



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 45 OF 2018

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 88 OF 2018 - JUMA HAMISI MWASHIRIKA VS REPUBLIC

&

CRIMINAL APPEAL NO. 89 OF 2018 - ABDALLA MWALIM VS REPUBLIC

SALIM RASHID MWALIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. E. Mutunga delivered on 11/04/2018

in Chief Magistrate Court Criminal Case No. 2151 of 2014).

J U D G M E N T

1. Salim Rashid Mwalim was accused with offence of robbery with violence contrary to Section 296(2) of the penal code in Mombasa CMC CR. Case No. 2151 of 2014.
2. The particulars of the offence were that the appellant together with Juma Hamisi Mwashirika and Abdalla Mwalimu on the 22nd day of November 2014 at Mtongwe area in Likoni subcounty within Mombasa County while being armed with a dangerous weapon namely a knife jointly robbed Bernard Mutua Munyao of his Charity Sweepstake terminal machine, Safaricom Credit Cards, Airtel Credit Cards, Yu Credic Cards and Charity Sweeptake Cards all valued at Kshs.150,000/= and immediately before or immediately after threatened to use actual violence to the said Bernard Mutua Munyao.
3. The prosecution tendered evidence of 4 witnesses which the trial Magistrate found had proved their prosecution beyond all reasonable doubt and convicted the appellant herein & his co-accused and they sentenced to suffer death as provided by Section 296(2) of the penal code.
4. The appellant herein was aggrieved by the conviction and sentence and he preferred the appeal herein on the following grounds:-
 - i. That the learned trial Magistrate erred in law and fact in convicting the appellant without considering that he had been branded a thief and this was just to eliminate him from society but no robbery occurred.
 - ii. That the learned trial Magistrate erred in law and fact by convicting the appellant without considering that the 1st report alleged to have been made by the complainant at the police station did not have his names.
 - iii. That the learned trial Magistrate erred in law and fact in convicting the appellant without considering that there was no specific amount as alleged to have been stolen.

iv. That the learned trial Magistrate erred in law and fact in convicting the appellant without considering that there was no weapon neither was the complainant injured.

v. That the learned trial Magistrate erred in law and fact in convicting appellant without considering that the prosecution case was not proved beyond any reasonable doubt.

vi. That the learned trial Magistrate erred in law and fact in convicting the appellant without considering his reasonable defence.

5. The appellant Juma Hamisi Mwashirika also filed grounds of appeal similar of those of the 1st Appellant Salim Rashid.

6. Abdalla Mwalimu in his amended grounds of appeal argued that:-

i. The learned trial Magistrate erred in law and fact by forming a conviction on identification evidence that was clumsy & inconsistent with the circumstances that prevailed in terms of the alleged incident.

ii. That he trial Magistrate erred in law & fact by failing to consider the glaring contradictions and inconsistencies that marred the prosecution's case.

iii. That the trial Magistrate erred in law and facts by failing to take account the very apparent indications that there existed a grudge between PW 2 & PW 3 and the appellants family which contributed to the framing of the charges.

iv. That the trial Magistrate erred in law & facts by failing to compel the prosecution to avail an OB Number that would have demonstrated the existence of the grudge between the named parties.

v. That the trial Court Magistrate erred in law & facts in failing to consider appellants reasonable defence.

vi. That the trial Magistrate failed to find that no recovery was done from the appellant, from what seems to have been stolen and search stint by members of the public in company of PW 1 & PW 3 should after the alleged incident at the accused persons place of abode, recent possession doesn't suffice.

vii. That the trial Magistrate erred in law and facts by failing to find that the attempt by the witnesses to create a chase & arrest scenario is and was wanting in detail and substance to connect the appellant with what had happened, in the absence of any evidence that show some one was in constant pursuit of the appellant from the scene of crime to his arrest a day later.

7. This appeal was canvassed by way of written submissions. 1st & 2ⁿ Appellants' Submissions was to the effect that evidence to their identification was unreliable and cannot safely sustained a conviction. That the circumstances under which they were allegedly identified was not conducive as it was at night and the prosecution witnesses did not give evidence as to the source of light use to identify them. They also submitted that the complainant did not readily mentioned who attack him and it was unclear whether he realized that the 3rd appellant attacked him after recovering consciousness.

8. The father submitted that evidence of PW 2 was a contrast version of the same incidence and the name Abdalla brought in belatedly as the person who attacked the complainant was identified as wearing a white T-shirt. It was further submitted that the evidence of PW 3 totally contradicted of that of PW 1 & PW 2 as alleged to have witness people pouring water to PW 1 a version that PW 1 never alluded to. Another contradiction of PW 3 is that he saw the 3rd appellant carrying the bags stolen from the complainant and yet PW 2 said that it is the 1st & 2nd appellant ran with the bag. The appellants concluded that the prosecution case was short of the standard of proof beyond reasonable doubt.

3rd Appellants Submission

9. The 3rd Appellant Abdalla Mwalim submitted that in consideration of the circumstances narrated by PW 1, the chain of events could not at any logical sense accord someone facing instant danger the chance to sanely and comprehensively register what was happening. He argued that it was impossible to take aside glance at night in an alley and be able to register anything other than fight off any aggression. It was submitted that PW 1 passed out after alleged attack and could not have known what transpired thereafter and the question of Accused identification remain doubtful.

11. It was further submitted that if it true 3rd appellant was identified as one of the perpetrators he would have been arrested & lynched. Appellant argued he was found in his house that very night and there was no evidence of pursuit of the appellant from scene of crime to where he was arrested the following day.

12. It was argued that PW 2's account of the incident was inconsistent and contradictory to the account given by other witnesses who alleged to have witnessed what transpired. It was 3rd appellant's further submissions that PW 2 claimed that PW 1 chased the robbers and yet PW 1 himself didn't say he chased the robbers as he had allegedly fell down unconscious. 3rd appellant claimed the testimony of PW 2 was common police 'text-book' coaching.

13. It was argued that it was not possible for PW 2 to recognize or identify the assailants at night as she had to take a close look even to identify PW 1 who was being beaten on the material night. The 3rd appellant submitted that there was evidence of dispute between him and the complainant which explained why he was fabricated. He also claimed he was denied access to OB No. 153/11/10/13 to prove that

dispute.

14. According to 3rd applicant the evidence of PW 3 was a narration given to her by PW 1. He said that evidence used to convict him had short comings and were incurable and the prosecution didn't prove its case beyond all reasonable doubt. The appellant prayed that the court gives him the benefit of doubt.

15. The Respondent in submissions relied in the holding in Criminal Appeal No. 163 of 2016 Kurera Chilo Kuto vs Republic to explain the ingredients of the offence of robbery with violence and in Oluoch vs Republic [1985] KLR 549 to support their position that proof of any one ingredient of the offence of robbery with violence is sufficient to base a conviction.

16. It was prosecution/Respondent argument that PW 1 recounted what happened to him on the material day and PW 2 saw PW 1 being wrestled by the throat by the appellant. That PW 3 also saw what was happening and that the waiting present bolstered the circumstances of positive identification.

17. The Respondent argued that the prosecution witnesses evidence was clean and there was no evidence of grudge and the trial Magistrate properly dismissed the 3rd appellant's arguments as complainant was not PW 2.

18. It was also submitted that the trial court ordered for production of OB report as applied by 3rd appellant and at the next hearing the 3rd appellant said he was ready to proceed with hearing. The Respondent submitted that the trial Magistrate considered the 3rd appellants defence and found it insufficient to exonerate him of the offence.

19. Regarding sentence the Respondent submitted that the court could substantive the death sentence with a definite sentence that is fit and just in the circumstances. It was prayed that conviction be confirmed and that appellant be re-sentenced as appropriate.

20. The duty of this court is to re-evaluate the evidence and Judgment on record in the Magistrates Court and come up with an independent opinion on whether the finding of the trial Magistrate was grounded on sound principles of law and on evidence on record.

21. The complainant in this matter said it is 3rd appellant who 1st attacked him but when he allegedly regained consciousness he didn't tell members of the public immediately because the attackers could have been lynched. The Complainant said that members of public went to appellant's houses and conducted search but recovered nothing that his wife called to tell him his stolen items had been returned. The wife of PW 1 didn't say who had returned the stolen items and didn't attend court to testify.

22. PW 1 said he identified 3rd appellant. He didn't say whether he identified the other appellants when he was attacked. According to PW 1, 1st appellant Salim Rashid had earlier stolen his chicken and that he was a known thief. The Complainant said that he was attacked on a populated area and light came from the houses near scene.

23. PW 2 said that when she heard screams outside at 8.00pm she went out and saw a man in white T-shirt had pinned another down and that the man ran away. That the victim shouted that they had taken everything and when she looked closely she realized that it was her neighbour Bernard who had been attacked and robbed. That Bernard gave chase and didn't manage to catch anyone. That the following day the bag was returned. That a man passed by and he was stopped and beaten. That 2 others had passed and the one who was being beaten demanded to know why he was being beaten alone.

24. PW 2 said he knew the appellants as they grew up in the same area. She said Salim and Juma took off with the bag and left Abdalla behind. That Abdalla was the last to run from scene. She said she didn't know what was in the bag. According to PW 1, A1 who is 2nd appellant herein was being hosted by the 1st and 3rd appellants. She said in cross examination that it is Accused 1 who was left at scene after Juma & Salim file. Initially she said Abdalla was the last to run from the scene and from the lower court file Accused 1 is Juma Hamisi, Accused 2 is Salim Rashid and Accused 3 is Abdalla Mwalim.

25. She said that her sister was also a witness. She said she recorded her statement and gave Accused 1 – 2nd Appellants name. She said she gave police the names and description of the robbers. She said she saw the clothes the 2nd accused – 1st Appellant was wearing. She said there was enough light. He said Accused 2 had a black shirt. She said Hamisi was not present during the incident. She said she was not present when Rajab and Accused 2 – 1st appellant with a panga. She said she had never threatened Accused 2 – 1st Appellant. She said Accused 2 used to steal her chicken when she used to rear.

26. In response to Accused 3 – 3rd Appellant, she said that she saw him choke complainant and she screamed and members of public came. She said Accused 3 was the last to flee from the scene.

27. PW 3 Ali Abdalla testified that on 22/22/2014 at around 8.00pm he stepped out of the houses and heard noise behind him. That he went near the light and saw the accused persons whom he knew. That when he inquired from Mama Zaitun why there were people at Mutuas shop he was told Mutua had been robbed outside his shop. That he told Zaintun to close her door and at that point he saw Accused 2 – 3rd Appellant with a bag and he was in company of Accused 1 & Accused 2.

28. That Abdalla asked why he was telling Mama Zaitun to close her door. That he then went to Mama Rukias house and met Mama Ali. That he saw Mutua on the ground and people were pouring water on him that he was informed Mutua had been robbed by the 3rd accused persons and that Rukia – PW 2 saw them run from scene.

29. According to PW 3, the crowd that had been pursuing accused persons wants PW 2's place and she told them that accused persons were

responsible for the theft. According to PW 3 wore a white shirt Accused 1 wore a black shirt and Accused 2 was in darkness and he didn't see what he wore.

30. He said they took accused (which are) to Mr. Mutua's shop and went to sleep. It would appear the next day they came and found the bag had been returned to PW 1's shop or it was then Accused 1 was thoroughly beaten by a mob and arrested. That the other accused persons were pushed and arrested. PW 3 said he heard PW 1 was strangled and his Kshs.30,000/= stolen together with a bag containing scratch cards for credit and Charity Sweepstake cards.

31. In cross examination, he said he knew Accused 1 (2nd Appellant) because he ended with 3rd Appellant – Abdalla Mwalim. He said Accused 1 had a tendency for stealing. He said they found Accused 1 in his underwear smoking bhang and had him arrested. He said nothing was recovered from Accused house. He said PW 1 was unconscious after the attack. He said there were over 100 people but it is Rukia who saw them rob the complainant. He said Accused 1 passed at scene of crime but he didn't know who returned the bag.

32. In cross examination by Accused - (1st Appellant) PW 3 said that they had fished together but his behavior was wanting in the community. He said A2 stole his chicken. He said there was a crowd at scene and that he saw A2 steal. He said the house was searched and nothing was recovered and A2 was told to go and sleep but that didn't mean he had been released.

33. He said Accused 2 was arrested at Soko Mjinga and taken to the village. He said he didn't injure Accused 2 for stealing chicken. In cross examination by Accused 3 (3rd Appellant) PW 3 said he saw Accused 3 carrying the bag. He said the bag was returned at night and it is not known who returned it. He said A3 & A2 were arrested at Soko Mjinga. He said the complainant was unconscious and he was taken to hospital after the incident. He said A3 spoke to him and he saw him with the black bag which belonged to Mutua.

34. PW 4 P.C. Titu Musumbi testified on behalf of the initial Investigating Officer who was allegedly injured and could not come to court. He produced Charity Sweepstake machine scratch cards for yu, zain and safaricom to P1 & 2. PW 4 said the accused persons were identified by the Complainant who knew them. He said suspects were arrested by members of the public. He said one witness was threatened by members of Accused 1's family. He said he could not tell of any grudge between Accused 2 (1st Appellant) and Complainant. He said he didn't know of any assault against Accused 7. He told Accused 3 that one witness was attacked. He said Accused 3 was arrested by members of public.

35. The appellants on their part gave sworn statement and Accused 1 Juma Hamisi said that he met 3 people who stopped him and he was arrested and told he would know his fate at the police stations. That A2 & A3 were also brought to the cell and they were accused of robbery with violence. He said he didn't commit the offence.

36. He said he knew PW 1's son. He said A2 had difference with witness. A2 (1st Appellant) testified that he had cooked at 7.00pm when neighbours went to his house and asked if he had seen any stolen things or thieves in the shop. He said Rajab & Rukia said he was a thief. That he was asked about A3. That the next day when he went to bring breakfast he saw Accused 3 had been arrested and he was told to join. That they went to PW 1's house he was to asked if he knew a bag which was said to have been collected. That he was let to go home but Rajab had a grudge against him. He produced OB & P3 to DR. He said the robbery case was a cover up. He said Rajab cut him with a panga on the hand and ear. He said the Complainant didn't mention him as a thief. He said Rajab fixed him in the matter while with Rukia.

37. A3 – Abdalla Mwalim testified he didn't know why he was charged. He said he was arrested on his way back home. He said that a group of people who were with Rajab arrested him. He said search was conducted in their house while he was with A2 – Salim. He said a mob arrested him on allegations he stole and he was taken to court. He said he didn't know why he was charged.

38. From the evidence on record and judgment of the trial Magistrate being that the offence was committed at night, it was important that it is established that proper identification of the perpetrators is established. This required that the prosecution proved that circumstances were conducive for proper identification i.e. that there was sufficient light to enable the witness to identify the perpetrators; that the perpetrators and the victim took considerable period within close proximity to each other to enable proper identification to take place.

39. From the evidence of PW 1 – A3 attacked him from behind and he was able to identify him as there was enough light which source he said was security light from the nearby houses. PW 1 was allegedly strangled from behind and he passed out. He said he had turned and seen Accused 3 behind him and he didn't expect he would attack him.

40. PW 3 said the area is populated and that there were like 100 people at the scene. It is not clear how PW 1 confirmed it was Accused 3 (3rd Appellant) who attacked him considering the big population. It is not clear whether PW 1 identified A1 & A2 as he does not explain or describe if he identified them. He didn't also tell his neighbours who the attackers were claiming they would have been lynched. It appears that PW 1 accompanied members of public immediately to go to the house of Accused 3 whom he suspected had robbed him and conducted search but nothing was recovered.

41. PW 1 also said that his wife called to say that the bag that had been stolen was returned but she didn't tell him who returned the bag. PW 1's wife didn't also testify. Whether the bag was returned while search was being conducted at Accused person's house or the next day or at night as alluded to by PW 3 is not clear.

42. A2 in his evidence produced P3 showing Rajab cut him on a different occasion and PW 2 & PW 3 as well as accused persons have referred to the said Rajab but it is suspicious that PW 1 claims not to know him. PW 4 claimed that he didn't testify because he was threatened but inconsideration of the P3 form it appears he didn't attend fearing he might be arrested.

43. From the evidence of PW 1, PW 2 & PW 3 it also comes out that the accused persons are marked as bad guys in the village and therefore any crime committed in the area is 1st attributed to them before it is established who exactly committed the crime. PW 1 said Accused had

earlier stolen his chicken. PW 2 also said that A2 used to steal her chicken when he was rearing chicken. PW 3 also said Accused 1 has tendency of stealing. PW 3 also said that Accused 2'S behavior is wanting in the community that he stole his chicken.

45. If PW 1 didn't tell the members of public who came rescue him that he identified accused persons/appellants as the perpetrators immediately, then the question is at what point did he tell them that he knew the robbers and what made them go to the accused person's house if he had not informed the members of the public that he had identified the robbers. In the course of the search they did not make any recoveries. They had arrested A2 and then released him to go and sleep. That would not be possible if he had been seen robbing the complainant. They must have had doubt as to the real perpetrators of the robbery.

46. I have also looked at PW 2' evidence and it is confusing. Her description of the robber was "we saw a man being pinned down by a man wearing white T-shirt and the man ran away". It is at that point, they looked closely and found it is PW 1 who had been pinned down.

46. I would agree with 3rd Appellant that if PW 2 had to look closely to identify that PW 1 is the one who had been robbed, it cannot be true that there was sufficient light. She was with her sister when they allegedly saw Accused 3 pin PW 1 down but they didn't call him by name. PW 2 contrary to what PW 3 said that the bag was returned the following day that as a man was passing by he was stopped and beaten. Why would she refer to the person as a man and not identify him by name if she knew the robbers.

47. In her initial testimony PW 1 didn't say she saw A1 & A2 ran away from scene with PW 1's bag. PW 2 'S sister who would have corroborated her evidence as to identification and/or recognition of the appellants didn't come to court to testify.

48. In being cross examined by A2, PW 2 said Hamisi was not at the scene. Hamisi is the 1st Accused in the lower court proceedings and it is not understood why then she told the 1st Accused in cross examination that she saw him during the attack. PW 3 said he learnt from Rukia – PW 2 that the accused persons had attacked and robbed PW 1. Whereas he says that A1 had a black shirt and that he was unable to identify what A2 was wearing because he was in darkness, PW 2 said it is A2 who wore a dark shirt and she didn't say the colour of clothes A1 was wearing. If PW 2 is right, then it means A1 & A2 didn't robe the same person or PW 2 & PW 3 could not have been referring to the same person and their claims that the place was well lit is dislodged by PW 3'S evidence that A2 was in dark area and he could not identify what he was wearing.

49. It is not possible that A2 could have been identified as robber when he was in a dark place. PW 3 said that Accused was taken to PW 1's shop while in boxers and it is when the bag was returned that Accused 1 was thoroughly beaten by a mob & arrested and the others were pursued and arrested. It is not explained how the return of the bag was connected to A1 and why he was beaten when search recovered nothing. PW 3 said PW 1's Kshs.30,000/= was stolen but PW 1 didn't say anything like that and the chargesheet only alludes to value of properties stolen.

50. There is also contradiction between evidence of PW 2 and PW 3 as to who has been carrying the allegedly stolen bag. PW 2 said A1 & A2 ran from scene. PW 1's stolen bag and left Accused 3 (3rd Appellant) behind, whereas PW 3 said he was A3 carrying the bag.

51. From the evaluation of the evidence on record as well as the analysis of the judgment of the trial Magistrate do find that circumstances of identification were not conducive to enable the robbers to be identified without mistake. There was also inconsistency and contradictory in the evidence of the prosecution witnesses which cannot sustain proof beyond reasonable doubt. The prosecution witnesses alluded to appellants past characters which seemed to have played a major role in having them suspected as the robbers.

52. In the circumstances this court finds that the conviction of the appellants based on the doubtful, inconsistent and contradictory evidence was not safe and the conviction is therefore so quashed and sentence set aside.

53. The appellants are therefore set at liberty forthwith unless otherwise lawfully detained.

Dated, signed and delivered in open court at Mombasa this 27th day of **May, 2021.**

HON. LADY JUSTICE A. ONG'INJO

JUDGE