REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBER 29 OF 2014

DICKSON NYAKUNDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the judgment of Hon. C.A. Nyakundi -PM in Narok* ***Cmcr No. 468 of 2013*** *delivered on 30th December, 2013 where the appellant was found guilty ad convicted of the offence of robbery with violence under Section 296(2) of the Penal Code and sentenced to death)*

JUDGMENT

1. The appellant **Dickson Nyakundi Obae,** together with another **Isaac Nderi Muriithi** were on the 6th May 2013 jointly charged with the offence of Robbery with Violence contrary to **Section 296(2) of the Penal Code**.

The particulars of the offence read:

"On the 2nd May 2013 at Polonga Estate in Narok Township of Narok County within the Republic of Kenya while armed with a pistol and crude weapons with others not before court robbed Edward Kasaine of two Samsung mobile phones, one Nokia phone, Toshiba Laptop, meko gas cylinder, one safe box, 3 wrist watches, one Cannon Camera, three solars, 50 Kgs of sugar, and cash Kshs.16,500/= all valued at Kshs.239,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Edward Kasaine."

In the alternative charge of **handling stolen property contrary to Section 322(1) (2) of the Penal Code,** the particulars were

"On the 3rd May 2013 at Polonga estate in Narok township of Narok County within the Republic of Kenya, otherwise than in the course of stealing dishonestly handled 25 Kgs of sugar knowing or having reasons to believe them to be stolen."

At the end of trial, the 1st accused was acquitted of the charges, but the 2nd accused, now the Appellant was convicted for the offence of Robbery with Violence Contrary to **Section 296(2) of the Penal Code** and sentenced to death ad the only sentence provided for by the law.

2. The appeal is against both conviction and sentence. In the supplementary petition of appeal fourteen grounds were stated.

In summary, the appellant was aggrieved that the trial court relied on uncorroborated evidence, that there were no eye witnesses called, that the court erred in law and fact in holding that the appellant was part of a gang of robbers who stole from the complainant yet there was no identification at all, that the court relied on the prosecutions **Exhibit No 1**, a sack of 25 Kilogrammes of sugar yet the complainant PW1 admitted it was not the sack stolen from him. It was his further ground that the 1st accused having been acquitted, the charges could not have been proved against him and that the court shifted the burden of proof to the appellant contrary to the law.

In his petition, the appellant states that the trial court erred in failing to hold that the Appellant suffered physical disabilities affecting his hearing capacity, had no the necessary mensrea to commit the offence of robbery with violence and that the magistrate misapprehended the law and facts thus arrived at an erroneous decision to convict the appellant.

3. The complainant –Edward Kasaine (PW1) case was that on the material day the 2nd May 2013 at about 9.00p.m. five people, armed with a pistol and other crude weapons entered his house as he had not locked the door and ordered him and his girlfriend PW2 to lie down which they complied. That there were two solar lamps in the room. They ransacked the house for a bout two and hours, and stole all the items stated in the charge sheet. In particular, he told the court that a 50 Kg sealed sack of sugar, red in colour was also stolen. Later, they informed the police at Narok police station using a neighbour's phone. After recording statements, they received a call from their **mother PW3** that two men had been seen carrying the stolen sugar and arrested by civilians. The alleged stolen sugar was shown to the court **25 Kgs in a 50 Kg** s**ack, white in colour –** and **produced as Pext No 1.** It was complainants testimony that the sugar was found with the 2nd accused the appellant. In cross examination, PW1 stated that the 1st accused was arrested in his co- accused house and that both had been detained by civilians before the police arrived. He further stated that the 1st accused was mentioned by the 2nd accused, and that neighbours suspected the two accused because they were carrying sugar at 7.00a.m. He stated that half of the sugar had been applied to *Kangara* (sic), and that he had hidden it under his bed.

4. The appellant cross examined PW1 in Kiswahili. About the sack of sugar PW1 stated that he recognised the sack as his, though it had no special marks and that his 50 Kg sack was red in colour, but the one in court was white in colour and it was not his that the appellant had exchanged the sack and further stated that the one produced in court was not his sack. He stated that he saw five men enter his house and others remained outside.

PW2 who was in the complainant's house at the time of the alleged robbery on cross examinations stated that she did not know if anything stolen from them was found in the accused's house.

When cross examined by the appellant, she stated that the 50 Kg sugar was in a sealed sack, and that she could not tell whether the sugar produced in court was the one stolen.

5. **PW3, the complainant's mother** told the court that she received intelligence that two men were seen carrying sugar, and with the complainant went to where the two had been detained by civilians. It was her testimony that the 2nd accused, the appellant led them to his house where they found the 25 kg sugar soaked in water and another 20 Kgs found in a hideout.

PW4 PC William Kangoro told the court how at the appellants premises he recovered the 25 Kgs of sugar near some drums, in a sack and soaked in water the one produced in court as PExt 1.

At the conclusion of the prosecution case,the two accuseds were put on their defence.

6. The 1st accused gave unsworn statement while the appellant opted to remain silent. None

called witnesses.

In his judgment,the trial Magistrate while analysing the evidence stated that the 1st accused was mentioned by the 2nd accused (appellant) as his accomplice and that the people alleged to have seen them carrying sugar were mysterious and none was called to testify on when or where they saw the accused carrying the stolen sugar. The Magistrate opined that it would have been crucial to call all those civilians who allegedly saw the the accused persons carrying the sugar. The trial court proceeded to acquit the 1st accused that there was no evidence of his participation in the robbery.

7. On the part of the appellant, the trial court made a finding that the recovery of the stolen sugar was made barely 24 hours after the robbery, that the police searched his premises and found the sugar, 25 Kgs, near *Kangara* drums and soaked in water. It was his finding that, that tallied with the circumstances that at the time of the robbery it was raining heavily,and that the sugar must have been made wet while being carried away under the rain. He made an assumption that the appellant had already utilised part of the stolen sugar to make *Kangara* as he was brewing at the premises, although the exact 50 Kgs in a sealed red bag were not recovered. This, he stated left no doubt about the connection of the appellant to the crime.

The court made further finding that opting to maintain silence the appellant had opted to a course of action that afforded him little or no protection at all because the silence had not created reasonable doubt in the court's mind about his role. He was convicted for the offence of robbery with violence as charged and sentenced to death as the only sentence provided under the law.

8. This is a first appeal. As stated in the case **Okeno -vs- Republic (1972) EA 32,** this court is mandated to re-evaluate and re-consider the evidence adduced so as to reach its own independent conclusion whether or not to uphold the conviction of the appellant. The court ought to put in mind that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any opinion as to the demenour of the witnesses.

From the evidence on record, the court is to determine whether the prosecution proved its case against the appellant on the charge of robbery with violence to the required standard of proof beyond reasonable doubt.

9. In his submissions, Mr. Chege Munene Advocate for the appellant stated that the trial court in convicting the appellant relied on uncorroborated evidence as no eye witnesses were called to testify how and where they saw the appellant and his co-accused carrying the 50 Kg red sack of sugar. It was his further submission that the alleged civilians who allegedly arrested the appellant were not called to testify.

He relied on **James Karani -vs- R – Criminal Appeal No. 30 of 2010 and Jairus Mukolwe -vs- R (2013) KLR** in this cases**,**---the court held that failure to call eye witnesses renders the evidence adduced in the trial court unsustainable.

Mr. Chege Advocate further submitted that the trial court erred by holding that the appellant was among a gang of robbers that robbed the complainant yet nobody including the complainant identified the appellant, and indeed there was no identification parade conducted by the police. He submitted despite PW1 having two solar lamps in his house, did not recognise the appellan, and that the two accuseds were total strangers to him when he saw them in court.

He relied on the case **HCRA No 30 of 2010, James Karani -vs- R** where issue of identification was discussed at length. The complainant had ample opportunity to recognise and identify the accused persons as he had two solar lamps in his house and according to his testimony the robbers stayed for 2-3 hours in his house. If indeed the appellant was one of the gang that robbed him, he would have been able to identify him when he and his co-accused were arrested and detained by alleged civilians. That casts doubts on the appellants participation in the robbery

with violence.

