



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 148 OF 2016

ZAKAYO KIVUYO KIZIOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in **Kikuyu Senior Principal Magistrate's Court Criminal Case No. 15 of 2015** by **Hon. E. Michieka S R M** on 15/06/16)*

J U D G M E N T

1. **Zakayo Kivuyo Kizioki**, the Appellant, was charged with the offence of **Robbery with Violence** contrary to **Section 296(1)** as read with **Section 295** of the **Penal Code**. Particulars of the offence were that on the on the night of **23rd August, 2015** at **Lower Kabete Estate**, in **Kikuyu Sub-county** within **Kiambu County**, with others not before Court while armed with crude weapons namely: pangas broke and entered the dwelling house of **Benjamin Maina Gitoho** with intent to steal therein and did steal from therein one TV make LG 42 inch, Samsung Mobile Phone make Note 3, Huawei Toshiba, Laptop make Dell, Laptop make Mini Acer all valued at **Kshs. 281,000/=** being the property of the said **Benjamin Maina Gitoho** and immediately before the time of such robbery threatened to use actual violence to the said **Benjamin Maina Gitoho**.

Having been taken through full trial, he was found guilty and convicted of the charge of robbery contrary to **Section 296(1)** of the **Penal Code** and sentenced to **four (4) years imprisonment**.

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

The learned Magistrate erred in fact by convicting him under **Section 296(1)** yet all along he was tried under **Section 296(2)** of the **Penal Code** a fact that the trial Magistrate averred in his judgment.

- The charge was defective, amorphous and fatally misplaced.
- The Prosecution failed to amend the charge under **Section 214** of the **Criminal Procedure Code**.
- The Prosecution failed to adduce the serial number of the alleged Huawei Phone, its colour and model.
- No identification parade was conducted to identify the Appellant.
- The case was not proved beyond reasonable doubt.
- The burden of proof was shifted to the defence.

4. Facts of the case as presented by the Prosecution were that on the **23rd August, 2015** at about **3.30 a.m.** PW1, **Benjamin Maina** the Complainant was woken up by his dogs that were barking. He went

outside to check but did not see anything and he returned to the house. All over a sudden he heard a knock on his bedroom door. He called out but there was no response. The person outside told him to open the door lest they killed his son. On opening he saw about five (5) people with his son, **Lawrence Maina**. They entered PW1's bedroom and switched off the alarm. They ransacked the room took his two (2) laptops. They had rungu (clubs) pangas and sticks. Lights were on. He went downstairs and found his television set and another laptop missing. His phones were also taken.

On going outside he found his dogs foaming at the mouth. He reported the matter to the police and recorded a statement.

5. On the **27th August, 2015** the police informed him that his phone had been tracked to **Kasarani**. In company of the police they went and met PW3 **Samson Muriuki** a student at **KCA University** who told them that he bought the phone from **Erick** following an advertisement on OLX. He led them to **Eric**. PW4 **Eric Ouma** a student at the **University of Nairobi Kabete** led them to the Appellant who had sold to him the cellphone, a person he had known as **Zeddy** for a long time as a friend. The Appellant was arrested and charged.

6. When put on his defence he stated that on **29th August, 2015** he had gone to collect his debt from **Naomi** who works with **Eric** (PW4). As he was taking tea, **Eric** arrived with police officers who arrested him. He met PW1 at the police station who told him that he had robbed him. On cross examination he stated that he disagreed with **Eric** over a girl, **Naomi**.

7. Prior to the case proceeding to hearing at the Appellate stage, the Court gave the Appellant a notice on enhancement of sentence to one of death as provided by the law if facts were to be proved.

8. At the hearing learned Counsel for the Appellant, **Mr. Swaka** submitted that no identification parade was mounted for purposes of identifying the assailant. That none of the witnesses gave the description of the Appellant for the police to tell if indeed the Appellant was the assailant. Relying on the case of **Joseph Maina Ndogo vs. Republic (2014) eKLR** he argued that dock identification was worthless.

9. Further, he stated that the recovered phone was not identified. No IMEI Number or serial number of the phone was given and there was no proof of ownership. There was no proof of the phone having been recently stolen because when the offence was committed on **23rd August, 2015** the phone had already been sold by PW4. He went on to argue that there was some disconnect between the testimonies of PW1 and PW2 as one talked of having been attacked by five (5) men while the other said they were four (4) men. He stated that in Court they talked of lights having been on while the statements were silent on that particular fact. Their statements were silent on the issue of having seen their attackers hence failed to give the description of their attackers. He faulted the trial Court for not considering the defence put up by the Appellant and not reaching a finding that investigations carried out were shoddy.

