



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 271 OF 2014

PETER NJENGA NJUGUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable J. Nthuku Senior Resident Magistrate,

delivered on 27th October, 2014 in Nakuru Chief Magistrate's Court

Criminal Case No. 3994 of 2012)

JUDGMENT

1. Peter Njenga Njuguna ("Appellant") was arraigned before the Chief Magistrate's Court in Nakuru facing three counts and two alternative counts.
2. On Count I, the Appellant was charged with the offence of robbery contrary to Section 296(2) of the Penal Code. The alleged facts were that on 10/11/2012 at Menengai Crater View in Nakuru District, jointly with others not before the Court, while armed with offensive weapons namely stones, robbed Jessy Ngotho Muigai of one mobile phone make Nokia valued at Kshs. 6,200/-, sun glasses valued at Kshs. 50/- and cash Kshs. 850/- all valued at Kshs. 7,200/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Jessy Ngotho.
3. The Appellant faced an alternative count of handling stolen property contrary to section 322(2) of the Penal Code. The facts were that on 10/11/2012 at Menengai Crater View in Nakuru District, otherwise than in the course of stealing dishonestly retained one mobile phone make Nokia valued at Kshs. 6,200/-, sun glasses valued at Kshs. 150/- all valued at Kshs. 6,350/- the property of Jessy Ngotho knowing or having reason to believe them to be stolen or unlawfully obtained.
4. The Appellant faced a second count of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that on 10/11/2012 at Menengai Crater View in Nakuru District, jointly with others not before the Court, while armed with offensive weapons namely stones, robbed Derrick Ombati of cash Kshs. 100/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Derrick Ombati.
5. The Appellant also faced a third count to wit stealing contrary to section 275 of the Penal Code. It is alleged that on 10/11/2012 at Menengai Crater View area in Nakuru, jointly with others not before Court, stole one laptop make Compaq 610 valued at Kshs. 60,000/-, the property of Dennis Munga Basweti.
6. He faced an alternative count of handling stolen property contrary to section 322(2) of the Penal Code. The facts were that on 10/11/2012 at Menengai Crater View in Nakuru District, otherwise than in the course of stealing dishonestly retained one laptop make Compaq 610 valued at Kshs. 60,000/- the property of Dennis Munga Basweti knowing or having reason to believe them to be stolen or unlawfully obtained.
7. The Appellant denied the charges and a fully-fledged trial ensued. The Prosecution called three witnesses and then closed its case. The Learned Trial Magistrate found that the Appellant had a case to answer and put him on his defence. The Appellant gave a sworn statement and did not call any witnesses.
8. At the conclusion of the case, the Learned Trial Magistrate found that the first count had been proved beyond reasonable doubt and sentenced him to suffer death as the law mandatorily required at the time. The Appellant was acquitted of the other two charges since no

evidence had been adduced in their support.

9. The Appellant is aggrieved by the conviction and sentence and has appealed to his Court. During the hearing of the Appeal, Mr. Maragia, counsel for the Appellant, grouped the grounds of appeal into three:

- a. First, he argued that the evidence presented was unsatisfactory to prove the charge beyond reasonable doubt;
- b. Second, he argued that the trial was unfair because it proceeded even though the Appellant had not been supplied with Witness Statements; and
- c. Third, he argued that the trial was vitiated by admission of inadmissible photographic evidence during trial.

10. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See *Okeno v Republic* [1973] E.A. 32; *Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA 570.

11. The evidence that emerged at trial was as follows.

12. Jessie Ngotho, the Complainant in Count I, testified as PW2. He testified that on 10/11/2012, he and his three friends decided to go for a hike at Menengai Crater. When coming back downhill, he and his other friend, Derrick, were left behind as the other two walked ahead. They were accosted by three people who suddenly emerged from the hill and demanded money. Jessie says that he hesitated to give them money and they grabbed him and dragged him down the valley. They then robbed him of his Nokia phone, sweater, and sunglasses.

13. Jessie testified that they immediately reported to the Forest Guards who immediately followed the assailants. He says that the Forest Guards arrested the Appellant whom he identified as one of the assailants.

14. On cross examination, Jessie said that one of the assailants had a stone which he threatened to use if he did not surrender. He also testified that he was not injured.

15. Benard Sang was one of the Forest Rangers who, upon receiving the report of the attack, went after the assailants and reportedly arrested the Appellant. He testified that they took a short cut and intercepted the three assailants but that they arrested the Appellant because he was the one carrying a bag with a laptop. He testified that they recovered the phone, sunglasses and laptop Compaq from him. The other two assailants apparently fled and could not be arrested. After the arrest, the victims apparently took photos of the Appellant as he was carrying the laptop bag. These were produced as evidence at the trial.

16. Corporal James Omollo, the Investigating Officer, rounded off the Prosecution case. He testified about re-arresting the Appellant and produced the phone; laptop; sun glasses and photos taken at the scene by the victims.

17. At the appellate stage, Mr. Maragia obtained leave of the Court to file additional evidence namely the OB Extract from Nakuru Police Station. The Extract says that the Appellant had been taken to the Station and booked on charges of stealing from Jessie Ngotho and Derrick Ombati Abuga. The items listed as having been stolen are laptop (Compaq); phone (Nokia); cash (Kshs. 1050/-) and black goggles.

18. Mr. Maragia argued that this Extract was an indication that there was no robbery at all and that the evidence produced at trial was inconsistent and contrived. In particular, Mr. Maragia wondered how Jessie could have been dragged down the hill and yet he did not get injured. He also wondered why the other complainants did not testify and hypothesize that it is because the charges were changed from stealing to robbery with violence or that there was no offence at all.

19. In the second place, Mr. Maragia argued that the Trial Court record indicates that the Appellant had not been supplied with witness statements yet the trial proceeded without any indication that he was ever supplied with those statements. This, Mr. Maragia argued, made the trial an unfair one.

20. Lastly, Mr. Maragia faulted the Trial Court for admitting photographic evidence taken by the Complainants contrary to the Evidence Act. He argued that scene photographs ought to be taken by a gazetted officer; yet this is not what happened here.

21. Mr. Motende, Prosecution Counsel, opposed the appeal. He argued that all ingredients of Robbery with Violence were proved; that PW3 was clear that there were 3 robbers; that the Appellant was found in possession of the robbed goods. The photographs evidence was produced of the stolen goods. Mr. Motende further argued that the Appellant did not challenge that the goods were found on him and that based on the other evidence available there was evidence to convict even beyond doctrine of recent possession.

22. I have not carefully scrutinized the entire Trial Court record as I am required to do and considered the submissions by both Mr. Maragia and Mr. Motende, the Prosecution Counsel.

23. There are troubling aspects about the evidence presented at trial in support of the charge. With the additional evidence presented now – the OB Extract from the Police Station – these questions deepen. It is extremely curious that the case was reported as theft and the Appellant booked as a theft suspect – yet he was later charged with robbery with violence. No cogent explanation was offered by the Prosecution about

this discrepancy.

24. This discrepancy alone might be excused – but other discrepancies abound: It is equally curious that from the same set of transactions some of the counts charged were robbery with violence and one is for stealing. What explains this variation? Secondly, according to the testimony of Jessie, the only Complainant who came to Court, he was accosted when he was in the company of one Derrick Abuga. However, Count III alleges that the Appellant stole a lap top from a Dennis Munga Bisweti. According to the account given by Jessie, he and Derrick were accosted up the hill because their friends – Dennis and Lawrence – had left them behind hence giving the three assailants a chance to overpower them. If this account is true, then it does not explain how Dennis happened to lose his laptop to theft at the instance of the Appellant. This calls into serious question the credibility of the account.

25. Thirdly, the account by Jessie gives such scanty details of the robbery that it raises questions as to its credibility. For example, there is no account where and how Jessie and Derrick were able to link back with Dennis and Lawrence after the robbery.

26. Lastly, the list of items which were allegedly robbed from Jessie seems to change frequently: in some accounts his sweater was stolen, yet in others there is no mention of the sweater. The OB Extract appears to suggest that the laptop was also stolen from him yet the charge sheet states otherwise. Additionally, in his testimony, he does not mention being robbed of cash.

27. All these discrepancies are compounded by the fact that two of the alleged victims of the crime did not show up to testify in Court: Both Derrick and Dennis chose not to come and testify despite several summons and even a warrant of arrest.

28. In my view all these discrepancies make the conviction in this case very unsafe. The evidence presented by the Prosecution was too hopelessly contradictory and transient to permit the very serious charge of robbery with violence to stick.

29. In addition, as Mr. Maragia argued, the Trial Court record indicates that the trial proceeded even though the Appellant variously complained that he had not been given witness statements. In particular, on 14/12/2012 and 19/09/2013, the Appellant, who was unrepresented, informed the Court that he had not been supplied with witness statements. The Court ordered the case to proceed yet there is no indication on the Court record that the Court ordered that the statements be supplied. Our jurisprudence is uniformly consistent on this question: it fatally vitiates a trial to fail to supply an Accused Person with Witness Statements and other documents relied on by the Prosecution so that he can prepare for his defence. This is now explicitly required by the Constitution at Article 50(2)(c) and (j). These clauses are quite clear and the Courts have said as much: the right to adequate time and facilities for the preparation of one's defence includes the right to receive beforehand the evidence that the Prosecution intends to adduce against the Accused. At a minimum, this right includes the right to receive a copy of the charge sheet, witness' statements and copies of any documents which will be relied on at the trial. See, for example, *Simon Githaka Malombe v R [2015] eKLR (Court of Appeal Crim. App No. 314 of 2010 at Nyeri)* for an enunciation of this principle.

30. The upshot is that after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

a. For the reasons stated above, the appeal is allowed and the conviction of the Appellant in Nakuru Chief Magistrate's Criminal Case No. 3994 of 2012 is hereby quashed.

b. The sentence imposed by the Trial Court of death is hereby set aside.

c. Consequently, the Appellant shall be set free forthwith unless he is otherwise lawfully held in custody.

31. Orders accordingly.

Delivered at Nakuru this 4th Day of October, 2018

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JOEL NGUGI

JUDGE