



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 705 OF 2010

FRANCIS IRUNGU MUTHONI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with two counts of robbery with violence contrary to **section 203** as read with **section 204** of the **Penal Code**. The offences were committed at Kirasha junction in Kiambu West District within the then Central Province. The particulars were that he and others, while armed with knives and metal bars robbed PW1 and PW2 of cash and mobile phones and at or immediately before or immediately after time of such robbery used actual violence on the two complainants.
2. The Appellant was convicted of the two counts of robbery with violence contrary to **section 296(2)** of the **Penal Code**, by Hon. Mrs. Murage, Senior Principal Magistrate on 1st December 2010. No order or finding was entered for the two alternative counts of handling stolen property contrary to **section 322** of the **penal Code**.
3. The Appellant was aggrieved by the judgement of the lower court and filed his appeal to the superior court. His appeal was heard and determined by Korir and Marete JJ on 7th June 2014.
4. The Court of Appeal set aside the judgement of the High Court in a judgment dated 29th September 2017. The Court gave the basis of that decision as the Supreme Court in **Republic vs. Karisa Chengo & 2 others [2017] eKLR** in which it was held that a judge of the specialized courts of Environment and Land (ELC) and Employment & Labour Relations (ELRC) have no jurisdiction to hear and determine matters reserved for the High Court and vice versa.
5. The Court of Appeal held that since the Appellants appeal should have been heard by a judge of the High Court under **section 347(1) (a)** and **section 359(1)** of the **Criminal Procedure Code (CPC)**. However, having been heard by a Judge of the High Court and a Judge of the ELRC, the decision of that bench was null and void. The Court of Appeal remitted the matter to the High Court ordered that the appeal be re-heard in accordance with the law. That is how the appeal has been brought back to this court.
6. The brief facts of the prosecution case were that PW1 and PW2 were travelling in motor vehicle registration number KAG 1634 Toyota Canter on the 21st June 2010. They left Thika. On arrival at Kirasha Shopping Centre, the vehicle broke down. It was around 11pm. Both witnesses told the court that they moved the vehicle to the Shopping Centre which was well lit with electricity lighting from street lights and the shops. That while there they were approached by the Appellant who sought to know why they had stopped there. They informed him that the vehicle had broken down.
7. PW1 and PW2 told court that the Appellant returned at 1am in the company of four others. He roughly knocked on the vehicle glass windows forcing them to open. They were pulled out of the vehicle and violently robbed each of a mobile phone and cash. They were also assaulted then left. At daybreak the duo reported the matter to PW4 at the Administrative Police Post. They also went for treatment for the injuries suffered during the incident.
8. At 9am PW1 and PW2 saw the App and they went back to PW4 who accompanied them to where the Appellant was and arrested him. PW4 went to Appellants house where he searched. On searching the Appellant, he recovered the two mobile phones stolen from the complainants, PW1 and PW2. They were in his trouser pocket. He was later handed over together with the recovered exhibits to PW5 a regular police officer.
9. The Appellant in his defence denied the offence and stated that he was at his place of work on 22nd June 2010. That at 8am some people who were accompanied by police approached him. He said that he was searched and nothing was recovered. He was arrested and framed

with this charge.

10. The Appellant was found guilty and convicted of the two counts of robbery with violence and sentenced to death. Being aggrieved by the conviction and sentence he filed his appeal to this court.

11. The Appellant relies on his memorandum of appeal in which he cites four grounds as follows:

(1) That, the learned trial magistrate erred in law and facts when she convicted me in this case with no identification parade to prove the positive identification.

(2) That, the learned trial magistrate erred in law and facts when she convicted me in this case with no exhibit.

(3) That, the learned trial magistrate erred in law and facts when she convicted me in this case with contradictions evidence from the prosecution side.

(4) That, the learned trial magistrate erred in law and facts when she convicted me while rejecting my defence with no good reason thus violating law provision under section 169(1) of CPC.

12. The Appellant also relies on supplementary grounds of appeal and written submissions. In the supplementary grounds of appeal, he raises 2 grounds thus:

(1) That the learned trial Magistrate in both law and facts and misdirected himself by basing my conviction in reliance of identification evidence by PW1 and PW2 without first of all ruling out altogether as to the possibility for the existence of mistaken identification at the scene of crime by the time of attack more so in view of the prevailing circumstances at the said scene.

(2) That the learned trial Magistrate erred in both Law and Facts by failing to observe that PW1 and PW2 never gave any description of their attackers to police yet it was a immediate report when their mind was fresh.

13. This is a first appellate court and therefore its mandate is clear that it analyze and evaluate afresh all the evidence that was adduced before the lower court, and draw my own conclusions of the matter, while giving an allowance for not having had the benefit of observing the witnesses. 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 it was 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. In **OKENO V. REPUBLIC [1972] EA 32**, the court of appeal held:

“An appellant on 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 to 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 v. Republic [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 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, [1958] EA 424.)”

15. I have analyzed and evaluated afresh the entire evidence adduced by both the prosecution and the defence in this case. The Appellant raised four grounds of appeal in his memorandum and two in the supplementary grounds. These grounds can be summarized to four grounds covering four issues. One the issue of identification, two the issue of failure to produce exhibits, three contradictory evidence of the prosecution witnesses and four the rejection of the defence.

16. On the issue of identification, it is the Appellant’s case that the learned trial magistrate erred in law and fact by relying on the evidence of identification by the two complainants. He contends that the two complainants did not give any descriptions of him to the police, and secondly, that no ID parade was conducted in the case.

17. The prosecution through the learned prosecution counsel, Ms. Kibathi opposed the appeal. Counsel urged the court to find that the prosecution proved all the ingredients of the offence, and that case against the Appellant was proved as required. In regard to identification, the learned counsel submitted that the complainants had good opportunity to see the Appellant, at 11 pm when he talked to them while alone

and 1 am when he returned in company of four others. Counsel urged that the place was well lit from lights from street lights along the shops where they had parked. Counsel urged that the lights were sufficient to identify the Appellant and therefore the identification was good.

18. Regarding identification by witnesses the law is very clear of the nature of the evidence that should be adduced against an accused person. In R. V. ERIA SEBWATO [1960] EA 174 it was held:

“Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction.”

19. What is watertight will depend on the quality identification. This was explained succinctly in the case of CLEOPHAS TIENO WAMUNGA vs. REPUBLIC [1989] eKLR where the court of appeal held:

“What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.

Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”

20. The learned trial magistrate in her judgment said this about identification:

“I have considered the evidence before me. I find that PW1 and PW2 positively identified accused at the scene. They had initially spent some time with him when he first went to them. Later PW1, PW2 and PW4 testified that the mobile phones were recovered from him. Accused has not challenged the evidence. I find the evidence against him is overwhelming...”

21. The prosecution called two eye witnesses of the incident who are also the complainants in the case. I have considered that the two witnesses saw the Appellant twice that night. Both times it is the Appellant who approached them at their car where they were forced to put up for the night when their vehicle broke down. Both witnesses described the area as outside shops where lighting was provided through electricity street lighting. They said that they could clearly see the Appellant sufficiently to be able to subsequently identify him.

22. They also testified that they had a conversation with the Appellant before they were robbed of their valuables. The first encounter was pleasant. The second encounter was violent and both PW1 and PW2 suffered injuries for which they received treatment. Their treatment notes and P3 form were exhibit 2, 3, 5 and 6 respectively.

23. The Appellant challenged the testimony of PW1 and PW2 as being full of contradictions. He urged that while PW1 stated that he was robbed of 1500/-, PW2 said that PW1 was robbed of 2500/-. The Appellant also raised issue with the evidence of PW1 where he said that the Appellant was taken to his house where two phones were recovered. That in contrast PW2 said that the Appellant was arrested and searched and the phones recovered.

24. I have analyzed the evidence afresh. I find that even though PW1 said that the Appellant was taken to his house after his arrest, he is clear that the search conducted which yielded the phones was from the person of the Appellant. The evidence of PW2 was also clear that the Appellant was searched upon arrest and the phones recovered from him. There was therefore no contradiction in the evidence of the two witnesses. There was merely a variation of evidence which is expected, and which does not go to the substance of the prosecution case.

25. I have cautioned myself of the need to consider the evidence of identification carefully especially because the incident occurred at night. The two witnesses corroborated each other's evidence as to the identity of their attacker. I find that they had ample chance to see their attacker at close quarters as he attacked both of them and demanded for phones and money. I find that the fact the Appellant came twice and engaged them in a conversation both times enabled the complainants to see their assailant. The identification was under street lighting described as strong enough to enable identification.

26. However, this was not the only evidence against the Appellant. There was other evidence against the Appellant. The Appellant was found with the two phones of the complainant the day following the night they were robbed. Specifically, he had possession of the phones 8 hours after the robbery. The issue is whether 8 hours qualifies as recent possession of mobile phones. And also whether the evidence adduced meets the requirements of the necessary ingredients to establish the doctrine of recent possession.

27. In the case of ERICK OTIENO ARUM VS REPUBLIC, CA NO. 85 OF 2005 (unreported) the Court of Appeal dealing with the doctrine of recent possession stated:

“In our view, before a Court of law can rely on the doctrine of recent possession as a basis of conviction in a Criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, secondly that, that property is positively the property of the Complainant, thirdly that the property was stolen from the Complainant, and lastly, that the property was recently stolen from Complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.....”

28. The prosecution proved that the phones, produced as exhibit 1 and 4 were stolen from PW1 and PW2, and that they were recovered from

the Appellant 8 hours after they were stolen. I find that this is recent possession of stolen property by any standard. Recent possession was proved and the doctrine is applicable to this case.

29. The Appellant's last ground was that his defence was not considered by the learned trial magistrate. I have perused the judgment of the trial court and find that the Appellant's defence was considered. The court found that the Appellant did not challenge the prosecution evidence. That is sufficient consideration of the defence.

30. I find that the evidence of identification taken together with the recovery from the Appellant of the complainants recently stolen phones fully establishes the case against the Appellant. In addition, the prosecution proved that he was in company of four others at the time of the robbery, that he was armed with offensive weapons and that he assaulted both PW1 and PW2 at the time of the incident.

31. Having analyzed and evaluated afresh the entire evidence adduced by both the prosecution and the defence I am satisfied that the prosecution has proved the two counts of **robbery with violence** contrary to **section 296 (2)** of the **Penal Code** as against the Appellant beyond any reasonable doubt. I find no fault in the conclusions reached by the trial court. Accordingly, I do confirm the conviction entered against the Appellant by the learned trial magistrate

32. In regard to the sentence, pursuant to the case of **MURUATETU AND ANOTHER VS REP. SUPREME COURT PETITION NO 14 AND 15 OF 2015** which has now received notoriety in Kenya, the death penalty is no longer a mandatory sentence.

33. I have looked at the lower court proceedings and noted that the Appellant chose not to give any mitigation before sentence. The prosecution on its part treated him as a first offender. Before this court, the Appellant mitigated and urged that he was 24 years old at the time of his arrest. He said that he recently lost his, brother and sister in an accident. He urged the court to give him a second chance to be able to take care of the children left behind by his siblings. He also said that he has undergone training and counselling while in prison and that he will go back a different person.

34. I have considered the Appellant's mitigation as above. I have also considered that he has been in prison since he was arraigned in court on 28th June, 2010 and sentenced to death on 8th December, 2010. He has therefore been in custody for a period of 10 years and 3 months. I considered that part of the items lost were recovered. There was aggravation for the offence by fact the Appellant was armed with offensive weapons and was accompanied by others. I find that having stayed in prison for the length of time he has, I find that he has served sufficient punishment for the offence he committed.

35. Accordingly, I set aside the sentence of death in both counts and in substitution thereof impose a sentence equivalent to the period served as to result in his immediate release unless he is otherwise lawfully held.

36. In the result the appeal against conviction has no merit and is dismissed in its entirety. The appeal against sentence succeeds to the extent ordered herein above.

DELIVERED THROUGH TEAMS THIS 1ST DAY OF OCTOBER, 2020

LESIT, J

JUDGE.

In the presence of

Gitonga.....Court Assistant

AppellantIn person present

.....For the State

LESIT, J

JUDGE