



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HIGH COURT CRIMINAL APPEAL NO. 226 OF 2017

KELVIN NZAU.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the judgment of Hon. Patrick Wambugu on 30th June, 2015

in Kilungu SRM Court Criminal Case No. 683 of 2017)

JUDGMENT

1. **Kelvin Nzau** the Appellant was charged with two offences namely:

Count I: Robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that the Appellant on the 5th day of December, 2015 at Ekalyoni village, Ndiani sub-location, Kikoko location in Kilungu sub county, within Makueni county, jointly with another not before court, robbed **Nathan Kavula Maweu** Samsung 302, three spanners, two pairs of motor-bike brakes all valued at Kshs.8,400/= and after the time of such robbery used actual violence to the said **Nathan Kavula Maweu**.

Count II: Assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars were that the Appellant on the 5th day of December, 2015 at Ekalyoni village, Ndiani sub-location, Kikoko location in Kilungu sub-county within Makueni county, assaulted one **Julius Kingoo Mbinda** thereby occasioning him actual bodily harm.

2. After a full trial, the Appellant was found guilty and convicted on both counts. On count **I** he was sentenced to death while the sentence on count **II** was to be held in abeyance.

3. Being aggrieved by the judgment, he filed this appeal citing the following grounds: -

a) **That** the trial court erred in law and facts by failing to re-evaluate, analyze and caution itself of the alleged identification evidence by a single identifying witness whose character, conduct and behavior is contrary to section 163(c) of the Evidence Act Cap 80. Hence, Pw1 is thus unreliable and incredible witness.

b) **That** evidence regarding the identification of the Appellant was poor and unreliable.

c) **That** the trial court erred in law and facts by failing to find the alleged circumstantial evidence regarding recovery of the bag and a trouser insufficient to base conviction.

d) **That** the trial court erred in law and facts upon inconsistent and contradictory evidence.

e) **That** the trial court erred in law by failing to observe violation of section 216 and section 329 of the Criminal Procedure Code, thus failing to exercise its discretionary power to award the appropriate sentence.

f) **That** the trial court erred in both law and facts by failing to consider his sworn defence.

4. The prosecution case is premised on the evidence of five (5) witnesses. **Pw1 Nathan Kavula Maweu** the complainant testified that on 5th December, 2015 at 7:00 pm he was at Liani market heading home from Nairobi. On the way he met two people who attacked him and stole from him. They used their hands to hit him and he got injured on the mouth, head and chest. Stolen from him was his bag which contained a

Samsung touch screen phone, spanners and motorbike brake shoes. He ran away to Liani market screaming.

5. He reported to **Pw2 David Musyoka Mwati** (a shopkeeper) his ordeal. Pw2 called **Pw3 Erick Kasyamani**. Together with Pw2 and Pw3 they went to the scene, where they found the Appellant with the stolen bag. On being asked by Pw3 why he had stolen from him, the Appellant started beating him and threw the bag at him. Pw1, Pw2 and Pw3 returned to the shop and later reported the matter to Kilome police station.

6. He was treated at Kilungu sub county hospital (Milungu). He stated that the night was not dark as there was moonlight and he was able to identify the Appellant whom he knew. He added that his bag also contained a shirt and trousers. He identified the bag (EXB3), P3 form (EXB2) and treatment card EXB1. He said the Appellant appeared drunk when he was found with the bag at the scene.

7. In cross examination, he gave different times for the occurrence of the incident i.e. 7:50pm, 8:00pm and 9:00 pm.

8. **Pw2 David Musyoka Mwati** confirmed receiving Pw1 at his shop on 5th December, 2015 6:00 – 7:00 pm. He reported to him what had happened. He told him that Kelvin Nzau and another had robbed and beaten him. Pw2 immediately called a member of the community policing Julius Kingoo (Pw4) who came and together (i.e Pw1, Pw2 and Pw4) they left for the scene. At the scene they found the Appellant and another person talking. The Appellant was hiding the bag (EXB3). The former jumped on Pw1 and started beating him after throwing the bag at him. On opening the bag, Pw1 said he could not see his phone and brake shoes.

9. The Appellant followed the witness and kicked Pw4. Later he heard Pw3 shout saying the Appellant had hit him with a metal. (EXB4). On seeing people, the Appellant ran away. He confirmed that the other person they found with the Appellant was never arrested. In cross examination he admitted that Pw4 is his cousin.

10. **Pw4 Julius Kingoo Mbinda** gave similar evidence to that of Pw2. He added that the person they found the Appellant with is **Martin Nyamasyo**. He stated that the Appellant hit him with a metal rod which broke his hand. He was treated and issued with a P3 form which was later filled.

11. **Pw3 Erick Kasyamani** is the clinical officer who treated and examined Pw1 and Pw4. He said Pw1 had injuries on the upper lip, which was swollen and painful. Pw4 on the other hand had injuries on the right hand and chest with a broken canine tooth. He produced the P3 forms as EXB2 and 6 respectively.

12. **Pw 5 No. 73650 Corporal Reuben Nyaundi** is the investigating officer. He stated that while in his office at Kilome police station on 5th December, 2015 he received a complaint of a theft and assault from the complainant and members of the public. The next day the Appellant was arrested from his house. His house was searched but nothing related to this case was recovered. He received a bag with a trouser and shirt (EXB3) and metal rod (EXB7) from the complainant.

13. The Appellant indicated that he would make a sworn defence. He later decided to rely on his written submissions as his defence. In his submissions then, he stated that the charge against him was based on falsehoods and the same was not proved. Two of the witnesses were from the same family. He also questioned the value of the items, as there was no documentary proof and the values differed.

14. Both parties filed written submissions. The Appellant submits that the evidence on identification was both direct and circumstantial. On the direct evidence he submits that Pw1 did not mention to Pw2 and Pw4 that he was one of his attackers. On this he referred to the case of **Mohamed Elibite Hibuya & Another –vs- R Criminal Appeal No. 22 of 1996 (UR)**. As for circumstantial evidence he submits that Pw1 said he identified him because he threw the bag at him. In other words, if it were not for the bag, he could not have identified him.

15. On this, he referred the court to the case of **Abanga alias Onyango –vs- R Criminal Appeal No. 32 of 1990 (UR)**. He argues that though its claimed he was found with the bag the items complained of were not found with him. On count II, he argues that the metal bar was never analyzed to link him to the offence.

16. His interpretation of section 322 (2) Penal Code is that since the bag was allegedly thrown back to Pw1 (restored) it ceased to be stolen properly and therefore could not be relied upon to found a conviction against him.

17. It is his further submission that Pw1 is a suspect witness and should not be relied upon. The issue he mentions for this submission is the varied value of these items. He therefore claims that Pw1's credibility is in doubt. He has referred to several authorities on the unconstitutionality of the death sentence. See **Francis Karioko Muruatetu –vs- R (Supreme Court Petition No. 15 of 2015, Edwin Otieno Odhiambo –vs- R Criminal Appeal No. 359 of 2006; Meru High Court Misc. Criminal Application No. 4 of 2015 – Douglas Muthaura Ntoribi by Justice Chitembwe**.

18. Finally, he submits that his defence was never considered by the trial court. Further that the judge did not comply with section 169(1) Criminal Procedure Code.

19. Mrs. Monica Owenga learned counsel for the Respondent opposed the appeal. She submitted that the Appellant was positively identified and a report made. He was then found in possession of Pw1's bag. That Pw1's evidence was never watered down, and his defence was considered. Counsel however, asked the court to look at the circumstances and deal with the issue of sentence as it deems fit.

Analysis and determination

20..This is a first appeal and this court has the duty to re-analyze and re-consider the evidence tendered before the trial court with a view of arriving at its own independent conclusion. See **Okeno –vs- R 1972 E.A 32. In Kiilu –vs- R (2005) IKLR 174** the Court of Appeal stated

thus:

1) An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

2) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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.

