



IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 73 OF 2019

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 74 OF 2019

CORAM: D.S. MAJANJA J.

BETWEEN

ROBERT MUCHUNGIM'NAITULI.....1ST APPELLANT

ERIC MUTETHIA 2ND APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon G. Sogomo, PM dated 2nd April 2019 at the Magistrate's Court at Tiganiain Criminal Case No. 1744 of 2016)

JUDGMENT

1. The appellants, **ROBERT MUCHUNGOM'NAITULI** and **ERIC MUTEITHIA**, were charged, convicted and sentenced to 5 years' imprisonment with hard labour for the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of Count I of the charge were that on 30th July 2016 at Muriri market, the appellants, jointly with others not before the court, robbed **SHARON NKIROTEKOBIA** of a mobile phone INFINIX valued at Kshs. 33,000/- and immediately before such robbery beat the said **SHARON NKIROTEKOBIA**. On Count II, it was alleged that at the same time, the appellants robbed **SYLVIA MUNORU** of Kshs. 40,000/- and a handbag valued at Kshs. 1,500/- and immediately before and immediately after the time of such robbery, they beat the said **SYLVIA MUNORU**.

2. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972]EA 32**). In order to deal with the grounds of appeal, it is necessary to outline the evidence that emerged before the trial court.

3. In order to prove its case, the prosecution marshalled 4 witnesses. Sylvia Munoru (PW 1) was with her daughter Sharon Nkirote (PW 3) and son, Tevor Muriithi at the Muriri Bus Stage on 30th July 2016 at about 11.30 am. PW 1 recalled that when PW 3 boarded a Pro Box vehicle, the appellants, whom she knew as touts pulled her out of the vehicle causing her to fall. When she confronted them, they started assaulting her. Other touts joined the fray and stole her handbag which contained Kshs. 40,000/-.

4. PW 3 also recalled that when she boarded the vehicle, the 2nd appellant pulled her violently. When her mother intervened, he grabbed her by the throat. As she tried to intervene, the 2nd appellant tore her blouse and threw her on the ground. The appellants and other touts continued to assault them and stole her Infinix phone.

5. PW 1 and PW 3 were rescued and taken to the hospital. They also reported the incident to the police. Kennedy Kimathi, PW 2, a clinical officer confirmed that he attended to PW 1 and PW 3 at the hospital on 30th July 2016. He confirmed that PW 1 had been injured on the left big toes with her nail extracted. PW 2 had a tender swelling on the forehead and a bruise on the right and left knee joint. He produced the P3 medical forms for both witnesses. Corporal Andrew Odeyo (PW 4), the investigating officer, gave an account of the investigation.

6. The 1st appellant denied the offence when put on his defence. In his unsworn statement, he told the court he was at the bus station on the material day when he saw a woman, her son and daughter arrive and it is the woman who grabbed the tout of the other vehicle and slapped him. He stated that other people separated the woman and the touts and they all went their separate ways. The 1st appellant's witness, Julius

Mberia Mururu (DW 2), also testified that he was a matatu tout. He stated that on the material day, it was the woman who picked the fight with the touts as she had jumped the queue.

7. The 2nd appellant denied the offence in his unsworn statement. He stated that it is PW 1 who grabbed him by his shirt and slapped him severally. He did not report because he feared that she was a police woman. His witness, Martin Kaiyiongi (DW 4), also testified that he saw the woman assault the 2nd appellant.

8. It is on the basis of the evidence that I have outlined that the appellants were convicted. They now appeal on the ground that the prosecution did not prove the offence beyond reasonable doubt. They complained that the stolen items were not recovered and none of the exhibits were produced in evidence.

9. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, Oluoch v Republic [1985] KLR 549*** and ***Ganzi & 2 Others v Republic [2005] 1 KLR 52***).

10. I am satisfied that the testimony of PW 1 and PW 3 was direct and consistent and proved that they were assaulted by two or more persons and their personal items stolen. The incident took place at daytime and they identified the appellants as touts who they knew. They reported the incident immediately to the police station and were treated for injuries consistent with the assaults.

11. The appellants' defence is that the complainants are the ones who assaulted them and that they feared to lodge a complaint with the police as PW 1 was a police woman. The appellants did not raise this issue either with PW 1 and PW 3 or the investigating officer in cross-examination. In any case, the trial magistrate was not impressed with their defence as he was of the view that PW 1 and PW 3 were, "*candid and forthright*." Having evaluated the evidence before the trial court, I affirm the conviction.

12. Following the Supreme Court decision in ***Francis Karioko Muruateru & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR*** declaring the mandatory death sentence for the offence of murder unconstitutional and the subsequent case of ***William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018]EkLr*** where the Court of Appeal applied the ***Muruatetu*** decision *mutatis mutandis* to the provisions of **section 296(2)** of the **Penal Code**, the appellants were lucky to be sentenced to 5 years imprisonment when the maximum sentence is death. The sentence was neither harsh or excessive. I would only note that the addition of "*hard labour*" as part of the sentence was unwarranted as this is not a punishment recognised in law.

13. Before I conclude the judgment, it is also clear that the trial magistrate failed to comply with **section 169(2)** of the **Criminal Procedure Code**. He did not state or specify the counts on which the appellants were found guilty and convicted given that there were two counts of robbery with violence. In ***James Nyanamba v Republic [1982 – 88] 1 KAR 1165 [1983]eKLR*** the Court of Appeal expressed the following view;

Again the magistrate transgressed subsection (2) of section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted. Since in his opening statement of the judgment, the magistrate did not state which accused was charged alone in which count of the counts 3 and 4 it cannot be said that the omission to comply with section 169(2) (ibid) did not occasion the appellant injustice. In the circumstances of this case that omission is not cured by section 382 of the Criminal Procedure Code

14. The appeal is dismissed save the record of conviction is amended to reflect that the appellants are convicted on Count I and Count II of the offence of robbery with violence contrary to **section 295** of the **Penal Code** and are each sentenced to 5 years' imprisonment on each count. The sentences shall run concurrently.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 20th day of AUGUST 2020.

A. MABEYA

JUDGE

Appellants in person.

Mr Maina, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.