



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 64 OF 2018

AMOS WAMBUA MUTUKU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Appellant, Amos Wambua Mutuku, was charged with offence of Robbery with violence contrary to Section 296(2) of the Penal Code.
2. The particulars are that on the nights of 16/17/05/2017 at Mutulani trading Centre in Watema Location within Makueni County, jointly with others not before court, being armed with dangerous weapon namely:- Pangas and axes robbed one JOYCE NDAMBUKI of **cash KShs.15,000/=, one laptop make HP serial No. CND 4523903, one camera make Sony serial No. 5803409, 3 driving licenses, one Senator keg pump, one dozen of Guarana beer, 6 Tusker can beer, 2 bundles of Supermatch cigarettes, 1 bundle of Sportman cigarettes, 1 bundle of Embassy cigarettes, Safaricom/Airtel/Orange and Yu airtimes all valued at KShs.112,000/=** and immediately before the time of such robbery threatened to use actual violence to the said JOYCE NDAMBUKI.
3. He pleaded not guilty and the trial proceeded whereof he was convicted and sentenced to suffer what trial court called mandatory death.
4. Being aggrieved by the aforesaid verdict he appealed and lodged 9 grounds. He has supplemented the same and decided to proceed with the 4 Supplementary Grounds of appeal namely: -
 - 1) **THAT** the Trial Court erred in law by failing to re-evaluate, analyzes and cautions herself of the alleged identification evidence by a single identifying witness, and observes that a room for the mistaken identity roomed high, bearing to the facts and the circumstances of the entire case.
 - 2) **THAT** the Trial Court erred in law by failing to make observation that the accused person was exposed to the complainant instead of conducting a proper identification contrary to chapter 46 of police standing orders letter (c) thus reducing authenticity of the alleged identification to that of dock identification.
 - 3) **THAT** the mode of arrest is suspect as the chasers lost the sight of the attackers hence it lacked concrete nexus to link the accused person with the scene of crime.
 - 4) **THAT** essential prosecution witnesses, especially those alleged to have arrested the Appellant (members of public) were not availed in court to ascertain the circumstances that led to the arrest of the accused arrest was arrested.
5. The parties agreed to canvass appeal via submissions the Appellant filed the same.
6. The prosecution relied on the evidence on record.

APPELLANT SUBMISSIONS

7. The Appellant in submission raise the issues that his identification was dock identification. PW3 complainant was called to identify him after he was arrested. There was no properly arranged parade. She never gave any description of Appellate prior to arrest and identification.
8. He also complains that he was allegedly arrested by members of public and none was called to testify as to how and why arrested him. He was not arrested at the scene of the crime.

9. On recovery of stolen items done, he complains that same were allegedly dropped on the way. The recovery was by members of public. They were not called to testify nor was any nexus established between Appellant and recovered items.

10. PW4 says items were handed over to him by members of the public. He found them at the scene, i.e. PMFI – 1-5. He relies on the case of **ROBIA –VS- REPUBLIC 1967, EA 583** which held;

“a conviction resting entirely on identity invariably cause a degree of uneasiness..... There may be a case in which identity is in question, and an innocent people are convicted today, I should think that in 9 cases out of 10, if there are as many as 10, it is in a question of identity.”

11. From the record the PW3 seems to be the only witness who connects the Appellant with the incident herein. She testified that the material night is the first time to see the Appellant. She saw the Appellant at 2.30 a.m. or thereabout when he entered the premises. He asked for money. He had put electricity on.

12. She handed over Kshs. 15,000/= to him and another suspect. They ordered her to open the bar which she did. There was light in the bar. They picked assorted set of Alcoholic drinks. They took her phone. They then left via a gate.

13. On cross examination, she said to report to a woman who claimed that thieves stole. She never gave name or descriptions. She said she saw Appellant face.

14. Then people arrested him and she was called and asked to identify him which she did. This was four kilometers away from scene of crime. There were no descriptions given to the police or to any other person.

15. The members of public who arrested Appellant were not called not even a single person to confirm there was such an arrest, where he was arrested and why. Nobody was called to corroborate PW3 that she identified Appellant upon arrest on the allegedly recovery of stolen items.

16. PW4 investigating officer claimed that he found one man who had been apprehended by a mob. He was said to be one of the attackers. It was claimed he dropped stolen items. He could not tell court where the person was arrested. None of the member of the arresting mob was called as a witness.

17. PW1, PW2 and PW4 say Appellant who was arrested by mob was beaten by same public and had injuries on the head and leg. His clothes were torn. This was even before PW3 had gone to identify him. There was no parade but was shown the victim of mob attack for identification.

18. The duty of the first appellate court, is to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld as it was stated in **Okeno –Vs- Republic [1972] E.A. 32.**

ISSUES ANALYSIS AND DETERMINATION

19. In this matter the issue is solely single witness identification in circumstances apparently akin to dock identification. Of course we must be aware that even the most honest of witnesses can be mistaken when it comes to identification.

20. Only PW3 claims to have seen the Appellant on the material night of the incident. Then people arrested him and she was called and asked to identify him which she did. This was four kilometers away from scene of crime. There were no descriptions given to the police or to any other person.

21. The members of public who arrested Appellant were not called not even a single person to confirm there was such an arrest, where he was arrested and why.

22. Nobody was called to corroborate PW3 that she identified Appellant upon arrest on the allegedly recovery of stolen items.

23. The she claimed in court to have identified him without any identification parade having been conducted under the relevant rules.

24. For the PW3 to identify Appellant in court during trial same amounts to dock identification which is worthless without a properly arranged identification parade.

25. See **Ajode –Vs- Republic (2004) 2 KLR 32** in the case of **Gabriel Kamau Njoroge –Vs- Republic (1982-88), KLR P. 134,** the court held;

“a dock identification is generally worthless and court should not place much reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give the description of the accused and police should then arrange a fair identification parade.”

26. See also **Kiarie –Vs- Republic (1984) KLR 740 & Ajode –Vs- Republic Supra.**

27. The Appellant sworn statement was very consistent and credible than the unconfirmed report by mob arrest.

28. He stated that on the day he was arrested, he had gone home to attend his father's burial but on alighting at Kamugwana stage at 7.20 p.m., he was mobbed by boda boda operators and other members of public and beaten seriously that he had to be taken to Machakos level 5 hospital.

29. His testimony was unshaken in cross examination and same displaced the alleged mob arrest and him dropping stolen items which is hearsay as no witness who testified as to the so called arrest and dropping of stolen items by the Appellant.

30. The court therefore finds that the prosecution never proved its case beyond reasonable doubt and thus court makes the following orders: -

1) The Appeal is allowed.

2) Conviction is quashed and Appellant is set at liberty unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED THIS 26TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE