IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KOOME & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 104 OF 2016

BETWEEN

JANET WANJA WAITHANJE……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi, ***(Mbogholi & Achode, JJ.)*** *dated 20th May 2014)*

in

H.C.CR. A. NO. 102 OF 2012)

****

JUDGMENT OF THE COURT

Background

1. **Janet Wanja Waithanje**, (the appellant) is before us in this second appeal in which she challenges the dismissal of her first appeal by the High Court ***(Mbogholi & Achode, JJ.)***. This followed her conviction in the Chief Magistrate's Court at Kiambu for the offence of robbery with violence contrary to **Section 295** as read with **Section 296 (2) of the Penal Code**.

2. The particulars of the offence were that on 10th March, 2010 at about 9.00 pm at Munene Estate in Kiambu District within Central Province jointly with others not before court while armed with a dangerous weapon namely knife she robbed **Jackson Waweru** of one mobile phone make Nokia 1110, ignition keys, remote control and helmet all valued at Kshs. 10,000/- and at or immediately before or immediately after the time of such robbery she used actual violence to the said **Jackson Waweru**.

3. The appellant also faced the alternative charge of handling stolen goods contrary to **Section 322(2) of the Penal Code**. The particulars were that on 10th March, 2010 at Munene Estate in Kiambu District within Central Province, otherwise than in the course of stealing, the appellant dishonestly retained one helmet knowing or having reason to believe it to be stolen.

4. The prosecution called nine (9) witnesses including **Jackson Waweru** (the complainant), **James Mathaga (James)** and **Samuel Kimiri Mwangi (Samuel)** all *boda boda* (motorcycle taxi) riders.

Also called were the complainant's brother **Simon Ngugi (Simon)**, the arresting officers, **PC John Kaperi (PC Kaperi)** and **PC Boniface Saulo (PC Saulo)**, a Medical Doctor, **Dr. Josephine Kimani (Dr Kimani)**, the investigating officer, **PC Walter Kagondu** (**PC Kagondu**), and **Corporal Peter Nzioka** (**Corporal Nzioka**) who conducted the identification parade.

5. The prosecution's evidence was that at about 8.00 pm on the material day, Samuel observed that the appellant was at a passenger boarding point at Kahawa West for about 15 minutes. He offered her a ride but she declined. She asked for the rider of motorcycle registration number KMC H565H who was the complainant. When the complainant arrived, the appellant asked him to take her to Munene Estate. He gave her a helmet and they proceeded to her destination.

6. When they approached her destination, there was a road barrier and the complainant maneuvered the motor cycle to the side of the road barrier. He swerved to avoid a pothole whereupon he was attacked by two people. It was his further evidence that while he was being attacked, the appellant laughed and asked the two attackers for money for luring "a customer" to them. The assailants stabbed his abdomen

twice and robbed him of a mobile phone, Kshs. 500/- and a driving licence and then ran into the nearby coffee plantation when they saw light from an oncoming motorcycle.

7. **James** testified that when he passed the entrance of Munene Estate he saw a motorcycle on the ground with its lights on. He stopped and saw the complainant coming out of the coffee plantation screaming and was bleeding from the abdomen. The complainant informed **James** that he had been attacked by robbers and rode back to Kahawa West.

8. **James** proceeded to his destination and reported the incident to police officers who were manning a roadblock. He directed them to the scene where the officers, **PC Kaperi** and **PC Saulo** found the appellant in the coffee plantation holding a helmet. According to **PC Saulo**, the appellant's clothes were mud-stained and when they asked her where she lived, she pointed to a direction where there were no houses, thereby raising suspicion. The appellant informed **PC Kaperi** and **PC Saulo** that she had not been raped during the attack by the assailants. **PC Kaperi** and **PC Saulo** arrested her, took her to Kiamumbi Police Station and she was subsequently charged.

9. Meanwhile, the complainant went to a hospital at Kahawa West. **Simon**, the complainant's brother was informed that the complainant had been injured and he went to the hospital. Subsequently, he made arrangements to have the complainant transferred to Kiambu District Hospital where he was treated and admitted for one week. Upon being discharged, the complainant went to Kiamumbi Police Station where he identified the appellant at an identification parade conducted by **Corporal Nzioka**.

10. On cross-examination, the complainant testified that he had noted the appellant's physical features on the material night before giving her a ride as there were street lights and security lights from Equity Bank and neighbouring buildings. **Samuel** also identified the appellant at an identification parade as he had a brief interaction with her at the passenger picking point at Kahawa West.

11. On 18th July, 2011, **Dr. Josephine Kimani,** a Medical Doctor at Kiambu District Hospital examined the complainant and filled a P3 form. Her findings were that he had bruises on the left side of the face and a penetrating stab wound measuring 1cm above the umbilical cord. She assessed the degree of injury as grievous harm.

12. In her defence, the appellant gave an unsworn statement and did not call any witnesses. She denied the offence and stated that on the material day she boarded the complainant's motorcycle and while on their way to her destination they hit a pothole and she fell from the motorcycle whereupon she and the complainant were attacked by two men who ordered them to lie down. The assailants pulled her into a coffee plantation and ordered her to remove her clothes. Thereafter, she lost consciousness and when she gained consciousness, she was naked and her bag and mobile phone were missing. However, she was still in possession of the helmet. She heard the sound of a vehicle and ran to seek help and found police officers who arrested and subsequently charged her.

13. In its judgment, the trial court found that the prosecution had proved the charge against the appellant beyond reasonable doubt. The trial court rejected the appellant's defence reasoning that the appellant's conduct and lack of cooperation with police officers during her arrest pointed to her guilt. The appellant was convicted of the main charge of robbery with violence and sentenced to death.

14. Dissatisfied with the judgment of the trial court, the appellant filed a first appeal to the High Court on grounds that the charge was not proved beyond reasonable doubt; that her defence was reasonable since the helmet found in her possession did not link her to the assailants; and that she was simply a victim of the robbery.

15. The State opposed the appeal on the grounds that the prosecution proved the charge beyond reasonable doubt; that the evidence of the complainant was credible and was not shaken on cross-examination; that the appellant was culpable since she specifically asked for the rider of motorcycle registration number KMC H565H whereupon the complainant was called to take her to her destination; and that the bright street and security lights and the duration that the appellant waited for the complainant were sufficient for **Samuel** to identify her.

16. The learned Judges of the 1st appellate court found that when the appellant arrived at the passenger picking point she specifically sought the complainant to take her to her destination; that she declined the ride offered by **Samuel** and waited for about 15 minutes for the complainant to arrive; that when the complainant was attacked, the appellant was not alarmed but laughed; that she was not injured at all in the attack, that she fled into the coffee plantation together with the attackers; and that she did not report theft of any items at the time of her arrest.

17. Further, the learned Judges found that the appellant was arrested a short while after the incident in the coffee plantation near the scene of the robbery and was found in possession of the complainant's helmet; that contrary to her statement, the appellant did not emerge from the plantation on her own to seek help but rather, it was the police officers who found her inside the coffee plantation; and that when the appellant was found, she was not naked as she had stated.

18. For these reasons, the learned Judges concluded that the ingredients for the offence of robbery with violence were satisfied and dismissed the appeal.

19. Undeterred, the appellant filed this second appeal. The appellant filed a memorandum of appeal *inter alia* on the grounds that the learned Judges erred in finding that the prosecution had proved its case beyond reasonable doubt; and in failing to consider the appellant's defence.

Submissions by Counsel

20. At the hearing of the appeal learned counsel **Mr. Swaka** appeared for the appellant. Counsel submitted that the charge is defective as the evidence adduced was in respect of an attempted robbery and not robbery. Further, that while the charge sheet indicated that the appellant robbed the complainant of one mobile phone make Nokia 1110, ignition keys, remote and helmet all valued at Kshs. 10,000/-, the complainant testified that the items stolen from him were a mobile phone make Nokia, driving licence and about Kshs. 500/-. Counsel further submitted that the helmet that was found in the appellant's possession and which was allegedly stolen from the complainant was the helmet

that the appellant had given to the appellant to use during the ride to her destination.

21. **Mr. Swaka** further contended that the appellant could not have preplanned the robbery as the complainant determined the route to take the appellant to her destination. Counsel submitted that the complainant's allegation that the appellant was laughing at the time of the attack was not substantiated nor proved beyond reasonable doubt. Lastly, he contended that the circumstantial evidence does not irresistibly point to the guilt of the appellant. For these reasons, he urged us to allow the appeal.

22. The learned Senior Assistant Deputy Public Prosecutor (SADPP), **Mr. Moses O'Mirera**, appeared for the State. In opposing the appeal, he submitted that the two courts below made concurrent findings of fact that the appellant was the person who led the complainant to the scene of the crime. Counsel further contended that the anomaly in the charge is curable under **Section 382 of the Criminal Procedure Code.** Finally, he submitted that the two courts below considered the appellant's defence including the fact that she was found in possession of the helmet. Counsel urged us to dismiss the appeal.

Determination

23. We have considered the appeal, the submissions, the authorities cited and the law. On a second appeal, **Section 361 of the Criminal Procedure Code** limits the jurisdiction of this Court to consideration of matters of law as follows:-

> ***"361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –***
>
> ***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
>
> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."***

24. Nevertheless, this Court may interfere with concurrent findings of fact of the trial court and the first appellate court if such findings are based on no evidence or are based on a misapprehension of the evidence or it is demonstrated that the two courts acted on the wrong principles. This principle was enunciated in **Karingo v Republic, *(1982) KLR 219*** as follows:-

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari s/o Karanja -vs- R, (1956) 17 EACA 146)".***
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> See also **Chemagong v Republic [1984] KLR 213**

25. The issues arising for our determination in this appeal are whether the charge against the appellant was defective and whether the prosecution proved its case to the required legal standard.

26. On the question of whether the charge is defective, we find that the items indicated in charge sheet as having been stolen from the complainant were at variance with those that the complainant indicated in his statement to have been stolen.

27. Faced with similar circumstances, where the appellant had contended that the charge was defective as it varied with the evidence in terms of the amount of money stolen, this Court in **Maxwell Kimani Njuguna v. Republic [2003] eKLR Criminal Appeal No. 208 of 2002** stated as follows:

> ***"It is true that the money stated in the charge sheet was less than the money actually recovered in the wallet when it was recovered. But we do not understand that to mean that the charge itself was inconsistent with the evidence. Some particulars of the charge were not in conformity with the evidence but we are far from convinced that that made the charge incurably defective…We think, like the learned Judges of the High Court did, that stating in a charge sheet a lesser amount that the amount which was actually stolen was no more than an irregularity in the charge sheet and it did not render the charge defective. It was an irregularity curable under the above-quoted section [Section 382] of the Criminal Procedure Code and the appellant did not point out to us any sort of prejudice which the irregularity could or did occasion to him."***

28. By parity of reasoning, we do not find merit in the appellant's contention that the charge was defective because of the variance in the items indicated to have been stolen in the charge sheet and in the prosecution evidence.

29. Further, we do not find merit in the appellant's contention that the charge is defective as it points to attempted robbery and not robbery. We find that the charge contains the correct offence and particulars in accordance with **Section 134 of the Criminal Procedure Code** which provides that:-

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

30. The second point of law raised by the appellant was whether the prosecution proved its case to the required legal standard. The appellant was charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** which provides that:-

> ***"(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."*** [Emphasis supplied].

31. This Court succinctly laid down the ingredients of the offence of robbery with violence in **Oluoch v Republic [1985] KLR 549** and held that:

> ***"Robbery with violence is committed in any of the following circumstances:-***
>
> ***(a) The offender is armed with any dangerous and offensive weapons or instrument; or***
>
> ***(b) The offender is in company of one or more person or persons; or***
>
> ***(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."*** [Emphasis supplied].

32. This Court in ***Daniel Muthoni V Republic [2013] eKLR*** found that proof of any of the three elements of the offence of robbery with violence would be enough to sustain a conviction under ***Section 296(2) of the Penal Code.***

However, where we part company with the two courts below is the analysis of the entire evidence including the defence raised by the appellant. The appellant was convicted on the grounds that she was identified by the complainant as being part of the attackers that robbed him, because he heard her laugh and ask them to pay her for availing a customer, further the appellant was found with a helmet that she had been given to wear by the complainant during the ride. The appellant testified in her defence that in the course of the journey, the complainant's motor bike hit a pot hole, whereupon she was thrown off, and a gang of robbers attacked her and the complainant. She testified that the robbers dragged her into a coffee plantation where they attempted to rape her. This was confirmed by the police that the appellant's clothes were muddy, and all along she explained that the helmet was in her possession because it had been given to her as a passenger. Had the two courts below considered this evidence, it would have become apparent that there was doubt as to whether the appellant was part of the gang or was an innocent passenger. In the event the appellant would have been acquitted of the charge.

33. It is clear from the record that the prosecution sought to prove that the appellant committed the offence by establishing the nexus between her and the two assailants who attacked the complainant. The prosecution therefore advanced the theory that the appellant was an accomplice in the robbery as she led the complainant to the scene of the crime.

34. The role of the prosecution is to prove, beyond a reasonable doubt, that the appellant was guilty of the offence that she was charged with. In a bid to do this, the prosecution led evidence that the appellant was found in possession of the complainant's helmet and that she laughed when the complainant was injured.

35. The appellant impugned **Samuel's** evidence that though he offered to ferry her to her chosen destination, she declined and specifically sought a ride from the complainant who took about 15 minutes to arrive at the bus park. It was the appellant's contention that she could not have participated in the commission of the robbery as the complainant selected the route to take her to her chosen destination. On being found in possession of the complainant's helmet in the coffee plantation, the appellant maintained that it was the riding helmet offered to her by the complainant as a pillion passenger. The appellant challenged the complainant's evidence that she was laughing while he was being attacked in that it was neither substantiated nor proved beyond reasonable doubt.

36. The fact that the appellant chose to ride with the complainant; that she laughed and that she was not injured in the attack did not prove that she was an accomplice to the assailants. There is therefore doubt whether the appellant was an accomplice or a victim of the robbery. In **Kamau v Republic (1965) EA 581** it was held that:-

> ***"(iv) while a person who aids and abets the commission of a crime or assists the guilty person to escape punishment is always an accomplice, a person who merely acquiesces in what is happening or who fails to report a crime is not normally an accomplice..."***

35. We are therefore not satisfied that the evidence adduced by the prosecution was sufficient to sustain the appellant's conviction for the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**.

36. In the result, we allow the appeal, quash the conviction, set aside the sentence and order the appellant released from prison forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 19th day of June, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

M. KOOME

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR