



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 60 OF 2012

DAVID JUMA ATELU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.1450 of 2001 of the Chief Magistrate's Court at Busia by Hon. B. Maloba – Senior Resident Magistrate)

JUDGMENT

1. **David Juma Atelu**, the appellant herein, was convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal code.
2. The particulars of the offence were that on the night of 20th and 21st October 2001 at **Machakus** village in **Osurete** sub-location, **Aramit** location in Teso District within Western Province, jointly with others not before court, robbed **David Odima Ekachul** of cash Kshs. 4,250/= and at or immediately before or immediately after the time of such robbery assaulted the said **David Odima Ekachul**.
3. The appellant was sentenced to death as prescribed in the law. He has appealed against both conviction and sentence.
4. The appellant was in person. He raised the following grounds of appeal:
 - a) That the learned trial magistrate erred in law and in fact by convicting the appellant without having heard the evidence after taking over the case which had been partly heard by another magistrate.
 - b) That the learned trial magistrate erred in law and in fact convicting the appellant without any exhibit having been recovered.
 - c) That the learned trial magistrate erred in law and in fact by convicting the appellant on the basis of contradictory evidence.
 - d) That the learned trial magistrate erred in law and in fact by convicting the appellant in spite of his of alibi defence.
5. The state opposed the appeal through Ms. Ngari, learned counsel.
6. The facts of the prosecution case were briefly as follows:

At about midnight, some robbers called at the complainant's home and ordered the door to be opened for them. The couple complied and the robbers entered and robbed them Kshs.4,250/=. The appellant was recognized as one of the robbers.
7. The appellant pleaded an alibi defence.
8. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will therefore be guided by the celebrated case of **Okeno vs. Republic [1972] E.A 32**.
9. All the prosecution witnesses' evidence was heard by Hon. S.O Omwega. Hon. Betty Maloba took over the case on 3rd March 2003. Before doing so, she explained to the appellant the provisions of section 200 of the Criminal Procedure Code. He elected to proceed from where the previous magistrate had reached. Section 200 of the Criminal Procedure code provides:

(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial,

ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resubmitted and reheard and the succeeding magistrate shall inform the accused person of that right.

The learned trial magistrate complied with subsection 3 and the appellant elected to proceed from where the matter had reached with the other magistrate. He cannot raise this as a ground for appeal. The ground that the learned trial magistrate only wrote the judgment is not only factually incorrect but also lacks merit.

10. It is not in every case that exhibits are recovered and presented in court. A court may convict even where no exhibit has been produced in court if there was no recovery but there is sufficient evidence to link an accused to the offence he is being tried for. However, if there is evidence of recovery and the exhibit is not produced in court and no satisfactory explanation for such a failure is tendered, the court may be hesitant to convict. Each case will be decided on the existing circumstances. In the circumstances of the instant case, this ground has no merit.

11. The appellant has argued that the evidence on record was contradictory. What evidence was at the disposal of the learned trial magistrate for consideration?

12. The key prosecution evidence in this case was that of the complainant and his wife. David Odima Ekachul (PW1) was the complainant. He testified that at about midnight on the night of 20th and 21st October 2001, he was ordered from outside to open his door. He said that he recognized the voice of the appellant among those who were telling him to open the door. He looked out and saw four men who were the appellant, Godfrey, Christine, Ipapa, Saulo Ekiring but did not recognize the fourth man.

13. The evidence by this witness raises some issues that were not pursued during the trial. He did not tell the court about how many different voices he heard and what made him conclude that he recognized that of the appellant. On voice recognition the Court of Appeal in the case of **Simeon Mbelle vs. Republic [1982] 1KAR 578** held:

In relation to the identification by voice, one it would obviously be necessary to ensure: -

(a) That it was the accused person's voice;

(b) That the witness was familiar with it and they recognized it and

(c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

In the instant case, the test prescribed hereinabove was not administered so as to ensure the voice was that of the appellant.

14. Though the complainant talked of seeing four men, while enumerating the people he saw, he included a woman. We cannot assume that Christine was a man for he told the court he could not recognize the fourth man. If we assume that P.C Joseph Mwali (PW4) was the investigating officer, for in his evidence he said that he charged the appellant, then his silence about the other named people did not help the prosecution case. Was there any investigation to establish their involvement in the robbery? He never testified to have investigated the case. He only re-arrested the appellant and charged him. This raises doubts whether indeed the complainant recognized anybody. He never testified as what aided him to see the four men and a woman and recognized the from outside.

15. Godfrida Nangila Okiaye (PW2) is the complainant's wife. In her evidence she testified only three men entered their house and the appellant was one of them. Like her husband she said that there was a lantern which assisted her to recognize them. We may not know if they had slept before the attack or not for the court to appreciate whether they were able to recognize the people who entered. However, since nothing was said as to why the rest were not arrested, I am doubtful if there was any positive recognition. The evidence of John Ikokonyi (PW5) who is the area senior chief bolster my doubts. His evidence was that when the complainant reported to him, he said that the appellant was one of the robbers. He only mentioned the names of the others after the arrest of the appellant. He said that the names of the others were given to him by the appellant. The trial court erred in admitting inadmissible confession.

16. When a witness purports to identify a culprit when circumstances are not favourable for a positive identification, care must be taken to ensure that no mistake in the purported identification is made. In the celebrated case of **R v Turnbull [1976] 3 All E.R. 549** at page 552 Lord Widgery C.J said:

Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

17. The upshot of the foregoing analysis of the evidence on record is that the conviction was unsafe. I quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 27th Day of March, 2019

KIARIE WAWERU KIARIE

JUDGE