



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO: 28 OF 2016

[From Original Conviction and Sentence in Criminal

Case No: 673 of 2011 of the Senior Resident

Magistrate Court at Gatundu]

JOSEPH NG'ANG'A KAMAU.....APPELLANT

-V E R S U S-

REPUBLIC.....RESPONDENT

J U D G M E N T.

1. This is the judgement of the **Criminal Appeal No. 28 of 2016**. The Appellant is **JOSEPH NG'ANG'A KAMAU**. He was charged with the offence of **Robbery with Violence** contrary to **Section 296 (2)** of the **Penal Code**.

The particulars thereof were that on the **29th** day of **November, 2011** at about **7.30p.m.** at **Kirangari** village **Ngenda** location of **Kiambu** County, jointly with another before court and others not before court while armed with offensive weapons namely **Pangas** and **Axes** robbed **JAMES KABUBI MWAURA** of his two DVD players, one television set, 30 CD's, a suitcase, assorted clothes, a fork jembe, a mobile phone all valued at **Ksh. 44,800/=** and cash of **Ksh. 800/=** and at or immediately before or immediately after the time of such robbery wounded **JAMES KABUBI MWAURA**.

2. Count **II**, the accused was charged with the offence of robbery contrary to **Section 296 (2)** of the **Penal Code**.

Particulars thereof being on the **30th** day of **November, 2011** at **2.30 a.m.** at **Karembu** village **Kiamwangi** location of **Kiambu** County jointly with another before court and others not before court while armed with offensive weapons namely **Pangas** and **Axes** robbed **FIDELIS MUTHONI KAMAU** of her cash **Ksh. 1500/=**, one Sony television set, one Sony DVD player and one Sony home theatre radio all valued at **Ksh. 60,000/=** and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **FIDELIS MUTHONI KAMAU**.

3. Count **III**, the accused was charged with the offence of Robbery with Violence contrary of the **Section 296 (2)** of the **Penal Code**.

The particulars thereof were that on **30th** day of **November, 2011** at **2.30a.m.** at **Karembu** village **Kiamwangi** location of **Kiambu** County jointly with another before court while being armed with offensive weapons namely **Pangas** and **Axes** robbed **MARY WANJIKU KAMAU** of her LG mobile phone valued at **Ksh. 3,000/=** and cash **Ksh. 5,900/=** and at or immediately before or immediately after the time of and Robbery threatened to use actual violence to the said **MARY WANJIKU KAMAU**.

4. The accused denied the charge when the same was read to him. He pleaded **NOT GUILTY**.

The accused, **JOSEPH NG'ANG'A KAMAU** as **1st** accused was jointly charged with **SAMSON GITHERE NDERI** **2nd** accused.

The trial magistrate, in her judgment acquitted the **2nd** accused, **SAMSON GITHERE NDERI** and proceeded to convict the **1st** accused, **JOSEPH NG'ANG'A KAMAU** of the offence of Robbery with violence contrary to **Section 296 (2)** of the Penal Code under **Section 215** of Criminal Procedure code.

He was accordingly sentenced to death on **24/03/2011**.

5. Appeal

Being aggrieved and dissatisfied has filed an appeal against both conviction and sentence.

6. HIS GROUNDS ARE:

1. That the offence was not proved against the appellant beyond reasonable doubt.
2. That trial court relied on identification evidence which had not been proved.
3. That trial magistrate relied on the doctrine of recent possession without proper prove.
4. That the evidence was both inconsistency and contradictory.
5. That the trial magistrate failed to take into account the appellant's defence.
6. That the trial magistrate failed to notice that the critical witnesses were not called by the prosecution.

7. SUPPLEMENTARY GROUNDS filed today are:

7. (1) - Similar to ground 3, above.
8. (2) - Similar to ground 2, above.
9. (3) - That the trial court failed to observe that my mode of arrest was not connected to this, and that my right to a fair trial as per **Article 50** of the constitution was infringed.
10. (4) – Similar to ground 6, above.
11. (5) – That the charge sheet before court is defective as it does not bear the name of the appellant who was the **1st** accused rendering the trial a nullity.

8. SUBMISSIONS

a) The appellant – **JOSEPH NG'ANG'A KAMAU** put his written submissions.

On ground one – he submitted that on doctrine of recent possession, there was no positive proof that I had the items.

On ground two – the identification was not proved by the prosecution. The appellant was not therefore identified at the scene.

On ground three – my right to fair trial was infringed.

On ground four and five – The appellant's name, **JOSEPH NG'ANG'A KAMAU** is nowhere in the charge sheet. This means there was a glaring defeat and therefore this trial is a nullity and should be set aside both a conviction and sentence.

b) The Respondent's response to the appellant.

The learned state counsel **Mr. Kinyanjui** opposed this appeal. He submitted thus:

1. The ingredients of the offence of robbery with violent were all proved beyond reasonable doubt.
2. There were **(6)** six men who were armed with Pangas, and the appellant was identified as one of those men. In addition, the appellant was found in possession of stolen items. That was a day after the incident. The complainant was injured, and confirmed that violence was used.
3. Therefore, we oppose the appeal and urge the court to uphold the conviction and sentence. Since the learned trial magistrate correctly analysed the evidence and arrived at the conviction.
4. The appellant's challenge of the doctrine of recent possession because it was applied to this case. The property in possession of the appellant was positively identified by the complainant.
5. The complainant confirmed that it is the same properties that was stolen from him.
6. These stolen properties was not discredited as belonging to the complainant. Therefore, this confirms that the learned trial

magistrate correctly applied the doctrine of recent possession to this case.

9. **First Appeal**

This being a first appeal, this court has a duty of reconsidering and evaluating the evidence afresh with view to reaching its own conclusions in the matter making allowance only for the fact that it neither saw nor heard the parties when they appeared before the trial court. **See generally Okeno –Vs-Republic [1972] E.A. 32**

10. **Issues for Determinations**

Having set out the facts and the law in this case, issues arise for determination.

The elements of the offence of robbery with violence that need to be established before a charge of robbery with violence can be sustained were elaborated by the court of Appeal in **Ganzi & 2 Others -Vs- Republic [2005] 1 KLR 52** as follows:-

1. The offence of robbery with violence under **Section 296 (2)** of the penal code is committed in any of the following circumstances namely:-

a) The offender is armed with any dangerous or offensive weapon or instrument; or

b) The offender is in company with one or more other person or persons; or

c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.

2. Is the absence of the name of the **1st** accused **JOSEPH NG'ANG'A KAMAU** vitiate the trial and make it a nullity?

11. **Proceedings: analysis**

On **13/12/2011**, both two accused persons were arraigned in court and the charges were accordingly read to them at page 1 thereof.

They both pleaded “**Not true**” on all counts order: plea of not guilty, was entered against their respective names. The hearing was set for **7th March, 2012**. In her judgment, the trial magistrate acquitted the **2nd** accused, **Samson Githere Nderi** and convicted **Joseph Ng'ang'a Kamau**, the **1st** accused.

The implication is that the charge sheet was present and in court file at plea taking stage. The trial proceeded on to its logical conclusion where he was convicted and sentenced to death as by law established.

However, it appears curiously that at the appeal stage the charge sheet for **Joseph Ng'ang'a Kamau** is missing without explanation. The appellant seeks to nullify the lower court's proceedings on this basis.

This court will invoke **Section 382** of Criminal Penal Code to hedge against such an anomaly.

Further analysis of the witnesses' testimonies, **PW2, PW3** and **PW5** identified the **1st** accused person, since the attack happened with security lights on, even when he entered one of the rooms through the window, he demanded lights to be put on. He was armed with a panga and an axe shouting “**umbwa hii fungua!**”

The three witnesses' testimonies is consistent and strong, he was found in possession of the stolen items, being transported elsewhere, the doctrine of recent possession was clearly ascribed to him.

The complainant positively identified the stolen items as his i.e. his DVD in the same sack.

The offence was therefore, proved beyond reasonable doubt.

12. **FINDINGS**

For these reasons, this appeal has no merits. The court upholds the convicted and the sentence. Therefore, this appeal is dismissed.

Right of appeal – **14** days.

JUDGMENT WRITTEN AND SIGNED BY:

C. B. NAGILLAH

JUDGE

JUDGMENT DELIVERED, DATED AND COUNTERSIGNED IN KIAMBU THIS 10TH DAY OF MAY 2017

BY:

JOEL NGUGI

JUDGE

In the Presence of:

.....the Appellant

.....for the Respondent

.....for the Court Assistant