10. The appellant submitted that the **25 Kgs sack of sugar is the one that connected the appellant to the crime.** It was his submission that the said sugar (PExt No 1) was never recovered as what was exhibited in court was a 25 kg bag of sugar in a 50 Kg sack, white in colour whereof the complainant stated in court that the said sack was not the one his sugar was packed in as it was red and was 50 Kg sack and sealed.

He further faulted the trial court by relying on assumptions that the sugar recovered from the appellants premises must have been part of the stolen sugar, yet PW2 testified that she did not know whether the sugar produced in court is what was stolen from their house.

11. In his defence, the appellant opted to keep quiet. It was submitted that the trial court ought to have interrogated the appellant on his option as this was a serious offence punishable by death. Relying on the case of **Dalus Mukole Ochieng -vs- R – (2013) KLR,** it was submitted that the court failed to discharge its duty to interrogate the appellant's silence and that having acquitted the appellants co-accused, the trial court erred as the two were charged jointly, allegedly seen together carrying sugar and together in the house where the alleged sugar was recovered, were arrested together by alleged civilians and therefore the conviction of the appellant cannot hold after the co-accused was acquitted.

He urged the court to set aside the conviction and sentence.

12. The Learned state counsel Ms. Ngovi submitted for the state that the prosecution had proved the appellants guilt beyond reasonable doubt on identification. She stated that the complainant was able to identify the accused persons and the stolen sugar in court, the 25 Kgs, being part of the 50 Kgs stolen.

It was her submission that the recovery of the sugar in the appellants house is proper in law though not a confession. She relied on the **Case Jairus Makore -vs- R – (2013) KLR -**

It was her further submission that the appellant participated fully in the court proceedings by cross examining all the prosecution witnesses and was therefore not incapacitated in anyway, that he exercised his option to remain silent on his defence after being explained the options and their consequences by the court **Under Section 211 Of The Criminal Procedure Code.** It was her further submission that the appellant lead the police to recover the sugar and he had no explanation for its possession.

It was urged that under **Section 236 Criminal Procedure Code,** two ingredients of robbery with violence were proved. She urged the court to uphold the conviction and sentence.

13. The court has considered the evidence as tendered before the trial court and submissions by learned counsel as mandated see **Okeno -vs- R (Supra).**

The ingredients for the offence of robbery with violence under **Section 296 (2)** of the Penal Code are three, and ought to be read collectively, and have to be considered together with **Section 295 of the Penal Code** – that is use of threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing.

Section 296(2) Penal Code, the ingredients are:

(1) If the offender is armed with any dangerous or offensive weapon or instrument, or

(2) If he is in company with one or more other persons or,

(3) If, at immediately before or immediately after the time of the robbery, he wounds,

beats, strikes or uses any other violence to any person.

See the case **Jairus Mukolwe Ochieng -vs- R (2013) KLR Criminal Civil Appeal No 217 of 2007, and Ajode -VS- Republic (2004) 2 KLR 81** in which the Court of Appeal opined that prove of any one of the above ingredients would constitute the offence under **Section 296(2) of the Appeal Code.** The record shows that PW1, the complainant could not identify his attackers so could PW2. Upon seeing them in court, the complainant stated they were total strangers.

The persons/civilians alleged to have arrested the appellant together with the 1st accused who was acquitted for lack of evidence were not called to testify on how or where or why they arrested the two. It is not in dispute that the stolen properties were never recovered except the alleged 25 Kg bag of sugar – which was alleged to have been part of the 50 Kgs of sugar. The complainant stated categorically that his sack of sugar had no special marks, and that it was in 50 Kgs sealed red sack, yet what was allegedly recovered was a 25 Kg white sack of sugar. PW2 stated that she could not say whether or not the sugar produced in court was what was stolen from them.

PW3, mother of the complainant is the only prosecution witness who said she recognized the appellant when she found him having been arrested by unnamed civilians, but other than that, her evidence did not add any value to the prosecution evidence case. She was not in the complainant's house at the time of the alleged offence.

In its totality, it is the courts finding that none of the prosecution witnesses were able to identify the appellant as the person, alleged to have been in a group of a gang that robbed the complainant. If indeed the appellant was arrested carrying sugar as alleged, why would the alleged civilians not be called to testify on why they thought the sugar was stolen? It was stated that the alleged civilians suspected the two accused persons to have stolen the sugar because they were carrying the same at 7.00a.m. The prosecution did not elaborate on what offence the accused persons had committed by carrying sugar at 7.00a.m.

14. We fully agree with the appellant's Advocate submission that the trial court erred in law and fact by making assumptions that the stolen sugar was found under the appellant's bed yet the prosecution stated that the civilians arrested the appellant with his co-accused carrying the sugar. If indeed the stolen sugar was being carried by the appellant and his co-accused when they were arrested and detained, it beats sense that it was found under the appellant's bed with police assistance. It was alleged that the appellant and his co accused were detained by the civilians. How then did the sugar go to their house under the bed?

The said confession if indeed there was one, was not recorded pursuant to **Section 25 of the Evidence Act** nor is it indicated under what circumstances the said confession was extracted from the appellant. We find that there was no confession at all by the appellant.

15. It was the prosecution's duty to bring to court all necessary witnesses to establish the truth. Failure to do so leads to an inference that the evidence of the witnesses not called to testify would have been adverse to the prosecutions case. See **Bukenya & Another -vs- Uganda (1972) E.A 549.** The Court of Appeal in the **Bukenya** case(**Supra**) further stated that an adverse inference can only be raised if the evidence in support of the charge is barely sufficient.

16. We have carefully analysed the evidence of all the prosecution witnesses. It is our finding that the evidence tendered in the trial court is not sufficient to connect the appellant to the offence he was charged with and convicted of.

The appellant is recorded to have participated fully in the proceedings by cross examining the prosecution witnesses. He however opted to exercise his right to remain silent in his defence. In the case **Jairus Mukolwe Ochieng (Supra),** the The Learned Judges of Appeal opined that,

pursuant to **Section 208(3) of the Criminal Procedure Act** that:

> ***"If an accused person does not employ an advocate the court shall, at the close of the examination of each witness, ask the accused person whether he wishes to put any question to the witness and shall record his answer."***

17. By analogy, it was incumbent upon the trial court to interrogate the appellants option to remain silent in his defence in the trial of the capital offence. The court is mandated to not merely play a passive role, unconcerned whether the accused understands the essence and importance of his defence. The trial court record shows no attempt at all by the trial magistrate to even enquire from the appellant whether he understood the explanation under **Section 211 Criminal Procedure Code** or not. The trial magistrate while justifying his conviction of the appellant stated:

> ***"---that by opting to maintain silence, the 2nd accused, (the appellants adopted a course of action that affords him with little or no protection at all because the silence has not created reasonable doubt in the court's mind about his role."***

This court is left to ask itself whether the reasonable doubt ought to have created by the appellant or by the prosecution evidence. It is the prosecution that is under a duty to prove its case beyond reasonable doubt and that burden cannot be shifted to the accused.

It is our finding that the trial court did not discharge its duty to interrogate the appellant's silence as an option to his defence, and by its above statement, shifted the burden of proof to the appellant.

18. In its totality, and having considered the submissions made on behalf of the appellant and the state, we opine that reasonable doubts have been created in our minds as to the evidence connecting the appellant to the offence as charged. This is clearly demonstrated by failure of the prosecution to call the witnesses who alleged to have seen the appellant carrying the alleged stolen sugar to testify. Further, there was no connection established by the prosecution linking the appellant to the 25 Kgs Sugar produced as exhibit in court which the complainant disowned.

19. In the premises we have no option but to allow the appeal as the prosecution failed to prove the case against the appellant to the required standards of proof beyond reasonable doubt .

The upshot is that the conviction of the appellant is quashed and the sentence set aside.

The appellant is set at liberty and ordered released from prison unless otherwise lawfully held.

Dated, signed and delivered in open court this 1st day of December 2015.

MAUREEN ODERO

JUDGE

JANET MULWA

JUDGE