



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NOS. 78 & 79 OF 2019

PATRICK MWITI alias KINOTI.....1ST APPELLANT

GEOFFREY MURITHI alias JEFF.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the decision of Hon E. Ngigi PM in Isiolo CMCR Case No.1 of 2017 made on 10/5/2019)

J U D G M E N T

1. The appellants, **Patrick Mwiti alias Kinoti and Geoffrey Murithi alias Jeff**, were charged with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**.
2. It was alleged that on 31/12/2016 at Moisa area in Isiolo town, Isiolo County within Eastern Region jointly with others not before court, the appellants robbed **NEHEMIAH MUHENYI** of a mobile phone make HTC and cash Kshs. 25,000/- all valued at Kshs. 42,000/- and during the time of such robbery they beat the said **Nehemiah Muhenyi**.
3. The 2nd appellant faced a second count of malicious damage to property contrary to **Section 339(1) of the Penal Code**. The particulars of the offence were that, appellant on 31/12/2016 at Isiolo County within Eastern region jointly with others not before court, the 2nd appellant willfully and unlawfully damaged one front right headlight valued at Kshs. 12,000/- of a motor vehicle lorry registration number KCD 009Z make Isuzu FSR the property of **SILAS MUTHARA**.
4. The trial court convicted and sentenced the appellants to serve thirty (30) years imprisonment for count I and for count II the 2nd appellant to serve three (3) months imprisonment. The sentences were to run concurrently.
5. Aggrieved by that decision, the appellants appealed to this Court against both conviction and sentence. Their appeals were consolidated and heard together. They initially set up 7 grounds which they latter increased to (15) which may be collapsed into four: **that the trial Court erred in relying on contradictory and insufficient evidence to convict the appellants, that the trial Court failed to consider that the case was not proved beyond reasonable doubt, that the trial Court failed to consider that no identification parade was carried out to identify the appellants and that the charge sheet was defective**.
6. This being a first appeal, this Court is obligated to revisit and re-evaluate the evidence afresh and arrive at its own independent findings and conclusions but bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Okeno vs. R [1972] EA 32**.
7. The prosecution called seven witnesses to support its case. **PW1 57131 WOII Nehemiah Miru Muhei**, attached to KDF at HQ Armed Brigade 78TB recalled that on 31/12/2016 at about 0300hrs, he went to Post Bank and withdrew Kshs. 20,000/-. He then boarded a *boda boda* to take him to Kulamawe within Isiolo town. He identified the rider as the 1st appellant who took him to between Isiolo Boys and the Catholic Church. That the 1st appellant then turned and headed to where they were coming from without his instructions. Before he could ask him where he was taking him, the 1st appellant stopped near a 'Mukuyu' tree where three people pounced on him and started beating him. He was able to identify the three as there was bright street lights. They beat him to the ground.
8. As **PW1** was on the ground, **Silas Muthara Murungi, (PW2)** drove a lorry registration KCB 009Z towards them and stopped. This made the attackers flee in three motorcycles. **PW1** boarded the lorry and he together with **PW2** began to chase after them. They chased one of them who lost control and fell on reaching Shell Petrol Station. That motorcyclist was the 2nd appellant who began to scream whereby he

drew the attention of his fellow riders which caused a commotion. The 2nd appellant then smashed the headlights of the lorry that **PW2** was driving.

9. The police arrived and **PW1**, **PW2** and the 2nd appellant were taken to the police station. **PW1** reported that the motorcyclist (2nd appellant) together with his colleagues had robbed him of Kshs. 25,000/- and a HTC Desire mobile phone valued at Kshs. 14,000/-. It was discovered that the motorcycle registration number KMDV 281L had been tampered with whereby letter V was manipulated to read Y.

10. **PW3 Daudi Dabaso**, deputy sub County Clinical Officer, attached to the Isiolo County Referral Hospital examined **PW1** on 31/12/2016. **PW1**'s shirt was torn without blood stains. He had tenderness around the waist and chest, bruises on both elbows which were swollen tender and bleeding. He treated him with painkillers and filled the P3 form on 2/1/2017 which he produced in evidence.

