



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 159 OF 2016

JOHN WAINAINA KAMAU.....1ST APPELLANT

BEN ODHIAMBO WAVINYA.....2ND APPELLANT

LEONARD KIPKOECH KIRUI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from both against both the conviction and the sentence of Hon. Kagendo (Chief Magistrate)

delivered on 10th October 2016 in Nakuru Chief Magistrate's Court case No. 1184 of 2015)

JUDGMENT

1. The Appellants, together with one other, were charged before the Chief Magistrate's Court in Nakuru with one count of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge as contained in the charge sheet were as follows

On the 3rd day of September 2014 at 8.00pm at Total Trading Centre in Molo District of the Nakuru County jointly robbed Patrick Kariuki of Cash Kshs 2,000 and a mobile phone make FOR ME all valued at Kshs 4,500 and immediately before or immediately after such robbery used actual violence.

2. After a fully-fledged trial, the Trial Court convicted the Appellants and sentenced them to suffer death as was then mandatorily stipulated in the law. One of their Co-Accused Persons was acquitted.

3. The Appellants were aggrieved and filed the present Appeal. They filed joint grounds of appeal filed on the 11th of October 2018 – before each of them revised them and filed Amended Grounds of Appeal.

4. When the matter came up for hearing on 24/02/2020, the 1st Appellant withdrew his appeal against conviction. He informed the Court that he only wished the Court to review his sentence in view of the recent jurisprudence spawned by the ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. The Court marked his appeal against conviction marked as withdrawn. After considering the circumstances of the case, the Court then sentenced the 1st Appellant (John Wainana Kamau) to fifteen years imprisonment. The sentence will be computed beginning on 0/10/2014.

5. The Appeal proceeded against the 2nd and 3rd Appellants.

6. The 2nd Appellant in his amended grounds of appeal stated as follows:

a. The Learned Trial Magistrate erred in law and fact to convict the Appellant whereas Hon. Court failed to establish scene of crime in evidence that according to PW 4 and investigations PW 5 it was outside said hotel.

b. The Learned Trial Magistrate erred in law and fact to convict Appellant alleged identified whereas alleged incident said was outside hotel

c. The Learned Trial Magistrate erred in facts and law to convict the Appellant who was implicated by the co-accused and arrested 4 months later on suspicion which does not form basis for a safe conviction while no voire dire conducted between Appellant and

said co-accused for court to assess in what way witness alleged co-accused mentioned him despite application made on page 29 line 8 to 9 turned down

d. The Learned Trial Magistrate erred in law and fact in convicting Appellant without thorough analysis and evaluation of the matter, thus conviction was manifestly unsafe as trial unfairly concluded contrary to Article 50 (2) of the Constitution of Kenya.

7. The 3rd Appellant in amended grounds of Appeal stated as follows:

a. The Learned Trial Magistrate erred in law and fact to convict appellant whereas Complainant in the charge sheet out rightly said did not see him on said material night

b. The Learned Trial Magistrate erred in law and facts to convict, Appellant whereas the Hon. Court was told by Court told by hotel owner PW 4 and police investigator PW 5 scene was not inside the Hotel

c. The Learned Trial Magistrate erred in law and fact to convict the Appellant who was merely implicated by co-accused no trial with a trial conducted as required by in what circumstances co-accused picked on him

d. The Learned Trial Magistrate erred in law and fact to convict the Appellant who was arrested 9 months that he escaped to elope arrest yet no evidence of police as to that effect, hence conviction unsafe, unfair trial contrary to Article 50 (2) of Constitution of Kenya.

8. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See **Okeno v Republic [1973] E.A. 32; Pandya vs. R (1957) EA 336, Ruwala vs. R (1957) EA 570.**

9. In the Court below, the Prosecution called five witnesses. The main witness was the Complainant, Patrick Kariuki. He testified as PW1. He testified that on the night of 03/09/014 at around 8:00pm, he and his friend, Joseph Njenga, went to Victoria Hotel for a meal. They ate Ugali and cabbages. He says that after eating they had a disagreement with the waiters about the amount due; but that the disagreement was resolved and he paid the amount due.

10. PW1 testified that as he and Njenga were about to leave the restaurant, a group of people came in. They shoved them, beat them and dragged them outside. He says the group took his phone and Kshs. 2,000/-. They dragged him into a ditch where he managed to crawl away.

11. PW1 said that during the scuffle, he was able to identify the 1st Appellant and the 2nd Appellant. He said it was the 1st Appellant who hit his legs with a metal rod and took away his phone. He also said that it was the 2nd Appellant who put his hand in his jacket's pocket and removed Kshs. 2,000/-.

12. PW1 conceded that he did not identify the 3rd Appellant – but that he had been linked to the robbery by the 1st Appellant when he was arrested.

13. Joseph Njenga, the Complainant's friend who was with him on the night of 03/09/2014. He recalled that they went to eat at the Victoria Hotel in Mau Summit in the evening; and that as they were paying they were attacked by a group of people. Njenga testified that he also identified the 1st and 2nd Appellant during the attack. He claims they asked why they had refused to pay for the food. He told the Court that the group beat them and pushed them outside the hotel – but he got an opportunity to escape and he ran away. After a short while he crossed the road and saw PW1 lying in a ditch after the group had stopped beating him. He escorted PW1 home.

14. Nancy Keiyo, a Clinical Officer at Molo District Hospital testified as PW3. She produced a P3 Form with respect to the Complainant. It confirmed that the Complainant went to the hospital with a history of assault on 03/09/2014 and that he was treated for lacerations on the left side of his face, lower limb swollen and pain on the left knee joint as well as a cut on the right anterior leg.

15. PW4, Jacob Ochieng' Ouma, the proprietor of Victoria Hotel gave evidence that was singularly unhelpful to the Prosecution: he basically said he knew nothing about the incident. He recalled being called from his home on the night because the Complainant and his friend had refused to pay for their meal. He went to the restaurant and they agreed to pay. They paid and he gave them change; he then went back home. He later was told by the Police that the two customers had been attacked while at the restaurant. He knew nothing about the incident.

16. The Investigating Officer, PC Temba Mwale of Mau Summit Police Station testified that he found the entry in the Station OB minuted to him and he began his investigations. He was quite clear that when he recorded the Complainant's statement, he gave him the name of only one assailant: John Wainaina. He was also clear that it was John Wainaina who implicated the other two Appellants. This is what the Investigating Officer testified:

[The Complainant] gave me the name of John Wainaina as one of those who attacked him...I went and arrested the Accused 1 [John]. A1 [John] then implicated Co-Accused. Wainaina told me he had been with Newton. I went and arrested A2. A1 also implicated Odhiambo. I arrested him. I knew John Wainaina. I was not with the Complainant when I arrested A1. A1 also implicated A4.

17. From this dispassionate account by the Investigating Officer, it is readily obvious that the Complainant in fact recognized only one of the assailants. When the Complainant reported to the Police, he identified the 1st Appellant as his assailant. This is corroborated by the fact that he said the same thing to the Clinical Officer. She testified that the Complainant reported at the hospital that he had been attacked by a group of people and that he knew one of them.

18. What all this means is that it cannot be correct, as the Complainant claimed in his testimony that he also identified and recognized the 2nd Appellant. If that were the case, he would have identified them in his first report; and would have indicated to the Clinical Officer that he had identified two-not just one of his assailants.

19. A scrutiny of the evidence is quite clear that the 2nd and 3rd Appellants were arrested because the 1st Appellant implicated them. For the 3rd Appellant, there is nothing else beyond that. For the 2nd Appellant, there is the added claims by the Complainant and PW2 that they identified him at the scene. However, that evidence is doubtful both because they both did not indicate that in the first report and in their statements to the Police; and because the evidence of two other Prosecution witnesses casts doubts on that evidence.

20. In short, there was no evidence that meets the threshold of beyond reasonable doubt linking the 2nd and 3rd Appellants to the assault and robbery of the Complainant in this case. Their conviction was not safe. It must be reversed.

21. The result, therefore, is the following:

a. The conviction against the 1st Appellant remains affirmed. However, the sentence against him is substituted with a sentence of fifteen years imprisonment to be computed beginning on 02/10/2014.

b. The convictions against the 2nd and 3rd Appellants are hereby quashed. The 2nd and 3rd Appellants shall be set at liberty unless otherwise lawfully held.

22. Orders accordingly.

Dated and delivered at Nakuru this 23rd day of April, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Verne Odero, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media and select members of the public were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.