



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 49 OF 2012

KARISA CHENGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 1 of 2011 of the senior resident Magistrate's Court at Kilifi – R.K. Ondieki, SRM)

JUDGEMENT

1. This is a rehearing of the appeal pursuant to the order of the Supreme Court in **Republic v Karisa Chengo & 2 others [2017] eKLR** .
2. The Appellant Karisa Chengo was convicted of the offence of robbery with violence and sentenced to death. Being aggrieved he has filed this appeal against both the conviction and sentence on fresh grounds that his fundamental rights were violated for reasons that he was kept in custody at the time of arrest for more than the prescribed time; that the Force Standing Orders of Cap 46 were breached as no identification parade was carried out the Appellant having been arrested two weeks after the incident; that he was not given adequate facilities to prepare for his defence contrary to Article 50(2) of the Constitution; that the trial court erred by convicting him on the evidence by prosecution witnesses which was inconsistent and contradictory.
3. The appeal was disposed of by way of written submissions. The Appellant took a two pronged approach. He submitted that the charge sheet was defective. He urges that the items allegedly stolen and indicated in the particulars were not the items that the complainant testified as being stolen hence the particulars were at variance with the evidence. It is further urged that the particulars do not disclose an offence and neither did the evidence. In addition it is submitted that identification was not proved since the complainant never gave a physical description of the assailant, the Appellant was arrested a week later without the stolen property, and there was no identification parade carried out. It is also the Appellant's case that his defence was not adverted to by the trial court, hence it was not considered.
4. The Appellant's second approach is that as per the Supreme Court decision of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** a sentence rehearing ought to be done. He urges that the mitigation he offered at the trial and the fact that he is reformed ought to be considered. He further urges that the time he spent in remand before his conviction ought to be considered. He brings to the fore the fact that the items allegedly stolen were of modest value and that he was a first offender. He urges that the court follows the Court of Appeal decision of **Mulamba Ali Mabanda v Republic, Criminal Appeal No. 12 of 2013 (Mombasa)**.
5. The Respondent has conceded to the defectiveness of the charge indicating that it is fatally incurable. It was submitted that the term **"robbed"** is in reference to the ingredients of the Sections 296(1) and 296(2) of the Penal Code. The framing of the charge and the particulars did not bring out the distinction between the offences enacted by Section 296(1) and 296(2) of the Penal Code. In addition, the framing of the charge and the particulars were in variance with the evidence hence prejudiced the Appellant. It is submitted that the ingredients of a lesser offence such as handling stolen property contrary to Section 322 (2) of the Penal Code and assault causing actual bodily harm contrary to section 251 of the Penal Code were proved. The Respondent without expressly stating so appears to concede the appeal.
6. This being a first appeal the onus of this court is to reconsider, re-analyse and re-evaluate the evidence which was before the trial court and reach its own conclusions - see **Okeno v R [1972] EA. 32** and **John Mwangi Kamau v Republic [2014] eKLR**
7. Further, it must be borne in mind that this court in its appellate jurisdiction ought not to interfere with the finding of facts by the trial court which had the advantage of observing the demeanour of the witnesses. It is only where the finding of fact was based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles that an appellate court can interfere with the finding of facts by a trial court - see **Chemagong vs Republic [1984] KLR 611** and **Gunga Baya & another v Republic [2015] eKLR**.
8. The issues arising are whether the constitutional rights of the Appellant were violated; whether the charge was incurably defective; and whether the Appellant was positively identified as the perpetrator. If the conviction is affirmed the Appellant is entitled to rehearing of the

sentence imposed in light of the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**.

9. The first issue is whether or not the Appellant's constitutional rights were violated? The Appellant's case is that he was held in police custody for more than the prescribed time. The Constitution stipulates that within 24 hours of arrest a suspect is to be presented to a court. The Appellant was arrested on 29th December, 2010, a Wednesday and arraigned on 3rd January, 2010 a Monday. The constitutional stipulation was therefore violated. The Court of Appeal has pronounced itself on this. The Appellant is to pursue a civil suit for compensation in damages - see **Musembi Kuli v Republic [2013] eKLR**. His appeal on this ground therefore fails.

10. Further, the Appellant indicates that he was not provided with adequate facilities to prepare his defence. Having perused the proceedings I note that the trial court ordered long before the trial commenced that the statements of the witnesses be supplied to him and he never indicated to the court that this was not done. There is therefore no proof that the facilities were not provided for the purpose of preparation of his defence. This ground of appeal also fails.

11. Was the charge incurably defective? The Appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars being:

“On the 23rd day of December, 2010 at Palakumi area in Kilifi County at Coast Province, robbed Kadzo Kalama Nzaro of 7 packets of maize flour, 2 packets of wheat flour, 2kg of sugar, 2 spoons of yeast all valued at Kshs. 845.00 and Kshs. 100.00 and immediately before the time of such robbery wounded the said Kadzo Kalama Nzaro.”

12. Section 296(2) of the Penal Code provides:

“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.”

13. The ingredients of the offence of robbery with violence were highlighted by the Court of Appeal in **Oluoch v Republic [1985] KLR** which was cited with approval in **Mohamed Ali v Republic [2013] eKLR; Criminal Appeal No. 2 of 2010** as follows:

“Robbery with violence is committed in any of the following circumstances:

a. The offender is armed with any dangerous and offensive weapon or instrument; or

b. The offender is in company with one or more person or persons; or

c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person”.

14. The Court of Appeal went ahead and explained that:

“The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code.”

15. The particulars of the offence disclosed that the complainant was wounded during the robbery. The charge as drafted therefore met the requirements of Section 296(2) of the Penal Code and there was no error by the trial court in finding the Appellant guilty under that section. I therefore do not agree with both the Appellant and the Respondent that there was a defect in the charge. This particular ground of appeal fails.

16. The other major issue is the sufficiency of the evidence that was adduced. In her testimony the complainant, Kadzo Kalama who testified as PW1 told the court that on 23rd December, 2010 at about 11.00 a.m. she was going home from the market with some foodstuff she had bought when she met the Appellant who was armed with a panga. The Appellant grabbed her and attempted to drag her into a forest. When she resisted, he cut her on the head and hand. He took away her maize flour, wheat flour and fish all valued at Kshs. 1,200. Her husband reported the matter to the police. About a week later she received information that the Appellant had been arrested and some packets of flour recovered from him. Her testimony was that she had not known the Appellant prior to the incident. She identified the Appellant in the dock and upon cross-examination she disclosed that the Appellant wore a black trouser and a black shirt.

17. PW2 Luwali Karisa's testimony was that he is a village elder and on 23rd April, 2010 he received a report that the complainant had been cut. He visited the complainant and noticed a cut on her head and left finger. The complainant told him that she had not known her assailant prior to the incident. Further, that the man who was dressed in a black shirt and black trouser had a panga. The complainant informed him that she was robbed of 7 packets of maize flour, 2 packets of wheat flour, 2 kgs of sugar and two packets of omena. He organised for the complainant to be taken to hospital and proceeded to the scene with other people from where split flour and sugar led them to the house of the Appellant. At the home of the Appellant he recovered 2 packets of maize flour, a polythene bag and a bloodstained panga. He took the recovered items to Kilifi Police Station. PW2 also testified that the Appellant was his relative and he had earlier seen him dressed in black clothes on the material day. He left word that the Appellant should report to him immediately he came home but the Appellant did not do so.

18. PW3 Mwambegu Ponda was the first to receive a complaint from the complainant. He took her to PW2. PW3's evidence was that the complainant told him that she did not know the attacker.

19. PW4 Safari Katana testified how the Appellant was arrested on 29th December, 2010. His testimony was that the Appellant attempted to flee but was arrested by a crowd. He was saved by the police after the members of the public wanted to set him ablaze.

20. PW5 Corporal Cosmas Kanyi testified how he rearrested the Appellant from an irate mob. He also produced the exhibits that had been recovered by PW2.

21. PW6 Dr. Rashid produced a P3 form filled for the complainant by her colleague on 31st December, 2010. The doctor noted that the complainant had lost her left thumb and had a deep cut on the neck.

22. In his testimony the Appellant testified that on 29th December, 2010 he was at Kaloleni Market when some people went and arrested him, beat him up, stole his money and shoes and escorted him to the police station. He was later charged.

23. Looking at the evidence adduced, it is clear that an identification parade ought to have been conducted in this case. The complainant's evidence was that she was meeting the complainant for the first time on the material day. The question is whether there was any other evidence adduced by the prosecution to connect the Appellant with the robbery.

24. The testimony of PW2 is the testimony that linked the Appellant with the offence. He stated that when he arrived at the scene he followed footmarks and flour which led him to the house of the Appellant. At the house of the Appellant he recovered 2 packets of maize flour, a polythene bag and a bloodstained panga. The complainant identified these items in court. The Appellant did not ask the complainant any questions that created any doubt about the two packets of maize flour. He never asked questions that disclaimed his ownership of the bloodstained panga.

25. PW2 testified that the Appellant was his relative. In the circumstances, PW2 knew the house of the Appellant and it cannot be said that the items could have been recovered from the house of anybody else.

26. The recovered items therefore established a solid nexus between the robbery and the Appellant. It is noted that although PW2 had left word that the Appellant should go and see him, the Appellant never did so and neither did he offer any explanation as to why he never went to see PW2.

27. Looking at the evidence adduced at the trial, I agree with the trial magistrate that it was the Appellant and nobody else who robbed the complainant. I therefore find the conviction safe and reject the Appellant's appeal on conviction. The conviction is upheld.

28. The remaining issue is the question of the appropriate sentence. **Francis Karioko Muruatetu** (supra) has now opened a door for imposition of appropriate sentences for persons charged with offences that attract the death sentence. In the case at hand I have noted the value of the foodstuff stolen from the complainant. It is however noted that the complainant lost her thumb and received a severe cut on her neck during robbery. A person who uses violence to steal from another can easily cause the death of the victim during robbery. On the other, I note that the Appellant was in custody from the time of his arrest until the time he was convicted and sentenced. That is a period of eight years. Considering the circumstances of the robbery, I find the sentence already served sufficient and appropriate punishment. The Appellant must have learned to stick to the narrow path of the law. For that reason, I allow the appeal on sentence. The death sentence imposed on the Appellant is set aside and substituted with a term of imprisonment amounting to the period already served. In essence the Appellant will be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 14th day of February, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT