



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, M'INOTI & MURGOR, J.J.A.)

CRIMINAL APPEAL NO. 137 OF 2014

BETWEEN

BENARD SHIKUKU WANJALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Busia (Ombija & G.B.M Kariuki, JJ.) dated 2nd July, 2008)

In

H.C.C.R.A. No. 31 of 2004

JUDGMENT OF THE COURT

1. **BENARD SHIKUKU WANJALA** (the appellant herein), appeals to this Court from the judgment of the High Court of Kenya at Busia (**Ombija and G.B.M Kariuki, JJ.**) dated 2nd July 2008 in which the learned judges dismissed the appellant's appeal against his conviction and sentence of death imposed upon him by the Senior Resident Magistrate at Busia (**B. Maloba**) on 1st August 2003.
2. The appellant had been convicted of robbery with violence contrary to **Section 296(2)** of the Penal Code and sentence to death. The particulars were that on the night of 12th July 2002 at Aget village, Amerikwai sub-location, Angorom Location in Teso District of the Western Province, jointly with others not before court, being armed with dangerous weapons namely, pangas and rungas, robbed **Josephat Wafula** of one bicycle frame number 4453956, make road master, one radio cassette number 419171, make Trident. Four blouses, six skirts, one petty coat, five long trousers, thirty two baby clothes and one coat all valued **Kshs. 22,500/=** and at or immediately before or immediately after the time of such robbery used actual violence to the said **Josephat Wafula**.
3. The facts of the case as found by the trial court are that at about 9.30pm on the material night Josephat Wafula (**PW1**), was at his house when his wife opened the door and a gang rushed in. it is alleged that the appellant stated that he had come to finish PW1. He then cut him with a sword and hit him on the chest; as a result PW1 lost consciousness. The appellant and another then took **PW1's** bicycle, bag and radio cassette. **PW1** testified that he identified his radio and bicycle and the bag which had his personal clothes, his Securicor uniform, permit and an agreement for the purchase of the said bicycle.
4. PW1 testified that the lights were on when he was attacked and that he recognized the appellant within 30 seconds because he had previously engaged him to thatch his house.
5. **PW2, Jentrix Adhiambo**, (PW1's wife), told the trial court that she identified the appellant as he was a regular visitor to their home where he did casual jobs. She was also strangled by the appellant. A neighbour came after the attackers had left and took PW1 to the hospital.
6. Both courts below believed the evidence of **PW1** and the other prosecution witnesses. As far as the identification of the appellants is concerned, the trial court stated in that regard:

“In this case the prosecution has established the case against the 1st accused beyond reasonable doubt. The 1st accused was identified by PW1 and 2. They had known the 1st accused for over two months. They had previously engaged the 1st accused to thatch their hut. It is this identification that is reliable.”

The High Court concurred with these findings and upheld the conviction and sentence.

7. The appellant now appeals to this Court against the said conviction and sentence on five grounds, namely, that he was not subject to the fair trial; that the offence was not proved beyond reasonable doubt; that the two courts below erred in law by relying on evidence of an informer; that the two courts below erred in law in failing to note that the police laid a trap that led to his arrest; and that the doctrine of recent possession was wrongly applied.

8. These grounds were advanced by **Mr. Mshindi**, learned counsel, on behalf of the appellant. Relying on his written submissions, his first argument was that the appellant was not accorded a fair trial by virtue of the fact that he was never supplied with all materials, exhibits, witness statements or any other documents in order to enable him prepare for his defence. On identification, Counsel submitted that the conditions for identification were not conducive and **PW2's** testimony was full of contradictions. The nature and intensity of the light was insufficient for proper identification, counsel added.

9. Counsel also faulted the two courts below for relying on the evidence of an informer. **PW5** testified that he got a report from an informer that the appellant had been seen with stolen items. According to the appellant, this was hearsay evidence.

10. On the doctrine of recent possession, Counsel argued that the items were planted on him and that was when he was arrested. He submitted that the same cannot be said to be recent possession as he was not found with the items immediately after the alleged robbery.

11. On the ground that the offence was not proved beyond reasonable doubt, counsel submitted that the conditions required to prove the offence of robbery with violence as enunciated in ***Oluoch v Republic (1985) 2 KLR 549*** were not met. He contended that the testimonies of the main prosecution witnesses, **PW1** and **PW2**, who alleged to have properly identified the appellant visually and by voice were full of contradictions and inconsistencies.

12. Mr. Mshindi further submitted that the learned judges failed to consider that crucial medical evidence was not produced to establish wounding of **PW1** or the nature of weapon used, and hence it was not proper to convict the appellant for the offence of robbery with violence.

13. The appeal was opposed by **Mr. Sirtuy**, learned Principal Prosecution Counsel, on behalf of the State. He maintained that identification of the appellant was clear and the doctrine of recent possession was properly applied. He urged that the appeal be dismissed.

14. **Section 361 of Criminal Procedure Code** enjoins us, acting as a second appellate court, to consider only issues of law. This Court will therefore not interfere with concurrent findings of fact by two courts below unless such finding were made on no evidence at all or if no court would reasonably have concluded as the lower courts did if it followed that evidence. See ***M' Riungu v. Republic (1983) KLR 455***.

15. The core issue in this appeal is whether the charge of robbery with violence was proved to the required standard. The offence of robbery with violence, as well as its ingredients are provided in **Section 296 (2)** of the Penal Code in the following terms:

“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.”

16. In ***Oluoch v. Republic (1985) KLR 549*** this Court set out the ingredients of robbery with violence. The court rendered itself in the following manner:

“The ingredients of the offence of robbery under section 296(1) of the Penal Code are:

a) Stealing anything and

b) At or immediately before or immediately after the time of stealing,

c) Using or threatening 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.”

17. This has been reaffirmed by this court on several occasions, such as in ***Daniel Muthomi M'arimi v Republic (2013) eKLR*** where the court stated that proof of any one 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.

18. Based on the aforementioned principles and the uncontroverted evidence of **PW1** highlighted in the beginning, we are satisfied that the ingredients of the offence of robbery with violence were present.

19. One of the factors relied upon by the courts below is the doctrine of recent possession. In Gideon ***Meitekin Koyiet v Republic (2013) eKLR***, this court stated that the doctrine of recent possession is applicable where the court is satisfied that the prosecution has proved the following:

a) “that the property was found with the suspect;

b) That the property was positively identified by the complainant;

c) That the property was recently stolen from the complainant.”

20. **PW3** had stated in his evidence that he noticed a bicycle with some luggage at his home. After about two hours the appellant came and claimed the items. He then reported to the Assistant Chief and an arrest was made. This evidence was corroborated by **PW4**, a village elder who was shown the items and later facilitated the arrest of the appellant. The bicycle and the luggage on it were the very items that **PW1** had been robbed of. Our conclusion from these facts is that neither the trial court nor the first appellate court could be faulted for relying in the doctrine of recent possession in finding the appellant guilty.

21. The onus fell upon the appellant to offer an explanation as to what he was doing with the items or how he got possession of them.

22. Having re-analysed the record fully, it is patently clear from the substance of the appellant’s cross-examination and the prosecution evidence that the evidence before the trial court was that the appellant was identified by the **PW1** and **PW2** through recognition and that he was also found to be in possession of complainant’s **PW1**’s property but did not offer any valid explanation as to how the property came to be in his possession. The proof of possession herein without explanation justifies an inference of guilt.

23. Consequently, we dismiss the appeal against conviction. As regards sentence, in ***Francis Karioko Muruatetu & Another v Republic (2017) eKLR***, the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional.

The Court held:

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the constitution; an absolute right.”

24. Although the said decision was in respect of the offence of murder for which the Penal Code prescribes mandatory death sentence upon conviction, by parity of reasoning, the same may also apply in a charge of robbery with violence under **section 296(2) of the Penal Code**, where upon conviction the law prescribes a mandatory death sentence.

25. In his mitigation before the trial court, the appellant said he was a first offender and pleaded for leniency. However, the trial court’s hands were tied by the provisions of **section 296(2) of the Penal Code** as it was interpreted then and could not pass any other alternative sentence except that of death. Considering the appellant’s mitigation and in light of the Supreme Court’s pronouncement in the above cited decision, we are inclined to allow the appeal against sentence. Consequently, we hereby set aside the death sentence and substitute therefor with sentence to imprisonment for a term of 25 years from the date of the appellant’s conviction by the trial court.

Dated and delivered at Kisumu this 24th day of JANUARY, 2019

D.K. MUSINGA

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR