



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 149 OF 2013

**Appeal from the original conviction and sentence by the Chief Magistrate at Garissa
(H.N.Ndung'u) in Criminal Case No. 790 of 2013**

MOHAMED ABDULLAHI MOHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Mohamed Abdullahi Mohamed, who is referred to in this judgement as the appellant, was charged before the Chief Magistrate Garissa with robbery with violence contrary to section 296(2) of the Penal Code. It was alleged in the particulars of the offence that on 19th June 2013 at Hagadera Refugee Camp in Fafi District within Garissa County while armed with dangerous weapon namely a metal bar robbed Ojulu Odami of his mobile phone make Nokia C-1 valued at Kshs 8,000 and at or immediately before or immediately after the time of such robbery used actual violence on the said Ojulu Odami.

Briefly, the appellant who had been talking to Nelly Ntaya (PW2) attacked Ojulu Odami (PW1) the complainant whom he stopped as he was passing by. The appellant held the complainant by his shirt collar and stabbed him on the left shoulder and back with a metal bar he had with him. The appellant demanded the complainant's mobile phone, a Nokia C-1. He ran off after taking the phone and the complainant chased him. With help of other people including Othow Omoth (PW3) the appellant was arrested and taken to Hagadera Patrol Base. He was handed over to the police and later charged. The mobile phone he had stolen was recovered from him.

After taking evidence of six prosecution witnesses and that of the appellant the trial court found the charge proved beyond reasonable doubt, convicted the appellant and sentenced him to death. It is for this reason that the appellant, who is dissatisfied with the conviction and sentence, has preferred this appeal.

Petition of appeal

The appellant filed a memorandum of appeal on 26th September 2013. With leave of this court he amended the appeal and filed on 8th July 2014 an amended petition of appeal and written submissions. In his earlier petition of appeal the appellant claims that the evidence was contradictory and inconsistent; that no exhibit was recovered from him; that he was not positively identified as the robber; that there existed a grudge between him and the complainant and that the prosecution case was not proved beyond reasonable doubt.

In his amended petition of appeal, the appellant claims that the charge is defective; the trial was unfair; that this was a normal disagreement which resulted into an assault and that there was no intention to commit robbery and that the case was not proved beyond reasonable doubt.

Appellant's submissions

The appellant did not have legal representation. He argued his appeal in person. He submitted that the charge is defective because it omits the words "dangerous or offensive weapon" and that the charge was amended by adding the words "dangerous weapon" without leave of the court and without countersigning against those changes; that the charge does not comply with the law and does not state all the ingredients of the offence of robbery with violence.

The appellant submitted that the circumstances of the case are that this was a dispute between him and the complainant and that the members of public planted the complainant's phone in the appellant's pocket; that the case was not proved beyond reasonable doubt and that he was beaten up and not given medical attention as a result of which his rights were infringed. The appellant asked this court to allow his appeal, quash the conviction and set aside the sentence and set him free.

Respondent's submissions

The respondent, through learned state counsel Mr. Collins Orwa, opposed the appeal. Mr. Orwa submitted that there are no defects in the charge sheet and that section 134 of the Criminal Procedure Code was complied with; that the appellant understood the charges and participated fully in the trial and that evidence adduced supported the charge sheet; that proof of one ingredient of robbery with violence is sufficient for a conviction of the offence of robbery with violence.

It was further submitted that the offence was committed at 7.30am and PW1 and PW2 identified the appellant; that PW1 and PW2 corroborated each other in their evidence and PW4 corroborated the evidence of PW1 on the injuries he suffered; that the phone recovered from the appellant was identified by the complainant as belonging to him; that the doctrine of recent possession is applicable and that the prosecution evidence is overwhelming. Counsel further submitted that the sentence meted out is a legal sentence. He urged the court to find that the appeal lacks merit, dismiss it and uphold the conviction and sentence.

Determination

Alive to the duty placed on this court while sitting on first appeal, we will subject all the evidence to fresh scrutiny. We caution ourselves that we did not benefit from observing the witnesses testify and we will give allowance to that. We will consider whether the charge is defective; whether the evidence is sufficient to support a charge of robbery with violence; whether there are contradictions or inconsistencies in the evidence; whether the appellant was positively identified and whether he was accorded a fair trial. It is our considered view that consideration of these issues will satisfy the issues the appellant has raised.

Defective charge

The offence of robbery with violence under section 296 (2) of the Penal Code is committed in any of the following circumstances:

- (a) The offender is armed with any dangerous and offensive weapon or instrument; or**
- (b) The offender is in company with one or more person or persons; or**
- (c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.**

The appellant contends that the charge in this case did not contain all the ingredients of the offence of robbery with violence because it omitted the words “dangerous or offensive weapon”. We have considered this issue. We have noted that it is true the charge does not include those words. It states that the appellant was armed with a metal bar. The word “dangerous weapon” has been inserted before “metal bar” using different pen and ink. Our scrutiny of the record does not show any application by the prosecutor to amend the charge by inserting those words and therefore the appellant could be right in making the claim if the contentious words were inserted after the plea was taken. It could also be true that the words were inserted before the charge was brought to court. Be that as it may, to resolve this issue we have examined the wording of section 296(2) of the Penal Code which provides that:

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death” (emphasis added).

The charge is clear that the appellant was armed with a metal bar. The issue is that the metal bar is not qualified in the particulars of the charge as a dangerous or offensive weapon or instrument. We have given this issue serious thought and we hold the view that the charge is not defective because of the omission of the words complained of. It clearly states that the weapon or instrument the appellant was armed with during the robbery was a metal bar. The issue is whether a metal bar can be described as dangerous or offensive weapon. We think it can and therefore the charge is not defective merely by omitting to insert the words “dangerous or offensive weapon or instrument” before the word “metal bar”. We think that by indicating that the appellant was armed with a metal bar it is sufficient for the purposes of the charge.

In the event that we are wrong on that issue, we have considered that this is not the only ingredient to be proved by the prosecutor. There are numerous decisions to the effect that if any of the three ingredients of robbery with violence has been fulfilled then the offence would be said to have been proved (see **Criminal Appeal No. 18 of 2009 Daniel Njoroge Mbugua vs. Republic (2014) eKLR**).

Evidence shows that the complainant was injured. The complainant told the court on this issue as follows:

“I was walking on the way there was a woman walking in front of me (*sic*). She was one Nelly. She was stopped by the accused person and I didn’t know what they were talking about. When I reached them he spoke to me in Kiswahili. I did not understand what he said and I asked him what he had said. He held me on the collar and removed a metal bar from his waist. He stabbed me on the left shoulder and back. He told me to give him my phone.”

PW2, on her part, told the court as follows:

“On the way I met one Somali man, the accused before the court. He asked me if I was Kenyan. I told him I was not Kenyan. Just then one Ojulu appeared. The Somali man asked him who he was and what he wanted. The Somali man then held Ojulu on the neck. The accused then produced a metal bar from his waist and started stabbing him on the body” (*sic*).

PW4 confirmed, after examining the complainant, that he had been injured on the right upper arm and lower back.

The evidence of these three witnesses confirms that one of the conditions of robbery with violence had been proved beyond reasonable doubt.

Contradictions in evidence

We have noted that the complainant told the court that the appellant removed the phone from his (complainant’s) pocket while PW2 said that the complainant gave his phone to the appellant. We have

considered that at the time PW2 said the complainant gave the appellant his phone, the complainant was under attack by the appellant. The phone was taken by the appellant by force and after he had begun stabbing the complainant with the metal bar. So whether the complainant handed the phone to the appellant or the appellant removed it from the complainant's pocket, the circumstances were such that the complainant was under threat. In our view this contradiction does not go to the root of the issue that under threat of violence the appellant took the complainant's phone.

Identification of the appellant

Evidence touching on the identification of the appellant was given by several witnesses. It was in the morning around 7.30am. The appellant had been talking to PW2 before the complainant arrived. After the robbery, the complainant chased the appellant. PW3 caught up with them and the appellant did not manage to escape. He was handed over to Police Constable Elijah Kipchumba PW5 the same day after about 30 minutes from the time of the robbery. We have no doubt in our minds that the appellant was positively identified and there is no error. There is no evidence to show that the identification of the appellant could have been hampered by anything.

PW3 told the court that the appellant threw the stolen phone down but the members of public picked it and gave it back to him. The phone was found in his pocket by PW5. The same phone was positively identified by the complainant as the phone stolen from him some minutes after the robbery.

The appellant claims there was a grudge between him and the complainant. In his defence, he alluded to a grudge with a certain man whose name he did not give. He did not raise the issue of grudge during his cross examination. The trial magistrate did not believe this defence and neither do we. We also find his claim that the trial court did not consider his defence unfounded. The trial magistrate indicated in her judgment that she had considered the defence and found that it did not shake the prosecution case.

We have not found any evidence that the complainant or any member of public planted the phone on the appellant as he claims. What the evidence shows is that the appellant threw the phone down after being cornered but members of public picked it and gave it back to him.

Our careful scrutiny of the evidence shows that the appellant complained to the trial court about injuries he had sustained and the court had ordered that he be taken to hospital for treatment. Other than that, the evidence was interpreted to the appellant in Kisomali and record shows he understood the charges against him. We have found his claim that he was not accorded a fair trial unfounded.

Lack of proof beyond reasonable doubt

We have considered this issue carefully. We have shown in this judgement that the complainant was attacked around 7.30am in the presence of PW2; that he stabbed the complainant using a metal bar he had with him; that the appellant was chased and caught before he got a chance to escape; that he was found with the phone recently stolen from the complainant and that he was handed over to PW5 the same morning about 30 minutes after the robbery. We have no doubt in our minds as shown in this judgment that there is no error in the identification of the appellant and that it was proved beyond doubt that he is the one who attacked and robbed the complainant of his phone. It cannot be true that the complainant was framing the appellant.

Our conclusion after giving this case due consideration is that the evidence proves beyond reasonable doubt that the appellant attacked the complainant with the intention of robbing him of his phone and that he used violence by inflicting physical injuries on the body of the complainant using a metal bar. This was not a simple disagreement turned into an assault as the appellant would want us to believe.

We have found no fault with the lower court grasp of the issues before it and the conclusions arrived at by that court. It is our finding, therefore, that this appeal has no merit and must be dismissed which we hereby do. We make orders accordingly.

Dated and signed this 11th September 2014.

F.N. MUCHEMI

S. N. MUTUKU

JUDGE

JUDGE

Delivered this 18th day of September 2014

By Justice Stella Mutuku.