



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KIHARA KARIUKI, FATUMA SICHALE, OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 52 of 2011

BETWEEN

ISAAC MWANGI WANJIKU..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Ouko J.) dated 25th February 2011

in

H.C.CR.A. NO. 379 of 2003)

JUDGMENT OF THE COURT

1. The appellant was convicted by the Chief Magistrate at Nakuru of the offence of robbery with violence contrary to **Section 296 (4)** of the *Penal Code* and sentenced to death. His appeal to the superior court against conviction and sentence was dismissed. The superior court, (Ouko J) upheld the conviction and sentence in a judgment delivered on 25th February 2011. This is a second appeal.
2. The particulars of the charge alleged that on 16th December 2002 at Koinange estate in Nakuru District within the Rift Valley Province, jointly being armed with dangerous or offensive weapon namely a sword robbed Nancy Njoki of her two radio cassettes, two mobile phones, thirteen CD discs, one camera, one knife, one bag and Ksh. 500/= all valued at Ksh. 62,000/= the property of Grace Wanjiru and at immediately before or immediately after the time of such robbery threatened to use personal violence to Nancy Njoki.
3. The PW 1 a female adult by name Nancy Njoki gave evidence at the trial. She stated she had finished school and was staying with her mother PW 2 at Koinange Estate in Nakuru. The description of the robbery in PW 1’s own words is as follows:

“On 16 December 2002 I was at home with Alex when we heard somebody knocking at the door. I told Alex to go and open but first find out who they were. It was 8.15 p,. They said they wanted mum and Alex said mum was not in. they asked who else was in and he said I was there. I went to the door to pee and didn't see anybody as it was dark. I then opened the door. The three people got in with knives and pushed up against the wall. They asked us for

money and I said I had nothing. They insisted and I gave them Ksh. 500/= that I had. They took us to my mother's bedroom and started ransacking. They tied my mouth with a handkerchief. They tied my hands with sisal and legs. The one in mothers bedroom took one radio cassette and Erickson mobile phone. The others came with their loot and they went. After a few minutes mother came and called at the gate, then came near. Alex told her there were thieves. She started calling neighbours who came and managed to arrest one of the thieves (accused 1) hiding in the chicken house. We called police and they came and re-arrested him with the radio he had (sony).

4. PW1 further testified in her evidence among other things, that the appellant took a camera make yashika, CD's, kitchen knife, bag, and I tin. That the police called the following day and stated they had arrested others and recovered the sony TV, remote control, the radio national star, camera, one erickson mobile phone, and the CDs and the tin.
5. PW 2 who is Alex Waweru Nganga testified that during the night of the robbery, he talked to the "robbers" before they tied them up. That they were all armed with knives. One had a long knife and the other 2 had short knives. He stated that accused 1 was arrested at their home that night. That one appeared with a slasher and threatened PW 1 and he ran behind the table and one came and tied him up with a sisal rope. One with a knife told him if he screamed he would cut him.
6. PW 3, Grace Wanjiru Wanjiru testified that she stayed at Koinange Estate in Nakuru with a her daughter (PW 1) and grandson (PW2)/ That on the night of 16th December 2002 at 8.45 pm she arrived home and she found the gate opened and peed inside and saw a person at her front door. The person left the door and went to a window in the bedroom. That she called out and the man went behind the home. She screamed and 2 neighbours came and they went behind the house and saw a person lying inside the chicken house. They tied the person who is the 1st accused. Neighbours interrogated the 1st accused and found the radio where he was standing. She checked the house and found other things missing including a camera, CDs, bag, mobile phones, remote control and a coin box. The following day they went to the police station and found the missing items recovered.
7. A police constable PC David Ndieri (PW 4) gave evidence at the trial in essence that he was on patrol at Ronda area and on 16 December 2002 they were called by controller and told a thief had been found at a plot in Koinange Estate and they should go for him. That he proceeded to the plot and re-arrested the 1st accused and recovered a radio and pieces of clothes and the sisal used to tie up PW 1 and PW 2. One knife was also found. PW 5 a police constable Arthur Mwangi told the trial magistrate that on 16th December 2002 at 10.30 pm while at the Nakuru Police Station, the 1st accused was brought to the station by officers in patrol and it was said he had been involved in a robbery.
8. The appellant in an unsworn evidence stated at the trial that he was a trader at and does business of selling farm produce. That on the material day on 16th December 2002 at around 8.00 pm he went to visit a girl friend (PW 1) who welcomed him as her mother was not around. That when the mother of the girl arrived he did not know what to do and she screamed and people appeared. That he did not steal anything and he was taken to the police station.
9. The trial magistrate considered the evidence and made the following finding; in her judgment delivered on 30th June 2003-

Evidence of PW 1 and PW 2 is very corroborative. The identity of the accused is not in issue having stayed with the complainant for a considerable long time during the robbery. Accused 1 was caught still at the scene of robbery with one stolen radio. The defence of the accused is a mere sham and did not in any way shake the prosecution evidence which is overwhelming.

10. The superior court on its part after re-evaluating the evidence concluded at page 8 of its judgment delivered on 25th February 2011 as follows:-

It was the evidence of both PW 1 and PW 2 that the appellant had his accomplices were

armed with knives which are in essence offensive weapons. The appellant and his accomplices immediately before the robbery used actual violence upon PW 1 and PW 2 by brandishing those knives against them and tying their wrists and herding them into the bedroom of PW 3 and gagged PW 1 and then ransacked the house carrying away a mobile phone, electronic equipment, a camera, a kitchen knife and other equipment described. In this case, the appellant was certainly one of the three robbers who forced their way into PW 3s dwelling house. He was unlucky not to escape. The ingredients of robbery with violence were proved.

11. The appellant was represented by learned counsel Mr. Nicholas Bichana. Four grounds of appeal were lodged and filed on 5th February 2013. During the hearing, counsel for the appellant stated that he relied on first and second grounds of appeal. Principally, the appellant complains that, the learned judge of the High Court erred in law and fact in convicting the appellant on contradictory evidence. That the judge erred in law and fact by failing to analyze the evidence adduced and make an independent judgment as required by law. Counsel for the appellant submitted that the evidence of PW 1 and PW 2 were contradictory. He pointed out that at page 43 of the record, the superior court seems to suggest that the evidence of PW 1 and PW 2 are almost identical. That the court was wrong to find that the evidence of PW 1 and PW 2 were identical. Counsel pointed out that at page 8 of the record in line 1, PW 1 states that the person said they wanted mum. At page 11 line 10, PW 2 states that the person asked if this was Mama Gachoka's house and I said yes. They said she had sent them. The appellant's counsel argued that this were contradictory statements where one person says they have come to see mum while the other states they have been sent by mum. This means that the superior court failed to re-evaluate the evidence to see this contradiction. It was submitted that there was no corroborative evidence adduced in court. Counsel for the appellant submitted that the superior court was wrong in convicting the appellant on the basis of recent possession of stolen goods.
12. Senior Principal Prosecution Counsel Mr, Chirchir appearing for the respondent opposed the appeal. He submitted that there were only two issues to be considered in the appeal namely whether the offence of robbery with violence was proved or not and whether the appellant was positively identified as the perpetrator of the robbery. In his submission, he stated that both the trial court and the High Court correctly found that the ingredients of robbery with violence was proved. He also submitted that the appellant committed the offence beyond any reasonable doubt. The unsworn testimony of the appellant that he had gone to visit a girl friend is preposterous since there is no need to tie your girlfriend and gag her when you visit her and take away a radio. He submitted that the intention was clearly to rob. Counsel submitted that if there is any contradiction in evidence, it is immaterial.
13. By **Section 361 (1) (a)** of the Criminal Procedure Code, a second appeal like the present one should be confined to points of law only. It is trite law that in a second appeal the appellate court will not interfere with concurrent findings of fact by the two lower courts unless it is apparent that on evidence no reasonable tribunal could have reached that conclusion (see **M'RIUNGU VS. REPUBLIC** [1983] KLR 455, **KARINGO VS. REPUBLIC** [1982] KLR 213). In **M'RIUNGA VS. REPUBLIC** (supra), this Court agreed with the views expressed in an English case:

“That where a right of appeal is confined to questions of law only an appellate court has royalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law”.

14. The law is also clear that an appellate court would not normally interfere with those findings by the trial court which are based on the credibility of witnesses unless, among other things, no reasonable tribunal could have made such findings (**REPUBLIC VS. OYIER** [1985] KLR 353).
15. It was submitted by the appellant's counsel that the conviction was wrong because the evidence of the complainant relating to what the persons who entered the house said was inconsistent between PW 1 and PW 2. It is true that both PW 1 and PW 2 state that some persons entered the house armed with knives and tied them up and took some items from the house.
16. We find that any such inconsistency is not sufficient to upset the conviction because there was also evidence that the complainant was robbed of items and the appellant was found at the scene

of the robbery. In our view, the inconsistency in what the person actually said does not render the entire evidence of the PW 1 and PW 2 relating to the robbery incredible.

17. It was further submitted that the appellant had gone to visit PW 1 who was allegedly his girl friend. PW 1 denied that she had any affair or relationship with the appellant. We find that the testimony of PW 1 was unshaken on this issue. We agree with the learned State Counsel that the issue of relationship between PW 1 and the appellant does not arise in this case and even if it were so, the issue of tying and gagging PW 1 and PW 2 should not have arisen. The important issue is whether the appellant was among the robbers who robbed the complainant. The evidence of PW 1, and PW 2 and PW 3 leaves no doubt that the appellant with his accomplices had entered the house of PW 3 and the items which went missing at the time of robbery were recovered by police. The appellant was actually arrested shortly after the robbery.
18. In our view, the prosecution case was not dependent on circumstantial evidence nor was the doctrine of recent possession applied. Rather, the prosecution case mainly depended on direct evidence that the appellant and other robbers robbed complainant the sum of Ksh. 500/= and other items and that he was apprehended in the compound where the robbery had taken place and while still inside the chicken house.
19. It is clear, from the evidence of witnesses which we have deliberately reproduced, that the prosecution case depended on the factual evidence particularly from PW1, PW 2 and PW 3. The credibility of these three witnesses was not impugned. The real question in the case was an issue of fact – whether the appellant himself participated in the robbery. The prosecution case was not based on any discernible point(s) of law like identification or circumstantial evidence.
20. The two courts below considered the evidence and made concurrent findings of fact associating the appellant with other robbers and also in the actual commission of the robbery. It has not been shown that either the trial court or the superior court misdirected itself in any material particular.
21. Indeed, there was credible and overwhelming evidence connecting the appellant with the robbery with violence. From the foregoing, we dismiss this appeal as being unmeritorious.

Dated and delivered at Nakuru this 12th day of APRIL, 2013.

P. KIHARA KARIUKI

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JUDGE OF APPEAL

FATUMA SICHALE

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR