



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO. 16 OF 2016

DENNIS NDOLO MUTUNGA.....1ST APPELLANT

ERICK WAMBUA MATHEKA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal arising from the conviction and sentence by Honourable L. Simiyu (SRM) at Machakos Chief Magistrate's Court in Criminal Case No. 991 of 2013 delivered on 24/03/2016)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

DENNIS NDOLO MUTUNGA.....1ST ACCUSED

ERICK WAMBUA MATHEKA.....2ND ACCUSED

JUDGEMENT

1. Both Appellants herein **DENNIS NDOLO MUTUNGA** and **ERICK WAMBUA MATHEKA** were jointly charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars were that on the 25th day of August, 2013 at King'atuani Sub-location, Masii Location in Mwala District within Machakos County, being armed with dangerous weapons namely a knife jointly robbed **ALEX MULI** of Kshs. 6,000/=, two wallets, one black jacket, one pair of grey laced sport shoes all valued at Kshs. 15,000/= and immediately before or immediately after the time of such robbery wounded the said **ALEX MULI**.

2. After a full trial, both appellants were found guilty and sentenced to death. They were aggrieved by the said conviction and sentence and through their former Advocates M/s P. M. Mutuku & Co. Advocates lodged the following grounds of appeal namely:-

(i) That the learned trial magistrate erred on a point of law in convicting the appellants on a defective charge sheet.

(ii) That the learned trial magistrate erred both in law and facts when she relied on evidence that was inconclusive.

(iii) That the learned trial magistrate erred both in law and facts when she failed to make a finding that the case was not proved beyond reasonable doubt and as such give the benefit of doubt to the Appellants.

(iv) That the learned trial magistrate erred both in law and fact when she convicted the Appellants against the weight of the evidence.

(v) That the learned trial magistrate erred in sentencing the Appellants to an excessive sentence in the circumstances.

3. This being a first appeal, the role of this court is well spelt out namely to analyze and evaluate the evidence presented before the trial court and subject it to an exhaustive examination and to arrive at an independent conclusion as to whether or not to uphold the decision of the trial

court. This court will also take into account the fact that it did not have the advantage of seeing or hearing the witnesses and therefore has to give an allowance for that. (See **Okeno –vs- Republic [1972] EA 32.**)

4. **Alexander Mutune Muli (PW.1)** was the complainant. He testified that he was a police officer attached at Mwala police post and that on 25/08/2013 he left for Masii Township to purchase medicine for his child and that at around 10.00 pm. he boarded a motor cycle in which the 2nd Appellant was the rider and that there was a pillion passenger who turned out to be the 1st Appellant. He stated that he alighted near his home and as he prepared to pay the 2nd Appellant the agreed fare of 100/-, the 1st appellant struck him on the face and he then struggled with him as the 2nd Appellant sped off. He further stated that the 1st Appellant continued pummeling him and later robbed him of two wallets one containing Kshs.6000/= while the other contained bank card, Identity Card and Mobile phone sim card. He received first aid from his wife and the next day he sought for medication and lodged a report at Masii police station. Three days later he managed to spot the 2nd appellant who was the rider at Masii bus stage and alerted the investigating officer leading to the arrest of the 2nd Appellant. He stated that he did not know how the 1st appellant was arrested but he confirmed identifying him at the police station. He was able to positively identify some of the items recovered from the 1st appellant namely a brown wallet and some cash allegedly recovered from the 1st Appellant. He finally confirmed that he had known both Appellants about four years prior to the incident and that he had no grudge with them.

On cross- examination by the 1st Appellant, he confirmed having seen him at Masii prior to the incident when he was then on leave and had also known him previously. He also confirmed that he did not get to know the identity of the member of public who brought some recovered documents to the police. He confirmed that he was not present during the arrest of the 1st Appellant. He also confirmed that he was not present when a member of public presented recovered items to the police and that he received the said items from the police.

On being cross –examined by the 2nd Appellant, he confirmed that he could easily identify the motor cycle that the 2nd Appellant was in possession and which he had boarded at the time of the incident.

On re-examination, he stated that the Appellants were standing near Weekend Bar when he approached the 2nd Appellant to ferry him to his home and that at the time there was light from the buildings and was able to recognize the appellants while negotiating for the bus fare with 2nd Appellant.

5. **Janet Nduku Nzioki (PW.2)** was wife to the complainant and who testified that her husband arrived home with some injuries allegedly inflicted by a motor cycle rider and a pillion passenger who had given him a lift home. She also stated that a certain lady had confirmed picking up the complainant’s documents and handling them over to the police.

6. **NO.90871 PC. Thomas Kinyanza (PW.3)** of Masii police station testified that he received the report of the robbery incident from the complainant and that on 28/08/2013 the complainant alerted him that he had spotted the suspects within Masii Township and thus he rushed there and arrested the appellants. Upon searching the 1st appellant he recovered a brown wallet containing Kshs. 1,145/- and which was positively identified by the complainant and who identified the Appellants as the person who had robbed him on the 25/08/2013.

On being cross – examined by the 1st Appellant, he stated that the complainant had claimed that the assailants were familiar but did not give names. He confirmed that the complainant identified the 1st appellant at the market.

On being cross-examined by the 2nd appellant, he stated that the complainant did not give him the registration number of the motor cycle. He further added that he found the 2nd appellant in possession of the motor cycle registration No. KMCW 003Z. He produced the recovered wallet, money and photograph of the motor cycle registration No. KMCW 003Z.

7. **James Kilonzo (PW.4)** was the clinical officer based at Masii health centre and who confirmed having examined the complainant and confirmed the injuries on lower and upper limbs. He produced the P.3 form and the treatment card as exhibits.

8. The trial court established that a prima facie case had been made against both accused and who were placed on their defence.

The 1st appellant (Dennis Ndolo Mutunga) gave a sworn testimony. His case was that he was a butcher and that on 28/08/2013 he had gone to visit his family at Masii and while outside Moonlight Bar two police officers arrested him without any explanation and escorted him to the police station where his red wallet containing cash Kshs, 1,145/- was confiscated and was later charged alongside another person he did not know.

On cross – examination, he maintained that he was not involved in the alleged robbery since the complainant did not confirm even having met him during his arrest.

The 2nd Appellant (Erick Wambua Matheka) tendered an unsworn statement and confirmed being a motor cycle operator within Masii Township. He recalled that on 28/08/2013 the boda boda chairman approached him with allegations that he had ferried some passenger who later claimed to have been robbed and directed him to proceed to Masii police station where he was subsequently charged. He maintained that he was innocent since had he been involved then he would not have surrendered himself to the police.

9. Parties agreed to canvass the appeal by way of written submissions. However, learned counsel for the Appellants appeared to have ceased from acting for them soon after filing the memorandum of appeal. The 2nd Appellant filed submissions while the 1st Appellant opted not to file. Learned counsel for the Respondent filed submissions. I have considered the evidence tendered before the trial court as well as the submissions filed herein. It is not in dispute that the complainant was robbed and injured on the material date. The injuries were confirmed by the clinical officer James Kilonzo (PW.4) who examined him on 28/08/2013 and who produced the P.3 form and treatment card as exhibits. Again the evidence of the investigating officer who received the report PC. Thomas Kinyanza (PW.3) further points to the fact that

a robbery had indeed taken place in which the complainant was the victim thereof. This being the position I find the singular issue for determination is whether the prosecution's case had been proved against both appellants beyond reasonable doubt.

10. As noted above, the evidence of PW.1, PW.2, PW.3 and PW.4 clearly established the offence of robbery with violence. Such an offence is established if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more 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 (see section 296 (2) of the Penal Code and Johana Ndungu –vs- Republic Criminal Appeal No. 116 of 1995. Herein the particulars of the charge show that Alex Mutune Muli (PW.1) was the complainant who had boarded a motor cycle allegedly under the control of the 2nd appellant while the 1st appellant was a pillion passenger and that as he alighted he was violently attacked and robbed of two wallets containing money and personal documents. The complainant claimed that one of the attackers was armed with a knife. Hence it is clear from the foregoing undisputed facts that the necessary ingredients of the offence of robbery with violence were established. To that extent, the charge was fully disclosed and that the essential ingredient established by necessary evidence.

11. The main issue falling for determination is whether the appellants were positively identified as the perpetrators of the crime. It was the evidence of the complainant that he boarded a motor cycle then under the control of the 2nd Appellant around 10 p.m. and that the 1st Appellant had been aboard the said motor cycle and then proceeded towards the complainant's home only for him to be attacked as soon as he alighted by the 1st Appellant while the 2nd appellant made a u–turn and sped off. He further stated that he made a report to Masii police station and on 28/08/2013 he spotted his assailants at Masii Town and alerted the investigating officer who rushed there and arrested them. He also stated that he received some of his stolen documents and items from the police station as the same had been taken there by a member of public. Whereas the complainant in his evidence in chief claims that he was present during the arrest of the Appellants but during cross – examination he denied having been present during the arrest of the 1st Appellant who was alleged to have been found in possession of the complainant's stolen wallet and this thus creates some doubt as to whether indeed the 1st Appellant had been found in possession of the stolen brown wallet. The complainant's evidence appears to be in contradiction with that of the investigating officer. It is indeed true that the incident took place at night while the complainant was alighting from the motor cycle. The complainant did not state in his evidence on the source of lighting available at the time of the attack which enabled him to recognize or identify the assailant. Even though the complainant claimed that he had known the appellants for four years, it was curious that he did not find it necessary to mention the names of his assailants to the police and also indicate the details of the subject motor cycle in the occurrence book. At the time of the attack there ought to be favourable conditions for identification given that the offence occurred in the hours of darkness. The complainant did not state anything regarding the intensity of any lighting available at the time. In the case of Kennedy Maina –vs- Republic Criminal appeal No. 14 of 2005 at Nakuru the Court of Appeal citing the English case of Republic –vs- Turnbull [1976] 3 ALL ER 549 noted that in cases of identification among the factors to consider is the intensity of the light at the scene. I find that the circumstances obtaining at the time were difficult conditions as it was at night and hence there was need for other corroborative evidence as the complainant was the single identifying witness. The law on identification is settled by various judicial decisions. In Maitanyi –vs- Republic [1986] KLR 196 the court set out what constitutes favourable conditions for correct identification by a sole identifying witness as follows: -

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can be accepted as free from the possibility of error.”

Again in the case of Mwaura –vs- Republic [1987] KLR 645 in which the Court of Appeal held *inter alia* that: -

“In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a Judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light.”

The above position was also reiterated in the case of Wamunga –vs- Republic [1989] KLR 424 where it was held as follows:-

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

2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and trends are sometimes made.”

Similarly in the case of Anjononi and others –vs- Republic [1976 – 1980] KLR 166 the Court of Appeal held that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

The evidence of the complainant viewed against the above guidelines leads me to come to the conclusion that the conditions for the Appellants identification were not favourable. The complainant had claimed that he had known the Appellants for four years yet he was unable to mention their names or describe their appearances to the police while lodging the report. Again during the robbery incident no evidence was presented regarding the nature of lighting at the scene of crime which enabled the complainant to identify or recognize the appellants.

12. The other dimension brought up by the prosecution relates to the aspect of circumstantial evidence in that it is alleged that some of the complainant's items namely a wallet and cash were found in possession of the 1st Appellant. The guiding principles regarding circumstantial evidence were laid down in the case of Republic –vs- Kipkering Arap Koske & 2 others [1949]EACA 135 where the East African Court

of Appeal held as follows:-

“In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

The above position was further pronounced in the case of **Simon Musoke –vs- republic [1958] EA 71** when the court held that before drawing the inference of guilt from circumstantial evidence the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. Also in the case of **Omar Mzungu Chimera –vs- Republic – Criminal Appeal No. 56 of 1998** the court went ahead to give further guidelines whenever circumstantial evidence is being relied upon to sustain a conviction as follows:

“It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:-

(i) the circumstances from which an inference of guilty is to be drawn must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

The complainant and the investigating officer have maintained that a brown wallet containing a sum of Kshs. 1,145/- was recovered from the 1st Appellant and which were produced as exhibits. However, there is some discrepancy regarding the alleged recovery of the said exhibits. Firstly, whereas the investigating officer stated that he recovered the items from the 1st Appellant during the arrest in the presence of the complainant, the complainant on the other hand denied being present as he categorically admitted on cross-examination by the 1st Appellant that he was not present during his arrest. Secondly, the investigating officer did not prepare an inventory of the recovered items allegedly from the 1st Appellant duly signed by the said appellant and the arresting officer. Thirdly, there was evidence and confirmed by the complainant that certain exhibits were recovered by a member of public and handed over to the police from where the complainant received them. There was no inventory as well prepared over the said items so as to differentiate them from the ones alleged to have been recovered from the 1st Appellant. Finally, the member of public who recovered the items was not called to testify and this weakened the prosecution's evidence linking the 1st Appellant circumstantially to the crime. It transpired from the evidence of the investigating officer that on arrival at the police station he booked the recovered wallet and contents as prisoner's (1st Appellant's) property thereby implying that there might have been a case of mistaken identity as no explanation was given as to how the said prisoner's property later became the property of the complainant. The 1st appellant in his defence maintained that any money recovered from him belonged to him and which was returned to him afterwards by the police.

Looking at the totality of the evidence even circumstantially, I find that there were glaring loopholes and contradictions such that it was quite unsafe to come to the conclusion that the 1st Appellant was the perpetrator and nobody else. Again there is no direct or circumstantial evidence linking the 2nd Appellant to the crime since he is claimed to have driven the complainant and 1st appellant upto the place where the complainant and 1st appellant alighted and then the 2nd appellant left them there and took off. The complainant did not present evidence alluding that both Appellants were acting in concert at the time. There are doubts created in the prosecution's case and hence such doubt ought to have been resolved in favour of the appellants. Hence I find the conviction arrived at by the trial court was not safe and which call this court to interfere with the same. I am unable to agree with the learned trial magistrate that the charge was proved against the appellants beyond any reasonable doubt.

13. As the conviction of the Appellants has been found to be unsafe, the issue of whether the sentence meted out was appropriate now becomes moot.

14. In the result it is my finding that the appeal by both appellants has merit. The same is allowed. The Appellants conviction by the learned trial magistrate is hereby quashed and the sentence set aside. Both appellants are set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 29th day of September, 2020.

D. K. Kemei

Judge