



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBERS 14, 4 AND 6 OF 2018

HUSSEIN BARAZA WEKESA.....1ST APPELLANT

ERIC OWINO OKIDI.....2ND APPELLANT

JAMES ODERO SIRENGO.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT.

(An appeal from the conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 1290 of 2016 delivered by Hon. E. Kanyiri, SRM on 13th December, 2017).

Background.

1. Hussein Baraza Wekesa, Eric Owino Okidi and James Odero Sirengo, hereafter the 1st, 2nd and 3rd Appellants respectfully were 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 1st May, 2016 at Muthaiga Area in Nairobi within Nairobi County, jointly robbed Stephen Ochieng Padi of his shirt and cash Kshs. 1,000/-, all valued at Kshs. 1,300/ and at the time of such robbery threatened to use violence to the said Stephen Ochieng Padi.

2. The 2nd Appellant was charged with an alternative charge of handling stolen property contrary to Section 322(1) (2) of the Penal Code. It was alleged that on 2nd May, 2016 at Utalii drift in Nairobi within Nairobi County, otherwise that in the course of stealing dishonestly retained one short knowing or having reason to believe it to be stolen goods.

3. At the conclusion of the trial the Appellants were found guilty in the main count and each sentenced to suffer death. They were dissatisfied with the conviction and sentence against which they preferred the instant appeal. Each Appellant filed his respective appeal which the court consolidated for purposes of this judgment. They all had similar grounds of appeal filed contemporaneously with their written submissions on 2nd October, 2018. They are that; (i) the learned trial magistrate erred when she convicted him on the basis of contradictory and conflicting evidence, (ii) the trial magistrate erred when she failed to note that the investigations in the case were shoddy, and (iii) the honorable magistrate erred when she dismissed their respective plausible defences.

Submissions.

4. With respect to the submission that the prosecution evidence was contradictory, the Appellants pointed to contradictions between the evidence of PW1 who testified that he was accosted by the river. PW2, they argued, testified that PW1 was accosted near his place of work. They pointed to further contradictions with regards to the location of the money stolen and what part of the complainant's body was stabbed. The 3rd Appellant added that no evidence was adduced that placed him at the scene of the robbery.

5. The Appellants took issue with the conduct of investigations, citing that they were shoddy. They cited that it was not established that PW1 was injured at all by the failure to produce a medical report. Under this head the 1st Appellant argued that the charge sheet was defective in that it did indicate that a weapon was used to inflict the injured yet PW1 testified that he was stabbed. Accordingly, he argued that the charge sheet was defective as the charge was not supported by the evidence. The 1st Appellant did also argue that the police failed to establish that the shirt the complainant claimed was stolen by him. He cited the fact that in his defence he claimed that the same belonged to him, an assertion that was not rebutted by the prosecution. Additionally, he argued that the knife was planted on him during his arrest which explained why it was not cited as the weapon used during the robbery in the charge sheet.

6. Each of the Appellants also submitted that their respective statements of defence were not considered which, if they had been, would have exonerated them from the crime.

7. Learned State Counsel, Ms. Aluda for the Respondent opposed the appeal. She set out the prosecution's case and submitted that the case was proved beyond reasonable doubt. She submitted that the recovery of the exhibits from the Appellants was never shaken on cross-examination and that the Appellants gave defences that did not shake the testimonies of the prosecution witnesses. She submitted that although PW1 was injured during the incident, medical evidence could not be adduced because he had been arrested by the time he testified. She submitted that lack of medical evidence did not lessen the fact that the offence of robbery with violence was established, citing that a proof of any other elements of the offence established the offence. In this regard, she submitted that the prosecution established that the assailants were more than one in number and some property was lost during the robbery which any of the element would prove the case.

8. On sentence, counsel urged the court to exercise its discretion after having regard to the fact that the extent of the injuries the complainant sustained was not ascertained and that the value of the items stolen was not high.

Evidence.

9. **PW1**, Stephen Ochieng was the complainant. He worked as a mechanic. He recalled that on 1st May, 2016 he was taking a bath at Mathare River at around 5:00 p.m. when three men approached him and one of them removed his shirt which had in it about Kshs. 1,000/-. He identified the man who took the shirt as Ali and the men with him as Kidero and Baraza who he testified stabbed him on the right thigh and head respectfully. He testified that he knew the men as they all lived in Mathare. He reported the matter at Muthaiga Police Station and the suspects were later arrested. He identified the shirt and the knives used in the attack in court. He identified the 1st Appellant as Baraza, the 2nd Appellant as Ali and the 3rd Appellant as Kidero. In cross examination he stated that he went to hospital but did not have evidence to show that he was stabbed and that it was the 2nd Appellant who was found wearing his shirt. Further, that his medical documents were with the investigating officer. In re-examination he pinpointed a scar on his left ear as originating from the incident.

10. **PW2**, Justus Ochieng worked at Muthaiga Primary School and his testimony was that he knew the Appellants as he used to see them around the neighbourhood. He added that on 1st May, 2016 they arrived at his place of work alongside the complainant. He noticed that the 2nd Appellant had a knife which he used to stab PW1 with on the buttocks before proceeding to take his shirt which he wore. He testified that he witnessed the 1st Appellant beating PW1 and the 2nd Appellant take Kshs. 1,000/- from PW1's pocket. He reported the matter at Muthaiga Police Station. He recalled that the 1st Appellant was arrested at 10:00 p.m. and found with a knife with a wooden handle. He also identified another knife and the shirt taken from the complainant.

11. According to **PW3**, **PC Daniel Oniang** he was informed on 2nd May, 2016 by CPL Korir that three suspects had been spotted at Mathare River bathing. They proceeded to the river alongside the complainant where they found two boys. The complainant identified one James Kidero, the 3rd Appellant, as the one who stole from him. They arrested him and on the road the complainant identified another person, one Eric Otieno, the 2nd Appellant. A knife with a black handle was recovered from him.

12. **PW4**, APC Joash Mulenje accompanied PW4 during the arrest of the 1st Appellant. **PW5**, PC Amos Nyakinya investigated the matter. He recorded the witness statements and later charged the Appellants. He also visited the scene of crime in the company of the complainant.

13. The 1st Appellant testified as DW1. He stated that on 2nd April, 2016 he was on his way home when he met two men who attacked him and took his mobile phone and money. They escorted him to Muthaiga Police Station where he was charged. He denied he committed the offence.

14. **DW2**, the 2nd Appellant also stated that on 2nd May, 2016 he was on his way home when near Muthaiga he saw a group of people gathered. The men questioned him and searched him but recovered nothing. After a few minutes one of them recovered a knife near where they stood. The men then escorted him to the police station where he was booked and later charged with the present matter.

15. **DW3**, the 3rd Appellant stated that he worked as a fisherman along Nairobi River and that on the material day he met three men who stopped him and asked what he was up to. They asked him to escort them to the police station where he was later charged with the present offence.

Determination.

16. After considering the evidence at hand and the respective rival submissions, I have concluded that the only issues arising for determination are whether the charge sheet was defective and whether the offence was proved beyond a reasonable doubt.

17. On the issue of whether the charge sheet was defective, the Appellants argued that the statement of the charge did not support the particulars thereof and that the evidence adduced did not support the entire charge. They thereby cited a contravention of Section 214 of the Criminal Procedure Code which reads as under;

“(1)Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

- i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;
- ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.”

15. I understood the Appellants to be referring to sub-section (2) above as it relates to the effect of variance between the charge and the evidence adduced. This behooves the court to define what constitutes a defective charge sheet. The law is now settled that a charge is deemed defective if it is drafted in such an unambiguous manner that the accused cannot understand the offence facing him and is therefore unable to mount a defence to the case. See *Sigilai v Republic* [2004]2 KLR480, the High Court held that;

“The principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare a defence to the charge. This principle of the law has a constitutional underpinning.”

16. The Appellants were convicted for the offence of robbery with violence which was framed as under;

“Robbery with violence contrary to Section 296(2) of the Penal Code.

1. Hussein Baraza Wekesa. 2. Eric Owino Okindi. 3. James Odero Sirengo

On the 1st May, 2016 at Muthaiga Area, in Nairobi, within Nairobi County, jointly robbed Stephen Ochieng Padi of his shirt and cash Kshs. 1,000/-, all valued at Kshs. 1,300/ and at the time of such robbery threatened to use violence to the said STEPHEN OCHIENG PADI.

17. Clearly, the Appellants pleaded to a specific offence of robbery with violence. They were tried for the said offence and defended themselves against the same offence. It is true that the particulars of the offence did not speak to the use of violence against the complainant only stating that there was simply a threat of violence. There was also no mention of the assailants being armed during the robbery contrary to the evidence of the complainant that he was attacked by men wielding knives and was stabbed on his right thigh and neck. However, in the definition of the offence of robbery with violence under Section 296(2) the Penal Code, the threat to use violence is an element that can singularly establish the offence. And so, even if the charge did not mention the use of a knife, if the evidence adduced established the threat to violence, the trial court was obligated to convict the Appellant.

18. As earlier stated, sub-section (2) of Section 214 refers to variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed. The submission by the Appellants did not respect to the time the offence was committed but the manner in which the offence was committed. Respectively, the submission that the charge sheet was defective for want of compliance with Section 214 is unmerited in the circumstances.

19. In any case, even if that were the case, the provision is very clear that the variance cited is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof. The submission in the instant scenario does not refer to the time of the commission of the offence and so is irrelevant to the provision.

20. It is my finding therefore that the charge sheet did contain sufficient material as would have enabled the Appellants to understand the charge(s) facing them. They were not prejudiced in the trial by the omission to include the use of a knife in the particulars of the charge.

21. I now delve into whether the evidence adduced sufficiently established the offence. My reevaluation of the evidence drives to conclude that the prosecution did not make up a case that warranted a conviction. I concur with the Appellants’ submissions that there were material contradictions in the evidence of the prosecution witnesses that rendered reliance on such evidence untenable. PW1 and PW2, the only eye witnesses to the incident clearly adduced contradictory evidence. The first contradiction relates to the *locus in quo* with PW1 testifying that he was accosted while he bathed by the river while PW2 testified that the incident occurred near some avocado trees at his place of employment, Muthaiga Primary School. This in my view casts doubt as to whether there were two incidences taking place at two different places and so which between the two the Appellants were charged in respect of. The contradiction cannot be wished away as an accused must be charged with a specific offence that took place at a specific place.

22. The second contradiction relates to what transpired during the incident with PW1 testifying that he was stabbed on the right thigh and head while PW2 only testified to seeing the complainant stabbed on the buttocks. Whilst this may not be so material depending on how the offence took place, the fact that the complainant failed to go to hospital casts doubt as to the truthfulness of his evidence that he was attacked at all. This then gives credence to the earlier contradiction that probably there was no robbery at all.

23. The third contradiction relates to the complainant's testimony that money was stolen from a shirt while PW2 testified that he saw the robbers take the money from the complainant's trouser pocket. This contradiction again raises substantial doubt about what transpired at the scene.

24. The contradictions are further strengthened by the failure to adduce medical evidence that would confirm that the complainant was injured during the incident. During PW1's initial cross examination he testified that the medical documents were at home and given his current incarceration he could not access them. When he was called for further cross examination he stated that the documents were with the investigating officer who never mentioned them either in his evidence-in-chief or the cross-examination. The court noted that from the complainant's evidence the injuries appeared severe which called into question how he was up and about a few hours later escorting police officers on patrols aimed at arresting his assailants as testified by PW3 and PW4.

25. Further eye brow is raised by the submission of the counsel for the Respondent who stated that the medical documents could not be adduced because PW1 had been arrested by the time of his testimony. This beats investigative procedure as exhibits should be kept under the custody of the investigating officer after investigations until they are adduced as exhibits. Amidst these contradictions, the safest conclusion to arrive at is that PW1 was never treated and so no medical documents were available for production in court. This is a case therefore I cannot hesitate to rule in favour of the Appellants.

26. In the foregoing, the court finds that the prosecution's evidenced could not found a case that warranted conviction. The conviction was therefore not safe. I allow the respective appeals. I quash the conviction, set aside the death sentence and order that the Appellants be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and delivered at Nairobi This 14th Day of November, 2018.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. 1st Appellant in person.
2. 2nd Appellant in person.
3. 3rd Appellant in person.
4. Mr. Miiri for the Respondent.