



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO 99 OF 2012

APPEAL FROM CONVICTION AND SENTENCE BY THE CHIEF MAGISTRATE

**(MISS HANNAH NDUNG’U) IN GARISSA CHIEF MAGISTRATES’
COURT CRIMINAL CASE NO 56 OF 2012**

ISMAEL MALATA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Ismael Malata, the Appellant, was convicted and sentenced to death on 26th September 2012 by the Chief Magistrate at Garissa in a judgement delivered on the same date. He was facing charges of robbery with violence contrary to section 296 (2) of the Penal Code. It was alleged in the particulars of that charge that on 13th December 2011 at 6.30pm at Madogo trading centre in Madogo Location Bura District in Tana River County, jointly with others not before the court being armed with a panga robbed Daniel Ndeto one Nokia 1280 mobile phone valued at Kshs 2,000 and cash Kshs 2,000 and immediately before and immediately after the time of that robbery wounded the said Daniel Ndeto.

Grounds of Appeal

The Appellant had filed on 14th October 2013 amended petition and grounds of appeal with leave of this court. He informed the court that he would abandon his earlier grounds of appeal filed on 15th October 2012 and rely on the amended grounds. He had filed written submissions in support of his appeal and he chose to rely on them fully without orally submitting. The amended grounds of appeal are summarized as follows:

- a. The charge sheet was fatally and incurably defective.
- b. The trial magistrate failed to consider that the alleged stolen property was not established and the prosecution evidence is contradictory and inconsistent.
- c. His arrest was poorly executed.
- d. The trial magistrate failed to consider that identification parade was not conducted to ascertain his involvement.
- e. The trial magistrate failed to consider that PW3 did not inform the police that he knew the Appellant.
- f. The Medical report did not support allegations that a dangerous weapon had been used.

- g. The investigations were poor and did not disclose an offence of robbery with violence.
- h. The trial magistrate failed to consider that there existed a grudge between the Appellant and the complainant.

Appellant's Submissions

The Appellant has submitted that the Charge is defective because it does not contain all the ingredients of robbery with violence charge namely whether the offender was armed with a dangerous weapon; whether the offender robbed the complainant of anything in the process; the value, nature and description of the alleged stolen property; whether the offender was in company of others; whether physical violence was used and whether the stolen property belonged to the complainant.

He challenged the evidence of PW5 in that while the charge shows the make of the phone stolen and cash of Kshs 2,000, the evidence of Police Constable John Awamu, PW5, does not show the make of the alleged stolen phone; that the same evidence shows one note of Kshs 2,000 when such denomination does not exist.

He submitted that the trial magistrate did not cause the charge to be amended in line with Section 214 of the Criminal Procedure Code or apply the provisions of Sections 275 (2) and 276 (1) of the Criminal Procedure Code. The appellant submits that the trial was unfair and prejudicial to him because of the defects in the charge.

He has submitted that the alleged phone cannot have been in the complainant's shirt pocket because if this was the case it would have dropped in the alleged struggle between him and the complainant; that the alleged panga, if it existed, cannot have remained in the behind trouser pocket during the alleged struggle because of the nature of such a weapon and that this was a trick to incriminate him.

He submitted on contradictions in evidence: that Kalonzo Mwanzi, PW3, cannot have seen him enter the counter of the complainant's shop from a verandah of a hotel away from the complainant's shop; that PW3 testified that he saw the Appellant alone and that after the fight he saw two other people emerge from the other side of the road; that this evidence contradicted the evidence of Daniel Mwenga Ngomo, PW2, who testified that he was the only customer while the complainant testified that there were two customers, PW2 and a woman; that the said woman was his (Appellant's) wife; that PW3 did not give the name of the Appellant to the police that he knew the Appellant yet he claimed to have known him; that the evidence of the doctor failed to support the allegations of use of the panga by stating that the object used to cause the injury on the complainant was blunt not sharp; that there cannot have been robbery when PW2 stated that he remained in the shop without running away or rescuing the complainant and that the trial magistrate ought to have noted all the contradictions and given the Appellant the benefit of doubt.

Prosecutor's Submissions

The learned State Counsel, Mr. Mulama, made oral submissions. He opposed the appeal and stated that the charge was drawn in line with Section 134 of the Criminal Procedure Code in that it gives sufficient particulars for the Appellant to understand what he was charged with; that the Appellant understood the charges and cross-examined; that the complainant was attacked by people known to him and the time was 6.30pm; that there was a struggle; that this is a case of recognition and not identification; that Priscilla Cheruto, PW6, confirmed the injuries on the complainant thereby laying to rest the issue of violence.

Counsel further submitted that proof of any one ingredient under Section 296 (2) of the Penal Code is sufficient to base a conviction on. He relied on a Court of Appeal decision **Criminal Appeal No 98 of 2008 Fanuel Otieno Omido v Republic** on that point.

On the issue of grudge, counsel submitted that the witnesses were Appellant's neighbours and there was no reason to implicate him and that even evidence of a single witness can be used to convict after the court warns itself on the dangers of relying on such evidence.

Duty of the court

We remind ourselves that this is a first appeal and we are under a duty to re-examine and re-evaluate all the evidence adduced in the lower court and come up with our own independent findings on the same.

Evaluation of the evidence

Seven witnesses testified in support of prosecution case. Daniel Ndeto, PW1, is the complainant. He testified that he was attacked while in his shop at Madogo on 13th December 2011 at 6.30pm; that his attackers were three including the Appellant and that at the time he was serving two customers Daniel Mwenga Ngomo, PW2, and another whose evidence on cross examination shows was a woman whose name is not given. He testified that two attackers remained outside while the Appellant went in and stood near a small entrance to the shop. The attacker asked “do you know this man?” making PW1 look up to see who was being referred to. He said that this is when the Appellant suddenly held him by his shirt collar; that PW1 held the Appellant’s hand and pushed him outside; that both fell outside the shop; that PW1 screamed for help and people came from the nearby hotel. He testified that the Appellant removed a panga from his rear pocket which PW1 held in his right hand as a result of which he was cut; that the other two attackers joined in the attack, one holding his left arm and the other removing Kshs 2,000 from PW1’s rear trouser pocket; that the Appellant rose and took PW1’s Nokia 1280 phone from his shirt pocket and the three attackers ran away. PW1 said that he reported the matter at Madogo Police Station and was issued with a P3 form which was completed on 15th December 2011. The Appellant was arrested on 7th January 2012 by PC Davis Alusisha within Garissa Town after PW1 sought help from Police at Garissa Police Station following spotting of the Appellant.

PW2 confirmed he was at PW1’s shop on 13th December 2011 at 6.30pm; that the Appellant who was not known to him entered the shop; that the Appellant hit the counter door; that PW2 saw the Appellant and the complainant holding each other and struggling; that they pulled each other outside; that the Appellant pulled a panga from his rear pocket. PW1 held the Appellant’s hand holding the panga. PW2 stood by watching. He testified that another short man came and took money from PW1’s trouser pocket and that both the Appellant and the short man ran away when members of the public arrived at the scene.

Kalonzo Mwanzi, PW3, testified that he was seated at the verandah of his father’s hotel in Mandogo at 6.30pm when he saw the Appellant enter the counter of PW1’s shop; that shortly thereafter both the Appellant and PW1 emerged from the shop holding each other struggling; that both fell down at the shop verandah; that the Appellant removed a panga from his rear pocket and PW1 held it; that two other people arrived at the scene from across the road, one person held PW1 at the waist while the other person held PW1; that he rushed to Mandogo Police Station and told the police that three men wanted to rob PW1.

Police Constable John Aswamu, PW5, confirmed receiving the report of the alleged attack from PW3 and visiting the scene in company of other officers. He testified that at the scene PW1 made a formal report of robbery where his mobile phone and Kshs 2,000 stolen and injuries on his right eye, cut on the right wrist and wound on left leg. PW5 further testified that PW1 was referred for treatment and that on 7th January 2012 he reported that the Appellant had been spotted at Garissa Town; that PW1 was referred to Garissa Police Station for assistance in arresting the Appellant.

Priscilla Cheruto, PW6, testified that PW1 presented history of having been assaulted by someone well known to him; that on examination, PW1 had injuries on left eye, bruises on right wrist joint and bruises on left foot. She classified the injury as harm and the possible weapon used as blunt.

The Appellant gave unsworn defence and said he was arrested for allegedly assaulting PW1 and wondered how the case turned to be one of robbery with violence. He testified that there existed a grudge between him and PW1. He told the court that at one time he went to buy cigarettes at PW1’s shop and found his wife there; that he asked her for keys; that PW1 asked her why she had married a poor man and

this led to a quarrel between him and PW1; that members of public separated them but PW1 claimed the Appellant has robbed him.

Determination

We have examined the grounds of appeal and understand the issue to be the following:

- a. Defective charge
- b. Identification of the Appellant
- c. Mode of arrest
- d. Inconsistent and contradictory evidence
- e. Robbery with violence not proved

A criminal charge is complete when it contains a statement of the specific offence(s) with which the accused is charged together with such particulars as may be necessary to give necessary information as to the nature of the offence. Section 134 of the Criminal Procedure Code states thus:

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.

The charge in respect of this case contains a statement of specific offence: Robbery with violence contrary to section 296 (2) of the Penal Code. It also contained particulars to the effect that the Appellant was alleged to be in company of two others; to be armed with a panga; to have robbed PW1 a Nokia phone and cash and to have used violence. The charge is complete and perfectly drawn in our considered view. In **Faniel Otieno Omido case above** the Court of Appeal set out the ingredients of robbery under Section 296 (2) as follows:

- a. Armed with dangerous or offensive weapon
- b. Is in company with one or more other person(s)
- c. Immediately before or immediately after the time of robbery he wounds, beats, strikes or uses any other personal violence to any person.

Proof of any one of the above ingredients is enough to lead to conviction and the prosecution need not prove all the ingredients. See **Johana Ndungu v. Republic, Criminal Appeal No. 116 of 1995** on the same issue.

We are of the considered view that this ground has no merit. Of importance to us is whether the offence of robbery with violence has been disclosed in this case when all the evidence is examined and evaluated.

We have considered the issue on how the Appellant was arrested and find nothing wrong with it. The police at Madogo Police Station sought assistance from Garissa Police Station to arrest the Appellant who was spotted in the latter's jurisdiction.

On the issue of identification of the Appellant, we have considered that he was known to PW1 and PW3 and the time was 6.30pm and not dark. He was also seen clearly by PW2. We have no doubts in our mind that there is no mistake that the Appellant went to PW1's shop and was clearly identified by the three witnesses. The issue that ought to concern us here is whether the appellant committed the offence of robbery with violence.

We now turn to the issue of evidence on which the Appellant has submitted in detail. On this issue the most crucial evidence is that of PW1 and PW2 who were inside PW1's shop. PW3 was outside at a hotel whose distance from the shop is not stated. It is also not shown in evidence whether the view of PW3 was obstructed and whether he could see inside PW1's shop from that distance.

PW1 said the Appellant went to his shop with two other people who remained outside. PW2 did not mention these two people who accompanied the Appellant. He mentioned one person who removed money from PW1's rear trouser pocket. PW1 said the Appellant asked: "do you know this man?" This is not mentioned by PW2. Instead PW2 said that the Appellant entered near the counter and hit it. The hitting of the counter was not mentioned by PW1. PW1 said he struggled with the Appellant and fell outside the shop. The falling is not mentioned by PW2. PW1 said he held the panga and he was cut on the right hand. PW2 said PW1 held the Appellant's hand that held the panga. He does not say PW1 was cut on his hand or anywhere else.

PW3 testified that he saw PW1 hold the panga but does not say whether PW1 was cut. PW3 did not mention seeing the Appellant with two other people. He mentioned seeing two other people go to the scene from across the road. At this time, PW1 and the Appellant had fallen down in the struggle. PW3 did mention anything to do with stealing of PW1's phone or money.

PW1, PW2 and PW3 all testified that the Appellant removed a panga from his rear pocket. They did not say whether it was trouser pocket or which pocket. The Appellant has attacked this evidence that a panga is not a weapon that can be carried in a pocket, rear or not. We agree with him. We take judicial notice that a panga is bigger than an ordinary knife. Our considered view is that it is not possible to carry a panga in a pocket, especially a pocket of the clothing ordinarily worn by a man, be it trouser, jacket or shirt pocket. We also note contradiction concerning whether the Appellant removed the panga when he was down after the alleged falling during the struggle with PW1 or after standing up.

We have also noted inconsistencies on the injuries allegedly sustained by PW1 and the part of the body he was allegedly injured. PW1 said he was cut on the right hand. PW5 said that PW1 reported to him that he had been cut on the right wrist. PW1 also testified that he was injured on the left eye. PW5 said he saw injuries on PW1's right eye. PW6 who filled the P3 form did not see any cut on any part of PW1's body. She testified that PW1 had injuries on left eye, bruises on right wrist and left foot. It is noteworthy that if it is true that PW1 held the panga to stop the Appellant from cutting him, the cut would have been on the hand and not wrist. PW6 also testified that PW1 went to hospital with a history of assault. This is what is indicated on Exhibit 1 (P3 form).

The evidence of PW2 is interesting in that he just stood there as PW1 and the Appellant struggled. This evidence creates doubt to us. It is incredible that someone can just stand there when two people are struggling with one of them armed with a panga which in itself is a dangerous weapon. The normal reaction in such circumstances is for him to assist PW1 who was in danger.

After considering all the inconsistencies and contradictions in the evidence highlighted above, we begin to doubt the evidence of PW1, PW2 and PW3. We begin to doubt whether they told the trial court the truth. We begin to doubt whether this was a robbery or PW1 and the Appellant were struggling over what the Appellant calls a grudge caused by other factors.

Our law places the burden of proving a criminal case on the prosecution and the proof has to be beyond reasonable doubts. This legal principle was enunciated in **Woolmington v. DPP [1935]AC 462** where it was stated that:

".....If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

We think we have said enough to demonstrate that the evidence in this case raises serious doubts as to what happened. We fault the trial court in not scrutinizing the evidence. Had she done this, she would have found the inconsistencies and contradictions we have highlighted. She would have found there are doubts in this case and would have given the benefit of those doubts to the Appellant. We do not think the offence of robbery with violence was proved due to those doubts. There is no proof, in our considered

view, beyond reasonable doubt that robbery with violence was committed by the Appellant. We agree with the Appellant in this respect that the evidence is inconsistent and contradictory. We give the Appellant the benefit of doubt. The upshot of this is that the appeal succeeds. We hereby proceed to quash the conviction, set aside the sentence and acquit the Appellant. He is free to go home and start enjoying his liberty unless for any other reason he is legally held. We make orders accordingly.

Signed and dated this 22nd November 2013.

S.N. MUTUKU

W. KORIR

JUDGE

JUDGE

Dated and delivered this 29th November 2013.

S.N. MUTUKU

JUDGE