



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 161 OF 2016

SOSPETER SIMIYU MUCHUNGWI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court

at Kibera in Cr. Case No. 5301 of 2014 delivered by Hon. Ojoo, PM on 2nd December, 2016).

JUDGMENT.

Background.

1. Sospeter Simiyu Muchungwi, hereafter the Appellant, was charged in count I with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. It was alleged that on 12th November, 2014 at Kabiria in Riruta within Nairobi County, jointly with others not before the court armed with dangerous weapons namely pangas robbed Zipporah Wangui of her mobile phones Tecno, Formi and two Samsung phones all valued at Kshs. 21,000/- and at the time of the robbery wounded the said Zipporah Wangui.
2. In count II he was charged with the offence of burglary contrary to **Section 304(1)(a)** as read with **Section 304(2) of the Penal Code** in that that on 12th November, 2014 at Kabiria in Riruta within Nairobi County, jointly with others not before the court broke and entered the dwelling house of Nelson Muhonza with intent to steal from therein and did steal one phone make ITEL valued at Kshs. 2,000/- and cash Kshs. 500/-, the property of Nelson Muhonza.
3. The Appellant was convicted in Count I and acquitted in the Count II. He was sentenced to suffer death as a result. He was dissatisfied with both the conviction and sentence as a result of which he proffered the instant appeal. His grounds of appeal filed 9th October, 2018 were that the prosecution evidence was contradictory evidence, that the purported identification by recognition was not founded on a prompt and cogent first report, that he was convicted based on evidence of hostile witnesses, that the charge sheet was defective and his defence was not considered.

Submissions

4. The appeal was canvassed before me on 9th October, 2018. The Appellant relied on written submissions while Ms. Atina for the Respondent gave oral submissions. I shall consider the respective submissions in the determined. I however underscore the fact that the appeal was opposed.

Evidence

5. The prosecution's case can be summarized as follows; **PW1**, Zipporah Wangui Kariuki was the complainant in Count I. On 12th November, 2014 at around 3.00 a.m. she was asleep and awoke to find two torches flashing in her house. She screamed but was asked to be quiet. The men asked her daughter for her cell phone before taking her phone as well. The robbers ransacked her house and took various documents. One of the robbers whom she identified as the Appellant demanded she gets out of bed and another cell phone was taken from her. One robber had a panga which she held on to when he tried to cut her pants. During the fracas she was cut between the thumb and index finger leading her to scream which caused the robbers to run away. Her daughter followed them calling out Sospeter and she had to urge her

to return to the house in case the robbers decided to return. They reported the matter at the police station and she also received treatment at Bodaki Medical Services. She would later have a P3 form filled at the police surgery. Sospeter was the Appellant and her neighbor for about three years. In cross examination PW1 denied she had a grudge with the Appellant and that the Appellant disappeared only to emerge after they had moved out of their house.

6. **PW2**, Anne Njeri Njuguna she was PW1's daughter and she entirely corroborated the evidence of PW1. She confirmed she ran after the robbers while shouting the words "Sospeter kumbe wewe ni mwizi" but her mother urged her to return to the house. She testified that they later learnt that one of their neighbours had his phone and money stolen on the same night. On 22nd November she spotted the Appellant and she informed her mother who in turn informed the police and he was arrested.

7. **PW3**, Nelson Makhatsa Nathonz the complainant in Count II was on the same night awoken by screams from his neighbour's house. He found his door open and the lights on which scared him. He joined neighbours who were gathering outside. The door of the Appellant's house was locked. He recalled that Sospeter had been at the house at 10.00 p.m. that night as he heard his radio playing. Thereafter, the Appellant went missing for two weeks.

8. **PW4, Dr. Joseph Maundu** attached to Nairobi Police Surgery examined PW1 on 13th November, 2014 .He found she had injuries on the thumb and index finger caused by a sharp weapon. He classified the degree of injuries as harm and filled a P3 form to the effect.