21. The same was reiterated in the case of **David Njuguna Wairimu –vs- R (2010) eKLR** where the Court of Appeal stated:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

22. Having considered the evidence on record, the grounds of appeal, the rival submissions and cited authorities, I find the following to be the issues falling for determination

i. Whether the offence of robbery was proved.

ii. Whether the Appellant was clearly and positively identified as one of the complainant's assailants during the robbery.

iii. Whether the Appellant assaulted the complainant in count II.

iv. Whether the sentence meted out on the Appellant was excessive.

Issue no. (i) Whether the offence of robbery was proved.

23. Section 296(2) Penal Code defines the offence of robbery with violence as:

“If the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more other person or persons, or if, 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, he shall be sentenced to death.”

It is clear that any of the ingredients satisfies the establishment of a charge of robbery with violence. In the instant case, there is evidence that Pw1 was assaulted; his bag containing named items stolen and the attackers were more than one. I am satisfied that the offence of robbery with violence was proved.

Issue no. (ii) Whether the Appellant was clearly and positively identified as one of the complainant's assailants during the robbery.

24. The offence herein occurred at night. The issue of identification is therefore a key issue herein. Pw1 stated that he had known the Appellant for about two years. From the evidence, he did not seem to have known the Appellant by name. In **Anjononi & Others –vs- R (1976-1980) KLR 1556 at 1568** the Court of Appeal stated thus:

“The recognition of an assailant is more satisfactory, more assuming and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.”

25. In the recent case of **Erick Oduor Odhiambo & Anor –vs- R (2019) eKLR**, the Court of Appeal clarified that:

“Of importance is the caution in Anjononi & Others –vs- R (1976 – 80) IKLR 1566, that although recognition of an assailant is more satisfactory than identification of a stranger, the possibility of someone making a genuine mistake even in recognition of someone known to him particularly in circumstances that are not favourable for identification cannot be ruled out, and therefore there is need to test and weigh the evidence of identification.”

26. It is therefore proper that the circumstances prevailing be analyzed to enable the court make a finding on whether the circumstances favoured a positive identification. Pw1 has given different times as to when this incident occurred namely; 7:00pm, 7:50pm, 8:00 pm and 9:00pm. It is however clear that the incident occurred at night. This court is actually looking at two episodes as far as this case is concerned.

i. The incident of the robbery when Pw1 was alone at the scene.

ii. The incident of the return of Pw1, Pw2 and Pw4 to the scene.

27. When this court refers to identification, it means identification during the first episode. Was Pw1 able to identify his attackers? This is what he states at pg 12 lines 13-15:-

“It was not very dark. There was lighting from the moon. I knew the accused by face and I also recognized his face. I am sure it is him because he later threw this bag at me.” (emphasis mine).

28. The first point of call by the Pw1 was Pw2’s shop and he found Pw2 there. This is what he says at page 12 lines 4-7 Record of Appeal.

“I ran away. I went back to Liani market screaming. I went to a shop owned by one Musyoka. I told him of my ordeal. He called another person King’oo who came and we went towards the place where the theft occurred.”

29. From this explanation, it is clear that Pw1 never mentioned to Pw2 and Pw4 that he was able to identify his assailants. He did not give any name as he had according to his statement only known and recognized the face.

30. Interestingly, when Pw2 testified he stated the following at pg 27-28 record of appeal.

“A young man came crying and bleeding. It was Nathan Kavula. He came into the shop he asked for our assistance. He told me he was coming from Nairobi and on the way met Kelvin Nzau and another and they beat him and robbed him of his bag.”

According to him Pw1 gave him the name of the Appellant as the assailant.”

31. Pw4 the community policing person stated the following at page 32 lines 11-15: -

“I went there and found a young man who had or looked like he was injured and was shaking. He told me his name is Nathan Kavula. I asked him what happened. He said he was beaten and robbed of a bag and its contents. David closed shop and we went to the place allegedly the offence occurred (sic).”

32. From Pw4’s statement it is clear that Pw1 did not give him the name of the assailant. Even Pw1 himself never said he gave the assailant’s name to Pw2 or Pw4. In the case of **Francis Kariuki Njiru and 7 Others –vs- R (2001) eKLR** the Court of Appeal stated that:

“The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.”

33. Pw1 stated that there was light from the moon and that is what enabled him to identify and/ or recognize the Appellant. He does not seem to say anything about the other assailant. If he indeed identified the Appellant during the first episode, he ought to have given a description of him to Pw2 and Pw4 who are the people he first reported to. Pw2 lied by saying that Pw1 gave him the names of the assailant as Kelvin Nzau the Appellant. The reason is very simple. i.e. Pw1 did not know the Appellant by name and his evidence is clear on this.

34. Coming to the 2nd episode, the evidence is that Pw1, Pw2 and Pw4 found the Appellant at the scene with Pw1’s bag EXB3.

According to Pw1 they found the Appellant at the scene alone and he appeared drunk. However, Pw2 and Pw4 say they found the Appellant and another young man whom Pw4 identified as **Martin Nyamasyo** at the scene. So whose evidence is to be believed?

35. Further that even in the presence of the three men (Pw1, Pw2 and Pw4) the Appellant started beating Pw1. He was not armed and there is no evidence of anyone stopping him. It is not lost to this court’s mind that Pw4 is a community policing member and that’s why he had been called. They did nothing and just walked away. So it’s at the point of beating that the Appellant threw the bag at Pw1 who recognized him as one of the assailants.

36. The mere fact that the Appellant was found at the scene holding Pw1’s bag is not sufficient proof that he was one of the two attackers. Pw1 has confirmed that the Appellant was drunk. He may have come to the scene after the fact. It was therefore important for Pw1 to identify him as one of those who robbed him.

37. If indeed he was there with **Martin Nyamasyo**, why was the said Martin never arrested and charged alongside the Appellant? The action by Pw4 and Pw5 on failure to arrest Martin Nyamasyo does not just add up.

38. After interrogating all these circumstances, I am not satisfied that the Appellant was properly identified as one of the people who robbed Pw1. The evidence was not properly interrogated by the trial court.

39. The injuries identified in EXB1&2 were on the upper lips of the mouth. These are the injuries which formed part of the robbery with violence charge. They were therefore caused by the persons who committed the robbery.

Issue no. (iii) Whether the Appellant assaulted the complainant in count II.

40. It is the evidence of Pw1, Pw2 and Pw4 that they walked together from the scene to the shops. Pw1 never witnessed the assault of Pw4.

Pw2 testified that as they returned, the Appellant kicked Pw4 who fell. Later while at his shop he saw the Appellant coming towards the shop. He then heard Pw4 shouting that the Appellant had hit him with a metal rod.

41. Pw4 gave evidence on the assault. The medical evidence (EXB6) confirmed that Pw4 had sustained injuries on the mouth, hand and chest. From the evidence of Pw1, Pw2 and Pw4, I am satisfied that indeed there had been an encounter between Pw1, Pw2 and Pw4 and the Appellant during the 2nd episode and Pw4 was injured. The injury was assessed as assault.

Issue no. (iv) *Whether the sentence meted out on the Appellant was excessive.*

42. The Appellant was sentenced to death for the offence of robbery with violence upon conviction. This court has found that the Appellant was not identified as one of the robbers and so the conviction cannot stand. The conviction on assault of Pw4 on count **II** stands as there is sufficient evidence to support it. The sentence on the said count was held in abeyance.

43. The upshot is that the appeal succeeds on the offence of robbery with violence contrary to section 296(2) Penal Code. The conviction is quashed and sentence set aside.

44. The conviction on the 2nd count for the offence of assault contrary to section 251 of the Penal code is upheld.

45. On sentence, I have considered that the Appellant remained in custody since his arrest on 6th December, 2015 up to 30th June 2017 (1 ½ years) when judgment in the Magistrate's court was delivered. He has been in prison since then which is two years and eight months (2years and 8 months).

46. I therefore sentence him on 2nd count to the period already served.

47. He shall therefore be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 19th day of February, 2020 in open court at Makueni.

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Hon. H. I. Ong'udi

Judge