



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
CORAM: KWACH, OMOLO & O'KUBASU, J.J.A.

CRIMINAL APPEAL NO. 208 OF 2002

MAXWELL KIMANI NJUGUNA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at
Mombasa (Ouna J & Comm Khaminwa) dated 17th June,
2002

in

H.C.CR.A. NO. 126 OF 2001)

JUDGMENT OF THE COURT

Maxwell Kimani Njuguna , the appellant herein was tried and convicted by a Senior Resident Magistrate at Mombasa on a charge of robbery with violence contrary to **section 296(2) of the Penal Code** and as that charge is mandatorily punishable by death, the appellant was duly sentenced to suffer death. His first appeal to the High Court, (Ouna, J. and Commissioner of Assize Khaminwa), was heard and dismissed on 17th June, 2002. The appellant now appeals to the Court a second time and that being so only matters of law can fall for our consideration.

Learned counsel for the appellant, Mr Buti, argued two points before us. If we understand him correctly, the first point was on the discrepancy between the amount of money stated in the charge sheet as having been stolen and the amount stated in the evidence of the witnesses as having been stolen or recovered. Leaving aside the other items listed therein, the particulars contained in the charge sheet were that three Austrian coins and KShs.4,267/= were among the items the appellant robbed the complainant of. The complainant was one Kurt Bochheiner (P.W.1), an Austrian tourist in Mombasa. In his evidence before the magistrate, Kurt gave evidence as follows:

"... A police officer arrived immediately with accused under arrest. He produced my blue wallet and asked me whether I could recognise it. I told him it belonged to me. At the time of attack it was on (sic) my short pocket. I then noticed it was missing in my pocket. In the wallet I had KShs.5,200/=, Austrian currency Shs.25/=, papers containing addresses, Bush tour voucher, two keys"

So that according to Kurt, he had in his wallet KShs.5,200/= while the charge sheet stated that he had only KShs.4,267/=.

That is one discrepancy the appellant through his counsel complains of before us. Mr Buti contended that under **section 214 of the Criminal Procedure Code**, the magistrate could have amended the charge to reflect the actual position as disclosed by the evidence and since no amendment was made, the charge became defective and the defect was or is fatal to the conviction. Mr Buti relied on this Court's decision in ***JASON AKUMU YONGO VS REPUBLIC (1982 -88) 1 KAR 167*** where the Court quoted with approval this statement from **Archbold, Criminal Pleading, Evidence and Practice (40th edition), page 52 paragraph 53:**

"An indictment is defective when it is bad, on the face of it, but also:

(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein;

(ii) when for such reasons it does not accord with the evidence given at the trial."

Mr Buti argued that the charge did not agree with the evidence and therefore the charge was defective. With the greatest respect to Mr Buti, we do not think the charge in the present appeal was at variance with the evidence. That charge against the appellant was one of robbery with violence contrary to **section 296 (2) of Penal Code** and the evidence of Kurt clearly showed that he was robbed. On that aspect of the matter; Kurt testified as follows:

"... On 7.1.2001 around 11.45 a.m. I was walking from my hotel along the main road towards Mamba Village. I passed near a petrol station as I proceeded walking on the side of the road along Mombasa -Malindi Road (on pavement) a person emerged from behind and stabbed me on the head with a knife. Another person emerged from the side and held by blue short and tore it. One of them grabbed my camera from the neck where I was hanging it leaving the strap with me. I was not able to see well as I was covered with blood on the head. I had my spectacles on. I was not able to see the faces. I only saw the legs. they then ran away. I was bleeding profusely. ..."

The plain meaning of this evidence must be that a group of persons suddenly emerged onto the road pavement along which Kurt was walking, that one of those people stabbed him on the head with a knife, that they took away his property among them a camera and they then escaped. Those facts are clearly consistent with a robbery with violence and that was what the appellant was charged with.

It is true that the money stated in the charge sheet was less than the money actually recovered in the wallet when it was recovered. But we do not understand that to mean that the charge itself was inconsistent with the evidence. Some particulars of the charge were not in conformity with the evidence but we are far from convinced that that made the charge incurably defective. The Judges of the High Court dealt with that issue in this way:

"... In the present case the discrepancy relates to the amount mentioned in the charge sheet. The state counsel replied that the discrepancy is not fatal. What was stated in the charge sheet was the total value of all things stolen. This is correct considering that the money involved was in Kenyan currency and Austrian currency and the value is not the same. We find this discrepancy to be immaterial and does not in any way prejudice the appellant's case."

Section 382 of the Criminal Procedure Code upon which Mrs Mwangi for the Republic relied provides as follows:

"Subject to the provisions hereinbefore contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint summons, warrant, charge, proclamation, order, judgment or other proceedings under this Code, unless the error, omission, or irregularity has occasioned a failure of justice."

We think, like the learned judges of the High Court did, that stating in a charge sheet a lesser amount than the amount which was actually stolen was no more than an irregularity in the charge sheet and it did not render the charge defective. It was an irregularity curable under the above-quoted section of the Criminal Procedure Code and the appellant did not point out to us any sort of prejudice which the irregularity could or did occasion to him. The situation would have been totally different if the evidence led by the prosecution has been consistent with say, a charge of stealing from the person under **section 279 (a) of the Penal Code** because then it would truly be said that the evidence relating to the charge of robbery did not prove the charge of stealing from the person.

But even then the trial court would still be entitled to record a conviction under the correct section, assuming of course that the evidence adduced proved an offence minor and cognate to the one charged. We are satisfied that the High Court reached the correct decision in saying that the discrepancy between the amount stated in the charge sheet and the amount in the evidence was immaterial and did not affect the validity of the conviction. Grounds one and three in the appellant's memorandum of appeal must accordingly fail.

The second point of law raised by the appellant was that three police officers were involved in his arrest while only two were called to testify. We were accordingly asked to draw an adverse inference against the prosecution that had the third police officer whose name was given as PC Adubwa, had been called to testify he would have given evidence adverse to the prosecution.

We do not think there is merit in this contention. Two police officers (P.W.2 and P.W.3) testified that they arrested the appellant. Their evidence on this point was accepted by the trial magistrate and was confirmed by the first appellate court. Whether it was P.W.2 and P.W.3 who arrested the appellant or whether it was Adubwa who did so cannot be a question of law for us to determine on a second appeal. P.W.2 and P.W.3 swore they arrested the appellant and their evidence was believed by two courts below. There is nothing this Court can do about that conclusion and there is no basis upon which we can draw any adverse inference, if such an inference is possible on the evidence, that in failing to call Adubwa the prosecution was avoiding evidence which would have been unfavourable to the prosecution. Grounds two and four of the appellant's memorandum of appeal must also fail.

The sentence imposed upon the appellant was the only one provided for the offence of which the appellant was convicted.

This appeal must accordingly fail in its entirety and we order that it be and is hereby dismissed.

Dated and delivered at Mombasa this 31st day of January, 2003.

R. O. KWACH

JUDGE OF APPEAL

R. S. C. OMOLO

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR