



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 173 OF 2012

FRANCIS GUCHU NGUGI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from the judgment of the Hon.W.Juma CM, Nyeri dated 12/09/2012 in CM Nyeri CR.Case No.331of 2011)

JUDGMENT

1. The Appellant, **Francis Guchu Ngugi**, was charged with the offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code**.

2. The particulars of the charge are that on the 5th June, 2009 at Majengo Estate in Nyeri District **Laban Maina Nungari (PW2)** was going about his routine business of a shopkeeper when he was attacked by the appellant, jointly with others not before the court; whilst armed with dangerous weapons namely an AK Rifle, rungun and pangas; they robbed **PW2** of cash in the sum of KShs.73,000/- and safaricom scratch cards worth KShs.43,918/- all totaling in value to the sum of Kshs.116,918; that immediately before or immediately after such robbery they threatened to use actual violence to **PW2**.

3. The prosecution called six witnesses and the *appellant was found guilty of the offence of robbery with violence and was convicted and sentenced to the mandatory death sentence.*

4. Being aggrieved by the conviction and sentence, the Appellant filed a Petition and a Supplementary Petition of Appeal and the grounds of appeal are summarized as follows;

i. There was no direct evidence against the appellant; there was no eyewitness account showing that the appellant was found in possession of the firearm; or that the appellant used the firearm to commit the offence, in Nyeri; and that the appellant was convicted on circumstantial evidence;

ii. The evidence of the prosecution witnesses was contradictory and lacked material credibility;

iii. There was no inventory prepared for the recovered firearm; and the investigations were not properly conducted;

iv. The conviction was erroneously based on the alleged possession of the firearm that was used in the robbery; this same issue was canvassed in CMCCR 311/2011 (Thika) and his conviction was overturned on appeal in HCRA 409/2013 by the Muranga High Court;

v. The learned trial magistrate erred in shifting the burden of proof to the appellant and also in disbelieving his defence; that the trial court did not exhaustively analyze all the evidence on record and hence arrived at a wrong finding;

vi. The trial court did not take into account the appellants mitigation and the sentence imposed was erroneous in law;

5. At the hearing of the Appeal the appellant was represented by learned Counsel Mr.Odero and Mrs. Gicheha was the Prosecuting Counsel for the State; both counsels made oral submissions; hereunder is a summary of the respective presentations;

APPELLANTS SUBMISSIONS

6. Counsel for the appellant submitted that;

i. There was no direct evidence connecting the appellant with the offence; that the trial court found that the circumstantial evidence was very strong and that the AK 47 rifle and the spent cartridges connected the appellant to the robbery;

ii. The rifle was recovered in Thika and was the subject matter in the Criminal Case No 409/2010 in Thika where the appellant was convicted and sentenced to 7 years imprisonment; the appellant's appeal in HCRA 49 of 2013 was allowed on the basis that the trial court did not consider that the appellant was not arrested at the kiosk; that the conviction had been based on the fact that the appellant had a rifle whereas in fact he was never found with a rifle;

iii. The complainant did not recognize any of the persons who robbed him; the prosecution's hope was in the firearm and the spent cartridges which were from the same rifle- the subject matter of the Thika case; the conviction was purely on circumstantial evidence; Counsel relied on the case of **Rex vs Kipkering Arap Koske & Kimure Arap Matatu** where it was held that;

“The circumstantial evidence must be where the inculpatory facts are incompatible with the innocence of the accused.”

iv. The appellant was not arrested at the kiosk where the rifle was recovered; he was lawfully riding his boda boda and was arrested 400 metres from the kiosk and brought back to the kiosk; the investigations by **PW5** were not properly conducted as the owner of the kiosk was unknown, was never arrested and was never summoned as a witness;

v. The appellant's defence was that he was a boda boda rider; he was arrested away from the kiosk whilst on his way home; the trial court dis-believed the appellant's defence but gave no good reasons for disregarding his defence; that the burden of proof is always on the prosecution; and it must prove its case beyond reasonable doubt; this was not achieved in this case.

vi. The accused is not obligated to prove anything; he was also not there; the case referred to was that of **Woolington vs DPP (1935) LR 462**.

vii. Counsel prayed that the appeal be allowed and the sentence be set aside.

RESPONDENTS SUBMISSION

7. In response Prosecuting Counsel for the State submitted that;

i. The appellant was connected to the robbery with violence basically on the evidence of the ballistic expert; the rifle that was examined was the one recovered at the stall where the appellant was found by the police officer in the wee hours of the morning of 30/11/2010; the appellant was among the others who were seated in the kiosk;

ii. The evidence of **PW5** was that he saw four boys emerge from the kiosk; when they saw the police vehicle they ran away and dispersed; unfortunately the appellant was arrested and taken back; the rifle was found upon a search being conducted by the police officers at the kiosk;

iii. **PW3** examined the rifle and discovered that it had been used elsewhere, that is in Nyeri; **PW2** told the court that the robbers had fired in the air and the loose spent cartridges were collected at the crime scene; that the officers also collected the used cartridges from where they found the appellant; and that was the connection;

iv. The lower court used circumstantial evidence which was strong against the appellant; even if his appeal was allowed by the High Court Muranga it did not mean that he was discharged from the offence of robbery with violence; the appellant never gave an explanation as to his whereabouts on the date of the robbery; that the appellant was only using the aforementioned case to exonerate himself of possession;

v. The prosecution discharged its burden of proof; that it was not in dispute that the robbery occurred and that **PW2** was robbed; the robbers were masked; there were three in number and were armed; the gun used was recovered and the appellant was where the weapon was recovered; the evidence connecting the appellant to the robbery was watertight; he was given time to explain his whereabouts; **DW2's** evidence did not explain the whereabouts of the appellant on the day the offence took place; the explanation given by the appellant was on the firearm but none was given for the robbery;

vi. That the defence did not challenge the prosecution's case; the appeal is not merited and prayed that it be dismissed;

REJOINDER

(i) The appeal is based on the fact that the gun found in Thika was the one used in Nyeri; the evidence was circumstantial and was not capable of any other explanation;

(ii) **PW5** confirmed that the appellant was arrested as he rode a bicycle;

(iii) The standard of proof was not maintained; the evidence was not strong as claimed; and prayed that the appeal be allowed.

ISSUES FOR DETERMINATION:

9. After taking into consideration the submissions of both the Appellant and Respondent this court finds the following issues for determination;

- i. Whether the trial court convicted the appellant on the basis of circumstantial evidence;
- ii. Whether the prosecution proved its case to the desired threshold;
- iii. Whether the trial court gave good reasons for rejecting the appellants defence;

ANALYSIS

10. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that the court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32**.

Whether the trial court convicted the appellant on the basis of circumstantial evidence:

11. Counsel for the appellant argued that the conviction was based purely on circumstantial evidence; that the complainant did not recognize any of the persons who robbed him; that the prosecutions hope was in the firearm and the spent cartridges; that the test such evidence must meet was set down in the case of **Rex vs Kipkering Arap Koske & Kimure Arap Matatu**.

12. Upon perusal of the evidence on record it is evident that **PW2** did not identify the robbers and that the appellant was convicted primarily on circumstantial evidence; this was based on the evidence of **Mutuku Mackenzie (PW5)** a police constable who told the court that acting on information that some suspicious young men had been spotted in Thika at a U-Shop; he proceeded there on the 30/11/10 at about 5.30am accompanied by the OCS Thika and PC Entapal; that they drove to the place using a police vehicle and before they could alight they saw four young boys emerge from a miraa kiosk and that they ran off in different directions;

13. They gave chase and managed to arrest the appellant and he was taken back to the kiosk; upon a search being conducted the rifle was found together with 15 rounds of live ammunition and 3 spent cartridges.

14. The above was handed over to **PW3** a ballistic officer who testified on behalf of his colleague under the provisions of Section 77 of the Evidence Act; he told the court that this rifle and the spent cartridges were examined and a comparison of the cartridges found at the Nyeri crime scene showed that the cartridges had sufficient markings which enabled the examiner to form the opinion that they had been fired from the same rifle in issue; and that the same rifle had been used in the Nyeri robbery in which **PW2** had been robbed;

15. Upon analysis of this evidence it is clear that the trial court accepted the evidence of the police officer as to the manner in which he arrested the appellant and the evidence of the ballistic expert on the ammunition recovered; the trial court in its judgment made the following findings;

“The firearms examiner is an expert he was not at the scene of crime in the three suspected scenes of crime. He had no reason to maliciously or through guess work create evidence linking spent cartridges found miles (sic) apart with a rifle found elsewhere.

.....In spite of the fact that PW5 was the single witness to the arrest, this court has no reason to doubt his evidence.

The court has after the above analysis found that the prosecution evidence was credible.

.....The court has no reason on the other hand to doubt the credibility of the prosecution evidence. The witnesses were independent they had no reason or motive whatsoever to create evidence against the accused person.”

16. On credibility of the prosecution witnesses this court opines that the trial court had the benefit of seeing the prosecution witnesses particularly **PW5** and **PW3** when they testified and was better placed to assess their credibility; the trial court found no inconsistencies in the evidence of the **PW5** and **PW3** on the arrest of the appellant, on the recovery and examination of the rifle and ammunition;

17. This court finds no reason to interfere with the trial courts finding that the circumstantial evidence connecting the appellant to the robbery of was strong and watertight; whereas the appellant merely denied being in possession of the rifle and the ammunition which denial was dislodged by the strong prosecution case;

18. Going further, this court needs to address the issue of the inventory raised by the appellant; it was his contention that there was no inventory prepared by the investigating officer for the recovered firearm and cartridges; this court is of the considered view that the failure to prepare such inventory did not diminish the evidence of **PW5**, **PW3** and **PW6** on the physical existence of the exhibits; and it is found to be only a procedural step; in this instance there was a recorded report of the previous spent cartridges and the ballistic officer compared the recovered rifle and the cartridges recovered from the appellant; that this comparison thereafter formed the basis of the case against the appellant;

19. This court is thus satisfied that the failure to prepare an inventory did not vitiate the prosecutions' case.

20. This ground of appeal has no merit and is disallowed.

Whether the prosecution proved its case to the desired threshold:

21. Section 296(2) of the Penal Code sets out clearly the essential ingredients of the offence of robbery with violence and reads as follows;

- a. The offender is armed with any dangerous and offensive weapon or instrument; or
- b. The offender is in the 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;

22. The trial court in its judgment specifically elaborated in detail these key ingredient(s) of the offence of robbery with violence and found that all three had been proved by the prosecution to the desired threshold; it gave the following narrative;

“I am satisfied that the prosecution has proved the case against the accused beyond any shadow of a doubt that the accused was involved in the robbery of 5/06/2009. The prosecution may not have brought evidence of the actual bodily harm but the threat to do so existed if the attackers were armed with a firearm. Attackers were also three or more in number and although the charge sheet particulars read as AK rifle, that omission of 47 is not a material defect for one to lose sight of the fact that the whip on being referred to was the AK47 rifle.....”

23. From the foregoing and the evidence on the court record this court is satisfied that the prosecution tendered evidence to prove the crucial ingredients of the offence; that the appellant was in the company of other robbers when they robbed **PW2**; the evidence of **PW6** Sgt Rose Thiongo was that the robbers fired one round and the spent cartridge and a metal bar were collected from the crime scene; this was sufficient proof that dangerous weapons were used during the robbery;

24. All in all the prosecution is found to have proved the key ingredients of the offence of robbery with violence to the desired threshold; this ground of appeal has no merit and is disallowed.

Whether the trial court gave good reasons for rejecting the appellants defence:

25. The appellant put forward a defence of alibi which he submits the trial court completely rejected without giving good reasons;

26. The appellant gave an unsworn statement of defence in which he claimed to have been ferrying a passenger **DW1** on that material date; and that he was arrested 400metres away from the kiosk whilst on his way home; he also called his former employer **DW2**;

27. The trial court found the appellant guilty of the offence after considering the appellants alibi defence and stated as follows;

“The court appreciates that the evidence of the arrest of the accused is of a single witness but the circumstances are not so much in dispute apart from the fact that whereas PW5 says the accused was running off, the accused says he was only riding on with a customer. As pointed out earlier the accused did not raise the issue of this 3rd party when PW 5 testified.....

The accused has no obligation to prove that that is what happened but this court doubts that DW1 was ever at this scene of arrest and it was never an issue in the first instance.

..... The alibi raised by the accused regarding the date of 5.6.09 is not credible, the accused and his witness tried to put up calculations which don't tie making that defence not credible. The court has no reason on the other hand to doubt the credibility of the prosecution evidence.”

28. **DW2's** evidence did not explain the whereabouts of the appellant on the day the offence took place in Nyeri and the evidence connecting the appellant to the robbery was watertight; and he was given time to explain his whereabouts on that;

29. This court is satisfied that the trial court considered the appellants defence of alibi and found that it did not displace the credibility of the prosecution's evidence.

30. This ground of appeal is found lacking in merit and is hereby disallowed.

FINDINGS

31. In the light of the forgoing this court makes the following findings;

- i. This court finds no reason to interfere with the trial courts finding that the circumstantial evidence connecting the appellant to the robbery was strong and watertight; that the conviction was safe.

ii. The prosecution proved its case to the desired threshold;

iii. The trial court gave good reasons for rejecting the appellants defence;

DETERMINATION

iv. The appeal is found lacking in merit and is hereby dismissed

v. The conviction and sentence are affirmed.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 15th day of June, 2017.

HON.A.MSHILA

JUDGE