



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LESIIT, KIMARU JJ

CRIMINAL APPEAL NOS.171 OF 2007

(An Appeal arising out of the conviction and sentence of HON. KIARIE WA KIARIE - SRM

delivered on 20th March 2007 in Kibera CM. CR. Case No.6695 of 2006)

PETER MWANGI WAITHAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, Peter Mwangi Waithaka was charged with **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 20th November 2006 at Kawangware within Nairobi County, the Appellant, jointly with others not before court, while armed with a dangerous or offensive weapon, namely a toy pistol robbed Mary Waithera of a Siemens C35 phone valued at Kshs.3,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Mary Waithera. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to death as is mandatorily provided by the law. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

2. In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of visual identification yet the circumstances favouring positive identification were absent. He faulted the trial magistrate for placing reliance on the evidence regarding the circumstances of his arrest to find him guilty of the charge. The Appellant was aggrieved that the trial court had relied on circumstantial evidence to convict him yet the evidence adduced was inconsistent. He took issue with the fact that the trial court had failed to take into consideration the fact that his constitutional right had been breached when he was detained by the police beyond the constitutional period before he was brought to court. He was aggrieved that he had been convicted on the allegation that he had injured the complainant yet no medical evidence was produced to support the evidence. He took issue with the fact that the trial court had failed to take into consideration his defence before arriving at the decision to convict him. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

3. At the hearing of the appeal, the Appellant presented to the court written submission in support of his

appeal. He further made oral submission urging the court to allow his appeal. He submitted that he was a victim of mistaken identity. He was shot in a gun fire exchange between the police and a gang of robbers. He denied being a member of the gang. He took issue with the fact that the evidence adduced by the complainant in court was at variance with the statements that were recorded with the police. He reiterated that he was innocent and the circumstances of his arrest by the police ought not to have formed a basis of his conviction. Mr. Kabaka for the State opposed the appeal. He submitted that the prosecution had established its case on the charge of **robbery with violence** to the required standard of proof. It was the prosecution's case that the Appellant, in company of others, waylaid the complainant as she was walking home, threatened her with a toy pistol, before robbing her of her mobile phone. As fate would have it, when the complainant raised alarm, the police on patrol reacted and shot one of the robbers. That robber happens to be the Appellant. He was injured in the abdomen when he was shot. He was taken to Kenyatta National Hospital where he was treated before being charged in court. The mobile phone robbed from the complainant was recovered in the Appellant's possession. The toy pistol too was recovered with the Appellant. Mr. Kabaka submitted that the evidence adduced by the prosecution pointed to the Appellant's guilt. He urged the court to dismiss the appeal.

4. The facts of this case as narrated by the prosecution witnesses are as follows: The complainant Mary Waithera (PW1) operates a bar business at Kawangware. She recalls that on 20th November 2006 at about 12.30 a.m., as she was walking home with her friends who included PW2 Ann Wangui Njuguna, they were accosted by a group of men. There was moonlight. One of the men pointed at her something that looked like a pistol. Another hit her. She fell on the ground. Her friends started screaming. She was robbed of her mobile phone. She then heard a gunshot. She stood up and ran home. Her testimony regarding the circumstances of their attack was corroborated by PW2 who testified that on the material night, they were attacked by a gang of seven robbers. She recalled that PW1 was hit and fell on the ground. They raised alarm by screaming. The police arrived at the scene and fired at the robbers. On the following day, they were summoned to go to Muthangari Police Station. PW1 was shown a mobile phone that had been recovered from the person who had been shot. PW1 positively identified the Siemens C35 phone, as one which was robbed from her. She identified it by a distinct scratch mark that was on the phone. The mobile phone was produced as an exhibit during the hearing of the case.

5. PW3 PC. Jackson Rotich Chemoro testified that on the material night of 20th November 2006, he had been assigned duties to patrol Kawangware area. He was in the company of PW4 PC. George Ochieng. At around midnight, they heard screams emanating from an area of Kawangware known as El Shaddai. They rushed to the scene and saw a group of seven (7) men robbing some women. When they saw the police, they started running away. PW3 and PW4 saw that one of the men was armed with a pistol. They shot at him. He however managed to escape. When they reached the scene of the shooting, they saw bloodstains. They called for reinforcement. They followed the blood trail. They found the Appellant hiding in a kennel. They removed him from the kennel and searched him. They found him with a C35 Siemens mobile phone which was later positively identified as the one that was robbed from PW1. They also found him with a toy pistol. The toy pistol was produced as an exhibit during trial.

6. PW3 and PW4 testified that the Appellant had gunshot wounds. They took the Appellant to Kenyatta National Hospital where he was admitted for more than a month before he was discharged. PW5 IP. Fredrick Ohanda, the investigating officer, testified that he was assigned to investigate the case. The suspect, the Appellant in this case, had been admitted at Kenyatta National Hospital for treatment after sustaining gunshot wounds. He testified that the Appellant was admitted on 20th November 2006 and discharged on 25th November 2006. The discharge summary was produced in evidence as a prosecution's exhibit. He testified that his investigations established that it was the Appellant who robbed the complainant in the case. In the course of the robbery, he threatened the complainant with a toy pistol. He denied the claim by the Appellant that he was a victim of mistaken identity having been wrongly shot.

