



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 147 OF 2017**

*(An Appeal arising out of the conviction and sentence*

*of Hon. B. Ojoo – CM delivered on 17<sup>th</sup> October 2017*

*in Makadara CMC. CR. Case No.907 of 2013)*

**DAVID KIPROTICH CHEPKOK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, David Kiprotich Chepkok was charged with another with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 18<sup>th</sup> February 2013 at Kawangware 56 Stage within Nairobi County, the Appellant, jointly with others not before court, while armed with a dangerous weapon, namely a pistol, robbed James Nasio Kangu of Kshs.200,000/-, a Sony camera, a mobile phone and an interim driving licence all valued at Kshs.213,000/- and immediately before the time of the robbery, threatened to use actual violence to the said James Nasio Kangu. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to death. The Appellant was aggrieved by his conviction and sentence. He filed an appeal against the said decision to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of a defective charge sheet, contradictory evidence and on evidence that had been contrived to frame him up. He faulted the trial magistrate for failing to find that the police had not properly investigated the case and had thereby reached the erroneous decision to charge him. He was aggrieved that he had been convicted after the trial court had shifted the burden of proof from the prosecution to the defence. He faulted the trial magistrate for failing to take into consideration his defence before arriving at the said impugned decision to convict him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Muriuki for the

Appellant and by Ms. Atina for the State. Mr. Muriuki submitted that the trial court convicted the Appellant on the basis of contentious and contradictory evidence. He gave examples of such evidence. He submitted that whereas the complainant alleged that the Appellant was carrying a gun at the time of the alleged robbery, it was not clear from the evidence of the other witnesses whether such gun was seen. Learned counsel pointed out that although the complainant testified that he had lost his mobile phone during the alleged robbery, in the first report that he made to the police he did not mention that the said mobile phone had been stolen.

He submitted that there was contradiction between the evidence adduced by the complainant and that of his wife who testified as PW2. Whereas the complainant testified that the Appellant escorted him to his house and conducted a search in the house, the wife testified that they had welcomed the Appellant and even had alcoholic drinks with the Appellant and his colleagues.

Learned counsel asserted that it was not clear from the complainant's evidence what type of business he was doing because the complainant kept changing the nature of business he was doing when asked by both the prosecutor and the defence. He questioned why if indeed the robbery had taken place, why it took almost a month for the complainant to report the incident to the police. He wondered why the complainant denied knowing the Appellant prior to the alleged robbery incident yet there was clear evidence that the Appellant and the complainant had met before and were known to each other. Learned counsel took issue with the manner in which the trial court dismissed the Appellant's defence which was to the effect that he went to the complainant's premises during the course of an investigation which he was conducting in his normal duty as a police officer. He urged the court to find that the trial court treated the Appellant's defence as if such evidence was meant to establish the prosecution's case. In that regard, he submitted that the trial court shifted the burden of proof to the Appellant to prove his innocence rather than placing the burden of proof on the prosecution to establish its case against the Appellant.

Mr. Muriuki further submitted that the ingredients to prove the charge of robbery with violence were not established. It was not established that the Appellant was armed. It was not established that the Appellant was with others during the course of the alleged robbery. Learned counsel took issue with the fact that the trial court failed to take into consideration that the Appellant had given credible explanation as to why he went to the Appellant's premises on the particular day. No evidence was adduced to establish that there was any element of violence during the alleged robbery. He submitted that indeed the trial court had considered that the prosecution was actually attempting to prove a case of theft and not of robbery with violence. Learned counsel faulted the trial court for putting forward a theory which was not part of the prosecution's case and thereby reached the erroneous decision to convict the Appellant. He cited several decisions being **Abdirashim Sora v Republic [2005] eKLR**, **Daniel Muthomi M'arimi v Republic [2013] eKLR** and **Stephen Mburu Kinyua v Republic [2016] eKLR** in support of his submission.

Ms. Atina for the State conceded to the appeal. She submitted that the complainant's testimony was full of contradictions that the only inference that can be drawn was that he was not telling the truth. She pointed out that the complainant's testimony and that of his wife were so much at variance that reasonable doubt was raised as regard whether such robbery took place. She noted that the events that allegedly took place in the complainant's house on the material day of the alleged robbery were completely at variance that reasonable suspicion was raised that the prosecution's witnesses were not telling the truth. She was of the view that the contradiction apparent in the evidence of the prosecution witnesses militated against the court upholding the Appellant's conviction. There was doubt that indeed that such robbery took place because the complainant claimed that the Appellant went to his premises twice in a span of three days and in both occasions, searched his house. The complainant did not report these incidences to the police. She submitted that the trial court wrongly applied the doctrine of recent possession to convict the Appellant yet the Appellant had given explanation of how he got possession of the camera and the interim driving licence from the complainant. She urged the court therefore to find that the prosecution had failed to establish its case to the required standard of proof beyond any reasonable doubt on the charge brought against the Appellant.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced during trial so as to reach its own independent determination whether or not to uphold the conviction of

the Appellant. As was held by the Court of Appeal in Njoroge –Vs- Republic [1987] KLR 19 at P.22:

*“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.*

The issue for determination by this court is whether the prosecution established to the required standard of proof beyond any reasonable doubt the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.

This appeal raises serious questions in regard to how the police investigate cases. The Appellant in this case was at the material time a police officer based at Central Police Station Nairobi. He told the trial court that in the course of his duties, he received information that a motor vehicle Registration No.KBT 163T Toyota Salon had been used to commit crime. Accompanied by another police officer, he traced the motor vehicle to Kawangware. This was on 18<sup>th</sup> February 2013. He met with the complainant who confirmed to him that he (the complainant) was the owner of the motor vehicle. He asked the complainant to give him proof of ownership of the motor vehicle. The complainant did not have such documents. He only gave him an interim driving licence and asked the Appellant to give him time to obtain proof of ownership of the motor vehicle.

From the evidence adduced by the complainant and his wife PW2 Rebecca Mueni, it was apparent that the Appellant and his fellow police officers were not satisfied with the explanation given by the complainant. They proceeded to search the house of the complainant. They found nothing to establish the ownership of the motor vehicle. The Appellant left the complainant’s house and requested the complainant to provide proof of ownership of the motor vehicle.

From the evidence adduced by the complainant and his wife, they claimed that during the course of the search of their house, the Appellant stole Kshs.200,000/- and the complainant’s mobile phone. The complainant and his wife claimed that the money had been kept in a coat pocket kept inside their bedroom. The complainant claimed that after this theft, he made a report to Muthangari Police Station. However, when the investigating officer PW5 Cpl. Gideon Mugambi testified in court, he was stood down to enable him get a copy of the OB entry that was allegedly made by the complainant at the said police station. After visiting Muthangari Police Station, PW5 told the court that no such report had been made at the said police station. It was therefore clear that the complainant was not telling the truth when he claimed that the Appellant and his fellow police officers robbed him of the said Kshs.200,000/- when they conducted a search on the material day of 18<sup>th</sup> February 2013.

According to the Appellant after leaving the complainant’s premises, he continued with investigations. He contacted the Registrar of Motor Vehicles and confirmed the particulars of the motor vehicle. He produced a copy of records as **D.Exh.No.2**. He confirmed that the motor vehicle was owned by S.N. Automart Kenya. On 15<sup>th</sup> March 2013, he went back to the complainant’s premises and sought to interview him. This was when the complainant mobilized a crowd claiming that the Appellant and his colleagues were robbers. The Appellant produced his police identity card. He also drew his pistol to ward off the crowd. Meanwhile a report had been made to Kabete Police Station about the incident. Police officers from the said police station arrived at the scene and escorted the Appellant and his colleagues to Kabete Police Station. That was when the complainant made the first report of a robbery that had allegedly taken place a month earlier.

On re-evaluation of the evidence adduced, it was clear to this court that indeed the explanation given by the Appellant regarding how he investigated the alleged commission of a crime allegedly committed by the complainant was credible. The contradictions evident in the evidence adduced by the complainant, and his witnesses, point to the fact that there was collusion to frame up the Appellant on the charge that was brought against him. These contradictions include the following: the complainant and his wife gave

contradictory evidence regarding the circumstances in which the search was conducted in their house. Whereas the complainant testified that the Appellant and his colleagues conducted two searches in the house, from the wife's testimony, she claimed that in one of the occasions, the Appellant and his colleagues were invited by the complainant to take alcoholic drinks in their house. If the wife's testimony was to be believed, the claim by the complainant that the Appellant threatened him with a pistol has no basis.

The second contradiction is the claim by the complainant that he reported the alleged robbery incident to Muthangari Police Station. The investigating officer confirmed that no such report was made to the said police station. Even if this court were to believe the complainant's story, the circumstances in which it was claimed the alleged sum of Kshs.200,000/- was removed from his possession does not constitute the offence of robbery with violence. The complainant and his wife testified that during the search, they were left in the sittingroom while the Appellant and his colleagues conducted a search in the bedroom where the alleged sum of Kshs.200,000/- was kept. It was apparent from their evidence that during this time, the Appellant did not show them a pistol or point a pistol at them.

From the analysis of the evidence, it was clear that the Appellant and the complainant and his wife had a cordial conversation. It is in this perspective that the claim by the complainant that he made a report to Muthangari Police Station should be considered. It has been established that no such report was made. If indeed the complainant and his wife were robbed, *why didn't they report the incident to the police? Why did the complainant wait until a month later when the Appellant was continuing with the investigations to report the incident to Kabete Police Station and not Muthangari Police Station? Why did the police based at Kabete Police Station not inquire from the Appellant's superiors at Central Police Station to confirm if the Appellant was conducting such investigations?* It was clear to this court that there is more than meets the eye in the manner in which investigations were conducted and the decision made to charge the Appellant.

Having re-evaluated the totality of the evidence, this court is not convinced that

the circumstances in which it claimed the robbery took place actually occurred. The complainant's conduct during the material period and the action that he took precludes this court from believing his story that he was robbed by the Appellant. Further, it was clear to this court that the police did not conduct proper investigations to establish whether indeed the claim by the Appellant that he was investigating the case was true. It appeared that the police at Kabete Police Station formed an opinion that the complainant was telling the truth before even investigations had commenced and had been concluded. It is this mindset that led to the charge being laid against the Appellant on the basis of insufficient, contradictory and incredible evidence.

It is clear from the foregoing that the appeal is for allowing. It is hereby allowed. The Appellant's conviction is quashed. He is acquitted of the charge. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MAY 2018**

**L. KIMARU**

**JUDGE**