9. **PW5, CPL John Sirunga**, investigating officer received report of the incident from PW1 and PW2. They informed him that they had identified one Sospeter Simiyu during the incident and he took down their report. They identified the house of the Appellant to him. He arrested the Appellant on 22nd November, 2014 after he resurfaced.

10. The Appellant in his defence stated that on 22nd November, 2014 he was at work as usual before retiring to his house. That he was asleep when he was awoken by loud knocks. When he opened his door two officers arrested him and escorted him to Riruta Police Station where he was informed that PW1 had lodged a complaint against him. He testified that PW2 used to be his girlfriend before they fell out as her mother, PW1, did not approve of the relationship. That he had since started a new relationship and when PW2 found out about his new girlfriend she tried to start a fight. He recalled that on 9th November, 2014 he left for his father's place where he was working for two weeks and only returned on 22nd November, 2014, when he was arrested. He concluded that the charges were framed up by PW1 and PW2. He called a witness who testified as **DW2**, Leonard Wanjala Muchungwi, his father. He stated that on 13th November, 2014 the Appellant was with him at Utawala but in cross examination stated that the Appellant was in Utawala the whole week.

Determination.

11. The court has considered the submissions by the parties and the record of appeal before arriving at the following issues for determination:

- i. Whether the charge was fatally defective.
- ii. Whether the Appellant's alibi defence was adequately considered.
- iii. Whether the offence was proved beyond reasonable doubt.

Defective charge sheet:

12. Under this head, the Appellant submitted the charge sheet was fatally defective as he was charged under sections 295 and 296(2) of the Penal Code. He relied on **Samuel Materu Munialu v. Republic[2007] eKLR** and **Joseph Kaberia Kahinga & 11 others v. Attorney General[2010] eKLR** to buttress the submission. Miss Atina on the other hand argued that the duplicity did not prejudice the Appellant.

13. Courts of concurrent and higher jurisdiction have held that drafting the charge under the two provisions of the law renders the charge sheet duplex. However, the test is whether the duplicity prejudices the accused. In **Paul Katana Njuguna v. Republic[2016] eKLR**, were it held that:

"... , while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case [she/he] has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective."

14. The Appellant was aware of the charges he was facing and the duplex charge sheet did not confuse him or limit his ability to put up a defence. This ground is therefore dismissed.

Whether the Appellant's defence was considered.

15. The Appellant submitted that whereas he set out an alibi defence the same was not taken into consideration by the trial court in arriving at its decision. Miss Atina submitted that while the Appellant's defence was that he was with his father from 11th to 22nd November, 2014 this was contradicted by the father who testified that they were together on 13th November, 2014 which was actually two days after the robbery.

16. The trial court in its judgment dismissed the Appellant's defence that he was a case of mistaken identity against a backdrop of strong and corroborated prosecution evidence. The Appellant's defence had several limbs, namely; (i) that he was framed due to an existing grudge between him and the complainants and (ii) that he had an alibi. With regards to the first limb, he argued that that animosity arose when he brought his new girlfriend home. However, he did not cross examine PW1 on this issue, a clear indicator of animus between himself and the complainants. He did raise the issue of a relationship between himself and PW2 which she vehemently denied further denying any fighting with a lady who had visited the Appellant. When he cross-examined PW1 he brought up the issue of a grudge which she denied. He never questioned her objection to his relationship between himself and PW2. This was a clear indicator that the assertion that there was a relationship between himself and PW2 was an elaborate deception concocted by the Appellant.

17. As regards the alibi defence, the Appellant testified that on 9th November, 2014 he left his house to go and stay with his father, DW2, for two weeks as there were opportunities at his father's workplace. He testified that this was a normal occurrence whereby he would spend Monday to Saturday noon at work before returning to the house and leaving again on Sunday evenings. DW2 testified that the Appellant was with him on 13th November, 2014 and that they had spent the whole week in Utawala together.

18. The prosecution is under a duty to rebut an alibi. The evidence of PW1 was that the Appellant was on the property on the night in question as she had seen him during the day. Her evidence was corroborated by that of PW3 who testified that the Appellant had been at his house until 10:00 p.m. as she heard the radio in his house playing. Further, the witness was surprised after the scream to find that the Appellant not in his house. This clearly called into question the alibi set out by the Appellant.

19. Further, while the Appellant testified that he spent two weeks working with DW2 this was contradicted by DW2 who testified that they had spent only the weeks in issue together. I have no doubt that an alibi was not established in light of the contradictory evidence and the rebuttal evidence apparent from the prosecution's case. This ground is thus dismissed.

Whether the offence was proved beyond reasonable doubt.

20. The next issue for determination is whether the offence was proved beyond reasonable doubt. The main issue here is that the Appellant must be identified as the culprit. On this issue, the Appellant submitted that the evidence of identification purportedly by recognition was not free from error or mistake. This was due to the fact that the witnesses had not given a prompt report naming the attackers they had seen or heard. He submitted that the failure to record the names of the assailants in the initial report pointed to the matter being a frame up for the reasons he set out in his defence. He relied on the statement of PW1 to submit that she had testified that she could not identify the robbers.

21. He relied on **Zaro v. Republic 2 KAR 212** to buttress the submission.

22. He also pointed that the prosecution evidence was riddled with contradictions. He questioned the evidence establishing what time the offence occurred pointing to contradictions between PW1 and PW3. He questioned the contradiction in the charge sheet and evidence relating to the value of the goods stolen, stating that the evidence was unreliable. He relied on **Augustino Njoroge Ritho & another v. Republic** to buttress his submission.

23. On identification, Miss Atina submitted that the Appellant had lived alongside the Appellant for three years and they used to talk to each other therefore they could recognize his voice when he asked for the phones. She submitted that the torches that were used by the robbers illuminated the house and since it was a small room made it possible for the witnesses to view them. She submitted that the fact that PW2 followed the robbers and called out the Appellant's name was a testament to the recognition.

24. She added that there was nothing contradictory in the evidence that was adduced by PW1 and PW2 as each described what they saw during the robbery. She conceded that PW3 did give a different time of the occurrence of the offence. She added that taking into account that the robbery caused distress the complainant may not have had the opportunity to look at the time.

25. Pertaining to the submission that the prosecution witnesses were hostile she submitted that this was not true as the evidence adduced by the witnesses proved the offence. She also urged the court to note the conduct of the Appellant after the robbery particularly his disappearance only to resurface after the complainant had moved from the area. She concluded by stating that the offence was proved beyond reasonable doubt.

26. While both PW1 and PW2 testified that they had positively identified the Appellant the view of the court is that the conditions prevailing at the scene were not sufficient for a positive visual identification as it was clearly dark with minimum lighting provided by torches. Furthermore, in cross examination the court noted that PW1's statement did not state that she could identify the Appellant contrary to her evidence.

27. But PW5, the officer who took the initial report testified that the complainants indicated that they could identify the Appellant as one of the attackers. This statement could not be in vain as PW2 was adamant that she identified the Appellant when he talked to her leading her to making the unusual step of following the robbers out of the house and addressing the Appellant. Thus, although the court may not rely on the evidence of PW1 relating to identification it could rely on the voice identification evidence adduced by PW2. However, reliance on this evidence will be subject to careful and through scrutiny as is expected when relying on the evidence of a single witness.

28. The place of voice identification in the Kenyan criminal justice system was set out by the Court of Appeal in **Simon Kiptum arap Chogo v. Republic[1985] eKLR**, viz:

“There can be no doubt that evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances, carry as much weight as visual identification, since it would be identification by recognition rather than at first sight.”

