REPUBLIC OF KENYA

Kamau v Republic

High Court, at Nairobi May 6, 1985

Cockar J & Torgbor J

Criminal Appeal No 1425 of 1984

(Appeal from the Resident Magistrate's Court at Nairobi: E O Bosire, Esq)

Advocates

Appellant present, unrepresented

Miss L G Mbarire for respondent

May 6, 1985, Cockar J & Torgbor J delivered the following Judgment.

Appellant was originally charged jointly with another person (2nd accused) on two counts of robbery with violence contrary to section 296(2) of Penal Code. Both the charges against the other person (2nd accused) were withdrawn under section 87(a) of Criminal Procedure Code. During the hearing the charge in respect of count 1 also was withdrawn against the appellant under section 87(a) of Criminal Procedure Code as the complainant in that count was not in the country at the time. Appellant was convicted on count 2 as charged and was sentenced to suffer death.

Evidence as to the robbery is that on December 10, 1982, at about 6.00 pm the complainant PW 1 and his son were about to close their saw mill and leave when a gang of five men armed with a patchet gun and a panga pounced on them and robbed them of the property as stated in the count after threatening the complainant with a panga and his son with the finger of the robber on the trigger. The patchet gun was never fired at the scene. No actual physical violence was used during the robbery.

The conviction is based not on identification of the appellant by witnesses but on the fact that the complainant's pass-port case (or a wallet Exh. 3) and a card (Exh. 4) showing the picture of a machine which the complainant intended to buy from England were found in a brief-case (which did not belong to the complainant) which was recovered on January 7, 1983 from the appellant's house in his presence. Both these items the complainant claimed in his evidence were in his suitcase or bag which was in his hand and snatched away by the appellant. This bag was not recovered. In addition to the bag which contained all the cheques and cash the complainant said that he was also robbed of his wrist watch, a set of pens and cash Kshs 1,500.00.

As count one had been withdrawn, the only count in respect of which the evidence produced in court could be taken into account was count two which stated that the complainant had been robbed of cash and a wrist watch only. There is no mention in this count of the complainant having been robbed of a suit-case or a bag case or a bag containing a passport case or any other item.

The appellant in his written submission stressed this omission in count two. This is an omission which is made worse by the fact that P C Peter Njoroge PW 3 said during crossexamination that the complainant had not mentioned about the loss of the said two items being Exh. 3 and 4 (passport-case and the card with the picture of a machine) in his statement to the police. We have deliberated carefully on this omission. There is no doubt at all over the fact that these items belong to the complainant. We also agree with the trial magistrate's finding that these two items were not such as would change hands quickly.

The fact that these items were not mentioned in the particulars of count 2 as having been stolen from the

complainant during the said robbery has not to our minds prejudiced the appellant in any way. The complainant was the first witness and he had identified the two items as being his which were in that bag which was snatched from his hand during that robbery. The appellant who appeared to be surprisingly well informed about procedure and rules of evidence in criminal cases, must have appreciated the significance of the production of these two items as exhibits during the evidence of the first witness. What matters is not the fact that the recovered items were not mentioned in the particulars of the charge but that they were stolen from the complainant during that particular robbery.

On the other hand, the omission of these two items from the particulars of the charge (count 2) and from the statement of the complainant made to the police is of great relevance in testing the credibility of the complainant and we are fully mindful of this aspect. We have carefully studied the evidence given by the complainant PW 1.

The trial magistrate's view was that the complainant could not possibly have remembered all that was inside his brief-case (or bag). There is no flaw in that argument. The two items in question are hardly of any value at all. We would, however, add further that after the robbery when the complainant made his report to the police and gave details of his losses his main concern at the moment must have been to remember items of value that had been lost. It is hardly likely that at that time his mind would have gone towards loss of such items of hardly any value as a pass-port case or a card with the picture of a machine he intended to buy. When recalling items lost for police record in such circumstances one's mind is not likely to think of such valueless items. We do not feel that a failure to mention loss of such items in his statement to the police is of such importance as to detract from the credibility of the complainants. The trial magistrate accepted it as a fact that these two items (Exh. 3 and 4) were in the bag which was stolen from him during the robbery 28 days before the same were found in possession of the appellant. We agree with his findings and are satisfied that the appellant was one of the robbers.

Coming now to the question of the robbers being armed with a patchet gun and simis we have already pointed out that no shot was fired at the scene. So PW 1's evidence does not prove that the patchet gun was in fact a fire-arm which was capable of firing a bullet. Nor was any evidence of a ballistic expert produced to prove that the patchet fun found in possession of the appellant was capable of firing a bullet. Finally, the evidence of P C Peter Njoroge PW 3 showed that the patchet gun produced as an exhibit in court belonged to one Mwangi Wahogo who had given it to the appellant to keep it for him. Mwangi Wahogo was the co-accused of the appellant against whom both the counts were withdrawn under section 87(a) of Criminal Procedure Code. With the withdrawal of count 2 against Mwangi Wahogo there was no longer any connection of Mwangi Wahogo with this robbery as far as the prosecution case was concerned. The patchet gun which according to prosecution evidence belonged to Mwangi Wahogo had therefore no relvance to this robbery and in our view should never have been produced in evidence. As to the robbers being armed with simis the complainant did not mention seeing any simis. All he said was that when he resisted the removal of his wrist watch the appellant took out a panga.

As to the defence of insanity raised by the appellant at the trial below and in his written submissions now the trial magistrate, in our view, has dealt with it efficiently and we do not feel it necessary to add anything further. We agree with his findings and are satisfied that at the time of the robbery the appellant was quite sane and normal. The trial magistrate very properly rejected the defence of insanity. The rest of the grounds of appeal and submissions made by the appellant have no merit.

The appellant was convicted of robbery with violence contrary to section 296(2) of the Penal Code because in the words of the trial magistrate, "it was quite clear the robbery in question involved a dangerous weapon, viz a sub-machine-gun (Exh.1) and therefore involved violence." We have found that the prosecution has not proved that the robbers were armed with a fire-arm. The evidence is that they were armed with only a panga as a dangerous or offensive weapon. The trial magistrate, however, has completely ignored the evidence relating to the panga and has not made any finding as to whether or not the robbers were armed with a panga. We are of the view that if the trial magistrate had not made a finding that the robbers were armed with a patcher gun he would not have convicted the appellant with the offence of robbery with violence contrary to section 296(2) of Penal Code. He would have convicted him of robbery contrary to section 296(1) of the Penal Code despite the fact that there was evidence that

the robbers were armed with a panga. Having carefully considered all the evidence and the arguments put forward by the appellant and the learned state counsel we are satisfied that the appellant was one of the robbers who robbed the complainant on December 10, 1982 of the items mentioned in count 2 but the evidence does not disclose facts to merit a conviction under section 296(2) of the Penal Code.

We set aside the appellants' conviction under section 296(2) of the Penal code and substitute it with a conviction under section 296(1) of the Penal Code.