appeal, the evidence adduced in the trial court by the prosecution witnesses and the appellant, and the submissions for and against the appeal herein, the main issues for determination are:

- 1) **Whether the appellant's constitutional rights to a fair trial were violated by failure to be provided with prosecution bundle of documents.**

26. It is the appellant's ground of appeal and submission that he was not provided with witness statements prior to trial and further that he was not availed with the investigation diary.

27. Article 50 (2) (j) of the Constitution provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence while sub-article (c) provides for the right of the accused to have adequate time and facilities to prepare his defence.

28. The right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence is expressly provided for in our constitution. In *Thomas Patrick Gilbert Cholmondeley Vs. Republic*[2008] eKLR (decided before the promulgation of the 2010 constitution) the Court of Appeal stated categorically that:

*"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under..... our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items." In arriving at this holding, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda: respectively R. V. Ward [1993] 2 ALL ER 557; R. V. Stinchcombe [1992] LRC (Cri) 68; Olum & Another V Attorney General [2002] 2 E.A. 508; and, the Kenyan Case of George Ngodhe Juma & two others Vs. The Attorney General Nairobi High Court, (Misc. Criminal Application No. 345 of 2001)."*

29. Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with **Sub-Article 2(c) which provides that every accused**

person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence. This means that the duty is cast on the prosecution to disclose all the evidence, materials and witnesses to the defence during the pre-trial stage and throughout the trial.

30. Failure to provide the accused with the prosecution witness statements in advance as provided for under Article 50(2)(j) would violate the appellant's constitutional right to a **fair trial** and vitiate the entire trial.

31. However, a perusal of the trial court record clearly shows that on 31/1/2019 after plea was taken on 3/1/2019, the trial court issued witness summons to the investigating officer and the OCS to produce witness statements and on 5/3/2019, the appellant stated that he was not ready to proceed with the hearing as he did not have witness statements. The trial court then recorded that **the accused has today been supplied with copies of witness statements** and set another date 9/5/2019 for hearing on which latter date the appellant stated that he was ready and the hearing commenced.

32. In addition, although the appellant claims that he was not given an investigation diary despite requesting for it severally in court, the trial court record does not show that he ever requested for the investigations diary which in the instant case was not part of the evidence relied on against the appellant by the prosecution. The claim is therefore baseless and dismissed. Accordingly, I find and hold that the allegation that the appellant's rights were violated by failure to supply him with witness statements is uncalled for and is dismissed.

## 2) Whether the prosecution proved its case beyond reasonable doubt.

33. The appellant was charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. Section 296 of the **Penal Code** provides:

***“296. (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***

***(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”***

34. Accordingly, for the offence of robbery to be proved, there must be evidence of theft by the person charged. A person cannot be guilty of the offence of robbery unless he is guilty of theft. The theft must however be accompanied by the use or threat of use of actual violence to a person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained. If all these ingredients are present and the offender was armed with any dangerous or offensive weapon or instrument, or was in company with one or more other person or persons, or at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used any other personal violence to any person, he would have committed robbery with violence and would be liable to be sentenced to death.

35. In the instant case, there is evidence that there was a robbery. PW1 GAO testified that she was robbed of her mobile phone on the night of 1/1/2019 when coming back from church. Ms. O ably testified that it was the appellant and another who robbed her as she was able to see his face very well since his co robber had a torch which he did not switch off. PW5 SA also stated that she was able to see the appellant and she stated that the appellant is the one who robbed her. Further, upon arrest, the appellant was found in physical possession of a memory card which was identified by the 2nd complainant as the one which was stolen from her. Both PW1 Ms. O and PW5 Ms. A testified that the persons who robbed them threatened them during the robbery. According to PW5, the two robbers were armed with a panga and a stick which were used to threaten the complainants and the witnesses who were in the company of the complainants. PW5 too was able to see the appellant and his co robber as they had a torch which was lit.

36. The appellant in his defence testified that on 31.2.2018 he was at Ngiya market at a disco and that he only went to check on a boy and a girl who were involved in an accident and escorted the girl to the police station and was instructed to take her to hospital which he did. He denied ever attacking the complainants and robbing them of their phones.

37. What that means is that the appellant was raising an alibi defence. On alibi defence, it is settled that the prosecution always bears the burden of disproving the alibi and proving the appellant's guilt (**Wang'ombe v. Republic [1976-80] 1 KLR 1683**). However, the Court of Appeal has stated over and over that it is desirable that an alibi defence be raised at the earliest opportunity to give the prosecution time to investigate its truth or otherwise.

38. The said Court of Appeal has also held that nevertheless, even when the defence is raised late in the day, it must still be addressed. See (**Ganzi & 2 Others vs. R [2005] 1 KLR 52**.) However, in the present case, and as already observed above, the appellant's belated alibi defence is weighed against the evidence adduced by the prosecution which was accepted by the trial court and which I wholly concur with, the conclusion I make is that the alibi defence is and was effectively displaced. I am satisfied that on the evidence adduced, the appellant was positively identified by the two complainants as the person who, in the company of another, accosted them, threatened them, using pangas and whips, they robbed the complainants of their mobile phones. The appellant could not explain the possession of a memory card which belonged to the 2nd complainant. He never claimed that it was his.

39. Having re-examined the evidence by the prosecution witnesses leading to the arrest of the appellant *vis a vis* the defence, I am persuaded that the prosecution proved their case against the appellant beyond reasonable doubt and that the defence of alibi was farfetched.

40. The appellant claims that PW1 exonerated him from the offence. I have perused evidence by PW1, the first complainant whose testimony places the appellant at the scene of crime as she is the one who recognised the appellant very well during the robbery as the one who emerged with another person who struggled with the 1st complainant and took away the ITEL phone of the 1st complainant. The allegation that the 2<sup>nd</sup> complainant did not know the make of her phone is far fetched as she was categorical that the memory card which was in her phone was found on the appellant. Further, that the appellant even told her to draw the phone's security pattern. She was firm that it was the appellant

who robbed her.. In addition, it is not the receipt that would demonstrate that the complainants had phones which were taken away that night. The complainants were students, from their testimonies. The appellant and another acted in concert. They had a common intention to rob the complainants of their properties.

41. In light of all the foregoing and in the absence of any evidence that the appellant's constitutional right to a fair trial were violated as discussed herein above, I find nothing that suggests that the learned trial magistrate was in error in convicting the appellant. Accordingly, I find and hold that the learned trial Magistrate properly reached the correct decision on good evidence. The appeal against conviction fails and the same is hereby dismissed.

42. On sentence, the mandatory sentence for robbery with violence upon conviction is death. The appellant was handed 15 years imprisonment on each of the two counts which is to run concurrently. That sentence is lawful and extremely lenient. It took into account the mitigations and the holding in the **Francis Karioko Muruatetu v Republic [2017]e KLR** a decision in the Supreme Court, Constitutional Petition No. 15 & 16 of 2015. For the above reasons I find no reason why I should interfere with the lawful lenient sentence imposed on the appellant. The appeal against sentence fails and the same is hereby dismissed.

43. On the whole, the appeal against conviction and sentence is hereby dismissed. The conviction and sentence of the lower court is hereby upheld.

44. Accordingly, this appeal against conviction is dismissed.

Orders accordingly.

**Dated, signed and delivered at Siaya this 20<sup>th</sup> Day of July 2020 via Microsoft Teams. Appellant present virtually from Kisumu Maximum Prison**

**R.E. ABURILI**

**JUDGE**

Note: in the process of delivering this judgment, the appellant implored the court to allow him to withdraw his appeal. As the judgment was already written and partially read, I concluded reading and pronouncing the judgment. I however allowed the application by the appellant to have his appeal against conviction and sentence wholly withdrawn.

**R.E. ABURILI**

**JUDGE**

**20/7/2020**