Case Number:	Criminal Appeal Case 31 of 2018
Date Delivered:	15 Mar 2022
Case Class:	Criminal
Court:	High Court at Kitui
Case Action:	Judgment
Judge:	Robert Kipkoech Limo
Citation:	Con Benard Mwendwa v Republic [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kitui
Docket Number:	-
History Docket Number:	Inquest No. 1 of 2017
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN TH HIGH COURT OF KENYA AT KITUI

HIGH COURT CRIMINAL APPEAL CASE NO. 31 OF 2018

CON BENARD MWENDWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being a Revision of the inquest Ruling in Mutomo SPMC Inquest No. 1 of 2017)

J U D G E M E N T

1. The appellant herein, was charged with two counts of robbery with violence contrary to ***Section 296 (2) of the Penal Code vide Kitui Chief Magistrate's Court Criminal Case No. 733 of 2015.***

2. In the first count, the particulars of the offence were that on 25th July, 2015 at around 1 am at Kivaani location, Kangungi sub-location, Kitui County, jointly with others not before court while armed with offensive weapons namely metal bars, axes and rungus robbed Bibiana Kyambi of 2 mobile phones of Techno valued at Kshs. 5,000 and Nokia valued at Kshs. 2,500 and cash of Kshs. 70,000 all valued at Kshs. 75,500 and immediately after the time of such robbery used actual violence to the said Bibiana Kyambi.

3. In the second count, the particulars were that on the same date, time and location, jointly with others not before court while armed with offensive weapons namely metal bars, axes, and rungus robbed Zachaeus Kyambi Kimotho of two mobile phones of make Nokia valued at Kshs. 2,500 and Techno valued at Kshs. 4,700 all valued at Kshs. 7,200 and immediately after the time of such robbery used actual violence to the said Zachaeus Kyambi Kimotho.

4. The appellant pleaded not guilty to both counts and the prosecution called 2 witnesses to prove their case. They were unable to present other witnesses because after several adjournments the trial court declined further adjournment forcing them to rely on the evidence of only two witnesses.

5. The first witness and the complainant in the second count **Zachaeus Kyambi Kimotho (PW1)** testified that material day some people broke into his house at around 1.00am. He stated that he was with his wife at the time when three people dressed in black hoodie broke into the house. He stated that he was able to see the robbers as lights were on. He stated that the thieves stole a TV set valued at 14,500 and 3 phones two of which were of Techno make. He stated that the thieves ordered the witness and his wife to lie down then left after robbing them. He stated that they screamed when the robbers left and their neighbours came to their rescue and pursued the robbers. That they caught up with the Appellant, arrested him and brought him back to the scene. He stated that Kshs 7,000/- was recovered from the Appellant and that police were called to the scene.

6. **Joseph Munyoki Kimotho (PW2);** informed the trial court that he was asleep in his house when he heard screams coming from his neighbour's house. He added that he went outside and saw people trying to break into his neighbour's house. He stated that he went into his neighbour's house who reported to him that she had been raped. He testified that a group of his neighbours went after the robbers and arrested the Appellant who he identified as his neighbour. He stated that footmarks resembled the Appellant's. However, he testified that when the appellant was arrested, he was not there.

7. The Appellant gave a sworn testimony in defence and denied committing the offence. He stated that he was at his home on the morning of 26th July 2017 when he was arrested by two people who claimed to have been looking for someone called Kingee. He stated he did not know why he was arrested.

8. The trial evaluated the evidence and found the appellant guilty in the 2nd Count. The appellant was convicted and sentenced to death.

9. He felt aggrieved and filed this appeal raising the following grounds namely;

i. That the pundit magistrate erred in both law and facts by convicting the Appellant while relying on the said recovered money without considering that the amount recovered compared to the amount said to have been robbed from the complainant and then compared to the number of people said to have robbed PW1 is very little to rely upon in order to convict.

ii. That the learned pundit magistrate erred both in law and facts by convicting the Appellant relying on evidence of PW1 and PW2 without considering that the two witnesses were close relatives who just negotiated so as to upload this heavy burden upon the Appellant's shoulders.

iii. That the learned magistrate erred both in law and facts by convicting the appellant without considering that one of the crucial witnesses the arresting and investigating officer was not produced before the court to testify hence weakening the evidence on the prosecution side whereby it could not sustain such a conviction.

iv. He erred both in law and facts by convicting the Appellant i.e. relying on the amount recovered without considering that the so said recovered amount had no evidence from the one who was said to have recovered the same and the court erred by believing the only evidence of PW1 the complainant could also deceive.

10. In his written submissions, the appellant introduced amended grounds without leave of this court as stipulated under ***Section 350(2) of the Criminal Procedure Code***.

11. None the less, he takes issue with the Prosecution's failure to call the investigating officer and the first complainant indicating that the two were vital witnesses. He further submits that the prosecution ought to have called some members of the public who participated in his arrest on the material night. He contends that failure to call them was fatal to the prosecution's case.

12. The Appellant further faults the charge sheet stating that it was defective for duplicity. He contends that he was charged with two counts of robbery with violence when the robbery was against a husband and a wife and occurred in the same house.

13. The Appellant further contends that he was not positively identified by the complainant. He submits that the court shifted the burden of proof to him instead of the prosecution.

14. The prosecution for the record had no submissions to make and its treated that it left the matter for determination of this court.

15. This being the first Appellate Court, this court is required to examine and analyze all evidence adduced in the trial court and arrive at its own independent finding. This principle was upheld by the Court of Appeal in ***Kiilu & Another V. Republic [2005] 1 eKLR 174*** where the court held that:

"An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1st Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1st Appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, only then can it decide whether the Magistrate's finding 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. …."

16. This appeal has raised 3 issues namely;

a) Whether the charge sheet was defective.

b) Whether the failure to call the investigating officer was fatal to the Prosecution's case.

c) Whether the prosecution proved the offence of Robbery with violence to the required standard;

17. Whether the charge sheet was defective

a) The Appellant submitted that he was convicted on a charge sheet that was defective. This was because the complainants were husband and wife and that they were robbed in the same room. The first count was in regard to the wife while count two referred to the husband. The Appellant contends that being charged with two counts of robbery with violence for a robbery that took place in the same room made the charge sheet defective for duplicity.

18. ***Section 134 of the Criminal Procedure Code*** spells out what constitutes a good charge it states as follows:-

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 particulars as may be necessary for giving reasonable information to the nature of the offence charged.

19. ***Section 135 of the Criminal Procedure Code*** allows for joinder of counts for a series of offences of the same or similar character as follows;

1. ***Any offences, whether felonies or misdemeanors, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.***

2. Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.

20. Joinder of similar offences in a charge sheet does not constitute duplicity just because the victims of the offence were married to each other and were in the same room. If the offences described are different but occurred in the same transaction, the prosecution is allowed by statute to have them in the same charge sheet in different counts. The charge sheet presented to the lower court had 2 counts which I have stated above which above which clearly stated that 2 people were robbed of valuables.

21. The charge sheet was not defective on the grounds advanced by the appellant. It was defective to the extent that the evidence given by **PW1** was not in tandem with the particulars indicated in the second count or in respect to what was stolen from the Complainant in **Count II**.

22. In his evidence PW1 stated the robbers stole a **TV Set** valued at **Kshs. 14,500** as well as cash money totaling **Kshs. 7,000** and 2 mobile phones all valued at **Kshs. 7,200**. The **TV Set** is missing from the particulars in the charge sheet presented to the trial court.

23. Another issue with the charge sheet is that it indicates that the Appellant together with others were armed with offensive weapons namely; **metal bars, axes** and **rungus.** There is however nothing on record from the evidence given by **PW1** and even **PW2** indicating that the robbers were armed with offensive weapons.

24. The ingredients of robbery with violence are set out in ***Section 296(2) of the Penal Code***. They are; -

'a) the offender must be armed with any dangerous or offensive weapon or instrument; or

b) the offender must be in the company of one or more other person or persons or;

c) 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.

25. The evidence presented indicates that the appellant was in the company of 2 gangsters which information is also captured in the charge sheet. The evidence therefore, revealed the existence if an ingredient because the use of conjunctive word ''or'' means that any of the elements in (a) (b) or (c) is sufficient to constitute a charge under ***Section 2a b (2) of the Penal Code***.

26. ***(b) Whether the failure to call the Investigating Officer was fatal to the prosecution's case***

The appellant has faulted the prosecution for failing to secure attendance of the Investigating Officer which I find legitimate. The

reasons why find so are as follows: -

27. In the first place, the properties stolen from the complainant were never produced in court. The appellant was charged with robbery with violence and it was crucial that the items recovered from him and marked for identification were tendered in evidence. The same was not done due to lack of diligence from the prosecution.

28. Secondly, the manner in which the appellant was arrested is not very clear. **PW1** stated that he did not know why he was arrested. PW2 stated that he was not among the group that arrested the appellant. It was critical for at least one of the witness who pursued the robbers and found the appellant, to be availed to shed light on how appellant was arrested and from where but the same was not done. The Investigating Officer also did not come to state why he preferred charges against the appellant.

29. Thirdly, though some of the stolen items were identified by PW1, there was no witness who testified to show from whom and where they recovered from and where the items were recovered from for the trial court could see whether the doctrine of recent possession could be applied against the appellant. The prosecution did not offer explanation why they could not avail witnesses to testify on those crucial aspects of their case. Failure by the State to avail the crucial witnesses should have made the trial court infer that the evidence of the witness not called was adverse to their case.

30. In the case of Republic v Cliff Macharia Njeri [2017] eKLR it was stated that

"The other witness not called was the Investigating Officer. No doubt this witness was important as he could have shed more light as to investigations carried out and would have explained on what basis the accused was charged.

Having considered the issue at hand I find that the prosecution failed to avail crucial witnesses in their case. I find that the prosecution failed to make available all witnesses necessary to establish the truth. The evidence adduced was barely adequate to establish the truth in this case. Consequently, I find that this court is justified to make an adverse inference that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution and that was the reason they were not called."

31. (c) Whether the Prosecution proved their case beyond doubt

It is quite clear from the evidence tendered that the prosecution's case against the appellant was based on evidence of PW1. He stated that he identified the appellant because he was spotting a beard. The appellant did not successfully dispute that fact but the omission by the prosecution to call witnesses who arrested the appellant and identify the items he was found with when arrested was fatal to their case because in the absence of the direct evidence linking him with the offence, the prosecution's case against him could not be sustained. The trial court fell into error by making the conclusion it did that the evidence of the 2 witnesses called was sufficient. This court finds that it was not due to the gaps highlighted above.

In the premises this court finds merit in this appeal. The conviction of the appellant based on evidence tendered by the prosecution was not safe and insufficient.

This **appeal is allowed.** The **conviction is set aside** and the **sentence is reversed.** The appellant shall be **set free** forthwith, unless lawfully held.

DATED, SIGNED AND DELIVERED AT KITUI THIS 15TH DAY OF MARCH, 2022.

HON. JUSTICE R. LIMO

JUDGE