



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO.4 OF 2017**

**SIMON MUTIE RUKUNYI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against the judgment in Nyeri CM's Court**

**Cr. Case No.46 of 2016 delivered by Hon. P. Mutua (P.M)**

**on 27<sup>th</sup> January 2017)**

**JUDGMENT**

The accused person **Simon Mutie Rukunyi** was charged with robbery with violence **c/s 296(2)** of the Penal Code. It was alleged that on 10<sup>th</sup> January 2016 at Kabarú Location within Nyeri County, being armed with a dangerous weapon namely Somali sword, robbed Kelvin Mwaniki Wachira a mobile phone make VINKO R7 and/ immediately before/immediately after such time of robbery wounded the said Kelvin Mwaniki Wachira.

After full hearing the appellant was found guilty of the offence and sentenced to mandatory death sentence. He filed his appeal and relied on amended Grounds of Appeal dated 8<sup>th</sup> February 2019.

- 1. THAT the trial magistrate erred in both law and fact in failing to appreciate the contradictory evidence tendered by the prosecution, thereby ending up with the wrong sentence and conviction.**
- 2. THAT the trial magistrate erred in both law and fact in finding that the appellant was in possession of a phone retrieved from the public thereby ending up with a wrong conviction and sentence.**
- 3. THAT the trial Magistrate erred in both law and fact by failing to establish a nexus between the appellant and the alleged criminal act.**
- 4. THAT the trial magistrate erred in both law and fact in entering the highest and harshest sentence for a charge different from what the prosecution had proofed before court.**
- 5. THAT the trial magistrate erred in law and fact in failing to consider that the prosecution had not proved their case beyond reasonable doubt.**

Arguing the appeal on his behalf Mr. Muthee submitted that the evidence before the learned trial magistrate was contradictory that there was insufficient evidence of identification as complainant stated that he only walked with appellant for a few minutes, that there was need for an ID parade to test the correctness of the identification of the appellant by the complainant.

See **Hassan Abdalla Mohammed Vs Republic [2017]eKLR**

That the phone exhibit was not found on the appellant, neither was the Somali sword hence doctrine of recent possession was not applicable see **David Mugo Vs. Republic (2015) eKLR**.

That the sentence was too harsh. The trial court found that the appellant was not armed, was alone hence the appropriate offence if it had

been proved would have been simple robbery – see **Konso Guye Vs. Republic (2017)eKLR.**

In response the state through Mr. Magoma state counsel submitted that the state had proved a charge of robbery with violence c/s 296(2) of the Penal Code.

That the appellant was properly identified by the complainant as offence was committed during the day, and the 2 had walked together for a while, hence the complainant had simply recognized the appellant and there was no need for Identification parade since the complainant had noted that accused had one incisor tooth missing and that was the identifier as it was the description given at the time of reporting the matter.

That the phone was recovered and evidence given that it was the appellant who had taken it to that shop.

That appellant voluntarily took members of the public to his house where they recovered the Somali sword.

### **The Evidence**

The case for prosecution is that on 10<sup>th</sup> January 2016 about 5:00pm the complainant Kelvin Mwaura was from church in Ndathi. He decided to take a shortcut through a forest to his home in Kabar. He states:-

“I saw a person on the road. I saw a person behind me”

The person followed him and greeted him, telling him he was an employee of one Gitonga Mbugua. He requested to be shown the route to Mbugua’s house through the shortcut. They continued walking. They came across a trench. The complainant jumped over the trench – the stranger entered the trench. He told him he was now near his home and directed him on how to get to Mbugua’s.

It was then that he was grabbed by the neck. A struggle ensued he was from the back, the complainant fell on his back – the attacker sat on him and demanded his phone and money. He held him by the neck – he could not scream – he said he had no money- the attacker said he had seen him with a wallet. The attacker then removed a Somali sword threatened to kill him.

The complainant gave him his phone and wallet which he said had Kshs.1200/-He identified the phone make VINKO R7. The attacker then ran away. He raised alarm- some children came and joined him in raising alarm. He testified that he followed the thief, but fainted. The thief dropped the wallet and ran off. That he saw him well wearing green /black gumboots stripped T-shirt, green trouser. He reported to the police that the thief did not have one upper incisor tooth. He also reported to the assistant chief Kaaria who after he was given the description recognized the person and telephoned members of Nyumba Kumi to trace him.

The Assistant chief PW4 Silas Kiamu. He said he was assistant chief Ndathi sub-location and on 11<sup>th</sup> January 2016 some members of the public came to Barrier at 8:00pm seeking his help to arrest a person who had allegedly robbed the complainant of phone and money. They found the person in a shop at Barrier, and at the point of being lynched he led them to Wilson PW2 saying he had given him the stolen mobile phone- which was recovered from there- some people also went to appellant’s home and recovered the Somali sword.

PW3 Lawrence Kahumbu Wachira was the chairman of Nyumba Kumi, his testimony was that he heard the alarm from the forest and when he went to check he found the complainant who told him he had been robbed of his phone and wallet- he told him to report to Ndathi Police Post- the following day he (PW1) rang him and told him that the person who had robbed him was found at Barrier. He (PW3) rang the assistant chief PW4, then boarded a boda- boda to Barrier where he and others arrested the appellant who took them to PW2’s shop.

PW2 Wilson Mwangi testified that on 10<sup>th</sup> January 2016 he was brought a phone by Simon – the appellant to charge for him – 20 minutes later accused went and asked for Kshs.500/- to refund upon collection of the phone. On 11<sup>th</sup> January 2016 the appellant went back at 5:00pm asking for more money- later on he was brought by other people and assistant chief who asked for appellant’s phone. He gave them the MFI 1.

He said when appellant took the phone to him he was wearing a green/black stripped T-shirt MFI4.

The report at Ndathi Police post was received by PW5 No.80762CPL Mark Kimaiyo at around 5:30pm, the complainant described the attacker as wearing green/black stripped T-shirt, without one incisor tooth.

On 11<sup>th</sup> January 2016 at about 10:00pm the assistant chief, complainant and other members of the public escorted accused to the police station together with the phone and Somali sword and green and black stripped T-shirt.

The complainant was examined by PW6 Rebecca Wamathai a clinical officer at Kieni sub county hospital who filled P3. The complainant went to hospital on 14<sup>th</sup> January 2016 with allegations of robbery and injury by person known to him. He had cut on face, bruise on base of nose, degree of injury- harm. P3 PE Exhibit 5.

The prosecution closed its case.

In his defence appellant denied the offence. He said on the material date he was a loader. He left his place at Villa at 2:00pm and went to work – the motor vehicle he loaded went up to Mathira where he worked till 7:00pm. He was left at Kwa Wambui- boarded a taxi to his home.

The following day he went to work at Ndathi- till 10:00pm. When he went to a shop to buy cigarettes he was arrested by members of the public who beat him up- took him to his house looking for a phone and knife which they did not get- then took him to Ndathi police post. He spent the night there and following day was taken to Kiganjo police station. He did not know the exhibits produced in court.

It is noteworthy that at some point the appellant was allocated counsel- Mr. Macharia and all PW1 to PW5 recalled and cross-examined.

As a 1<sup>st</sup> appeal court, I am required to re-examine, re-assess, the evidence on record and draw my own conclusions. See **Okeno Vs. Republic**.

The prosecution was expected to prove the offence of robbery with violence c/s 296(2) as set out.

“On the 10<sup>th</sup> day of January 2016 at Kabaru location within Nyeri County, being armed with a dangerous weapon namely Somali sword robbed KELVIN MWANIKI WACHIRA a mobile phone make VINKO R7 valued at Kshs.4,000/- and money Kshs.1200/- and at immediately before/immediately after the time of such robbery wounded the said KELVIN MWANIKI WACHIRA”

There must be theft accompanied with the use/threat of use of violence and in addition:-

- Offender is armed or
- In company of one or more persons or
- At or immediately before or immediately after time of robbery, use personal violence on the victim.

### **THEFT**

The complainant complained of having been robbed of a phone and money. That the thief took the money and left the wallet – to support his claim no wallet was produced as evidence by the prosecution as the wallet that contained the Kshs.1200/- that had been stolen.

When PW4 testified, he said the complainant told him he had also been robbed of his ID- this was not in the complainant’s testimony. With regard to the phone, the complainant alleged the phone was his. He produced no single evidence that he owned P Exhibit 1. No receipt of purchase. Neither was there any evidence that he had even used that phone- we are in the digital era where if one uses a hand set, evidence can be traced in the handset of having been used by that person with their service provider line.

In this case the complainant merely claimed that he had a mobile phone make VINKO but produced no evidence to prove it was his phone or that he had even owned it. The appellant lay no claim on the phone – so appellant did not have to prove anything.

Hence with regard to theft of the mobile phone, there is no evidence that complainant was ever an owner of that phone.

Even PW2 whose business is charging phones did not identify the phone as belonging to the complainant. No other witness testified that the mobile phone belonged to the complainant.

### **Connection with the accused**

According to PW1, PW3, and PW4 the phone was recovered from PW2 through the direction of the appellant- PW1 was not present was appellant was arrested but PW3 and PW4 testified that it is the appellant who took them to PW2 to recover the phone-except for PW2’s word that it is the appellant who took the phone to him there is no other evidence.

On cross-examination the PW2 testified that the accused was taken to the shop by a crowd of more than 30 people that the owner of the phone who was in the crowd said it was the accused who had robbed him and not the PW2.

### **USE OF VIOLENCE**

The medical evidence before court is that the complainant went to hospital 4 days after the alleged robbery. He was issued with P3 same date of alleged offence at Ndathi Police post. He alleged to have attended Ndathi Health centre but no treatment notes were seen by the clinical officer who filled the P3 hence the indication that no treatment had been received before P3 was completed- that in itself was suspect- how would the court know that the injuries seen on 14<sup>th</sup> January 2016 were the ones alleged to have been received on 10<sup>th</sup> January 2016 when the evidence of treatment at Ndathi Health Centre was not produced?