11. **PW4 No.80926 PC Victor Kipkoeh**, attached to Crime Scene support staff Isiolo, took photographs of Isuzu FSR lorry KCB 009Z which had its headlight broken. He also took photographs of motor cycle KMDV 281L Skygo Red in color which was involved in the robbery. Its number plate had been interfered with whereby letter V had been cello taped to read 'Y'.

12. **PW5 Hussein Hamada** had on 30/12/16, given his motorcycle registration number KMDV 281L to the 2nd appellant to operate. The following day, he received a message from the 2nd appellant that he was in police cells. He sent **Hassan Jatani PW6** who confirmed that fact. On 2/1/2017, he went to the Station and confirmed that his motor cycle KMDV 281L Skygo whose number plate had been tampered with whereby letter 'V' looked like 'Y' was at the station.

13. **Corporal Samson Moreto (PW7)** investigated the case. He established that on the material day, the complainant withdrew money at the Post Bank Isiolo, branch and boarded a motorcycle to Kulamawe at 3 am. Later on, the rider with two others attacked him and robbed him of the money and mobile phone. He produced a bank statement to show the withdrawal, a receipt dated 24/12/2016 for the HTC Desire and the black tape that had distorted letter 'V' on the motor cycle to letter "Y".

14. After visiting the scene, he interrogated the 2nd appellant who led them to the 1st appellant whereby **PW1** identified him. He was unable to recover the stolen items.

15. In his defence, **Patrick Mwiti Joseph**, the 1st appellant told the Court that he was a casual laborer doing construction work within Isiolo. That on 2/1/2017, he went out of Club Liquid when a police car came and stopped right outside the door. Police alighted and instructed all of them to board their vehicle. On their way to the police station, the police demanded a bribe from them. Those who paid were released but he was unable to pay. At the station, he met the investigating officer who reminded him that he had earlier on in 2016 refused to pay him a bribe of Kshs.4,000/-. He therefore framed him with the charges he was facing.

16. On his part, **Geoffrey Muriithi**, the 2nd appellant testified that on the material day at about 3.50 am, he was selling his miraa supplies around Shell Petrol station. He left his friend with the miraa and went to Little Red Club. On his way back, a motor cycle was hit by a motor vehicle and he was caught in between and injured. A fight broke out and when the AP officers came, those fighting run away.

17. He went and reported the matter at Isiolo Police Station. But before he could report, the motor vehicle that had been involved in the accident was brought and the driver and conductor booked. The driver demanded Kshs. 10,000/- from them. Later the investigating officer came and said that he was riding the motorcycle which was involved in the accident. He was then brought to court where he met the 1st appellant and charged with the case before Court.

18. The first complaint was that the charge sheet was defective as it did not collaborate the evidence tendered. This ground was contained in the supplementary grounds of appeal. I have looked at the charge sheet. The charges facing the appellants were robbery with violence and malicious damage to property. It was not shown how the sheet was defective. I find nothing defective about the charge sheet. The evidence tendered at the trial supported the charge. That ground is rejected.

19. The second ground was that the trial Court erred in convicting the appellants on contradictory evidence. That **PW1** contradicted himself as to the person who ferried him with the motorcycle from the bank and the person whom they gave chase.

20. The testimony of **PW1** was clear. That it was the 1st appellant who ferried him from Post Bank to the place where he was robbed. That the 1st appellant led him to 3 other people, who included the 2nd appellant, who pounced on him and robbed him valuables. That when **PW2** came driving a lorry towards them and shone lights on them, his attackers took off on three motor cycles. That it was the 2nd appellant whom they gave chase up to the Shell Petrol station where they caught up with him.

21. In view of the foregoing, I see no contradiction in the evidence of the prosecution either as alleged or at all. That ground is also rejected.

22. The 3rd, 4th and 5th grounds are intertwined and I propose to deal with them jointly. These are; that the trial Court erred in convicting the appellants on insufficient evidence; that the case had not been proved beyond any reasonable doubt and that the trial Court did not consider that there was no identification parade.

23. The evidence by the complainant was that on the material day and time, the 1st appellant was the one riding the *boda boda* that he took from Post Bank. That the 1st appellant then detoured and took him to his attackers whereby he was robbed of valuables amounting to Kshs. 42,000/-. He was injured in the process of the robbery. A bank statement was produced to show that he had withdrawn Kshs.20,000/- as well as receipt for his mobile phone.

24. **PW3** produced the P3 form to prove the injuries that **PW1** had sustained in the course of the robbery. **PW2** witnessed the robbery and saw the injuries sustained by **PW1**.

25. **PW1** and **PW2** gave chase to one of the robbers and caught up with him when his motor cycle lost control at the Shell Petrol Station. It turned out that the rider thereof was the 2nd appellant and the motorcycle he was riding was positively identified by the owner, **PW5**. **PW5** had given the Motor Cycle to the 2nd appellant the previous day. The defence of the 2nd appellant that he had been injured when the lorry belonging to **PW2** hit motor cycle rider did not displace the strong case that had been established against him.

26. As regards the 1st appellant, **PW1** testified that, even though it was at night and he did not see the number plate of the motor cycle that he boarded at Post Bank, he was able to identify the 1st appellant as the rider. That it was the 1st appellant who rode the motor cycle to the destination where he was robbed.

27. **PW7** told the Court that, the 2nd appellant is the one who directed him to the 1st appellant. That he was then identified by **PW1** even though there was no identification parade. According to the 1st appellant, he first saw the 2nd appellant in Court when they were charged.

28. When an incident happens at night or under difficult circumstances such as sudden attacks, evidence of identification ought to be firm to justify a conviction. In **Wamunga v. Republic [1989] KLR 424**, the Court held:-

“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.”

29. Before the incident, **PW1** had not known the 1st appellant. Unlike the 2nd appellant, the 1st appellant was not arrested at the scene. Further, nothing was recovered from him. It is alleged that it is the 2nd appellant who led the police to the 2nd appellant when the complainant identified him. To my mind, there was need to hold an identification parade so as to clear the possibility of any error as regards the 1st appellant.

30. In the case of **John Kamau Wamatu & another v Republic [2010] eKLR**, the Court of Appeal held:-

“Identification parades are meant to test the correctness of a witness’ identification of a suspect.”

31. Although **PW1** had seen the rider on the material night, this ought to have been tested through an identification parade. It is not clear at what stage **PW1** identified the 1st appellant as one of his attackers. The importance of an identification parade cannot be gainsaid. This extends to even circumstances where a complainant has not given the description of his attacker.

32. In **Nathan Kamau Mugwe v Republic [2009] eKLR**, the Court held:-

“As to the complaint in ground six that the witnesses had not given to the police a description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL’s case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness “SHOULD” be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him”.

32. Accordingly, I am of the view that the prosecution did not prove how the 1st appellant was identified. The prosecution did not prove beyond reasonable doubt that the 1st appellant participated in the subject robbery.

33. With regard to the second count, the 2nd appellant was charged with malicious damage to property contrary to **Section 339(1) of the Penal Code**. **PW2** testified that after they had cornered the 2nd appellant, he drew the attention of his fellow motorcycle riders. A fight ensued and he saw the 2nd appellant break the right head light of the lorry. From the evidence adduced, the 2nd appellant was not only placed at the scene but was identified as the one who smashed the headlights of the subject lorry. The 2nd appellant did not rebut that evidence. That count was also proved against him to the required standard.

34. From the foregoing, I am of the view that the appeal filed by the 2nd appellant is unmeritorious and is dismissed. As for the 1st appellant, his appeal is successful and is allowed. His conviction is quashed and the sentence set aside. He should be set at liberty forthwith unless otherwise lawfully held. The 2nd appellant is to serve his sentence.

Signed at Meru

A. MABEYA

JUDGE

DATED and DELIVERED at Meru this 23rd day of January, 2020.

A. ONG'INJO

JUDGE