



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.645 OF 2010

PATRICK ANGWENYE SHIMEKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Appellant was charged with three counts of robbery with violence contrary to Section 296(2) of the Penal Code. On a fourth count, he was charged with being in possession of imitation fire arm contrary to Section 34(1)(2) of the Fire Arm Act, Chapter 114, Laws of Kenya.

The particulars of the offence were as follows:

Count I: That on the 26th of May, 2007 at Lavington along James Gichuru Road, Kilimani in Nairobi within Nairobi area, jointly with others not before court while armed with dangerous and offensive weapons namely a pistol serial number 089899 MC make Barretta, a toy pistol, one part of shear and a rungu robbed Paul Edward Odhiambo Gondi of cash 6,000/=, two mobile phones make Nokia and Motorola 113, two credit cards for National Bank and Prince Bank, one identity card and one motor vehicle registration No. KAS 180Q make Toyota Xtrail all valued at Kshs. 4 million and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Paul Edward Odhiambo Gondi.

Count II: That on the 26th day of May, 2007 at Lavington along James Gichuru Road Kilimani in Nairobi within Nairobi area, jointly with others not before court, while armed with dangerous and offensive weapons namely pistol serial number 089899 MC make Barreta, a toy pistol one part shear and a rungu robbed ALICE NEREYA GONDI of Kshs. 23,000,220 Sterling Pounds, a pair of golden earrings, two golden rings, one golden chain, one Nokia and one Olympia camera all valued at Kshs. 180,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Alice Nereya Gondi.

Count III: On the 26th day of May 2007 at Nairobi area, jointly with others not before court, while armed with dangerous and offensive weapons namely pistol serial number 089899 MC make Barreta, a toy pistol, one part shear, and rungu rubbed Tom Odhiambo Gondi or cash 250/= and one mobile phone make Nokia 2610 all valued at Kshs. 6,950/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Tom Odhiambo Gondi.

Count IV: On the 26th day of May, 2007 at Lavington in Nairobi within Nairobi area, was found in possession of an imitation firearm to wit one black toy pistol which has the appearance of a firearm with intent to commit a criminal offence namely robbery with violence thereof.

In a Petition of Appeal filed on 16th November, 2010, the Appellant appealed against both the conviction and sentence. Subsequently on 24th November, 2014, he filed a Notice of Withdrawal of the Appeal. On his appearance in court on 3rd December, 2015, he informed the court that he wished to withdraw the appeal because he had already served 5 years in jail out of the 10 years imprisonment term. Since the date of taking plea, he had been in prison for 8 years. He urged the court to consider the 8 years he had been in prison as constituting sufficient punishment and set him free. The trial court found him guilty in the first 3 counts but reduced the offence to one of simple robbery under Section 296(1) of the Penal Code. He was accordingly sentenced to 10 years imprisonment. The court was however, silent on whether the sentence was in respect of either of the counts or in respect of all the counts and how the same would run. Be that as it may, the court was of the view that the appeal should be expedited so as to ensure that justice was done to the Appellant. The court advised the Appellant not to withdraw the appeal merely because the same had taken long to be heard. This court personally called for the lower court proceedings and set the appeal for hearing on priority basis. On receipt of the lower court record, on 15th December, 2015, the appeal was admitted to hearing and the Appellant was requested to proceed.

However, the Appellant insisted that he did not wish to proceed with the appeal but appreciated the court's effort in having the proceedings brought to the court within a very short time. Instead, he submitted that he would withdraw the appeal and proceed with a revision of the sentence. His submission was that for the period he had been in prison, he had reformed. He had also learnt how to make upholstery which skill would help him earn a lawful living upon leaving the prison. He also submitted that he was a family man and was extremely remorseful.

Learned state counsel M/s. Maina for the Respondent opposed the appeal. She submitted that there was sufficient evidence to convict the Appellant for the offence of Robbery with Violence. The 10 years jail term was in the circumstances lenient and the court ought not to interfere with it.

Having considered the submissions, the Appellant having withdrawn the appeal and having submitted that he was seeking a review of the sentence meant that he was invoking the provisions of Section 362 of the Criminal Procedure Code. The provision donates to the High Court the power to call for criminal proceedings before a subordinate court for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded on passed, and as to the regularity of any proceedings of the subordinate court.

Section 364 on the other hand provides for the orders this court may give upon examining the subordinate court's proceedings pursuant to Section 362. Under Section 364 (1)(a), the Court may exercise any of the powers conferred on it as a Court of Appeal by virtue of Sections 354, 357 and 358 of the Criminal Procedure Code and may even enhance the sentence. Under Sub- Section (1)(b), the court may also alter or reverse the order. Under Sub-Section (2) the court must not make any order that is prejudicial to an accused person unless he has had an opportunity to be heard either personally or by an advocate in his own defence.

This court is seized with the original record of the trial court. In convicting the Appellant of lesser offences under Section 296(1) of the Penal Code, the learned trial magistrate justified her finding on ground that the victims of the robbery were not seriously injured. The facts of the case unfortunately revealed that the ingredients of the offence of robbery with violence were proved. PW1 who was the

complainant in count 1 was accosted by four robbers who were armed with a gun as he parked his vehicle in the home garage. He was in the company of his wife Alice Melea Gondi, the complainant in the second count. She vividly identified the Appellant and during the attack robbed her of her chain and earrings. PW4 was the complainant in count III and during the robbery was confined into the servant quarters together with the gardener one, Nicholas Omondi. In the course of the robbery, all the three complainants lost the properties itemized in the particulars of the charges. There was evidence that the robbery was committed by a gang of more than one person, the robbers were armed and they used actual violence against the victim. The court cannot fathom how the then learned trial magistrate in those circumstances deemed it necessary to substitute the charges for lesser offences.

Under Section 354(3)(ii), the court may alter the finding by reducing or increasing the sentence. On considering that the revision is against the sentence, and that he was convicted for a lesser offence, which under the Penal Code carries a possible 14 years imprisonment, I conclude that the sentence was within the provision of the Law. However, due to the omission of the court on how the sentences would run, I order that the same in respect of the first 3 counts should run concurrently. Given the circumstances of the case, and notwithstanding that the Appellant has been in prison for the last 8 years, I find no good reason to vary the same. The request for the revision is accordingly dismissed.

DATED and DELIVERED this 23rd day of DECEMBER, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant present in person.*
2.*Respondent.*



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