The complainant alleged he was cut with a Somali sword which was allegedly recovered from the house of the accused – the trial magistrate formed the opinion that the said recovery was not admissible because evidence of the alleged recovery was hearsay.

The evidence of PW4 the assistant chief is that unknown, unnamed members of the public brought the Somali sword to the police station. PW3 said when accused was arrested he had no weapon.

Hence there was no evidence that the Somali sword produced in court belonged to the accused or had been used in the alleged robbery.

### **Identifying the assailant**

The complainant explained how he met the person who attacked him. From the evidence it is not clear from the outset whether there were 2

people or one – the one he saw on the road, and the one who followed him. He also said that the person he walked with for a while entered into the trench which he himself jumped. He left out the detail as to whether this person who followed him came out of the trench/or whether he told him about the directions while he was still in the trench.

It is not clear at what point this attacker came out of the trench and grabbed the complainant. Complainant was first grabbed from behind- from the description of the attack there was a struggle and he was thrown down, sat on and strangled. The only features he saw were missing incisor tooth, green and black striped T-shirt, and green trouser, green/black gumboots.

PW4 the assistant chief testified that PW3 Lawrence Kahumbu and others went to report to him about the robbery yet PW3 said he rang the assistant chief PW4 told the court that the complainant had told PW3 the name of the person who had robbed him

“I received a report that Simon (accused) had robbed a person of a phone. It was about 7:00pm. Lawrence (PW3) was among the people who came to report. The complainant had told them the name but they did not know him physically so I was told to identify him as my subject. Complainant was behind but was afraid and we went to look for the accused”.

PW3 said

“Accused calls himself Raila. I used to see him before the incident. Information had been given that the accused be traced for robbing the complainant”.

This evidence clearly contradicts the evidence of PW1 in material particulars. He said he did not know the accused before and only identified him physically- however the assistant chief said the complete opposite that the complainant had given the name of the robber and the assistant chief was to identify him from that name – which according to PW3 was “Raila”.

The assistant chief was not to identify him by appearance- missing tooth but by his name. He was not given any physical description but a name which he was to match to the person. Even his evidence in chief is clear-

“Members of the public came seeking my help to arrest a person who had allegedly robbed Kelvin.....he found him in a shop at Barrier”

No description is given by the PW4 of the person the members of the public were looking for.

PW1 the complainant said, “the following day I reported to the chief..... (who) recognized the person after I gave description. He telephoned Nyumba Kumi to trace him. The other people I was with went to look for him in his home area. They found him at Barrier....pool table. They telephoned the elder”.

In his part of the evidence the complainant was not there when the accused was found.

However he proceeds to say...”*He was found at Barrier- a shop where he ran to when he saw me.....we arrested him and called the chief*”

On further cross-examination he said

“I gave description of the person who robbed me and the people said they can recognize him and they traced him. It was Nyumba Kumi elders. The chief told me the person had been traced.....after being strangled I fainted. I then woke up, followed the accused and told him to leave my wallet, I recognized him through his clothing. He also had no upper incisor tooth”.

In this testimony he mentions the missing upper incisor tooth. He does not state it in the parts where he tells others about the attack. His testimony contradicts that of PW3- who said that it is the complainant who told him that the person who had robbed him had been found at Barrier. That it was PW3 who rang the assistant chief and told him that the person who had robbed PW1 was at Barrier and it is then that the assistant chief went to the Barrier.

According to PW5 the police officer the accused was taken to the police station with the phone, Somali sword and the T-shirt which were all handed over to him. Under cross examination he said the exhibits were found with the accused person- he did not say that accused was brought wearing the T-shirt but that it was handed over to him.

All the foregoing throw into doubt the identification of the appellant even the missing upper incisor tooth was not precise- which one? There are four upper incisor teeth. The complainant also knew the accused’s nickname ‘Raila’.

The description of the tooth appears to have come later after the arrest of the appellant. This is because if that was the identifying mark everyone was looking for it would have featured in their testimony- the assistant chief and the village elder would have been precise.

It is clear that it is not the complainant who identified the accused for arrest. It was other people and complainant came in after the fact – one Martin Mugo a member of Nyumba Kumi is said to have told PW3 that he had seen the accused. This witness was not called to testify yet his evidence would have corroborated that of the complainant. The complainant may have been attacked by someone and injured but the evidence before court was not sufficient to establish the offence of robbery with violence c/s 296 (2).

-No proof of theft

-No proof of injuries

-no proof of arms

-Contradictory evidence of identification

Having considered the foregoing, I find that the appeal has merit. The same is allowed. The conviction is quashed. The sentence is set aside. The appellant be set at liberty unless otherwise legally held.

**Dated, delivered and signed in open court at Nyeri this 7<sup>th</sup> day of June 2019.**

**Mumbua T. Matheka**

**Judge**

In the presence of:-

Court Assistant: Nancy

State counsel: Mrs.Ndung'u

Appellant –present

Muthee for appellant –no appearance

**Judge**