



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO.94 OF 2010

JOHN GITONGA MIATU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment in the Chief Magistrate's Court at Nyeri in Criminal Case No.166 of 2009 by M. NYAKUNDI (Mrs) – SRM)

J U D G M E N T

The appellant was charged with two counts of Robbery with Violence contrary to Section 296(2) of the Penal Code.

The particulars of the offence were that on the 13th day of October 2008 at Kabebero market in Nyeri District of the Central Province, jointly with others not before court while armed with dangerous weapons namely axes and knives,robbed **Nancy Wambui Kiberenge** of cash Kshs.10,000/= and immediately after or immediately before such robbery threatened to use actual violence to the said **Nancy Wambui Kiberenge**.

The third count was shop breaking and committing a felony contrary to Section 306 (a) of the penal code.

The particulars of this count were that on the 13th day of October 2008 at Kabebero market in Nyeri District of the Central Province, broke into a building namely a shop of William Ngunjiri with intent to steal from therein and did steal (1) twelve packets of golden ilion batteries, (2) four packets of Eveready batteries, (3) one dozen of U.H.B pencils (4) half bundle of bahari maize flour (5) half bail of 1kg maize flour (6) half bail of 1kg wheat flour (7) eight sachet of drinking chocolate, (8) one dozen of nescaffe sachets, (9) two sachets of omo (10) two dozens of toss soap sachets, (11) two dozens of locos, (12) half bail 250gms salt (13) eight loaves of bread (14) five packets of Bina cooking oil, (15) one carton of kasuku cooking fat, (16) ten kgs of rice, (17) eight kgs of sugar and (18) two packets of sweets all valued at 5,832/= the property of **William Ngunjiri**

PW1 **Nancy Wambui Keverenge** a waiter at Kabebero bar situated at Kabebero village in Othaya, where she had worked for two years recalled that on the 13/10/2008 at 2.00 am, she was asleep at her residence when she heard a knock on her door by gangsters. They broke the window and gained entry. They were five in number including the appellant. They asked for money and when she said that she did not have any she was hit with a big stick and threatened with a knife. She gave them Kshs.10,000. She recognised the person who was asking for the money as the appellant as she had previously seen him at the bar where he was a regular customer.

On cross-examination she insisted that she recognised the person who had asked for money as a Mr. Gitonga and was a familiar person. The robbers used torches to light the room and an axe to break the door. There was bright moonlight. Two of the robbers entered through the window and three from the door. The main issue to consider in this witnesses evidence is whether there was favourable condition for identification as it was raining, and though there was moonlight and torches the robbery was committed in the room.

The second witness, **Mr. Elijah Mukiri** an electrician by profession doing business at Kabebero center about 11 km from Othaya and staying at the said center recalled that on the 13.10.2008 at 2.00 am while asleep in his room at the shop together with his wife, heard a bang at the door. Suddenly, thugs broke into the shop and asked for money. The first person poured all the money that was in the cash box into a bag. His wife gave them Kshs.7,000/= but they wanted more. He gave them Kshs.26,000 but insisted for more. They took his mobile phone Nokia 1100 valued at Kshs.2400/=. They took Zain cards, Safaricom cards, Eveready batteries, shoes and all assorted goods from the shop and put them in a sack and ultimately hit him on the head. This witness states that bedroom lights were on and therefore he saw someone he knew physically. He had known him for one year as he used to go to the shop and would go to the club to drink alcohol. He identified the man as the appellant and as the person who ordered him to switch of the electricity. He knew the appellant's name when he was called at Othaya police station. The appellant was arrested 3 days after the robbery thus on 16/10/2008. He was not called for a identification parade. According to this witness, the appellant held the knife. He was able to identify cartons of Maisha Bora and Alfa deep frying fat with his names inscribed on the same. The witness also identified the sack of shoes found at the appellant's home.

On cross-examination, he states that he knew the appellant as his customer. He knew the appellant physically but learnt his name later. During the robbery he was told to lie down but later he was told to put off the lights that were on and was hit and bled on the floor. Moreover he states on cross-examination that the cartons of fat found in the appellant's home were the ones stolen from the shop as his names were inscribed thereon. The complainant states that the names of customers are normally written on the cartons as they buy the goods in a group and the same are transported by one vehicle.

The third witness was **Mary Wambui Mukiri**, the wife of PW2. She states that on the material day, it was raining when 8 people entered the shop. They put on mufflers and demanded money which she gave them, thus Kshs.7,000/= and later Kshs.10,000. Her husband also gave money. They ransacked the shop and packed goods in a sack and hit him on the head. They took her phone Nokia 1200 valued at Kshs.2500. When they were living they accidentally switched on the lights and that was when she saw her husband unconscious. She did not identify any of them. Her husband was taken to hospital where he was treated and discharged. The appellant was a person she knew before. On cross-examination it is important to note that she states that the thugs were wearing mufflers and that her husband was unconscious after the attack.

PW4 was **William Ngunjiri Nderitu** was a businessman with hotel and shop at shopping center. He closed his shop and went home. Later he was called by a neighbour that they had been attacked. He called the sub-chief and told him of the robbery. He went to the scene and found that PW2 had been cut and was unconscious and was later taken to hospital. He found his shop had been broken into and everything stolen.

PW5 Anthony Njigoya was an Administration Police Constable attached to Chinga A.P Post but was previously of Waikala A.P. Post. On the 13/9/2008 he received a call from the Assistant Chief Kabebero that there was a robbery going on. He went to the scene but found that the thieves had left. He found PW2 bleeding on the heard lying on the floor in his shop. He was taken to hospital by the police.

On the 16/11/2008 in the afternoon, they received information that one of the suspects was drinking at Kihini bar. He was arrested and taken to his house where the police recovered some of the stolen goods. He was taken to Othaya Police Station and booked.

PW6 was the clinical officer at Othaya District who filled the P3 form for the victim PW2. He had

a cut wound on the scalp measuring 5cm, soft tissue injury on the right shoulder joint, 1st digit and left heel. The degree of injury was harm.

PW6, Anthony Karisa an inspector of police based at Othaya Police Station recalled that on 13/10/2008, he received a phone call from the Assistant chief of Waihera location that 20 people had raided Kabebero shopping center. He booked in the O.B and proceeded to the scene and followed the robbers in vain. He found that the shops of PW2 and PW4 had been raided and in the house of Mr. Kiberenge they took Kshs.10,000 while armed with a panga and axe, and at Elija Mukiri's shop a big stone was recovered.

On 16/10/2008 they received information from A.P.C Felix Njeru and Anthony Njiguta that a suspect had been arrested at Kabeberu trading center. They proceeded to the center and the suspect introduced himself as John Gitonga Miatu. They proceeded to his residential home and recovered the cartons that were used to carry stolen items. The cartons had the names of the complainant (PW2) thus Elijah Mukiri who identified the cartons. The money was not recovered. The complainant identified the appellant as a customer and that there was no grudge between the two. No identification parade was done because the complainant knew the appellant.

The appellant chose to give a sworn statement on the 10/10/2008 at around 8.00 am he went to the Aberdare forest where he was farming and stayed there for three days. He returned on 14/10/2008 and found his wife had ran away from the house carrying everything his home is in Mucharange village, Chinga location, Othaya Division.

On 15/10/2008 he went to Kapeperu to ask for the items. He met them there where they do sell beer in a bar called Kabeberu bar. He asked for his belongings but the wife screamed causing the public to beat him until he was unconscious. Later he was taken to their home where they took items from his brother's house. He entered in another house and took cartons from there. One was for Mpishi poa and other cooking fat. He told them that it is his wife who had the carton. He stated that PW1 Margaret Wambugu Kiberenge was his wife's mother.

On cross-examination he stated that his wife was known as Peris Waithera. They were not formally married but had stayed together for one year and half. He also stays with his mother and brother.

Upon analysing this evidence in full the trial court found two issues to be determined.

1. ***Whether there was a robbery.***
2. ***Who committed the robbery.***

The court found that it was clear that a robbery took place on the night of 13/10/2008. We agree with the court that the evidence on record shows that there was a robbery with violence against the complainants on the night of 13/10/2008.

On the issue of who committed the robbery the court found that the prosecution had proved beyond reasonable doubt that the appellant was one of the people who robbed the complainants and found him guilty of counts i and ii of robbery with violence contrary to section 306 (a) of the penal code and convicted him under Section 215 of CPC and later sentenced him to death on the two counts of robbery with violence.

He was also convicted on count iii and ordered to serve 3 years jail term.

In his amended grounds of appeal, the appellant's appeal is based on grounds that the learned trial magistrate erred in both points of law and facts and, or misdirected herself in both in failing to find that the amended charge sheet was never read over to me and explained and that he original trial court was below the required jurisdiction. **Moreover**, that the learned trial magistrate gravely erred in both points of law and fact and or misdirected herself in failing to find that the items referred to as exhibits were not all marked as exhibits **and** that the learned trial magistrate erred in both points of law and facts and, or

misdirected herself by failing to find that the circumstantial evidence adduced against me (the recovery and possession of the stolen items) fell far short of standard of proof required in criminal proceedings in that no inventory recovery form was tendered in as evidence and to worsen the case no search warrant was tendered in as evidence to certify certain the said search or recovery. **Lastly**, that the learned trial magistrate erred in both points of law and facts and, or misdirected herself in upholding the identity by recognition attributed at the scene under the uncondusive condition and thus not fresh from error or mistake.

The first ground is that the amended charge sheet was never read to him and explained and that the original trial court had no jurisdiction. This court finds that it is true the charge sheet was amended and that the amendment of the charge sheet was not opposed by the appellant. Though the amendment was not explained and read over to the appellant, the said amendment was not substantial to prejudice the appellant's defence at the trial court.

The court finds that the case proceeded before the Senior Resident Magistrate Mrs M. Nyakundi who had jurisdiction to hear the matter and make the decision.

On the second ground this court finds that it is lacking in basis as all the items were marked as exhibits.

On the third ground of the appeal. This court finds that the appellant admitted that the carton bearing the names of the 2nd complainant were found at his house which he shares with his wife. He states that ***“they entered in another house and took cartons from there. One was Mpishi poa and other cooking fat. It was my wife who had the cartons”***

This evidence points to the fact that the cartons bearing the name of the complainant were found at the appellants house. He stated further that he had been living with his wife in that house for one and half years.

On ground 4, this court finds that the evidence of identification was not sufficient as there is serious contradiction in the evidence of PW2 and PW3 who are husband and wife respectively.

PW2 stated that the robbers were not wearing mufflers whilst PW3 stated that the robbers were wearing mufflers. This court notes that one cannot identify a person wearing mufflers. Secondly PW3 states that it was dark and the lights were off. Infact she states that as they were leaving, one of the robbers switched the lights accidentally as a result of which she realized that PW2 was on the floor unconscious. However, PW2 stated that he was never unconscious. This contradiction casts reasonable doubt as to whether the 2nd witness identified the appellant. This court finds that there is a possibility that PW2 identified the appellant after the latter was arrested and therefore the the evidence of identification is unreliable.

The upshot of the above is that in count two the only available evidence is the two cartons that were found in the house of the appellant. No reasonable explanation was given by the appellant as to how he came into possession of the cartons and therefore the principle of ***recent possession*** applies. The conviction and sentence by the trial court on this count are upheld.

On the 1st count of robbery with violence, this court finds that the condition of identification were not favorable as it was raining and therefore the moonlight was not enough for positive identification bearing in mind that the robbery occurred in the room.

This court finds that count 3 of shop breaking and committing a felony contrary to Section 306 (a) of the penal code was not proved as nobody saw the appellant enter the shop and none of the stolen items recovered from the appellant's house were stolen from the shop of William Ngunjiri Nderitu.

Ultimately, this court upholds the conviction of the appellant in respect of count ii and finds the death sentence proper and dismisses the appeal accordingly.

Dated, signed and delivered at Nyeri this 12th day of February 2014

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE

Judgment is read in the presence of the appellant and Mr. Njue for the state.

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE