



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: TUNOI, O’KUBASU & DEVERELL, JJ.A.)

Criminal Appeal 139 of 2005

BETWEEN

NGOME PATRICK 1ST APPELLANT

NGOME NYALE 2ND APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Mombasa (Mwera& Khaminwa, JJ) dated 9th November, 2004 in

H.C.C.R.A. NO. 192 & 193 OF 2003

JUDGMENT OF THE COURT

The two appellants, Ngome Patrick Nyawa and Ngome Nyale Nyawa were tried and convicted on a charge of robbery with violence contrary to **section 296(2)** of the Penal Code by a Senior Resident Magistrate at Mombasa and upon their conviction each of them was sentenced to suffer death in the manner authorized by the law. They appealed to the High Court at Mombasa but in its judgment dated 9th November, 2004 the High Court (Mwera and Khaminwa, JJ) dismissed their appeals. The appellants now come to this Court by way of second appeal. That being the case only issues of law can be raised – see **section 361** of the Criminal Procedure Code.

The main legal issues raised here were that the charge was defective and the superior court failed in its duty to re-evaluate the evidence. There was a third issue to the effect that persons who were unqualified appeared as prosecutors during the mentions of the appellants’ case in the trial Magistrate’s court.

The facts of the case as accepted by the trial and first appellate courts were fairly brief. The complainant, Joseph Ndurya (PW1), a teacher at Kizini Primary School was on his way home from school riding his bicycle at about 6.30 p.m. when the bicycle developed some problems. He started pushing it and as he did so somebody hit the bicycle with a stone. He saw two people ahead and two others behind. The complainant put the bicycle down but those people hit him with stones. One of the assailants hit him with

a panga. The assailants took away the bicycle and a radio which was in a paper bag.

The incident was reported to a nearby home and the complainant was taken to the hospital for treatment. There was evidence from Tsuma Gende (PW3), Hamisi Mazera (PW5) and Umazi Jefwa (PW6) that they saw the two appellants with a bicycle and a radio about two weeks after the robbery. While the radio was recovered and produced as exhibit during the trial the bicycle was never recovered.

The learned trial Magistrate considered the evidence before her and in convicting the appellants stated as follows in her judgment:-

“The evidence from these witnesses, i.e. PW2, 3, 5 and 6 coupled with the complainant’s positive identification of the two accused persons leaves me in no doubt that the two accused persons were among the four people who ambushed the complainant herein and injured him before robbing him of his belongings.”

The learned Judges of the superior court dismissed the appellants’ consolidated appeals and in their judgment stated inter alia:-

“Although the bicycle was not recovered the learned Trial Magistrate was satisfied that it belonged to the complainant like the radio which was recovered and identified. She held this impression because PW1 said that his bicycle had a problem with the rear ring and Genya saw that it was old and with a pedal problem.

Having considered all the above, we are not of a different view from that of Learned Trial Magistrate. The appellants had been trying to sell the bicycle and radio together to their relatives – some two or so weeks after the robbery.”

We would like to deal with the issue of “mention” before the trial court which, according to Mr. Mulongo the learned counsel for the appellants, rendered the trial a nullity as unqualified persons appeared for prosecution. Mr. Mulongo must have had in mind this Court’s decision in **ROY RICHARD ELIREMA V. REPUBLIC – Criminal Appeal No. 67 of 2002** – (unreported). There is no substance in such submission and we have no hesitation in rejecting it. The learned Assistant Deputy Public Prosecutor (Mrs. Mwangi) very properly countered that submission by referring to the decision of this Court in **AHMED ANAKEYA MOHAMED & ANOTHER V. REPUBLIC – Criminal Appeal No. 161 of 2004** (unreported) in which we stated :-

“The misconception arises from the mistaken belief that prosecutors conduct trial and that the “mention” of a case is a “trial”. But the Elirema case clarified all that when the court stated:-

“We must start by pointing out that a trial is never conducted by a prosecutor but by the court itself. The function of a prosecutor is to lead witnesses in presenting their evidence to the court. When we say the prosecutor leads witnesses in presenting their evidence to a court, we do not mean to say that he is to coach them, train them in what to tell the court. His role is merely to ask witnesses questions which are relevant to the matter under investigations by the court and, to a large extent, to determine the order in which the witnesses are to appear before the court.”

In that case two Corporals, Kamotho and Gitau purported to exercise the functions of public prosecutors, by calling and leading evidence from several witnesses at the trial. They could not even pretend to be private prosecutors authorized under section 88(1) because there was no order made to that effect. This Court made no reference to the various “mentions” which are inevitably made in the course of criminal trials and were made in that particular case. The concern of the court was only the occasions when witnesses were summoned and heard or submissions were made.”

Mr. Mulongo’s other submission related to the manner in which the first appellate court dealt with the

evidence on record. It was Mr. Mulongo's submission that the first appellate court failed in its duty as it did not re-evaluate the evidence on record but merely repeated what the trial court had concluded. It went further to highlight some contradictions which it stated were not material. These contradictions in Mr. Mulongo's view, ought to have been resolved in favour of the appellants.

In **OKENO V. R [1972] E.A. 32** at p.36 the predecessor of this Court stated:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424.”

Taking into account the foregoing and in view of the submissions by Mr. Mulongo, we are not satisfied that the first appellate court discharged its duty fully as set out above. The superior court Judges highlighted some of the contradictions in the prosecution evidence but instead of resolving the doubts in favour of the appellant dismissed such contradictions as immaterial. Finally we come to the issue of the charge which Mr. Mulongo, submitted to be defective.

The particulars of the charge were that “on 27th June, 2002 at about 6.30 p.m. at Dumbule Village, Mizeras – Kinango location in Kwale District within the Coast Province, jointly with others not before court while armed with pangas and stones robbed Joseph Ndurya of his cash Kshs.500/-, a bicycle make Atlas, one radio make National, one trouser, one shirt, shoe polish, identity card and personal effects all valued at Kshs.11,825/- and at or immediately before or immediately after the time of such robbery used personal violence to the said JOSEPH NDURYA”.

It was Mr. Mulongo's submission that the words “dangerous or offensive” must be included in the charge and as they were missing this omission rendered the charge fatally defective.

On the outset we wish to state that charging a person with robbery with violence contrary to **section 296(2)** of the Penal Code is an extremely serious matter. A person charged under that section faces a mandatory death sentence upon conviction. What acts constitute an offence under **section 296(2)** of the Penal Code? This Court considered that question in **JOHANA NDUNGU V. REPUBLIC – Criminal Appeal No. 116 of 1995** (unreported) where it stated:-

“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are presupposed in the 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.***

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of he offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances. With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly.”

Finally, we come to the issue of particulars of the charge. We have already stated that in charging a person under section 296(2) of the Penal Code the prosecution must be extremely careful. Section 296(2) of the Penal Code provides that:-

**“If the offender is armed with any dangerous or offensive weapon or instrument
.....he shall be sentenced to death.”**

The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under **section 295** of the Penal Code. That is why this Court has held in its previous decisions that where the prosecution is relying on the element or ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the accused was armed was dangerous or offensive. The reason for that is that a knife for example, or a stone (as was the case in the present appeal) are not an inherently dangerous or offensive weapons. A knife or a panga often can be used under very many circumstances for entirely peaceful and innocent purposes. So that if it is being alleged that a particular weapon or instrument was being used for dangerous or offensive purpose, it must be stated so in the particulars of the charge under **section 296(2)** of the Penal Code to distinguish such a charge from the one under section 295 punishable by **section 296** of the Penal Code.

The facts of this case are more or less similar to those in **JUMA V. REPUBLIC** [2003] E.A. 471 in which this Court said:-

“Under section 296(2) of the Penal Code the charge must sate that the accused was armed with a dangerous or offensive weapon or instrument, or was in the company of one or more other person or persons or at or immediately before or immediately after the time of the robbery the accused wounds, beats or strikes or uses any other personal violence to any person. In this appeal the charge as laid was defective as it did not clearly specify the essential ingredients of the offence under section 296(2) of the penal Code.

We wish to point out that in charging a person under section 296(2) of the Penal Code the prosecution must be extremely careful as the consequence of conviction are serious. Care must be taken when dealing with drafting of charges as it is the life of an individual that is at stake.”

Having considered the issues raised in this appeal particularly relating to the duty of the first appellate court as set out in **OKENO V. R** (supra) and the necessity for extreme care in setting out the particulars of the charge under **section 296(2)** of he Penal Code, we are of the view that the appellants’ convictions

were based on a defective charge. The conviction recorded against each appellant must therefore, be quashed.

Consequently, this appeal is allowed, conviction quashed and the sentence of death imposed on each appellant set aside. The appellants are to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 29th day of July, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.