



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL CASE NO. 160 OF 2019

JOSEPH WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Principal Magistrate Honourable N. Wairimu

in Eldoret Chief Magistrate's court Criminal Case No. 1676 of 2018

dated 3rd October, 2019)

JUDGMENT

JOSEPH WAFULA, the appellant herein was charged with the offence of Robbery with violence, contrary to *Section 295* as read with *Section 296 (2)* of the *Penal Code*.

The particulars of this offence are that on the 28th day of March 2018 at Miti Moja village in Ukunyani Sub County within Kakamega County, the appellant jointly with another not before court, while armed with dangerous weapons robbed Ann Wanjiru one Decorder make Etonsat, one DVD make Sony, one Floride Exide battery and one Laptop all valued at Kshs. 24, 800/- and immediately before the time of such robbery threatened to use actual violence.

The prosecution case is that on 28/3/2018 Gladys Masika, the PW-3 in this case, was living at Nangili with PW-1 and PW-2. On the said date at about 2.00 p.m she was not in the house but PW-1 and PW-2 were. PW-2 was watching the TV while PW-1 was mopping the floor. PW-2 heard a knock on the door and alerted PW-1 about it. As PW-1 went to open the door she saw two men already in the house. One had a panga and the appellant herein had a knife. The two threatened her and PW-2 told her to sit down. She did so and her hands were tied from behind with a rope. She was then ordered to lead them to PW-3's bedroom. She led them and the door to it was locked and she had no key. The assailants claimed they had heard there was 7,000/- therein. One of the assailants used a long wire to open the door. PW-2 was there watching and was threatened that if he struggles he'll be cut. The assailant took a brief case of which they opened and found no money. They took several bags of which they cut open, but as well found no money in them. They took a laptop belonging to a person called Tom who was in South Africa. They then went to the sitting room and took a Decorder, DVD Player and a Car battery, before they left. The incident took about 2 hours. PW-2 untied PW-1. They went outside and alerted neighbours. Neighbours pursued them.

PW-3 was told of the incident. She went home and witnessed what had happened. A car battery, Decorder, DVD Player and a Laptop had been taken away. She reported the matter at Nangili Police Patrol Base. Villagers who had pursued the robbers said they knew them as they followed them upto a point where they boarded a motorcycle at Makoha market. They were said to be Brian Walubango and Joseph Wafula. After one week the appellant herein was arrested. He was taken to Nangili Police Patrol Base. PW-1 and PW-2 were called and they identified him as one of the two culprits.

The appellant was taken to Matunda Police station. On 17/4/2018 PW-4 was asked to conduct identification parade in his respect. He did so and the appellant was picked by PW-1 and PW-2. PW-5 investigated the case. The other suspect was not got and the allegedly robbed items were not recovered. The appellant was then charged.

The appellant in his defence stated that he was a firewood seller. On 15/4/2018 at about 10.00 a.m he was at his place of work when one Erick Simiyu while in company of two others called him, offering to sell him some trees. He needed to see the trees and headed towards Mrembe area. When they got near Nangili Police Patrol Base gate, they alleged he had stolen at Nangili. When he asked what he had stolen they told him that he'll explain it to the police. He was taken therein and locked up till 5.00p.m when a girl and two young men visited. The door was opened and the three had a look at him. When he was later taken to Matunda Police station, the three picked him from parades. He was then charged for an offence he did not commit.

The trial court evaluated the evidence and found that the offence took place; the appellant was well identified by PW-1 and PW-2 as one of the two assailants and confirmed so when they saw him at Nangili Police Patrol Base and Matunda police station. He was convicted of the offence and sentenced to death.

The appellant dissatisfied with the said conviction and sentence preferred an appeal before this court on the grounds that:-

- (1) The charge sheet is defective as it is duplicitous.
- (2) The death sentence meted against him is harsh and excessive given the mitigation and the holding in Francis Karioko Muruatetu case.
- (3) Identification by PW-1 and PW-2 was not free of error.
- (4) The offence of robbery with violence was not proved beyond reasonable doubt.
- (5) His defence was not shaken and is therefore true.

The appellant offered written submissions in which he addressed the aforesaid grounds of appeal.

Prosecution offered oral submissions. They opposed the appeal on the grounds that the charge sheet was not defective and in case found otherwise, such defect is curable as it did not prejudice the appellant in any way. Further, on identification, the state claimed that it was proper as the incident happened during the day and took ample time, giving PW-1 and PW-2 an opportunity to see and identify the assailants.

Death sentence is averred by the prosecution to be lawful and deserved given the circumstances of the offence.

I have evaluated the charge, evidence adduced by both sides, judgment passed and sentence, grounds of appeal and submissions by both sides. The only ground and issue that deserves consideration is the one of identification of the appellant.

The evidence reveals that the incident took place during the day at about 2.00p.m, in a house. The appellant was armed with a knife and PW-1 even disclosed how he was dressed up. The assailants were strangers to both PW-1 and PW-2. The evidence is therefore of identification as opposed to that of recognition. Of importance is that there is no evidence that prior to the arrest of the appellant the witnesses had described him to the police and indicated that they would be able to identify him if they saw him again. PW-1 and PW-2 are not the ones who identified the appellant during his arrest. Neighbours who allegedly identified him and later on arrested him were not called as witnesses. PW-3 disclosure that he was her pupil is worthless as she did not witness the alleged robbery. The allegedly robbed items were not recovered and the used weapons. The clothes he was allegedly wearing were also not recovered. The alleged identification at Nangili Police Patrol Base and at the parades conducted at Matunda Police Station are worthless. Upon arrest of the accused as is well admitted by PW-5, the witnesses were called and shown him to which they confirmed he was the one. Such is not safe identification. A witness can easily be mistaken in identification of a sole person presented to him or her, as the arrested suspect, by the police, in a case. Such cannot be said to be safe identification. The witnesses did not even disclose details of how they were able to identify him; by probably disclosing noted physical features. The parades conducted at Matunda police station were a waste of time and of no probative value. The two witnesses had already seen the appellant at Nangili Police Patrol Base, and would have easily picked him in the parades as the suspect they had seen at Nangili Police Patrol Base, rather than at the robbery scene.

In Wamunga –vs- Republic (1989) KLR 424, the court held that:-

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction”.

In this appeal, I do find that the evidence on record, in regard to identification of the appellant as having taken part in the offence, is uncertain and does not stifle reasonable doubt of his mistaken identity. The trial magistrate erred in not finding so. I do resolve the doubt in favour of the appellant. The appeal therefore succeeds. The conviction is quashed as well as the sentence. The appellant is set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 24th day of June, 2021.

In the presence of:-

The appellant

Ms Limo for state

Ms Gladys - Court assistant