



IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 18 OF 2009

BETWEEN

DANIEL NJOROGI MBUGUA.....  
.....APPELLANT

AND

REPUBLIC .....  
....RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nairobi (Ojwang & Dulu, JJ.) dated 9th February, 2009*

in

H.C.C.R.A. NO. 285 OF 2006)

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JUDGMENT OF THE COURT

This is a second appeal by **Daniel Njoroge Mbugua**, (hereinafter referred to as the appellant) who was charged before the Principal Magistrate's Court at Kikuyu with the offence of robbery with violence contrary to *Section 296 (2)* of the Penal Code. The particulars of the offence were that: -

***“On the 5th day of June, 2005 at Kerua Village in Kiambu District within Central Province jointly with another not before court while armed with offensive weapons namely toy pistol robbed George Gaitho Kung'u of cash, in the sum of Kshs.2000/=, and at or immediately before or immediately after the time of such robbery, threatened to use actual violence upon the said George Gaitho Kung'u.”***

A summary of the prosecution case was that PW1 *Joseph Kariuki Munga* testified that on 5th June, 2005, at 8.15a.m. he was on duty in his office when two men entered and informed him that they wanted to purchase milk. They then whipped out pistols and commanded those in the office to lie down. They demanded money and grabbed Kshs.2,000/= and ran away. PW1, PW2 (*George Gaitho Kungu*) and others in the office screamed and gave chase after the assailants. They caught up with one of the assailants and arrested him, while the other escaped. PW1 and PW2 recovered a toy pistol which had fallen as the assailants ran away. The assailant who had escaped, ran off with the sum of Kshs.2,000/=. The assailant who was arrested is the appellant herein. PW1 testified that he did not know the appellant

before that day.

PW2 testified that he was a clerk with Limuru Dairy. On 5th June, 2005 at 8.15 a.m. two people came into the shop and said they wanted to buy milk. He testified that he went into the office to call his colleague and the two followed him into the office. They removed a pistol and ordered those in the office to lie down and demanded the money PW1 and PW2 had made from proceeds from sale of milk. PW2 testified that he hit and injured the appellant with a *jembe* while the other assailant ran away with the money. He further testified that he arrested the appellant and that he did not know the appellant before the day of the violent robbery and did not have a grudge against him.

PW3 (No. 93048632) *Abdi Kala* of Kabete AP Post testified that on 5th June, 2005 while on duty, the appellant was taken to the Police Post by people who reported that he had robbed them of Kshs.2,000/= while armed with a toy pistol. He re-arrested the appellant.

PW4 (No. 60106) *Pc Isaac Ngugi* of Kikuyu Police Station testified that on 5th June, 2005 at 10.00 a.m, PW3 and others took the appellant to the

police station and informed him that the appellant together with another assailant, had committed the offence of robbery with violence while armed with a toy pistol. He re-arrested the appellant. He identified the appellant as the person sitting in the dock and also identified the toy pistol.

At the close of the prosecution case, the appellant was put on his defence and gave unsworn testimony. In his defence, the appellant testified that on the material day while on his way to buy milk from Kerwa Dairy, he saw two people behind him. The two removed a gun and ordered everyone to lie down. He lay down as ordered and then heard the complainant say that the gun was a toy. Although he was not one of the robbers, he was arrested and taken to the police station. It was his testimony that there was a grudge between him and PW2 arising from his relationship with his girlfriend, DW2 who had previously been PW2's girlfriend.

DW2 confirmed that she was indeed the appellant's girlfriend and had previously been PW2's girlfriend. She however explained that she was not with the appellant at the time of the robbery and that she did not know whether he had committed the offence with which he was charged.

The trial court, being satisfied of the appellant's guilt, found that the prosecution had proved its case beyond reasonable doubt and convicted and sentenced him to death.

Aggrieved by the judgment, the appellant preferred an appeal to the High Court in which he faulted the trial court on the following grounds: that the prosecution did not prove its case beyond reasonable doubt; that the evidence of the two prosecution witnesses was contradictory and that the prosecution failed to call vital witnesses.

The appeal was opposed by the State, who argued that the burden of proof was properly discharged; that the prosecution case was proved beyond reasonable doubt; the prosecution witness' testimonies were corroborative and sufficient; and that all vital witnesses were called.

The first appellate court after re-evaluating the evidence on record, was satisfied that the prosecution had proved its case beyond reasonable doubt, that it was indeed the appellant, together with another, while armed with a pistol who robbed PW1 and PW2. The Court dismissed the appeal and upheld the conviction and sentence.

Aggrieved once again by this judgment, the appellant preferred this second appeal. He relied on the Supplementary Memorandum of Appeal dated

16th September, 2013 and filed on 20th September, 2013 which sets out grounds of appeal which can be summarised as follows: -

- i) The learned Judges failed to re-analyse and re-evaluate the evidence which was contradictory and inconsistent.*
- ii) The prosecution case was not proved beyond reasonable doubt.*
- iii) The appellant's defence was neither considered nor displaced;*
- iv) Vital witnesses were not called to testify.*

At the hearing of the appeal, Ms. Khaemba, learned counsel represented the appellant while learned counsel Mrs. Njeru, Senior Prosecution's Counsel represented the respondent. Learned counsel for the appellant argued that the High Court should have re-evaluated the evidence of the trial court. Counsel submitted that the evidence of PW1 and PW2 was contradictory in that they were not sure how the appellant was arrested, whether by a mob or by PW1 and PW2. Counsel argued that PW1 and PW2 had testified that there were other people at the scene of the crime but they were not called to testify.

Counsel further argued that the prosecution did not prove its case beyond reasonable doubt and further that the toy pistol was not found with the appellant; that had the High Court re-evaluated the evidence of the trial court it would have come to a different conclusion; that due consideration was not given to the defence and that the prosecution case was not proved beyond reasonable doubt.

Mrs. Njeru argued that PW1 and PW2 both testified that the appellant was arrested in person. Counsel argued that from the evidence on record, PW2 hit and injured the appellant and that upon being injured he was apprehended and found with a toy pistol. Counsel argued that this was the same toy pistol used to threaten PW1 and PW2. In counsel's view the evidence of PW1 and PW2 is therefore not contradictory but is corroborative and sufficient.

On the issue that vital witnesses were not called, counsel submitted that the crucial witnesses were called and that they gave the crucial evidence; that the evidence of other witnesses was not vital hence not fatal to the prosecution case. In counsel's view the offence or robbery with violence was proved as all the ingredients of robbery with violence were present and proved. Counsel added that the appellant's defence was considered by the two courts below and it was found to lack merit; that it was PW1's and PW2's evidence that two people had attacked them. There was no evidence of other people in the premises and the evidence adduced in defence was in counsel's view strategic and not factual.

By dint of *Section 361* of the Criminal Procedure Code, this Court has jurisdiction only to deal with matters of law. We are guided by **Karingo vs. R.(1982) KLR 213 at page 219** where this Court held that:

“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.”

See also **Thiaka vs. R. [2006] eKLR.**

On the issue that the High Court did not re-evaluate the evidence of the lower court, we note that the High Court re-considered the testimonies of all the witnesses. The court stated: -

“We have carefully considered all the evidence as well as the manner in which the learned magistrate had analysed the same before finding the appellant guilty and convicting him accordingly.”

From the record, we find that the evidence of PW1 and PW2 was consistent and their testimonies

corroborative. Any discrepancies or inconsistencies in the evidence adduced by the prosecution were minor and did not weaken the probative value of the evidence on record.

On the issue that the prosecution case was not proved and that the appellant should have been charged with the offence of robbery and not robbery with violence, we find that all the ingredients of robbery were present and proved.

**Section 296 of the Penal Code provides: -**

**“296 (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.**

**(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.”**

The ingredients of the offence of robbery with violence were further elaborated by the Court of Appeal in the case of **Oluoch vs. Republic (1985) KLR** where it was held that robbery with violence is committed in any of the following circumstances:

***“(a) The offender is armed with any dangerous and offensive weapon or instrument; or***

***(b) The offender is in company with 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.***

The use of the word “or” implies that if any of the three conditions is fulfilled then the offence would be said to have been committed.

This is the position taken by the High Court in **Mohamed Ali v Republic (2013) eKLR** where it was held ***“the use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296 (2) of the Penal Code.”***

In the instant appeal, the appellant was in the company of another, they were in possession of a pistol, robbed PW1 and at or immediately before or immediately after the time of such robbery, threatened to use actual violence

upon PW1. This Court recently held in **Michael Nganga Kinyanjui vs. R (2014) eKLR** that a toy gun is an offensive weapon for the purpose of the Penal Code.

We find that all the ingredients of the offence of robbery with violence were present and proved by the prosecution beyond reasonable doubt.

We are satisfied that the two lower courts below carefully scrutinised the evidence before them and arrived at the right conclusion that the appellant was properly identified and that there was no doubt at all of the identity of the appellant. We find that the High Court correctly upheld the trial magistrate in rejecting the defence raised by the appellant.

On the issue that vital witnesses were not called to testify, Mrs. Njeru argued that the prosecution need not call a superfluity of witnesses. This

Court is guided by the case of Mwangi vs. R [1984] KLR 595 where this Court stated: -

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

From the record, it was not pointed out who the uncalled vital witnesses were or the possible materiality of their evidence.

The findings of the trial court and the High Court were based on sound evidence. In the circumstances, there is no basis for interfering with those findings.

Accordingly, we dismiss this appeal in its entirety.

*Dated and delivered at Nairobi this 30th day of May, 2014.*

**W. KARANJA**

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**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**I certify that this is**

**a true copy of the original.**

**DEPUTY REGISTRAR**