



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), WARSAME & MWILU, JJA)

CRIMINAL APPEAL 306 OF 2007

BETWEEN WILLIAM MWONGERA IGWATHU

AND

REPUBLIC.....RESPONDENT

*(an appeal from the judgment of the High Court of Kenya at Nairobi (Lesiit & Dulu, JJ.)
dated 17th May 2007*

in

H.C. Cr. A 53 of 2005)

JUDGMENT OF THE COURT

This is a second appeal by William Mwangera Igwathu, hereinafter referred to as ‘the appellant’, who challenges his conviction of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code, Chapter 63 of the Laws of Kenya. The brief particulars of the charge were that on the 18th day of May 2004, the appellant, together with John Mwangi Mahugu (now deceased), along Bogani Road near the Catholic University of Eastern Africa in Hardy Area within the then Nairobi Province, jointly and while armed with a knife, robbed Belinda Nakesa Obore of Kshs 2,010.00 in cash and one handbag, and immediately at the time of the robbery, used or threatened to use violence to her.

The prosecution’s case was that on the 18th May 2004, at around 11:30 am, Belinda Nakesa Obore (PW1) was walking home from the Catholic University campus when she was approached by the appellant and the deceased. The appellant, who was armed with a knife, ordered her to give him money and her mobile phone or else they would kill her and throw her in the forest. The appellant took her handbag, pushed her onto the road and then he and the other assailant ran away in the direction of the nearby forest.

PW1 began screaming, which attracted passers-by who went into the forest to search for the assailants. PW1 went back to the Catholic University grounds. Patrick Wanyama Busia (PW2) was a security guard at the Catholic University who went to the scene; he met PW1 at the stage who narrated her ordeal to him. PW2 headed into the forest where he saw the appellant, who ran away. PW2 joined members of the public in chasing and apprehending the appellant. PW2 took the appellant to the Catholic University grounds where PW1 identified him as one of the people who had robbed her. The appellant was searched, and the money stolen from PW1 was recovered.

PC Kioko Muthungu (PW3) was at the time attached to the Hardy Police Station when he received information of a robbery in the vicinity of the Catholic University. He went to the scene and after getting a narration of what had occurred, PW3 escorted the appellant to the Langata Police Station. At the station, the appellant admitted to having robbed PW1 and led PW3 to the scene where PW1's handbag had been hidden.

The appellant on his part denied committing the offence and stated that on the day in question, he was walking to the Rongai Shopping Centre when he saw some people running behind him. These people ransacked his clothes and took his money, and then arrested him.

Upon receipt of this evidence, the trial court found that the prosecution had proved its case beyond a reasonable doubt and therefore found the appellant guilty as charged, and sentenced him to death as prescribed by law.

The appellant being aggrieved with his conviction, preferred a first appeal. He alleged that the charge sheet was defective because it did not describe the knife as being the offensive weapon; that the evidence relied on to convict him was unsafe as it was by a single identifying witness, yet the trial magistrate never cautioned herself in relying on it; and that the trial magistrate rejected his defence without giving it any due consideration.

After acknowledging it duty to analyse and evaluate the evidence tendered before the trial court, the High Court dismissed the appeal, upholding the conviction and affirming the sentence.

In this appeal, the appellant relies on the supplementary memorandum of appeal dated the 18th February 2014 which lists three grounds of appeal as follows:

1. ***That the learned appellate judges erred in law in upholding the conviction based on insufficient evidence, hence the case was not proved beyond reasonable doubt contrary to section 107 of the Evidence Act;***
2. ***That the learned trial judges erred in law and fact in upholding the sentence and conviction (sic) yet failed to find that vital witnesses were withheld from testifying in breach of section 150 of the Criminal Procedure Code; and***
3. ***That the learned appellate judges erred in law and fact by failing to re-evaluate the entire evidence on record in reaching their decision.***

In a second appeal, we are enjoined by section 361 of the Criminal Procedure Code to consider only matters of law. We are also alive to the fact that in a second appeal, the Court is bound by the concurrent findings of fact and law of the lower courts, unless we find them perverse or unsupported by the evidence. These principles were reiterated by this Court in ***Boniface Kamande & 2 Others v Republic [2010] eKLR (Criminal Appeal 166 of 2004)*** in the following manner:

“On a second appeal to the Court, ... we

are under duty to pay

proper homage to the concurrent

findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable

tribunal could be expected to base any decision upon it.”

