



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 26 OF 2016

JOSEPH WAINAINA GITAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Gatundu Chief Magistrate's Court Criminal Case No. 936 of 2010 by M/s Kinyanjui Ag. S R M on 24/03/14)

J U D G M E N T

1. **Joseph Wainaina Gitau**, the Appellant, was charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. Particulars of the offence were that on the **13th day of December, 2010** at **Kagumo Ini Village** in **Gatundu South District** within **Kiambu County**, jointly with others not before court while armed with dangerous weapons namely pangas, runigus and iron bars, robbed **Grace Wangui Gitau** of cash **Kshs. 4,200/=** and at the time of such robbery injured the said **Grace Wangui Gitau**.

2. After full trial he was found guilty, convicted and sentenced to death.

3. Aggrieved by the conviction and sentence he appealed on grounds that:

- The charge was defective. Names of the Complainant and the particulars of the offence were at variance with evidence on record.
- Evidence of recognition was unclear.
- The entire evidence was not evaluated to establish if there was nexus between the Appellant's arrest and the case as the crowd that chased people lost sight of him prior to the arrest.
- The conviction was based on unreliable, inconsistent and contradictory evidence by the Prosecution.
- **Section 210** and **211** of the **Penal Code** were not invoked.
- Dismissing the Appellant's strong and cogent defence was erroneous.

4. Facts of the case were that on the **13th December, 2010** at about **9.30 a.m.** PW1 **Grace Wangui Gitau** who was a member of a '**Micro Savings Group**' popularly known as '**Merry-go-round**' was on her way to the meeting that was to be held at the home of **Agnes Njeri**. As she opened the gate she noticed some three men armed with pangas, clubs and iron bars. They followed her to the homestead and before she called the owner she was hit on the forehead with an iron bar and snatched the purse that she had. The three men ran away. She screamed running towards the home of **James Njathi** where another group was meeting. Members of the public among them PW2 **Agnes Njeri Kimani**, PW4 **Anne Njeri Muhoho** saw

the people who were running. Among them was the Appellant who wore a skirt and was armed with a panga and iron bar. Two (2) of the persons were arrested by members of the public who beat them up. One of them was beaten to death. The Appellant who ran into the coffee plantation was arrested. The two (2) persons were taken to **Gatundu Police Station**. In the meantime the Complainant was taken to **Gatundu Hospital** for treatment. Investigations were conducted and the Appellant was charged.

5. When put on his defence the Appellant denied having committed the offence. He opted to make an unsworn statement where he stated that he was asked by **Geoffrey Karanja** to buy for him paraffin worth **Kshs. 4,400/=** and a bag of cement. He went to **Ituru Village** where he found a big crowd surging towards the Shopping Centre. He saw a man that was badly beaten. The crowd wanted to take away the petrol. He denied having stolen anything from **Grace Wangui** and **Eric Wainaina** whom he referred to as his siblings.

6. At the hearing the Appellant canvassed the appeal by way of written submissions. He stated that there was a discrepancy relating to the name of the Complainant which could not be dismissed as a typographical error. As such the charge was defective. That the testimony of the Complainant at the outset contradicts the 2nd one that she gave. Errors noted are prejudicial to the Appellant. He pointed out that there was a discrepancy as to the amount of money stolen which made the value of the amount stolen different hence contrary to the framing of charges as required by **Section 137(a)(iv)** of the **Criminal Procedure Code**.

7. Further, he argued that recognition was not cogent. The case against him was fabricated, inconsistent and full of contradictions.

8. That failure by the trial Magistrate to strictly observe the law as provided by **Section 210** and **211** of the **Criminal Procedure Code** respectively was fatal to the Prosecution's case.

9. That he was forced to proceed with the case while he was unwell which violated provisions of **Article 50(4)** of the **Constitution**. PW3 and PW4 testified and he was unable to cross examine them and his alibi defence was not considered.

10. In response, the State through **Ms. Maundu** opposed the Appeal. She stated that there was an error at the point of recording the testimony of PW1 where her name was recorded as **Lucy** instead of **Grace**. But evidence adduced by PW2 and PW3 was correctly recorded giving her name as **Grace**. An error that is not fatal.

11. Regarding the 2nd, 3rd and 4th grounds she submitted that circumstances that prevailed favoured correct identification. The Appellant was a person well known to the Complainant. She described how he was dressed. Some of the items he wore were not recovered as he was found hiding in an expansive coffee plantation.

12. Further, she submitted that the provisions of **Section 211** of the **Criminal Procedure Code** were complied with and the defence put up was considered.

13. This being the first Appellate Court, I am duty bound to re-evaluate, re-assess and re-analyze evidence adduced before the trial Court bearing in mind I had no opportunity of seeing and hearing witnesses who testified at trial then come up with my own conclusions. (**See Okeno vs. Republic (1972) EA 32**).

14. This is a case where the name of the Complainant in the charge is stated as **Grace Wangui Gitau**. I have perused the handwritten proceedings which have the name of the Complainant as **Grace Wangui Gitau**. Typed proceedings where **Honourable D. G. Karani** took evidence the name is correctly recorded as **Grace Wangui Gitau**. However, when **Honourable Nyangena** took over the matter and complied with **Section 200(3)** of the **Criminal Procedure Code**, the Complainant was recalled after the Appellant demanded to have the matter heard denovo. Her name was recorded by the Judicial Officer as **Lucy Wangui Gitau**. It is apparent that the error was made by the trial Magistrate. This is curable under **Section 382** of the **Criminal Procedure Code** which provides thus:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

In the case of **Peter Ngure Murungi vs. Republic (2014) eKLR** where a name of the Complainant was stated in the charge sheet as ‘**Mongare**’ instead of ‘**Mungai**’ the Court of Appeal stated that it did not prejudice the Appellant in any way because the person who was robbed was **Mungai**. He is the one who led the police to the arrest of the Appellant. It went on to state that by indicating his name to read ‘**Mongare**’ instead of ‘**Mungai**’ was a typographical error. The type of errors normally curable under **Section 382 of the Criminal Procedure Code**.