7. When he was put on his defence, the Appellant denied the charge. He told the court that he was shot by the police as he was about to enter the gate of the compound where he lived. He recalled that on the material night, he was running because it was raining. He denied that he was among the gang that robbed the complainant. He denied the assertion that the C35 Siemens mobile phone and the toy pistol were recovered while in his possession. He reiterated that he was a victim of mistaken identity. He insisted that

the charge was brought against him by the police to cover up the fact that they had shot him.

8. This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (see **Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant of **robbery with violence** contrary to **Section 296(2) of the Penal Code** to the required standard of proof beyond any reasonable doubt.

9. We have re-evaluated the evidence adduced by the prosecution witnesses before the trial court. We have also considered the defence that was put forward by the Appellant. We have also considered the grounds of appeal that the Appellant relies on in support of his appeal. We have read the written submission filed by the Appellant. We have evaluated the oral submission made by both the Appellant and Mr. Kabaka on behalf of the State. It was the prosecution's case that the Appellant, in company of others, threatened the complainant with a toy pistol, after which he robbed her of her mobile phone. There was evidence that the complainant was assaulted before she was robbed. During the course of the robbery, the complainant and her friends raised alarm. The police, who were on patrol, responded. When the gang saw the police, they ran away. The police shot at one of them. He managed to escape. When the police arrived at the scene, they saw a blood trail. They called for reinforcement. They followed the blood trail to a kennel where they found the Appellant hiding. He had a gunshot wound. When they searched him, they found him with a toy pistol and a C35 Siemens mobile phone which was later identified to be the one that was robbed from the complainant. The toy pistol and the mobile phone were produced as exhibits during trial.

10. In our considered opinion, the prosecution established a clear chain of events from the time the complainant was robbed to the time the Appellant was arrested hiding in the kennel. Although the complainant and her friends did not identify their assailants, the fact that the mobile phone robbed from the complainant was recovered in the Appellant's possession a few minutes after the robbery, proves beyond any reasonable doubt that the Appellant was in the gang that robbed the complainant. The doctrine of recent possession applies here. The mobile phone that was found in the Appellant's possession was positively identified by the complainant as the one that was robbed from her. The Appellant is not claiming that the mobile phone belongs to him.

11. To establish a charge of robbery with violence, the prosecution is required to prove either that the Accused was in company of one or more accomplices, or that he used a dangerous or offensive weapon or that he used or threatened to use violence on the victim. In the present appeal, the prosecution established that the Appellant was in the company of more than one accomplice when they robbed the complainant. Although a toy pistol was recovered from the Appellant, the fact that it was a toy pistol does not lessen in any way the Appellants culpability. This is because the complainant and her friends believed that the item that was used to threaten them was in actual fact a real pistol. It is the effect that the toy pistol had on the complainant that is material here. It was clear that the Appellant intended to use the said pistol, and give an impression to the victims, that it was a real pistol and that it could cause harm to the complainant. We hold that the prosecution proved that indeed the Appellant used a dangerous and offensive weapon during the cause of the robbery. The toy pistol had the effect of causing the complainant to have reasonable apprehension and fear that she would be harmed if she did not comply with what the Appellant was asking of her.

12. As regard the defence offered by the Appellant, we are of the view that it does not in any way lessen his guilt. It was the Appellant's defence that he was a victim of mistaken identity. From the testimony of PW3 and PW4, it was clear that the Appellant was traced to the place he was hiding from the blood trail that started from the scene of the robbery. If there was any doubt that the Appellant participated in the robbery, that doubt was removed when the Appellant was found in possession of the C35 Siemens mobile phone that was robbed from the complainant. We find no merit with the Appellant's assertion that he was a victim of mistaken identity. The Appellant was shot when the police intervened as the Appellant and his

accomplices were robbing the complainant. The Appellant's defence is therefore dismissed.

13. There is one issue that remains for this court to address before concluding this judgment. The Appellant claims that he was detained by the police beyond the then constitutionally provided statutory period of fourteen (14) days. Under **Section 72(3)(b)** of the **Constitution** that was repealed and replaced by the **2010 Constitution**, the police were required to present an accused person before court for plea within fourteen (14) days of his arrest. The Appellant complained that he was detained for a period of more than fourteen (14) days before he was arraigned in court. The prosecution, however, adduced evidence which established that the Appellant, upon his arrest, was taken to Kenyatta National Hospital to be treated for his gunshot wounds. He was admitted for a period of thirty-four (34) days before he was discharged. It was after his discharge from hospital that he was brought to court to take plea. We cannot fault the police for first taking the Appellant to hospital to be treated before bringing him to court to take plea. We hold that the prosecution gave a reasonable explanation for the delay in bringing the Appellant to court. We find no merit with this complaint.

14. The upshot of the above reasons is that we find no merit with the appeal. It is hereby dismissed. The conviction and the sentence of the Appellant by the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI, THIS 15TH DAY OF MAY 2015

J. LESIIT

JUDGE

L. KIMARU

JUDGE