



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 129 OF 2016

NATHANIEL NGONYO SIRYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Msa CM CR. Case No. 56 of 2012

(Hon. R. Odenyo SPM) delivered on 25/5/16)

J U D G M E N T

1. **NATHANIEL NGONYO SIRYA (“the Appellant”)** was charged with three counts of robbery with violence contrary to **section 295 as read with section 296 (2) of the Penal Code**. It was alleged that on 1/1/2012 at Ajunta Estate in Bamburi Location of Kisauni district of the Coast Province, jointly with others not before court, while armed with dangerous weapons namely pangas and knives, the appellant robbed Mary Wachia Maganga of DVD machine make sony valued at Kshs 9,500/-, Laptop make Toshiba valued Kshs.40,000/-, mobile phone make Nokia C3 valued at Kshs. 10,000/-, gas cooker make K-gas valued at Kshs.6,500/-, pluning machine valued Kshs.500/- and cash 7,000/- all totaling Kshs.66,500/- and immediately before or immediately after the time of such robbery used actual violence to the said Mary Wachia Maganga.

2. The other robberies were in respect of Rispa Kola and Rachel Ochola on the same day, time and place whereby the victims lost one mobile make Motorola C115 valued at Kshs.3,500/- and one Safaricom Modem valued at Kshs.2,500/- and cash of Kshs.500/-, respectively. The appellant and his accomplices were also alleged to have used violence on the two.

3. The appellant denied the charges and after trial, he was found guilty and convicted of all counts. He was sentenced to suffer death as per the law provided on count 1 while the sentences on the other two counts were held in abeyance.

4. This being a first appellate court, the court is enjoined to re-appraise the evidence afresh and come to its own independent findings and conclusions. In so doing, the court must have in mind that it did not have the advantage of seeing the witnesses testify. **(See Okeno v. Republic [1972] EA)**.

5. The prosecution case was that on the material night **PW1** came from church at about 4.00 am when she heard a loud bang on the main door to her house. She came out of the toilet only to be met by armed men who cut her all over. Two entered her bedroom and others went to the bedrooms of her sisters in law Rachel and Risper, **PW2** and **PW4**. She bled and lost consciousness which she regained while at Aga Khan hospital.

6. After treatment she came back home and realized that Kshs. 7,000/- cash, Laptop, video machine, a 6 kg gas cylinder and a pair of secateurs were missing. She later identified her 6 kg gas cylinder at Bamburi Police station. She never identified any of the attackers.

7. On the material night, **PW2 Rachel Ochola** was in the residence of **PW1**. At about between 3 and 3.30 am she was awakened by a loud bang. She heard **PW1** screaming and saw about 3 men in the bedroom that she was sharing with **PW4**. The attackers assaulted them and took her cash Kshs.500/-, Safaricom Modem and a motorolla phone belonging to her sister. As the attackers were leaving, she heard a voice which she recognized as that of a neighbor who had a kiosk nearby. She identified the voice as that of the appellant.

8. On the material night, **PW3 Sarah Ombura** was awakened by **PW4** at about 4.15 am who informed her that they had been attacked. At about 6am she went around **PW1**'s house when she saw a torch on the perimeter wall. She also saw a 6 kg gas cylinder in a house belonging to the appellant. They reported the matter to the police who came and recovered the 6 kg gas cylinder (PEXh.1).

9. **PW4 Risper Kola** was in the house at the time when the attackers struck at about 4 am. They were armed and they demanded for money and phones. She gave them a motorolla phone while **PW2** gave them Kshs.500/- and a modem. **PW5 Dr. Khadija Mahwi** produced the P3 forms which showed that DR. Ngone of Coast General Hospital examined **PW1 and PW4** on 3/1/2012. Dr. Ngone had concluded that **PW1 and PW4** had been assaulted with injuries which he assessed as harm.

10 **CLP Benard Nzioki Kilonzo (PW6)** investigated the case. He visited the scene on the material day at about 4.30 am. He found **PW2 and PW4** nursing injuries. He established the items that had been stolen. They went to the house of the appellant and recovered the 6 kg gas cylinder from the appellant's house whom they arrested.

11. In his defence, the appellant told the court that on the material day, he heard screams of 'mwizi' at night. When he went out he the met police officers in uniform when he went back to his house, he found a 6 kg gas cylinder at his door. He went and reported to the village elder. When he came back at about 7 am, he found that the police had taken the 6 kg gas cylinder, broken his house and taken Kshs.36,500/-, a gold chain and a torch. He went and made a report but did not get the OCS. When he went back on 4/1/2012, he was beaten and charged with offence of robbery with violence. In cross-examination, he claimed that the complainants wanted to take some plot from him.

12. In his petition of appeal, the appellant set out 4 grounds of appeal, that; ***he had not been properly identified; the trial court erred in relying on circumstantial evidence; the case was not proved to the required standard and that his defence was not considered.***

13. The parties filed their respective submissions which the court has taken into consideration.

14. On the first ground, the appellant complained that he was not properly identified. He submitted that his was mere dock identification as the voice identification by **PW2** was unreliable. That an identification parade should have been held. That the court erred in relying on the doctrine of recent possession to convict him.

15. The record shows that **PW2** told the court that two of the robbers entered their bedroom. After robbing them, she heard one of them ask the others if they had taken everything. She recognized the voice as that of a man who had a kiosk nearby.

16. It is correct that dock identification that is not backed or preceded by an identification parade is worthless. In **Ajode v. Republic [2004] eKLR**, the Court of Appeal held:-

“It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade”.

17. The present case is about voice identification. Voice identification is as good as visual identification. **See Karani v. Republic [1985] KLR 1**. However, care must be had in its reception to ensure that the voice belonged to the accused; that the witness must have been familiar with the voice and he recognized it and that the prevailing circumstances were such that there was no mistake as to what was said and by whom. (**See Safari Yaa Baya v. Republic [2017] eKLR**).

18. The trial court properly warned itself against relying on the voice identification of the appellant by **PW2**. The court properly found that since the witness and the appellant were not familiar with each other, it was not safe to rely on the said identification alone.

19. After discarding the voice identification, the trial court considered the fact that one of the items that were said to have been stolen from the complainant's house, the 6 kg gas cylinder, was recovered from the house belonging to the appellant a few hours after the robbery.

20. This was circumstantial evidence. In **Abanga alias Onyango v. Republic CR. A No. 32 of 1990 (UR)** the Court of Appeal set out the principles to be applied in order to determine whether circumstantial evidence adduced is sufficient to sustain a conviction. The Court held:-

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances must be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”.

21. In the present case, **PW3** told the court that on the morning after the robbery, she walked behind the compound to see how the robbers escaped. She saw the 6 kg gas cylinder in the house belonging to the appellant. The gas cylinder was recovered later from that house by the police and produced in court. It was positively identified by the witnesses as the one stolen from the house of **PW1**.

22. The appellant admitted that the cylinder was recovered from his house. That when he was coming back, to his house, he met six police officers in uniform. They asked him what he was doing there and he answered that it was his home. One of them aimed an arrow at him. It is then that he noticed the 6 kg gas cylinder at the door of his house. At 6 am, he went and reported the matter to the village elder but when he returned, he found that the police had taken away the gas cylinder, broken into his house and stolen Kshs.36,500/-. He reported the matter to the police.

23. To this court's mind, the appellant's explanation was not cogent. He alleged that it was the police who placed the gas cylinder at his door. He never told the court that he saw them do so nor was there any explanation why the police would do so. The fact that the gas cylinder was found in his house barely a few hours after the robbery unerringly pointed towards the appellant's guilt. His explanation on how it found its way to his house was neither probable nor convincing.

24. The circumstantial evidence in this case was strong enough and unerringly pointed to the appellants guilty and none else. The court did not rely on the voice identification alone. That ground fails.

25. On the complaint that his defence was not considered, I have already set out above what his defence was. That the police planted on him the gas cylinder. That the complainant's had a grudge with him as there was a plot that they wanted to take from him.

26. Firstly, he never saw the police plant the cylinder on him. Secondly, the appellant did not put any of the allegations he was raising in his defence to the prosecution witnesses when they testified. Thirdly, he never gave the particulars of the alleged plot. Further, there was no evidence that any case relating to the alleged plot was pending before the High Court between him and the Mombasa Municipal Council as he alleged. The defence was not only a mere denial and an afterthought but wholly diversionary. The trial court considered it and rightly rejected it.

27. The last ground was that the case was not proved to the required standard and that there were contradictions in the prosecution evidence. The evidence on record shows that the complainants were attacked on the night of 1/1/12. The robbers were more than one and they were armed with dangerous weapons, pangas and knives. They injured the complainants during the robbery a fact that was confirmed by **PW5** and the P3 forms that were produced. In this regard, the essential ingredients of the offence as set out in **section 296 (2) of the Penal Code** were sufficiently proved. A few hours after the robbery, the appellant was found in possession of one of the items that was stolen during the robbery.

28. As regards the alleged contradictions in the prosecution evidence; these were pointed out to be that **PW3** told the court that the gas cylinder was in the appellant's house while **PW4** stated that the same was behind the walled fence which was short. To this court's mind that was not a material contradiction that could weaken the prosecution case. It was not the appellant's case that his house was not behind the subject short wall.

29. In **Philip Nzaka Watu v. Republic [2016] e KLR**, the Court of Appeal held:-

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question”.

30. In this regard, even if there were any contradictions in the evidence of the prosecution, which is not the case, the same were so minor and did not affect the prosecution case.

31. On sentence, the appellant was sentenced to suffer death. The prosecution submitted that for reason of the case of **Francis Karioko Muruatetu & Another v. Republic [2017] eKLR**, I should interfere with the same. The appellant's mitigation is on record. I have considered it. I do not think it necessary to return the matter to the trial court for re-sentencing. It will be a waste of judicial time.

32. In this regard, I have carefully considered the mitigation. There was use of dangerous weapons during the robbery. The complainants sustained serious injuries. The appellant was a first offender and sole bread winner of his family. I quash the death sentence and substitute therefor a sentence of 20 years imprisonment. The sentence shall run from the 19/10/2016.

33. In the end, I find the appeal to be without merit and dismiss the same save for the appeal on sentence to the extent set out above.

DATED and DELIVERED at Mombasa this 11th day of September, 2019.

A. MABEYA

JUDGE