



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.68 & 69 OF 2016

SIMON MUSANGI NYAGAH.....1ST APPELLANT

PAUL NJORU NJUGUNA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. E. Juma SPM

delivered on 23rd October 2015 in Kibera CM CR. Case No. 1477 of 2013)

JUDGMENT

The 1st Appellant, Simon Musangi Nyagah, and the 2nd Appellant, Paul Njoru Njuguna were jointly charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the night of 4th and 5th May 2013 at Matasia Trading Centre in Ngong within Kajiado County, the Appellants, jointly with others not before court, while armed with dangerous weapons namely knives, robbed Martin Mwirigi of cash Ksh.4,000/- and one mobile phone make X-TIGI Serial No.354297055606333 valued at Ksh.2,000/- all totaling to Ksh.6,000/- and the time of such robbery unlawfully killed the said Martin Mwirigi.

In the alternative charge, the 1st Appellant was charged with the offence of handling stolen goods contrary to Section 322(1) & (2) of the Penal Code. The particulars of the offence were that on 5th May 2013 at Matasia Trading Centre in Ngong within Kajiado County, the 2nd Appellant, otherwise than in the course of stealing, dishonestly retained one mobile phone make X-TIGI Serial No.354297055606333 knowing or having reasons to believe it to be stolen. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, they were convicted as charged in the main charge. The Appellants were each sentenced to death. The Appellants were aggrieved by their conviction and sentence. They have each filed a separate appeal to this court.

In their petitions of appeal, the 1st and 2nd Appellants raised more or less similar grounds of appeal challenging their conviction and sentence which can be summarized as follows: They faulted the trial magistrate for hearing and determining their case despite ruling that their constitutional rights provided under Article 49(f) of the Constitution had been violated. They were aggrieved by their conviction stating that the prosecution failed to establish their case to the required standard of proof beyond any reasonable doubt. They took issue with the fact that the trial court failed to consider their respective defences in arriving at its decision. They asserted that the trial court failed to acknowledge that the deceased had been drinking and could therefore have spent the money given to him by his employer. They were aggrieved by their conviction stating that there was no evidence pointing to the fact that they were armed with dangerous weapons. They were of the view that their conviction was unsafe since the prosecution did not avail any eye witnesses to establish the case. They were of the opinion that the trial court shifted the burden of proof from the prosecution to the defence.

The Appellants were aggrieved that the trial court failed to consider the evidence of PW5 who stated that there were many people at the bar on the fateful night. They were further aggrieved that the trial court failed to consider the evidence of PW9 which pointed to the fact that the case against the Appellants was purely based on assumptions. They complained that the post mortem was conducted after the Appellants had been charged. They took issue with the trial court's decision to convict them based on the evidence of the prosecution which was full of gaps and contradictions. They faulted the trial magistrate for convicting them on the basis of a defective charge sheet. They were of the view that their conviction was hinged on the case of mistaken identity. In the premises

therefore, they urged the court to allow their respective appeals, quash their convictions and set aside the sentence that was imposed upon them.

The two separate appeals were consolidated and heard together as one for the purpose of this appeal. The Appellants presented to court written submission in support of their respective appeals. They urged this court to allow their appeals. This court also heard oral submission from Mr. Juma for the Appellants. Counsel for the Appellants submitted that none of the witnesses who were available saw the Appellants rob or kill the deceased. He stated that the prosecution did not provide any evidence that the deceased had the Ksh.4,000/- that was alleged to have been stolen. He averred that the evidence by the prosecution was that the deceased had been to several bars that night. He could therefore have spent all his money drinking at the said bars. He asserted that the 1st Appellant gave an explanation as to why he was in possession of the deceased's phone. The deceased had asked him to charge the phone for him. The phone was recovered with the deceased's SIM card still intact. He pointed out that the evidence of the arresting officers PW8 and PW9 was inconsistent with respect to the dates when the Appellants were arrested. He stated that the trial court failed to consider the defence of the Appellants that they left the deceased at the bar. In the premises, he urged this court to allow the Appellants' respective appeals.

Ms. Akunja for the State conceded to the 2nd Appellant's appeal. She stated that

no evidence was adduced by the prosecution to connect the 2nd Appellant to the offence. She however opposed the 1st Appellant's appeal. She submitted that the 1st Appellant admitted to meeting the deceased at Sinyorita Bar. He was the last person seen with the deceased on that fateful night. She averred that the evidence by the prosecution witnesses was consistent. She therefore urged this court to dismiss the 1st Appellant's appeal.

The facts of the case according to the prosecution are as follows: On 5th May 2013 at about 6.00 am, PW1 Edward Muriithi, left his house. He was going to work. He lived next to his bar (Stage Inn Bar). He saw a man lying on the ground near a gate that was next to his bar. The man was wearing a blue trouser and a blue sweater. There were blood stains on the ground. He recognized the man. The man was the deceased, Martin Mwangi. He told the court that he had seen the deceased at his bar the previous night at about 7.00 p.m. PW1 made a call to Matasia Police Station and informed them that there was a body lying on the ground. PW1 testified that his son (PW2) informed him that he left the deceased drinking at Sinyorita Bar with the two Appellants on the previous night. Both Appellants were known to PW1. When the police officers arrived, they asked PW1 if he knew where the Appellants were. He found the 1st Appellant at a bar while drinking. He also called the 2nd Appellant who came to the scene. The police officers arrested the Appellants.

PW2, Martin Muriithi was a friend to the deceased. He told the court that on the evening of 4th May 2013, on his way from work, he met the deceased. He offered to buy him a drink. They went to Sinyorita Bar located in Matasia, Ngong. Both Appellants were also at the said bar. PW2 left the bar at about 8.00 p.m. He left the deceased drinking with the two Appellants. He stated that the Appellants were his friends. He had known them for about three years. PW3, Boniface Mutura, received a call from PW1 informing him that he found a body lying on the outside his bar. PW3 proceeded to the scene. He found the deceased's body lying on the ground in a pool of blood. He stated that he did not know the circumstances under which the Appellants were arrested.

PW4, Elias Kuyu was the deceased's employer. He told the court that he paid the deceased the sum of Ksh.4,000/- being his salary on 3rd May 2012. On 5th May 2013 he received a call informing him that the deceased had been stabbed to death. PW5, Susan Wangui was a bar attendant at Sinyorita Bar, Matasia. She was on duty on the material night of 4th May 2013 from 2.00 p.m. to 10.45 p.m. She told the court that there were many people at the bar that night and she could not recall if she saw the Appellants at the bar. She closed the bar at 11.00 p.m. that night. PW6, Wanja Ephraim was the deceased's aunt. She received a call from a police officer on 5th May 2013 informing her that her nephew had been killed in Matasia Town. She attended a post-mortem examination of the deceased's body on 14th May 2013. The post-mortem was conducted by PW10, Dr. Oduor. PW10 stated that the deceased had stab wound on his face, two stab wounds on the right side of his neck and a stab wound at the back of his neck. He stated that the deceased died of massive bleeding from the stab wounds.

PW7, PC Kipng'etich Kitur told the court that on 5th May 2013, he was informed by his superior that there was a body of a person suspected to have been murdered at Matasia Town in Ngong. He went to the scene of crime accompanied by other police officers. He took photographs of the scene. He produced the photographs as exhibits in court. PW8, Sgt. Joseph Mugenya was the arresting officer. He received a call from PW1 on 5th May 2013 at about 6.30 am. PW1 informed him that there was a dead body lying next to his bar. He proceeded to the scene and found the deceased's body lying in a pool of blood. PW1 informed him that the deceased had been drinking at his bar with the Appellants on the previous night. They left his bar and went to Sinyorita Bar at about 10.00 p.m. PW8 interrogated the watch man at Sinyorita Bar who confirmed that the deceased came to the bar accompanied by the two men; one was known as Njoro and the other had a damaged eye. Later in the day, at about 3.00 p.m., PW1 informed him that the two young men who were in the company of the deceased the previous night were at Sinyorita Bar.

PW8 proceeded to Sinyorita Bar with PW1. He arrested the two men who were the Appellants. The 1st Appellant was arrested in possession of the deceased's phone. PW9, IP Luka Kiptoo investigated the present case. He was also at the scene of crime with PW8. He reiterated the facts as narrated by PW8. He also stated that PW2 informed them that he was drinking at Sinyorita Bar on the night of 4th May 2013. He saw the deceased drinking with the two Appellants at Sinyorita Bar. He left them at the bar and went home. PW9 pointed out that the Appellants were the last people seen with the deceased. He stated that the deceased was robbed of his money and phone and was killed in the process. He testified that the 1st Appellant was unable to explain why he was found in possession of the deceased's phone. He told the court that the watchman who was guarding Sinyorita Bar informed him that the Appellants and the deceased person were the last people to leave the bar before it was closed at 11.00 p.m. PW9 was however unable to trace the said watchman to give evidence since he had relocated from the area.

The 1st Appellant was put on his defence. He gave a sworn statement. On 5th May 2013, he left his house in the morning and went to work at Ongata Rongai. He later went back to the house. He stated that the deceased gave him his phone the previous day. He asked him to charge the phone for him since he did not have electricity at his place. They had planned to meet at Zebra Bar later that day. The 1st Appellant went to Zebra Bar as agreed. While at the said Bar, PW1 came accompanied by a police officer. The police officer informed him that the deceased was found dead that morning. He explained to the police officer that the reason he was found in possession of the deceased's phone was because the deceased had asked him to charge his phone on the previous day. He was arrested and taken to the police station. He stated that PW9 asked him for money to facilitate his release. He was unable to raise the money. He was afterwards charged with the present offences. He denied the charges brought against him.

In his unsworn statement, the 2nd Appellant stated that he was at Sinyorita Bar on the night of 4th May 2013 with his friends. The deceased came to the bar and joined them. The 2nd Appellant stated that he left the bar at 10.30 p.m. He left the deceased at the bar. The following day on 5th May 2013, PW1 informed him that police officers needed to see him. He went to Ngong Police Station on 6th May 2013. He was arraigned before court on the following day.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellants. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32). In the present appeal, the issue for determination is whether the prosecution established the Appellants' guilt with regard to the charges preferred against them to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on circumstantial evidence and the doctrine of recent possession to secure the conviction of the Appellants. In Abanga alias Onyango v. Republic Cr. Appeal No.32 of 1990 (unreported), the Court of Appeal set out the principles to apply in order to determine whether circumstantial evidence adduced in a case is sufficient to sustain a conviction. It stated thus:

“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 should 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.”

In the present appeal, none of the prosecution witnesses witnessed the robbery. The circumstantial evidence connecting the Appellants to the robbery was that the deceased was last seen in their company. The 1st Appellant was also arrested in possession of the deceased's phone. PW2 told the court that the deceased offered to buy him a drink at Sinyorita Bar. PW2 did not sit at the same table as the deceased at the bar. He stated that the deceased sat at a different table with the two Appellants as well as one Chege and one Ken who were also his friends. PW2 testified that he left the bar at 8.00 p.m. on that night. He left the deceased drinking in the company of the Appellants and the said Chege and Ken. PW5, who was an attendant at the said bar was not able to tell the court whether the deceased left the bar with the Appellants. PW9 testified that he interrogated Joseph Momanyi who was a watchman at Sinyorita Bar. The said Joseph Momanyi informed him that the deceased left Sinyorita Bar in the company of the Appellants on that fateful night. However, the prosecution failed to avail the said Joseph Momanyi before court to adduce evidence. The evidence of PW9 that the deceased left the bar with the two Appellants amounted to hearsay evidence.

No cogent evidence was led by the prosecution to establish that that deceased left Sinyorita Bar in the company of the Appellants. PW2 who was the last prosecution witness to see the deceased that night stated that the Appellant was drinking in the company of the two Appellants and two other people, Chege and Ken. It can therefore not conclusively be said that the deceased was last seen with the Appellants. Looking at the evidence presented by prosecution, this court has no way of knowing at what point the deceased left the bar and with whom. PW5 who closed the bar at 11.00 p.m. was not able to shed light on this issue. The Appellants stated that they left the deceased at the bar. The circumstantial evidence does not unerringly point towards the guilt of the Appellants and to the exclusion of no one else.

The Appellants were arrested the following day on 5th May 2013. PW8 stated that the Appellants willingly accompanied him to the Police Station. This does not point to the behaviour of a guilty person. The 1st Appellant was arrested in possession of the deceased's phone. In his defence, the 1st Appellant stated that the deceased asked him to charge the phone for him since he did not have electricity at his place of residence. They had planned to meet at Zebra Bar later that day when he would give him back the phone. The 1st Appellant, during cross-examination, told the court that it was not the first time the deceased had asked him to charge his phone. PW1 found the 1st Appellant at Zebra Bar where he had agreed to meet the deceased. When the 1st Appellant was arrested, he did not deny that the phone belonged to the deceased. PW8, during cross-examination, stated that when he arrested the 1st Appellant, he informed him that the deceased had given him his phone. PW8 stated that the deceased's SIM card was still intact when his phone was recovered from the 1st Appellant. This court notes that the deceased and the Appellants were friends as was stated by PW2. The 1st Appellant's defence raised reasonable doubt as to whether he stole the phone from the deceased. His defence may well be the truth. The doctrine of recent possession is therefore not applicable in the instant case since the prosecution failed to prove beyond any reasonable doubt that the 1st Appellant stole the phone from the deceased. *Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt (See Sawe -vs- Republic [2003] eKLR).*

The ingredients of the offence of **robbery with violence** were not established by the prosecution since the element of theft as particularized in the charge sheet was not established. The prosecution failed to provide conclusive proof that the deceased was in possession of Ksh.4,000/- when he was killed. From the evidence led by the prosecution, the deceased received the Ksh.4,000/- from PW4 on 3rd May 2013. The deceased had been drinking in several bars on that fateful night of 4th May 2013. There is no telling whether or not the deceased

had the said Ksh.4,000/- when he left the bar that night. The 1st Appellant gave a reasonable explanation as to how he came to be in possession of the Appellant's phone.

From the foregoing, the circumstantial evidence was not sufficient to sustain the Appellants' convictions. There were other co-existing circumstances which weakened the inference of the Appellants' guilt in the present offences. In **Parvin Singh Dhalay v Republic [1997] eKLR**, the Court of Appeal stated as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”

Taking into consideration the totality of the evidence adduced, this court is unable, with certainty, to reach the conclusion that the conviction of the Appellants is beyond reproach. There are many holes in the prosecution's case which cannot establish the serious charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. The appeals filed by both Appellants have merit. They are hereby allowed. The convictions of the Appellants are quashed. The sentences are set aside. The Appellants are ordered set at liberty and released forthwith from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE