



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 264 OF 2017

ANDREW WAMBUA MUSAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with robbery with violence contrary to Section 296 (2) Penal Code Cap 63 Laws of Kenya. Particulars of offence were that on the 15th day of October, 2012 at Domino Bus stage, Kilome Sub-location within Makueni County jointly with others not before court robbed Benjamin Musau Muthenya of National Identity card, vetting card, a wallet, one mobile phone make Nokia 1280, Kshs. cash 700/=, one Safaricom number plate, one Celtel number plate and asserted documents all valued at Ksh.3000/= and immediately after the time of such robbery used actual violence to the said Benjamin Musau Muthenya.

2. He pleaded not guilty and matter went into trial. He was found guilty and was sentenced to suffer death.

3. Being aggrieved by the decision he lodged instant appeal and set the grounds vide amended ground in memo filed on 12/7/19.

4. The same grounds can be compressed into 2 namely whether;

(i) The ingredients of an offence was proved?

(ii) The charge was defective?

(iii) The sentence was excessive?

Duty of First Appellate Court:

5. This being a first appeal, I am required to re-evaluate the evidence and reach my own conclusion. In doing so, I bear in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing - see **Okeno vs R (1972) EA 32** and **Joseph Njuguna Mwaura & 2 Others vs Republic [2013] eKLR**.

Prosecution Case:

6. The prosecution case was to be established by 4 witnesses called. Same is captured as follows; **PW1, Benjamin Musau Muthenya** told the court that he comes from Kitaingo area. On 15/10/2012 at around 9.00pm he alighted from a matatu at Domino stage along Kilome-Uvete road and was walking home alone.

7. About 30 meters from the stage, two people emerged and held him. They struggled and two other people emerged from the bushes and started helping them. One of them held his throat and the other dipped his hands into his jackets breast pocket tearing it.

8. He took away a wallet containing each Kshs.700, National ID card, elector's card, Safaricom and Celtel number plates and other personal effects. They also robbed him of a Nokia phone 1280 black in colour with a scratched screen. He has a receipt of its purchase from Nobes Electronics and communication serial No. 10583 dated 30/6/2011 (MFI1) it bears serial number 357001/04/301725/7.

9. He identified the phone in court and the scratch on its screen serial No.357001/04/301725/7. He identified the phone in court and the scratch on its screen serial No.57001/04/301725/7 (MFI2). The ID card was No. 5060792 (MFI3), Electors card was identified as (MFI4), Celtel sim number plates (MFI5).

10. He identified the grey jacket (MFI6). After robbing him the people escaped. He did not identify any of them. He received lacerations on the left side of the face, left wrist and right elbow. Both legs below the knee, painful neck, swollen and painful chest. One of them kicked him in the chest and he fell down and lost consciousness.
11. He regained consciousness in the morning and walked home. He returned to the scene at 6.30 am but did not find anything. He reported to the local headman who referred him to Kithangani AP post and was further referred to Mbukuni Dispensary where first aid was administered.
12. He then returned home in the evening and his wife Sofia Mwikali came home from Kyandue Market and gave him his Safaricom line, ID card, electors card and the mobile phone plates among the items stolen from him.
13. She had gotten them from Agnes Mutuku who had picked them from where they had been thrown. He then reported to Kithangathini AP Post.
14. On 2/11/2012 at 4.00 pm he received a call and was told that his phone had been recovered. He headed there and furnished the AP's with receipts and identified his phone.
15. He saw the person from whom the phone was recovered from as he was called from the cells. He identified him as person in the dock (appellant).
16. The person said he bought it at Salama Market. They escorted him to Kilome Police Station and lodged a complaint. He was issued with a P3 form which was filled at Kilungu Level 4 Hospital. He produced treatment card from Mbukuni Dispensary (MFI7), Kilungu Level 4 Hospital (MFI8) (OP 10620/12) P3 form was (MFI9).
17. On cross-examination he stated that he didn't identify anybody and that he did not name anybody to the police by name. That he was absent when the appellant was arrested with the phone.
18. **PW2 Erick Kasiamani** testified that he was a clinical officer at Kilungu Sub-district Hospital. That he filled a P3 form for one Benjamin Musau Muthenya. He signed it on 6th November 2012. He had been assaulted and sustained the following injuries, Healing scar right side of the face, tenderness on the chest, healing scar on the right elbow joint, and knees.
19. The approximate age of injury was 20 days and the degree of injury was "Harm". He produced hospital card dated 6/11/2012 (P. exhibit 6), Hospital card dated 29/10/2012 (P. Exhibit 7), P3 form (exhibit 8).
20. On cross-examination by the appellant in person he stated that he could only state the history of injury as narrated by the patient and the injuries were by blunt objects.
21. **PW3 was AP Constable Francis Giathi.** He testified that, on the year 2012 he was based at Kithangathini AP Post. On 16/10/2012 at 11.45 am he was at the AP Post. The complainant reported that on 15/10/2012 at night he had been attacked by four (4) people at a stage called Domino. He sustained injuries on the neck, hands and feet. They also stole his wallet, his phone, ID card and Kshs.700/= and voting card.
22. On 2nd November 2014 at 3.00pm they met appellant and arrested him. On searching him they recovered a phone from him. He could not explain where he gotten the phone from .It was a Nokia 1280. They called the complainant to the camp and he identified the phone as his (MFI2). He produced a receipt as evidence.
23. They took appellant to Kilome police station for further investigations. He said he bought the phone at Salama from an unknown person. On cross-examination he stated that he arrested the appellant at a shop alone.
24. Nobody saw him take the phone from appellant as the shopkeeper was inside his shop. That he arrested the appellant when he was still new at the place and that he has never wanted appellant's girlfriend.
25. **PW4 Corporal John Mburu** stated to court that he was the investigating officer. That on 2/11/2012 he was at kilome police station at 7.30 pm and was on duty. He received the appellant Andrew Wambua Musau from AP camp Kithangathini in the company of the complainant Benjamin Musau Muthenya.
26. It was alleged that, on the 15th October, 2012 the complainant alighted at Domino stage at 9.00pm. He was then attacked by a gang of four armed men. They beat him up and stole; a mobile phone, voters card, Safaricom plate, Celtel plate.
27. The cards were in his jacket. He received a torn jacket from him. He was also given a mobile phone allegedly stolen and the complainant identified the same. He confirmed the serial number as the one in the receipt issued during purchasing of the same. He produced as evidence the following; Mobile phone (Exhibit 1), Receipts (Exhibit 2), Voters card (Exhibit 4), Celtel plate (Exhibit 5), Safaricom (Exhibit 6).
28. On cross-examination by the appellant in person, he stated that the appellant was arrested by another arresting officer. That appellant was taken to the police station on the date of arrest. That appellant was arrested with a phone that the complainant identified as his.
29. That appellant stated that he bought the phone from a passerby he didn't know. The appellant was put to his defence and he elected to give sworn evidence. He stated that on 2/11/2012 he woke up at 8.00 am he then went to the shopping centre. He saw two administration

police officers arresting people and was also arrested.

30. He was searched. From then on he does not know why he was in court or why he was arrested. He was escorted to Kilome police station and was charged for nothing. He requested that the court considers that he was suffering for nothing. He closed his defence without calling any more witnesses.

Issues:

31. After going through the prosecution evidence on record and the defence tendered, I find the issues are; **whether the charge was defective? Whether the prosecution proved its case beyond reasonable doubt? And was sentence excessive?**

Analysis and determination:

32. On the issue as to whether the charge was defective, This section provides as follows:

“Section 137 CPC Cap. 75 Laws of Kenya. The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code -

(a) (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:

Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required.”

33. I have considered the contents of the charge sheet in this matter. After setting out the offence charged as robbery with violence contrary to section 296(2) of the Penal Code, the particulars of the offence are set out as follows:

“That on the 15th day of October, 2012 at Domino Bus stage, Kilome Sub-location within Makeni County jointly with others not before court robbed Benjamin Musau Muthenya of National Identity card, vetting card, a wallet, one mobile phone make Nokia 1280, Kshs. cash 700/=, one Safaricom number plate, one Celtel number plate and asserted documents all valued at Ksh.3000/= and immediately after the time of such robbery used actual violence to the said Benjamin Musau Muthenya.”

34. In the present case, the appellant was charged with the offence of robbery with violence. The particulars of the offence stated that he was with others, and that he used violence on the victim. In my view, the charge in the present case was proper, and the challenge to the appellant’s conviction on the basis of the defects on the charge sheet must fail.

35. On prove of charges against appellant, all prosecution witnesses were credible enough and their evidence could therefore be admissible.

36. There is no dispute that the complainant was attacked on the night of the 15th October, 2012 at a stage called Domino stage along Kilome-Uvete road. The appellant has not in his defence or cross-examination tried to disprove that and thus this is a proved fact. He was assaulted by four people. In the process of the attack he sustained injury which PW2, the Clinical Officer filled in the P3 form and classified as harm.

37. PW1 stated that the injuries he incurred were as a result of the attack by the four unknown people. PW1 states that he did not recognize any of his attackers as it was at night. He could not place the appellant to be at the scene unless he recognized him in any manner but he attempted no such thing.

38. However, during the assault PW1 phone among other items were stolen from him. Later on 2nd November, 2012, PW1 AP Francis Giathi arrested the appellant at Domino stage. Upon searching him he recovered a phone. The phone was later identified as PW1 phone by serial numbers.

39. The serial numbers completely matched the owner reflecting on its receipts upon purchase which was produced in court. The court confirmed the similarity.

40. Appellant was asked to explain how he came about the phone two weeks after the theft he stated that he bought the same from a stranger at Salama market who he could not point out.

41. Having said that and taking that the evidence of recognition or identification was not relied on then the prosecution tried to pin appellant on the doctrine of recent possession. The doctrine of recent possession states in John Kioko Mwau vs Republic 2012 eKLR:

“A person found in possession of stolen goods shortly after they have been stolen and proffers no explaining for his possession is deemed the thief or a handler of the stolen goods.”

In Morris Kinyalili Liema vs Republic eKLR:

“This is a rule of law that permits an inference that where it is proved that property was stolen and the same property recently after the robbery is found in exclusive possession (of the goods) of a person, that person is presumed to have participated in the crime that resulted to the theft or robbery of that property. The presumption is a rebuttable one but the burden shifts to the appellant person as soon as all ingredients or elements are proved to property invoke the doctrine.”

42. Thus was this doctrine proved? There was no question that the phone recovered from appellant was a stolen item. Also there was no doubt that the phone was found in exclusive possession of the appellant herein. The phone was positively identified as the property of the complainant to police and to court through receipt serial number and physical appearance.

43. And finally the phone was found two weeks after it was stolen and within the same locality it was stolen from. Thus the doctrine of recent possession was proved thus the burden shifted to appellant to rebut the same in his defence.

44. In his defence he mentions nothing of the phone. He just gave a general denial of non-involvement. In Malingi vs Republic KLR 225 the court stated;

“By application of the doctrine the burden shifts from the prosecution to the appellant to explain his possession of the items complained of.”

45. He has failed to do so and thus the trial court was justified in making an inference that he was among the robbers who robbed the complainant in the material night.

46. Having found that then does the prosecution satisfy ingredients of Section 296(2) of the Penal Code. On the issue whether this was a robbery or a common theft, the court is guided by Section 295 of the Penal Code

“Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is guilty of a felony called robbery.”

47. In this case actual force was used resulting to injury and thus there was a robbery in this case. Section 296(2) of the Penal Code further stipulated that if the Offender is armed with any dangerous weapon or instrument or is in company of one or more other persons or persons of it at or immediately before or immediately after the time of robbery he wounds, beats, strikes, or use any personal violence to any person he shall be sentenced to death.

48. The trial court via doctrine of recent possession found appellant guilty of the charged offence which cannot be faulted.

49. However when it came into sentencing, the court found its hands tied by the mandatory nature of the provisions of section 296(2) P C cap 63 Laws of Kenya. However that aspect has been declared unconstitutional by the courts starting with **Supreme Court of Kenya case of Murutetu**.

50. Thus this court dismisses the appeal on conviction but sets aside the sentence of death. Thus the court makes the following orders;

i) The appeal on conviction is dismissed and conviction is upheld.

ii) The appeal on sentence is allowed, the death sentence is set aside and substituted with 5 years to run from the date of arrest 2/11/2012. Thus he will be released immediately.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

C. KARIUKI

JUDGE