



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 449 of 2006

JOSEPH THURANIRA NGUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Joseph Thurania Ngugi, was arraigned in the Senior Principal Magistrate's Court at Thika on a charge of robbery with violence contrary to Section 296(2) of the Penal Code. The prosecution called eight witnesses after which the appellant was put on his defence and he made an unsworn statement. He was found guilty as charged and ordered to be detained at the President's pleasure. He appealed to the High Court against conviction and sentence.

The prosecution case was that on 13th July, 2004, the appellant with some other persons went to the house of the complainant (PW 3), attacked the house girl (PW 2) injuring her seriously on the leg, ear and head. They dragged her into the kitchen where PW 3 found her almost unconscious and rushed her to the nearest Health Centre. As she was undergoing treatment, PW 3 took the opportunity to report to the Police, and when he came back he was informed that the injuries were serious and he took PW 2 to hospital where she was admitted for a week. In the evening the Police called PW 3 to the station where they showed him some items which had been recovered and he identified some items belonging to him and some others belonging to PW 2. Among his own items were a video deck and safety boots. The Police told him that they had arrested some two people and they were looking for the 3rd person.

Meanwhile Humphrey Mwangi (PW 4) testified that the appellant offered to sell him (PW 4) a radio cassette and a toy walkie talkie, and further told him he had some other items in the forest. They went to the forest and the appellant showed the witness a bag in which were a video deck and boots. PW 4 told the appellant that he would go and look for money and the two returned to town. The village elder (PW 5) then advised PW 4 to go back and remove those items and relocate them so that the appellant does not take them away. They went looking for the appellant and when they found him in a club house they called the police who arrested him and took the radio which he had kept outside the club house. The complainant's Security Manager also went with PW 4 and PW 5 and recovered the other items which they handed over to the police. This evidence was corroborated by that of PW 5 in every material particular.

PW 6, Joseph Irungu Kinuthia testified that on the material date at 2 p.m., the appellant offered to sell him a radio which the witness identified as MFI 3A. However, the witness did not buy it as he did not have money.

Rose Nabwana Sikuku (PW 7) was a Government analyst. On 19th August, 2004 and 23rd September, 2004, she was requested to examine and generate DNA profiles and establish the source of blood stains among some specified items. One of them was a multi-coloured short sleeved shirt in which she found some blood which matched that of Margaret Ndamuta (PW 2).

Dr. Charles Kariuki (PW 1) who examined PW 2 on 8th October, 2005, for the alleged assault confirmed that she had a lacerated wound on the head about 5 inches by ½ inch which was scalp deep, and that there was a healed superficial wound at the back of the right ear. There was also a cut wound on the right leg on the ankle. He approximated the age of injuries at about 3 months and opined that they had been caused by a blunt object.

The last prosecution witness was Corporal Susan Mwangi (PW 8) who was the investigation officer. She revisited the report filed by PW 3 with whom she went to Makuyu Health Centre where PW 2 was still being treated. She confirmed that PW 2 had a deep cut on the head, and had said that she could not identify her attacker(s) as she was hit from behind. The witness then visited the house where she noticed some blood on the floor, recovered a metal bar which had some blood and took it to the police station. Later she received a report that there was a boy selling a radio. She went with other police officers and saw the radio that was being sold hidden in a Kibanda. She identified it as “MFI 3”. She then found the appellant playing pool and arrested him. He told the witness that the radio was not his. The witness was also taken to Kakuzi forest where the appellant had allegedly hidden other stolen items and she found one pair of shoes, video deck and a toy mobile phone all of which the complainant identified as his.

Upon conviction on the basis of the above evidence, the appellant filed 4 grounds of appeal as follows –

1. That the charge was defective.
2. The conviction was based on circumstantial evidence which was very weak.
3. That he was incarcerated in police custody for a longer period than provided for under Section 72 of the Constitution.
4. That the trial court did not consider his defence.

The particulars of the charge against the appellant read as follows –

“(1) Joseph Thurania Ngugi (2) Stanley Nduati Mwai (3) Peter Kamau; On the 13th day of July, 2004 at Kakuzi estate in Maragua District of Central Province, jointly with others not before the court robbed GLINY JOSEPH DENA of one video deck, a toy radio call, a pair of safety boots, a radio cassette and a travelling bag all valued at KSh. 32,000/= and at or immediately before the time of such robbery wounded MARGARET VUTAGUA.”

It is the appellant’s contention that the charge was defective since the proper complainant should have been PW 2, Margaret Vutagua who was manning PW 3’s home at the material time.

Section 295 of the Penal Code defines robbery as follows –

“Any person who steals anything, and, at or immediately before or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

In the instant case, some items were stolen from the house of the complainant (PW 3). Immediately before the time of stealing those items, the thief or thieves used actual violence on the housegirl most

probably in order to prevent or overcome resistance to those items being stolen. The two main ingredients of the offence of robbery were therefore satisfied and it matters not that PW 3 was not in the house at the time. He qualifies to complain inasmuch as his property was stolen. Similarly, PW 2 could also have complained since her radio was stolen and in the process she was subjected to actual violence. Either of the two was therefore competent to launch the complaint and therefore the charge was not defective. The first ground of appeal accordingly fails.

The second ground is that the appellant's conviction was based on circumstantial evidence. To the extent that he was not caught red handed, his assertion is correct. The circumstantial evidence in this case is two pronged. It consists of the evidence that some blood was found on the multi-colored T-shirt matched with that of PW 2, and that the appellant was found in possession of a radio cassette and other items which were stolen from the complainant's house a few hours earlier. Although the DNA profile generated from the blood stain on the multicoloured shirt matched the DNA profile generated from the blood sample labeled "Margaret Vutagwa" (PW 2), none of the witnesses described the type of clothes which the appellant was wearing at the time of his arrest. The closest that the investigations officer (PW 8) came to describing that shirt was during her cross examination when she said –

"... When I recovered your shirt you stayed without the shirt until your mother brought you another shirt. It is not true we arrested someone called Maina Ngaru ..."

This evidence does not disclose when the shirt, which is not even described, was recovered from the appellant, and there is no evidence that it is the same shirt which he was wearing at the time of his arrest. In the absence of such evidence, and granted that the samples taken to the Government analyst were received there on 19th August and 23rd September, 2004 which was more than a month since the date of the arrest of the appellant, the chain of events is not watertight, and there is scope for doubt as to whether the multi-coloured shirt was then one that the appellant was wearing at the time of his arrest. The appellant is accordingly entitled to the benefit of doubt on that limb of the circumstantial evidence.

The second aspect of that evidence is that the appellant was found in possession of a radio cassette which was identified as one of the items stolen from the complainant's house. The robbery took place between mid morning and mid day, and the appellant was arrested shortly after 3.30 p.m. on the same day. PW 4 testified that at about 11.00 a.m. of that day, the appellant approached him, offering to sell to him a radio cassette. That radio was identified in court by PW 6, to whom the appellant also offered to sell it after the would-be deal with PW 5 aborted. When the appellant was arrested playing pool, the same radio was recovered hidden in a nearby "kibanda". The appellant alleged that the radio belonged to PW 6, but this witness had already testified that the appellant offered to sell it to him but he did not have the money to buy it. He had attempted to sell it to three different people, PW 4, PW 5 and PW 6, and PW 6 identified it in court. The same radio was found in a "Kibanda" nearby where he was arrested.

From these instances, we find that the appellant was in possession of that radio. And since the radio was identified by both PW 2 and PW 3 as one of the items stolen from the complainant's house that morning, the doctrine of recent possession applies. Under that doctrine, where it is proved that premises have been entered and property stolen therefrom, and that very soon after the entry the appellant is found in possession of the property, it is open to the court to convict him of theft. On that basis, we find that the appellant was one of those who robbed the complainant's properties and that he is guilty of robbery with violence.

Finally, the appellant raised the issue of a violation of his constitutional rights under Section 72 (3) (b) of the Constitution. In a nutshell, this section requires that any person arrested upon reasonable suspicion of having committed a criminal offence shall be brought to court as soon as is reasonably practicable, and if he is not brought to court within fourteen days where he is arrested on reasonable suspicion of having committed an offence punishable by death, the burden of proving that such a person was brought to court as soon as was reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

On the facts of this case, it is to be observed that the charge sheet reads that the appellant was arrested on 20th February, 2005, and that he was brought to court on 28th February, 2005. With the greatest respect to whoever authored this charge sheet, the date of arrest is at great variance with the evidence on record. The offence of robbery with which the appellant was charged was committed on 13th July, 2004 as borne out by the charge sheet itself. This was also the evidence of all the prosecution witnesses except the doctor (PW 1) and the Government analyst (PW 7). The complainant testified that when he was called to the Police Station on the day of the robbery to ascertain whether some items which were recovered perchance belonged to him, he went there and he was "... told 2 people had been arrested" and the police "were looking for the third person." Humphrey Mwangi (PW 4) who on 13th July, 2004 was told by the appellant that the latter was selling a radio cassette and a toy walkie talkie said in evidence that on the same day, they "... called the police.... and showed then the 1st accused (i.e. appellant) and he was arrested." Speaking of the same date, Gregory Oremba PW 5) said under cross examination that "When police came we had you arrested." All these averments were confirmed by the Investigation Officer PW 8) who, testifying on what transpired on 13th July, 2007, said that later at 3.30 she received information that there was a boy selling a radio, and that she found the young man playing pool. "I arrested him and took him to the police station."

The appellant was therefore arrested on 13th July, 2004 and was first brought to court on 28th February, 2005. That was a delay of 7 ½ months, and there is no explanation as to why he was never brought to court any earlier. Mr. Muriithi for the Republic submitted that the prosecution was not accorded an opportunity to explain the delay in the lower court, and that at this stage it is too late to do so. He further submitted that the appellant's rights should be weighed against the complainant's rights, and that the latter had suffered serious injuries. He finally submitted that the appellant has a remedy as he can seek compensation under Section 72 (6) of the Constitution.

Regarding lack of an explanation for the 7 ½ months delay in bringing the appellant to court, on 25th February, 2009, the State was given 2 weeks to file and serve a replying affidavit, and this leave was granted at the request of learned State Counsel. No such affidavit was filed. In respect of suffering by both the appellant and PW 2, each suffered in a different way, and it would not be easy to compute who suffered more. And whereas it is true that the appellant can claim compensation under Section 72 (6) of the Constitution, we are concerned that someone sought to distort the magnitude of the violation of the appellant's Constitutional rights by falsifying the charge sheet to read that the appellant was arrested on 20th February, 2005 when in fact and in truth he was arrested more than seven months before that date.

Each case should be considered on its own peculiar facts and circumstances. In the circumstances of this case we find that the delay in taking the appellant to court was excessive and that it would be more prudent to apply the decision of the Court of Appeal in ALBANUS MWASIA v. REPUBLIC Cr. Appeal No. 120 of 2004 (Nairobi) in which the court said -

"At the end of the day, it is the duty, of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge."

We find these words most appropriate to this case where the appellant was incarcerated for 7 ½ months without any explanation. His appeal is accordingly allowed on the ground of the serious breach of his constitutional rights, and his conviction for robbery with violence is quashed and his detention at the President's pleasure is set aside. He is hereby set free unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 5th day of November 2009.

L. NJAGI

M. WARSAME

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