



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 28 OF 2018**

**(CONSOLIDATED WITH HCCRA NO. 31 OF 2018)**

**BENARD MWENDWA KANANI..... 1<sup>ST</sup> APPELLANT**

**DICKSON WAMBUA MUNYAO.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**REPUBLIC..... RESPONDENT**

*(From the original conviction and sentence of Hon. J. N. Mwaniki (SPM) in Makueni Principal Magistrate's Court Case No. 660 of 2016 delivered on 31<sup>st</sup> July, 2018).*

**JUDGMENT**

1. The two appeals were consolidated and heard together as they arose from the same trial.
2. The two Appellants were jointly charged before the Magistrate's court with robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence being that on 13<sup>th</sup> November 2016 at Miangeni Sub-location, Athi Location in Mbooni East Sub-county within the Makueni County jointly robbed JOSEPH MUEMA MUTIE one mobile phone make ITEL, a pair of brown leather shoes, a long trouser, half a kilo of sugar, two kilograms of maize, three kilograms of maize flour, half a litre of cooking oil and cash money Kshs. 5,000/= all valued at Kshs. 7,155/= and immediately after the time of the robbery, used actual violence to the said JOSEPH MUEMA MUTIE.
3. Dickson Wambua Munyao was charged with a second count of possession of cannabis sativa contrary to Section 3(1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994, the particulars of which were that on 16<sup>th</sup> November 2016 at Miangeni AP Camp, Miangeni Sub-Location, Athi Location in Mbooni East Sub-County within Makueni County was found being in possession of cannabis sativa to wit ten grams, valued at Kshs. 100/= which was not in medical preparation.
4. After a full trial, they were both convicted of robbery with violence and sentenced to serve seven (7) years imprisonment each. Dickson Wambua Munyao was acquitted of the offence of possession of cannabis sativa.
5. Dissatisfied with the conviction and sentence for robbery with violence, the Appellants filed the present appeals on several grounds. Dickson Wambua Munyao is in person while Bernard Mwendwa Kanani is represented by Kamolo & Associates advocates. The combined grounds of appeal can be summarized as follows:-
  1. *The evidence of identification was insufficient.*
  2. *The prosecution failed to call crucial witnesses to testify.*
  3. *The evidence of the prosecution was contradictory.*
  4. *That the Magistrate erred when he failed to accord the Appellants the right to legal representation.*
  5. *The learned Magistrate erred when he failed to comply with section 200 of the Criminal Procedure Code.*
  6. *That the Magistrate erred in not taking into account the alibi defence of DICKSON WAMBUA MUNYAO.*
6. The appeals hearing proceeded through filing of Written Submissions which I have perused and considered.

7. This being a first appeal, I have to start by reminding myself that I am required to evaluate the evidence on record afresh and come to my own independent conclusions and inferences. In doing so however, I have to bear in mind that I did not have the opportunity to see the witnesses testify to determine their demeanor. See **OKENO –VS- REPUBLIC [1972] EA 32**.

8. I have evaluated the evidence on record. I have considered the grounds of appeal and submissions of the Appellants and the State. I note that the Appellants relied on several authorities.

9. At the trial, the prosecution called five (5) witnesses. Pw1 was Dr. Emmanuel Laiposha who produced a P3 Form to confirm that the Complainant suffered injuries which were classified as harm. Pw2 was **Joseph Mwema Mutie** the Complainant who stated that on 13/11/2016 at 11.00 p.m., he left a bar at Miangeni market, and while on the road, he was attacked by two people, who approached him on a motorcycle, attacked, injured him and robbed him of various items and money. Pw3 **Peter Mwangi Wambua** testified that on 14/11/2016 while going to work, he picked a mobile phone whose owner he did not know and handed it over to the police. Pw4 **Patrick Mwau Mukoma** an Administration Police Constable testified that he rescued the two Appellants from a mob on 16/11/2016 and arrested them and handed them over to the regular police. Pw5 **Stephen Onchori** a Police Constable was the investigating officer who picked the two Appellants from the Administration Police camp and charged them with the offence.

10. In their defences, Dickson Wambua tendered a sworn defence and stated that he was beaten and arrested for merely sympathizing and trying to assist Bernard Mwendwa who was being assaulted by the public. On his part Bernard Mwendwa tendered unsworn defence statement and stated that he was a motor cycle rider and that on 16/11/2016 he rode to the market only to be attacked by a crowd, and was arrested and taken to Kalawa police station.

11. It is trite that in any criminal case, the burden is always on the prosecution to prove the guilt of the accused person beyond any reasonable doubt. An accused person has no burden to prove his innocence – See **WOOLMINGTON –VS- DPP [1935] AC, 462; AND KELVIN KISWIKI KYONGI –VS- REPUBLIC – MACHAKOS HIGH COURT CRIMINAL CASE NO. 1998 OF 2014 (2018) eKLR**.

12. The incident herein occurred at night. The Complainant was from a bar and had taken alcohol. He was attacked on the way home. Though he talked about moonlight, the intensity of the light is not described by him. The period he was with his attackers was also not described. Again though he initially stated that his bag containing various items was robbed, later in cross examination he said that his bag was picked by Wambua (Pw3) because he had left it behind at the bar and that Wambua in fact brought it to him at home. Peter Wambua who testified as Pw3 however, never mentioned in his evidence about the bag. Instead he talked about recovery of a mobile phone the next day whose owner was not known.

13. Thus the evidence regarding the circumstances of the alleged robbery shows that the conditions at the scene were not favourable to positive identification of the attackers in that first the complainant was under the influence of alcohol and thus his senses were impaired. Secondly, no evidence was tendered to establish sufficiency of light for positive identification as the intensity of moonlight was not described. The evidence of the complainant was also contradictory and his credibility was in doubt since he gave contradictory evidence about the role of Peter Wambua and recovery of his bag and phone.

14. In addition to the above, there is no evidence that the Complainant mentioned the names or gave the description of any of the attackers before arrest. In fact, he merely went to the police station to make a report of the incident after the arrest.

15. Thus it cannot be said from the complainant's evidence that any of the Appellants was identified as being connected with the alleged robbery of the Complainant.

16. Further, crucial witnesses were not called to testify, as none of the people who arrested the Appellants were called by the prosecution to testify. These were crucial witnesses who would have tendered evidence to establish why the Appellants were arrested. In my humble view, since the trial court did not know why the Appellants were arrested, it went into error to convict them as the evidence regarding the reasons for their arrest was hearsay evidence. The failure of the prosecution to call these crucial witnesses could only lead to the inference that their evidence would contradict the prosecution evidence. See **BUKENYA –VS- UGANDA (1972) E.A 549**.

17. Finally, with due respect, the trial court also did not evaluate the evidence on record as required under Section 169(1) of the Criminal Procedure Code (Cap 75). In my view, had the trial court weighted the evidence of the prosecution against the defences of the Appellants, it would not have convicted the Appellants as it did, as the prosecution evidence was full of contradictions, and gaps, which should have led the trial court to determine the case in favour of the two Appellants.

18. I thus find merits in the two appeals. I allow both appeals, and quash the convictions and set aside the sentences imposed upon each of the Appellants.

19. I order that each of the two Appellants be set at liberty unless otherwise lawfully held.

**Delivered, signed & dated this 11<sup>th</sup> day of February, 2021, in open court at Makueni.**

.....

**GEORGE DULU**

**JUDGE**