



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 32 OF 2013**

**PATRICK MWANGI WAWERU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the judgment of the Senior Resident Magistrate's Court, Nyeri (Hon.C.Wekesa) delivered on 6<sup>th</sup> May, 2014 in Criminal Case No. 388 of 2013)**

**JUDGMENT**

**FACTS**

1. The appellant, **Patrick Mwangi Waweru** was charged with the offence of Robbery with violence contrary to **Section 296(2)** of the **Penal Code** and an alternate count of Handling Stolen Goods contrary to **Section 322(1)(2)** of the **Penal Code**.
2. The particulars of the main charge are that on the 8<sup>th</sup> day of June, 2013 at Balonzi area in Nyeri County, jointly with others and being armed with dangerous weapons namely a panga, knife and slasher robbed **Mohamed Roba Bonaya** of his laptop make SNSU, a mobile phone Nokia CI and cash in the sum of Kshs.800/- all valued at Kshs.32,300/- and immediately before or after such robbery threatened to use actual violence to the said **Mohamed Roba Bonaya**.
3. In the alternative, the appellant was charged with handling stolen goods and the particulars of the offence were that on the 8th day of June, 2013 within Nyeri Municipality otherwise than in the course of stealing dishonestly received or retained a laptop make SNSU knowing or having reason to believe it to be stolen goods.
4. *The prosecution called four witnesses to prove its case; the appellant was tried and found guilty on the main charge; he was convicted and sentenced to the mandatory death sentence.*
5. Being aggrieved by the conviction and sentence, the appellant filed a Petition of Appeal on 12<sup>th</sup> May, 2014 and also filed Grounds of Appeal which are as follows;
  - (i) There was no credible evidence on identification to support the conviction;
  - (ii) He was convicted on contradictory and inconsistent evidence;
  - (iii) There was no evidence from essential witnesses;
  - (iv) The prosecution failed to prove its case to the required standard;
  - (v) The trial court rejected his sworn defence.
6. At the hearing hereof the appellant was represented by learned Counsel Mr.Wahome Gikonyo whereas Prosecuting Counsel Mrs Gicheha represented the State; hereunder is a brief summary of their rival submissions;

**APPELLANTS SUBMISSIONS**

7. The evidence of **PW1** was that he reported the matter to Nyeri Police Station and this contradicts the evidence of **PW2** and **PW3**; **PW1** who was a police officer stated that **PW1** did not report the matter at the police station; nor was **PW1** given two police officers; he was found walking in the area they were;

8. As for **PW3** he said he accompanied **PW1** to the police station and was given two (2) police officers; **PW3** says he was with **PW1** but **PW1** in his testimony makes no reference to being with anyone when he was attacked nor when he went to the police station to make the report;

9. The evidence of **PW1** was that the thieves stole from him and hid inside the Green Hills Hotel; whereas the evidence of **PW2** was that they were on patrol at the Itara area where they had received reports of people being mugged; that the Itara area is near the Barclays Bank; that the witnesses present two different crime scenes which are about 1 ½ kilometers apart;

10. **PW1** stated that the appellant threw the laptop down whereas **PW3** stated that the appellant was pushed down and his trousers pulled and the laptop was retrieved from the appellant's trousers; no inventory was prepared by the police as required by Section 25; which provides that upon an officer conducting a search an inventory must be prepared; without an inventory there is no proof that the laptop was recovered from the appellant; case law referred to **John Mutura Muraya vs Republic CA NO.384 of 2009 Nyeri**;

11. **PW3's** evidence was that the police came and searched and left when they didn't find the appellant; **PW4** stated that he left his contacts with **PW1** and was called when the thugs were sighted that they rushed back and found the suspect struggling with the complainant and arrested him; that there were also members of the public who wanted to lynch the appellant; that there was tension and they were forced to shoot in the air; they couldn't search the suspect there so they rushed him to the police station and the search was done at the police station and the laptop was found; nothing of this sort was mentioned in the evidence of **PW1, PW2** and **PW3**;

12. Counsel submitted that the evidence of **PW1, PW2, PW3** and **PW4** did not add up; these four (4) prosecution witnesses gave different versions of what transpired; their evidence was full of material contradictions that the trial court did not reconcile; their evidence was not straight forward, there was no truthfulness and their integrity and credibility was doubtful; case law referred to **Kiilu & Anor vs Republic (2005) 1KLR 174**;

13. The appellant gave an *alibi* defence and stated that he was not at the place the incident took place; which of the stories was more reliable between the appellant's evidence and that of **PW1, PW2, PW3** and **PW4** whose evidence was full of contradictions;

14. The trial court did not test the evidence of the appellant; it was the counsel's contention that he was not able to tell whether the correct onus was applied and whether the prosecution was called upon to discharge the alibi; there was no burden of proof upon the appellant;

15. The trial court should not have convicted the appellant; and the appellants prayer was that the appeal be allowed, conviction quashed and sentence set aside;

#### **RESPONDENTS SUBMISSIONS**

16. The states response was that on the face of the record the appellant does not deny that he was within the vicinity of the scene of crime which was exactly where he was arrested;

17. The state conceded that the evidence tendered by the prosecution witnesses had glaring contradictions; that the evidence of **PW1, PW2, PW3** and **PW4** does not merge;

18. It was not clear how many policemen were at the scene; or whether the complainant was given police officers; or whether the policemen found **PW1** at the scene; it was not clear whether the laptop was retrieved at the scene or at the police station; the evidence of **PW1** contradicts that of **PW3** and **PW4**; the complainant **PW1** does not mention he visited **PW2** and requested him to accompany him to the police station; it is not clear when **PW1** met up with **PW2**;

19. The scene of crime has discrepancies; the complainant and the Investigating Officer talked of two different scenes of crime; these discrepancies raise doubt which should go to favour the appellant;

#### **REJOINDER**

20. The appeal has been conceded;

#### **ISSUES FOR DETERMINATION**

21. After taking into consideration the forgoing submissions these are the issues framed for determination;

- (i) Whether the prosecution witnesses evidence was inconsistent and contradictory;
- (ii) Whether the prosecution failed to prove its case to the desired threshold;
- (iii) Whether the trial court disregarded the appellants sworn defence;

#### **ANALYSIS**

22. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA**.

**Whether the prosecution witnesses evidence had material inconsistencies and contradictions:**

23. The testimony of **PW1** who was a student at Nyeri Technical College was that he was walking alone on his way to Nyeri Town and he had a bag that contained his books and lap top; that he met three youths one being the appellant; the appellant had a slasher and was pretending to slash the grass; they greeted him as he passed by and he was grabbed from behind and robbed of his phone and bag;

24. His evidence was that he reported the matter to the Nyeri Police Station and was given three officers to accompany him to the scene; the appellant had hidden himself in Green Hills Hotel fence from where he emerged; **PW1** then pointed out the appellant to the police officers; the appellant is said to have removed the laptop from the inside of his trouser whilst pleading with the police officers not to harm him;

25. **PW2** who was a police officer stated that they were on patrol in Nyeri Town when they received a call from their report office of people being mugged at Itara Area; that they proceeded to the scene where they met **PW1**; he explained to them what had transpired; that they did a search and found the appellant hiding in the Napier grass; his evidence was that they took him to the station and while at the station retrieved the laptop from the appellant's trousers;

26. **PW3** was at home when **PW1** passed by and told him that he had been robbed and asked him to accompany him to report the matter at the police station; that they were given two police officers to accompany them to the scene; the police searched and did not find anyone and they left;

27. His version of how the appellant was arrested was that after the police had gone the appellant later emerged from the bushy area and they got hold of him with the help of members of the public; his trousers were pushed down and the laptop was found;

28. As for **PW4** who was a police officer; his evidence was that he was on patrol with **PW2** within Nyeri township when they got information from their control room that there were people robbing students and members of the public at Itara Road; that they proceeded to the scene and met two youth who had just been robbed; they were taken to the scene by **PW1**; that they combed the scene to no avail so they left after exchanging contacts with **PW1** and told him to contact them upon sighting the suspects; they then left for town;

29. Before they got to town **PW1** called them and said that he had sighted one of them; they rushed back and found the suspect struggling with **PW1** and they arrested him; the commotion attracted members of the public who wanted to lynch the appellant and they were even forced to shoot in the air and in such a tense environment they couldn't search him; that they rushed him to the police station where they conducted a search and retrieved a laptop hidden under his trousers;

30. On evaluation of the evidence of **PW1, PW2, PW3** and **PW4** this court finds that there are glaring inconsistencies and contradictions and their evidence does not add up; these four (4) prosecution witnesses gave different versions of what transpired; it is not clear how many policemen were at the scene; or whether the complainant was given police officers to escort him to the scene; or whether the policemen found **PW1** at the scene; it is not clear whether the laptop was retrieved at the scene of crime or at the police station; none of the police officers prepared or produced an inventory as required to corroborate their evidence on the recovery of the stolen item; the evidence of **PW3 and PW4** contradicts that of **PW1** in all aspects of the evidence tendered;

31. There are also discrepancies as to the scene of crime; **PW1** and the **PW4** the Investigating Officer gave evidence of two different scenes of crime which it is noted are distances apart;

32. Upon carefully perusing the trial courts judgment it is clear that the trial court merely invoked the doctrine of recent possession and made a finding that; '*.....there is circumstantial evidence which is conclusive to sustain a conviction*'.

33. The trial court did not adequately evaluate or analyze the prosecution's evidence; had it done so it would have noted that the prosecution's evidence was riddled with material contradictions; the record shows that the trial court did not attempt to reconcile these glaring inconsistencies and contradictions; had it done so it would have definitely arrived at a different finding; these discrepancies raised a lot of doubts which the trial court ought to have resolved in favour of the appellant;

34. This court is satisfied that the prosecution case has glaring inconsistencies and material contradictions which go to the root of the charge and the evidence cannot be relied upon to support the conviction; the trial courts finding is found to have no basis and the conviction is found to be unsafe;

35. This ground of appeal is found to have merit and is hereby allowed; and this court finds no need to belabor itself in addressing the other two issues;

**FINDINGS**

36. For the forgoing reasons we make the following findings;

(i) The prosecution evidence had glaring inconsistencies and material contradictions which go to the root of the charge and the evidence cannot be relied upon to support the conviction for the offence of robbery with violence; the conviction is found to be unsafe;

**DETERMINATION**

37. The appeal is found to have merit and it is hereby allowed.

38. The conviction is hereby quashed and sentence set aside; the appellant to be set at liberty forthwith unless otherwise lawfully held.

Orders Accordingly.

*Dated, Signed and Delivered at Nyeri this 12<sup>th</sup> day of July, 2018.*

**HON. A. MSHILA**

**JUDGE**