10. The State through **Ms. Mutheu**, learned State Counsel opposed the Appeal She submitted that it was not necessary to conduct an identification parade because witnesses saw the suspect at the point of his arrest. That the Complainant PW1 and PW2 saw the Appellant clearly as there were lights. Although the phone was not found in his possession, **Eric** identified him as the person who sold to him the phone.

11. Further, she argued that PW1 gave the police particulars for the phone to be tracked and even if there was an oversight of not providing the IMEI Number, the police tracked and found it with PW3. Admitting that a wrong provision of law was used when the Appellant was charged, she stated that the Appellant defended himself of the charge of robbery with violence but the Magistrate could not have convicted on the offence because it was higher in magnitude.

12. This being a first Appeal I am enjoined to re-consider and re- evaluate evidence adduced at trial afresh and come up with my own conclusions bearing in mind the fact that I did not have the advantage of seeing or hearing witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).

13. This is a case where the offence was committed at about **3.30 a.m.** and no identification parade was

conducted after the arrest of the Appellant. The question to be answered is whether it was mandatory to hold such a parade as suggested by the Appellant. The Appellant herein was not known to the Complainant and his son. Approximately five (5) men entered the house of the Complainant and threatened to kill his son, PW2, if he did not open his bedroom door. These people took away his phones and laptops. In his evidence in chief he stated that he saw the Appellant clearly. On cross examination he denied having given the police the description of his assailants. In his testimony PW2 also stated that he clearly saw the Appellant as the light was on but he could not remember what he was wearing. The Complainant accompanied the police when they went to arrest the Appellant.

14. An identification parade would ordinarily be held when a witness has to identify a suspect he believes committed an offence. This is a case where the Complainant witnessed arrested of a suspect believed to have been in possession of a phone he believed was his. It would have been pointless to conduct a parade. Holding a parade in the circumstances would have been unfair to the Appellant for the Complainant already knew him.

15. In the case of **Kariuki Njiru and 7 Others vs. Republic (2001) eKLR** the Court of Appeal stated that:

“..... evidence relating to identification must be scrutinized

carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility

R. vs. Turnbull (1976) 63 Civil Appeal R 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.....”

PW5 who received the report stated thus:

“..... I received a report of a robbery from Benjamin (PW1). He told me that he had been robbed on 23.08.15 at his house at Lower Kabete. I recorded his statement. We tracked one of the phone.....”

His evidence just like that of PW1 and PW2 was silent on whether they observed the attackers and could tell if they had any distinctive features that would enable them identify them.

16. Further evidence tending to connect the Appellant with the offence was the allegation that he sold a mobile phone to PW4 Eric who in turn sold it to PW3.

17. In his testimony PW1 stated that they stole his phones but he did not state which type of phones he owned. He did not even state if he was a registered owner of a sim card. If, he was a user he must have obtained a number. He should have given details. In his evidence PW5 casually stated that they tracked one of the stolen phones which led them to PW3 at **Kasarani**. Neither the IMEI No. nor the mobile phone number was given. When a phone is being tracked evidence would be availed by a service provider the mobile cellphone was connected to, ordinarily a print out would have the IMEI No. The cellphone number and even the identity card number of the registered owner. This evidence was not adduced.

18. It was insinuated that the Appellant was in possession of the alleged cellphone prior to disposing it off. In the case of **Isaac Ng’ang’a Kahiga alias Peter Ng’ang’a Kahiga vs. Republic Nyr CA Criminal Appeal No. 272 of 2005**, the Court of Appeal stated that:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved, in other words, there must be positive proof, first that the property was found with the suspect; secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The

proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen from one person to the other.”

19. In the particulars of the offence it is stated that property stolen included a Huawei Mobile Phone make P6. PW1 identified a phone. The court noted “Huawei Vs. phone”.

There was no attempt by the Prosecution to prove ownership of the mobile phone. Therefore there was no cogent proof that the cellular phone produced in evidence belonged to the Complainant herein. The property was not found with the Appellant. It was alleged he sold it to **Eric**. Other than the allegation there was no proof beyond reasonable doubt that he sold the cellular phone to him.

20. This is a case where the Complainant made a report to the police of a robbery having been committed at his house. The police, probably due to ignorance or lackluster carried out shoddy investigations which culminated into them framing the charge wrongly. The Court on its part was not diligent enough to note the error in the provision of law quoted. This is a case where the learned trial Magistrate should have directed the Prosecution to amend the charge as provided by **Section 214** of the **Criminal Procedure Code**.

21. The upshot of the above is that the trial Court failed to evaluate evidence before it properly. In view of the foregoing the Appeal is allowed. The conviction of the Appellant is quashed and the sentence imposed is set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

22. It is so ordered.

Dated and Signed at Kitui this 25th day of April, 2017.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Kiambu this 12th day of June , 2017.

PROF. J. NGUGI

JUDGE