15. In the instant case the error that was made by **Honourable Nyangena** is curable since the Complainant in her testimony at the outset clearly stated her name as ‘**Grace**’. The Appellant was arrested by members of the public soon after the offence was committed and she identified him as one of the persons who attacked and robbed her.

16. The second defect alluded to by the Appellant in the charge sheet was that the value of stolen money was indicated in the charge sheet as **Kshs. 4,200/=** yet in her testimony the Complainant stated that she lost **Kshs. 4,000/=**. In the case of **Njuguna vs. Republic (2002) LLR No. 3735 (CAK)** the Court Appeal stated that:

“We think, like the learned Judges in the High Court did, that stating in a charge sheet a lesser amount than the amount which was actually stolen was no more than an irregularity in the charge sheet and it did not render the charge defective. It was an irregularity curable under the above quoted Section of the Criminal Procedure Code and the Appellant did not point out to us any sort of prejudice which the irregularity could or did occasion to him.”

17. The defect stated other than being curable under **Section 382 of the Criminal Procedure Code**, the charge of robbery with violence is proved as long as one of the ingredients of the offence is proved. In the case of **Oluoch vs. Republic (1985) KLR 549** the Court of Appeal set out the ingredients of robbery with violence thus:

“Robbery with violence is committed in any of the following circumstances:

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

b. The offender is in company with one or more 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.....”

Proof of any of the three elements stated is sufficient to sustain a conviction for the offence of robbery with violence.

18. This was a case of recognition. The offence was committed in broad day light. In the case of **Republic vs. Tumbull and Others 1976)** the Court stated that:

“.....recognition may be more reliable than identification of stranger, but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that

the mistake in recognition of close relatives and friends are sometimes made.”

19. When the case started denovo the Complainant stated that she saw three people. She identified **Wainaina**, the Appellant as one of them. He was wearing a skirt, a weave that appeared to have artificial beads. He threatened to attack her with a panga and he had an iron rod. His face was not covered therefore she saw it clearly. The Appellant, her step brother was known to her since childhood. The incident happened at **9.00 a.m.** or thereabout. In the meantime PW4 **Agnes Njeri Muhoho** who was preparing to go to the meeting at **Agnes Njeri's** home heard screams. She went to find out what it was and found the Appellant in a wig, skirt and he had fake breasts. He carried a panga and an iron rod. Members of public chased after him and found other two (2) men. They caught up with them. The Appellant was saved by the police. In his defence the Accused admitting having been where he was arrested he stated that he had gone to purchase paraffin when he found a crowd surging and his sibling the Complainant claimed that he had stolen from her.

20. The police found the Appellant having been arrested by members of public who had subjected him and other two (2) people to mob justice.

21. It is argued that the Appellant was prejudiced by the trial Magistrate's failure to comply with **Section 210** of the **Criminal Procedure Code** prior to placing him in his defence. Further that he was prejudiced after he notified the Court that he was unwell but he was ordered to proceed thereby being unable to cross examine PW3 and PW4.

22. A perusal of the proceedings shows that the trial Court failed to comply with the provisions of **Section 210** of the **Criminal Procedure Code** which provides thus:

“If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.”

23. Procedurally, at the close of the Prosecution's case both the Prosecutor and Accused or if represented by an Advocate ought to present their summing up arguments in an endeavour to establish whether or not a case has been made out sufficiently to require the Accused to be put on his defence. The Court did not record what prompted it to put the Appellant on his defence.

24. On the **19th June, 2013** the Accused notified the Court that he was unwell. He notified the Court that he had dental problems. The Prosecutor responded thus:

“Matter has been adjourned too many times. Accused talks badly and has no respect for court.”

The Court ordered thus:

“Court: Matter to proceed.”

25. The trial Court did not record any reasons that prompted it to disregard what the Appellant stated. The case proceeded; after PW3 and PW4 testified the Accused had no questions to put to them.

26. After the Appellant was put on his defence he notified the Court of his intention to call witnesses. After he defended himself the Court stated thus:

“Court: Close of defence hearing.

I am on transfer.

Judgment will be on 20th November, 2013.”

The Court did not record if the Appellant abandoned his intention to call witnesses or if he closed the defence case himself.

27. All these events clearly prove that the learned Magistrate failed to comply with the law. Definitely, what transpired was prejudicial to the Accused. This was a mistrial and I declare it so.

The question that follows is whether an order for a retrial should issue?

28. In the case of **Fatehali Manji vs. Republic (1964) EA 481** it was held that:

“Even where a conviction is vitiated by a mistake of the trial court of which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused.”

29. This is a case where the Appellant was convicted and sentenced to suffer death yet there are gaping flaws occasioned by the trial Court. It will be in the interest of justice to order a retrial.

30. In the premises, the Appeal is allowed. The conviction is quashed and the sentence imposed set aside. The Appellant shall be remanded at **Gatundu Police Station** and produced in Court on the **15th June 2017** to be tried by another Magistrate of competent jurisdiction.

31. It is so ordered.

Dated, Signed and Delivered at Kiambu this 13th day of June, 2017.

L. N. MUTENDE

JUDGE