



IN THE COURT OF APPEAL

AT NYERI

SITTING AT NAKURU

CORAM: WAKI, NAMBUYE, & KIAGE, JJA)

CRIMINAL APPEAL NO. 7 OF 2011

BETWEEN

ALEX MWANGI WAWERU..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at

Nakuru (Emukule, Ouko, JJ.) dated 5th March, 2010).

in

(H. C. CR. A. No. 293 of 2009)

JUDGMENT OF THE COURT

In this second and final appeal, **ALEX MWANGI WAWERU** (the appellant) challenges the dismissal of his appeal by the High Court at Nakuru (Emukule J. and Ouko J. (as he then was)) against the conviction and sentence of death imposed on him by the Nyahururu Ag. Senior Resident Magistrate for the offence of robbery with violence. The particulars of the offence were that:

"On the 28th day of October 2008 at Githunguchu village in Nyandarua District within the Central Province, while armed with a sword robbed SIMON NJAGI WANJIRU of a mobile phone make Motorola C117 and cash Kshs 80/= (eighty only) all valued at Kshs 2,080/= (two thousand and eighty shillings only) and at the time of such robbery used actual violence to the said Simon Njagi Wanjiru."

The prosecution evidence on which the trial court founded and the High Court affirmed, the appellant's conviction was that on the material night, Simon Njagi Wanjiru (Simon) a resident of Githunguchu who did "casual jobs wherever [he] found them" entered a bar christened 'Karuma' at Mairo Inya Trading Centre. He was in the company of **JAMES KAMAU** (James). They found the appellant arguing with **CHARLES WANYIRI** (Charles) apparently over some money. It cannot have been a

serious argument and indeed the other bar patrons simply ignored them.

After taking some drinks, all four, who were friends, decided to walk home. The appellant then suggested to Simon, who agreed, that the two walk ahead of James and Charles who were 'walking slowly'. After walking for a about three (3) kilometers, in Simon's reckoning, the appellant jumped on Simon and tried to strangle him, wrestled him to the ground and demanded to be given everything Simon had. The latter complied, giving him a Motorola C117 mobile phone he had received from Charles at the bar, as well as some Kshs 80. After this, according to Simon;

"He (the appellant) then removed a knife from his waist. He told me to remove my trousers as he wanted to have sex with me. I hesitated but removed my trousers. The accused removed his trousers and I screamed. The scream attracted the attention of a watchman who came but the accused fled inside a maize plantation."

Simon then narrated his ordeal and narrow escape to the watchman, who testified in court as PW4, and to James and Charles. The three friends then walked homeward together. On getting near the appellant's house, they found him with a *panga* which he threw at James, but missed. The trio, with help from members of the public, chased, caught up with and arrested the appellant. Nothing was recovered from him but he was tied up and taken to *Mairo Inya* Police Station where he was detained and later charged in court.

The appellant in his defence made an unsworn statement in which he denied the charge and stated that he was in fact the victim of an assault by Simon. This is because the appellant had called Simon "uncircumcised".

The appellant's self-authored Memorandum of Appeal charges that the learned Judges erred by upholding a conviction based on the testimony of a single witness acted upon without warning; failing to find that he was not accorded a fair trial; upholding a conviction based on a defective charge sheet; failing to find that the case was not proved; upholding a conviction based on inconsistent and contradictory evidence and dismissing his plausible defence.

At the hearing of the appeal the appellant's learned counsel **Mr. Ngamate** relied on and elucidated upon these grounds. He in particular emphasized that it is only Simon's evidence that was tendered as to what happened, there not having been any other eye-witness. He also questioned whether any violence was used on Simon in the absence of any P3 or other medical evidence of injury. No weapon was produced in evidence either and the other members of the public not having been called to testify. The conviction was not safe, contended counsel, and should be quashed.

For the Republic, **Mr. J. K. Mutai**, the learned Senior Principal Prosecution Counsel opposed the appeal by first pointing out, correctly, that this being a second appeal, our jurisdiction is limited to a consideration of matters of law only and not of fact, by dint of **Section 361** of the **Criminal Procedure Code**. He contended that most of the matters raised in the Memorandum of Appeal were questions of fact and there being concurrent findings of fact by the courts below, we ought not to interfere. He next submitted that the alleged contradictions in the prosecution evidence were minor and had, moreover, been addressed by the High Court. Counsel also asserted that nothing turned on the non-production of the exhibits, explaining that the appellant having fled into a maize plantation, he might as well have disposed of the items he stole from Simon and the weapons he was stated to have had. He made light of the non-production of the P3 Form as even though there was no injuries suffered by Simon, other elements of the offence of robbery with violence were present and proved.

It is trite that we deal only with matters of law. We seldom interfere with the concurrent findings of fact by the first instance and first appellate courts. We interfere and dislodge those findings only where the same are based on no evidence (See **NJOROGE VS. REPUBLIC** [1982] KLR 388; **SAI VS. REPUBLIC** [2009] KLR 353) or are based on a misdirection on a misapprehension of the evidence of such nature and magnitude as to render the same bad in law and untenable. See also **KIARIE VS. REPUBLIC** [1984] KLR 739; **CHRISTOPHER NYOIKE VS. REPUBLIC** [2010] eKLR.

The pivotal point of law raised in this appeal is whether, on the facts, the offence of robbery with violence was proved. The offence is said to be committed when any one of the certain aggravating factors are proved in addition to the fact of robbery which is defined at **Section 295** of the **Penal Code** as *stealing accompanied with the threatened or use of actual violence to any person or property in order to obtain or retain the thing stolen or prevent or overcome resistance to the stealing or retention.*

The aggravating factors which convert a simple robbery to the capital offence called robbery with violence contrary to **Section 296 (2)** of the **Penal Code** are when the offender, as was stated in **OLUOCH VS. REPUBLIC** [1985] KLR 549 at 550;

"a) Is armed with any dangerous or offensive weapon or instrument; or

b) Is in company with one or more other person or persons; or

c) At or immediately after the time of the robbery [he] wounds, beats, strikes, or uses other personal violence to any person."

Having anxiously considered the evidence on record and the rival submissions made before us, we are not persuaded that the offence of robbery with violence was proved. On whether the appellant was armed with a dangerous or offensive weapon, whereas the charge as laid stated that he was armed with a sword, there was no evidence led that he had any such sword. What Simon said is that the appellant removed a knife from his waist. There was no indication that the knife was brandished at or used to threaten Simon. More critical to our analysis is that the appellant allegedly removed the knife from his waist after he had allegedly taken the phone and money as he asked Simon to remove his trousers so as to have sex with him.

The knife was never produced and is not in the charge sheet. If the appellant ever had it, Simon was oblivious of its existence at the time when he was allegedly dispossessed of the phone and money. The investigating officer's claim that the appellant was armed with a sword and knife is not borne out by the evidence. The fear factor that a dangerous or offensive weapon brings to bear in a robbery situation was therefore totally lacking and that element therefore was not established.

The other element charged is that actual violence was used on Simon. His own testimony was that he was jumped upon and wrestled to the ground. He never raised alarm, doing so only when the appellant undressed to have anal sex with him. That is when he screamed. Simon did not complain of having suffered any injuries. No medical evidence was availed of any such injuries. Indeed, the investigating officer **P.C KIMATHI KINOTI** (PW5) stated thus in cross-examination;

"The complainant did not have injuries. He was only slapped. He never went to hospital"

Simon never testified that he was slapped. He never mentioned any form of violence to PW4, the first person to answer his sex-scared scream. There therefore appears to have been absolutely no evidence in proof of personal violence against Simon.

Once these two elements are unproven, and the third being inapplicable as the appellant was alone, the offence of robbery with violence was not proved. Indeed, it is telling that when PW4 came to the scene, all that Simon told him was that the appellant had wanted to sodomize him. There was no mention of robbery, whether simple or with violence. Adding to this the absence of any recoveries of the money or the phone, the matter is left to the word of Simon that of against the appellant. The appellant's defence that he was in fact the victim in what appears to have started as a tipsy tiff between friends and neighbours over Simon's alleged uncircumcision does not appear to be implausible. The learned Judges' off-hand rejection of his explanation, though unsworn, coupled with their finding that *"the appellant was obviously a calculating and shrewed operator [who] isolated [Simon] and snatched the cell-phone from him"* was not based on evidence and was clearly erroneous, calling for our interference..

In the result, we conclude that the appellant's conviction was unsafe. It is accordingly quashed and

the sentence of death set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Nakuru this 14th day of April, 2016

P. N. WAKI

JUDGE OF APPEAL

R. N. NAMBUYE

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR