



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 28 OF 2018

DANIEL MUYALA ANGUCHE...APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Resident Magistrate's Court at Maseno (Hon. R.S. Kipngeno SRM) dated the 20th March 2018 in Maseno SRMCCRC No. 503 of 2015]

JUDGMENT

The Appellant, **DANIEL MUYALA ANGUCHE** was convicted for the offence of **Robbery with Violence** Contrary to **Section 296(2)** of the **Penal Code**.

1. He was then sentenced to Life Imprisonment.
2. In his appeal to the High Court, the Appellant challenged both the conviction and the sentence.
3. His primary issue was in relation to the alleged identification by the Complainant.
4. He described the evidence which was tendered on the said issue, as being unsound.
5. The basis for that contention was that the Complainant and her husband were being assaulted at the time of the robbery. In particular, the lady was hit on the left side of her head, prompting her to look away.
6. At the time of the robbery, the only source of light was the torches which the robbers had.
7. The Complainant testified that one of the Appellant's accomplices flashed his torch onto the face of the Appellant, thus enabling the Complainant to identify the Appellant.
8. But the Appellant took up the alleged identification as being unsound, because the prosecution did not lead evidence to show the length of time when the light was shone on the Appellant's face.
9. Secondly, the Appellant submitted that the prosecution failed to prove the intensity of the light that was at the scene of crime, and which therefore enabled the Complainant to identify the assailant.
10. Thirdly, the Appellant submitted that the failure of the Complainant to describe the assailant when she first reported to the police, was an indication that she did not identify the said assailant.
11. Another issue which was raised by the Appellant concerned the failure by the Prosecution to call essential witnesses. In his view, the members of the public, who responded to the alarm raised by the Complainant, ought to have been called to give evidence.
12. Finally, on the question of the sentence, the Appellant submitted that the learned trial magistrate did not follow the sentencing guidelines.
13. He complained that his mitigation was not taken into account when the trial court sentenced him to Life Imprisonment.
14. When responding to the appeal, Miss Barasa, learned state counsel submitted that the Prosecution had proved that the Complainant positively identified the Appellant, as one of the persons who had robbed her.

15. On the issue of the neighbours who responded to the alarm raised by the Complainant, the Respondent submitted that they were not essential witnesses, as they arrived at the scene after the robbers had left.
16. And as regards the sentence, the Respondent submitted that it was not harsh.
17. As the Complainant and her spouse were attacked using crude weapons, resulting in serious injuries, the Respondent believed that the Life Imprisonment was appropriate.
18. Being the first appellate court, I am obliged to re-evaluate all the evidence on record. I have undertaken the said task of re-evaluation, and I have drawn my own conclusions.
19. **PW1** was the Complainant. She testified that the robbery took place at her residence, where she lived with her husband, **PW2**.
20. On the material night she heard some scratching sounds on the mabati, from outside her house. She therefore woke up her husband, who then went outside the house to try and find out what was happening there.
21. When **PW2** got outside the house, he shone his torch towards the door area, and he saw many young men.
22. The young men reacted by shining their torches towards **PW2**. They then went to where **PW2** was, and they assaulted him with pangas and rungu.
23. When **PW2** screamed, his wife, (**PW1**) went outside the house. She found many young men, who were still cutting **PW2** with pangas.
24. The young men grabbed **PW1**, and shoved her to the ground, near **PW2**.
25. Whilst **PW1** was on the ground, she looked up, and she clearly saw one of the assailants.
26. It was the testimony of **PW1** that it is the Appellant whom she identified at the scene of crime.
27. The Appellant responded by hitting **PW1** on the left side of her head.
28. Was there darkness at the scene, at the material time?
29. **PW1** said that the Appellant's accomplices had torches, and one of the said torches was shone on the Appellant's face.
30. Therefore, it was not dark at that time.
31. It was the evidence of **PW1** that she saw the Appellant's face clearly.
32. She made it clear that this was a case of recognition, as she and the Appellant hail from the area where the offence was committed.
33. Indeed, the Appellant was born in that area, and the Complainant said that she knew him very well.
34. The Complainant not only saw the Appellant when the torch-light was shone on his face, she also testified that it is the Appellant who hit her with a rungu.
35. In other words, the Complainant did not just give generalized statements about a person she picked out from within a crowd; she specified the role which the Appellant played during the robbery.
36. That shows that the Complainant had a clear frame of mind. And she told the Appellant, during cross-examination, that before he hit her with a rungu, she had already identified him.
37. Therefore, it is clear that the assault, which affected the Complainant's eye-sight, did not affect the Complainant's ability to identify the Appellant, as it happened after she had already recognized him.
38. She knew him by his facial appearance, as well as by his name.
39. The Complainant testified that when she reported the incident to the police, she gave the Appellant's name to them, as being one of the robbers.
40. **PW4**, CPL Jared Atoni corroborated the testimony of the Complainant, confirming that she reported that the Appellant, whom she knew by name, was one of the robbers.
41. **PW3**, John Shigali, is a Senior Clinical Officer who was based at the Emuhaya Sub-County Hospital.

42. When he attended to the Complainant at that hospital, she told him that she had been assaulted, and that she was able to identify the assailants.

43. First, I note that the oral testimony of **PW3** is not supported by the notes he recorded in the Complainant's treatment notes.

44. In the treatment notes it is recorded thus;

“Patient was assaulted by people she doesn't know well, on 22/3/2015.

She was hit by a “rungu” (rod)

45. As that note was made at a time which was closer in proximity to the robbery than the time when the Complainant testified, I am inclined to believe that it was factually accurate.

46. But whether or not it was factually accurate, the position is that the prosecution has put forward two sets of evidence which are inconsistent.

47. I say so because on the one hand, the Complainant says that she clearly identified the Appellant, but the information recorded on the treatment notes indicates that she did not know her assailants.

48. The same thing can be said about the evidence of the Clinical Officer. He testified that the Complainant told him that she was able to identify her assailants, yet the treatment notes indicate the opposite.

49. I also note that the learned trial magistrate questioned **PW4** concerning the record at the police station, when the Complainant reported the incident.

50. **PW4** said that the police officers at the Report Office omitted to record the name of the accused.

51. First, that shows that **PW4** was not one of the officers who received the Complainant when she arrived at the police station. It is therefore not clear how **PW4** knew that the Complainant had named the Appellant, when she reported the incident.

52. To be fair to **PW4**, he said that;

“ at the crime branch when we were interviewing her she mentioned the name of the accused Daniel Muyela.”

53. It is therefore possible that whilst the first report, (which was recorded at the Report Office) did not have the Appellant's name, the Complainant may have given his name to the police officers in the Crime Branch.

54. However, as none of the police officers who were at the Report Office when the Complainant made the first report gave evidence, we are unable to verify whether or not the Complainant gave the name of the Appellant when she first reported.

55. I have found it necessary to look closely at the mode of arrest. This is because when a suspect is so well known to the Complainant, and has been named or been described, the persons effecting the arrest of the suspect have a foundation upon which to work, going forward.

56. In this case, the Complainant did not testify that she was present at the time when the Appellant was being arrested. In effect, she did not lead to the arrest of the Appellant.

57. Her husband, who was also assaulted during the robbery, had not identified any of the robbers.

58. However, he testified that the Appellant was arrested after he was heard shouting;

“Mambo bado, Ragai atajua mimi ni nani.”

59. In the light of those words, **PW2** concluded that the Appellant was in the group of persons who had attacked him and his wife during the robbery in issue.

60. In effect, the Appellant was not arrested because the Complainant had identified him positively.

61. From the line of questioning adopted by the learned trial magistrate when **PW4** testified, I can tell that the court had some anxiety about the absence of any record to show that the Appellant's name was given by the Complainant when she made her first report.

62. In the final analysis, although it is possible that the Appellant may have been in the group of persons who assaulted and robbed the Complainant, I find that there are some lingering doubts concerning his alleged identification. Therefore, I find that the Appellant ought to have been given the benefit of that doubt.

63. In the event, I set aside the conviction.

64. If I had upheld the said conviction, I would also have upheld the sentence. I say so because the said sentence is lawful, and the Appellant failed to demonstrate any error which the trial court made when handing down the said sentence of Life Imprisonment.

65. But having quashed the conviction, I now set aside the sentence and order that the Appellant be set at liberty unless he is otherwise lawfully held.

DATED, SIGNED and DELIVERED at KISUMU this 24th day of January 2019

FRED A. OCHIENG

JUDGE