REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 9 of 2016

ABUBAKAR WAHOME……..……..APPELLANT

VERSUS

REPUBLIC …….…….……...…….RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's court at Kiambu Cr. Case No. 2783 of 2014 delivered by Hon. J. Kituku, PM on 10th December 2015).

JUDGMENT

Background

Abubakar Wahome, the Appellant herein, was charged alongside two others with two counts of robbery with violence contrary to Section 295 as read with 296(2) of the Penal Code. The particulars of Count I were that on the night of 16th September, 2014 at Maziwa village within Nairobi area, with others not before the court, armed with a dangerous weapon, namely a pistol, robbed James Ngugi Njoroge of a woofer(sic) with two speakers, midrates, four tweeters, a pair of slive, radio phase, driving licence and cash 5,050/=(five thousand and fifty only) all valued at Kshs. 50,000/= and immediately before the time of said robbery threatened to use actual violence to the said James Ngugi Njoroge.

The particulars of Count II were that on the night of 16th September, 2014 at Maziwa village within Nairobi County, with others not before court while armed with a dangerous weapon namely pistol robbed Peter Njoroge of one mobile phone make Nokia and cash Kshs. 2,200/= all valued at Kshs. 5,000/= (five thousand) and immediately before the time of such robbery threatened to use actual force to the said Peter Njoroge.

The Appellant was also charged in the alternative with handling stolen goods contrary to Section 322(1) (2) of the Penal Code. The particulars of this charge were that on 17th September, 2014 at Maziwa village within Nairobi County, otherwise than in the course of stealing, retained a hoofer with two speakers, one radio phase and two tweeters knowing or having reason to believe them to be stolen goods.

The Appellant was convicted in counts I and II and sentenced to death in Count I. The sentence in count II was held in abeyance. His co-accused were acquitted in respect of all the charges. The Appellant preferred the present appeal against both the conviction and sentence. His grounds of appeal were that the charge sheet was defective, that the evidence was not properly evaluated, that the recovered exhibits were not properly adduced in court and that Section 169 of the Criminal Procedure Code was not complied with.

Submissions

The Appellant filed written submissions on 10th April, 2017. On the issue of defective charge, he submitted that he was prejudiced by the charge sheet being drafted under both **Section 295 and 296(2) of the penal Code**. He submitted that this rendered the charge sheet duplex and as a result, the entire trial was a nullity. In furtherance to this submission, he submitted that the evidence adduced did not support the charge. He took issue with the fact that it was not demonstrated that he was armed with a pistol. According to him, the defects were not curable under **Section 382 of the Criminal Procedure Code**. On prove of the case, he submitted that it was not sufficiently demonstrated that the recovered goods were found in his house. Furthermore, the arresting and investigating officers did not testify to confirm where the goods were recovered from. Therefore, his conviction based on the doctrine of recent possession was erroneous. Again, the said recovered items despite being identified by PW1 were not produced as exhibits. Finally, he submitted that **Section 169(1) of the Criminal Procedure Code** was not complied with. He pointed to the fact that the learned trial magistrate did not indicate that the judgment was delivered in an open court which was fatal to the case.

Leaned State Counsel Ms. Atina opposed the appeal. Her submission was that although the charge sheet was drafted both under **Section 295 and 296(2) of the Penal Code** was not fatal to the prosecution case as it did not prejudice the Appellant. With regard to the exhibits, she submitted that although they were not produced by the investigating officer, they were properly identified by PW1. Accordingly, she submitted that the doctrine of recent possession was properly applied. Furthermore, the Appellant having opted not to tender a defence implied that he knew he could not challenge the prosecution's case.

Evidence

The prosecution called two witnesses. Its case was basically premised on the evidence of PW1 Peter Njoroge Kanyi who was the conductor of Motor vehicle registration No. KAU 028R Nissan Matatu. On the material date 16th September, 2014 at about 11.30 a.m., he was with the driver of the vehicle one James Ngugi plying Thika Road towards Nairobi. At Roysambu Bus stage, three passengers boarded the motor vehicle. One sat immediately behind the driver while the other two sat behind the conductor (PW1). On arrival at Rosters Bus Stage, the three passengers turned robbers and simultaneously attacked him and the driver. The passenger behind the driver strangled the driver with a nylon paper and the two behind him did the same. The driver was forced to stop the motor vehicle and his attacker took control of the same as a driver. The vehicle turned towards Zimmerman. As it moved, they robbed PW1 and the driver of their personal effects and vandalized the Matatu of its radio, speakers and a woofer. The vehicle then stopped at a location near Kenyatta University at a place with many houses. The vandalized items were taken into one of the houses and PW1 and the driver were dropped off. PW1 marked the location with an avocado tree. He and the driver proceeded to Kiamumbi Police Station where they reported the incident. One police officer who was allocated to investigate the case informed them that he had seen a Matatu being driven at a very high speed along Thika Road. They did not however trace it. They then proceeded to where the stolen goods were offloaded. It is in one of the houses that the Appellant was found sleeping and the items recovered which PW1 identified in court. In addition he lost his Techno mobile phone valued at Kshs. 5,500 and cash Kshs. 2,200/=.

PW2, Dominic Wanyoike was the registered owner of Nissan Matatu KAU 022R. He confirmed that he had employed one James Ngugi as his driver and PW1 as the conductor. He also identified the recovered items namely, the vehicle radio, two tweeters speakers and a woofer.

At the close of prosecution case, the trial court ruled that the prosecution had established a prima facie case and accordingly put the Appellant on his defence. The Appellant chose to keep quiet and await the court's decision.

Determination

It is now the duty of this court to re-evaluate the evidence afresh and come up with its own conclusions. The court must however bear mind that it has neither seen nor heard the witnesses and give due regard for

that. See **Njoroge vs R. [1987] KLR, 19.**

I have considered the submissions and the evidence on record. It is trite that the Appellant was convicted solely on grounds of being arrested in possession of recently stolen items. That is to say that the trial court applied the doctrine of recent possession to convict the Appellant. The question that follows is whether the court was justified in applying the doctrine of recent possession to convict the Appellant. The factors to be considered in applying this doctrine were laid down in the case of **Malingi vs Republic [1989] KLR 225** in which Bosire J. (as he then was) held that:

> ***"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly, that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

In the instant case, no doubt that PW1 and his driver were robbed off the items PW1 identified in court. He also was able to demonstrate that they belonged to the carjacked Matatu as they were stamped with its registration numbers. Further, the items had just been robbed off just a few hours before their recovery. The intriguing question though is whether it was the Appellant who was found in their possession.

PW1 testified that he led the police to where he suspected the items were hidden. That is where they found the Appellant sleeping in one of the houses where the goods were recovered. But his evidence was not confirmed by any other witness. In my view, the evidence of either the investigating or the arresting officer could not be wished away. They are the only witnesses who would have attested that those goods were indeed recovered from the house the Appellant was sleeping in. I am unable to find the sole evidence of PW1 convincing in supporting the allegation that it was the Appellant who was found in possession of recently stolen goods. As such, I hold that the co-existing circumstances did not exclusively point to the guilt of the Appellant.

I bear in mind that the doctrine being a presumption of fact is a rebuttable presumption. That is why as was held in the **Malingi case (supra)**, that an accused must be called to offer an explanation of how he came by the stolen goods. The Appellant did not offer a defence and it could easily be presumed that he did not want to make a rebuttal to the prosecution. However, it is my candid view that before an accused is called to offer the rebuttal, the prosecution must first demonstrate that the item in the possession of the accused had been stolen, that it was stolen within a short period prior to the possession and that the lapse of time from the time of its loss to the time the accused was found with it from the nature of the item and the circumstances of the case point that the accused was in possession of that item. I have demonstrated that the prosecution failed to discharge the fact that it was the Appellant and no other person from whom the goods were recovered. In the circumstances, the doctrine of recent possession could not apply.

It is important I emphasize that the burden of proof in criminal cases always lies with the prosecution to prove the case beyond a reasonable doubt. This burden can never shift upon the accused, otherwise, the court would be asking him to prove his innocence. It was therefore untenable that the Respondent submitted that the court should uphold the conviction because the Appellant did not offer a defence. He exercised his right to keep quiet pursuant to Section 211 of the Criminal Procedure Code which he was entitled to. The salience did not in way lessen the burden of proof shouldered by the prosecution. And in my view they did not discharge it.

Let me also add that the conviction of the Appellant in Count I was based on no evidence as the complainant in that count did not testify.

I think it is also important that I highlight other issues that were raised by the Appellant. The first was that the charge sheet was defective because it was drafted under both **Sections 295 and 296(2) of the Penal Code**. I entirely concur with the Appellant and as drafting the charge sheet under both provisions made the charge sheet duplex. This was the reasoning also held by the Court of Appeal in the case of **Joseph Njuguna Mwaura and 2 others v Republic 2013] KLR Cr. Appeal No. 5 of 2008**. The court delivered itself as follows:

> ***"The offence of robbery with violence is totally different from the offence defined under Section 295 of the penal code which provides that any person who steals anything, and acts, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296(2) as this would amount to a duplex Charge."***

The test in my view is whether the duplicity occasioned the Appellant any prejudice. From the outset, I observe that the statement of the offence and the particulars related to the offence of robbery with violence only. Therefore, the Appellant all along knew that he was charged with only one offence, namely, robbery with violence. That is the offence he pleaded to and defended himself against. Accordingly, no prejudice was occasioned by the error. It is also clear that the same was a technical error which is curable under **Section 382 of the Criminal Procedure Code.**

The second issue related to non-compliance **with Section 169(1) of the Criminal Procedure Code**. The same reads as follows:

> ***"169. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***

The contention of the Appellant is that the learned trial magistrate did not indicate that the judgment was delivered in an open court but only indicated that it was delivered in the presence of the accused and the prosecutor. I have perused the judgment and I confirm the submission. However, the fact that the judgment was not delivered in isolation of parties who were required to be present means that it was pronounced in public as opposed to in privacy. I accordingly dismiss that submission.

In the upshot, I find that the prosecution did not prove its case beyond a reasonable doubt. I allow the appeal accordingly. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held.

Dated and Delivered at Nairobi this 7th day of June, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant present in person

2. M/s Kimiri for the Respondent.