



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 57 OF 2012

JAMAAL OMAR HUSSEINAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 1359 of 2011 in the Principal Magistrate's Court at Garissa - J.N. Onyiego (PM) on 2nd May, 2012)

JUDGMENT

In Garissa Principal Magistrate Court's Criminal Case Number 1359 of 2011 Hersi Umo Yusuf (1st Accused), Jamaal Omar Hussein (2nd Accused) and Ahmed Ali Aden (3rd Accused) were jointly charged with robbery with violence contrary to Section 296(2) of the Penal Code; the particulars of the offence being that on 9th July, 2011 at Dagahaly Market, Dadaab District in Garissa County while armed with a panga they jointly robbed Abdifatah Amin Hassan of a mobile phone, a wallet containing personal documents and cash Kshs.500/= and at or immediately before or immediately after the said robbery used actual violence to the said Abdifatah Amin Hassan.

At the conclusion of the trial the magistrate convicted the 2nd Accused, now the Appellant before us, and sentenced him to death. The other accused persons were acquitted. The Appellant being aggrieved by the said decision has appealed to this court.

When the appeal came up for hearing on 14th October, 2013 the Appellant indicated to us that he would rely on the amended memorandum of appeal, together with the submissions, filed on 30th September, 2013. The Appellant's five grounds of appeals are:-

1. **THAT, the learned trial magistrate erred in law and facts where he acted and convicted me on a defective charge sheet that could not support such verdict.**
2. **THAT, the learned trial magistrate erred in law and fact when he convicted failing to find that provision of Section 151 CPC was not duly complied with.**
3. **THAT, the learned trial magistrate erred in law and fact when he relied on conflicting testimonies to convict instead of resolving the same in favour of the appellant as benefit of doubt.**
4. **THAT, the learned trial magistrate erred in law and fact when he failed to duly comply with the provision of Section 211 CPC during the ruling in the instant case.**
5. **THAT, the learned trial magistrate erred in law and fact when he rejected my plausible defence that was truthful.**

Mr. Orwa for the Appellant opposed the appeal and submitted that the Appellant was properly convicted by the trial court. He urged us to find that the Appellant was clearly identified at the scene of crime by the complainant and was arrested a few minutes later with the complainant's stolen property.

This being a first appeal, it is over responsibility to reconsider, evaluate and reach our own conclusion on the evidence that was adduced at the trial. In doing so, we are guided by the fact that we did not see or hear the witnesses testify. This principle of law was stated by the Court of Appeal in **OKENO V. REPUBLIC [1972] E.A. 32** as follows:-

“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.”

Before proceeding to analyse the evidence adduced in the trial, we will first address the points of law raised in the appeal.

In the 1st ground of appeal it is the Appellant's case that the charge upon which he was convicted was defective. The Appellant submitted that in order for a charge of robbery with violence to be valid, the definition Section (Section 295) of the Penal Code should be quoted so that a charge should read **“robbery with violence contrary to Section 295 of the Penal Code as read with Section 296 (2) of the Penal Code.”**

In support of this argument the Appellant gave us the example of a murder charge which usually reads: **“Murder Contrary to Section 203 of the Penal Code as read with Section 204 of the Penal Code.”** He told us that Section 203 defines the offence of murder whereas Section 204 provides the punishment.

In reply, Mr. Orwa for the state submitted that even if there was a defect in the drafting of the charge, there is no evidence that such a defect prejudiced the Appellant who all along knew the charge facing him. He urged us to apply Section 382 of the Criminal Procedure Code (Cap 75) (CPC) to cure any defect that we may find in the charge. He however, urged us to find that the charge as drafted complied with the provisions of Section 134 of the CPC.

Section 134 of the CPC provides:-

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

Section 137 of the CPC provides the rules for framing of charges and informations. In particular Section 137(a) provides that:-

“(a) (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by

enactment shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:

Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;

(iv) the forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the same effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances of each case;

(v) where a charge or information contains more than one count, the counts shall be numbered consecutively;”

The Second Schedule of the CPC has standard forms for charges. In the form for a charge of murder, the offence is stated to be **“Murder contrary to Section 204 of the Penal Code.”** No reference is made to Section 203. Ideally, a charge should state the section creating the offence and the punishment section. This would ensure total compliance with Article 50(2)(b) of the Constitution which provides that **“(e)very accused person has a right to a fair trial, which includes the right - to be informed of the charge, with sufficient detail to answer it.”** However, stating the punishment section alone does not render a charge defective. Once an accused person reads the punishment section, he/she will be guided to the section that creates the offence. In our view, what is important is for an accused person to sufficiently understand the offence with which he is charged so as to enable him to fully participate in the trial.

On another issue of law, the Appellant complained that Section 211 of the CPC was not complied with. We have checked the lower court record and find that Section 211 of the CPC was complied with on 28th March, 2012. The Appellant indicated that he would give unsworn testimony and he was not going to call any witness. This particular complaint is therefore unfounded.