29. The test to be applied when evaluating this evidence was set out in **Karani v. Republic**[1985] eKLR, to wit:

“Identification by voice nearly amounts to identification by recognition. Yet here as in any other case care has to be taken to ensure that the voice was that of the Appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification.”

30. The above test was further fortified by the Court in **Vura Mwachirumbi v. Republic**[2016] eKLR, where it held that:

“Of course in testing voice recognition, in addition to considering the length of time the witness had known the person and circumstances of their acquaintance, one has to consider the words heard by the witness in order to determine whether they were sufficient to enable him correctly recognize his voice.”

31. From the foregoing it is clear that the test to be applied requires that the following be established before voice identification can be relied upon:

- i. How the complainant was acquainted with the accused and the circumstances of the acquaintance.
- ii. The conditions prevailing at the scene.
- iii. The sufficiency of the words uttered to establish a positive identification.

32. On the acquaintance between the Appellant and PW2 it was PW2’s evidence that the Appellant was a neighbor to her mother and she had known him for two years. This fact was corroborated by the Appellant who testified that he was their neighbor. As regards to the circumstances of their acquaintance, it was clear that they lived in cross proximity to each other and interacted from time to time as could be glimpsed from the evidence on record that she used to talk to him often and she even testified that they were friends. With regards to the conditions prevailing at the scene, they were conducive for positive voice identification as it was dead at night when all was quiet. The prevailing circumstances could be glimpsed from the fact that PW3 was roused from his deep slumber by the scream of PW1, and so were the rest of the neighbors. I have no doubt in my mind therefore, that the Appellant was positively identified by voice.

33. Of paramount importance is whether the words uttered were sufficient to establish a positive identification. There is no rule of the thumb as to the requisite amount of words required to establish a positive identification with in **Karani**(Supra) the words “I am Ario, open for me” being deemed sufficient while in **Simon Mbelle v. Republic**(CoA, Mombasa Criminal Appeal 45 of 1984) the words “Ni mimi” were found to be sufficient for positive voice identification.

34. In the present case, PW2 testified that the Appellant said, “Njeri, get up and give us money and phones”. PW2 then followed the escaping robbers and uttered the words, “Sospeter kumbe wewe ni mwizi”. I find the words were sufficient to enable positive voice identification. Furthermore, the perpetrator addressed her by her name. The Appellant was therefore sufficiently identified.

35. I have treated the identification evidence with caution as it was of a single witness. Nevertheless, I am convinced that it is further added weight by the circumstantial evidence relating to the Appellant’s disappearance from the locality after the incident. In all, I hold that the Appellant’s conviction was safe.

36. Were the elements of the offence proved? The prosecution’s case was that four mobile phones were stolen as testified by PW1 and PW2. While documentary evidence establishing their ownership stolen was not adduced this was explained as being occasioned by the theft of the ownership documents by the thieves. The robbers were two in number, PW1 was hurt during the robbery as she struggled with a panga wielded by the robbers. She subsequently received treatment at a facility called Bodaki. This evidence was corroborated by PW4, the police doctor, who examined PW1 who made a finding that there were injuries on her left arm. It is trite that a proof of any of the three elements establishes the offence, and so the offence was proved beyond a reasonable doubt. I accordingly uphold the conviction.

Sentence:

37. The Appellant was sentenced to suffer death but following the Supreme Court decision in **Francis Muruatetu & another v. Republic**[2017] eKLR the sentence is no longer mandatory. The circumstances of this case are that the Appellant was a first offender and in his mitigation he submitted that he was asthmatic and suffering in prison. It is also apparent that the Appellant spent the whole of the trial period in remand custody, a period of two years and eight days. I accordingly set aside the death sentence and substitute it with a penalty of five years imprisonment. The sentence shall be reduced by the period the Appellant spent in custody. It is so ordered.

DATED and DELIVERED this 20th day of **November, 2018**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant present in person.*

2. *Miss Atina for the Respondent.*