The grounds of appeal were canvassed before us by Ms Mwangi for the appellant, and Mr V. S. Monda, Senior Principal Prosecution Counsel, opposed the appeal on behalf of the state. Ms Mwangi submitted that the evidence could not sustain the charge of robbery with violence because it was never proved that it was the appellant who attacked the complainant, and also because the knife that was allegedly used in the assault was never recovered. In addition, counsel stated that the money recovered from the appellant was his, and not the complainant's. Counsel therefore urged us to find that the charge was not proven beyond a reasonable doubt. Moreover, Ms Mwangi took issue with the re-evaluation of the evidence by the first appellate court, arguing that such re-evaluation was improper and led the first appellate court to the wrong conclusion.

In response, Mr Monda submitted that the evidence of PW2 was clear that she was accosted by two men, who were both armed, which is enough to prove the charge of robbery with violence beyond a reasonable doubt. Counsel further submitted that the first appellate court accepted this evidence, and also appreciated that the conditions prevailing were favourable for the positive identification of the appellant. He concluded by stating that the High Court properly evaluated and analysed the evidence tendered before the trial court, and made the correct conclusion that it was the appellant who robbed the complainant.

To sustain a charge of robbery with violence, the evidence available must show, in addition to the fact of robbery, any one of three essential ingredients. These were set out in the decision of this Court in **Johana Ndungu v. Republic [1996] eKLR (Criminal Appeal No. 116 of 1995)** as follows:

“(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296

(2) which we give below and any one of which if proved will constitute the offence under the sub-section.

- 1. If the offender is armed with any dangerous or offensive weapon or instrument, or***
- 2. If he is in company with one or more other person or persons or***

(3) If, at or immediately before or immediately after the time of the robbery, he wounds, beats , strikes or uses any other violence to any person.”

The holding in that appeal was relied upon in **Michael Nganga Kinyanjui V Republic [2014] eKLR (Criminal Appeal No. 230 of 2011)** where the Court held that:

“The act of being armed with a dangerous or offensive weapon is but just one of the elements under Section 292 (2) of the Penal Code. There are other elements such as being in the company of one or more persons, or wounding, beating, striking the victim, which if proved would bring the offence under Section 296 (2)”

In the appeal before us, the concurrent findings of fact and law of the courts below were that the appellant was in the company of another person during the course of the robbery of PW1, and that during that robbery he used the threat of force on PW1. These facts are borne out in the testimony of PW1, who also stated that during the course of the robbery, she fell after being pushed down by the appellant. PW1 lost her handbag and Kshs 2,010.00. The money was recovered from the appellant, and further, it was the appellant who led PW3 to the forest where the handbag had been hidden. It is clear to us that it was the appellant who led to the recovery of the handbag that was stolen from PW1 during the robbery. The fact that the appellant led PW3 to the place from where the handbag was recovered is a clear manifestation that it was the appellant who committed the robbery. These facts are in our view enough to sustain the charge that it was the appellant who committed the offence against PW1. If the appellant had not committed the robbery we doubt that he would have led PW3 to the forest where the handbag was recovered. In any case, he did not give any explanation as to how he came to know the location of the

handbag. Having led PW3 to the recovery of the handbag that had been stolen, the onus lay on the appellant, pursuant to section 111 of the Evidence Act, Chapter 80 of the Laws of Kenya, to explain how he came to know its location because this was a matter that only he could explain.

As was stated by this Court in *Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR (Criminal Appeal No 5 of 2008)*, the failure of a first appellate court to re-evaluate the evidence tendered before the trial court is a serious omission of law that would warrant the interference of this Court. The question here is whether there is such a failure on the part of the first appellate court as has been alleged by the appellant.

It is apparent from the judgment of the High Court that the evidence tendered, as well as the submissions given before that court, were given due consideration by the learned judges, who formed the opinion that the prosecution had proved two ingredients of the offence, and that the incident in question took place in broad daylight thus enabling the complainant clearly see the appellant rob her and thereafter positively identified him as one of the robbers. In addition, the learned judges considered the fact that the appellant had been arrested in the vicinity of the scene of the robbery, as well as the fact that it was the appellant who led PW3 to the area where PW1's handbag was recovered, and concluded that there was sufficient evidence to connect the appellant with the offence. To its credit, the first appellate court reconsidered the entire case, analysed all the evidence tendered before the trial court, and rendered itself in the following manner:

“We have considered that money is a common item and the fact that the Appellant had in his possession the exact amount stolen from the [complainant] is per se not proof it belonged to the Complainant. However, we do not find the fact that the Appellant led to the recovery of the Complainant's bag within 2 hours of its theft was a mere coincidence. The recovery of the bag has to be taken together with the recovery of the money in the exact denomination the Complainant was robbed off and the arrest from the same area the robbers had run into after robbing the Complainant. Even [though] the evidence of identification by the Complainant may not carry much weight in that it was done before she described him to those who arrested the Appellant, that of recovery and the handbag are sufficient evidence to connect the Appellant with the offence.”

This was sufficient re-evaluation of the evidence on record, and the first appellate court cannot be faulted. We therefore find no merit in the appellant's assertion that the first appellate court failed in its duty to re-evaluate and re-analyse the evidence tendered before the High Court.

The second ground by Ms Mwango on behalf of the appellant was that vital witnesses did not testify during trial. In particular, counsel argued that PW2 stated that he had conducted a search for the appellant with a man called 'Robinson' but the said person was never called to testify. It is the appellant's position that the absence of this witness was a failure on the part of the prosecution. To buttress this submission, the appellant relied on the decision of the High Court of Kenya at Kisumu in *Victor Ochieng Owuor v Republic [2013] eKLR (Criminal Appeal No 46 of 2013)* in which the High Court allowed an appeal on the basis *inter alia* that material witnesses were not called, and therefore held that the presumption was that if those witnesses had been called, they would have given evidence averse to the prosecution.

Mr Monda on his part refuted this submission and stated that the witnesses called by the prosecution were sufficient, and that the totality of their evidence was that the appellant was at the scene of the robbery and is the one who committed the offence under determination. Counsel also urged us to consider that the appellant himself never denied being at the scene of the robbery.

On our part, we have considered the rival arguments of both sides, and our first and foremost view is to rely on section 143 of the Evidence Act which provides:

“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

In Mwangi v Republic [1984] KLR 595 it was held that:

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

Further in Collins Akoyo Okwemba & 2 others v

Republic [2014] eKLR (Criminal Appeal No. 684 of 2010)

this Court held as follows:

“The prosecution is under no obligation to call any number of witnesses so long as they bring before the court evidence sufficient to prove their case to the required standard.”

Applying these principles to the circumstances at hand, we agree with Mr Monda, counsel for the respondent, that the witnesses called by the prosecution gave sufficient and cogent evidence. In our view, even if Robinson, who was among the people who arrested the appellant, had been called, he would have given similar evidence to that of PW2. The failure of the prosecution to procure his testimony did not weaken its case, and we do not think that any negative inference can be drawn from the fact that he was not called by the prosecution. We agree with Mr Monda that the evidence on record is overwhelming and sufficient to sustain the conviction of the appellant. On the whole, the prosecution proved its case to the standard required by law. In our considered view, the contention that failure to call a particular witness vitiated the strength and weight of the prosecution case is without any basis or foundation.

In the result, we find that the trial court was right in convicting the appellant on the evidence presented before it. The prosecution proved its case beyond a reasonable doubt and the conviction of the appellant is safe, and the first appellate court was correct in upholding it. That being our view of the matter, the only order that we can make is that this appeal be, and is hereby dismissed.

Dated and delivered at Nairobi this 24th day of October, 2014

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

P. M. MWILU

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I certify that this is a true copy of the original

DEPUTY REGISTRAR *mwk*