The Appellant also contended that the trial magistrate did not comply with Section 151 of the Criminal Procedure Code. The said Section provides that every witness in a criminal cause or matter shall be examined upon oath. We have checked the court record and find that oaths were administered on all the four prosecution witnesses before they testified. It may be true that the complainant who testified as PW1 was not sworn when he was recalled for re-examination. It may have been prudent for the trial magistrate to indicate: “PW1 still on oath recalled cross-examined by A1 states”. It would even have been better if the witness was sworn afresh. We, however, take note of the fact that the complainant had been sworn before he gave his evidence-in-chief and the oath administered to him at that time was still binding at the time he was cross-examined.

We now move to analyse the evidence adduced in the trial court. The complainant told the court that he works with the Kenya Red Cross and was based at Dagahaley Refugee Camp. On 9th July, 2011 he had been called by a police officer who was his friend to go to Dagahaley Police Post and attend to some people who had been attacked and injured by thugs. As the complainant was walking to the police post he encountered two men who attacked him. One of them who, was armed with a panga, hit him with the blunt side of the panga. The other one hit him with his knee on the back. They then took his phone and wallet. The complainant screamed and people came to his rescue. He was escorted to the Police Post. While at the Police Post he identified one of his attackers in the crowd that had escorted him to the Post. He alerted the police and the attacker who is the Appellant herein was arrested and searched. The complainant’s wallet which contained a practising certificate from the Nursing Council, a staff identification card from GTZ, a national identity card, Kshs. 200/= and a packet of cigarettes were recovered from the Appellant. The complainant positively identified these items. The Appellant was

locked up and later charged.

PW4 Police Constable Musa Abdi told the court that on 9th July, 2011 he was at Dagahaley Police Post when some people made a report of assault. Since vehicles do not operate at night at Dagahaley, he decided to call his friend, the complainant, who is a medical officer so that he could attend to the victims. The complainant took time in coming but later arrived in a crowd. The complainant who was bleeding from the forehead informed him that he had been attacked and robbed. The complainant pointed to a person in the crowd and identified him as one of his two attackers. PW4 arrested the man and upon searching him he found him with the complainant's wallet which had the complainant's identity card, cash kshs.200/=, a packet of cigarettes, staff identification card and business cards. He placed the Appellant in custody.

The evidence of the complainant and PW4 is what led to the conviction of the Appellant. In his judgement the trial magistrate proceeded on the assumption that the prosecution case depended on the evidence of a sole witness. This was not so but his presumption was not prejudicial to the Appellant. The magistrate warned himself to the effect that although it is lawful to convict an accused person solely on the evidence of one witness, care should be taken to ensure that the single witness was truthful and there is no room for miscarriage of justice. We find that the trial magistrate acted on the correct legal principle as concerns the treatment of the evidence of a single witness. He found that the complainant was truthful and credible.

We have on our part reviewed the complainant's evidence and we do not find anything to make us arrive at a conclusion which is different from that of the trial court. From our own review of the evidence, we find that the complainant was indeed a credible witness. The complainant told the court that during the robbery there was light from a video shop and that is how he managed to identify the two attackers.

The conviction of the Appellant was not based on the evidence of a single identifying witness. The evidence of the complainant was corroborated by the recovery of his wallet and its contents from the Appellant. The recovery was done by PW4. The evidence of PW4 therefore corroborated that of the complainant. We have closely examined the evidence of PW4 and we find nothing to make us doubt it. PW3 Dr. Yusuf Mohamed examined the complainant and filled a P3 form. He concluded that the complainant had a bruise on his face. This evidence confirms the fact that the complainant was indeed injured.

In his defence the Appellant told the court that the case was fabricated by the complainant who was his friend because of differences over a woman called Sophia. He told the court that on a date he cannot remember he sat with the complainant and they chewed miraa. Thereafter the complainant asked him to accompany him to the Police Post. At the Police Post the complainant started conversing with a police officer in English, a language he did not understand. He was then locked up and ordered to surrender the miraa he had and the complainant's belongings. He was later charged.

The trial magistrate considered the Appellant's defence and found it to be incredible. We have noted that the Appellant did not explain how he came into possession of the complainant's wallet. We are not convinced that PW4 who is a public officer could conspire with the complainant so as to charge the Appellant with such a serious crime. It is noted that the Appellant's mobile phone which was stolen together with the wallet was recovered the next day from somebody who was with a person the Appellant had named as having committed the robbery with him.

We are satisfied that the Appellant's conviction is safe and sound. He was found with the complainant's property a few minutes after the robbery and he never offered any reason as to how he came into possession of the property. The doctrine of recent possession therefore came to the aid of the prosecution case.

All in all, we find that the appeal before us has no merit. The conviction of the Appellant was proper and so was the sentence of death imposed on him. We therefore dismiss the Appellant's appeal.

We make orders accordingly.

Signed and dated this 22nd November 2013

S. N. MUTUKU,

JUDGE

W. KORIR,

JUDGE

Dated and delivered this 9th December 2013

S. N. MUTUKU,

JUDGE